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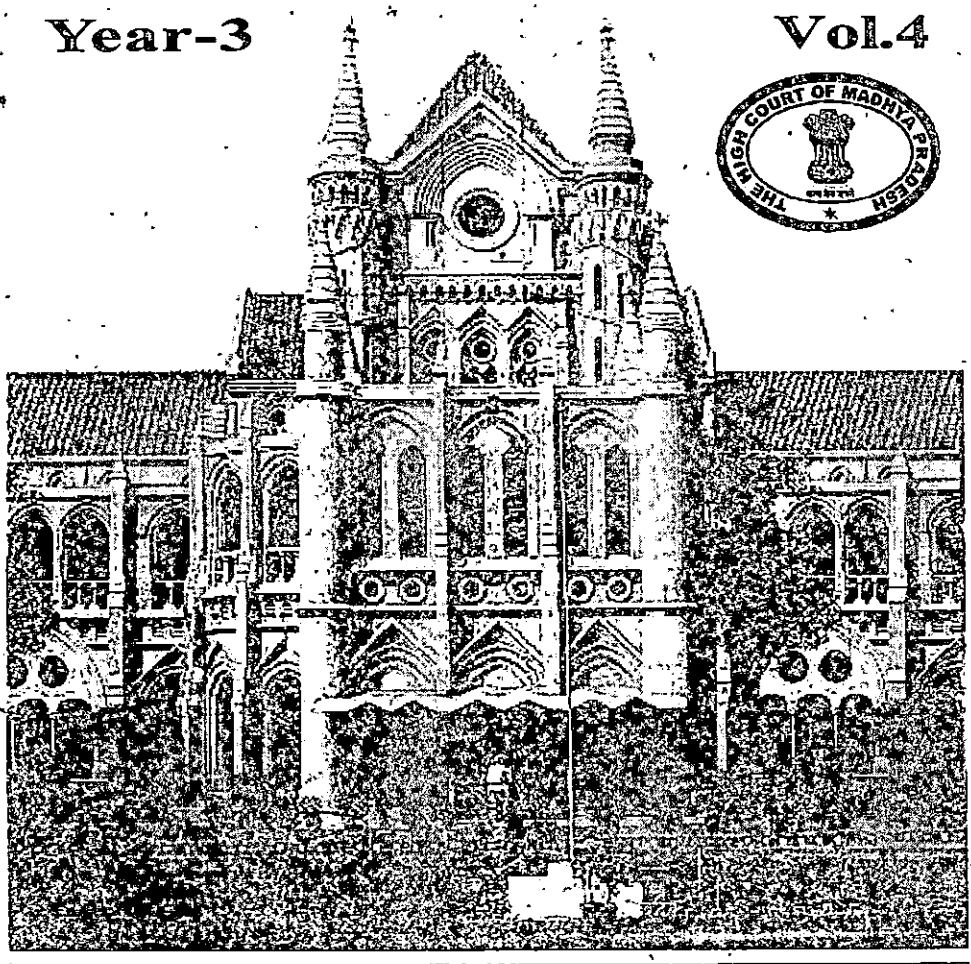

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NOTES OF CASES SECTION

Short Note (SC)

**(133)*

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

Civil Appeal No. 2965/2011 decided on 6 April, 2011

AKHIL BHARTIYA UPBHOKTA CONGRESS ...Appellant

Vs.

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

A. Constitution, Article 14 - Allotment of Land - **Allotment of land to bodies/organisations/institutions on political considerations or by way of favouritism and/or nepotism or with a view to nurture the vote bank for future is constitutionally impermisible.**

State and/or its agencies/instrumentalities can not give largesse to any person according to the sweet will and whims of the political entites and/or officers of the State - Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity - Such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy.

Distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State - There can not be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality - By entertaining applications made by individuals, organizations or institutions for allotment of land or for grant of any other type of largesse the State can not exclude other eligible persons from lodging competing claim.

क. संविधान, अनुच्छेद 14 – भूमि का आवंटन – राजनीतिक प्रभाव या पक्षपात और/या भाई भतीजावाद या भविष्य के लिये वोट बैंक के परिपोषण को दृष्टिगत रखते हुये निकाय/संगठन/संस्थाओं को भूमि का आवंटन संवैधानिक रुप से अनुज्ञेय नहीं है।

B. ***Nagar Tatha Gram Nivesh Adhiniyam, M.P. (23 of 1973), Section 23-A(1)(a) - Modification of Plan*** **- Bhopal Development Plan was modified vide notifications dated 06.06.2008 and 05.09.2008 - State Government modified the plan for the purpose of facilitating establishment of an institute by respondent No. 5 and not for any proposed project of the Government or for implementation of any Town Development Scheme - Exercise undertaken for the change of land use, which resulted in modification of the development plan was an empty formality - Modification of the development plan was ultra vires the provision of Section 23-A(1)(a).**

ख. नगर तथा ग्राम निवेश अधिनियम, म.प्र. (1973 का 23), धारा 23–ए(1)(ए)–योजना का परिवर्तन – भोपाल विकास योजना को अधिसूचना दिनांक 06.06.2008 और 05.09.2008 द्वारा परिवर्तित किया गया – राज्य सरकार ने प्रत्यर्थी क्र. 5 की संस्था की स्थापना सुकर बनाने के प्रयोजन हेतु योजना का परिवर्तन किया और न कि सरकार की किसी प्रस्तावित योजना के लिये या किसी शहर विकास स्कीम को लागू करने के लिये – कार्यवाही भूमि के उपयोग को बदलने के लिये की गयी जिसके परिणामस्वरुप विकास योजना का परिवर्तन मात्र औपचारिकता रह गई – विकास योजना का परिवर्तन धारा 23–ए(1)(ए) के उपबंध के अधिकारातीत था।

The judgment of the Court was delivered by : **G.S. SINGHVI, J.:**

Cases referred :

(2001) 3 SCC 635, (2005) 8 SCC 550, (2005) 13 SCC 495, (2009) 6 SCC 171, (1974) 1 SCC 447, (2004) 8 SCC 355, (2001) 9 SCC 550, (1979) 3 SCC 489, (1968) AC 997, (1971) 2 QB 175, (1977) QB 643, AIR 1967 SC 1427, AIR 1969 KER. 81(FB), (1975) 1 SCC 70, (1980) 4 SCC 1, (1996) 6 SCC 530, (1991) 1 SCC 212, (1995) 5 SCC 482, (1996) 5 SCC 510, AIR 1996(P&H) 229, (1996) 113 PLR 17, (1987) 1 SCC 227, 1988 PLJ 123).

Short Note (DB)

****(134)***

Before Mr. Justice S.N. Aggarwal & Mr. Justice Anil Sharma

Cr. A. No. 249/1994 (Gwalior) decided on 13 September, 2011

AMAR SINGH & ors. ...Appellants

Vs.

STATE OF M.P. ...Respondent

A. ***Evidence Act (1 of 1872), Section 8 - Motive*** **- Motive of crime is a double edged weapon and can be used either side - Possibilities**

of the appellants being falsely implicated in the case on account of previous animosity can not be completely ruled out - Benefit of the same necessarily shall go to the accused persons.

क. साक्ष्य अधिनियम (1872 का 1), धारा 8 – हेतु – अपराध का हेतु दुधारी हथियार है और दोनों तरफ से उपयोग किया जा सकता – पूर्व वैमनस्यता के कारण अपीलार्थीगण को मामले में मिथ्या आलिप्त किये जाने की संभावनाओं से इंकार नहीं किया जा सकता – इसका लाभ अवश्य ही अभियुक्त व्यक्तियों को जायेगा।

***B. Evidence Act (1 of 1872), Section 8, Penal Code (45 of 1860), Section 302 - Discrepancies and infirmities* - Discrepancies and infirmities in the case of the prosecution - May not affect the case of the prosecution individually but taking them cumulatively renders the case of the prosecution against the appellant highly doubtful - It shall be totally unsafe to place reliance on such incredible and untrustworthy testimony of the prosecution witnesses.**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 8, दण्ड संहिता (1860 का 45), धारा 302 – असंगतियां एवं कमजोरियां – अभियोजन के प्रकरण में असंगतियां एवं कमजोरियां – अभियोजन के प्रकरण को पृथक–पृथक रुप से प्रभावित नहीं कर सकती परंतु संयुक्त रुप से वह अपीलार्थी के विरुद्ध अभियोजन के मामले को बेहद संदेहास्पद बना देती है – अभियोजन साक्षियों की ऐसी अविश्वसनीय एवं अविश्वासपात्र परिसाक्ष्य पर विश्वास करना पूर्णतः असुरक्षित होगा।

***C. Criminal Procedure Code, 1973 (2 of 1974), Sections 154 & 157- Delay* - Delay of 15 hours in registration of FIR coupled with non sending of report of the crime to the Magistrate - May create serious doubt on the fair and impartial investigation of the case.**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 154 व 157 – विलंब – प्रथम सूचना रिपोर्ट दर्ज करने में 15 घंटों का विलंब और इसके अलावा अपराध की रिपोर्ट मजिस्ट्रेट को न भेजी जाना – मामले के निष्पक्ष एवं समुचित अन्वेषण पर गंभीर संदेह पैदा कर सकता है।

D. Evidence Act (1 of 1872), Section 3, Penal Code (45 of 1860), Section 302 - Murder Case - Benefit of doubt - When may be extended* - Prosecution not able to prove either the recovery of weapons or recovery of other articles of the deceased allegedly recovered by the I.O. from the spot - Recovery of weapons of offence alleged to have been recovered by PW 18 pursuant to disclosure statements of accused *persons being

appellants herein is not free from doubts - Weapons recovered by the I.O. were not sent for forensic examination - As there was no blood stain notices on the weapons - As per FSL report no blood stain was found on the articals of the deceased - Prosecution could not establish beyond reasonable doubt that the human remains recovered by the I.O. from the spot were that of the deceased - No cogent evidence on record to establish the identity of the deceased as the person who was murdered in the incident -Appellants are acquitted of charges against them by extending them benefit of doubt.

घ . साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता (1860 का 45), धारा 302 – हत्या का मामला – संदेह का लाभ – कब दिया जा सकता है – अभियोजन न तो हथियारों की बरामदगी न ही मृतक की अन्य वस्तुओं की बरामदगी साबित कर पाया है जिन्हें अभिकथित रुप से अन्वेषण अधिकारी द्वारा घटनास्थल से बरामद किया गया था – अभियुक्तगण/अपीलार्थीगण के प्रकटन कथनों के अनुसरण में पी.डब्ल्यू.18 द्वारा अभिकथित रुप से बरामद किये गये अपराध के हथियारों की बरामदगी संदेह से मुक्त नहीं है – अन्वेषण अधिकारी द्वारा जब्त किये गये हथियारों को विधि वैज्ञानिक परीक्षण हेतु नहीं भेजा गया – क्योंकि हथियारों पर रक्त के कोई दाग नहीं देखे गये – एफएसएल की रिपोर्ट के अनुसार मृतक की वस्तुओं पर रक्त के कोई दाग नहीं पाये गये – अभियोजन युक्तियुक्त संदेह से परे यह स्थापित नहीं कर पाया है कि घटनास्थल से अन्वेषण अधिकारी द्वारा बरामद किये गये मानव अवेशष, मृतक के थे – मृतक की पहचान स्थापित करने के लिये अभिलेख पर कोई प्रबल साक्ष्य नहीं कि मृतक वही व्यक्ति था जिसकी घटना में हत्या की गयी थी – संदेह का लाभ देते हुये अपीलार्थीगण को उनके विरुद्ध लगाये गये आरोपों से दोषमुक्त किया जाता है।

The judgment of the Court was delivered by : **S.N. AGGARWAL, J.**

Cases referred :

AIR 1952 SC 159, AIR 1973 SC 2407, (2003) 12 SCC 377, AIR 1957 SC 637, (2002) 7 SCC 11, (2006) 2 SCC 450, (2010) 6 SCC 533, (2004) 13 SCC 147, (2008) 16 SCC 319, (2003) 11 SCC 223, (2002) 10 SCC 236, (2007) 11 SCC 261, (2010) 12 SCC 182, (1972) 3 SCC 393, (2002) 9 SCC 147, (2009) 13 SCC 565, (2001) 10 SCC 206.

Nandita Dubey with *R.K. Shrivastava,* for the appellants.
Prabal Solanki, PP for the respondent/State.
M.L. Yadav, for the complainant.

NOTES OF CASES SECTION

Short Note

****(135)***

Before Mr. Justice Abhay M. Naik

C.R. No. 723/2000 (Indore) decided on 24 August, 2011

AMRITLAL ...Applicant

Vs.

DR.RAVISHCHANDRA PANDEY (DECEASED) & ors. ...Non-applicants

Accommodation Control Act, M.P. (41 of 1961), Section 23-A(b) - **Eviction ordered on the ground of personal bona fide need of Dr. 'R' to open dispensary in the premises - After his death, such need completely eclisped on account of his death, during the pendency of the present revision - None of the legal heirs came forward expressing bona fide need of any kind and no such application for amendment of pleadings in the application for eviction was submitted before High Court - Held - On account of this subsequent event, the order of eviction can not be, permitted to be kept alive - Revision petition allowed.**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–ए(बी) – परिसर में दवाखाना खोलने की डॉक्टर 'आर' की व्यक्तिगत वास्तविक आवश्यकता के आधार पर बेदखली आदेशित की गयी – प्रस्तुत पुनरीक्षण लंबित रहने के दौरान उसकी मृत्यु के पश्चात ऐसी आवश्यकता उसकी मृत्यु हो जाने के कारण पूर्णतः समाप्त हो जाती है – कोई भी विधिक वारिस किसी प्रकार की वास्तविक आवश्यकता अभिव्यक्त करते हुये सामने नहीं आया और न ही उच्च न्यायालय के समक्ष बेदखली के आवेदन में अभिवचनों में संशोधन हेतु ऐसा कोई आवेदन प्रस्तुत किया – अभिनिर्धारित – इस पश्चातवर्ती घटना के कारण, बेदखली का आदेश कायम रखने की अनुमति नहीं दी जा सकती – पुनरीक्षण याचिका मंजूर।

Cases referred:

2011(3) MPHT 145, AIR 1981 SC 1711, AIR 1975 SC 1409, AIR 1997 SC 2399, AIR 1973 SC 2110, AIR 1992 SC 700, AIR 2001 SC 803, AIR 2004 SC 3484, 2010(I) MPJR (SC) 269.

M.K. Jain, for the applicant.

A.K. Sethi with *Harish Joshi*, for the non-applicants.

NOTES OF CASES SECTION

Short Note (DB)

****(136)***

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

F.A. No. 228/2009 (Gwalior) decided on 22 September, 2011

BRIJENDRA SINGH BHADAURIA ...Appellant

Vs.

USHA SINGH ALIAS DEEPA (SMT.) ...Respondent

A. Civil Procedure Code (5 of 1908), Order IX Rule 6 - Proceeding Ex parte **- Court before proceeding ex parte against a defendant, must cautiously see the process and the report of service of the summons and should not formally use the words that the defendant was served, but was absent.**

The Court shall always be justified by recording cogent reasons in proceeding ex parte provided it is convinced that the defendant despite lawful service of summons and knowledge of the pendency of the proceedings had chosen to remain absent before proceeding ex parte, the Court must advert itself and follow the legal requirements regarding service of summons as provided under Order V of CPC.

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश IX नियम 6 – एकपक्षीय कार्यवाही – प्रतिवादी के विरुद्ध एकपक्षीय कार्यवाही करने से पूर्व न्यायालय को प्रोसेस तथा समन की तामीली की रिपोर्ट को सावधानीपूर्वक देखना चाहिये और औपचारिक रुप से शब्दों का प्रयोग नहीं करना चाहिये कि प्रतिवादी को तामील किया गया था परंतु वह अनुपस्थित रहा।

एकपक्षीय कार्यवाही में न्यायालय द्वारा प्रबल कारणों को अभिलिखित करना सदैव न्यायोचित होगा परंतु यह तब जब वह संतुष्ट हो जाये कि प्रतिवादी समन की विधिपूर्ण तामीली एवं कार्यवाही लंबित होने की जानकारी के बावजूद वह एकपक्षीय कार्यवाही में अनुपस्थित रहा, न्यायालय को ध्यान देना होगा और समन की तामीली से संबंधित विधिक अपेक्षाओं का अनुसरण करना होगा जैसा कि सीपीसी के आदेश V के अंतर्गत उपबंधित है।

B. Civil Procedure Code (5 of 1908), Order IX Rule 13 r/w Section 151 **- Application filed under would not become infructuous on the ground that the plaintiff/appellant had re-married after passing of the ex parte decree for divorce.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश IX नियम 13 सहपठित धारा 151 – के अंतर्गत प्रस्तुत आवेदन इस आधार पर निष्फल नहीं होगा कि वादी/अपीलार्थी ने विवाह विच्छेद की एकपक्षीय डिक्री पारित होने के पश्चात पुनः विवाह कर लिया है।

C. Civil Procedure Code (5 of 1908), Order IX Rule 13 Proviso - Applicability of Proviso - **If the plaintiff satisfies the Court that summons was in fact served in accordance with law but certain directive provision was not observed, only in such a case, the Court may on being satisfied that the defendant had sufficient time to approach the Court on the date of hearing, can refuse to set aside the ex parte decree.**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश IX नियम 13 परंतुक – परंतुक का लागू होना – यदि वादी न्यायालय की संतुष्टि करता है कि समन वास्तविक रुप से विधिनुसार तामील किया गया था परंतु कतिपय निर्देशिती उपबंध का पालन नहीं किया गया, केवल ऐसे मामले में, न्यायालय संतुष्टि उपरांत कि प्रतिवादी को सुनवाई के दिनांक को न्यायालय आने के लिये पर्याप्त समय था, एकपक्षीय डिक्री अपास्त करने से मना कर सकता है।

The judgment of the Court was delivered by : **BRIJ KISHORE DUBE, J.:**

Cases referred :

AIR 1997 RAJ. 63(SB), 2002(2) MPLJ 585, (2011) 3 SCC 545, 1991 JLJ 45, 1992(1) MPJR SN 28, 2000(1) JLJ 95, (2002) 5 SCC 377, 2008(1) MPLJ 150, 1991 MPLJ 329, AIR 2004 CAL. 113, AIR 1988 SC 839, 1997(1) MPLJ 124.

H.D. Gupta with *Santosh Agarwal,* for the appellant.

M.B. Mangal, for the respondent.

Short Note

****(137)***

Before Mr. Justice R.S. Jha

S.A. No. 469/1994 (Jabalpur) decided on 29 July, 2011

JAMUNA PRASAD & ors. ...Appellants

Vs.

SHIVNANDAN & ors. ...Respondents

A. Registration Act (16 of 1908), Section 57(5), Evidence Act (1 of 1872), Sections 64, 65(e) &(f) - Certified copy of the sale deed - **Can be taken on record by the Courts even in the absence of laying any foundation in that respect or having obtained prior permission to adduce secondary evidence in this regard.**

क. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 57(5), साक्ष्य अधिनियम

(1872 का 1), धाराएँ 64, 65(ई) व (एफ) – विक्रय पत्र की प्रमाणित प्रति – न्यायालयों द्वारा अभिलेख पर ली जा सकती है, इस संबंध में कोई आधार प्रस्तुत नहीं किये जाने के बावजूद या इस संबंध में द्वितीय साक्ष्य देने की पूर्वानुमति अभिप्राप्त नहीं किये जाने के बावजूद।

***B. Registration Act (16 of 1908), Section 57(5), Evidence Act (1 of 1872), Sections 67 & 68* - Plaintiffs produced the certified copy of the sale deed which was taken on record - Plaintiff did not examine any person including the witnesses to the sale to prove the document - On the contrary, the vendor, who was examined as DW 4, categorically denied the execution of the sale deed as well as his signatures thereon - He was also not confronted with the signature in the sale deed for the purpose of proving his signature in the sale deed - Plaintiffs have failed to prove the document, i.e. proving the fact that it was executed, signed and executed by the vendor.**

Courts below have not gone wrong in taking the certified copy of the sale deed on record as secondary evidence of the existence, condition or contents of the document, they have gone wrong in decreeing the suit filed by respondents No. 1 & 2 plaintiffs simply on that basis inspite of the fact that the respondents/plaintiffs have failed to prove the signature or execution of the document as required by Section 67 of the Evidence Act.

ख. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 57(5), साक्ष्य अधिनियम (1872 का 1), धाराएँ 67 व 68 – वादीगण ने विक्रय पत्र की प्रमाणित प्रति प्रस्तुत की जिसे अभिलेख पर लिया गया – दस्तावेज साबित करने के लिए वादी ने विक्रय के साक्षियों के एवं किसी अन्य व्यक्ति का परीक्षण नहीं किया – इसके विपरीत, विक्रेता जिसका डीडब्लू 4 के रुप में परीक्षण किया गया था, उसने स्पष्ट रुप से विक्रय के निष्पादन तथा उस पर उसके हस्ताक्षर को अस्वीकार किया है – विक्रय पत्र पर उसके हस्ताक्षर साबित करने हेतु उसे विक्रय पत्र में उसके हस्ताक्षर का सामना नहीं कराया गया – वादीगण दस्तावेज साबित करने में असफल रहे अर्थात यह साबित करने में असफल रहे कि उसे निष्पादित, हस्ताक्षारित तथा विक्रेता द्वारा निष्पादित किया गया था।

Cases referred :

2006(1) MPLJ 103, 2001 (3) SCC 530, (2004) 8 SCC 270, 2010(4) SCC 329.

K.N. Agrawal, for the appellants.

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

NOTES OF CASES SECTION

Short Note (DB)

****(138)***

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

Cr.A. No. 118/1999 (Jabalpur) decided on 1 August, 2011

JAY MANGAL SINGH ...Appellant

Vs.

STATE OF M.P. ...Respondent

Prevention of Corruption Act, (49 of 1988), Section 13(1)(d) - Illegal gratification **- Court may feel safe in accepting the prosecution version on the basis of oral evidence of complainant and police officers even if the trap witnesses turn hostile or are not found to be reliable - Independent witness could not be examined due to his death - Evidence of complainant and police witnesses finds support from the circumstantial evidence that the hand and pocket of the shirt of the appellant and tainted notes gave pink colour to sodium carbonate solution - This establishes that tainted currency notes were accepted or received by the appellant - Appellant did not furnish any explanation as to how the tainted currency notes were found in his pocket - Appeal dismissed**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – अवैध परितोषण – शिकायतकर्ता एवं पुलिस अधिकारियों की मौखिक साक्ष्य के आधार पर अभियोजन कहानी को स्वीकार करने में न्यायालय सुरक्षित महसूस कर सकता है तब भी जबकि ट्रेप के साक्षीगण पक्ष विरोधी हो गये या विश्वसनीय नहीं पाये गये – स्वतंत्र साक्षी की मृत्यु हो जाने के कारण परीक्षण नहीं किया जा सका – शिकायतकर्ता तथा पुलिस साक्षियों की साक्ष्य इस परिस्थितिजन्य साक्ष्य से समर्थन पाती है कि अपीलार्थी के हाथ तथा कमीज की जेब तथा दूषित नोटों ने सोडियम कॉर्बोनेट के घोल को गुलाबी रंग दिया – यह स्थापित करता है कि दूषित करेंसी नोट अपीलार्थी द्वारा स्वीकार या प्राप्त किये गये – अपीलार्थी ने कोई स्पष्टीकरण प्रस्तुत नहीं किया कि उसके पॉकेट में दूषित करेंसी नोट कैसे पाये गये – अपील खारिज।

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

Cases referred :

AIR 1974 SC 1024, AIR 1980 SC 873, AIR 1984 SC 1453, (1995) 3 SCC 567.

R.K. Nanhoriya with *Akhil Singh*, for the appellant.

Aditya Adhikari, Spl. P.P. with *Satish Chaturvedi*, for the respondent/ State.

NOTES OF CASES SECTION

Short Note

****(139)***

Before Mr. Justice Sanjay Yadav

W.P. No. 12362/2011 (Jabalpur) decided on 24 August, 2011

KYMORE CEMENT MAJDOOR CONGRESS (INTUC) ...Petitioner
Vs.
REGISTRAR OFFICE OF REGISTRAR TRADE UNIONS BHOPAL & ors. ...Respondents

Trade Unions Act (16 of 1926), Chapter IIIA - Jurisdiction under - **Registrar, Trade Unions, Madhya Pradesh had no jurisdiction to invoke the provisions of Chapter IIIA of the Trade Unions Act, 1926 in respect of the industry viz., the mining industry and the cement industry, which are governed by the provisions of Industrial Disputes Act, 1947 - Impugned order quashed.**

व्यवसाय संघ अधिनियम (1926 का 16), अध्याय IIIए – के अंतर्गत अधिकारिता – रजिस्ट्रार, व्यवसाय संघ मध्य प्रदेश को औद्योगिक विवाद अधिनियम 1947 के उपबंधों द्वारा शासित उद्योग अर्थात खनन उद्योग एवं सीमेंट उद्योग के संबंध में व्यवसाय संघ अधिनियम 1926 के अध्याय *IIIए* के उपबंधों का अवलंब लेने की कोई अधिकारिता नहीं – आक्षेपित आदेश अभिखंडित।

Cases referred :

AIR 1966 SC 925, 1973 JLJ 376.

Indira Nair with *Rajesh Pohankar,* for the petitioner.
Akash Choudhary, for the respondents.

Short Note

****(140)***

Before Mr. Justice Sujoy Paul

W.P. No. 7476/2010 (Gwalior) decided on 25 August, 2011

LEELAWATI (SMT.) ...Petitioner
Vs.
KANHAIYALAL & ors. ...Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 - Election Petition - **Election Tribunal in Section 122 proceedings can examine the entitlement of the candidate to contest against a reserve seat.**

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म. प्र. 1993 (1994 का 1),

धारा 122 – निर्वाचन याचिका – निर्वाचन अधिकरण धारा 122 की कार्यवाही में आरक्षित सीट पर चुनाव लड़ने की प्रत्याशी की हकदारी का परीक्षण कर सकता है।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 - Election Tribunal - **Alongwith nomination only photocopy of caste certificate was produced by the petitioner - The original was neither produced during nomination nor in the proceedings before Election Tribunal - Factum of issuance of said certificate by the competent authority is not established.**

The judgment in *Kumari Madhuri Patil and anr. Vs. Addl. Commissioner, Tribunal Development and ors.* has no application in such cases where only photocopy of a certificate is produced and original was never produced.

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 – निर्वाचन अधिकरण – याची द्वारा नामांकन पत्र के साथ केवल जाति प्रमाण पत्र की फोटो प्रति प्रस्तुत की गयी – मूल प्रति न तो नामांकन के दौरान प्रस्तुत की गयी न ही निर्वाचन अधिकरण के समक्ष की कार्यवाही में प्रस्तुत की गयी – कथित प्रमाण पत्र सक्षम प्राधिकारी द्वारा जारी नहीं किये जाने का तथ्य स्थापित नहीं होता।

ऐसे प्रकरणों में जहां केवल प्रमाणपत्र की फोटोकापी प्रस्तुत की गयी है और मूल प्रमाणपत्र कभी भी प्रस्तुत नहीं किया गया था, कुमारी माधुरी पाटिल और अन्य वि. अतिरिक्त आयुक्त, ट्रिब्यूनल डेवलपमेंट और अन्य में पारित निर्णय लागू नहीं होगा।

C. Precedent - **While interpreting a judgment court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed - Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases - Hence, blind reliance on a decision is never proper.**

ग. पूर्व-निर्णय – न्यायालय को निर्णय का निर्वचन करते समय जिस निर्णय पर विश्वास किया गया है उस निर्णय की तथ्यात्मक परिस्थिति के साथ किस प्रकार वर्तमान मामले की तथ्यात्मक परिस्थिति अनुकूल होने के बारे में परीक्षण किये बिना निर्णयों पर विश्वास नहीं करना चाहिये – परिस्थितिक लचीलापन, एक अतिरिक्त अथवा भिन्न तथ्य दो मामलों में निष्कर्षों के मध्य बहुत अधिक अंतर पैदा कर सकते हैं – इस प्रकार, बंद आंखों से निर्णय पर विश्वास करना कभी भी उचित नहीं।

D. Panchayats (Election Petitions, Corrupt Practices and **Disqualification for Membership), M.P. Rules 1995 - Rule 13 - Withdrawal**

of election petition - Mere filing of an application for withdrawal will not automatically result into withdrawal of election petition - It can be withdrawn only with the leave of the Specified Officer.

घ. पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995 – नियम 13 – निर्वाचन याचिका का वापस लिया जाना – वापस लेने के लिये आवेदन प्रस्तुत करने मात्र से निर्वाचन याचिका की अपने आप वापसी परिणित नहीं होगी – वह केवल विनिर्दिष्ट अधिकारी की अनुज्ञा से वापस ली जा सकती है।

E. **Costs - Costs is intended to achieve the goal of acting as a deterrent to vexatious, frivolous and speculative litigations by the parties - In the fact situation of the present case a costs of Rs. 30,000/- is imposed to give a message that Courts are not asylum for frivolous litigations.**

ङ. खर्चे – पक्षकारों द्वारा तंग करने वाले, तुच्छ एवं काल्पनिक मुकदमेबाजी पर भयपरतिकारी के रुप में कार्य करने के उद्देश्य को अभिप्राप्त करना खर्चों का आशय है – वर्तमान प्रकरण की तथ्यात्मक परिस्थिति में रुपये 30,000/– खर्च अधिरोपित किया जाता है यह संदेश देने के लिये कि न्यायालय तुच्छ मुकदमेबाजी के लिये आश्रय स्थान नहीं है।

Cases referred :

2005(1) MPLJ 467(DB), 2010(3) MPLJ 417, (1997) 2 SCC 571, (2007) 10 SCC 590, (2008) 2 SCC 186, (2006) 1 SCC 368, 1998 (2) MPLJ 309, (2010) 8 SCC 1.

S.K. Sharma, for the petitioner.
Udit Saxena, for the respondent No. 1.
Ravindra Sarvate, for the intervenor Bramhanand Kushwaha.
Bhagwan Raj Pandey, G.A. for the respondents/State.

Short Note (SC)
****(141)***

Before Mr. Justice J.M. Panchal, Mr. Justice Deepak Verma & Mr. Justice Dr. B.S. Chauhan

Civil Appeal No. 3726/2011 decided on 26 July, 2011

NARMADA BACHAO ANDOLAN ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Constitution, Articles 77(3), 166(3) - Rules of Business -*** **Functions or duties which are vested in a State Govt by a Statute may be**

allocated to ministers by Rules of Business framed under Article 166(3) - Decision of any minister or officer under the Rules of Business is the decision of the President or the Governor and these Articles do not provide for delegation - Decisions made and action taken by minister or officer under the Rules of Business can not be treated as exercise of delegated power in real sense but are deemed to be the actions of the President or Governor and that are taken or done by them on the aid and advice of the Council of Ministers - Rules of Business operate even when a statute does not authorize sub-delegation.

क. संविधान, अनुच्छेद 77(3), 166(3) – कामकाज के नियम – कानून द्वारा राज्य सरकार में निहित कार्य एवं कर्तव्यों को अनुच्छेद 166(3) के अंतर्गत विरचित कामकाज के नियमों द्वारा मंत्रियों को आवंटित किया जा सकता है – कामकाज के नियमों के अंतर्गत किसी मंत्री अथवा अधिकारी का निर्णय राष्ट्रपति अथवा राज्यपाल का निर्णय है और इन अनुच्छेदों में प्रत्यायोजन के लिए उपबंध नहीं है – मंत्री अथवा अधिकारी द्वारा कामकाज के नियमों के अंतर्गत की गयी कार्यवाही और लिये गये निर्णय वास्तविक अर्थ में प्रत्यायोजन शक्ति के प्रयोग में होना नहीं माने जा सकते बल्कि राष्ट्रपति अथवा राज्यपाल की कार्यवाहियां समझी जाती है और मंत्री परिषद की सहायता एवं सूचना से इन्हें उनके द्वारा लिया या किया जाता है – कामकाज के नियम क्रियाशील रहेंगे तब भी जब कानून उप प्रत्यायोजन प्राधिकृत नहीं करता।

***B. Constitution, Article 166 - Conduct of Govt. Business* - Provisions of Article 166 are only directory and not mandatory in character - Council of Ministers is permitted to delegate the power to amend its decision to a Committee of Ministers consisting of the Ministers-in-charge of the Departments concerned and the Chief Minister - Delegation of power is permissible and Rules of Business are directory.**

ख. संविधान, अनुच्छेद 166 – सरकारी कामकाज का संचालन – अनुच्छेद 166 के उपबंध केवल निर्देशिती स्वरुप के हैं और न कि आज्ञापक – मंत्री परिषद को अपने निर्णय में संशोधन करने की शक्ति मंत्रियों की समिति को प्रत्यायोजित करने की अनुमति है जिसमें सबंधित विभागों के भारसाधक मंत्री तथा मुख्यमंत्री समाविष्ट हैं – शक्ति का प्रत्यायोजन अनुज्ञेय है और कामकाज के नियम निर्देशिती हैं।

***C. Interpretation of Statute/Documents - It is impermissible in law to read a part of the document in isolation* - The document has to be read as a whole.**

ग. कानून/दस्तावेजों का निर्वचन – दस्तावेज के किसी भाग को अलग

करके पढ़ा जाना विधि में अननुज्ञेय है – दस्तावेज को संपूर्णता से पढ़ा जाना चाहिये।

D. ***Land to Landless Persons*** **- Landless persons are not entitled for allotment of agricultural land admeasuring two hectares - It had never been contemplated nor it is compatible with R & R Policy.**

घ. भूमिहीन व्यक्तियों को भूमि – भूमिहीन व्यक्ति दो हेक्टेयर माप वाली कृषि भूमि के आवंटन हेतु हकदार नहीं हैं – यह कभी भी अनुध्यात नहीं या न ही यह आर व आर नीति के अनुरुप है।

The judgment of the Court was delivered by : **DR. B.S. CHAUHAN, J.**

Cases referred:

AIR 1970 SC 1118, AIR 1961 SC 221, AIR 1964 SC 1823, AIR 1995 SC 1512, AIR 1974 SC 2192, AIR 1964 SC 1128, AIR 1970 SC 679, (2005) 1 SCC 625, AIR 1952 SC 181, (2010) 11 SCC 374, AIR 2006 SC 2544.

Short Note (DB)

****(142)***

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

W.A. No. 615/2010 (Gwalior) decided on 16 September, 2011

SATPURA NARMADA KSHETRIYA GRAMIN BANK ...Appellant

Vs.

A.K. CHATURVEDI & ors. ...Respondents

A. ***Resjudicata - Writ Appeal*** **- Earlier dismissal of appeal of the selected candidates in limine and by a non-speaking order, can not be used against the appellant Bank either as a binding precedent or on the principle of res judicata - Present appeal is maintainable and needs to be considered on merits.**

क. पूर्व न्याय – रिट अपील – चयनित अभ्यर्थियों की पूर्वतर अपील की आरंभ में ही और कारण विहीन आदेश द्वारा खारिजी को या तो पूर्व निर्णय के रुप में या पूर्व न्याय के सिद्धांत पर अपीलार्थी बैंक के विरुद्ध उपयोग नहीं किया जा सकता – वर्तमान अपील पोषणीय है और गुण–दोषों पर इसका विचार किये जाने की आवश्यकता है।

B. ***Service Law - Public Examination - Written test held by the appellant for promotion of employees from clerical cadre to Officer*** **Junior Management Grade Scale-I (OJM-I) - Written test held for**

Sarguja Kshetriya Gramin Bank at Ambikapur, at 10.00 am to 11.15 am while the written test of Satpura Narmada Kshetriya Gramin Bank was held at Gwalior Centre at 1.00pm to 2.15 pm - IBPS, an outside agency engaged by the both Bank for conducting the written test - Both the question paper of English language were same for both these banks and 19 questions of the second test paper (Banking Law, practice and procedure) were also same -Held - It can not be said that there was any leakage of question paper merely because the written test for promotion was held for both the Banks on the same day but at different times.

Pleadings of the parties have not disclosed the name of any person who gave information about similarity of question paper and the name of the persons who received such information or the mode of communication - No pleading in this regard as to how it was known that the question paper of both the examinations are same - It can not be said that there was any leakage of question paper merely because the written test for promotion was held for both the Banks on the same day but at different times -There was no leakage of question and in this regard we are fortified in our view by the paper wise and centre wise analysis of the result of the candidates - In the present case, there is no report either by Vigilance or by CBI or even by IBPS regarding the leakage of question paper - There is no evidence on record to suggest that there was any leakage of question paper as alleged by respondents - It is extremely difficult of us to sustain the conclusion of the learned Single Judge in the impugned judgment that there was leakage of question paper - Candidates who have finally made for their promotion after going through the stringent selection procedure laid down for promotion in the Rules of 1998, can not be denied promotion merely on the bald allegation by a fraction of candiates with vested interest that there was leakage of question paper - Every candidates who qualifies the written examination after thorough preparation spreads over a couple of months and who also fulfils other criteria for promotion has a legitimate expectation for his promotion - Appeal allowed.

ख. सेवा विधि – लोक परीक्षा – अपीलार्थी द्वारा लिपिकीय वर्ग से अधिकारी कनिष्ठ प्रबंधकीय श्रेणी स्केल– I (ओजेएम– I) पर पदोन्नति हेतु लिखित परीक्षा ली *गयी* – सरगुजा क्षेत्रीय बैंक के लिये लिखित परीक्षा अंबिकापुर में प्रातः

10.00 बजे से 11.15 तक ली गयी जबकि सतपुड़ा नर्मदा क्षेत्रीय ग्रामीण बैंक की लिखित परीक्षा ग्वालियर केन्द्र पर दोपहर 1.00 बजे से 2.15 बजे तक ली गयी – दोनों बैंकों द्वारा लिखित परीक्षा के परिचालन हेतु आईबीपीएस, एक बाहरी एजेंसी को कार्य सौंपा गया – दोनों बैंक के अंग्रेजी भाषा के दोनों प्रश्न पत्र समान थे और द्वितीय प्रश्न पत्र (बैंकिंग विधि, पद्धति और प्रक्रिया) के 19 प्रश्न भी एक समान थे – अभिनिर्धारित – मात्र इसलिये कि दोनों बैंकों के लिये पदोन्नति हेतु लिखित परीक्षा एक ही दिन किन्तु भिन्न समय पर ली गयी थी, यह नहीं कहा जा सकता कि प्रश्न पत्र का कोई प्रकटन हुआ था ।

The judgment of the Court was delivered by : **S.N. AGGARWAL, J.:**

Cases referred :

2006(4) MPLJ 467, 2004(4) MPLJ 537, (2001) 3 SCC 537, AIR 1979 SC 1328, (1968) 2 SCR 740, (2010) 6 SCC 614.

D.S. Chouhan, for the appellant.

Prashant Sharma, for the respondents No. 1 to 7.

Sanjay Dwivedi, for the respondent No. 8.

Jitendra Sharma, for the successful candidates.

Short Note

****(143)***

Before Mr. Justice G.S. Solanki

F.A. No. 446/1998 (Jabalpur) decided on 16 September, 2011

SURENDRA KUMAR AGARWAL & ors. ...Appellants

Vs.

NARAYAN PRASAD AGARWAL & ors. ...Respondents

A. Specific Relief Act (47 of 1963), Sections 16 & 20 - Readyness & Willingness **- Plaintiff deposed that he was ever ready for registry and even today he is ready - He further deposed that during the period of four months as stipulated in agreement defendant sent a letter Ex. P/2 to him and Ex. P/3 to his agent (PW 2) - P.W. 2 supported the version of plaintiff and deposed that he also wrote a letter to defendant and her husband for execution of sale deed and even he visited their place at Allahabad for this purpose -Considering the letters Ex. P/2, P/3 and Ex. P/4 written by the husband of defendant No. 1, inference can be drawn that before execution of sale deed and registry, defendant No. 1 has to prepare the document like Reen-pusthika and**

same was got prepared through PW2, mediator/commission agent - Executant of agreement/defendant No.1 though filed written statement of total denial of execution of agreement to sell but she did not appear before the Court to contradict the evidence of plaintiff - There was continuous correspondence between plaintiff and defendant through her husband an advocate by profession - Held - In these circumstances, it can not be said that plaintiff was not ready and willing to perform his part of the contract.

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धाराएँ 16 व 20 – तैयार और रजामंद – वादी ने कथन दिया कि वह रजिस्ट्री करने के लिये हमेशा तैयार था और आगे भी तैयार है – उसने आगे कथन दिया कि चार महिनों की अवधि के दौरान जैसा कि अनुबंध में नियत है प्रतिवादी ने उसे पत्र प्रदर्श पी/2 भेजा और उसके एजेंट (अ.सा. 2) को प्रदर्श पी/3 भेजा – अ.सा. 2 ने वादी के कथन का समर्थन किया और यह कथन दिया कि उसने भी प्रतिवादी एवं उसके पति को विक्रय पत्र के निष्पादन हेतु पत्र लिखा और इस प्रयोजन हेतु वह उनके स्थान इलाहाबाद भी गया – प्रतिवादी क्र. 1 के पति द्वारा लिखे गये प्रदर्श पी/2, प्रदर्श पी/3 एवं प्रदर्श पी/4 पर विचार करने पर यह निष्कर्ष निकाला जा सकता है कि विक्रय पत्र के निष्पादन एवं रजिस्ट्री से पहले प्रत्यर्थी क्र. 1 को ऋण पुस्तिका जैसे दस्तावेज बनाने थे और उन्हें पी.डब्ल्यू. 2 मध्यस्थ/कमीशन एजेंट के द्वारा बनवाया गया था – अनुबंध के निष्पादक/प्रतिवादी क्र. 1 ने यद्यपि विक्रय करार के निष्पादन को पूर्णतः अस्वीकार करते हुये लिखित कथन प्रस्तुत किया किन्तु वह न्यायालय के समक्ष वादी की साक्ष्य के खंडन हेतु उपस्थित नहीं हुयी – वादी एवं प्रतिवादी के पति जो कि एक अधिवक्ता है के जरिये प्रतिवादी का लगातार पत्राचार हुआ था – अभिनिर्धारित – इन परिस्थितियों में, यह नहीं कहा जा सकता कि वादी संविदा के अपने पक्ष का पालन करने के लिये तैयार और रजामंद नहीं था।

B. Transfer of Property Act (4 of 1882), Section 53-A (Proviso) - Bonafide Purchaser **- Defendants No. 2 to 4 pleaded that Defendant No. 1 executed agreement to sell in their favour on 13.10.1983, however defendant DW1 admitted that Khasra number written on the basis of original Reen-pusthika which he got from defendant No. 1/the executant - As per the correspondence between agent PW2 and husband of defendant No. 1, the original Reen-pusthika was prepared in the year 1985 as mentioned in letter dated 03.08.85 - Held - It reveals that this document (agreement dated 13.10.1983) was prepared antedated - Sale deed executed in favour of appellants/defendants No. 2 to 4 appears to be collusive and defendants No. 2 to 4 are not appear to be bonafide purchasers of the disputed land.**

ख. *सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 53–ए(परंतुक) – सद्भाविक क्रेता* – प्रतिवादी क्र. 2 से 4 ने अभिवाक् किया कि प्रतिवादी क्र. 1 ने उनके पक्ष में विक्रय का करार 13.10.1983 को निष्पादित किया, अपितु, प्रतिवादी डी. डब्ल्यू. 1 ने स्वीकार किया कि खसरा नंबर मूल ऋण पुस्तिका के आधार पर लिखा गया जिसे उसने प्रतिवादी क्र .1/निष्पादिता से प्राप्त किया था – एजेंट पी.डब्ल्यू. 2 तथा प्रतिवादी क्र. 1 के पति के मध्य पत्राचार के अनुसार मूल ऋण पुस्तिका वर्ष 1985 को तैयार की गयी थी जैसा कि पत्र दिनांक 03.08.1985 में वर्णित है – अभिनिर्धारित – यह प्रकट करता है कि यह दस्तावेज (करार दि. 13.10.1983) पूर्व दिनांक को तैयार किया गया था – अपीलार्थी/प्रत्यर्थी क्र. 2 से 4 के पक्ष में निष्पादित विक्रय पत्र दुस्संधिपूर्ण प्रतीत होता है और प्रतिवादी क्र. 2 से 4 विवादित भूमि के सद्भाविक क्रेता प्रतीत नहीं होते हैं।

Cases referred:

2000(2) CIVIL LJ 709, 1997 (3) CIVIL LJ 95, (2008) 11 SCC 45,

V.K. Agrawal with *M.K. Agarwal,* for the appellants.
M.L. Jaiswal with *K.K. Gautam,* for the respondent No.1/plaintiff.
None for the respondent No.2.

Short Note

****(144)***

Before Mr. Justice K.K. Trivedi

W.P. No. 2446/2003 (Jabalpur) decided on 1 August, 2011

UPENDRA ARVINDEKAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Civil Services (Pension) Rules, M.P. 1976, Rule 42 - Notice of Voluntary Retirement - Withdrawal from **- Petitioner working in the establishment of District & Sessions Judge, on 28.03.2002 submitted an application for voluntary retirement w.e.f. 31.07.2002 - District & Sessions Judge, accepted this application for voluntary retirement and passed the order on 11.04.2002 - Petitioner, later on 24.05.2002, made the application for granting him permission to withdraw his notice/ application for voluntary retirement which was rejected - Appeal was also dismissed vide order dated 01.07.2003 - Held - Petitioner was precluded to withdraw his application/notice for voluntary retirement, once it was accepted by the competent authority - Nothing wrong committed by the respondents in passing the impugned order - Writ petition dismissed.**

Once notice is given by the petitioner for voluntary retirement, there was no option available to the State except to accept notice of voluntary retirement of the petitioner because he was not within the two categories under which the permission to voluntary retirement could have been refused to the petitioner

सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42 – स्वेच्छिक सेवानिवृत्ति का नोटिस – वापस लिया जाना – याची जिला एवं सत्र न्यायाधीश की स्थापना में कार्यरत था और उसने दिनांक 31.07.2002 से प्रभावी स्वेच्छिक सेवा निवृत्ति के लिए दिनांक 28.03.2002 को आवेदन प्रस्तुत किया – जिला एवं सत्र न्यायाधीश ने यह आवेदन स्वीकार किया और दिनांक 11.04.2002 को आदेश पारित किया – याची ने, बाद में, स्वेच्छिक सेवानिवृत्ति हेतु अपने नोटिस/आवेदन वापस लिये जाने की अनुमति प्रदान किये जाने के लिए 24.05.2002 को आवेदन किया, जिसे अस्वीकार किया गया – आदेश दिनांक 01.07.2003 द्वारा अपील भी खारिज की गयी – अभिनिर्धारित – एक बार सक्षम प्राधिकारी द्वारा स्वीकार किये जाने के बाद याची को अपना स्वेच्छिक सेवानिवृत्ति हेतु आवेदन/नोटिस वापस लिये जाने से प्रवरित किया गया – आक्षेपित आदेश पारित करने में प्रत्यर्थियों द्वारा कुछ गलत नहीं किया गया – रिट याचिका खारिज।

Cases referred :

(1998) 9 SCC 559, (2003) 2 SCC 721, (2010) 5 SCC 335.

M.K. Verma, for the petitioner.

P.R. Bhave with *B.P. Yadav*, for the respondents No. 2 &3.

Short Note (SC)

****(145)***

Before Mr. Justice Altamas Kabir & Mr. Justice Cyriac Joseph

Civil Appeal No. 7562/2011 decided on 1 September, 2011

YOGRAJ INFRASTRUCTURE LTD. ...Appellant

Vs.

SSANG YONG ENGINEERING AND CONSTRUCTION CO. LTD. ...Respondent

***Arbitration and Conciliation Act (26 of 1996), Sections 2(2) & 42* - Parties agreeing that the arbitration proceedings, if any, would be governed by the SIAC Rules as the Curial law, which included Rule 32 - It was no longer available to the appellant to contend that the 'proper law' of the agreement would apply to the arbitration proceedings.**

Section 2(2) of the 1996 Act, in fact, indicates that Part-I would apply only in cases where the seat of arbitration is in India - Once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the SIAC Rules, which includes Rule 32.

Section 42 of the Act, the same, in our view was applicable at the pre-arbitral stage, when the Arbitrator had not also been appointed - Once the Arbitrator was appointed and the arbitral proceedings were commenced, the SIAC Rules became applicable shutting out the applicability of Section 42 and for that matter Part-I of the 1996 Act, including the right of appeal under Section 37 thereof.

माध्यस्थम और सुलह अधिनियम (1996 का 26), धाराएँ 2(2) व 42 – पक्षकारों की सहमति कि माध्यस्थम कार्यवाही, यदि कोई हो तो, क्यूरिअल विधि के रुप में एसआईएसी नियमों द्वारा शासित होगी, जिसमें नियम 32 सम्मिलित है – अपीलार्थी तब यह तर्क नहीं कर सकता कि अनुबंध की 'उचित विधि' माध्यस्थम कार्यवाहियों में लागू होगी।

वास्तव में अधिनियम 1996 की धारा 2(2) इंगित करती है कि भाग–I केवल उन मामलों में लागू होगा जहां माध्यस्थम का स्थान भारत में है – एक बार जब पक्षकार विनिर्दिष्ट रुप से सहमत है कि माध्यस्थम कार्यवाहियां एसआईएसी नियमों के अनुसार की जायेंगी जिसमें नियम 32 सम्मिलित है।

अधिनियम की धारा 42 हमारे दृष्टिकोण से माध्यस्थम के पूर्व के प्रक्रम पर लागू होगा जब मध्यस्थ की नियुक्ति नहीं की गयी थी – एक बार जब माध्यस्थ नियुक्त किया गया और माध्यस्थम कार्यवाही आरंभ हो गयी थी, धारा 42 तथा जहां तक उसका संबंध है अधिनियम 1996 का भाग–I जिसमें धारा 37 के अंतर्गत समाविष्ट है, की प्रयोज्यता को बाहर करते हुये एसआईएसी नियम लागू हो गये।

The judgment of the Court was delivered by : **ALTAMAS KABIR, J.:**

Cases referred :

(2002) 4 SCC 105, (2008) 4 SCC 190, (2009) 7 SCC 220, (1998) 1 SCC 305, (1992) 3 SCC 551.

CRIMINAL REVISION NO.554/2007

40. At the outset, it may be observed that the order impugned in this revision is based on the decision of the Apex Court in *State of Orissa* v. *Debendra Nath Padhi* (2005) 1 SCC 568. As explained therein, the entitlement of the petitioners to seek order, under Section 91 of the Code, would ordinarily not come till the stage of defence. Accordingly, the rejection of application seeking production of documents mentioned therein does not suffer from any error of jurisdiction.

41. In the result -

(i) The MCrC preferred by Ashok Kumar Jain, Smt. Sunita Jain and Rajeev Jain stands dismissed.

(ii) Cri. Revision No.554/2007 is also dismissed. However, it would be open to the revisionists to apply at the stage of defence for production of any relevant document existence of which is admitted by any witness of the respondent in his cross-examination or otherwise to enable him to prove any specific plea taken by them.

(iii) The Cri. Revision Nos.836/2008 and 1098/2008 stand dismissed.

42. Copy of this order be retained in the connected revisions.

Order accordingly.

I.L.R. [2011] M. P., 2651
SUPREME COURT OF INDIA
Before Mr. Justice P. Sathasivam & Mr. Jusice Dr. B.S. Chauhan
Criminal Appeal No.1489/2011 decided on 28 July, 2011

GLAXOSMITHKLINE PHARMACEUTICALS LTD. & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Drugs and Cosmetics Act, (23 of 1940), Section 25(3) - Delay in filing complaint **- Appellants did not express any intention to adduce evidence to controvert the analyst report within the statutory limitation period of 28 days - Delay in the filing the complaint (more than 3 years and 9 months) becomes immaterial.**

Even otherwise, expiry date of the medicine was March 1998 i.e: only after 4 months of submission of the reply by the appellants, and they did not fulfill their burden of expressing intention to adduce evidence in contravention of the report - Therefore, they can not raise the grievance that the complaint had been lodged at a much belated stage (Para 8)

औषधि और प्रसाधन सामग्री अधिनियम (1940 का 23), धारा 25(3) – शिकायत प्रस्तुत करने में विलंब – अपीलार्थीगण ने विश्लेषक की रिपोर्ट के खंडन हेतु 28 दिनों की कानूनी सीमा अवधि के भीतर साक्ष्य प्रस्तुत करने में कोई आशय अभिव्यक्त नहीं किया – शिकायत प्रस्तुत करने में विलंब (3 वर्ष 9 महिनों से अधिक) तत्वहीन हो जाता है।

Cases referred :

AIR 1970 SC 318, (2008) 7 SCC 196, (1998) 5 SCC 343.

JUDGMENT

The Judgment of the Court was delivered by **DR. B.S. CHAUHAN, J. :**–Leave granted.

2. This appeal has been preferred against the judgment and order dated 14.9.2010 passed by the High Court of Madhya Pradesh at Jabalpur in Misc. Criminal Case No. 6315 of 2008 which rejected the application of the appellants for quashing the complaint under the provisions of The Drugs and Cosmetics Act, 1940 (hereinafter called 'the Act 1940').

3. Facts and circumstances giving rise to this appeal are that:

A. The Drug Inspector under the Act 1940 had taken a sample of Betnesol tablets (Batch No. NC 160 Mfg. October 1996, expiry March 1998), manufactured by the appellant-company from the shop of one Mahesh Agarwal at Chattarpur on 9.12.1996. The statutory authority sent the medicine for chemical analysis to the laboratory i.e. Government Analyst, Madhya Pradesh (Bhopal) on 10.12.1996.

B. The said Government Analyst vide certificate dated 27.8.1997 declared that the sample was not of "standard quality" as defined under the Act 1940. The sample led to "analytical difficulties" for the purpose of determining compliance with the official standards as stated under uniformity of content.

C. In view thereof, a show cause notice was issued to the appellant-

company by the statutory authority on 29.9.1997 as to why proceedings should not be initiated against the appellants and others. The appellant submitted its reply on 3.11.1997, submitting that sample of the aforesaid medicine ought to have been examined/ analysed under Indian Pharmacopoeia (hereinafter called 'I.P.') 1996 and it had wrongly been analysed under I.P. 1985. Subsequent thereto, the department filed a complaint against the appellants on 3.7.2001 impleading the company as well as its Managing Director and Officers under the provisions of the Act 1940. A prayer was made that the appellants and other accused be punished under Section 35 of the Act 1940 and information of the said punishment be published in the newspapers at the cost of the accused.

D. The Chief Judicial Magistrate, Chattarpur, took cognizance and issued summons to all accused persons including the appellants. The appellants filed an application under Section 25(3) of the Act 1940 before the Chief Judicial Magistrate, Chattarpur, with a prayer that sample of Betnesol tablets be sent for chemical analysis to the Director, Central Drugs Laboratory for being tested as per I.P.1996 on 1.10.2007. The said application stood rejected vide order dated 5.5.2008. The appellants approached the High Court by filing Misc. Criminal Case No. 6315 of 2008 for quashing the proceedings in Criminal Case No. 982 of 2001 (State of Madhya Pradesh v. M/s Aggarwal Medical Stores and ors.). The said application stood rejected by the impugned judgment and order dated 14.9.2010. Hence, this appeal.

4. Shri R. Ramachandran, learned senior counsel appearing for the appellants, submitted that the Drugs Inspector issued show cause notice dated 29.9.1997 which was duly replied by the appellants on 3.11.1997. Therefore, there was no occasion for the respondent-authorities to file a complaint, that is too after the expiry of more than 3 years and 9 months of the expiry date of the medicine itself. The appellants could not avail their remedy under Section 25(3) of the Act 1940 which can be exercised within 28 days from the date of service of show cause notice. The chemical analyst's report was not clear at all. The certificate declared that the medicine "was not of the standard quality". The analyst had analytical difficulties in determining the compliance with the official standards as stated "Under uniformity of Contents". The purpose of exercising his right under Section 25(3) of Act 1940 is to ask the statutory

authority to send the medicine to some other laboratory for chemical analysis in case the report was not acceptable to the accused. In the instant case, it was the technical problem as the fault had been found in view of analytical defects, and thus, there was no violation of substantive character. There could be no justification for the State to file the complaint at such a belated stage. Thus, the High Court erred in rejecting the application for quashing the complaint.

5. On the other hand, Ms. Vibha Datta Makhija, learned counsel appearing for the respondent-State, has vehemently opposed the appeal contending that the applicants are the manufacturer of drugs and under Section 18(a)(i) of the Act 1940, they could not manufacture drugs of sub-standard quality. They could have expressed their option to adduce evidence in contravention of the analytical report within the period of limitation i.e. 28 days which they did not do. Unless the accused has given option that it would adduce evidence in contravention of the analytical report, it cannot ask the court to send the medicine for chemical analysis to the Central Government Laboratory. As no such option had been made by the appellants, they are not entitled to challenge the report. More so, the onus of proof was on the appellants to tell as on what date the company had received the show cause notice dated 29.9.1997. The appellants have not disclosed the date of receipt of the show cause notice till date. The issue of launching criminal prosecution at a much belated stage has not been raised before the High Court in the gravity in which it is being agitated before this Court. Appeal lacks merit and thus, is liable to be dismissed.

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

7. The issue involving herein is no more res integra matter. The issues have been examined time and again. It is a settled legal proposition that report of the analyst is conclusive. It means that no reasons are needed in support of conclusion given in the report, nor it is required that the report should contain the mode or particulars of the analysis. (See: *Dhian Singh v. Municipal Board, Saharanpur & Anr.*, AIR 1970 SC 318.)

However, law permits the drug manufacturer to controvert the report expressing his intention to adduce evidence to controvert the report within the prescribed limitation of 28 days as provided under Section 25(3) of the Act 1940. In the instant case, the report dated 27.8.1997 was received by the statutory authorities who sent the show cause notice to the appellants on

29.9.1997 and the appellants replied to that notice on 3.11.1997. The case of the statutory authorities is that option/willingness to adduce evidence to controvert the analyst's report was not filed within the period of 28 days i.e. limitation prescribed for it. The appellants are the persons who knew the date on which the show cause notice was received. For the reasons best known to them, they have not disclosed the said date. It is a company which must be having Receipt and Issue department and should have an office which may inform on what date it has received the notice, and thus, should have made the willingness to controvert the report. In fact, such application had only been made on the technique adopted for analysis. It has been the case that instead of testing the medicine under the I.P. 1985, it could have been done under I.P. 1996 because the I.P.1996 had come into force prior to the date of taking the sample on 9.12.1996.

8. In view of the fact that the appellants did not express an intention to adduce evidence to controvert the analyst report within the statutory limitation period of 28 days, further delay in filing the complaint becomes immaterial. Even otherwise, expiry date of the medicine was March 1998 i.e. only after 4 months of submission of the reply by the appellants, and they did not fulfill their burden of expressing intention to adduce evidence in contravention of the report. Therefore, they cannot raise the grievance that the complaint had been lodged at a much belated stage. So far as the application of I.P. 1985 or I.P. 1996 is concerned, such an issue can be agitated at the time of trial.

9. The judgment in *Medicamen Biotech Limited & Anr. v. Rubina Bose, Drug Inspector,* (2008) 7 SCC 196, was heavily relied on by Shri R. Ramachandran, learned senior counsel appearing for the appellants. Nevertheless, the facts of the said case are quite distinguishable. In that case, the complaint had been filed about a month short of expiry date, and the accused therein had expressed their option to lead evidence in contravention of the analyst's report within limitation time but were not able to do so as shortly thereafter the medicine expired.

10. We agree with Ms. Makhija that the case is squarely covered by the judgment of this Court in *State of Haryana v. Brij Lal Mittal & Ors.,* (1998) 5 SCC 343 wherein this Court has held as under:

> *"....Sub-section (4) also makes it abundantly clear that the right to get the sample tested by the Central Government Laboratory (so as to make its report override the report of the Analyst)*

through the court accrues to a person accused in the case only if he had earlier notified in accordance with sub-section (3) his intention of adducing evidence in controversion of the report of the Government Analyst. To put it differently, unless requirement of sub-section (3) is complied with by the person concerned he cannot avail of his right under sub-section (4)."

In the said case, like the present case, the manufacturer did not notify the Inspector within the prescribed period that he intended to adduce evidence in contravention of the report. Also, akin to the case at hand, the manufacturer's right under section (3) of Section 25 expired few months before expiry of shelf life. Holding for the directors of the manufacturing company on different grounds, the court opined that the right to get drugs tested by Central Drugs Laboratory does not arise unless requirement of sub-section (3) is complied with.

11. It is pertinent to mention herein that present appellants had earlier also been informed by the Drug Inspector of various cities on many occasions that the aforesaid medicine was i.e. Betnesol Tablet, was not of standard quality and the authorities had been making an attempt to initiate proceedings against them. As is evident from the pleadings taken by the appellants themselves and the letter dated 1.7.1996 (Annexure P-9) wherein the appellant-company wrote a letter to The Controller, Food and Drug Administration, Madhya Pradesh. The relevant part thereof reads as under:

"During the past one month we have received requests from Drug Inspectors of Dhar, Rewa, Seoni and Ambikapur all under your kind control, to provide Memorandum of Articles of Association, constitution etc. of our company to initiate action for manufacturing Betnesol Tablets B.No. NA 660, Mfd. Dec. 92, Exp. May 94, NB 290, Mfd. Nov. 94, Exp. Apr. 96, NB 538, Mfd. May 95, Exp. Dec. 96 and NB 656, Mfd. Sep. 95, Exp. Feb. 97, which were earlier ***declared as not of standard quality*** *by Government Analyst, Bhopal for facing analytical difficulties during the determination of uniformity of content by the IP 1985 method."* (Emphasis added)

In that letter also the appellant company does not make its intention clear to adduce any evidence to controvert the Government Analyst's report rather made the following request:

"Under these circumstances, we respectfully reiterate that our product Betnesol Tablets referred above are of standard quality and request you to kindly treat all the matter as closed."

12. As explained hereinabove, the appellants and other co-accused did not give any option to adduce evidence in contravention of the analyst's report within statutory limitation period. Even if there was inordinate delay in launching the criminal prosecution or filing the complaint, it is thereby of no consequence. We do not find any ground to interfere with the well reasoned judgment of the High Court. The appeal lacks merit and is, accordingly, dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 2657

SUPREME COURT OF INDIA

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

Civil Appeal No.7002/2004 decided on 9 August, 2011

D.P. DAS ...Appellant

Vs.

UNION OF INDIA & ors. ...Respondents

A. Service Law - Seniority - **Seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules - In absence of a provision, ordinarily the length of service is taken into account.** (Para 22)

क. सेवा विधि – ज्येष्ठता – ज्येष्ठता सेवा का क्रम है और जहां सेवा नियम उसकी संगणना की पद्धति विहित करते हैं, वह पूरी तरह से ऐसे नियमों द्वारा शासित होती है – उपबंध के अभाव में, सामान्यतः सेवा की अवधि को विचार में लिया जाता है।

B. Service Law - Determination of Seniority - **For determination of seniority of the officers who were recommended on the same date, age is the only valid and fair basis - Their seniority should be decided on the basis of age of the candidates who have been recommended.** (Para 34)

ख. सेवा विधि – ज्येष्ठता का निर्धारण – अधिकारी जिनकी समान तिथि पर सिफारिश की जाती है, उनकी ज्येष्ठता के निर्धारण हेतु केवल आयु ही वैध एवं उचित आधार है – उनकी ज्येष्ठता का निर्धारण सिफारिश किये गये अभ्यर्थियों की आयु के आधार पर किया जाना चाहिए।

Cases referred :

AIR 1993 SC 267, AIR 1979 SC 429, (2003) 5 SCC 604, (2011) 4 SCC 266.

JUDGMENT

The Judgment of the Court was delivered by **ASOK KUMAR GANGULY, J. :–** This appeal has been preferred from the final judgment and order passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No.5238 of 2000 dated 30th June, 2003.

2. The facts and circumstances giving rise to this appeal are that in the year 1983, the first batch of the Specialist Medical Officer (SMO) in the Ordnance Factories Organization was recruited in the category of Obstetrics, Gynecology, Medicine and Surgery. The appellant was one of the five recruited persons and he belonged to the category of Surgery.

3. In the year 1991, on the recommendation of the Fourth Pay Commission, one post in the Indian Ordnance Factories Health Services (Group A, grade of Rs.5900-6700) was sanctioned for filling up amongst the SMOs cadre. The specialists cadre was in different disciplines and hence, there was necessity of preparing a combined gradation list in the SMOs cadre. The respondent No.1 referred the matter to the UPSC for preparation of the common seniority list. Further, the SMOs were recommended by the UPSC by three different lists, two of which were made on the same date and therefore the UPSC was requested to furnish the relative order of seniority of those SMOs who are recommended on the same date.

4. Accordingly, the seniority list of SMOs in the grade of Rs.4500-5700/- was prepared on 1.7.1992 and published vide order dated 21.8.1992. In the seniority list respondent Nos. 4, 5 and 6 were placed above the appellant.

5. As the appellant felt aggrieved by the publication of the said seniority list, he made representations in the year 1992, 1993 and 1995 before the respondent No.1. However, no reply was received by the appellant from the respondent No.1.

6. Being aggrieved, the appellant preferred an original application (O.A.No.457 of 1995) before the Central Administrative Tribunal, Jabalpur Bench ('the Tribunal') and prayed to quash the said seniority list and also for maintenance of discipline wise seniority list initially prepared by the UPSC and for keeping Confidential Reports as criteria for selection to the next higher

grade and also to rearrange the seniority of the candidates on the basis of age of candidates by placing the oldest candidate on top of the seniority list followed by juniors in age. The appellant contended, inter alia, before the Tribunal that the:

a) The relative seniority of SMOs was not determined by UPSC, at the time of selection

b) The Department should have requested the UPSC to recommend candidates for such posts on the basis of a consolidated order of merit and not subject wise

c) The Department never requested the UPSC to prepare a combined seniority list as per merit on the basis of performance in the interview. It was therefore not possible for the UPSC to prepare a combined seniority list in the year 1992.

7. The UPSC before the Tribunal contended, inter alia, that the interview for different disciplines viz specialists I medicine, surgery and gynecology in Ordnance Factories Organization were conducted on different dates. Before the Tribunal UPSC further contended that:

(i) As far as the Specialist (Obstetrics and Gynecologist) is concerned the date of advertisement was 13.11.1982, date of interview was 28.2.1983 and date of UPSC recmmendation letter was 16.3.1983.

(ii) Insofar as the Specialist (Medicine) is concerned the date of advertisement was 6.11.1983, date of interview was 15/16.03.1983 and date of UPSC recommendation letter was 14.4.1983.

(iii) And so far as the Specialist (Surgery) is concerned, the date of advertisement was 13.11.1982, date of interview was 22/24.03.1983 and date of UPSC recommendation letter was 14.4.1983.

8. The UPSC also filed the extracts of its file which contain the note sheets from Page 2 to Page 13. From those extracts the basis of arriving at the methodology adopted for fixing the seniority of two different disciplines, whose recommendations were made on the same date were available.

9. By a judgment and order dated 26.7.2000, the Tribunal dismissed the O.A.457 of 1995 and in paragraph 8.4 held as under:

> "8.4 It is fact that date of recommendation of the applicant who belongs to surgery discipline and the private respondents belonging to medicine discipline was same i.e.14.4.1983. Also that the rules provide for fixing the seniority based on the date of recommendations of the UPSC maintaining inter se merit as per the recommendation. It is also fact that respondent did not approach the UPSC for preparing a combined merit list of such specialist which they should have done as per DOPTs instructions for seeing future promotion prospects for these specialists and also the fact that separate seniority list for number of specialist disciplines and separate promotion prospects thereof were not feasible. From the extract of note sheet filed by the respondent, it is seen that the Commission, based on detailed examination decided to fix the seniority in such case, based on date of interview i.e. candidates interviewed on an early date to be senior to those interviewed on a later date. The contention of learned counsel for applicant that their seniority should have been fixed based on the date of birth cannot be accepted since presuming this criteria was to be adopted then very purpose of preparation of merit list of the candidates, will get defeated. The reckoning of seniority based on age may be relevant in cases of recruitment where no merit list is made and the selection criteria is for qualifying the test along or where the recommendations are only as 'fit' of 'unfit'."

10 .Being aggrieved, the appellant filed a writ petition before the High Court of Madhya Pradesh.

11. By the impugned judgment dated 30.6.2003, the High Court dismissed the writ petition, affirming the methodology adopted by the UPSC for fixing the seniority of two different disciplines whose recommendations were made on the same date.

12. The High Court in para 15 held that:

> "15. ..... What is reasonable to be seen in the obtaining factual matrix is that under regrettable circumstances the inter se merit list was not available as there was no requisition for fixing such seniority. However, the UPSC had evolved a base which indicates that the

date of interview would be the criteria for fixing the seniority, in such a case. Ordinarily this may look quite peculiar but it has to be borne in mind that peculiar circumstances are solved by taking recourse to innovative methods. The tribunal in paragraph 6.1 has reproduced the date of advertisement and the date of recommendation letter of UPSC. We have also reproduced the same above. The date of advertisement for the post of Specialist (Surgery) was 13.11.1982. The date of advertisement for post of Specialist (Medicine) was 6.11.1983. Definitely there was advertisement for the post of Specialist (Surgery) earlier than Specialist (Medicine) but the interview of Specialist (Medicine) was on 15/16.3.83 whereas the date of interview of Specialist (Surgery) was on 22/24.3.93. The Tribunal has taken note of the fact that from the note sheets, which has been produced by the UPSC, it was perceivable that recommendations were made on the date of interview. Thus, selection was made on that date. It is noticeable that recommendations were sent on the same date i.e. 14.4.1983. Thus, the date of interview has earned the status of date of selection. Submission of Mr. Gupta is that it can be fortuitous circumstances as the interview in one subject may take place earlier than the other. The aforesaid submission may appear on a first blush to be quite attractive but on a closer scrutiny of the same it has to be repelled,..... The UPSC has determined the seniority on the basis of the date of interview and the date when selection had taken place. In the absence of any document on record, in the absence any preparation of merit list, in the absence of drawing of the seniority list at the initial stage and taking note of the peculiar facts and circumstances of the case, we are of the considered view that the UPSC has adopted a rational approach and the Tribunal has not flawed in accepting the same....."

13. It is pertinent to note here that on 28.8.1946, the Government of India, Department of Home issued an Office Memorandum (O.M.) for determination of seniority of direct recruits

14. Clause 2(iv) thereof provides as under:

"When a number of vacancies for direct recruits are filled simultaneously without candidates first being placed in order of merit or preference, seniority should be determined by age provided a

candidate joins within such period not exceeding one month from the date of appointment as may be fixed by the appointing authority. A candidate who does not join within the time so specified will rank below those who did so join, and seniority among the later arrivals will be according to the date of joining.

The orders in this paragraph will be of general application. "

15. Vide an Office Memorandum dated 22.12.1959, the Government of India, Ministry of Home Affairs issued general principles for the determinationof seniority in Central Civil Services.

16. It is pertinent to note that the O.M. dated 22.12.1959 does not supersedes Office Memorandum of 1946 but expressly discontinues the application of some previous Office Memorandum cited below:

- Office Memorandum No. 30/44/48- Apptts, dated the 22nd June, 1949.
- Office Memorandum No. 65/28/49 – DGS.(Appts.) dated the 3rd Feburary, 1950 and other subsequent Office Memorandum regarding fixation of seniority of ex-employees of the Government of Burma.
- Office Memorandum No. 31/223/50 – DGS, dated the 27th April, 1951 and other subsequent Office Memorandum regarding fixation of seniority of displace Government Servants.
- Office Memorandum No. 9/59/56 – RPS dated the 4th August, 1956.
- Office Memorandum No. 32/10/49 – CS dated the 31st March, 1950.
- Office Memorandum No. 32/49/CS(C) dated the 20th September, 1952.

17. Para 4 of the Annexure attached to the said O.M. dated 22.12.1959 specifically provides that "..... the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment on the recommendations of the UPSC or other selecting authority, persons appointed as a result of subsequent selection."

18. But this circular fails to address the situation, where no combined merit list is prepared in the order of merit in which the candidates are appointed and their date of recommendation being the same, as in the present case.

19. The learned counsel for the appellant contended that the O.M. dated 22.12.1959 has not repealed O.M. dated 28.8.1946 and therefore the O.M. of 1946 shall be applicable in this situation.

20. The learned counsel for the respondents contended that the intention of the authorities was clear in O.M. of 1959, so as to repeal all the prior O.Ms. in relation to the determination of seniority, which is expressed in para 2 of the O.M. which reads as under:

> ".....It has therefore, been decided in consultation with the UPSC, that hereafter the seniority of all persons appointed to the various Central Services after the date of these instructions should be determined in accordance with the General Principles annexed here to."

21. However as noted above, office memorandum of 1959 does not answer the problems arising in this case.

22. The law is clear that seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of a provision ordinarily the length of service is taken into account.

23. The Supreme Court in *M.B. Joshi & others.* V. *Satish Kumar Pandey* & Ors., AIR 1993 SC 267 has laid down that it is the well settled principle of service jurisprudence then in the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of the service and not on any other fortuitous circumstances.

24. Determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are just and fair. This is the mandate of Articles 14 and 16.

25. In *The Manager, Government, Branch Press and another* v. *D.B. Belliappa* reported AIR 1979 SC 429, a three-Judge Bench of this Court construing Articles 14 and 16 interpreted the equality clause of the Constitution as follows:-

"...The executive, no less than the judiciary, is under a general duty to act fairly. Indeed, fairness founded on reason is the essence of the guarantee epitomized in Articles 14 & 16(1)." (see para 24 at page 434)

26. Another three-Judge Bench of this Court in *Bimlesh Tanwar* v. *State of Haryana* & other, (2003) 5 SCC 604, while dealing with the question of absence of a rule governing seniority held that an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case. (see para 47 at page 619)

27. In the instant case, no record has been brought before the Court to ascertain merit wise position of the persons who were directly recruited. Except the office memorandum of 1946, which is still in force, no other rule or executive instruction has been shown to apply to the facts of the case.

28. The appellant argued that the date of interview would have to be considered as a guide for determination of seniority. This cannot be accepted as such a date is wholly fortuitous. Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust.

29. As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority.

30. From the analysis of the executive instructions referred to hereinabove, it is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority. Such a basis is not fortuitous and is otherwise just and reasonable.

31. In the premises aforesaid the seniority of the officers who were recommended on the same date must be decided by their respective age.

32. The contrary view taken by the High Court of fixing seniority on the basis of date of interview, being wholly fortuitous, cannot be accepted.

33. The reliance by the respondent(s) on judgment of this Court in *B. Premanand and others* v. *Mohan Koikal and others,* (2011) 4 SCC 266, is misconceived in the facts of the case. In that case this Court was dealing with Rule 27(c) of the Kerala State and Subordinate Services Rules, 1958. In the

instant case there is no rule. Therefore in this case, this Court has to evolve a fair and just basis of seniority on the basis of the office memorandum discussed herein above.

34. For the reasons aforesaid this Court holds that for determination of seniority of the officers who were recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended.

35. The appeal is, thus, allowed. The judgment of the High Court which has taken a contrary view is set aside. In the facts of the case, there will be no orders as to costs.

Appeal allowed.

I.L.R. [2011] M. P., 2665
SUPREME COURT OF INDIA
Before Mr. Justice D.K. Jain & Mr. Justice Asok Kumar Ganguly
Civil Appeal No. 2331/2004 decided on 19 September, 2011

STATE OF M.P. & ors. ...Appellants
Vs.
PREMLAL SHRIVAS ...Respondent

A. Financial Code M.P. - Rule 84 - Clerical Error - **Clerical error or mistake would fall within the ambit of the rule which is caused due to the negligence or want of proper care on the part of some person other than the employee seeking correction - Onus is on the employee concerned to prove such negligence.** (Para 14)

क. वित्तीय संहिता म.प्र. – नियम 84 – लिपिकीय त्रुटि – लिपिकीय त्रुटि या गलती नियम की परिधि के भीतर आयेगी जो सुधार चाहने वाले कर्मचारी के अतिरिक्त किसी अन्य व्यक्ति द्वारा उपेक्षा एवं उचित सतर्कता के अभाव के कारण कारित हुयी है – ऐसी उपेक्षा साबित करने का भार संबंधित कर्मचारी पर होता है।

B. Financial Code M.P. - Rule 84 - **Delay in applying for correction - Delay of over two decades in applying for the correction of date of birth is ex-facie fatal, notwithstanding the fact that there is no specific rule or order, prescribing the period within which such application could be filed.** (Para 12)

ख. वित्तीय संहिता म.प्र. – नियम 84 – सुधार के लिये आवेदन करने में विलंब

– जन्म तिथि के सुधार हेतु आवेदन करने में दो दशकों से अधिक का विलंब स्पष्टतः घातक है बावजूद इसके कि अवधि जिसके भीतर ऐसा आवेदन प्रस्तुत किया जा सकता है विहित करने वाला कोई विनिर्दिष्ट नियम या आदेश नहीं है।

Cases referred:

(2010) 6 SCC 482, (1993) 2 SCC 162, 1994 SUPP (1) SCC 155, (2005) 6 SCC 49, (1997) 1 SCC 247, (1997) 4 SCC 647.

JUDGMENT

The Judgment of the Court was delivered by **D.K. JAIN, J. :–** This appeal is directed against the judgment and order dated 17th January, 2002 passed by the High Court of Madhya Pradesh, Jabalpur Bench, in Writ Petition No. 2561 of 2001. By the impugned judgment, the High Court has allowed the writ petition preferred by the respondent, directing the appellants to correct the service record of the respondent, incorporating his date of birth as 30th June, 1945 in place of 1st June, 1942, within a period of one month from the date of the impugned order.

2. To appreciate the controversy involved, a brief reference to the facts, as stated in the impugned judgment, would suffice. These are:

> The respondent was appointed to the post of a Police Constable in the year 1965. In the service book, prepared at the time of his entering the service, his date of birth was recorded as 1st June, 1942. His father's name was recorded as Gayadin. This position continued till 1990, when he made a representation to the appellants seeking correction of his father's name and date of birth in the service record. The plea of the respondent was that at the time of joining the service, his date of birth as also the name of his father was wrongly recorded on the basis of the information furnished by his maternal grandfather, who was accompanying him at that point of time as he was living with him after the death of his father. According to the respondent, he came to know about the mistake when he was promoted as Head Constable. In support of his application, the respondent submitted his class IV marksheet, transfer certificate of class VIII and a certificate from a local MLA.

3. By order dated 8th March 1995, the representation came to be rejected, inter-alia, on the ground that the service record of the respondent was prepared on the instructions of his maternal grandfather, accompanying the respondent

at the time of enrolment, the same carries his finger and thumb impressions and was duly attested by the then Superintendent of Police on 7th September, 1976. Moreover, at the time of enrolment, the respondent had been subjected to a medical examination on 27th September 1965, when the Examining Medical Authority had certified his age to be 23 years.

4. Being dissatisfied, the respondent preferred an application before the M.P. Administrative Tribunal (hereinafter referred to as "the Tribunal"). Referring to several documents brought on record by the appellants, which included some documents which had been filled up by the respondent himself and showing the date of his birth as 1st June, 1942 and father's name as Gayadin, the Tribunal dismissed the application vide order dated 18th April, 2001.

5. Having failed before the Tribunal, the respondent filed a writ petition before the High Court which set aside the order of the Tribunal and allowed the writ petition. Being aggrieved, the State of Madhya Pradesh and two of its functionaries are before us in this appeal.

6. Despite service of notice, the respondent remains unrepresented. Accordingly, we have heard learned counsel for the appellants.

7. The learned counsel, appearing on behalf of the appellants, strenuously urged that the High Court ought not to have directed a change in date of birth of the respondent, on his request, made after a lapse of over two decades of his joining the service. It was asserted that some of the documents in which his father's name was shown as Gayadin, bore his signatures and, therefore, the plea of the respondent that he was not aware of the contents of his service record cannot be accepted. It was also submitted that as per Rule 84 of the M.P. Financial Code, the date of birth recorded in the service record is conclusive and only a bonafide clerical mistake in the said record can be corrected. To bolster his submission, learned counsel commended us to a recent decision of this Court in *Punjab & Haryana High Court at Chandigarh Vs. Megh Raj Garg & Anr.*, (2010) 6 SCC 482, wherein it has been held that the declaration of age made at the time of or for the purpose of entry into government service is conclusive and binding on the government servant.

8. Having considered the issue at hand in light of the afore-stated factual scenario, and the principles of law on the point, we are convinced that the High Court was not justified in directing change in date of birth of the respondent.

9. It needs to be emphasised that in matters involving correction of date of birth of a government servant, particularly on the eve of his superannuation or at the fag-end of his career, the Court or the Tribunal has to be circumspect, cautious and careful while issuing direction for correction of date of birth, recorded in the service book at the time of entry into any government service. Unless, the Court or the Tribunal is fully satisfied on the basis of the irrefutable proof relating to his date of birth and that such a claim is made in accordance with the procedure prescribed or as per the consistent procedure adopted by the department concerned, as the case may be, and a real injustice has been caused to the person concerned, the Court or the Tribunal should be loath to issue a direction for correction of the service book. Time and again this Court has expressed the view that if a government servant makes a request for correction of the recorded date of birth after lapse of a long time of his induction into the service, particularly beyond the time fixed by his employer, he cannot claim, as a matter of right, the correction of his date of birth, even if he has good evidence to establish that the recorded date of birth is clearly erroneous. No Court or the Tribunal can come to the aid of those who sleep over their rights (See: *Union of India* Vs. *Harnam Singh,* (1993)1 SCC 162).

10. In *Secretary And Commissioner, Home Department & Ors.* Vs. *R. Kirubakaran,* 1994 Supp (1) SCC 155 indicating the factors relevant in disposal of an application for correction of date of birth just before the superannuation and highlighting the scope of interference by the Courts or the Tribunals in such matters, this Court has observed thus :

> "An application for correction of the date of birth should not be dealt with by the tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose their promotions for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while

examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case, on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible. Before any such direction is issued, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be filed within the time, which can be held to be reasonable. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their dates of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if ultimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief for continuation in service, unless prima facie evidence of unimpeachable character is produced because if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and merely caused injustice to his immediate junior." (Emphasis supplied)

11. In *State of U.P. & Anr.* Vs. *Shiv Narain Upadhyaya*, (2005) 6 SCC 49 while reiterating the aforesaid position of law, this Court has castigated the practice of raising dispute by the public servants about incorrect recording of date of birth in their service book on the eve of their retirement.

12. Viewed in this perspective, we are of the opinion that the High Court committed a manifest error of law in ignoring the vital fact that the respondent had applied for correction of his date of birth in 1990, i.e., 25 years after his

induction into service as a constable. It is evident from the record that the respondent was aware ever since 1965 that his date of birth as recorded in the service book is 1st June, 1942 and not 30th June, 1945. It had come on record of the Tribunal that at the time of respondent's medical examination, his age as on 27th September, 1965 was mentioned to be 23 years and his father's name was recorded as Gayadin; and in his descriptive roll, prepared by the Senior Superintendent of Police as well, his father's name was shown as Gayadin and his date of birth as 1st June, 1942 and this document was signed by the respondent and the form of agreement known as "Mamuli Sipahi Ka Ikrarnama" was filled up by the respondent himself with the very same particulars. Therefore, it cannot be said that the decision of the Tribunal rejecting respondent's plea that it was for the first time in the year 1990, when he was promoted as Head Constable, that he noticed the error in the service record was vitiated. Be that as it may, in our opinion, the delay of over two decades in applying for the correction of date of birth is ex-facie fatal to the case of the respondent, notwithstanding the fact that there was no specific rule or order, framed or made, prescribing the period within which such application could be filed. It is trite that even in such a situation such an application should be filed which can be held to be reasonable. The application filed by the respondent 25 years after his induction into service, by no standards, can be held to be reasonable, more so when not a feeble attempt was made to explain the said delay. There is also no substance in the plea of the respondent that since Rule 84 of the M.P. Financial Code does not prescribe the time-limit within which an application is to be filed, the appellants were duty bound to correct the clerical error in recording of his date of birth in the service book.

13. Rule 84 of the M.P. Financial Code, heavily relied upon by the respondent reads as under :

> "Rule 84. Every person newly appointed to a service or a post under Government should at the time of the appointment declare the date of his birth by the Christian era with as far as possible confirmatory documentary evidence such as a matriculation certificate, municipal birth certificate and so on. If the exact date is not known, an approximate date may be given. The actual date or the assumed date determined under Rule 85 should be recorded in the history of service; Service book or any other record that may be kept in respect of the Government servant's service under Government. The date of birth, once recorded in this manner, must

be deemed to be absolutely conclusive, and except in the case of a clerical error no revision of such a declaration shall be allowed to be made at a later period for any purpose whatever."

14. It is manifest from a bare reading of Rule 84 of the M.P. Financial Code that the date of birth recorded in the service book at the time of entry into service is conclusive and binding on the government servant. It is clear that the said rule has been made in order to limit the scope of correction of date of birth in the service record. However, an exception has been carved out in the rule, permitting the public servant to request later for correcting his age provided that incorrect recording of age is on account of a clerical error or mistake. This is a salutary rule, which was, perhaps, inserted with a view to safeguard the interest of employees so that they do not suffer because of the mistakes committed by the official staff. Obviously, only that clerical error or mistake would fall within the ambit of the said rule which is caused due to the negligence or want of proper care on the part of some person other than the employee seeking correction. Onus is on the employee concerned to prove such negligence.

15. In *Commissioner of Police, Bombay and Anr.* Vs. *Bhagwan* V. *Lahane*, (1997) 1 SCC 247 this Court has held that for an employee seeking the correction of his date of birth, it is a condition precedent that he must show, that the incorrect recording of the date of birth was made due to negligence of some other person, or that the same was an obvious clerical error failing which the relief should not be granted to him. Again, in *Union of India* Vs. *C. Rama Swamy* & Ors.,(1997) 4 SCC 647 it has been observed that a bonafide error would normally be one where an officer has indicated a particular date of birth in his application form or any other document at the time of his employment but, by mistake or oversight a different date has been recorded.

16. As aforesaid, in the instant case, no evidence has been placed on record by the respondent to show that the date of birth recorded as 1st June, 1942 was due to the negligence of some other person. He had failed to show that the date of birth was recorded incorrectly, due to want of care on the part of some other person, despite the fact that a correct date of birth had been shown on the documents presented or signed by him. We hold that in this fact situation the High Court ought not to have directed the appellants to correct the date of birth of the respondent under Rule 84 of the said rules.

17. In view of the foregoing discussion, the decision of the High Court, holding that the respondent was entitled to get his date of birth corrected in the service record, cannot be sustained. Resultantly, the appeal is allowed and the impugned judgment is set aside, leaving the parties to bear their own costs throughout.

Appeal allowed.

I.L.R. [2011] M. P., 2672

FULL BENCH

Before Mr. Sushil Harkauli, Acting Chief Justice, Mr. Justice S.C. Sharma & Mr. Justice Prakash Shrivastava

W.A. No. 262/2006 (Indore) decided on 16 August, 2011

HEMLATA (DR.) & ors. ...Appellants

Vs.

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

A. Transfer of Property Act (4 of 1882), Section 100 - **Charge - Liability to pay itself does not create a "charge" over the property - A charge can be created only in two ways, namely (i) by act of parties i.e. by contract or (ii) by operation of law.**

Society purchased the property from its owners by sale deed dated 07.05.1995 - The property was subsequently sold by the Society to the appellants - A proceeding was initiated on 01.05.1999 against the said society by the competent authority, for recovery of the shortage of stamp duty amounting to Rs. 64,35,908/- in respect of the sale deed dated 07.05.1995 - Held - Under Section 29 of the Indian Stamp Act, the liability for payment of the stamp duty was that of the Society. (Para 2)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 100 – भार – संदाय का दायित्व अपने आप सम्पत्ति पर भार निर्माण नहीं करता – भार केवल दो प्रकार से निर्मित किया जा सकता है, अर्थात (i) पक्षकारों के कार्य द्वारा अर्थात संविदा द्वारा, या (ii) विधि के प्रवर्तन द्वारा।

B. Stamp Act (2 of 1899), Sections 29 & 48 - **Recovery of Stamp Duty/or Penalty - Society purchased the property from its owners by sale deed and subsequently sold it to the appellants - State has no authority to recover the shortage of stamp duty on the sale deed executed in favour of the Society or penalty therefor, from the subsequent purchasers/appellants.** (Para 20)

ख. स्टाम्प अधिनियम (1899 का 2), धाराएँ 29 व 48 – स्टाम्प शुल्क/या दण्ड की वसूली – विक्रय विलेख द्वारा सोसायटी ने सम्पत्ति उसके स्वामियों से क्रय की और तत्पश्चात अपीलार्थीगण को उसे विक्रय किया – राज्य को सोसायटी के पक्ष में निष्पादित विक्रय विलेख पर स्टाम्प शुल्क की कमी पश्चातवर्ती क्रेता/अपीलार्थीगण से वसूलने का कोई प्राधिकार नहीं।

Cases referred :

AIR 1971 SC 1201, (2006) 1 SCC 615, 1978 JLJ 89.

Amit Agrawal, for the appellants.

Vivek Patwa, Dy. G.A., for the respondents No. 1 & 2.

None, for the respondent No.3.

ORDER

The Order of the Court was delivered by

SUSHIL HARKAULI, AG.C.J (ORAL):–This intra-court appeal preferred under Section 2(1') of the Madhya Pradesh Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam 2005, challenges the order dated 25.6.2001 passed by a learned Single Judge of this Court in W.P.No.l 017/2001. A Division Bench of this Court heard the. appeal and referred the entire appeal for consideration by a larger Bench with the following words:

> *"Regard being had to all the aspects that have arisen before us we are of the considered opinion that the . controversy is of immense signification and involves substantial question of law of general importance. Thus, it is apt that the matter should be heard by a larger Bench. We also think it condign that the entire case be heard and decided by a larger Bench so that ' the controversy is put to rest in an authoritative manner. Thus, we restrain ourselves from framing any question. We are inclined to refer the matter to the larger Bench under Rule 8(2) of the High Court of Madhya Pradesh Rules, 2008."*

2. The bare facts necessary for the decision of this appeal are that the respondent No.3 *Abhishek Griha Nirman Sahakari Sanstha Maryadit* (hereinafter referred to as 'the Society') is a co-operative housing society. The Society purchased the property bearing Survey No. 93, area 0.364 hectare (39204 sq. ft.) from its owners (called the Keemti family) by sale deed dated 7/5/1995. The property was subsequently sold by the Society to the present appellants by 4 sale deeds dated 30/5(2007. There is no dispute that full stamp duty was paid on the 4 sale deeds executed by the Society in favour of

the present appellants. After purchasing. the land on 30/5/1997, the appellants constructed a building thereon after obtaining the necessary sanction for construction from the concerned Authorities. Much after the 4 sale-deeds, and after the constructions, a proceeding was initiated .on 1/5/1999/against the said society by the competent authority by the Indian Stamp Act, 1899 (for brevity 'the Act') for recovery of the shortage of stamp duty amounting to Rs. 64,35,908/- in respect of the sale deed dated 7/5/1995 executed in favour of the Society. The said stamp duty was assessed by order dated 24/9/1999 on the ground that the society had acquired the said land by the sale-deeddated 7/5/1995 without payment of the stamp duty because of exemption which was improperly obtained. The Authority under the Act by order dated 15.3.2001 attached the said property as the respondent-society had not paid the requisite stamp duty on the instrument of sale. The said attachment was done taking recourse to the provisions under the Madhya Pradesh Land Revenue Code, 1959 .(hereinafter referred for short as 'the Code').

3. The recovery and attachment was unsuccessfully objected to, then unsuccessfully challenged in appeal and finally in the writ petition which was dismissed by the impugned order by the learned single.Judge.

3. We have heard both sides. In the light of the facts mentioned above and the arguments advanced, the following basic questions arise for consideration:

1. Whether the assessed shortage of stamp duty, and penalty if any, amounts to a 'charge' on the property which is the subject matter of the deficient sale-deed?

2. If so, whether the present appellants are bona-fide purchasers of the property for consideration?

3. If so, whether they had notice of the charge?

4. If not, whether there is any law under which the charge can be enforced against a purchaser for consideration without notice of the charge?

5. Section 100 of the Transfer of Property Act defines a "charge" and also specifies the persons against whom and the circumstances under which the "charge" is not enforceable. It reads as under.-

*"**100. Charges.**- Where immovable property of one person is by the act of parties or operation of law made security for the*

payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a c1c:rge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trustproperty for expenses properly incurred in the execution of his trust,' and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to who such property has been transferred for. consideration and without notice of the charge." (Emphasis supplied)

6. In *The Ahmedabad Municipal Corporation of the City of Ahmedabad* v. *Haji Abdul Gafur Haji Hussenbhai*, AIR 1971 SC 1201 it has been held in. respect of section 100 of the Transfer of Property Act :-

"This section in unambiguous language fays down that no charge is enforceable against any property in the hands of a transferee. for consideration without notice of the charge. except where it is otherwise expressly provided by any law for the time being in. force. The saving provision of law must expressly provide for .enforcement of a charge against the property in the hands of a transferee for value without notice of the charge and not merely create a charge !' (emphasis supplied)

7. In *State of Karanaka and another* vs. *Shreyas Papers (P) LId.* and others, (2006) 1 SCC 615 it has been held :-

"18. The next limb of Mr. Hegde's arguments was that since Section 13(2)(i) of the KST Act creates a charge on the property of the defaulting company, the charge would continue on the properties, even if it changes hands by transfer.

xxxx xxxx xxxx

20. As the section itself unambiguously indicates, a charge may not be enforced against a transferee if she/he has had no notice of the same, unless by law, the requirement of such notice has been waived This position has long been accepted by this Court

in Dattatreya Shanker Mote v. Anand Chintaman Datar and in Ahmedabad Municipal Corpn. of the City of Ahmedabad v. Haji Abdulgafar Haji Hussenbhai (hereinafter 'Ahmedabad Municipal Corpn. '). In this connection, we may refer to the latter judgment, which is particularly relevant for the present case."

8. Section 47-A (3) of the Stamp Act reads as under:-

"(3) The Collector may suo motu within five years from the date of registration of any instrument not already referred to him under sub- section (1) call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject-matter of any such instrument and the duty payable thereon and, if after such examination, he has reason to believe that the market value of such property has not been truly setforth in the instrument, he may determine the market value of such property and the duty as aforesaid in accordance with the procedure provided for in sub-section (2). The difference, if any, in the amount of duty shall be payable by the person liable to pay the duty.

Provided that nothing in this sub-section shall apply to any instrument registered before the date of commencement of the Indian Stamp (Madhya Pradesh Amendment) Act, 1975. "

(emphasis supplied)

9. Regarding the person by whom the stamp duty is payable and the manner of its recovery, reference may be made to Sections 29 and 48 of the Act which read as follows:-

"29. Duties by whom payable- *In the absence or an agreement to the contrary, the expense of providing the proper stamp shall be borne.:*

(a) in the case of any instrument described in any of the following Articles of Schedule I, namely:-

No.2 (AdministrativeBond)
No, 6 (Agreement relating to Deposits of Title-deeds, Pawn or Pledge),]
No. 13 (Bill of Exchange),

No.15 (Bond),
No.16 (Bottomry Bond),
No,26 (Customs Bond),
No.27 (Debenture),
No.32 (Further charge),
No.34 (Indemnity-bond),.
No. 40 (Mortgage-deed),
No. 43 (Note of Memorandum (add in UP),
No. 49 (Promissory-note),
No. 55 (Release),
No. 56 (Respondentia Bond),.
No.57 (Security-bond or Mortgage-deed),
No. 58 (Settlement),
No. 62 (a) (Transfer of shares in an incorporated company or other body corporate)
No. 62 (b) (Transfer of debentures, being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by Section 8),
No. 62 (c) (Transfer of any interest secured by a bond, mortgagedeed or policy of insurance),:
by the person drawing, making or executing such instrument:

(b) in the case of a policy of insurance other than fire insurance by the person effecting the insurance;

(bb) in the case of policy of fire Insurance by the person issuing the policy;

(c) in the case of a conveyance (including a re-conveyance of mortgaged property) by grantee; in the case of a lease or agreement to lease- by the lessee or intended lessee;

(d) in the case of a counterpart of a lease-by the lessor;

(e) in the case of an instrument of exchange-by the parties in equal shares;

(f) in the case of a certificate of sale- by the purchaser of the property to which such certificate relates; and

(g) in the case of an instrument of partition- by the parties

thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue-authority or civil Court or Arbitrator, in such proportion as such authority, Court or arbitrator directs. *(emphasis supplied)*

48. Recovery of duties and penalties.- *All duties, penalties and other sums required to be paid under this chapter may be recovered by the Collector by distress and sale of the movable property of the **person from whom the same are due**; or, by any other process for; the time being in force for the recovery of arrears of land revenue.*

10. Admittedly in the present case there is no contract to the contrary in the sale deed dated 7/5/1995 by the *Keemti* family in favour of the Society on which there was deficiency of stamp duty. Therefore under section 29 of the Act the liability for payment of the stamp duty was that of the Society.

11. But liability to pay by itself does not create a "charge" over the property. As seen from section 100 of the Transfer of Property Act (quoted above) a charge can be created only in two ways, namely (i) by act of parties ie. by contract, or (ii) by operation of law:

12. There is nothing to show that the Society created any charge over the property by any express or implied contract. So it has to be examined whether any charge was created by operation of any law.

13. The State of Madhya Pradesh relies upon Section 137 and 139 of the Code, which read as follows: -

"137. Land Revenue first charge on land.–*The land revenue assessed on any land shall be first charge on that land and on rents and profits thereof"*

"139. Land revenue recoverable from any person in possession. *-In case of default by any person who is primarily liable under section 138, the land revenue, including arrears, shall be recoverable from any person in possession of the land ....."*

14. Now under section 137 it is the "land revenue" which, by operation of law (Statute), constitutes a charge over the land. *'Land Revenue'* is distinct from *'monies recoverable as arrears of land revenue'*. It may be noticed that land

revenue is a tax on land while stamp duty is not a tax on land, but is a tax on an instrument of transfer (sale-deed). Therefore we are unable to hold that by virtue of section 137 or section 139 of the Code, individually or read together, by their express words or by necessary intendment, *'monies recoverable as arrears of land revenue'* will constitute a 'charge' over the land.

15. In *Manoharlal Awal v. State of M.P. and another* reported in 1978 JLJ 89, a Full Bench of this Court held :-

> *"10. From the above analysis it can be clearly seen that (i) "an arrear of land revenue" is distinct and separate from (ii) "money recoverable as an arrear of land revenue"; and this distinction has been studiously maintained throughout the Chapter. The intention of the Legislature becomes obvious enough. In every section only that expression has been used to which it was meant to apply. There does not appear to be any confusion. Where the expression "an arrear of land revenue" alone is used it does not include "money recoverable as an arrear of land revenue"- Bearing in mind this distinction, section 150 of the Code, may not be read carefully. The first sub-section speaks of "an arrear of land revenue" alone. There is no mention of "money recoverable as an arrear of land revenue" in the whole of the section."*
>
> *"16. Our answer to the question referred to is this:-*
>
> *(1) Section 150 of the MP Land Revenue Code applies to the recovery of "an arrear" of land revenue" but not to a proceedings for the recovery of any sum of money which is "recoverable as an arrear of land revenue" within the meaning of Section 155 of that Code. "*

16. Section 53 of the Transfer of-Property Act, on which some argument was advanced, reads as under:-

> ***"53. Fraudulent transfer-*** *(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.*

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being inforce relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

17. It was argued by the learned counsel for the State that the appellants could not have been passed on a better right than what their vendor had. It is urged by him that once on the first transaction stamp duty was not paid solely because of exemption, and later on exemption was withdrawn the State has a right to realize it from the property itself and the property cannot be regarded as having gone into the hands of present, appellants free from all encumbrances. This brings us back to the same question discussed above, namely, whether the deficiency of stamp duty is an "encumbrance" upon the property. "Encumbrance" here would mean a "charge".

18. It is also canvassed on behalf of the State that the exemption of the society had been withdrawn because of a fraud practiced by the society. It was submitted that fraud, which vitiates everything, would also bring in its net the second transaction and the appellants cannot escape from the liability to pay the stamp duty on the first transaction as they derive their title from the society.

19. This submission also cannot be accepted for the following reasons.

Firstly, there are no clear pleadings containing particulars of the alleged fraud, nor there are any such cogent findings. Secondly, even assuming there was a fraud by the Society, it was regarding non-payment/short-payment of stamp duty on the sale deed in its favour. The consequences of non- payment/short-payment of stamp duty are provided in the Stamp Act. Passing on the liability of payment of duty or penalty to the subsequent purchaser is not among the consequences provided. Nor is the sale deed or its registration rendered a nullity due to such non-payment/short-payment.

20. Therefore, in view of the foregoing discussion, the respondent State has no authority to recover the shortage of stamp duty on the sale deed executed in favour of the Society or penalty therefor, from the subsequent purchasers ie. the appellants. The recovery would however be open from the Society.

21. The appeal is therefore allowed and the recovery proceedings against the appellants are quashed.

Appeal allowed.

I.L.R. [2011] M. P., 2681
WRIT APPEAL

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

W.A. No. 259/2011 (Indore) decided on 24 June, 2011

DHARMENDRA ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. Lokayukt and Uplokayukt Adhiniyam, M.P. 1981, Section 12(1)& (2) - Report - **Lokayukt or Uplokayukt can only recommend about the action to be taken - Recommendation received from the Lokayukt or Uplokayukt has to be examined by Competent Authority and then it has to take decision on it instead of treating the recommendation so received to be directory in nature for issuance of charge sheet and holding departmental enquiry.** (Para 10)

क. लोकायुक्त और उपलोकायुक्त अधिनियम, म.प्र., 1981, धारा 12 (1) व (2) – रिपोर्ट – लोकायुक्त या उपलोकायुक्त कार्यवाही करने के बारे में केवल सिफारिश कर सकता है – लोकायुक्त या उपलोकायुक्त से प्राप्त सिफारिश का सक्षम प्राधिकारी द्वारा परीक्षण किया जाना चाहिये और तब उस पर उसे निर्णय लेना चाहिये बजाय इसके कि प्राप्त सिफारिश आरोप पत्र जारी करने हेतु निदेशिका के स्वरुप की समझकर विभागीय जांच करें।

B. Service Law - Issuance of Charge Sheet on the recommendation of Lokayukt **- At no point of time, the Competent Authority examined the recommendation of Lokayukt as required under Section 12(2) of Adhiniyam, 1981 - Competent Authority did not take an independent decision on the said recommendation as to whether the charge sheet is required to be issued to the appellant for initiating disciplinary proceedings against him - Merely on the basis of letter received from Lokayukt Organization, the State Govt. mechanically issued the charge sheet - Charge sheet quashed with liberty to Competent Authority to take fresh decision after examining the report received from Lokayukt.** (Para 13)

ख. सेवा विधि – लोकायुक्त की सिफारिश पर आरोप पत्र जारी करना – सक्षम प्राधिकारी ने कमी लोकायुक्त की सिफारिश का परीक्षण नहीं किया जो कि अधिनियम 1981 की धारा 12(2) के अंतर्गत अपेक्षित है – सक्षम प्राधिकारी ने उक्त सिफारिश पर इस संबंध में स्वतंत्र निर्णय नहीं लिया कि क्या अपीलार्थी को उसके विरुद्ध अनुशासनिक कार्यवाही करने के लिए आरोप पत्र जारी करना अपेक्षित है – मात्र लोकायुक्त संगठन से प्राप्त पत्र के आधार पर राज्य सरकार ने यांत्रिक रुप से आरोप पत्र जारी किया – सक्षम प्राधिकारी को लोकायुक्त से प्राप्त रिपोर्ट का परीक्षण करने के पश्चात पुनः निर्णय करने की स्वतंत्रता के साथ आरोप पत्र अभिखंडित।

A.K. Sethi with *Anand Singh,* for the appellant.
Vivek Patwa, Dy. G.A. for the respondent.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. :–This intra Court Appeal under Section 2 (1) of the M.P. Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, is filed against the order dated 05.04.2011 passed by the learned Single Judge of this Court in Writ Petition No. 7054/09 (S).

2. Brief facts necessary for disposal of this writ appeal are that the appellant/ petitioner was appointed as Deputy Collector on 30.01.1987. He was promoted from the said post to the post of Joint Collector w.e.f. 01.01.1994. Thereafter he was further promoted as Additional Collector vide order dated 30.12.2000 and was granted selection grade vide order dated 15.12.2008 w.e.f. 08.09.2008.

3. On 21.07.2009 a charge-sheet was issued to the appellant/petitioner for the alleged misconduct committed by him during the period 1992 – 1993 and 1999. Aggrieved by belated issuance of the charge-sheet, the appellant

had filed the aforesaid Writ Petition No.7054/09 (S) praying for quashment of the charge-sheet on the ground of delay and latches.

4. The respondent filed reply to the writ petition and stated that the charge-sheet has been issued on the basis of the recommendation of the Lokayukt Organization which found the petitioner to be guilty in the enquiry conducted in respect of the complaint received against him. The respondent explained the delay by stating that in the detailed enquiry conducted by the Lokayukt about the complaint received against him much time was consumed.

5. A rejoinder was filed by the appellant/petitioner before the writ Court challenging the action of the State Government in issuance of charge-sheet, on the ground that merely on the basis of recommendation of the Lokayukt Organization the State Government could not have issued the charge-sheet mechanically without examining the recommendation. The respondent filed reply to the rejoinder and justified their action of issuance of the charge-sheet on the basis of recommendation of Lokayukt.

6. The learned Single Judge after hearing the parties and after going through the record relating to the issuance of charge-sheet dismissed the writ petition. Aggrieved, the appellant/petitioner has filed this writ appeal.

7. Shri A.K.Sethi, learned Senior Counsel for the appellant argued that after receipt of the enquiry report from the Lokayukt, the Competent Authority of the State Government ordered for issuance of charge-sheet to the appellant without examining the said report. He argued that the Lokayukt Organization can only recommend about the action to be taken on it but is not empowered to direct the Competent Authority of the State Government to issue charge-sheet as has been done in this matter. He also argued that in the impugned order the learned Single Judge though recorded a finding that after receiving the report from Lokayukt Organization the State Government with due application of mind has framed the charge sheet and has issued the same to the petitioner but in the entire record of the State Government, there is no material available on the basis of which such a finding could have been recorded by the learned Single Judge.

8. Shri Vivek Patwa, leared Deputy Govt. Advocate appearing for the respondent supported the order passed by learned Single Judge and has argued that after receiving the enquiry report from the Lokayukt Organization, the Competent Authority of the State Government had examined the

same and after due application of mind a decision was taken to issue charge-sheet to the appellant.

9. To verify the correctness of the submission made by the learned Senior counsel for the appellant to the effect that in the original record of the State Government there is no material available from which it can be said that the Competent Authority of the State Government had applied its mind on the said enquiry report and then took a decision to issue charge-sheet to the appellant, the Deputy Govt. Advocate was directed to make available the original record. The same was produced and we have perused it in the presence of the learned counsel for both the sides.

10. On going through the said record, we find that the the Lokayukt Organization vide letter dated 23.04.2008 addressed to the Principal Secretary of the General Administration Department of the State Government directed the State Government to conduct the departmental enquiry against the appellant. First of all in our considered view such direction could not have been issued by the Lokayukt Organization. The M. P. Lokayukt and Uplokayukt Adhiniyam, 1981 (for short "Adhiniyam") no where empowers the Lokayukt or Uplokayukt to give such direction. Section 12 (1) of the Adhiniyam provides that if after enquiry into the allegation, the Lokayukt or an Uplokayukt is satisfied that such allegation is established, he shall by report in writing communicate his findings and recommendations along with the relevant documents, material and other evidence to the Competent Authority. Section 12 (2) of the Adhiniyam casts a duty upon the Competent Authority of the State Government to examine the recommendation received from the Lokayukt or Uplokayukt. Thus, a conjoint reading of Sections 12 (1) and (2), makes it clear that the Lokayukt or Uplokayukt can only recommend about the action to be taken. The recommendation received from the Lokayukt or Uplokayukt, has to be examined by the Competent Authority and then it has to take decision on it instead of treating the recommendation so received to be directory in nature for issuance of charge-sheet and holding departmental enquiry.

11. In order to ascertain as to whether the Competent Authority has examined the report and has taken an independent decision to issue charge-sheet to the appellant, we have gone through the original record produced before us. On deep scrutiny of the record of the State Government, we find that after receipt of the recommendation under Section 12 (1) of the Adhiniyam from the Lokayukt Organization with letter dated 23.04.2008 following note-

sheet was recorded in the file of the Competent Authority of the State Government :-

एफ–बी /3/29/2008/2/एक

विषयः– विभागीय जॉच – (प्रस्तावित) लोकायुक्त अप0क0 24/2004 श्री धर्मेन्द्र सिंह रा0प्र0से0,तत्कालीन आयुक्त नगर पालिका निगम इन्दौर एवं श्री ओ0पी0 पगारे रा0प्र0से0 तत्कालीन तहसीलदार नजूल इंदौर

पंजी क्रमांक 1802/2008/2/एक

पुलिस महानिरीक्षक, विशेष पुलिस स्थापना लोकायुक्त कार्यालय भोपाल के पत्र दिनांक 23/04/2008 का कृपया अवलोकन हो।

2/ धार कोठी की जमीन घोटाले में श्री धर्मेन्द्र सिंह रा0प्र0से0 तत्कालीन आयुक्त नगर निगम इंदौर एवं श्री ओ0पी0 पगारे रा0प्र0से0 तत्कालीन तहसीलदार नजूल जिला इंदौर वर्तमान में उपजिलाध्यक्ष के विरूद्ध विभागीय जांच किये जाने हेतु पुलिस महानिरीक्षक विशेष पुलिस स्थापना लोकायुक्त कार्यालय भोपाल ने अपने पत्र दिनांक 23/04/2008 द्वारा प्रस्ताव एवं विशेष पुलिस स्थापना प्रतिवेदन तथा अभिलेखों की छायाप्रतियां संलग्न कर भेजा है।

3/ श्री धर्मेन्द्र सिंह रा0प्र0से0 जब वर्ष 99–2000 में आयुक्त नगर निगम इंदौर के पद पर पदस्थ थे तत्समय उनके द्वारा धार कोठी इंदौर की महत्वपूर्ण प्रश्नाधीन भूमि के संबंध में गलत अंतरण/नामांतरण हेतु नियम विरूद्ध नोटशीट/प्रस्ताव मेयर इन काउंसिल को प्रस्तुत किया जबकि प्रश्नाधीन भूमि बहुमूल्य होने से नगर पालिका निगम इस हेतु सक्षम नहीं थी, बल्कि राज्य शासन इस हेतु सक्षम था। इसके अतिरिक्त श्रीमती मृणालिनी देवी के नाम उत्तराधिकार पत्र न होने के उपरांत भी बहुमूल्य महत्वपूर्ण भूमि के अंतरण/नामांतरण का प्रस्ताव मेयर इन काउंसिल को भेजा गया। श्री सिंह द्वारा विभागीय नियमों का उल्लंघन किया गया है।

इसी प्रकार श्री ओ0पी0 पगारे तत्कालीन तहसीलदार नजूल इंदौर द्वारा प्रश्नाधीन धार कोठी इंदौर की भूमि के संबंध

तत्कालीन कलेक्टर श्री मनोज श्रीवास्तव द्वारा लीज डीड की शर्तों के उल्लंघन के कारण भूमि का कब्जा शासन हित में लेने के आदेश होने के उपरांत अपने कर्त्तव्य एवं निहित दायित्वों का पालन नहीं करते हुए कब्जा शासन हित में नहीं लिया गया जिससे महत्वपूर्ण भूमि शासन में वेष्ठित नहीं हो सकी।

4/ प्रश्नाधीन प्रकरण में आरोपीगण श्री धर्मेन्द्र सिंह रा.प्रसे. तत्कालीन आयुक्त नगर निगम इंदौर एवं श्री ओ.पी. पगारे रा.प्र.से. तत्कालीन तहसीलदार नजूल इंदौर के द्वारा विभागीय नियमों का उल्लंघन किये जाने हेतु उनके विरूद्ध

विभागीय जांच किये जाने की अनुशंसा पुलिस महानिरीक्षक विशेष पुलिस स्थापना लोकायुक्त कार्यालय भोपाल ने किया है।

5/ श्री धर्मेन्द्र सिंह रा.प्र.से. एवं श्री ओ.पी. पगारे रा.प्र.से. के विरूद्ध विभागीय जांच संस्थित किये जाने हेतु आरोप–पत्रादि का प्रारूप लोकायुक्त संगठन द्वारा नहीं भेजा गया है। अतः यदि मान्य हो तो लोकायुक्त संगठन से प्राप्त प्रतिवेदन एवं अभिलेखों की छायाप्रति तथा विशेष पुलिस स्थापना लोकायुक्त भोपाल के पत्र दिनांक 23/04/2008 की प्रति प्रमुख सचिव, मध्यप्रदेश शासन नगरीय प्रशासन एवं विकास विभाग, मंत्रालय भोपाल की ओर भेजकर आरोप–पत्रादि का प्रारूप मंगाया जावे।

अपर सचिव महोदय से समक्ष में चर्चा हुई। प्रकरण श्री धर्मेन्द्र सिंह, रा.प्र.से. के आयुक्त, नगर पालिका निगम, इन्दौर एवं श्री ओ.पी. पगारे, रा.प्र.से. के तहसीलदार नजूल इन्दौर के पद पर पदस्थापना अवधि का है।

2/ पुलिस महानिरीक्षक, विपुस्था/लोकायुक्त कार्यालय, भोपाल द्वारा विशेष पुलिस स्थापना प्रतिवेदन एवं संबंधित अभिलेखों की प्रति सीधे सा.प्र.वि. को भेज दी गई है, जबकि उक्त अभिलेख म.प्र. शासन, नगरीय प्रशासन एवं विकास विभाग के माध्यम से भेजा जाना चाहिए था।

3/ अतः यदि मान्य हो, तो श्री धर्मेन्द्र सिंह, रा.प्र.से. तत्कालीन आयुक्त, नगर पालिका निगम, इन्दौर एवं श्री ओ.पी. पगारे, रा.प्र.से. तत्कालीन तहसीलदार, नजूल इन्दौर के विरूद्ध विभागीय जांच किये जाने हेतु विशेष पुलिस स्थापना, लोकायुक्त कार्यालय, भोपाल के पत्र दिनांक 23.4.2008 द्वारा भेजा गया मूल अभिलेख म.प्र. शासन, नगरीय प्रशासन एवं विकास विभाग की ओर मूलतः भेजकर म.प्र. शासन, सा.प्र.वि. के परिपत्र दिनांक 25.11.04 के अनुसार सुस्पष्ट एवं स्वयंपूर्ण प्रस्ताव, सुसंगत अभिलेखों एवं आरोप पत्रादि के प्रारूप के साथ शीघ्र भेजने हेतु प्रमुख सचिव, म.प्र. शासन, नगरीय प्रशासन एवं विकास विभाग, मंत्रालय, भोपाल को लिखा जावे।

12. Thereafter on various dates proceedings were recorded which are in the nature of reminders and for taking necessary steps on the said recommendation and letter dated 23.04.2008. Thereafter following proceeding was recorded on 13.05.2009 and then on 16.06.2009 :-

लोकायुक्त कार्यालय से प्राप्त पत्र का कृपया अवलोकन करें।

2/ प्रकरण में लोकायुक्त कार्यालय द्वारा अपने पूर्व प्रेषित पत्र दिनांक 23.04.08 का उल्लेख करते हुए प्रकरण विषयांकित रा.प्र. सेवा संवर्ग के अधिकारियों के विरूद्ध शीघ्र विभागीय जांच में जारी आरोप पत्र की प्रति उपलब्ध कराए जाने हेतु लिखा गया है।

3/ प्रकरण में विभागीय पत्र दिनांक 24.05.08 द्वारा सामान्य प्रशासन विभाग के परिपत्र दिनांक 25.11.04 की प्रति संलग्न प्रेषित करते हुए उसमें दिए गए निर्देशानुसार सुस्पष्ट एवं स्वयंपूर्ण प्रस्ताव, सुसंगत अभिलेखों एवं आरोप पत्रादि का प्रारूप तैयार कर भेजने हेतु लिखा गया था। तत्पश्चात् विभागीय पत्र 07.08.08 एवं अ0शा0 पत्र दिनांक 17. 09.08, 15.12.08 एवं पत्र दिनांक 31.12.08 स्मरण कराए जाने के उपरान्त भी उक्त प्रस्ताव नगरीय प्रशासन विभाग की ओर से अप्राप्त है। अतः पुनः उच्च स्तर से अ0शा0 पत्र प्रेषित कर वांछित आरोप पत्रादि का प्रारूप/प्रस्ताव सुसंगत अभिलेखों सहित तत्काल प्रेषित किए जाने हेतु प्रमुख सचिव, नगरीय प्रशासन विभाग को लिखा जाना उचित होगा।

मान्य हो तो प्रारूप अनुमोदनार्थ प्रस्तुत है।

पंजी0 क0 2803/09 दिनांक 16.06.09

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नगरीय प्रशासन एवं विकास विभाग की टीप के साथ लोकायुक्त कार्यालय से प्राप्त पत्र का कृपया अवलोकन करें।

2/ प्रकरण के संबंध में लोकायुक्त कार्यालय द्वारा उनके पत्र दिनांक 25.04.09 द्वारा लिखा गया था कि विषयांकित राप्र. से. संवर्ग के अधिकारियों के विरूद्ध शीघ्र विभागीय जांच में जारी आरोप पत्रादि की प्रति उपलब्ध कराई जाए।

3/ श्री धर्मेन्द्र सिंह, रा.प्र.से. तत्कालीन आयुक्त, नगर निगम इंदौर के द्वारा धार कोठी की जमीन घोटाले के संबंध में लोकायुक्त कार्यालय द्वारा की गई जांच में उन्हें धार कोठी, इंदौर की महत्वपूर्ण प्रश्नाधीन भूमि के संबध में गलत अंतरण/नामांतरण हेतु नियम विरूद्ध नोटशीट/प्रस्ताव मेयर इन काउंसिल को प्रस्तुत किया, जबकि प्रश्नाधीन भूमि बहुमूल्य होने से नगर पालिका नियम इस सक्षम नहीं थी, बल्कि राज्य शासन इस हेतु सक्षम था। प्रकरण में श्रीमती मृणाली देवी के नाम उत्तराधिकार पत्र न होने के उपरान्त भी बहुमूल्य महत्वपूर्ण भूमि के अंतरण/नामांतरण का प्रस्ताव मेयर इन काउंसिल को भेजा गया।

4/ श्री ओ.पी. पगारे, तत्कालीन तहसीलदार, नजूल, इंदौर वर्तमान में रा.प्र. से. के संबंध में धार कोठी की जमीन घोटाले के संबंध में लोकायुक्त कार्यालय द्वारा की गई जांच में उन्हें प्रश्नाधीन धार कोठी, इंदौर की भूमि के संबंध में तत्का0 कलेक्टर द्वारा लीज डीड की शर्तों के उल्लंघन के कारण भूमि का कब्जा शासन हित में लेने के आदेश होने के उपरान्त अपने कर्तव्य एवं निहित दायित्वों का पालन नहीं करते हुए कब्जा शासन हित में नहीं लिया गया,

जिससे महत्वूपर्ण भूमि शासन में वेष्ठित नहीं हो सकी। इस प्रकार श्री ओ.पी. पगारे, रा.प्र.से. तत्का0 तहसीलदार, नजूल इंदौर द्वारा विभागीय नियमों का उल्लंघन किया गया।

5/ लोकायुक्त कार्यालय द्वारा उनके पत्र दिनांक 23.04.08 द्वारा श्री धर्मेन्द्र सिंह एवं श्री ओ.पी. पगारे, तत्का0 आयुक्त, नगर पालिक निगम, इंदौर तथा तत्का0 तहसीलदार, इंदौर द्वारा उनकी पदस्थापना अवधि के दौरान की गई अनियमितताओं के लिए दोषी पाया गया एवं उनके विरूद्ध विभागीय जांच संस्थित की जाकर अंतिम निर्णय से अवगत कराने हेतु लिखा गया।

6/ लोकायुक्त कार्यालय द्वारा प्रेषित प्रतिवेदन के आधार पर विषयांकित अधिकारियों के विरूद्ध विभागीय पत्र दिनांक 24.05.08 द्वारा लोकायुक्त कार्यालय के पत्र दिनांक 23.04.08 की प्रति एवं विशेष पुलिस स्थापना का जांच प्रतिवेदन मूलतः तथा अभिलेखों की सत्यापित प्रतियॉ नगरीय प्रशासन विभाग को प्रेषित कर सा.प्र.वि. के परिपत्र दिनांक 25.11.04 में दिए गए निर्देशानुसार सुस्पष्ट एवं स्वयंपूर्ण प्रस्ताव सुसंगत अभिलेखों एवं आरोप पत्रादि का प्रारूप तैयार कर प्रेषित करने हेतु लिखा गया था।

7/ नगरीय प्रशासन एवं विकास विभाग द्वारा प्रकरण के संबंध में विभागीय पत्र दिनांक 15.05.09 के द्वारा श्री धर्मेन्द्र सिंह एवं श्री ओ.पी. पगारे, रा.प्र.से. के संबंध में वांछित आरोप पत्रादि का प्रारूप अभिलेखों की सत्यापित प्रतियॉ तथा सीडी आयुक्त नगर पालिक निगम, इंदौर से प्राप्त कर नगरीय प्रशासन विभाग की नस्ती सहित मूलतः प्रेषित किया गया है।

8/ श्री धर्मेन्द्र सिंह, रा.प्र.से. तत्कालीन आयुक्त, नगर पालिक निगम, इंदौर एवं श्री ओ.पी. पगारे रा.प्र.से. तत्कालीन तहसीलदार, नजूल, इंदौर के संबंध लोकायुक्त कार्यालय की अनुशंसानुसार नगरीय प्रशासन एवं विकास विभाग द्वारा उपलब्ध कराए गए आरोप पत्रादि के प्रारूप के आधार पर आरोप पत्रादि का प्रारूप तैयार किया गया है, जो पताका "स" "द" पर प्रस्तुत है।

9/ अतः श्री धर्मेन्द्र सिंह, तत्का0 आयुक्त, नगर पालिक निगम, इंदौर एवं श्री ओ.पी. पगारे, तत्का0 तहसीलदार, नजूल, इंदौर के विरूद्ध लोकायुक्त की अनुशंसानुसार मध्यप्रदेश सिविल सेवा ;वर्गीकरण, नियंत्रण तथा अपीलद्ध नियम–1966 के नियम 14 के अन्तर्गत विभागीय जांच संस्थित किए जाने हेतु आरोप पत्र जारी किए जाए अथवा नगरीय प्रशासन विकास विभाग द्वारा उपलब्ध कराए आरोपत्र पत्र प्रारूप के आधार पर श्री सिंह एवं श्री पगारे का स्पष्टीकरण प्राप्त किया जाए?

तत्संबंध में निर्णय लिए जाने हेतु प्रकरण निर्णयार्थ प्रस्तुत है।

13. Having regard to the aforesaid proceedings and the entire record, it is

very clear that at no point of time the Competent Authority of the State Government had examined the recommendation as required under Section 12 (2) of the Adhiniyam. The competent Authority also at no point of time taken an independent decision on the said recommendation of the Lokayukt Organization as to whether the charge-sheet is required to be issued to the appellant for initiating disciplinary proceedings against him. On the other hand, it is clear that after recording various proceedings, without due application of mind on the recommendations merely on the basis of the said letter dated 23.04.2008 received from the office of the Lokayukt the State Government has mechanically issued the charge-sheet treating the said letter dated 23.04.2008 received from the Lokayukt organisation to be directory, which in our considered view is contrary to the spirit of Section 12 (2) of the Adhiniyam.

14. In view of the aforesaid and on the basis of close scrutiny of the record, we find that the learned Single Judge has committed an error in holding that after receiving the report from the Lokayukt Organization the State Government has issued the charge-sheet after due application of mind. We find that in none of the proceeding of the entire record there is any material to hold that the Competent Authority of the State Government had ever examined the report and applied its mind to it as to whether on that basis a charge-sheet needs to be issued to the appellant. On the other hand, we find that merely on the basis of the said letter dated 23.04.2008 issued by the Lokayukt Organization, the charge-sheet was prepared by the State Government and was issued to the appellant/petitioner.

15. In the aforesaid circumstances the order passed by the learned Single Judge being contrary to the material on record cannot be sustained. As a result, we allow this writ appeal and set aside the order passed by the learned Single Judge. However, we grant liberty to the Competent Authority of the State Government to take a fresh decision after examining the said report received from Lokayukt keeping in view the provision contained in Section 12 (2) of the Adhiniyam. The Competent Authority of the State Government while examining and taking decision on the said report, shall be free to take decision in accordance with law, and any observations made and findings recorded by the learned Single Judge while dismissing the writ petition, shall not come in the way of the competent authority of the State Government while taking the appropriate decision in the matter.

16. With the aforesaid observations/directions, the writ appeal stands allowed to the extent indicated above. No orders as to the costs.

Appeal allowed.

I.L.R. [2011] M. P., 2690
WRIT APPEAL
Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe
W.A. No. 1727/2007 (Jabalpur) decided on 28 July, 2011

D.K. KURARIA ...Appellant
Vs.
M.P. RAJYA MATSYA VIKAS NIGAM & anr. ...Respondents

Service Law - Promotion **- Appellant on basis of recommendation of the Departmental Promotion Committee, was promoted on ad hoc basis on the post of Executive Engineer - Later on, he was reverted on the basis that the post of Executive Engineer was required to be filled in by a candidate belonging to the reserved category - Held - The only sanctioned post of Executive Engineer in the set up can not be earmarked for reserved category candidate as the same would amount to 100% reservation, which is violative of Article 16(4) of the Constitution -Writ Appeal allowed.** (Paras 3 & 8)

सेवा विधि – पदोन्नति – विभागीय पदोन्नति समिति की सिफारिश के आधार पर अपीलार्थी को तदर्थ रुप से कार्यपालन यंत्री के पद पर पदोन्नत किया गया – बाद में, उसे इस आधार पर पदावनत किया गया कि कार्यपालन यंत्री का पद आरक्षित श्रेणी के अभ्यर्थी द्वारा भरा जाना अपेक्षित था – अभिनिर्धारित – स्थापना में कार्यपालन यंत्री के एकमात्र स्वीकृत पद को आरक्षित श्रेणी के अभ्यर्थी हेतु चुना नहीं जा सकता क्योंकि यह 100 प्रतिशत आरक्षण की कोटि में आयेगा जो कि संविधान के अनुच्छेद 16(4) का अतिलंघन है – रिट अपील मंजूर।

Cases referred :

(1988) 2 SCC 214, (1998) 4 SCC 1, 1999 AIR SCW 4602.

Rajendra Tiwari with *H.K. Upadhyaya,* for the appellant.

Mrigendra Singh, for the respondents.

ORDER

The Order of the Court was delivered by **S.R. ALAM, C. J. :–** In this intra-Court appeal, the appellant has challenged the validity of the dated 4.10.2007 passed by learned Single Judge by which

writ petition preferred by the appellant has been dismissed. In order to appreciate the appellant's challenge to the impugned order, relevant facts need mention which are stated herein under.

2. The appellant was initially appointed as Assistant Engineer by direct recruitment vide order dated 2.6.1982 in the services of respondent No.1 namely Madhya Pradesh Rajya Matsya Vikas Nigam. The service conditions of the appellant are governed by Madhya Pradesh Rajya Matsya Vikas Nigam Prabandhkiya Sewa Bharti Niyam, 1993 (hereinafter referred to as the Rules, 1993) which have been framed by the respondent No.1 Corporation with prior approval of the State Government in exercise of powers under Section 40 of the Madhya Pradesh Matsya Vikas Adhiniyam, 1979. Rule 14 of the Rules lays down the condition of eligibility for promotion. From perusal of Schedule 1 appended to the Rule it is evident that one post of Executive Engineer and two posts of Assistant Engineer is sanctioned in the set up of respondent No.1. Schedule 2 of the Rules provides that the post of Executive Engineer shall be filled in by promotion or by deputation. Schedule 4 provides that an Assistant Engineer should have worked on the post of Assistant Engineer for a period of five years in order to be eligible for consideration for promotion to the post of Executive Engineer.

3. After rendering 14 years of service, the appellant on the basis of recommendation of the Departmental Promotion Committee, was promoted on ad-hoc basis on the post of Executive Engineer vide order dated 31.12.1996. However, the appellant was reverted to the post of Assistant Engineer vide order dated 6.7.1998 with immediate effect. The appellant challenged the validity of the aforesaid order in the writ petition before the learned Single Judge. The learned Single Judge by an interim order dated 20.7.1998 stayed the operation of the order of reversion of the appellant. Thereafter, while deciding the petition by an order dated 4.10.2007, the learned Single Judge inter-alia held that appellant was promoted to the post of Executive Engineer on ad-hoc basis. He therefore does not have any right to hold the post and, therefore, no opportunity of hearing was required to be afforded to him before passing the order of reversion. It was further held that the post of Executive Engineer was required to be filled in by a candidate belonging to the reserved category. Accordingly, the writ petition preferred by the appellant was dismissed.

4. Shri Rajendra Tiwari, learned senior counsel for the appellant submitted

that the appellant was promoted in accordance with the Rules. Since, there is only one sanctioned post of Executive Engineer in the set up respondent No. 1, therefore, the same could neither have been reserved for candidates belonging to reserved category nor any roster for promotion could have been applied. It is further submitted that the action of respondents in reverting the appellant from the post of Executive Engineer to that of Assistant Engineer is patently arbitrary. In support of his submissions, learned senior counsel for the appellant has placed reliance on decisions of Supreme Court in *Dr. Chakradhar Paswan v. State of Bihar and others,* (1988)2 SCC 214, *Post Graduate Institute of Medical Education & Research, Chandigarh v. Faculty Association and others,* (1998) 4 SCC and *S.R. Murthy v. State of Karnataka and others,* 1999 AIR SCW 4602.

5. On the other hand, Shri Mrigendra Singh, learned counsel for the respondents has submitted that the appellant was promoted to the post of Executive Engineer on ad-hoc basis on 31.12.1996. The appellant did not challenge his promotion on ad-hoc basis and joined the post of Executive Engineer. In the year 1998, a decision was taken to wind up the Corporation and, therefore, the ad-hoc promotion of the appellant was cancelled. It was further submitted that since the post of Executive Engineer as per the roster was meant to be filled in by reserved category candidate, therefore, the appellant was reverted to the post of Assistant Engineer.

6. We have considered the submissions made by learned counsel for the parties. Admittedly, by virtue of interim order passed by this Court, the appellant has continued on the post of Executive Engineer and has superannuated during the pendency of the appeal in the month of June, 2011. It is also not in dispute before us the pursuant to the recommendations made by the Departmental Promotion Committee, the appellant was promoted on the post of Executive Engineer on ad-hoc basis vide order dated 31.12.1996. In the order dated 6.7.1998, on reasons have been assigned for reverting the appellant to the post of Assistant Engineer. However, in the return, the respondents have asserted that as per the roster prescribed for promotion, the post of Executive Engineer was required to be filled in by a candidate belonging to the reserved category. It is also not in dispute before us that there is only one sanctioned post of Executive Engineer in the set up of respondent No.1.

7. In *Dr. Chakradhar Paswan,* supra, the Supreme Court has held that if

there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up a future vacancy in respect of the post. No reservation can be made under Article 16(4) of the Constitution of India so as to create a monopoly otherwise it would render the guarantee of equal opportunity contained in Article 16(1) and (2) wholly meaningless and illusory. Similar view has been reiterated by the Supreme Court in Post Graduate Institute of Medical Education & Research. Chandigarh and *S.R. Murthy*, supra.

8. Admittedly, there is only sanctioned post of Executive Engineer in the set up of responsent No.1. Therefore, in view of aforesaid enunciation of law by the Supreme Court, the post of Executive Engineer cannot be earmarked for reserved category candidate as the same would amount to 100% reservation, which is violative of Article 16(4) of the Constitution of India. Thus, the explanation offered by responndents that the appellant was reverted to the post of Assistant Engineer as the post of Executive Engineer was meant to be filled up from candidate belonging to reserved category is not worthy of acceptance. Besides that, respondent No.1 Corporation is still in existence, therefore, the reason assigned by the respondents in the return that the services of the appellant were reverted on account of winding up of the respondent No.1 Corporation also cannot be accepted.

9. For the aforementioned reasons, in our considered opinion, the order of reversion dated 6.7.1998 cannot be sustained in the eye of law. Accordingly, the order of reversion dated 6.7.1998 as well as the order passed by the learned Single Judge in W.P. No. 2895/98 dated 4.10.2007 are hereby quashed.

10. In the result, the writ appeal is allowed. However, there shall be no order as to cost.

Appeal allowed.

I.L.R. [2011] M. P., 2694

WRIT APPEAL

Before Mr. Sushil Harkauli, Acting Chief Justice &
Mr. Justice K.K. Trivedi

W.A. No. 975/2010 (Jabalpur) decided on 29 August, 2011

MOULANA AZAD NATIONAL INSTITUTE OF TECH NOLOGY ...Appellant

Vs.

AJIT NARAYAN & ors. ...Respondents

A. Service Law - Compulsory Retirement - **Committee constituted to scrutinise the case of respondent/petitioner relied on a report of enquiry conducted behind the back of respondent/petitioner - No opportunity of hearing whatsoever was given to the respondent/ petitioner in that enquiry and a report was given with respect to certain conducts of the respondent/petitioner - Order of compulsory retirement can not be sustained.** (Para 7)

क. सेवा विधि – अनिवार्य सेवानिवृत्ति – प्रत्यर्थी/याची के मामले की संविक्षा करने के लिये गठित की गयी समिति ने प्रत्यर्थी/याची की पीठ पीछे की गयी जांच के प्रतिवेदन पर विश्वास किया – उस जांच में प्रत्यर्थी/याची को सुनवाई का कोई अवसर नहीं दिया गया था और प्रत्यर्थी/याची के कतिपय आचरण के संबंध में प्रतिवेदन दिया गया था – अनिवार्य सेवानिवृत्ति का आदेश कायम नहीं रखा जा सकता।

B. Service Law - Writ Petition - Non impleadment of necessary party -Effect - **Respondent being aware of the fact that the respondent No.4 was already selected and appointed on the same post, did not consider it necessary to implead the selected candidate as a respondent in the writ petition - Held - Without the impleadment of the said person as a party, no effective relief could have been granted to the respondent No.1 - Appeal partly allowed.** (Para 11)

क. सेवा विधि – रिट याचिका – आवश्यक पक्षकार को पक्षकार नहीं बनाया जाना – प्रभाव – प्रत्यर्थी को इस तथ्य की जानकारी होते हुये कि प्रत्यर्थी क्र. 4 का पहले ही चयन हो गया था और उसी पद पर नियुक्त किया गया था, रिट याचिका में प्रत्यर्थी के रुप में चयनित अभ्यर्थी को पक्षकार बनाना आवश्यक नहीं समझा – अभिनिर्धारित – उक्त व्यक्ति को पक्षकार बनाये बिना प्रत्यर्थी क्र. 1 को प्रभावकारी अनुतोष प्रदान नहीं किया जा सकता था – अपील अंशतः मंजूर।

Cases referred :

(2001) 3 SCC 314, 2011(6) SCC 570.

R.N. Singh with *A.J. Pawar,* for the appellant.

Respondent No. 1 in person.

Brian Da. Silva with *V. Bhide,* for the respondent No.2.

None, for the respondent No.3.

Shobha Menon with *Rahul Choubey,* for the respondent No.4.

ORDER

The Order of the Court was delivered by **K.K. TRIVEDI, J. :**–The aforesaid two writ appeals have been filed against the order dated 27.8.2010 passed in Writ Petition No.97/2008(S) filed by the respondent No.1, decided by learned single Judge of this Court. Therefore, both the writ appeals are heard and are being disposed of by this order.

2. The facts as mentioned in Writ Appeal No.1013/2010 are taken for consideration.

3. The respondent No.1 who was appointed as Registrar in the respondent No.2 Institute on 22.10.1990, was said to be compulsory retired by an order dated 28.9.2007, approached this Court by filing Writ Petition No.97/08(S) contending inter alia that he could not have been compulsory retired in exercise of power under Fundamental Rule 56(j) as the entire consideration of his case was done in complete violation of the settled norms. The learned single Judge entertained the writ petition, issued the notices, response were filed by the respondents and after hearing at length, passed the impugned order, set aside and quashed the order of compulsory retirement with a direction to reinstate the petitioner/respondent No.1 in service with all the consequential benefits.

4. The contentions commonly raised by learned senior counsels for the appellant are that the learned single Judge has committed an error in not considering the fact that the entire service record of the respondent No.1 was considered and taking note of other fact that the respondent No.1 was treated to be a deadwood, was rightly compulsory retired. It is also contended by the learned senior counsel for the appellant that the initial appointment of the appellant was not in accordance to the Rules and since he could not have been initially appointed as Registrar if an order was passed compulsory retiring him, no error was committed by the employer.

5. The other ground raised by learned senior counsel is that after compul-

sory retiring the respondent No.1, the proper procedure as per the Rules in vogue at present was initiated and a candidate was selected and appointed on the post of Registrar of the Institution. This fact was brought to the notice of the Court and even the respondent No.1 has made an application for grant of interim relief. Despite knowledge of such a fact, the respondent No.1 did not implead the newly recruited Registrar of the Institution as a party in the writ petition and, therefore, no effective relief could have been granted to the respondent No.1 by the learned single Judge even if the writ petition of the respondent No.1 was to be allowed. Thus, it is contended that in fact the writ petition was liable to be dismissed.

6. We have heard the learned counsel for the parties at length and have examined the laws placed for our consideration.

7. The findings reached by the learned single Judge with respect to consideration of the case of the respondent No.1 for his compulsory retirement are scrutinised in view of various laws laid down by the Apex Court. On careful consideration, it has rightly been found by the learned single Judge that the committee constituted to scrutinise the case of respondent No.1/petitioner has relied on a report of enquiry conducted under the orders of the State Government, behind the back of respondent No.1/petitioner. No opportunity of hearing whatsoever was given to the respondent No.1/petitioner in that enquiry and a report was given with respect to certain conducts of the respondent No.1/petitioner. According to us, such a finding reached by the learned single Judge is just and proper. This particular aspect can be examined in view of the law laid down by the Apex Court in the case of *State of Gujrat Vs. Umed Bhai M. Patel* [(2001) 3 SCC 314], where their Lordships have held that the previous misconduct for which punishment has been awarded, cannot be taken into consideration for holding an employee fit for compulsory retirement. In the present case, even the respondent No.1/petitioner was not only denied any opportunity of hearing in the so called enquiry, but the same was not directly conducted by an employer for a service misconduct of its employee. In our considered opinion, there was no occasion for the screening committee to take into consideration a report of such an enquiry conducted ex parte. Such a finding of learned single Judge has not been nor could be assailed by the appellant. We do not find any error in such consideration by the learned single Judge, therefore, such findings of the learned single Judge are not liable to be disturbed. We, therefore, affirm the findings recorded by learned single Judge with respect to the order of compulsory retirement, the

procedure adopted by the appellant and a declaration to the effect that such a course was not rightly adopted by the appellants and, therefore, the order of compulsory retirement of the respondent No.1 is not to be sustained.

8. The other ground raised by the appellant, more particularly about impleadment of a necessary party, the respondent No.4 in W.A.No.975/2010, who was subsequently selected and appointed as Registrar in the Institution, as is indicated in Writ Appeal No.975/2010 and bringing this fact to the notice of the Court as well as the respondent No.1 herein and not taking any action by the respondent No.1/petitioner in that respect, it is urged that no effective order granting a relief to the respondent No.1/petitioner could have been passed by the learned single Judge. Our attention is drawn to the law laid down by the Apex Court in the case of *J.S. Yadav Vs. State of U.P.* [2011 (6) SCC 570], wherein dealing in some what similar circumstances, the Apex Court has held in paragraph 31 of the report as under :-

> "31. No order can be passed behind the back of a person adversely affecting him and such an order if passed, is liable to be ignored being not binding on such a party as the same has been passed in violation of the principles of natural justice. The principles enshrined in the proviso to Order 1 Rule 9 of the Code of Civil Procedure, 1908 provide that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the petitioner-plaintiff may not be entitled for the relief sought by him. The litigant has to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise the proceedings will have to fail. In service jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person are terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the petitioner-plaintiff succeeds, it may not be possible for the Court to issue direction to accommodate the petitioner without removing the person who filled up the post manned by the petitioner-plaintiff. (Vide *Prabodh Verma V. State of U.P., Ishwar Singh V. Kuldip Singh, Tridip Kumar Dingal V. State of W.B., State of Assam V. Union of India and Public Service Commission V. Mamta Bisht.*) More so, the public exchequer cannot be burdened with the liability to pay the salary of two persons against one sanctioned post."

It is thus, contended that learned single Judge though was of the view that the petition filed by the respondent No.1 was liable to be allowed, no effective relief of reinstatement in service could have been granted to the respondent No.1 in view of the fact that deliberately and knowingly, the respondent No.1 has not impleaded the necessary party in the writ petition.

10. Facing with such a situation when asked, the respondent No.1 has submitted that he moved an application in the writ petition pointing out the fact that the advertisement for recruitment on the post of Registrar of the appellant Institution has been issued after compulsory retirement of the respondent No.1 and a prayer for grant of interim relief was made. It is contended by the respondent No.1 that since an order was passed by the learned single Judge in the pending writ petition on 21.10.2009, where an observation was made by the learned single Judge to the effect that "the writ petition was against the order dated 28.9.2007, whereby the writ petitioner has been retired compulsory and in case the petition succeeds, the writ petitioner will be entitled to all the consequential benefits," he did not consider it necessary to implead the selected candidate as a respondent in the writ petition.

11. In our considered opinion, such an action on the part of the respondent No.1 was not justified. He was aware of the fact that the respondent No.4 in the Writ Appeal No.975/2010 was already selected and appointed on the post of Registrar of the appellant Institution and, therefore, she had become a necessary party in the writ petition. Without the impleadment of the said person as a party, in view of the law laid down by the Apex Court in the case of *J.S. Yadav* (supra), no effective relief could have been granted to the respondent No.1. To this extent writ appeals deserve to be and are partly allowed.

12. For the aforementioned reasons while affirming the order of the learned single Judge passed in Writ Petition No.97/2008(S) with respect to quashment of the order dated 28.9.2007 (Annx. P/31 to the writ petition) to the extent that the said order of compulsory retirement could not have been passed against the respondent No.1 compulsory retiring him from the post. However, since the respondent No.1 has not impleaded the necessary party, the one who is going to be affected by granting other consequential benefits to the respondent No.1, rest of the part of the order of the learned single Judge, directing reinstatement of the respondent No.1/petitioner on the post held by him at the

time of compulsory retirement and granting him all the consequential benefits and salary and other monetary benefits in accordance to his entitlement, after deducting the post retiral benefits already granted to him after his compulsory retirement, is hereby set aside. This is done because the aforesaid part of the order of the learned single Judge will in fact adversely affect the new recruit the respondent No.4 in Writ Appeal No.975/2010 without her impleadment as a party in the writ petition.

13. In the result, the writ appeals are partly allowed to the extent indicated hereinabove, without any order as to costs.

Appeal partly allowed.

I.L.R. [2011] M. P., 2699

WRIT APPEAL

Before Mr. Sushil Harkauli, Acting Chief Justice &
Mr. Justice K.K. Trivedi

W.A. No. 963/2011 (Jabalpur) decided on 16 September, 2011

MOHD. IMRAN SIDDIQUE ...Appellant

Vs.

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

A. Constitution, Article 226 - Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) -Writ Appeal - Maintainability of **- Order passed or direction issued in a review petition which was not contained in the order under review - Would amount to a fresh writ order or direction under Article 226 and would therefore be amenable to a writ appeal.** (Para 1)

क. संविधान, अनुच्छेद 226 – उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) – रिट अपील – की पोषणीयता – पुनर्विलोकन याचिका में जारी निर्देश या पारित आदेश जो पुनर्विलोकनार्थ आदेश में अंतर्विष्ट नहीं था – अनुच्छेद 226 के अंतर्गत नया रिट आदेश या निर्देश की कोटि में आयेगा और इसलिए रिट अपील के अध्याधीन होगा।

B. Constitution, Article 226 - Observation made in Review Petition -When may be modified **- Order/Observation may result in person junior to the appellant being asked to officiate against the higher posts and the present appellant will stand excluded because of the said observation - Order may be modified.**

The aforesaid order of the learned Single Judge is modified to the extent that the appellant will not be denied the benefit of officiation, if any person junior to him is required to officiate, and if the appellant is not otherwise disqualified or found unfit to so officiate. (Paras 5 & 6)

ख. संविधान, अनुच्छेद 226 – पुनर्विलोकन याचिका में किये गये संप्रेक्षण – उपांतरण कब किया जा सकता है – आदेश/संप्रेक्षण से अपीलार्थी से कनिष्ठ व्यक्ति को उच्च पदों पर स्थानापन्न होने के लिये कहा जाने का परिणाम हो सकता है और उक्त संप्रेक्षण के कारण अपीलार्थी अपवर्जित हो जायेगा – आदेश में उपांतरण किया जा सकता है।

ORDER

The Order of the Court was delivered by **SUSHIL HARKAULI, AG.C.J.** :–We have heard the learned counsel for the appellant and the learned counsel for the respondent No. 4.

There is a preliminary objection about maintainability of a writ appeal against an order passed in a review petition. It is not necessary to go into the question about such maintainability generally. It is not disputed that a writ appeal was maintainable against the original order passed in the writ petition under Article 226 of the Constitution of India. Therefore, suffice it to say that if in review an order is passed or direction is issued, which direction was not contained in the order under review, it would amount to a fresh writ order or direction under Article 226 of the Constitution of India, and would therefore be amenable to a writ appeal.

2. By the impugned order dated 6-9-2011 passed in the Review Petition No.392/2011 the learned Single Judge has directed that the writ petitioner, who is respondent No.4 before us shall continue on the present post till his posting order is modified within 10 days and he is posted to a cadre post. This order does not appear to have been challenged by the said writ petitioner.

3. So far as the present appellant is concerned, he was respondent No.4 in the writ petition. The writ petition was dismissed by the original final order. However, in the review petition the impugned order has been passed by the learned Single Judge observing that his posting shall be reconsidered and it shall be ensured that he is posted against a post as per the substantive post held by him and he shall not be allowed any undue benefit of posting in any higher post beyond his entitlement.

4. The appellant is aggrieved against this observation of the learned Single Judge.

5. It has been argued before us that the said higher post was filled-up by posting of this appellant on officiating basis, because these higher posts were lying vacant and employees of that level were not available to man these higher posts. It has been argued that the persons of lower substantive post were, therefore, appointed to officiate on the higher posts. The present appellant, who belongs to senior scale of the lower substantive post, was also asked to officiate. It has been argued before us that if the impugned observation of the learned Single Judge stands, it may result in person junior to the appellant being asked to officiate against the higher posts and the present appellant will stand excluded because of the said observation. The argument seems to have force.

6. Accordingly, we modify the aforesaid order of the learned Single Judge to the extent that the appellant will not be denied the benefit of officiation, if any person junior to him is required to officiate, and if the appellant is not otherwise disqualified or found unfit to so officiate.

Appeal disposed off accordingly.

C.c. as per rules.

Appeal disposed of.

I.L.R. [2011] M. P., 2701
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 3744/2003 (Jabalpur) decided on 28 April, 2011

SAYEED AHMAD ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Cooperative Societies Act, M.P. 1960 (17 of 1961), Sections 3 & 66* - Where the State Government has specified any officer to assist the Registrar in exercise of the powers u/s 3, the Registrar in such case need not have to further exercise his powers u/s 66(1) of the Act except to transfer the dispute to the officer specified.** (Para 9)

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराएँ 3 व 66 – जहां राज्य सरकार ने धारा 3 के अंतर्गत शक्तियों का प्रयोग करते हुए रजिस्ट्रार की सहायता के लिए किसी अधिकारी को विनिर्दिष्टित किया है, ऐसे मामले में विवाद विनिर्दिष्ट अधिकारी को अंतरित करने के अलावा रजिस्ट्रार को अधिनियम की धारा 66(1) के अंतर्गत अपनी शक्तियों का और आगे प्रयोग करने की आवश्यकता नहीं।

Ashish Rawat, for the petitioner.
Ashsih Shroti, G.A. for the respondents No. 1, 2, 3 & 5.
Nalini Gurung, for the respondents No. 4.

ORDER

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

2. Order in this petition shall also govern disposal of W.P. No. 5008/2002.

3. Common cause of both the writ petitions is an order dated 28.3.2002 passed by the Deputy Registrar, Cooperative Societies Shahdol; whereby, the dispute of the nature under Section 64, Madhya Pradesh Cooperative Societies Act, 1960 (for short the Act of 1960) arising between the practitioners and Madhya Pradesh Rajya Laghu Vanopaj Sahkari Sangh Maryadit has been referred to the Divisional Forest Officer, North Forest Division Shahdol on the anvil of the notification issued by Government Madhya Pradesh Co-operative Department bearing No. F-5-12/2005/15-1, Bhopal dated 16.1.2002, whereby, the powers of the Registrar, Co-operative Societies have been delegated in favour of the Divisional Forest Officer.

4. The Dispute arises form the agreement regarding purchase of Tendu leaves from the Sangh.

5. The petitioner claims that the powers conferred upon Registrar Co-operative Societies, under Section 66 of the Act of 1960 can only be delegated by him and not by the State Government. It is the contention of the petitioner that the State Government has incursed within the powers of the Registrar. There is no merit in the contention of the petitioner.

6. Circular dated 16.1.2002 which is the centre of controversy stipulates.

> विषय :–मध्य प्रदेश सहकारी सोसायटी अधिनियम 1960 के अन्तर्गत प्राथमिक लघु वनोपज समितियॉं/जिला वनोपज यूनियनों के सेवा संबंधी विवादों तथा व्यवसायिक विवादों की सुनवाई।
> राज्य शासन द्वारा यह निर्णय निया गया है कि मध्य प्रदेश सहकारी सोसायटी अधिनियम 1060 के अंतर्गत लधु वनोपज समितियों/जिला सहकारी लधु वनोपज संघों के कर्मचारियों के सेवा संबंधी विवादों तथा व्यवसायिक विवादों की सुनवाई के अधिकार वन विभाग के जिला अधिकारी (वन मंडल अधिकारी) जो उक्त संस्थाओं से किसी तरह संबद्ध न हो;को प्रदान किये जाये।

अतः राज्य शासन एतद द्वारा यह निर्देश देता है कि लघु वनोपज सहकारी समितियों, जिला लघुवनोपज संधों के सेवा संबंधी विवादो तथा व्यवसायिक विवादों की सुनवाई सहकारिता विभाग के अधिकारियों द्वारा न की जावे । इस प्रकार के प्रकरण प्राप्त होने पर उन्हें मध्यप्रदेश सहकारी सोसायटी अधिनियम 1960 की धारा –64 के तहत उप/सहायक पंजीयक द्वारा पंजीकृत किया जाये तथा तत्पश्चात् उन्हें अधिनियम की धारा–66 (1) के तहत जिले के उस वनमंडलाधिकारी को हस्तांतरित कर दिया जाये जो कि उक्त संस्थाओं से किसी तरह संबद्ध न हो । यह अधिकारी इन प्रकरणों की विधिवत आगे सुनवाई कर प्रकरण का विनिश्चय करेंगे । "

Section 3 of the Act of 1960 provides for

"**3. Registrar and other officers.**-(1) The State Government shall appoint a person to be the Registrar of Co-operative Societies for the State and may appoint one or more officers of the following categories to assist him, namely:

(a) Additional Registrar of Co-operative Societies;

(b) Joint Registrar of Co-operative Societies;

(c) Deputy Registrar of Co-operative Societies;

(e) Such other categories of officers as may be prescribed.

(2)The officers appointed to assist the Registrar shall, within such areas as the State Government may specify, exercise such powers and perform such duties conferred and imposed on the Registrar by or under this Act as the State Government may, by special or general order, direct:

Provided that no officer other than the Additional Registrar or the Joint Registrar shall be directed to exercise the powers to hear appeals under Section 78.

(3) The officers appointed to assist the Registrar shall be subordinate to him and shall work under his general guidance, supervision and control."

The expression 'officer' as it appears in the difinition clause in 1960 Act in the following terms:

"2(t-i) "Officer" means a person elected or appointed by a society according to its bye-laws to any office of such society and includes

a Chairman, Vice-Chairman, President, Vice-President, Managing Director, Manager, Secretary, Treasurer, Member of the Committee and any other person elected or appointed under this Act, the Rules or the bye-laws to give directions in regard to the business of such society;

8. It is thus within the powers of the State Government under Section 3 to appoint such other categories of officers to assist the Registrar. The officers so appointed shall be sub-ordinate to Registrar and shall work under his general guidance, supervision and control.

Section 66 of the Act 1960 provides for

"66. Settlement of dispute.-(1) The Registrar may, on receipt of the reference of dispute under section 64 decide the dispute himself, or transfer it for disposal to a nominee or board of nominees to be appointed by the Registrar.

(2) When a dispute is transferred under sub-section (1) for disposal by no a nominee or board of nominees, the Registrar may at any time, for reasons to be recorded in writing, withdraw such dispute from such nominee or board of nominees and may decide the dispute himself or transfer it again to any other nominee or board of nominees appointed by him for decision.

(3) The decision of a nominee or a board of nominees to whom any dispute is transferred for decision under this section shall, for the purposes of this Act, be deemed to be the decision of the Registrar."

9. When sections 3 and 66 are harmoniously read together, then in case where the State Government has specified any officer to assist the Registrar in exercise of the powers under Section 3, the Registrar in such case need not have to further exercise his powers under Section 66 (1) of the Act of 1960 except to transfer the dispute to the officer specified.

10. In the case at hand Deputy Registrar was within his right to have transferred the dispute for adjudication to Divisional Forest Officer as per notification dated 16.1.2002.

11. In the result petition fails and is hereby dismissed. However, there shall be no costs.

Petition dismissed

I.L.R. [2011] M. P., 2705

WRIT PETITION

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

W.P. No. 1247/2007(S) (Indore) decided on 1 July, 2011

MANAGING DIRECTOR, M.P. STATE ROAD TRANSPORT CORPORATION BHOPAL & anr. ...Petitioners

Vs.

PRANTIYA RAJYA PARIVAHAN KARMACHARI SANGH (CONGRESS), GWALIOR & anr. ...Respondents

A. ***Industrial Disputes Act (14 of 1947), Section 10 - Reference of Disputes*** **- Order of reference not challenged by petitioner but also participated in the proceedings - Objection with regard to absence of competence never challenged in the reply - Not open to the petitioner to challenge the award on this ground.** (Para 10)

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – विवादों को निर्देशित किया जाना – याची द्वारा निर्देश के आदेश को चुनौती नहीं दी गयी बल्कि कार्यवाही में सहभाग भी लिया – सक्षमता की अनुपस्थिति के संबंध में आक्षेप को उत्तर में कभी चुनौती नहीं दी गयी – इस आधार पर अवार्ड को याची चुनौती नहीं दे सकता।

B. ***Industrial Disputes Act (14 of 1947), Section 10 - Benefit to retiree employees*** **- When a dispute is raised against the employer, the person regarding whose employment, non-employment, terms of employment or conditions of labour the dispute is raised, need not be, strictly speaking a workman within the meaning of the act, but must be one in whose employment, non-employment, terms of employment or conditions of labour the workmen as a class have a direct or substantial interest - Dispute was related to the dearness allowance of the employees, when they were workmen of the corporation - Retiree (VRS) employees are entitled to revised dearness allowance during their service period before VRS.** (Paras 14 to 19)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10 – सेवानिवृत्त होने वाले कर्मचारियों को लाभ – जब नियोक्ता के विरुद्ध विवाद उठाया जाता है, व्यक्ति जिसके नियोजन, अनियोजन, नियोजन की शर्तें अथवा श्रम की शर्तों के संबंध में विवाद उठाया गया है, को अधिनियम के अर्थान्तर्गत कर्मकार होना सर्वथा आवश्यक नहीं, परंतु ऐसा व्यक्ति होना चाहिये जिसके नियोजन, अनियोजन, नियोजन शर्तें अथवा श्रम की

शर्तों का एक वर्ग के रुप में कर्मकारों का प्रत्यक्ष एवं सारभूत हित है – विवाद कर्मचारियों के मंहगाई भत्ते से संबंधित था जब वे निगम के कर्मचारी थे – सेवानिवृत्त (स्वेच्छा सेवा निवृत्त) कर्मचारी व्ही.आर.एस. से पूर्व उनकी सेवा के दौरान की अवधि में पुनरीक्षित महंगाई भत्ते के हकदार हैं।

Cases referred:

AIR 1958 SC 353, 2001-II LLJ 52, (1990) 4 SCC 27, 2003 II LLJ 1021, 1999 II CLR 380, (2004) 10 SCC 460, (1995) SCC (L&S) 631, (1997) 10 SCC 417.

G.S. Patwardhan, for the petitioners.
Shekhar Bhargava with S.P. Sharma, for the respondent No.1.
Vivek Patwa, Dy. G.A. for the respondent No.2.

ORDER

The Order of the Court was delivered by **ABHAY M. NAIK, J.:–** This writ petition has been preferred against the award dated 08.01.2007 under Section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to as the ID Act) by the MP Industrial Tribunal, Indore in Reference Case No.2/2006.

2. Relevant facts, which are not in dispute, are that the first party is a registered union in the name of Prantiya Rajya Parivahan Karmachari Sangh (Congress) (respondent No.1) whereas second respondent-Madhya Pradesh State Road Transport Corporation is established under Section 3 of the Road Transport Corporation Act, 1950. There was a memo of settlement (Annexure P/4) dated 03.02.1988 in Form 'M' as per Section 43 of the MP Industrial Relations Act, 1960 (hereinafter referred to as the MPIR Act) and Rule 44 of the MP Industrial Relations Rules, 1961. Settlement was arrived at after conciliation proceedings between the Managing Director, MP State Road Transport Corporation and the Madhya Pradesh Transport Workers Federation. Relevant terms of the settlement are as under: -

> "(1) That it is agreed that the existing pay scales of the Corporation employees shall be revised in accordance with the pay scales of the State Government employees. An Annexure 'A' showing the existing scale of the Corporation and the corresponding scale on par with the Government employees is appended herewith.
>
> (2) That it is agreed that the dearness allowance shall also be payable to the corporation employees on par with the Government

employees and that further revision of the dearness allowance as and when done for the Government employees shall also be made applicable for the corporation employees."

3. Pursuant to the said settlement, circular No.21 dated 13.04.1999 was issued by the Corporation for grant of three installments of dearness allowance. The said circular is on record as Annexure P/11. Corporation did not give dearness allowance to its employees from 01.01.1998. The State Government has increased the dearness allowance of its employees as per circular dated 24.04.1998 (Annexure P/12). Dearness Allowance in respect of those employees has also been increased who continued to draw their salaries in the pay scales of the Fourth Pay Commission. These have been described as pre-revised pay scales. Thereafter, the State Government has revised the dearness allowance payable to its employees several times as per Annexure P/13, but the benefit of increased dearness allowance from time to time has not been granted to the employees of the second party.

4. The State Government has accepted the recommendations of the Fifth Pay Commission for its employees. The Corporation has also granted 20% interim relief to its employees in anticipation of the implementation of the recommendations of the Fifth Pay Commission for its employees. That has been done by order dated 06.05.1998 (Annexure P/14). It is gainsaid that several other State owned Corporations have given the benefit of the pay scales recommended by the Fifth Pay Commission to their employees, but the Madhya Pradesh State Road Transport Corporation did not extend the benefit of the pay scales recommended by the Fifth Pay Commission to its employees.

5. The State Government has taken an administrative decision in the year 2005 for winding up of the MP State Road Transport Corporation mainly on the ground that it was incurring huge and heavy losses. A large number of the employees of the Corporation have been given benefit of Voluntary Retirement Scheme of the year 2005.

6. In the aforesaid backdrop, the first party served a notice of change on the second party as per Section 31 (2) of the MPIR Act on 19.11.1998 vide Annexure P/1. On failure of the conciliation proceedings, the Deputy Labour Commissioner, Indore in exercise of powers under Sub Section (1) of Section 10 of the ID Act made a reference on the following dispute to the Industrial Tribunal, Indore: -

"अनुसूची

क्या वर्तमान में मध्यप्रदेश राज्य सड़क परिवहन निगम के परिसमापन हेतु निर्णय लिये जाने के पश्चात तथा उक्त कार्यवाही के अंतर्गत लगभग 75 प्रतिशत कर्मचारियों द्वारा व्ही.आर.एस. लेने के बाद, संस्थान में कार्यरत कर्मचारियों को दि. 1.1.96 से शासकीय कर्मचारियों के समान केन्द्रीय पॉचवा वेतनमान तथा दिनांक 1.1.98 से मंहगाई भत्ता निगम के कर्मचारियों को दिये जाने का औचित्य है? यदि हां तो इसका क्या स्वरूप होना चाहिये? तथा इस संबंध मे नियोजक को क्या निर्देश दिये जाने चाहिए?"

7. It is pertinent to note that it is clearly mentioned in the order of reference that notice of change by first party was served as per Section 31 (2) of the MPIR Act on 19.11.1998. MPIR Amendment Act, 2000 was enforced with effect from 17.05.2006 with the effect that MPIR Act is no longer applicable to the employees of the MP State Road Transport Corporation, in view of the notification dated 17.05.2006, issued under Sub Section (4) of Section 1 of this Act, and therefore, reference has been made under Section 10 of the ID Act.

8. MP Industrial Tribunal vide the impugned award Ex.D/5 answered the reference in the following manner: -

"(i)The employees of the MP State Road Transport Corporation are entitled to the dearness allowance as per the "Memorandum of Settlement" dated 03.02.1998 (Annexure P/4) from 01.01.1998. In other words, they are entitled to the dearness allowance at par with the employees of the State Government increased from time to time after 01.01.1998 for "pre-revised pay scales" (Scales prevalent before the recommendations of Fifth Pay Commission were accepted for the employees of the State Government). The employees of the Corporation who have been given the benefit of the Voluntary Retirement Scheme, 2005 would be entitled to the increased dearness allowance as per the "Memorandum of Settlement" dated 03.02.1988 (Annexure P/4) up to the time they were in service. The dearness allowance in terms of this Award shall be paid to the employees of the Corporation in four equal quarterly installments in one year.

(ii) The employees of the Corporation are not entitled to the pay scales recommended by Fifty Pay Commission and they are also not entitled to any other relief."

9. Shri Girish Patwardhan, learned advocate for the petitioner, Shri Shekhar Bhargava, learned senior advocate for respondent No.1 and Shri Vivek Patwa, learned Deputy Government Advocate made their submissions in support of their respective plea, which have been considered in the light of the material on record and the law governing the situation.

10. It has been contended on behalf of the petitioner that the reference was neither proper nor competent, because the notice of change served by the first party on the second party was as per Section 31 (2) of the MPIR Act. Provisions of MPIR Act have been made inapplicable in view of notification dated 17.05.2006 by virtue of MPIR Amendment Act, 2000. According to the learned counsel for the petitioner, notice under Section 31 (2) of the MPIR Act stood vitiated on account of the aforesaid amendment of the Act and fresh proceedings for the reference under Section 10 of the ID Act ought to have been initiated.

Submission of the petitioner's learned counsel is having no force, firstly because the order of reference was made vide Ex.D/1 dated 2nd August, 2006 under Section 10 of the ID Act, in specific Sec. 10 (1). Petitioner did not challenge it immediately but, instead participated in the reference proceedings before the MP Industrial Tribunal. Though objection is raised about absence of competence to make the reference on the said ground, no such objection was ever raised in the reply to the statement of claim, as revealed in Ex.D/4. This apart, the petitioner was already made aware vide the order of reference that the same was being made under Section 10 of the ID Act. Petitioner did not choose to challenge it and, instead, contested the reference before the MP Industrial Tribunal on other grounds. This being so, it is not open for the petitioner to challenge on this ground the outcome of the reference vide impugned award after passing of it.

11. In any case, appropriate Government is empowered under Section 10 of the ID Act, 1947 to refer the dispute if it so exists to Industrial Tribunal. Relevant provision contained in Section 10 (1) of the ID Act, 1947 is reproduced below: -

> **"10. Reference of disputes to Boards, Courts or Tribunals. -** (1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing -

(a) .....

(b) .....

(c) .....

(d) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication:

Provided that where the dispute relates to any matter specified in the Third Schedule and is not likely to affect more than one hundred workmen, the appropriate Government may, if it so thinks fit, make the reference to a Labour Court under clause (c):

Provided further that where the dispute relates to a public utility service and a notice under section 22 has been given, the appropriate Government shall, unless it considers that the notice has been frivolously or vexatiously given or that it would be inexpedient so to do, make a reference under this sub-section notwithstanding that any other proceedings under this Act in respect of the dispute may have commenced:

Provided also that where the dispute in the relation to which the Central Government is the appropriate Government, it shall be competent for the Government to refer the dispute to a Labour Court or an Industrial Tribunal, as the case may be, constituted by the State Government."

Appropriate Government having formed an opinion about existence of industrial dispute has rightly made the reference under Clause (d) of Sub Section (1) of Section 10 of the ID Act, 1947. This being so, we reject the aforesaid objection/contention.

12. Further contention on behalf of the petitioner is that the reference was made in respect of existing employees alone and the employees having sought voluntary retirement cannot be benefited by it.

13. This contention is also without any substance because the question referred was in two parts. Former part relates to the propriety of the grant of pay scales payable to the Government servants as per the Central Fifth Pay Commission with effect from 01.01.1996 to the existing employees, after the

decision of winding up of the MP State Road Transport Corporation and 75 % of the employees having availed Voluntary Retirement Scheme. This relates to the grant of pay scales as per Fifth Pay Commission to the existing employees with effect from 01.01.1996. Later part relates to propriety of dearness allowance to the employees of the Corporation with effect from 01.01.1998. Thus, it cannot be said that the reference was made in respect of existing employees alone and was not in respect of the employees who had sought retirement under Voluntary Retirement Scheme. Accordingly, it cannot be said that answer to the reference is beyond the question referred to the Industrial Tribunal.

14. Further contention on behalf of the petitioner is that there did not exist a dispute within the meaning of Section 10 of the ID Act and that the reference in the absence of requisite ingredients under Section 10 of the ID Act itself is without jurisdiction.

An industrial dispute has been defined in Clause (k) of Section 2 of the ID Act, as under: -

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

Statement of claim is contained in Ex.D/2, which contains the following prayer: -

> "(a) That the Corporation may kindly be directed to grant enhanced periodical installments of the dearness allowance to employees in terms of settlement dated 03.02.1988, which are due from 01.01.1998.
>
> (b) That the corporation may kindly be directed to implement Vth Central Pay Commission report with effect from 01.01.1996."

Term 'workmen' has been defined in Clause (s) of Section 2 of the ID Act in the following manner: -

> "(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied,

and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii)who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him,, functions mainly of a managerial nature."

It has been contended that the workmen who have sought voluntary retirement are no longer workmen and their dispute is not covered under Section 10 of the ID Act. This is again a misconceived submission because when a dispute is raised against the employer, the person regarding whose employment, non-employment, terms of employment or conditions of labour the dispute is raised, need not be, strictly speaking, a 'workman' within the meaning of the Act, but must be one in whose employment, non-employment, terms of employment or conditions of labour the workmen as a class have a direct or substantial interest. We may successfully refer to the decision of the Apex Court in the case of *Workmen of Dimarkuchi Tea Estate v. Management of Dimakuchi Tea Estate* AIR 1958 Supreme Court 353.

15. Reliance on behalf of the petitioner has been placed on the decision of Kerala High Court in the case of *Purandaran and others v. Hindustan Lever Limited* 2001-II LLJ 52. In this case, the workmen opted for voluntary retirement under the Voluntary Retirement Scheme, as it existed. After acceptance of the benefits under the said scheme, a change was made in the Voluntary Retirement Scheme, enhancing certain benefits. It was held that the workmen who accepted the benefit under the scheme, which existed at the

relevant time, cannot be treated as workmen thereafter. Thus, the case is quite distinguishable on facts.

In the case in hand, workmen are claiming dearness allowance during the period before they accepted voluntary retirement and were admittedly workmen within the definition of Section 2 (s) of the ID Act.

Further reliance on the Apex Court decision in the case of *J.K. Cotton Spinning and Weaving Mills Company Limited v. State of UP and others* (1990) 4 SCC 27 is also of no avail, because the aggrieved person was not found to be a workman after acceptance of his resignation by the employer.

The decision of High Court of Patna in the case of *Yugeshwar Kumar (Y. Kumar) v. Union of India and others* 2003 II LLJ 1021 is also distinguishable as there was a challenge to Voluntary Retirement Scheme, after accepting the benefit under it.

In the case of *Everestee v. District Labour Officer* 1999 II CLR 380 the appellant opted for voluntary retirement pursuant to the scheme offered by the management, entered into an agreement regarding the terms of his retirement and got retirement as per accepted terms. It was held that after the acceptance, the appellant cannot claim that he will come under the purview of ID Act as a workman. This also was a case where a change in terms opposed to the aforesaid norms of voluntary retirement was sought.

In the case in hand, the question referred to was about propriety of payment of dearness allowance to the employees of the Corporation with effect from 01.01.1998. Voluntary Retirement Scheme (VRS) was made applicable to the Corporation which contained no clause that workmen opting for voluntary retirement will not claim dearness allowance as per their entitlement. Thus, *Everestee's* decision (supra) is also of no assistance to the petitioner.

16. Relying upon the decision of the Hon'ble Supreme Court in the case of *Mukand Limited v. Mukand Staff & officers' association* (2004) 10 Supreme Court Cases 460, it has been argued that the Tribunal while deciding the reference has no jurisdiction to adjudicate the issue of non-workmen.

On perusal of the question referred to, it is clear that the dispute was related to the dearness allowance of the employees, when they were workmen of the Corporation. Thus, the decision in *Mukand Limited case* (supra) is also of no assistance to the petitioner.

17. Relying further on (1995) SCC (L&S) 631 *(Shramik Uttarsh Sabha v. Raymond Woollen Mills Limited and others)*, it has been argued that respondent No.1 has no right to represent the workmen referred to in terms of reference.

This objection is beyond the scope and ambit of the present writ petition and we accordingly, hold so.

18. Shri Patwardhan, learned counsel drew attention of this Court to the law laid down by the Supreme Court of India in the case of *Arka Bikas Chakravorty v. State Bank of India and others* (1997) 10 Supreme Court Cases 417 to contend that reference under Section 10 of the ID Act was without jurisdiction since the matter was initiated under MPIR Act, which became inapplicable by virtue of the notification dated 17.05.2006. This has already been answered against the petitioner, because the order of reference under Section 10 of the ID Act has been issued after taking into consideration the effect of MPIR Amendment Act, 2000.

19. Lastly, it has been contended that the learned Tribunal was required to strike a balance with financial status of the Corporation. According to the Corporation, it having already suffered a very huge loss, will have to carry an additional burden, if award is maintained.

We are not impressed by this submission, because the retiree (VRS) employees are found to be entitled to revised dearness allowance as per the revision, during their service period before VRS. Thus, the defence of the petitioner for not granting enhanced dearness allowance to the voluntary retirees under the scheme, is not liable to be accepted, more so, when it is in consonance with the settlement, which is binding on the petitioner.

20. Impugned award has also been opposed on behalf of the petitioner on the ground that the settlement referred to by the Industrial Tribunal could not have been taken into consideration.

Again a misconceived submission has been made because settlement is binding on the petitioner and the petitioner is bound to comply with the terms and conditions of the settlement.

21. Learned counsel for the petitioner further contended that without decision about right of dearness allowance, reference could not have been legally decided.

This submission is totally misconceived, because the Tribunal is found to have rightly held voluntary retirees under scheme to be entitled to revised dearness allowance during their tenure.

In the result, the petition fails and the same is hereby dismissed. However, effect of this order is directed to be kept in abeyance for a period of one month in order to enable the aggrieved party to approach the Apex Court, because money pursuant to the impugned award is kept in FDR due to this Court's order.

No order as to costs.

C. c. as per rules.

Petition dismissed.

I.L.R. [2011] M. P., 2715
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 18098/2003 (Jabalpur) decided on 4 July, 2011

R.K.S. GAUTAM ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law - Disciplinary Enquiry - Punishment* - Petitioner as apparent is guilty of charges of dereliction of duty as Court Moharrir, and of being in drunken state while attending the district office - Past conduct of the petitioner was also found to be not congenial for a disciplined force - Removal from service, can not be said to be disproportionate.** (Para 12)

सेवा विधि – अनुशासनिक जांच – शास्ति – याची प्रकट रुप से एवं न्यायालय मोहर्रिर के रुप में कर्तव्य की उपेक्षा जिला कार्यालय में उपस्थिति के समय नशे की स्थिति में होने के आरोपों का दोषी है – याची का पूर्व आचरण भी अनुशासित बल के लिए अनुकूल नहीं पाया गया – सेवा से हटाया जाना, अननुपातिक नहीं कहा जा सकता।

Cases referred :

AIR 1992 SC 2188, AIR 1997 SC 1900, (2009) 13 SCC 102.

Atul Anand Awasthy, for the petitioner.
Ashish Shroti, G.A. for the respondents/State.

O R D E R

Sanjay Yadav, J. :– This petition is directed against the order dated

24-04-2000 and 16-11-2000. By order dated 24-04-2000 the petitioner, a constable in Police Department, having been found guilty of the charges levelled against him in a departmental enquiry and has been removed from service. Whereas by order dated 16-11-2000, the appeal preferred against the impugned order of penalty has been dismissed.

2. Petitioner who was detailed for Court Moharrir duty on 01-12-1998 was found derelecting in his duty. As well on 10-08-1999 was found attending District Police Office in drunken condition.

3. The said conduct led to issuance of charge sheet on 22-12-1999.

4. Three charges were levelled against the petitioner, viz., (i) दिनांक 1.12.98 को कोर्ट मोहर्रिर ड्यूटी के लिये व्योहारी न्यायालय रवाना किये जाने पर कर्तव्य पर उपस्थित न होकर बिना किसी सूचना के स्वेच्छापूर्वक कर्तव्य से अनुपस्थित होकर एवं 250 दिवस पश्चात उपस्थित होकर अत्यन्त अनुशासनहीनता पूर्ण आचरण व कर्तव्यों की अवहेलना करना। (ii) दिनांक 10.8.99 को लगभग 14.30 बजे जिला पुलिस कार्यालय में शराब का सेवन किए उपस्थित होकर अनुशासन हीनता एवं दुराचरण प्रदर्शित करना। (iii) बार बार दंडित किये जाने के उपरांत भी अपने आचरण में कोई सुधार न लाना।

5. Denial of charges by the petitioner led to initiation of a departmental enquiry wherein by enquiry report dated 28-12-1999 charges were found proved.

6. After following the procedure as to issuing the show cause notice along with enquiry report and calling defence, the disciplinary authority i.e. Superintendent of Police, Shahdol, after considering the material on record and the defence put forth by the petitioner, found the petitioner guilty of the charges, accordingly, inflicted the penalty of removal from service and treated the period of suspension from 11-08-1999 to 15-09-1999 as suspension. Appeal preferred against the said order was dismissed on 16-11-2000.

7. Petitioner assails the removal on four grounds that (i) the petitioner is punished on perverse findings (ii) the petitioner was not under the influence of alcohol but had consumed the medicine (iii) that, as to third charge, the petitioner could not have been punished as he had already undergone the punishment for the past charges, and (iv) the punishment of removal was disproportionate.

8. The aforesaid grounds when tested on the findings recorded by the enquiry officer, does not recuse the petitioner of the charges framed against him.

9. In the enquiry the charges were proved on the basis of the evidence led by the prosecution. Petitioner had the opportunity to cross-examine the witnesses. The analysis of the evidence on record by the Disciplinary Authority does not suggest that the findings are perverse. As regard to charge of drunkenness, the doctor who examined the petitioner was examined as witness in the enquiry, he substantiated the charge of drunkenness. The law is trite that a personnel belonging to the disciplined force is not expected to be on duty in drunken state and if found to be, the same tantamount to a conduct unbecoming of a member of disciplined force. In *State of Punjab and others v. Ram Singh:* AIR 1992 SC 2188, it is held :-

> " Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order."

10. Similarly, in *Govt. of Tamil Nadu and others v. Vel Raj :* AIR 1997 SC 1900, it has been observed :-

> "7. ..... The police force has to be a disciplined force and member of the police force has to behave in a disciplined manner particularly when he is on duty. The respondent even though he was sent for official work and was on duty returned to the police station in 'mufti' and in drunken condition after consuming 'arrack'. He had returned to the police station to report to his superior officer as to what happened to the work which was entrusted to him. Under these circumstances, his behavior has to be regarded as an act of gross misconduct. It is difficult to appreciate how the Tribunal could

persuade itself to take a contrary view. In view of the facts and circumstances of this case it is not possible to say that the punishment which was imposed upon him was highly excessive."

11. Furthermore, regarding contention that for the past conduct for which the petitioner has already undergone the punishment he could not be punished twice, has been answered in *Union of India and others v. Bishamber Das Dogra* : (2009) 13 SCC 102 that :-

> "22. This Court in *State of Assam v. Bimal Kumar Pandit* considered the issue as to whether while imposing the punishment it is permissible to take into consideration the past conduct of an employee if it is not so mentioned in the second show-cause notice.
>
> 31. It is settled legal proposition that habitual absenteeism means gross violation of discipline [vide *Burn & Co. Ltd. v. Workmen* (AIR 1959 SC 529, para 5) and *L & T Komatsu Ltd. v. N. Udayakumar* [(2008) 1 SCC 224, para 6].
>
> 33. Admittedly, the respondent employee has not completed the service of six years and had been imposed punishment three times for remaining absent from duty. On the fourth occasion when he remained absent for ten days without leave, the disciplinary proceedings were initiated against him. The show-cause notice could not be served upon him for the reason that he again deserted the LINE and returned back after fifty days. Therefore the disciplinary proceedings could not be concluded expeditiously. The respondent submitted the reply to the show-cause notice and the material on record reveal that during the pendency of the enquiry he further deserted the LINE for ten days. There is nothing on record to show any explanation for such repeated misconduct or absenteeism. The court/tribunal must keep in mind that such indiscipline is intolerable so far as the disciplined force is concerned."

12. Regarding the contention that the penalty of removal is disproportionate to the charges levelled and proved. The petitioner as apparent is guilty of charges of dereliction of duty as Court Moharrir, and of being in drunken state while attending the district office and the past conduct of the petitioner was also found to be not congenial for a disciplined force. For these the removal cannot be said to be disproportionate.

13. Having thus considered this Court does not find any substance in the petition as would warrant any interference.

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

Petition dismissed.

I.L.R. [2011] M. P., 2719
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 8245/2004 (Jabalpur) decided on 5 July, 2011

JAGDISH PRASAD ...Petitioner
Vs.
M.P. STATE ELECTRICITY BOARD ...Respondent

Service Law - Delay in enquiry **- Charge-sheet issued to the petitioner on 16.04.1994 in respect of an incident which took place on 24.03.1994, the enquiry report was submitted on 06.03.1997 - The respondent instead of taking action thereupon within a reasonable time sat over the same for about seven years, when suddenly on 22.11.2003, i.e. just seven months before his retirement, issued a show cause notice and culminated it into a minor penalty vide impugned order dated 23.01.1994 - No explanation as to what were the circumstances which prevented respondents from taking an action on the enquiry report for about seven years - The delay in enquiry caused great prejudice to the petitioner as because of the same he suffered from being considered for higher pay scale and the proper fixation of pension - Held - The impugned order deserves to be set aside - Petition allowed.** (Paras 8, 13 & 14)

सेवा विधि – जांच में विलंब – 24.03.1994 को घटित घटना के संबंध में याची को 16.04.1994 को आरोप पत्र जारी किया गया, 06.03.1997 को जांच रिपोर्ट प्रस्तुत की गई – प्रत्यर्थी ने उस पर उचित समय पर कार्यवाही करने के बजाये करीब सात वर्षों तक कुछ नहीं किया और अचानक 22.11.2003 अर्थात उसकी सेवा निवृत्ति के सात माह पूर्व, कारण बताओ नोटिस जारी कर आक्षेपित आदेश दिनांक 23.01.1994 द्वारा लघु शास्ति के साथ समापन किया – कोई स्पष्टीकरण नहीं कि वे कौन सी परिस्थितियां रहीं जिसने प्रत्यर्थीगण को जांच रिपोर्ट पर सात वर्षों तक कार्यवाही करने से रोका – जांच में विलंब से याची को बहुत हानि हुई है क्योंकि इससे उसे उच्च वेतन मान हेतु विचार में नहीं लिया गया और पेंशन का उचित निर्धारण नहीं किया गया – अभिनिर्धारित – आक्षेपित आदेश अपास्त किये जाने योग्य – याचिका मंजूर।

Case referred :

(2006) 5 SCC 88.

K.N. Pethia, for the petitioner.
Ashish Pathak, for the respondent.

ORDER

SANJAY YADAV, J. :– Heard.

Petitioner calls in question correctness of orders dated 13.1.2004 and 30.6.2006. By order dated 13.1.2004 the petitioner has been inflicted with a penalty of withholding of increment for six months. Whereas by order dated 30.6.2004, an appeal preferred by the petitioner against the punishment order has been dismissed.

2. Petitioner, an ex-army personnel, was in the employment of respondent as Security, Sub Inspector, wherefrom he retired on attaining the age of superannuation on 30.6.2004.

3. While in service the petitioner was charge sheeted on 16.4.1994 in respect of an incident which took place on 24.3.1994. While he was posted as Security Officer at Sanjay Gandhi Thermal Power Station, Birsinghpur, when he allowed a tractor bearing registration No. M.P.17-D-0534 carrying cement and other construction material to pass through the barrier.

4. Following two charges were levelled against him viz:

"आरोप क्र0 : 1

ट्रेक्टर क्र0 : एम0पी0–17–डी–0534 में सीमेन्ट एवं अन्य सामान अनाधिकृत रूप से दिनांक : 23.3.94 को श्री रामनाथ ट्रेक्टर चालक द्वारा पावर हाउस गेट क्र0 : 1 से बाहर ले जाया जा रहा था, उक्त सामान को एक दिन बाद दिनांक : 24.3.94 को रात्रि में 9.30 बजे बिना गेट पास के सिर्फ सुन्दर एजेंसी के लेटर पैड में लिखे हुए टीम के आधार पर बाहर जाने की अनुमति श्री जे0पी0 जावरिया सुरक्षा निरीक्षक द्वारा दी गई। इस प्रकार श्री जे0पी0 जावरिया बिना गेट पास एवं सत्यता की जॉच किये बगैर सामान बाहर जाने देने की अनुमति देकर अपने कर्तव्यों एवं सुरक्षा नियमों की अवहेलना कर घोर लापरवाही की है।

आरोप क्र0 : 2

जप्त किये गये ट्रेक्टर में रखा हुआ सामान जो कि ट्रेक्टर चालक द्वारा अनाधिकृत रूप से बाहर ले जाया जा रहा था, एक दिन के उपरान्त मे0 सुन्दर

एजेन्सी के लेटर पैड में लिखे टीप के आधार पर श्री जे0पी0 जावरिया ने अनुमति देकर मण्डल की सम्पत्ति की हेरा–फेरी में सहयोग किया है।"

5. The denial of charges by the petitioner led to a departmental enquiry culminating into an enquiry report dated 6.3.1997 which was served on the petitioner with a show cause notice dated 22.11.2003 whereby, the petitioner was called upon to show cause as to why on the basis of report penalty as proposed be not imposed. In the enquiry charge no.1 was found fully proved, whereas charge no.2 was found to be partially proved. On the basis of charges proved petitioner was inflicted with a penalty of withholding of increment for six months on the verge of his retirement by order dated 13.1.2004 which was affirmed in appeal which was dismissed on 30.6.2004.

6. Petitioner questions the impugned orders on two counts, firstly, that the findings are vitiated so much so that the same is not in consonance with the evidence on record and secondly that the order of punishment is vitiated because of the delay caused by the respondent in taking a decision after about a decade from the date of issuance of charge sheet.

7. In respect of first contention, the same when tested on the anvil of the proceedings and evidence which have come on record and anlaysed by the disciplinary authority does substantiate the charge of dereliction on the part of the petitioner in permitting the tractor which was under seizure to allow the same to pass through the security barriers. Findings based on cogent evidence recorded during the proceedings where the petitioner was given proper opportunity does not call for interference. Therefore, the first contention that the findings suffer from vice of perversity since have no legs to stand are rejected.

8. In respect of second contention it is seen that the charge sheet was issued to the petitioner on 16.4.1994 in respect of an incident which took place on 24.3.1994 and was concluded in 3 years time when the enquiry report was submitted on 6.3.1997. The respondents instead of taking action thereupon within a reasonable time sat over the same for about seven years, when suddenly on 22.11.2003, i.e , just seven months before his retirement, a show cause notice was issued culminating into a minor penalty vide impugned order dated 13.1.1994.

9. Be that a minor penalty, the question is whether the respondents are justified in acting upon an enquiry after seven years and thereon inflicting the minor penalty.

10. This can be answered when the matter is examined, from the angle of an employee who is at a receiving end as to any prejudice is caused to him because of the long pending enquiry.

11. By way of rejoinder petitioner pleads that while in service he became entitled for first higher pay scale in 1990 after completing 9 years of service and was due for second higher pay scale after completing total 18 years of service which the petitioner was deprived of because of pending enquiry. Furthermore, it is contended though inflicted a minor penalty of withholding of increment for six months but the effect of the same is cumulative because the annual increment drawn by the petitioner is in January, which was not drawn because of the imposition of penalty. It is urged that the petitioner retired in June 2004 and the pension was settled on lessor average income than his entitlement.

12. When examined from above angle there is much force in the contention of the petitioner that he has been prejudice because of long pending enquiry.

13. The respondents are silent in their return nor have they tendered an explanation as what were the circumstances which prevented them from taking an action on the enquiry report submitted on 6.3.1997 which they could do only after about seven years.

14. In the considered opinion of this Court the delay in enquiry caused great prejudice to the petitioner as because of the same he suffered from being considered for higher pay scale and the proper fixation of pension.

15. Question is whether an element of prejudice could be a ground for quashing a punishment. The question has been affirmatively answered by Supreme Court in the decision in *M.V.Bijlani V. Union of India and others:* (2006) 5 SCC 88, wherein it is observed:

> **"16.** So far as the second charge is concerned, it has not been shown as to what were the duties of the Appellant in terms of the prescribed rules or otherwise. Furthermore, it has not been shown either by the disciplinary authority or the appellate authority as to how and in what manner the maintenance of ACE-8 Register by way of sheets which were found attached to the estimate file were not appropriate so as to arrive at the culpability or otherwise of the Appellant. The appellate authority in its order stated that the Appellant was not required to prepare the ACE-8 Register twice. The

Appellant might have prepared another set of register presumably keeping in view the fact that he was asked to account for the same on the basis of the materials placed on records. The Tribunal as also the High Court failed to take into consideration that the disciplinary proceedings were initiated after six years and it continued for a period of seven years and, thus, initiation of the disciplinary proceedings as also continuance thereof after such a long time evidently prejudiced to the delinquent officer."

16. In view of above the impugned order deserves to be and is hereby quashed. The petition is allowed to the extent above. No costs.

Petition allowed.

I.L.R. [2011] M. P., 2723
WRIT PETITION

Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe
W.P. No. 920/2011 (Jabalpur) decided on 14 July, 2011

BANTI @ BRIJESH @ ASHISH ...Petitioner

Vs.

AVAR SACHIV & ors. ...Respondents

National Security Act (65 of 1980), Section 3(2) - Order of Detention **- Petitioner committed various offences even in public and also terrorized the people of the locality by throwing the country made bombs - Such acts are bound to create fear in the minds of the people and is bound to disturb the normal life of the locality - Hence, it is a case of public order - Writ petition dismissed.** (Para 11)

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – निरोध आदेश – याची ने पब्लिक में विभिन्न अपराध कारित किये और देशी बम फेंककर परिक्षेत्र के लोगों को आतंकित भी किया – ऐसे कृत्य से लोगों के मन में निश्चित रुप से भय उत्पन्न होगा और परिक्षेत्र का सामान्य जीवन विक्षुब्ध होगा – अतएव यह लोक व्यवस्था का मामला है – रिट याचिका खारिज।

Cases referred :

2004(2) A.N.J. 119, 1970 (1) SCC 98.

Anil Kumar Gupta, for the petitioner.

Kumaresh Pathak, Dy. G.A, for the respondents.

ORDER

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

In the instant case the petitioner has questioned the validity of the order of the District Magistrate, Jabalpur, dated 4.8.2010 detaining the petitioner under section 3(2) of the National Security Act, 1980, (hereinafter referred to as 'the Act').

2. Facts leading to filing of the writ petition, briefly stated, are that the petitioner, because of his involvement in several criminal cases and his activities being prejudicial to the public order, is detained under section 3(2) of the Act. The prejudicial activities are stated in detail in the grounds of detention, a copy whereof is enclosed as annexure P/6.

3. It appears that the Superintendent of Police, Jabalpur, vide memo dated 4.8.2010 informed the District Magistrate, Jabalpur, about the criminal activities and involvement of the petitioner in several criminal cases which are prejudicial to the public order as he is a habitual offender and has formed a gang and is in possession of dangerous weapons and explosives. It has also been alleged that the petitioner is accused in a murder case alleged to have been committed openly on the road and on many occasions he threatened of dire consequences to the general public. It has also been alleged that he used to terrorize the public by throwing country made bombs.

4. The District Magistrate having gone through the materials placed before him and having been satisfied that the activities of the petitioner is detrimental to the public order and, therefore, with a view to prevent and restrain him from his indulgence in the alleged prejudicial activities, passed the order under section 3(2) of the Act on 4.8.2010. The order of detention and the grounds of detention were accordingly communicated to the petitioner as per requirement of Section 8 of the Act. The Advisory Board also considered the order of detention as required under section 9 of the Act and approved the detention. The State Govt. also confirmed the detention order vide order dated 27.9.2010.

5. Learned counsel for the petitioner vehemently contended that on account of involvement of the petitioner in criminal cases, he cannot be detained under the provisions of the Act and the alleged activities of the petitioner have no impact on public order. It was further submitted that the allegations which

have been levelled against the petitioner are vague in nature and at the most it would come within the realm of law and order. In support of his submissions learned counsel for the petitioner has placed reliance on a Division Bench decision of this Court in *Shishupal Singh Vs. The District Magistrate, Damoh,* 2004(2) A.N.J. 119.

6. We have considered the submissions made by learned counsel for the petitioner and have perused the record.

7. At the outset we must say that we are not impressed with the submissions made on behalf of the petitioner for the reason that the alleged prejudicial activities of the petitioner is bound to disturb the even tempo of the society and thus it is difficult to hold that the same does not fall within the purview of public order.

8. From perusal of the grounds of detention it appears that the petitioner is involved in number of criminal cases which are as follows :-

S.No.	Crime No.	Offences
1.	130/1999	302 I.P.C.
2.	73/2000	25 of Arms Act
3.	258/2000	341, 294, 506-B I.P.C.
4.	269/2000	5 of Explosive Substances Act
5.	270/2000	25 Arms Act
6.	466/2001	336, 427 I.P.C.
7.	586/2001	341, 323, 294, 506-B, 34 I.P.C.
8.	574/2001	307 I.P.C. and 3/5 of Explosive Substances Act
9.	182/2002	341, 294, 323 and 50 of I.P.C.
10.	292/2003	384 I.P.C.
11.	210/2005	25 of Arms Act
12.	273/2007	25/27 of Arms Act
13.	386/2008	341, 34 of I.P.C.
14.	288/2010	307 I.P.C.

9. It further appears from the grounds of detention that the petitioner is a habitual offender and is in a habit of committing serious crimes publicly. It has also been stated in the grounds of detention that he is in possession of dangerous weapons and explosives which has endangered the public safety. It has also been alleged that on account of his activities there is an atmosphere of fear in the locality and, therefore, the District Magistrate being satisfied with the material placed before him that the alleged activities of the petitioner are detrimental to the public order rightly passed the impugned order in order to prevent him from acting in a manner prejudicial to the public order.

10. The argument that the allegations or the alleged activities of the petitioner did not have any impact on the public order and, therefore, it is at the most case of law and order, hence detention is not justified, cannot stand. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality and it is to be distinguished from the acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. Therefore, to find out as to whether the alleged activities or the act comes within the purview of public order or it is simply a law and order problem, one has to find out the impact or its effect upon the life of the community and degree of disturbance in a locality (See : *Arun Ghosh Vs. State of West Bengal,* 1970(1) SCC 98).

11. In the instant case, we are of the considered view, that the alleged activities of the petitioner is bound to disturb the even tempo of the society and thus it is a case of public order and cannot be held to be a breach of law and order. Reliance placed in *Shishupal Singh Vs. The District Magistrate, Damoh* (supra) is of no help to the petitioner because in that case the detenue was involved in a case of pity nature and the alleged act since was directed against individuals, therefore, it cannot be said to be a case of public order whereas in the case in hand the petitioner has committed various offences even in public and also terrorized the people of the locality by throwing the country made bombs and such acts are bound to create fear in the minds of the people and is bound to disturb the normal life of the locality, hence it is a case of public order.

12. No other point has been urged before us.

13. In view of the above, we do not find any illegality in the impugned order of detention. The writ petition being without merit is dismissed without cost.

Petition dismissed.

I.L.R. [2011] M. P., 2727

WRIT PETITION

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

W.P. No. 918/2005 (Jabalpur) decided on 26 July, 2011

BASANTI SURYAWANSHI (SMT.) ...Petitioner

Vs.

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

Service Law - Termination of Services **- Petitioner applied for post of 'Aganwadi' suppressing the fact that her husband was employed as Assistant Teacher and secured her appointment - Later on, she also took advantage of her experience on the post of 'Aganwadi' worker at the time of her selection to the post of 'Samvida Shala Shikshak' - Termination of petitioner in view of instructions dated 27.05.1996 issued by the State Government can not be said to be either discriminatory, arbitrary or violative of Article 14 and 16 of the Constitution of India.** (Paras 3 & 10)

सेवा विधि – सेवा समाप्ति – याची ने इस तथ्य का छिपाव करके कि उसका पति सहायक शिक्षक के रुप में नियुक्त था, आंगनवाड़ी के पद हेतु आवेदन किया और अपनी नियुक्ति प्राप्त की – बाद में, उसने संविदा शाला शिक्षक के पद पर अपने चयन के समय अपने आंगनवाड़ी सेविका के पद के अनुभव का लाभ भी लिया – राज्य सरकार द्वारा जारी निर्देश दिनांक 27.05.1996 को दृष्टिगत रखते हुये याची की सेवा समाप्ति न तो भेदमूलक, मनमानी है और न ही भारत के संविधान के अनुच्छेद 14 व 16 का अतिलंघन है।

Cases referred :

AIR 1955 SC 191, AIR 1962 SC 602, AIR 1979 SC 1868, AIR 1983 SC 374, AIR 1995 SC 914, AIR 2001 SC 2616, AIR 2002 SC 2877, AIR 2004 P&H 156.

Sanjay Agrawal, for the petitioner.

Sanjay Dwivedi, G.A. for the respondents.

O R D E R

The Order of the Court was delivered by **S.R. ALAM, C. J. :**–The petitioner in the instant writ petition has impugned the legality and validity of the order (Annexure P/15) dated 27.1.2004 by which her services have been terminated from the post of Samvida Shala Shikshak and the consequential order dated 29.1.2004 (Annexure P/16) as well as the Ocircular (Annexure P/12) dated 27.5.1996.

2. Facts leading to the filing of the present petition, briefly stated, are that petitioner submitted an application dated 28.9.1998 (Annexure P/l) for appointment on the post of 'Aaganwadi' worker in Mahidpur, District Ujjain. Clause (3) of the advertisement reads as under:-

> *"Any Government Servant or any person elected or nominated in panchayats or local bodies or their relatives shall not be appointed as 'Aaganwadi 'worker. "*

Subsequently, by a notice dated 06.10.1998 Municipal Council, Mahidpur, District Ujjain, invited applications for appointment on the post of 'Aaganwadi' workers in 11 'Aganwadi' centres situate within the limits of Municipal Council, Mahidpur. On the recommendation of Municipal Council, Mahidpur, petitioner was appointed by an order dated 2.1.1999 (Annexure P-3) as 'Aaganwadi' worker in the centre situate in Ward No. I, Municipal Council, Mahidpur.

3. Thereafter, an advertisement (Annexure P/6) dated 17.7.2001 was issued by Janpad Panchayat, Mahidpur inviting applications for appointment on the post of Samvida Shala Shikshak. In response to the aforesaid advertisement, the petitioner submitted an application (Annexure P/7) on 23.7.2001. The petitioner was selected and an order of appointment dated 26.9.2001 (Annexure P/8) was issued. The petitioner was posted in Government Middle School, Dhulet, Tahsil Mahidpur, District Ujjain. Thereafter the petitioner was served with a show-cause notice dated. 18.8.2003 (Annexure P/10) by which petitioner was asked to show-cause as to why her services should not be dispensed with, on the ground that petitioner was found ineligible for appointment as 'Aganwadi' worker in view of instructions dated 27.5.1996 issued by the State Government the husband of the petitioner was already in Government service. The petitioner submitted reply to aforesaid show-cause notice. Thereafter by an order dated 27.1.2004 (Annexure P/15), services of petitioner were dispensed with. A consequential order dated 29.1.2004 (Annexure P/l 6) was also passed.

4. The respondents have filed return, inter alia, contending that against the impugned order dated 27.1.2004 (Annexure P/15), remedy of appeal is provided under the Rules framed under the provisions of Madhya Pradesh Panchayat Avam Gram Swaraj Adhiniyam, 1993. It has further been averred that petitioner was ineligible for appointment on the post of 'Aaganwadi' worker as her husband was employed as an Assistant Teacher. The petitioner

by suppressing the aforesaid material fact secured appointment on the post of 'Aaganwadi' worker and also took advantage of her experience on the post of 'Aaganwadi' worker at the time of her selection on the post 'Samvida Shala Shikshak'. The executive instructions dated 27.5.1996 (Annexure P/12) have been issued by the State Government in consonance with the instructions issued by the Department of Women and Child Development, Ministry of Human Resources Development, Government of India regarding Integrated Child Development Service Programme. The Executive Instructions contained in Annexure P/12 have no force of law. The impugned order of termination of services of the petitioner, is in accordance with law and has been passed after following the principles of natural justice. The petitioner having accepted the terms and conditions enumerated in the executive instructions contained in Annexure P/12 dated 27.5.1996 cannot now challenge or assail the same. At this belated stage she cannot now be allowed to take a somersault and challenge the conditions incorporated in the executive instructions Annexure P/12.

5. We have heard learned counsel for the parties at length. Shri Sanjay Agrawal, learned counsel for the petitioner contended that clause 3 of the executive instructions in so far as it provides that no person shall be appointed on the post of 'Aaganwadi' worker in case his or her near relatives are in Government service or in employment of any local bodies, is arbitrary and discriminatory and is violative of the constitutional guarantee contained in Articles 14 and 16 of the Constitution of India. The impugned action of termination of services of the petitioner from the post of Samvida Shala Shikshak by the respondents, is arbitrary, illegal and is unconstitutional. It has further been contended that respondents have not furnished any justification for incorporation of such a clause in the executive instructions which amounts to prohibition and is not a reasonable restriction as the same tantamounts to violation of Articles 14 and 16 of the Constitution of India. The appointment of the petitioner on the post of Aaganwadi Worker was not cancelled and as she has worked on the post of Aanganwadi Worker, she is entitled to 20 bonus marks therefore, there is no justification to cancel the appointment of the petitioner on the post of Samvida Shala Sikshak by discarding the bonus marks awarded to her. Learned counsel for the petitioner in support of his submissions has placed reliance on *Budhan Choadhary and others vs. State of Bihar,* AIR 1955 SC 191, *Krishan Chander Nayar vs.The Chairman, Central Tractor Organisation and others,* AIR 1962 SC 602, Miss

C.B.Muthamma vs. Union of India and others, AIR 1979 SC 1868, *State of Madhya Pradesh vs. Ramashanker Raghuvanshi and another,* AIR 1983 SC374, *v. N.Sunanda Reddy and others vs. State of Andhra Pradesh and others,* AIR 1995 SC 914, *Ganga Ram Moolchandani vs. State of Rajasthan,* AIR 2001 SC 2616 , *Kailash Chand Sharma vs. State of Rajasthan and others,* AIR 2002 SC 2877 and Division Bench decision of Punjab & Haryana High Court in *Tarsem Singh vs. Bharat Sanchar Nigam Limited,* AIR 2004 P&H 156.

6. On the other hand, Shri Sanjay Dwivedi, learned Government Advocate submitted that petitioner secured appointment on the post of Aaganwadi worker by suppressing material fact that her husband was a 'Government Servant'. Petitioner was ineligible for appointment on the post of 'Aaganwadi' worker in view of the bar contained in clause (3) of the executive instructions dated 27.5.1996 (Annexure P/12). The petitioner on the basis of her experience as 'Aaganwadi' worker got bonus mark as provided under Rule 8 of Madhya Pradesh Panchyat Samvida Shala Shikshak (Niyukti Evam Seva Sharetein) Niyam, 2001, illegally at the time of appointment on the post of Samvida Shala Shikshak. The Instructions contained in Annexure P/12 dated 27.5.1996 have been issued which are in tune with the scheme framed by the Department of Women & Child Development, Ministry of Human Resources Development, Government of India. It has further been contended that person cannot be appointed on the post of 'Aaganwadi' worker de hors the executive instructions contained in Annexure P/12 dated 27.5.1996.

7. It is well settled in law that Article 14 of the Constitution of India forbids class legislation but does not forbid reasonable classification. The classification in order to be reasonable must be founded on intelligible differentia and that differentia must have rational relation to the object sought to be achieved. An arbitrary imposition of bar against the employment of certain person would certainly amount to denial of right of equal opportunity of employment as guaranteed under Article 16(1) of the Constitution of India. Object of Articles 14 and 16 of the Constitution is to ensure equality to all those who are similarly situated. In other words, all the citizens applying for employment under the State are entitled to similar treatment.

8. In *Miss C.B.Muthamma* (supra), the Supreme Court while dealing with Rule 8(1) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961 which required a female employee to obtain permission of the Government in

writing before her marriage is solemnized, held that aforesaid Rule is discriminatory and accordingly struck down the same. However, in para 7 of the aforesaid judgment, Supreme Court has held as follows:-

> *"7. We do not mean to universalize or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern. This creed of our Constitution has at last told on our governmental mentation, perhaps partly pressured by the pendency of this very writ petition. In the counter affidavit, it is stated that Rule 18(4) (referred to earlier) has been deleted on November 12, 1973. And, likewise, the Central Government's affidavit avers that Rule 8(2) is on its way to oblivion since its deletion is being gazetted. Better late than never. At any rate, we are relieved of the need to scrutinize or strike down these rules. "*

In view of aforesaid enunciation of law by Supreme Court, it is clear that requirement of a particular employment, peculiarities of societal sectors may provide a reasonable basis for intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group failing which rule of equality must govern.

9. The Department of Women & Child Development, Ministry of Human Resources Development, Government of India has issued instructions regarding Integrated Child Development Service Programme. Clause 3.2.12 of the aforesaid instructions provide that an 'Aaganwadi' worker should be a woman aged in between 18 to 44 years from the local village and should be acceptable in the local community. The aforesaid clause further provides that special care should be taken in her selection so that children of Scheduled Castes and other weaker sections of the society are ensured free access to 'Aganwadi'. Thus, the object of the instructions is to make appointment of a woman on the post of 'Aaganwadi' worker who should be a resident of the local village and should be acceptable in the local community so that children of Scheduled Castes and other weaker sections of the society have free access to 'Aaganwadi' centre. In accordance with aforesaid instructions, State

Government has issued instructions dated 27.5.1996 (Annexure P/12) which prescribe the procedure for appointment to the post of 'Aaganwadi' workers, the conditions of eligibility for appointment and the procedure for removal from the post of 'Aaganwadi' worker. Clause 3 of the said instructions stipulates that close relative of any Government servant or persons in the employment of local bodies cannot be appointed as 'Aaganwadi' worker.

10. Integrated Child Development Project has been formulated by the Government of India and the same is being implemented through the State Government. The said project has been formulated with an object to ensure development of the children belonging to underprivileged class of the society in rural area and to provide employment to women of local area living below the poverty line. The job of an 'Aaganwadi' worker is not a full-time employment, but is a part-time one on a fixed honorarium basis. An 'Aaganwadi' worker who is possessed of matriculation pass certificate is entitled to receive a fixed honorarium of Rs.400/- per month whereas a non-matric 'Aganwadi' worker is entitled to receive a sum of Rs.350/- per month. The object of imposing the restriction contained in clause (3) of the instructions dated 27.5.1996 is to employ a woman living below the poverty line, as she would be more conversant with the culture and behavioural aspect of the children belonging to underprivileged class of the society. Clause (3) of the instructions ensure that while providing employment to a woman living below the poverty line, object of the scheme is fulfilled that is to say to provide free access to the children belonging to weaker sections of the society to 'Aaganwadi' centre and at the same time, the financial condition of the family of such a woman is ameliorated . Thus, there is an intelligible differentia which distinguishes the persons that are grouped together from others which are left out of the group i.e the candidates who have their near relatives in Government service or in the employment of the local bodies and those whose near relatives are not employed either in Government service or in any local bodies. The intelligible differentia has a reasonable nexus with the object sought to be achieved i.e. to provide free access to children belonging to weaker sections of the society to 'Aaganwadi' centre. The requirement in clause (3) of the instructions dated 27.5.1996 (Annexure P/12) has been incorporated by taking into account the requirements of particular employment and peculiarities of societal sectors and, therefore, the same cannot be said to be either discriminatory, arbitrary or violative of Article 14 and 16 of the Constitution of India.

11. Clause (3) of instructions dated 27.5.1996 puts a complete embargo on the person who seeks appointment as 'Aaganwadi' worker, if his near relatives are in Government service or in service of local bodies. Since, the petitioner's husband was employed as an Assistant Teacher she was not eligible to be appointed as 'Aaganwadi' worker. We are unable to accept the contention of learned counsel for the petitioner that since the petitioner's appointment as Aaganwadi worker was not cancelled therefore, she was entitled to bonus marks, for the simple reason that the same would tantamount to putting premium on illegality which cannot be permitted.

12. Reliance placed by the learned counsel for the petitioner on the decision of the Supreme Court reported in *Ramashanker Raghuvanshi* (supra) is of no assistance to the petitioner. In the aforesaid case, services of the teacher employed in Government school were terminated on the basis of police report that he had taken part in Rashtriya Sewa Sangh and Jan Sangh activities. In the aforesaid factual backdrop, it was held that action of respondents in denying employment to an individual because of his past political affinities is violative of Articles 14 and 16 of the Constitution of India, unless such affinities are considered likely to affect the integrity and efficiency of individual in the service. In *V.N.Sunanda Reddy* (supra) it was held that Government order extending 5% weightage to Telgu medium candidates in the examination held by Andhra Pradesh Public Service Commission is arbitrary, as the same amounts to imposing of additional qualification which is de hors the recruitment rules and a special beneficial treatment was being given to the candidates who had passed their graduation examination in Telgu medium, which offended the constitutional guarantee contained in Articles 14 and 16 of the Constitution. Thus, the aforesaid decision is clearly distinguishable. In *Ganga Ram Moolchandani* (supra), while considering the validity of Rules 8(ii) and 15(ii) of Rajasthan Higher Judicial Services Rules which required that only those Advocates are entitled to be considered for direct recruitment to Rajasthan Higher Judicial Service who have practiced in Rajasthan High Courts or courts subordinate thereto; it was held that classification made had no reasonable nexus, as the same is not founded on any intelligible differentia. Consequently, the Rule was held to be ultra vires Article 16 of Constitution of India. Thus, the aforesaid decision also has no application in the facts and circumstances of the case. Similarly, in *Kailash Chand Sharma* (supra). Supreme Court had the occasion to deal with the question whether a residence within a district or rural area of the district could be a valid basis of classification for the purpose of public

employment. Thus, the aforesaid decision is also of no assistance to the learned counsel for the petitioner in the facts of present case. In *Tarsem Singh* (supra) the Division Bench of Punjab and Haryana High Court while dealing with validity of the clause contained in the notice inviting tender which debarred the candidates from participating in the NIT whose near relatives were working in BSNL unit, held that sufficient safeguards have been provided to ensure that relatives of prospective contractors do not get any undue advantage. Accordingly, Division Bench opined that impugned clause of tender notice was violative of Article 14 of the Constitution of India. Thus, the aforesaid decision also is of no help to the petitioner.

13. In the result, the writ petition fails and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 2734
WRIT PETITION
Before Mr. S.R. Alam, Chief Justice & Mr. Justice Alok Aradhe
W.P. No. 10755/2009(S) (Jabalpur) decided on 27 July, 2011

RAKESH GAUTAM & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution, Article 226, Court Fees Act (7 of 1870), Section 17 - Payment of Court Fees on Petition **- Where more than one person have joined in one petition and are seeking relief on distinct and separate causes of action, then each of the petitioner is required to make payment of separate court fees.** (Para 10)

संविधान, अनुच्छेद 226, न्यायालय फीस अधिनियम (1870 का 7), धारा 17 – याचिका पर देय न्यायालय शुल्क – जहां एक से अधिक व्यक्ति एक ही याचिका में जुड़े हैं और भिन्न एवं पृथक–पृथक वाद हेतुक पर अनुतोष चाह रहे हैं, तब प्रत्येक याची को पृथक–पृथक न्यायालय शुल्क अदा करना अपेक्षित है।

Cases referred :

(2009) 1 MPJR SN (5), 1976 MPLJ 6, 2006 CAL. HN3-462, 2006 CAL LJ-1-621, 2008(4) MPHT 279, AIR 1992 KAR. 342, AIR 1998 KAR. 99, AIR 1954 MAD. 594, AIR 1995 GUA.1, AIR 1981 SC 484, (2010) 1 SCC 234, AIR 1984 ALLA. 46.

D.K. Tiwari, for the petitioners.
R.D. Jain, A.G. with *Jaideep Singh,* Dy. G.A. for the respondents.
Ravish Agrawal with *K.S. Jha,* appeared as amicus curiae.

ORDER

The Order of the Court was delivered by **S.R. ALAM, C. J. :**–Learned Single Judge having found difficulty in agreeing with the view taken by learned Single Judge in the case of *Hukum Singh Vs. State of M.P.* [(2009) 1 MPJR SN (5)] has referred the following question for the opinion of the Larger Bench :-

> "Whether several petitioners have joined in one petition claiming individual rights based on similar set of facts or cause of action, whether all the petitioners are required to make payment of separate Court fees or one Court fees payable on the petition is sufficient ?"

2. Before adverting to the question referred to us, it would be useful to take note of the facts of the case. The petitioners had filed the writ petition being aggrieved by the action of respondents in adopting wrong procedure for regularization and in recommending juniors of the petitioners for regularization. In the said writ petition, the petitioners had sought the relief of regularization of their services and other consequential benefits. Since the reliefs sought were based on common facts, a joint petition was filed on behalf of all the petitioners and one set of Court fees of Rs.250/- was paid. The office raised an objection with regard to the amount of Court Fees on the ground that the petitioners being three in number ought to have paid Court Fees of Rs.750/-.

3. Learned counsel for the petitioners, however, placed reliance on the decision in the case of *Hukum Singh* (supra) and submitted that only one set of Court Fees is payable and, therefore, the office objection may be overrules. However, the learned Single Judge did not agree with the view taken in *Hukum Singh's case* (supra) and by order dated 29.6.2010, referred the question of payment of Court Fee in a joint petition claiming individual rights based on similar set of facts or cause of action for our consideration.

4. Shri Ravish Agrawal, learned Senior Counsel who has appeared as amicus curiae has drawn our attention to Section 4 of the Court Fees Act read with Article 1(e) (ii) of Scheduled II of the Court Fees Act and has contended that Court Fees Act provides for payment of Court Fee on petition

under Article 226 of the Constitution of India. For the purposes of determination of quantum of Court fee payable on writ petition, number of persons is totally an irrelevant consideration. It was contended by learned Senior counsel that so long as several persons could jointly maintain writ petition, one set of Court fee is sufficient. Even though provisions of Code of Civil Procedure are not applicable to the petition under Article 226 of the Constitution of India, the Principles underlying the provisions contained in Code of Civil Procedure are applicable and it is open to the Court to direct separate cases to be registered where number of persons have been joined as petitioners claiming similar reliefs against the respondents on the basis of distinct and separate cause of action. Learned senior counsel further submitted that the question of payment of Court fee, has to be decided on the anvil whether or not several persons can be permitted to be joined in one writ petition. If they cannot remain joint in one writ petition then they have to file separate writ petitions and to make payment of separate Court fee in respect of relief claimed by them. The question of payment of Court fee is connected with reliefs claimed and not the benefits expected to flow from the orders. In support of his submission, learned counsel has referred to Single Bench decision of this Court in *Heavy Electrical Employees Union and others Vs. State of Industrial Court, M.P., Indore and others,* 1976 MPLJ 6 and decision of Division Bench of Calcutta High Court in *Parul Debnath Vs. Union of India,* 2006 Cal HN3-462, 2006 CalLJ-1-621.

5. On the other hand, learned Advocate General while referring to provisions of Rule 23 Chapter-X of the High Court of M.P. Rules, 2008 has submitted that the writ petition under Article 226 of the Constitution of India has to be filed as far as possible in Format 7 and as far as possible conform to the provisions of Order 2 Rule 1,2 and 3 of the Code of Civil Procedure. It has further been contended that if several petitioners claiming similar reliefs file a writ petition jointly on the basis of distinct and separate causes of action in such a case, the Court may for the sake of convenience allow the petitioners to prosecute a joint petition subject to the condition that each of them pays separate Court fee on the principles underlying Section 17 of the Court Fees Act. It has further been submitted that in a writ petition filed jointly by several petitioners, here more than one relief is claimed on the basis of same cause of action, then also separate set of Court fee is required to be paid. It has further been contended that Full Bench of this Court in *S.P. Anand Vs. Registrar General, M.P. High Court, Jabalpur,* 2008 (4) MPHT 279 was dealing with the issue with regard to payment of security amount in public

interest litigation. Therefore, the aforesaid decision is of no assistance while deciding the question of payment of Court fee in a writ petition which has been filed jointly by several petitioners claiming similar relief. In support of his submissions, learned Advocate General has placed reliance on Full Bench decision of Karnataka High Court in *Cochin Trawl Net Boat Operators Association and others Vs. State of Kerla,* AIR 1992 *Karnataka 342, Gnana Jyothi TCH College, Belur Vs. State of Karnataka* AIR 1998 Karnataka 99, Full Bench decision of Madras High Court in *In re, D. Lakshminarayana Chettiar and another* AIR 1954 Madras 594, Full Bench decision of Guwahati High Court in *Sri Achinta Mili and others Vs. State of Asam,* AIR 1995 *Guwahati 1 and in Mota Singh Vs. State of Haryana,* AIR 1981 SC 484.

6. We have considered the submissions made on both sides. At this stage, we deem it appropriate to refer to the relevant provisions of the Court Fees Act, 1870, (hereinafter referred to as 'the Act'). Section 4 of the Act prescribes the court fees on the documents filed in the High Court in exercise of its extra-ordinary jurisdiction. Article 1(e)(a) of Schedule II of the Act prescribes the court fees of Rs.250/- on a writ petition preferred under Article 226 of the Constitution of India. Section 17 of the Act provides that in any suit in which two or more separate and distinct causes of action are joined and separate and distinct reliefs are sought in respect of each, the plaint shall be chargeable with the aggregate amount of the fees with which the plaints would be chargeable under this Act if separate suits were instituted in respect of each suit cause of action.

7. In *Mota Singh and others etc. etc. Vs. State of Haryana and others, etc.,* AIR 1981 SC 484, independent truck owners having no relations with each other as partners or under any other legally subsisting jural relationship of association of persons filed a common petition by paying single court fees challenging liability to pay impugned tax. The apex Court held that since each one has his own cause of action arising out of liability to pay tax individually, therefore, the petition of each one would be a separate and independent petition and each such person would be liable to pay legally payable court fees on his petition. Their Lordships observed that it would be travesty of law if one were to hold that as each one uses highway, he has common cause of action with the rest of truck pliers.

8. It is well settled legal proposition that even though provisions of Code of Civil Procedure are not applicable to the petitions under Article 226 of the Constitution of India, yet principles underlying them are applicable. (See.(2010)1 SCC 234, *Bharat Amratlal Kothari and another Vs.*

Dosukhan Samadkhan Sindhi and others) Thus, the joinder of more than one person under Article 226 can be permitted where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right to claim relief does not arise from same act or transaction, the petitioners are jointly interested in the cause or causes of action. In other words, joinder of more than one person is permissible when the cause of action is the same. Our view finds support from the Full Bench decision of Allahabad High Court in the case of *Umesh Chand Vinod Kumar and others Vs. Krishi Utpadan Mandi Samiti,* AIR 1984 Allahabad 46. Therefore, in a case where in a petition number of persons have joined as petitioners claiming similar reliefs against a party on the basis of distinct and separate causes of action, in such a case also, the Court may for the sake of convenience allow the petitioners to prosecute a joint petition subject to the condition that each one of them have paid separate court fee on the principle underlying section 17 of the Act.

9. Thus, cause of action may be common if the liability or the relief sought is to be granted individually and separately in that event each petitioner's combining together in one petition would be liable to pay separate court fees, because each petitioner has his own independent cause of action and, therefore, though they have filed the petition together but that is a separate and independent petition. Separate court fees can be demanded from each of the petitioners only when it appears to the Court that causes of action are distinct and separate. For instance, ten persons are transferred by a common order and they file a joint petition challenging the order of transfer, the relief claimed by them is based on separate causes of action and, therefore, in such a case they are liable to pay separate set of court fees.

10. For the aforementioned reasons, we are of the considered opinion that in a joint petition where each of the petitioner has his separate cause of action which may or may not arise out of the same act or transaction, each of the petitioner is required to pay separate court fees on the principle underlying section 17 of the Act. Thus, our answer to the reference is where more than one person have joined in one petition and are seeking relief on distinct and separate causes of action, then each of the petitioner is required to make payment of separate court fees.

11. Let the matter be now placed before the appropriate Bench for orders.

Order accordingly.

I.L.R. [2011] M. P., 2739

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 9524/2007 (S) (Jabalpur) decided on 1 August, 2011

CHUNNILAL SEN ...Petitioner

Vs.

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

***Service Law - House Rent Allowance* - HRA is a special allowance prescribed under a scheme made by the State to grant benefit to such employees who are not allotted the Government accommodation - Scheme of HRA is introduced to grant some benefit to those employees, who are living in their own houses and are working for the State - Though the allowance has not been specifically mentioned under Fundamental Rules or under other service Rules but the scheme is squarely applicable to all employees of the State - Respondents are directed to pay the HRA to the petitioner - Writ petition allowed.**

It was not right on the part of the respondents/State to say that since under definition of 'pay' as given under Fundamental Rules, HRA is not added, the petitioner will not be entitled to the same. (Paras 5 & 6)

सेवा विधि – गृह भाड़ा भत्ता – एचआरए एक विशेष भत्ता है जिसे राज्य सरकार द्वारा योजना के अंतर्गत ऐसे कर्मचारियों को लाभ प्रदान करने हेतु विहित किया गया है जिन्हें सरकारी स्थान का आवंटन नहीं किया गया है – एचआरए की योजना उन कर्मचारियों को कुछ लाभ प्रदान करने के लिए पुरःस्थापित की गयी है जो अपने स्वयं के मकानों में रह रहे हैं और राज्य के लिये कार्य कर रहे हैं – यद्यपि मूलभूत नियम के अंतर्गत या अन्य सेवा नियमों के अंतर्गत भत्ता विनिर्दिष्ट रुप से उल्लिखित नहीं है किन्तु योजना पूरी तरह से राज्य के सभी कर्मचारियों को लागू होती है – याची को एचआरए का भुगतान करने के लिए प्रत्यर्थियों को निदेशित किया गया – रिट याचिका मंजूर।

Case referred :

2006(4) SCC 1.

Pushpendra Yadav, for the petitioner.

Sanjeev Kumar Singh, PL for the respondents/State.

ORDER

K.K. TRIVEDI, J.:– Since common questions is involved in these writ petitions they were heard together. This order shall also govern the disposal

of W.P. No.9218/2006 (S) and W.P. No. 9219/2006 (S). The facts and documents referred in this order are taken from W.P. No. 9524/2007.

2. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the validity of order dated 15.03.2007 passed by respondent No.2 by which the House Rent Allowance (hereinafter referred to as 'HRA') has been denied to the petitioner, stating that in terms of the instructions issued by the respondent No. 1 HRA is not included in the pay and, therefore, the petitioner will not be entitled to the same. It is the contention of the petitioner that he was being paid the HRA but all of a sudden such orders have been issued withholding the HRA. It is further contended by the petitioner that by filing O.A. No. 598/2002 before the M.P. Administrative Tribunal Bench at Bhopal claiming the benefit of minimum of the pay of the post of Lower Division Clerk/Assistant Grade-III from the date of his appointment of the said post was claimed by the petitioner. The petitioner brought to the notice a decision of the Tribunal rendered in the case of *Bharat Darshan Shrivastava Vs. State of M.P.* The said original application came before this Court after closer of the Tribunal and was registered as W.P. No. 26702/2003. The said matter was listed before this Court on 04.11.2004 and this Court after considering the order passed by the Tribunal in *Bharat Darshan Shrivastava and others* (supra) disposed of the writ petition with a direction to the respondents to consider the claim of the petitioner within a period of six months and if his case was identical to the case of *Bharat Darshan Shrivastava* (supra), pass an appropriate order and grant the benefit as per the order passed by the Tribunal in the aforesaid case. It is the contention of the petitioner that the claim with respect to HRA was also considered in the case of *Bharat Darshan Shrivastava* (supra) by the Tribunal and it was categorically held that, since the matter relating to grant of such benefit to daily wagers also, has travelled upto the Apex Court and all such orders of the Tribunal have been affirmed, and since the persons like Bharat Darshan Shrivastava were living in their own houses they be granted the benefit of HRA along with the salary. It is contended by the petitioner that in view of the aforesaid the order was passed in his favour on 03.06.2004 and he was extended all the benefits of the minimum of the pay scale available to the post of Assistant Grade-III and other allowances payable with the said scale. Accordingly, the petitioner was getting the HRA also. Now contending that the HRA is not the part of the allowances which are sanctioned along with the pay, petitioner will not be entitled to such benefit, the order impugned has

been passed which is contrary to the law settled by the Tribunal, affirmed by this Court as also by the Apex Court. Therefore, the prayer is made for quashing of the order impugned.

3. The respondents in their return have contended that the definition of 'pay' as given in Fundamental Rule 9 (21) means only the pay, other than special pay or the pay granted in lieu of his personal qualifications, which has been sanctioned for the post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in a cadre. According to them HRA is not including in the pay and, therefore, as per the aforesaid definition, the person like petitioner will not be entitled to the benefit of HRA. However, relying on the case of *Secretary, State of Karnataka and others Vs. Uma Devi and others,* 2006 (4) SCC 1, it has been contended by the respondents that while issuing the directions to make the scheme for regularization of daily wagers, it has been said that the persons like petitioners would be given a minimum of the pay scale of the post on which they are working as daily wagers. It is therefore, submitted by the respondents that the petitioner will not be entitled to the benefit of HRA. Thus, it is contended that the petition is misconceived and is liable to be dismissed.

4. In the considered opinion of this Court the entire stand taken by the respondents is incorrect and rests on wrong interpretation of word 'pay". In fact what is required to be seen is the emoluments which an employee gets as a salary every month. This particular aspect was already considered by the Tribunal in an application filed before the said Tribunal by Bharat Darshan Shrivastava and specific order was passed in O.A. No. 400/94 on 15.12.1997. From the order passed inM.A. No. 71/1998 by the M.P. Administrative Tribunal Bench at Bhopal Anenxure P-3 to the writ petition, it is clear that order passed by the Tribunal was assailed before the Division Bench of this Court by respondents/State but the said writ petition was dismissed. The respondents/State preferred a Special Leave Petition before the Supreme Court but the same was also dismissed. Therefore, the decision rendered by the Tribunal becomes final and binding on the State. The very same decision was relied by the petitioner. The orders passed in aforesaid M.A. No-71/1998 further indicates that the word 'HRA' was interpreted properly and it was categorically held that those daily wagers who were granted benefit of minimum of the pay scale, by virtue of the aforesaid orders, were also entitled to grant of HRA. This being so, the petitioner was also given the same order by the respondents on their own on 03.06,2004. By a subsequent order said

to be issued by the respondent No.1 with reference to a case of a different person which could not have been made applicable to the case of the petitioner the benefit of HRA has been withdrawn by the respondents, by the impugned order, from the petitioner. What was the circumstances in the said case, whether the case of Shri Sudip Trivedi, who filed the Original Application before the Tribunal was identical or different, nothing has been indicated. How and why the said person was not entitled to grant of HRA is also not clear. If the person was specifically granted the benefit of order passed by the Tribunal in the case of *Bharat Darshan Shrivastava* (supra), he was entitled to HRA also which according to the order of respondent issued on 03.06.2004 was made available to the petitioner.

5. The entire confusion is, whether an employee is entitled to grant of HRA or not? HRA is a special allowance prescribed under a scheme made by the State to grant benefit of allowances, in case such employees are not allotted the Government accommodation. Looking to the number of employees, it is quite difficult for the State to provide residential accommodation or quarters to all employees engaged by the State. The scheme of HRA is therefore introduced to grant some benefit to those employees, who are living in their own houses and are working for the State. This being so, this allowance has not been specifically mentioned under Fundamental Rules or under other service Rules but the scheme is squarely applicable to all employees of the State. Therefore, it was not right on the part of the respondents/State to say that since under definition of 'pay' as given under Fundamental Rules, HRA is not added, the petitioner will not be entitled to the same. Secondly, in case of *Uma Devi* (supra) the Apex Court has granted solace or some sort of relief for those employees who are said to be working as daily wagers for a period of more than 10 years but are not being considered for regularization for one reason or another. The Apex Court has simply said that those who were working as daily wagers for a long period be given certain benefit or the minimum of the pay scale. That by itself will not amount as if the Supreme Court has denied the grant of other allowances to such daily wager employees. It is only a direction to the competent authority to make the scheme in this respect. This being so, the reliance placed by the respondents in the case of *Uma Devi* (supra) is totally misconceived. The said decision will not be attracted in the present cases.

6. For the reasons aforesaid, the order passed by respondents cannot be sustained and therefore, the order impugned dated 15.03.2007 (Annexure

P-5) is hereby quashed. The respondents are directed to pay the HRA to the petitioner which he was getting from the date the Benefit of regular pay scale was made avilable to him on the fixation of salary as is indicated in document (Annexure P-4) it was specifically said that the petitioner was being paid HRA @ Rs. 244/- per month. The arrears of HRA be paid to the petitioner within a period of two months from the date of receipt of certified copy of the order passed today and to continue to pay the said benefit to the petitioner.

With the aforesaid directions, the writ petition is allowed and disposed of but with no order as to costs.

Petition allowed.

I.L.R. [2011] M. P., 2743
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 1627/2009 (Gwalior) decided on 16 August, 2011

VIRENDRA KUMAR SWARNKAR ...Petitioner
Vs.
MADHYA PRADESH STATE AGRICULTURAL MARKETING BOARD & anr. ...Respondents

A. Constitution, Article 226 - Writ Petition - **Findings of D.P.C. is based on inadmissible, irrelevant or insignificant material/fact - This can very well be a ground to interfere in Article 226 proceedings.** (Para 11)

क. संविधान, अनुच्छेद 226 – रिट याचिका – डी.पी.सी. के निष्कर्ष, अग्राहय्, असंगत एवं महत्वहीन सामग्री/तथ्य पर आधारित है – यह अनुच्छेद 226 की कार्यवाही में हस्तक्षेप के लिये उचित आधार हो सकता है।

B. Service Law - Public Services (Promotion) Rules, M.P. 2002 - Promotion - **There is no impediment for promotion to an employee who is inflicted with a minor punishment which came to an end much before the D.P.C. - The rule no where provides that such employee can be treated as "unsuitable" for promotion.**

Once the petitioner is admittedly eligible for consideration for promotion and has obtained sufficient marks to be promoted, the only impediment shown by the respondents can not be a ground for depriving him from the fruits of promotion - A minor punishment which came to an end on 25.02.2008 - Thus, the right of meaningful consideration for promotion

of the petitioner is infringed which hits Article 14 & 16(1) of the Consitution of India - Petition allowed. (Paras 13, 15, & 18)

ख. सेवा विधि – लोक सेवा (पदोन्नति) नियम, म.प्र. 2002 – पदोन्नति – ऐसे कर्मचारी की पदोन्नति हेतु कोई बाधा नहीं जिस पर लघु शास्ति अधिरोपित की गयी जो डी.पी.सी. के काफी समय पूर्व समाप्त हो गयी थी – नियम कहीं भी उपबंधित नहीं करते कि ऐसे कर्मचारी को पदोन्नति हेतु 'अनुपयुक्त' माना जा सकता है।

Cases referred :

(2000) 8 SCC 395, 1991 SUPP (2) SCC 199, (1999) 7 SCC 209, (2007) 6 SCC 704, AIR 1991 SC 2010, (2000) 6 SCC 698, (2010) 1 SCC 335.

Vivek Jain, for the petitioner.

Nitin Agrawal, for the respondents.

ORDER

SUJOY PAUL, J.:–Brief facts for the decision of this matter are as under:-

2. The petitioner, an Assistant Sub Inspector posted at Krishi Upaj Mandi Samiti was eligible to be promoted on the post of Mandi Inspector. The petitioner's name was reflected at serial No. 384 of the gradation list (Annexure P-2). The promotion orders were issued on 2.7.2008 (Annexure P-1). Shri Vivek Jain submits that the petitioner was inflicted with a minor punishment on 21.2.2007. By that order, petitioner's one annual increment was withheld for one year without cumulative effect. Shri Jain submits that the said currency of punishment came to an end on 25.2.2008. Shri Jain further submits that a bare perusal of the promotion order dated 2.7.2008 shows that the D.P.C. for the same was convened on 26.6.2008. Shri Jain submits that on the date of D.P.C., the petitioner was not under cloud nor was undergoing punishment.

3. The case of the petitioner is that no adverse C.R. is communicated to him and he was not subjected to any other disciplinary proceedings, which can be a reason for depriving him from promotion. Shri Jain submits that the findings of D.P.C. are irrelevant, arbitrary and violative of Article 14 and 16 (1) of the Constitution of India. The learned counsel further submits that right of consideration for promotion is now recognized as a statutory as well as fundamental right which flows from Article 14 and 16 (1) of the Constitution of India. The learned counsel further submits that right of consideration includes in it a right of meaningful consideration. Shri Jain submits that the petitioner has been deprived from promotion on extraneous considerations and, therefore, it warrants interference of this Court under Article 226 of the Constitution of India.

4. Per contra, Shri Nitin Agrawal submits that the petitioner was undergoing punishment and D.P.C. took it into account. He supported the findings of the D.P.C. The stand of Shri Nitin Arawal, learned counsel for the respondents is that D.P.C. has not committed any error of law which warrants interference in the present writ proceedings.

5. I have heard the learned counsel for the parties and perused the record.

6. Shri Nitin Agrawal also produced the D.P.C. proceedings for the perusal of this Court. The stand of the respondents is that the petitioner was not found suitable for promotion by the D.P.C. in its meeting held on 26.6.2008 on the basis of norms and criteria fixed by it. It is further submitted that the petitioner was inflicted with a punishment on 21.2.2007 and, therefore, D.P.C. rightly held that the petitioner is unsuitable.

7. A bare perusal of D.P.C. Proceedings shows that Madhya Pradesh Public Services (Promotion) Rules, 2002 were made applicable in the matter. As per rule 4 of the said rules, the promotion within Class-III to Class-III and even from Class-III to Class-II are required to be made on the criteria of "Seniority subject to fitness". The said rule is re-produced here-in-under:-

> **4. Determination of basis of promotion--(1) Promotion from class IV to higher pay scale of class IV, class IV to class III, class III to higher pay scale of class III, class III to class II, class II to higher pay scale of class II and class III to class I posts shall be made on the basis of "seniority subject to fitness".**
>
> **(2) Promotion from class I to higher pay scale of class I posts shall be made on the basis of "merit-cum-seniority".**

8. Rule 6 of the said rules provides the method of promotion on the basis of "seniority subject to fitness". As per rule 6(7), the D.P.C. was required to consider the case of each public servant separately on the basis of his own merit.

9. In the light of aforesaid rules, this Court has minutely perused the D.P.C. proceedings. The D.P.C. has drawn a list of eligible general candidates wherein the name of the petitioner finds place at serial No. 351. The petitioner obtained four "Ka" and one "Kha". The total marks given to the petitioner on the basis of aforesaid ACR entries were 14. In Clause 8 of the said D.P.C. proceedings,

it is mentioned that after scrutiny this fact came out that against the petitioner by order dated 21.2.2007, penalty of withholding of one increment without cumulative effect was imposed, only on the basis of this reason that the petitioner had suffered a small punishment which continued from 25.2.2007 to 25.2.2008, he was not found fit for promotion in D.P.C. which held on 26.6.2008. Thus, the pivotal question for determination is whether a minor punishment which lost its complete effect much before holding of D.P.C., can be a valid reason for depriving promotion in the criteria of "seniority subject to fitness?".

10. It is true that while exercising writ jurisdiction under Article 226 of the Constitution of India, this Court cannot sit as an appellate authority over the proceedings and decisions of D.P.C. However, the scope of interference in the findings of D.P.C. is well established in view of the judgment of the Supreme Court reported in (2000)8 SCC 395, *Badrinath Vs. Government of Tamil Nadu and others*. In para 40 of the said judgment, the Apex Court held as under:-

> **"Unless there is a strong case for applying the Wednesbury doctrine or there are mala fides, courts and Tribunlas cannot interfere with assessments made by Departmental Promotion Committees in regard to merit or fitness for promotion. But in rare cases, if the assessment is either proved to be mala fide or is found based on inadmissible or irrelevant or insignificant and trivial material and if an attitude of ignoring or not giving weight to the positive aspects of one's career is strongly displayed, or if the inferences drawn are such that no reasonable person can reach such conclusions, or if there is illegality attached to the decision, then the powers of judicial review under Article 226 of the Constitution are not foreclosed."** **(emphasis added)**

11. In view of this legal position, it is crystal clear that the Wednesbury principle is made applicable even in cases of D.P.C. proceedings/promotion. If the findings of D.P.C. is based on inadmissible, irrelevant or insignificant material/fact, this can very well be a ground to interfere in Article 226 proceedings. Thus, in the light of 2002 rules, it is required to be examined whether singular reason of imposition of punishment which came to an end much before the date of D.P.C. can be a valid reason to deprive the petitioner from the fruits of promotion.

12. It is settled in law that right of consideration for promotion is statutory as well as fundamental under Article 14 read with 16 of the Constitution of India. The Apex Court in the judgments reported in 1991 Supp (2) Supreme Court Cases 199, *Co. Arumugam and Others Vs. State of Tamil Nadu and Others,* (1999) 7 Supreme Court cases 209, *Ajit Singh and Others (II) Vs. State of Punjab and others* and (2007) 6 Supreme Court cases 704, *Union of India and Others Vs. Sangram Keshari Nayak* held that the right of consideration is a fundamental right and such right includes in it a right of meaningful consideration.

13. It is also settled in law in view of judgment of Supreme Court in *Union of India Vs. K.V.Jankiraman,* reported in AIR 1991 SC 2010 that if an employee is served with a charge sheet in a departmental enquiry and if a challan is filed against him in a criminal case, his fate will be kept in sealed cover. In that case, the D.P.C. will consider his case for promotion but its outcome shall be kept in a sealed cover. If the person is exonerated from the charges, then only such sealed cover can be opened. A microscopic reading of 2002 rules no where shows that there is any impediment for promotion to an employee who is inflicted with a minor punishment which came to an end much before the D.P.C. The rule no where provides that such employee can be treated as "unsuitable" for promotion. It is also settled in law in view of catina of judgments of Supreme Court that in the criteria of "seniority cum fitness/ suitability" there is no scope of comparison of interse merits of the candidates and seniority has to be given preference. The Apex Court in the case reported in (2000) 6 SCC 698 (*Union of India and others Vs. Lt. Gen. R. Rajendra Singh Kadyan and Others*) held as under:-

> **"There is no requirement of assessment of comparative merit both in the case of seniority-cum- fitness and seniority-cum-merit."**

14. Recently in the case reported in (2010) 1 SCC 335 (*Rajendra Kumar Srivastava and others Vs. Samyut Kshetriya Gramin Bank and others*), the Apex Court held as under:-

> **"Where promotion is on the basis of seniority alone, merit will not play any part at all."**

15. In the light of the aforesaid, it is clear like noon day that once the petitioner is admittedly eligible for consideration for promotion and has obtained

sufficient marks to be promoted, the only impediment shown by the respondents cannot be a ground for depriving him from the fruits of promotion.

16. In the present case, it is not disputed by the respondents that a sizable number of juniors have been promoted. On perusal of the D.P.C. proceedings, it is further gathered that the petitioner has received 14 marks as per his A.C.R. gradings whereas the persons who had received even nine marks in his category have been promoted.

17. In the light of the aforesaid, in the opinion of this Court, the D.P.C. has taken into account an extraneous, irrelevant, inadmissible and insignificant material into consideration, i.e., a minor punishment which came to an end on 25.2.2008. Thus, this attracts Wednesbury principle. This Court has no hesitation to hold that the petitioner who was otherwise within the zone of consideration, eligible and obtained sufficient marks to be entitled for promotion, was deprived for promotion because of aforesaid irrelevant, insignificant and extraneous material which could not have been taken into account to deprive the petitioner. Thus, the right of meaningful consideration for promotion of the petitioner is infringed which hits Article 14 and 16(1) of the Constitution of India.

18. The result is inescapable. The D.P.C. proceedings are bad in law to the extent it declared the petitioner as unsuitable for promotion on the basis of punishment dated 25.2.2007. The respondents are, accordingly directed to reconsider the case of the petitioner for promotion to the post of Mandi Inspector w.e.f. 2.7.2008, the date on which his juniors have been promoted to the said post. The respondents are further directed to pay all consequential benefits to the petitioner on his promotion from 2.7.2008. The aforesaid exercise be completed within 45 days from the date of receipt of certified copy of this order. The respondents shall pay Rs.5000/- as cost to the petitioner.

19. The petition is allowed.

Petition allowed.

I.L.R. [2011] M. P., 2749

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No.7416/2010 (Jabalpur) decided on 24 August, 2011

RAJENDRA KUMAR AGRAWAL ...Petitioner

Vs.

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

Land Revenue Code, M.P. (20 of 1959), Section 51(1) - Review - **Proceedings for review initiated by the Collector who had passed the order, but the review order was passed by the Collector, who was successor in office - Held - It was imperative on the part of the Collector to seek permission of the Board of Revenue before seeking to review the order passed by his predecessor in office - Impugned order is without jurisdiction.** (Para 8)

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 51(1) – पुनर्विलोकन – कलेक्टर जिसने आदेश पारित किया था, द्वारा पुनर्विलोकन हेतु कार्यवाही आरंभ की गयी परंतु पुनर्विलोकन आदेश, पद उत्तरवर्ती कलेक्टर द्वारा पारित किया गया – अभिनिर्धारित– उसके पद पूर्ववर्ती द्वारा पारित आदेश का पुनर्विलोकन करने से पूर्व कलेक्टर की ओर से राजस्व मंडल की अनुमति अभिप्राप्त करना अनिवार्य था – आक्षेपित आदेश बिना आधिकारिता के है।

Cases referred :

1988 RN 45, 1998 RN 415, 2010 RN 124, AIR 1977 SC 740, AIR 1975 SC 915, (1975) 1 SCC 559, (2002) 1 SCC 622, 200 RN 1610.

R.L. Gupta and *Sidharth Gupta*, for the petitioner.

Lalit Joglekar, G.A. for the respondents.

ORDER

ALOK ARADHE, J.:–In these two petitions under Article 226 of the Constitution of India the petitioners have challenged the validity of the orders dated 28.1.2010 and 27.1.2010 by which the Collector in exercise of power under Section 51 (1) of the M.P. Land Revenue Code, 1959 (hereinafter referred to as 'the Code') has reviewed the order dated 13.10.2008 and the order dated 6.10.2008 respectively. In order to appreciate the controversy involved in the petitions, the facts from W. P. No. 7416 2010 are being referred to.

2. The land bearing kharsa number 362/3 admeasuring 0.795 hectare situate at village- Chaka Tahsil and district - Katni was being used by the

villagers for the purpose of cremation though the same was held in bhumiswami rights. The petitioner purchased the aforesaid land vide registered sale deed dated 29.12.2007 from its erstwhile owner. Thereafter the petitioner made an application for exchange of the land. On the application submitted by the petitioner an enquiry was conduced by Tahsildar and the enquiry report (Annexure P-2) dated 23.5.2008 was submitted. Thereupon a notice was published inviting objections with regard to exchange of the land. The Gram Sabha through the Gram Panchayat, Chaka also submitted the 'no objection certificate' for exchange of land in question. The patwari submitted the report pointing out that the value of the land belonging to the petitioner is Rs.4,12,053/-. The Collector vide order dated 13.10.2008 Annexure P-4 allowed the application for exchange of land submitted by the petitioner subject to the condition that the petitioner shall deposit a sum of Rs.2,46,800/- i.e.difference in the value of the land of the petitioner and that of the land which was allotted to the petitioner bearing khasra number 198 admeasuring 0.30 hectare. It was further directed that the land which is allotted to the petitioner shall be used for the agricultural purpose only and the petitioner shall not claim any compensation in respect of 0.100 hectare of land.

3. The Collector thereafter in exercise of suo motu powers under Section 51 (1) of the Code initiated the proceedings on 12.6.2009 for review of the order dated 13.10.2008 and by order dated 28.1.2010, order dated 13.10.2008 was reviewed and the amount deposited by the petitioner was directed to be refunded. In the aforesaid factual background the petitioner has visited this Court.

4. Shri R.L. Gupta, learned counsel for the petitioner submitted that the order dated 28.1.2010 passed by the Collector is ab initio void as no prior permission from the Board of Revenue was taken by the Collector prior to invocation of suo motu power under Section 51 of the Code. It has further been submitted that suo motu power was exercised by the Colllector after inordinate delay. Since, the order is ab initio void therefore, the doctrine of alternative remedy would not apply in the facts and circumstances of the case. In support of his submissions, learned counsel for the petitioner has placed reliance on the decisions in *Bhagwati Prasad v. Marketing Society, Karera,* 1988 RN 45, *Bhagwandas and Others v. State of M.P. and Others,* 1998 RN 415 and *Biharilal v. State of M.P. and Others,* 2010 RN 124.

5. On the other hand, learned Panel Lawyer for the respondents submitted

that the land bearing khasra number 362/3 was reserved for the purpose of cremation prior to 1956. In this connection reference has been made to the document contained in Annexure R-3. It was further submitted that Tahsildar after conducting the enquiry vide order dated 5.7.2010 had struck out the name of predecessor-in-title of the petitioner from the revenue record therefore, no title was conveyed to the petitioner. The application was filed with ulterior motive to grab the valuable land of the government bearing khasra number 198 situate near National Highway No. 7. It was also submitted that since, the Collector who had passed the order on 13.10.2008 had initiated the proceeding for review on 12.6.2009 therefore no permission was required to be obtained from the Board of Revenue under Section 51 of the Code. It was also pointed out that against the order impugned in the instant petition, the petitioner has the remedy of filing of an appeal under Section 44 of the Code, therefore, in view of the availability of alternative remedy, the writ petition should not be entertained.

6. I have considered the submissions made by learned counsel for the parties. Relevant extract of Section 51 of the Code reads as under :

> *"51. Reveiew of orders.-* (1) The Board and every Revenue Officer may, either on its/his own motion or on the application of any party interested review any order passed by itself/himself or by any of its/his predecessors in office and pass such order in reference thereto as it/he thinks fit: provided that- [i] if the Comissioner, Settlement Commissioner, Collector or Settlement Officer thinks it necessary to review any order which he has not himself passed, he shall first obtain the sanction of the Board, and if an officer sub-ordinate to a Collector or Settlement Officer proposes to review any order, whether passed by himself or by any predecessor, he shall first obtain the sanction in writing of the authority to whom he is immediately subordinate;"

Thus, from perusal of Section 51 of the Code it is apparent that where an officer seeks to review the order passed by his predecessor in office, he has to obtain sanction from the higher authority.

7. The power to review is a creature of statute and does not exist till it is provided by the statute. It is equally settled that the if the conditions in which power of review has to be exercised are specified by the statute then on fulfilament of those conditions alone, the power conferred, becomes

annexed with a duty to be exercised in that manner. [See: *Official Liquidator v. Dharti Dhan(P) Ltd,* AIR 1977 SC 740]. It is also well settled legal proposition that where the statute prescribes a mode of doing of certain thing in certain way that thing must be done in that way and not at all. [*Ramchandra Keshav Adke v. Govind Joti Chavare and Others,* AIR 1975 SC 915= (1975) 1 SCC 559 and *State of Maharashtra v, Bharat Fakira Dhiwar,* (2002) 1 SCC 622]

8. In the backdrop of well settled legal position, the facts of the case may be seen. In the instant case though the proceedings for review were initiated by the Collector who had passed the order dated 13.10.2008, yet the order reviewing the order dated 13.10.2008 was passed by the Collector who was successor in office of the Collector who had passed the order dated 13.10.2008. Thus, it was imperative on the part of the Collector to seek permission of the Board of Revenue before seeking to review the order passed by his predecessor in office. [*Ravi Narayan v. State of M.P. and Others,* 2000 RN 161 and *Biharilal* (supra)] The availability of an alternative remedy does not operate as a bar in a case where the order is wholly without jurisdiction. [See: AIR 1969 SC 556, *Whirpool corpon. V. Registrar of Trade Marks,* (1998) 8 SCC 1, *Harbanslal Sahia v. Indian Oil Corpn. Ltd.*, (2003) 2 SCC 107 and *Sanjana M. Wig (Ms) v. Hindustan Petroleum Corpn. Ltd.*, (2005) 8 SCC 242] The impugned order dated 28.1.2010 is without jurisdiction as the same has admittedly been passed without obtaining permission from the Board of Revenue. Therefore, the contention of the learned Government Advocate that the petitioner should be relegated to avail the alternative remedy cannot be accepted. Accordingly, the order dated 28.1.2010 is quashed. Needless to state that the respondents would be at liberty to proceed against the petitioners after taking permission from the Board of Revenue.

9. Accordingly, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2011] M. P., 2753

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 5671/2011(Gwalior) decided on 6 September, 2011

BRIJ MOHAN SINGH ...:Petitioner

Vs.

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

A. Constitution, Article 226 - Power and Jurisdiction - **Despite availability of alternate remedy, the High Court can exercise its powers and jurisdiction under Article 226 - However, there is a self imposed restraint on the High Court while deciding regarding exercise of such powers - The writ petition can be entertained if it is shown that there is something more in a case, something which would show that it would be a case of palpable injustice to the writ petitioner if he is forced to adopt the remedies provided by the statute.** (Paras 5 & 13)

क. संविधान, अनुच्छेद 226 – शक्ति एवं अधिकारिता – वैकल्पिक उपचार की उपलब्धता के बावजूद उच्च न्यायालय अनुच्छेद 226 के अंतर्गत अपनी शक्ति एवं अधिकारिता का प्रयोग कर सकता है – किन्तु, ऐसी शक्तियों के प्रयोग के संबंध में निर्णय करते समय उच्च न्यायालय पर स्वयं अधिरोपित अवरोध है – रिट याचिका ग्रहण की जा सकती है यदि यह दर्शाया जाता है कि प्रकरण में कुछ और अधिक है, कुछ ऐसा जो यह दर्शाये कि रिट याची पर प्रत्यक्ष अन्याय का मामला होगा यदि उसे कानून द्वारा उपबंधित उपचारों को अंगीकृत करने के लिये बाध्य किया गया।

B. Constitution, Article 226 - Writ Petition - Alternative Remedy - **Disciplinary authority passed the impugned order and inflicted the punishment - This order is admittedly appealable under Rule 23 of M.P. C.S. (CCA) Rules, 1966 - Held - The Rules are complete code and provide in house redressal of grievance - It can not be said that efficacious remedy is not available to the petitioner - No interference is warranted.** (Paras 1, 2 & 4)

ख. संविधान, अनुच्छेद 226 – रिट याचिका – वैकल्पिक उपचार – अनुशासनिक प्राधिकारी ने आक्षेपित आदेश पारित किया और शस्ति अधिरोपित की – यह आदेश म.प्र. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम 1966 के अंतर्गत स्वीकृत रुप से अपीलीय है – अभिनिर्धारित – नियम संपूर्ण संहिता है और इसके भीतर ही शिकायत का निवारण उपबंधित करते हैं – यह नहीं कहा जा सकता कि याची को प्रभावकारी उपचार उपलब्ध नहीं है – किसी हस्तक्षेप की आवश्यकता नहीं।

Cases referred :

2009(2) SCC 630, ILR (2011) MP 354, (1998) 8 SCC 1, (2003) 2 SCC 107, (2007) 10 SCC 88, (2005) 8 SCC 242, (2005) 8 SCC 264, (2010) 8 SCC 110, (2011) 2 SCC 782, (2011) 2 SCC 575.

Sanjeev Tiwari, for the petitioner.

Bhagwan Raj Pandey, G.A. for the respondents/State

ORDER

SUJOY PAUL, J.:—Heard.

This order shall also govern the disposal of W.P N0.5672/2011, 5673/2011, 5674/2011, 5675/2011, 5676/2011, 5577/2011, 5678,2011, 5579/2011 and 5681 /2011.

The facts are taken from W.P No.5671/2011.

1. Learned counsel for the petitioner submits that earlier by an order dated 17.08.2009 a punishment was inflicted on the petitioner without giving him any opportunity by the Disciplinary Authority/Collector. Against this order, petitioner preferred an appeal under Rule 23 of M.P. C.S (CCA) Rules, 1966 (hereinafter referred to as 'Rules of 1966'). The Commissioner/Appellate Authority passed an order dated 07.12.2009 (Annexure P/3). The Appellate Authority accepted the appeal partially and quashed the order dated 17.08.2009 .(Annexure P/2). The Appellate Authority remitted the matter back to the Disciplinary Authority to give opportunity to the petitioner and then proceed further. Thereafter, a show cause notice dated 07.04.2010 (Annexure P/4) was issued to the petitioner. In turn, petitioner submitted his reply (Annexure P/5). The Disciplinary Authority passed the impugned order dated 05.05.2011 and inflicted the punishment. This order is under challenge in this petition.

2. Learned counsel for the petitioner fairly admits that this order dated 05.05.2011 is appealable under rule 23 of the said Rules. However, by placing reliance on 2009(2) SCC 630 (*Committee of Management and Another Vs. Vice Chancellor and Others*) learned counsel submits that the availability of alternate remedy is not a bar for this Court to exercise the power and jurisdiction under Article 226 of the Constitution. He further submits that the Collector has passed a non-speaking order and such order runs contrary to the law laid down by this Hon'ble Court in the case of *Mahila Rukhmani Primary Consumer Co-operative Society Vs. State of M.P and Others* reported in ILR (2011) MP 354.

3. I have heard learned counsel for the parties and perused the record.

4. Rule 23 of Rules of 1966 reads as under:-

> "23. **Orders against which appeal lies:-** Subject to the provisions of Rule 22, a Government servant may prefer an appeal against all or any of the following orders, namely :-
>
> (i) an order imposing any of the penalties specified in Rule 10 whether made by the disciplinary authority or by any appellate or reviewing authority:

The aforesaid Rules of 1966 are complete code and provide in house redressal of grievance. On earlier occasion, when petitioner preferred an appeal against Annexure P/2, the Appellate Authority redressed his grievance, therefore by no stretch of imagination it can be said that efficacious remedy is not available to the petitioner.

5. It cannot be disputed that despite availability of alternate remedy, this Court can exercise its powers and jurisdiction under Article 226 of the Constitution of India. However, there is a self imposed restraint on this Court while deciding regarding exercise of power under Article 226 of the Constitution of India.

6. Supreme Court in the following judgments has held as under:-

In case of *Whirlpool Corpn. v. Registrar of Trade Marks,* (1998) 8 SCC 1, it is held as under:-

> "Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction." (Emphasis added)

7. In case of *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*, (2003) 2 SCC 107 : *M.P. State Agro Industries Development Corpn. Ltd. v. Jahan Khan,* (2007) 10 SCC 88, it is held as under:-

> "suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of avail-

ability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. "

8. In case of *Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd.*, (2005) 8 SCC 242, it is held under:-

"However, there cannot be any doubt whatsoever that the question as to when such a discretionary jurisdiction is to be exercised or refused to be exercised by the High Court has to be determined having regard to the facts and circumstances of each case wherefor, no hard-and-fast rule can be laid down. "

9. In case of *U.P. State Spg. Co. Ltd. v. R.S. Pandey,* (2005) 8 SCC 264, it is held as under:-

"Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute." (Emphasis added)

10. In case of *United Bank of India v. Satyawati Tondon,* (2010) 8 SCC 110, it is held as under:-

"we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this

Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance."

11. Incase of *Kanaiyalal Lalchand Sachdev v. State of Maharashtra,* (2011) 2 SCC 782, at page 789

"23. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (*Sadhana Lodh v. National Insurance Co. Ltd.*, (2003)3 SCC 524, *Surya Dev Rai v. Ram Chander Rai* (2003) 6 SCC 675 and *SBI v. Allied Chemical Laboratories* (2006)9 SCC 252).

24. In *City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala* (2009)1 SCC 168, this Court had observed as under:-

"30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether.

(a) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(b) the person invoking the jurisdiction is guilty of unexplained delay and laches;

(c) ex facie barred by any laws of limitation,

(d) grant of relief is against public policy or barred by any valid law; and host of other factors."

12. On the question of maintainability of the writ petition, the Apex Court in (2011) 2 SCC 575 (*Transport and Dock Workers Union and others vs Mumbai Port Trust and another*) held as under:-

"In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear alternative remedy available to the appellants by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles." (Emphasis added)

13. In view of the aforesaid legal position, it is clear that the discretionary jurisdiction of this Court under Article 226 of the constitution is not required to be exercised in a routine manner as held in *U.P. State Spg. Co. Ltd* (supra). The writ petition can be entertained if it is shown that there is something more in a case, something going to the root of the jurisdiction of the Officer, something which would show that it would be a case of palpable injustice to the writ petitioner if he is forced to adopt the remedies provided by the statute, no interference is warranted here as petitioner has not shown any such reason, which attracts aforesaid principle laid down by the Supreme Court in the aforesaid matters. Apart from this, in the recent judgment of Supreme Court in Transport and Doc Workers Union (Supra) the Supreme Court has again discouraged the tendency of adopting an over liberal approach and unnecessarily adding to their load of arrears. Accordingly, I find no reason to entertain the petition. Petitioner is at liberty to prefer an appeal under the Rules of 1966. In the interest of justice it is made clear that, if, the petitioner prefers an appeal within fifteen days from the date of receipt of certified copy of this order, the competent Appellate Authority shall consider and decide his appeal on merits and impediment of delay will not come in the way of the petitioner.

14. With the aforesaid observation, petition stands disposed of.

No order as to costs.

Petition disposed of.

I.L.R. [2011] M. P., 2759
WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav
W.P. No. 2930/2011 (Jabalpur) decided on 6 September, 2011

CHEDILAL DAHIYA ...Petitioner
Vs.
MANAGER, CHRISTUKULA MISSION HIGHER SECONDARY SCHOOL, SATNA & anr. ...Respondents

A. Industrial Disputes Act (14 of 1947), Section 25F - **Wages for one month and retrenchment compensation sent to the petitioner by registered post before the order of dismissal became effective - Respondent did everything within his means to pay the wages and retrenchment compensation to the petitioner before the order of dismissal became effective - There was, thus, no failure to comply with the provisions - There has been sufficient compliance of the mandatory provisions.** (Para 6)

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ – सेवा से हटाये जाने का आदेश प्रभावी होने से पूर्व याची को रजिस्ट्रीकृत डाक द्वारा एक महिने का वेतन तथा छंटनी प्रतिकर भेजा गया – हटाये जाने का आदेश प्रभावी होने से पूर्व याची को वेतन तथा छंटनी प्रतिकर का भुगतान करने के लिए प्रत्यर्थी ने अपने बस में जितना था सब किया – इस कारण, उपबंधों के पालन में कोई कमी नहीं – आज्ञापक उपबंधों का पर्याप्त अनुपालन किया गया है।

B. Industrial Disputes Act (14 of 1947), Section 25F - Principle of Estoppel - **The petitioner, after receiving the cheque of wages for one month and retrenchment compensation, immediately encashed the same - He is, therefore, estopped from complaining that his termination was illegal because of the non-compliance of the provisions of the Section 25F of the Act.** (Para 7)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ – विबंध का सिद्धांत – याची ने एक महिने के वेतन तथा छंटनी प्रतिकर का चेक प्राप्त करने के पश्चात अविलंब उसे भुनाया – इसलिए उसे यह शिकायत करने से रोका गया कि अधिनियम की धारा 25एफ के उपबंधों के अननुपालन के कारण उसकी सेवा समाप्ति अवैध थी।

Cases referred :

(2010) 5 SCC 497, AIR 1965 SC 1503.

Sanjay Verma, for the petitioner.
A.K. Jain, for the respondents.

ORDER

The Order of the Court was delivered by :

AJIT SINGH, J.:– This petition, under Article 226 of the Constitution, is directed against the order dated 31.8.2010 passed in Case No. 37/2008/ID Act (Reference) by the Labour Court, Satna, whereby it has decided the reference against the petitioner holding that his termination was legal and proper.

2. In the year 1998 the petitioner was appointed as bus conductor in the Christukula Mission Higher Secondary School, Village Pateri, District Satna, of which respondent nos.1 and 2 are Manager and Principal. On 1.2.2008, due to economic, managerial and administrative problems, the governing body of the school by a resolution decided to sell all the seven buses and to retrench drivers and conductors of the buses by paying them retrenchment compensation as per law. The buses were then sold to contractor Khurshid Alam Hashmi on 24.3.2008. Thereafter, respondent no.2 by letter dated 28.3.2008 terminated the services of petitioner with effect from 31.3.2008 by paying wages for the period of one month in lieu of one month's notice. The letter of termination was sent along with a cheque of Rs.30,349/- of the same date i.e. 28.3.2008 to the petitioner by registered post which he received on 2.4.2008. Rs.30,349/- included wages for one month and the amount of retrenchment compensation. Being aggrieved, the petitioner raised an industrial dispute inter-alia on the ground that his termination was in violation of section 25-F of the Industrial Disputes Act, 1947 (in short, "the Act") and prayed for his reinstatement with back wages. The Labour Court, after appreciating the evidence on record by the impugned award, has held that the termination of petitioner was legal and proper. The Labour Court, however, directed the respondents to pay Rs.10,000/- as cost to the petitioner because he received the termination order by registered post on 2.4.2008 though it was made effective from 31.3.2008.

3. The only submission made by the learned counsel for petitioner is that, although the services of petitioner were terminated with effect from 31.3.2008 he had been paid retrenchment compensation on 2.4.2008 and, therefore, the Labour Court committed an illegality in holding that the provisions of section 25-F of the Act were complied with. According to the learned counsel, since the petitioner had received retrenchment compensation after the date of his termination, there was no compliance of the mandatory provisions of section 25-F and this vitiates his termination order. To support his submission, the learned counsel has also placed reliance on a decision of the Supreme Court

in *Anoop Sharma v. Executive Engineer* (2010) 5 SCC 497. The learned counsel for respondents, in reply, defended the validity of the impugned award and relied upon *The Management of Delhi Transport Undertaking v. Industrial Tribunal* AIR 1965 SC 1503.

4. The question is whether the retrenchment of petitioner is illegal because wages for one month and retrenchment compensation were actually not paid to him on the date of his termination.

5. Section 25-F of the Act reads as under:

> **"25.F Conditions precedent to retrenchment of workmen.-** No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until -
>
> (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;
>
> (b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and
>
> (c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

6. The expressions "the workman has been paid in lieu of such notice wages for the period of notice" in sub-clause (a) and "the workman has been paid at the time of retrenchment compensation" in sub-clause (b) of section 25-F of the Act do not mean that the wages for one month or the retrenchment compensation should have been actually paid on the date of termination because in many cases the employer can only tender the amount before the termination but cannot force the employee to receive the payment before dismissal becomes effective. In the case of *The Management of Delhi Transport Undertaking* (Supra) retrenchment of an employee was assailed on the ground that one month's wages were not actually paid as per section 33(2)(B) of the Act before the order of dismissal. The Supreme Court held that it was not necessary

that wages for one month should have been actually paid because the tender for wages was made before the termination became effective. In the decision of *Anoop Sharma* (Supra), on which petitioner has relied, the employer was unable to prove that compensation was offered on the date of retrenchment nor the delay was explained in sending demand draft after three months of termination. This case, therefore, does not help the petitioner. The decision also does not depart the proposition of law laid down in The Management of Delhi Transport Undertaking. In the present case, wages for one month and retrenchment compensation were admittedly sent to the petitioner by registered post before the order of dismissal became effective which he received on 2.4.2008. Respondent no.1 did everything within his means to pay the wages and retrenchment compensation to the petitioner before the order of dismissal became effective. There was, thus, no failure to comply with the provisions of section 25 of the Act. In fact, there has been sufficient compliance of the mandatory provisions.

7. It is also to be noted that the petitioner, after receiving the cheque of wages for one month and retrenchment compensation, immediately encashed the same. He is, therefore, stopped from complaining that his termination was illegal because of the non-compliance of the provisions of section 25-F of the Act.

8. For these reasons, we find no merit in the petition. It is accordingly dismissed but without any order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 2762
WRIT PETITION
Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui
W.P. No. 12930/2011 (Jabalpur) decided on 26 September, 2011

AJOY ACHARYA ...Petitioner
Vs.
STATE BUREAU OF INVESTIGATION AGAINST ECONOMIC OFFENCES, BHOPAL ...Respondent

Constitution, Article 14 & 226 - Equality before law **- Prima facie evidence for filing charge-sheet is available against the petitioner - He can not be exonerated or his prosecution be quashed merely on the ground that because of some supervening circumstances another accused could not be proceeded against similarly.**

In view of the peculiar facts and circumstances of the case, it can not be held that the petitioner has been discriminated or denied equality before the law.

In view of the subsequent development when the Law and Legislative Affairs Department of the Govt. issued directives, if at a later stage, respondent proceeded for obtaining sanction for prosecution against co-accused, it can not be held that different standards were adopted by the prosecution by giving unequal treatment to the petitioner. (Paras 20 & 21)

संविधान, अनुच्छेद 14 व 226 – विधि के समक्ष समानता – याची के विरुद्ध आरोप पत्र दाखिल करने हेतु प्रथम दृष्ट्या साक्ष्य उपलब्ध – उसे दोषमुक्त नहीं किया जा सकता अथवा उसका अभियोजन अभिखंडित नहीं किया जा सकता मात्र इस आधार पर किसी गतिरोधक परिस्थितियों के कारण अन्य अभियुक्त के विरुद्ध समान रुप से कार्यवाही नहीं की जा सकती।

प्रकरण की विशिष्ट परिस्थिति एवं तथ्यों को दृष्टिगत रखते हुये, यह धारणा नहीं की जा सकती कि याची के साथ भेदभाव हुआ है अथवा विधि के समक्ष समानता से वंचित किया गया है।

Cases referred :

(2007) 1 SCC 1, AIR 1984 SC 684, 2003 CRLJ 2225, 2000 CRLJ 1767, (1982) 3 SCC 370, (2003) 2 SCC 708, (2007) 5 SCC 403, (2011) 4 SCC 418.

Amit Prasad, for the petitioner.

S.K. Rai, G.A. for the respondent.

ORDER

The Order of the Court was delivered by **RAKESH SAKSENA, J.:–** Petitioner has filed this petition under Article 226 of the Constitution of India seeking a writ, order or direction to quash the charge sheet filed by the respondent, against him in the case "*State of Madhya Pradesh Vs. Rajendra Singh and others*"- Case No. 07/2007 pending in the Court of Special Judge, Bhopal and also to restrain the respondent from initiating any proceedings against him without obtaining sanction on the ground of discrimination.

2. In brief, the history of the case is that on 24.7.2004, State Bureau of Investigation Economic Offences, Bhopal Unit registered F.I.R No. 25/2004 under Sections 120-B, 409, 420, 467 and 468 of the Indian Penal Code and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 against the petitioner, Sh. S.R. Mohanty and number of other

accused persons on the ground that under a conspiracy a large amount of money of Madhya Pradesh State Industrial Development Corporation (for short 'MPSIDC') was misappropriated by them in the garb of Inter Corporate Deposits in contravention of the decision of Cabinet Review Meeting which was adopted by MPSIDC Board in its Board meeting dated 31.1.1994. At the relevant time, petitioner by virtue of his being the Industries Commissioner with the Government of Madhya Pradesh was nominated as a Director of MPSIDC and Sh. S.R.Mohanty was the Managing Director of MPSIDC.

3. After investigation, charge sheet was filed against the petitioner and some other accused persons except Sh. S.R.Mohanty. As per prosecution, the sanction for prosecution under Section 197 of the Code of Criminal Procedure and Section 19 of the Prevention of Corruption Act, 1988 (for short 'the Act') was not required in the case in view of the law laid down by the Apex Court in the cases of *Prakash Singh Badal Vs. State of Punjab*- (2007) 1 SCC 1 and *R.S.Nayak Vs. A.R.Antulay*-AIR 1984 SC 684, *State of Kerala Vs. K.Karunakaran*-2003 Cr.L.J. 2225 and the decision of M.P. High Court rendered in case of *Managing Director, M.P. Leather Development Corporation*-2000 Cr.L.J. 1767 (M.P.).

4. Petitioner moved an application before the Special Court seeking discharge from the offences on the ground of absence of sanction and also on the merits of the case, however, the same was rejected on 11.4.2008. Petitioner challenged the said order in the High Court by filing Criminal Revision No. 1422/2008. Said revision was also dismissed by the High Court on 29.8.2011 after consideration of the facts of the case and in the light of the law laid down by the Apex Court in cases of *A.R.Antulay and Prakash Singh Badal* (supra).

5. The reason for not filing charge sheet against accused Sh. S.R.Mohanty was that after registration of the F.I.R. by the respondent, Sh. S.R. Mohanty moved a petition in the High Court and the High Court on 19.1.2006 quashed the said F.I.R as far as it related to Sh. Mohanty. Respondent Bureau, then preferred S.L.P. against the said order and the Hon'ble Supreme Court on 3.2.2011, reversed the said order passed by the High Court and directed Investigation in respect of Sh. S.R. Mohanty to be completed in three months. The respondent in view of the order passed by the Supreme Court completed the investigation against Sh. S.R. Mohanty and proceeded to obtain sanction for his prosecution which is said to be pending.

6. According to petitioner, on 12.7.2011, when questions were raised in the State Assembly with respect to the status of prosecution in MPSIDC case and in relation to status of the sanction for prosecution, it was stated by the Chief Minister that on 16.5.2011 sanction for prosecution had been applied in case of Sh. S.R. Mohanty to the Law Department of M.P. Govt. and the Law Department had sent the request for grant of sanction to the Govt. of India. In case, sanction was accorded, charge sheet against Sh. Mohanti would be filed in the Court.

7. Petitioner, therefore, has challenged his prosecution in this Court alleging discrimination against him. It has been stated by the petitioner that he has been denied a protection which has been given to Sh. S.R.Mohanty despite the fact that the petitioner had no role in day to day operation and management of MPSIDC as compared to the role of Sh. S.R. Mohanty as Managing Director. According to him, preferential treatment was being given to Sh. S.R.Mohanty and petitioner was being denied equal protection of law. Because of his prosecution, he was denied vigilance clearance before his retirement resulting in withholding of pensionary benefits to him and thereby causing substantial failure of justice. Learned counsel for the petitioner contended had the petitioner been treated at par with Sh. S.R.Mohanty, who was similarly placed in terms of continuing in Govt. services, no charge sheet would have been filed against him. The denial of protection to petitioner was improper, unjust and bad in law and violative of petitioner's fundamental right as guaranteed under Article 14 of the Constitution of India. Learned counsel contended that the State cannot discriminate between the petitioner and Sh. S.R.Mohanty to apply for sanction for prosecution of Sh. S.R. Mohanty and deny the protection of sanction to petitioner while both the persons are similarly placed. Both are accused in the same case, as such, denying equal protection of law amounts to violation of petitioner's right of equality guaranteed under Article 14 of the Constitution of India, therefore, charge sheet pending before the Special judge, Bhopal in the absence of sanction for prosecution against the petitioner, deserves to be quashed.

8. Per contra, the respondent in its return stated that since Sh. S.R.Mohanty had moved a petition in the High Court challenging registration of F.I.R. against him and the said F.I.R. had been quashed only in respect of Sh. S.R. Mohanty on 19.1.2006, investigation against Sh. S.R. Mohanty was discontinued. Respondent Bureau preferred SLP against the order passed by the High Court, whereby the Supreme Court on 3.2.2011 held the order passed by the High

Court not sustainable. As per order passed by the Supreme Court, investigation in respect of Sh S.R. Mohanty was then completed within three months and the proceeding to obtain sanction for prosecution of Sh. S.R. Mohanty was underway.

9. In para-4 of the return, respondent stated that the sanction for prosecution of Sh. S.R.Mohanty was being obtained in the light of the letter dated 15.9.2008 issued by the Secretary to the Govt. of M.P. Law and Legislative Affairs Department, wherein it has been stated that it was imperative for the investigating agencies to seek sanction of the competent authority under Section 19(1) of the Act for prosecution, so long as the officer continued to be a member of civil service and the protection under the aforesaid Section could not said to have been taken away only on the consideration that at the time the Officer held charge of another post on transfer or promotion, then one alleged to have been abused. Copy of the letter dated 15.9.2008 issued by the Secretary to the Govt. of M.P., Law and Legislative Affairs Department is Annexure R-1. It has also been stated by the respondent that the Law and Legislative Affairs Department issued the above-mentioned directive in reference to the letter No. D-2/44/2008/6/one dated 11.8.2008 issued by the General Administration Department, Govt. of M.P., copy of which is as Annexure R-2 and also letter No. 107/13/07 A.V.D.I issued by the Govt. of India, Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, copy whereof is annexed as Annexure R-3.

10. In para-5 of the return respondent stated that the petitioner was charge sheeted by the Bureau on 24.9.2007, whereas the aforesaid directives by the Law and Legislative Affairs Department were issued on 15.9.2008, i.e. much later to the date of filing of charge sheet against the present petitioner.

11. In view of the above, learned Govt. Advocate submitted that the averments made by the petitioner regarding preferential treatment being given to Sh. S.R.Mohanty were unjust and baseless and there was no discrimination between the petitioner and Sh. S.R.Mohanty as alleged in the petition. Investigation against Sh. S.R.Mohanty was being carried out as per order dated 3.2.2011 passed by the Hon'ble Supreme Court and before filing charge sheet in the Special Court, the Bureau of Investigation sought for sanction to prosecute him as per directives of the Law Department which came into effect, after filing charge sheet against the petitioner. As such, no unequal treatment or protection was being given to accused Sh. S.R. Mohanty.

12. Learned counsel for the petitioner submitted that in Criminal Revision No. 1422/2008, it was argued by learned counsel for the State that the ratio in the cases of *A.R.Antulay and Prakash Singh Badal* applied in the case of petitioner, but contrary to it, opposite contention was raised to form the defence in the present case. According to him, the contention of prosecution regarding applicability of the Office Memorandum was correct, but the prosecution was bound on the date of arguments in Criminal Revision No. 1422/2008 by the terms of the Office Memorandum and could not have argued contrary to the terms of the said memorandum. The use of the office memorandum was an afterthought defence. In these circumstances, the law of estoppal squarely applied upon the prosecution.

13. Learned counsel for the petitioner reiterated that it was argued by him in Criminal Revision No. 1422/2008 that the petitioner was entitled to protection under Section 19(1) (a) of the Act and that the law laid down by the Apex Court in the cases of *A.R.Antulay and Prakash Singh Badal* was not applicable to petitioner because of his being a Member of Indian Administrative Service i.e. being a " continuous Govt. servant".

14. Whatever was argued on merits of the case and about the applicability of the law laid down by the Apex Court in the aforesaid decisions had been considered by this Court in Criminal Revision No. 1422/2008, which has been disposed of on 29.8.2011, we, therefore, feel no need to answer the same questions which have already been answered in the said revision.

15. There is no dispute that the case of prosecution against petitioner as well as against Sh. S.R.Mohanty, on merits, stood on the same footing. Petitioner, at the relevant time, was the Director of MPSIDC, whereas Sh. S.R. Mohanty was the Managing Director of MPSIDC. Neither petitioner nor Sh. S.R. Mohanty continued to hold the same office which was alleged to have been misused when charge sheet was filed against the petitioner. In these circumstances, both would have been prosecuted together, but as indicated in the return filed by the respondent, Sh. S.R. Mohanty moved a petition in the High Court seeking quashment of the F.I.R against him and the High Court quashed the said F.I.R in respect of him on 19.1.2006. Respondent preferred S.L.P against the said order wherein the Supreme Court on 3.2.2011 held that order not sustainable and directed respondent to complete investigation against Sh. S.R. Mohanty within three months. In the meanwhile, in view of the memorandum number 107/13/2007-AVDI dated 27th June

2008, issued by Department of Personnel and Training (Ministry of Personnel, Public Grievances & Pensions Department of Personnel & Training) Govt. of India, Ministry of General Administration, M.P. and Department of Law and Legislative Affairs, M.P. Govt. issued instructions to Director General of Police, EOW and also to Special Police Establishment, Bhopal by orders dated 11th August, 2008 and 15.9.2008, respectively, clarifying that while holding different posts on transfer or promotion, a civil servant cannot be treated as holding different 'offices' within the meaning of relevant Sections of the 'Act'. The only office held by him would be that of the member of the service to which he belonged as a civil servant, irrespective of the post held on transfer/ promotion etc. Therefore, the requirements of seeking sanction of the competent authority under Section 19 of the Act continued to be applicable so long as the officer continued to be a member of civil service and the protection under Section 19(1) of the Act could not said to have been taken away only on the consideration that at the time the officer held charge of another post on transfer or promotion, then one alleged to have been abused.

16. Learned Govt. Advocate for the State submitted that in the aforesaid circumstances, investigation against Shri Mohanty could be started only after 3.2.2011, whereas charge sheet against the petitioner was filed in the Special Court on 24.9.2007, without obtaining sanction for prosecution in view of the law laid down by the Apex Court in cases of *A.R.Antulay and Prakash Singh Badal* (supra). By that time, the directives issued by Law and Legislative Department and the memorandum issued by the Department of Personnel and Training (DOPT) were not in existence. After receiving the aforesaid directives, respondent proceeded to obtain sanction for prosecution of Shri Mohanty. As such, it cannot be said that the respondent committed discrimination in not obtaining sanction for prosecuting the petitioner.

17. As far as the stand taken by learned counsel for the respondent in Criminal Revision No. 1422/2008, wherein the petitioner challenged his prosecution in the absence of sanction, that the ratio of the decisions of the Apex Court rendered in the cases of *A.R.Antulay and Prakash Singh Badal* was applicable in the case, in our opinion, did not estop him contending that feeling bound by the directives issued by the Ministry and Law and Legislative Department respondent proceeded to obtain sanction from the Govt./competent authority. Learned counsel for the respondent was free to submit about the legal interpretation of the decisions rendered by the Apex Court. Apart from it, since the directives for obtaining sanction for prosecution in terms of

memorandum issued by DOPT on 27th June, 2008 were issued by the Law and Legislative Affairs Department of the Govt. of M.P. on 15.9.2008, it cannot be held that respondent discriminated petitioner by proceeding to obtain sanction for prosecution of Sh. S.R.Mohanty. Since, respondent could not have proceeded against Sh.S.R.Mohanty and filed charge sheet against him in view of the order passed by the High Court quashing the F.I.R against him, it cannot be held that respondent adopted different standards for prosecution of two accused persons in the same case.

18. Placing reliance on *Bansi Lal Vs. State of Madhya Pradesh and another*-(1982) 3 SCC 370, *Akhil Ali Jehangir Ali Sayyed Vs. State of Maharashtra*- (2003) 2 SCC 708, *Soma Chakravarty Vs. State through CBI*- (2007) 5 SCC 403 and *C.B.I. Vs. Mustafa Ahmed Dossa*- (2011) 4 SCC 418, learned counsel for the petitioner submitted that trial of two accused persons arising out of the same incident cannot proceed under different procedures. Court would not deny the same benefit to other accused which has been granted to one accused.

19. In case of *Bansi Lal and Akhil Ali Jehangir* (supra), the Apex Court extended reliefs to accused persons which were granted to other co-accused who were similarly placed in the same case. In case of *Soma Chakravarty* (supra), the Apex Court observed that if exoneration in departmental proceeding was the basis for not framing a charge against an accused person who was similarly situated, the question which required further consideration was whether another accused present before the Court was similarly situated and/or whether exonerated officer also faced the same charge. In the case in hand F.I.R. against Sh. Mohanti was quashed by the High Court but the position was restored by the Supreme Court at a later stage. In case of *Mustafa Ahmed Dossa* (supra), the Apex Court observed that the trial of two accused arising out of the same incident cannot proceed under different procedures.

20. All the above cited cases pertained to the parity of treatment amongst the accused persons of the same incident in the trial, whereas in the instant case on the basis of evidence collected during investigation charge sheet was filed against the petitioner without obtaining sanction of his prosecution in the light of the ratio of the Apex Court decisions rendered in the cases of *A.R.Antulay* and Prakash Singh Badal. This Court in Criminal Revision No. 1422/2008 preferred by the petitioner challenging his prosecution in the absence of sanction held that the interpretation and the clarification given by

DOPT vide memorandum dated 27.6.2008 could not be accepted in view of the observations made by the Apex Court in case of *Prakash Singh Badal* (supra) in paras-23-24 of the decision. Thus, in our opinion, prosecution of the petitioner was valid. In view of the subsequent development when the Law and Legislative Affairs Department of the Govt. issued directives, if at a later stage, respondent proceeded for obtaining sanction for prosecution against co-accused, it cannot be held that different standards were adopted by the prosecution by giving unequal treatment to the petitioner. An accused against whom there is prima facie evidence for filing charge sheet, cannot be exonerated or his prosecution be quashed merely on the ground that because of some supervening circumstances another accused could not be proceeded against similarly.

21. For the reasons stated hereinabove, we are of the view that in view of the peculiar facts and circumstances of the case, it cannot be held that the petitioner has been discriminated or denied equality before the law. It is also significant to note that the trial Court has wide powers under Section 319 of the Code of Criminal Procedure in an enquiry or trial of an offence to see from the evidence if any person not being accused has committed any offence for which such person could be tried together with the accused.

22. We find no merit in this petition. Accordingly, it fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 2770
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P. No. 3290/2006 (Jabalpur) decided on 26 September, 2011

RAMCHARAN ...Petitioner
Vs.
AIRPORT AUTHORITY OF INDIA & anr. ...Respondents

*A. **Constitution, Article 226 - Writ Petition - Jurisdiction** -* **Concurrent findings recorded by the Estate officer and the District Judge, showing that the premise is a 'public premise', and the petitioner an 'unauthorized occupant' - Intereference into the matter by the High Court is not warranted.**

Concurrent findings recorded by the authorities can be interfered

with by the Court exercising limited jurisdiction available under Article 226 of the Constitution only if it is found that the findings are perverse, without jurisdiction or there is an error apparent on the face of the record. (Paras 1, 13 & 14)

क. संविधान; अनुच्छेद 226 – रिट याचिका – अधिकारिता – सम्पत्ति अधिकारी तथा जिला न्यायाधीश के समवर्ती निष्कर्ष दर्शाते हैं कि स्थान 'सरकारी स्थान' है और याची 'अप्राधिकृत अधिभोगी' है – उच्च न्यायालय द्वारा मामले में हस्तक्षेप का औचित्य नहीं।

इस न्यायालय द्वारा संविधान के अनुच्छेद 226 के अंतर्गत उपलब्ध सीमित अधिकारिता का प्रयोग करते हुये प्राधिकारियों द्वारा अभिलिखित समवर्ती निष्कर्षों में केवल तब हस्तक्षेप किया जा सकता है यदि यह पाया जाता है कि निष्कर्ष अनुचित है, बिना अधिकारिता के है अथवा भूल जो अभिलेख से प्रकट है।

***B. Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971), Section 2(g) - Public Premise* - Any premise which is in the possession for the time being with the Government of India or its authority would be a 'public premises' and any person who without any authority occupies the said premises would be an 'unauthorized occupant'.**

To come within the purview of 'public premises' it is not necessary that ownership of title of the property should be available with the Government of India - It is enough to show that they are in lawful possession as against a person who is claiming illegal possession without any legal right to ownership or possession.

ख. सरकारी स्थान (अप्राधिकृत अधिभोगियों की बेदखली) अधिनियम (1971 का 40), धारा 2(जी) – सरकारी स्थान – कोई स्थान जो कुछ समय के लिये भारत सरकार या उसके प्राधिकारी के कब्जे में है, 'सरकारी स्थान' होगा और कोई व्यक्ति जो बिना किसी प्राधिकार के उक्त स्थान का अधिभोग करता है वह 'अप्राधिकृत अधिभोगी' होगा।

Cases referred :

1998(2) AWC 1338, AIR 2005 ALL 342, (2004) 11 SCC 425, AIR 1982 BOM.443, AIR 1965 SC 1923.

R.N. Singh with *Avinash Zargar,* for the petitioner.

Rohit Arya with *Brahmadatt Singh,* for the respondents.

ORDER

RAJENDRA MENON, J. :–Challenging the order-dated 24.12.2005 passed by the Estate Officer, Airport Authority of India, exercising powers under

The Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as 'Act of 1971'), directing for evicting the petitioners from the property in question and the order-dated 28.2.2006 passed by the District Judge, Bhopal dismissing the appeal, filed by the petitioners under section 9 of the Act of 1971, both these petitions have been filed.

2. As the facts and question of law involved in both these petitions are common, they are being disposed of by this common order. Pleadings and documents available in Writ Petition No.3290/2006 are being referred to in this order.

3. Petitioner Ramcharan, in Writ Petition No.3290/2006, claims himself to be owner and in possession of land bearing Khasra No.62 measuring 6 Acres, and similarly petitioner Harnarayan, in Writ Petition No.3291/2006, claims to be owner of land bearing Khasra No.62 area 5 Acres. Both these land are situated in village Laukhedi, Tehsil Huzoor, District Bhopal. According to the petitioner Ramcharan in the year 1939, the land belonged to one Mohammed Asgar Sahib. In the land records upto the year 1949 Mohammed Asgar Sahib was shown to be owner of the land. Subsequently, it is stated that Ramcharan's father obtained the land on 'Shikmi' and thereafter he was in possession of the land for various period. Subsequently, after death of Shri Waliram @ Kashiram, petitioner is in possession on the basis of an unregistered will executed in his favour, whereas petitioner Harnarayan claims that be ontained lease of the property from Mohammed Asgar Sahib and since then he is in possession. On the contrary, it is the case of the respondents that the land initially belonged to the Nawab of Bhopal and subsequently, it was taken over by the Government of India, after it came into their ownership and possession, was used as Hawai Adda by the Government of India and the land is shown entered in the name of this authorities i.e... 'Hawai Adda'. Subsequently, it was transferred to the Airport Authority and when the Airport Authority found that the petitioner is in illegal occupation of the land, show cause notice under section 4 of the Act of 1971 was issued vide Annexure P/1, petitioner submitted his reply and after summary enquiry into the matter, by the impugned order - Annexure P/8 dated 24.12.2005, the Estate Officer directed for eviction of the petitioner, treating the petitioner to be an unauthorized occupant. Being aggrieved by the same, petitioner preferred an appeal and the appeal filed under section 9 of the Act of 1971 having been dismissed by the District Judge, Bhopal on 28.2.2006 vide Annexure P/12, petitioner has filed this writ petition.

4. Shri R.N. Singh, learned Senior Advocate for the petitioners, taking me through the statement of respondents' witness namely Shri D.K. Saxena recorded before the Estate Officer filed at page 26 of the paper book, argued that in the show cause notice issued to the petitioners and the grounds for eviction, it is shown that the land earlier belonged to the Nawab of Bhopal, thereafter it was recorded in the name of Hawai Adda, it was under their custody for sometime. Hawai Adda was functioning under the Central Government and in the year 1994 the Central Government handed over possession to the Airport Authority of India. Accordingly, it is stated that the Airport Authority is claiming their right to the property, but in the revenue records the land is not at all shown in the name of Nawab of Bhopal. It is the case of the petitioners that in the revenue records in the year 1939-49, the land is shown in the name of Mohammed Asgar Ali. In the year 1945, Mohammed Asgar Ali gave 'Shikmi' right to the Ramcharan's father Waliram @ Kashiram, who remained in possession and after death of Waliram @ Kashiram, it is stated that the petitioners are in possession. To establish their claim, the petitioners have filed certain Khasra entries of the land for the period 1964-65, 1965-66, 1966-68, 1973-74 to 1976-77 and then from 1976-77 upto 1980-81 and an unregistered will executed by Waliram @ Kashiram. Based on these records petitioners claim their right to the property. According to Shri R.N. Singh, learned Senior Advocate, when the Airport Authority of India is exercising their right to the property and are claiming eviction of the petitioners from the property in question, on the ground that it is a Public Premise owned by the Government of India or its authority, the law mandates the respondents to establish their claim by producing adequate evidence to show that the property is in the ownership of the Government of India or the Airport Authority.

5. Referring to the statement of witness recorded i.e... Shri D.K. Saxena., his answer to many of the questions, Shri R.N. Singh, learned Senior Advocate, tried to emphasize that the respondents have not produced any document to show as to how and on what basis they are claiming their right to the property. Except for producing certain Khasra entries showing the land in the name of Hawai Adda and subsequently in the name of Airport Authority of India for certain periods, no evidence - oral or documentary in nature, is produced to establish the fact that the premises was owned by the Government of India or its authority. It is emphasized by him that without their being any foundation to show as to how and on what basis the respondents are claiming their right to

the property, action initiated under the Act of 1971 is said to be illegal. It was argued by him that in the show-cause notice issued the basis for evicting the petitioner is shown to be that the land belonged to the Nawab of Bhopal and thereafter it came into the possession of Government of India, but in the land records the name of Nawab of Bhopal is not at all available. Instead, in the year 1939 upto 1949 the land is shown to be under the owner of Mohammed Asgar Ali. Accordingly, emphasizing that the respondents have no authority to seek eviction of the petitioners from the property in question as their ownership and the basis or foundation to proceed in the matter is not at all established, petitioners seek for interference into the matter. Contending that the Estate Officer and the District Judge, Bhopal ignoring the basic fact about ownership of the land by the respondents have interfered into the matter for evicting the petitioners, which is illegal, therefore, interference is sought for into the matter.

6. Respondents represented by Shri Rohit Arya, learned Senior Advocate, argued that for a premises to come within the purview of 'Public Premises' as defined under section 2(e) of the Act of 1971, ownership or title is not necessary. Once the material available on record shows that the premises belong to the Government of India or its authorities and their possession over the property is established, action can be taken under the Act of 1971 and in doing so it was argued by him that the respondents have not committed any error.

7. Shri Rohit Arya, learned Senior Advocate, emphasized that a person under occupation and possession of land is entitled to seek eviction and once the Union of India or its authority is shown to be in occupation/possession, the provisions of the Act of 1971 are attracted. It is the case of the respondents that the petitioners have no right to hold the property, except for showing some Khasra entries in their name for certain periods for most of the period the land records shows that the land was under the possession of the Hawai Adda, an establishment of the Government of India, and thereafter from the year 1973-74 onwards continuously the land is shown to be in possession of the Airport Authority. Accordingly, contending that the possession of the Airport Authority of India on the land is established and further pointing out that petitioners' suit for declaration and injunction has already been dismissed by the Second Civil Judge Class II, Bhopal vide judgment-dated 30.11.2009 - Annexure R/1, and even the applications for mutation filed by the petitioner have been dismissed, Shri Rohit Arya submits that the petitioners have no right to seek interference into the matter once it is found that they are not

owners and have no right to the property. Contending that concurrent findings recorded by the Estate Officer and the District Judge in the matter of eviction of the petitioner, does not warrant any interference and further submitting that the burden of proving as to how petitioners are claiming their right lies on them once a notice under section 4 of the Act of 1971 is issued, learned Senior Advocate submits that concurrent findings recorded in the matter does not warrant any interference. In support of his contention, learned counsel invites my attention to two judgments of the Allahabad High Court: *Kanpur Development Authority Vs. Banwari Lal and others,* 1998 (2) AWC 1338; and, *Janak Singh Yadav and others Vs. State of UP, Ministry of Irrigation, UP Government and others,* AIR 2005 ALL 342.

8. Refuting the aforesaid, Shri R.N. Singh, learned Senior Advocate, invited my attention to a judgment of the Supreme Court, in the case of *Draupadi Devi and others Vs. Union of India and others,* (2004) 11 SCC 425, to contend that in the absence of any document showing that the property by Rule of Accession of territory of the Nawab of Bhopal came to the Government, respondents cannot claim any right to the property.

9. Having heard learned counsel for the parties and on a perusal of the records it is clear that both the parties claim their right to the property mainly on the basis of the entries made in the revenue records. If the orders passed by the Estate Officer and the District Judge in appeal are taken note of, it would be seen that in the Khasra entry for the period 1939-49, the land is shown to be in the name of Mohammed Asgar Ali. According to the petitioners, Waliram @ Kanshiram came into possession thereafter. However, the finding recorded is that the name of Waliram @ Kanshiram is not at all entered in the revenue record at any point of time.

10. Be it as it may be, the moot question that arises for consideration is as to whether for evicting a person under the Act of 1971 and for treating the said person as an 'unauthorized occupant', ownership and title of the land with the Central Government or its authority is required to be established or not. A public premise is defined in section 2(e) of the Act of 1971, and an 'unauthorized occupation' is defined in section 2(g). If the definition of 'public premises' is scrutinized it would be seen that any premise belonging to or taken on lease or on behalf of the Government of India is included within the purview of a 'public premises'. The word used is "belonging to" and no 'ownership'. The definition of 'public premises' is considered by the District Judge, Bhopal while

deciding the appeal and after placing reliance on a judgment of the Bombay High Court in the case of *M. Mohammed and others Vs. Union of India and others,* AIR 1982 BOMBAY 443, the following principles laid down by the Bombay High Court is taken note:

> "Assuming we are wrong in our aforesaid conclusions we are of the view that there is no reason why the present premises should not fall within the express 'belonging to the Central Government' in the definition of 'public premises' in Section 2(e) of the said Act. There is no doubt that the express 'belonging to' does not mean the same as 'owned by'. The two expressions have two different connotations. The expressions 'belonging to' will take within its sweep not only ownership but also rights lesser than that of ownership. It must be remembered in this connection that the expressions used in the statute are to be interpreted and given meaning in the context in which they are used. The present Act has been placed on the statute book to give a summary remedy to the Government to evict persons in occupation of public premises to obviate the long ordeal of trial in a Civil Court and of further proceedings thereafter. Hence a wider meaning will have to be given to the expression used in the Act for defining the concept of 'public premises'. So viewed there is no reason why the premises of which possession for the time being vests in the Government and which are allotted by the Government to others while so in possession should not be held to be public premises." *(Emphasis supplied)*

11. The words 'belonging to' as appearing in section 2(e) of the Act of 1971 has been the subject mater of consideration in various cases. Apart from the interpretation given by the Bombay High Court as referred to hereinabove, in another case i.e.... *Mohammed Amir Ahmad Khan Vs. Municipal Board of Sitapur,* AIR 1965 SC 1923, Supreme Court was called upon to consider the meaning of the expression 'belonging to me' used in relation to certain proceedings held under the Government of India's, Act 26 of 1948, pertaining to rehabilitation of refugees. While commenting upon the meaning of the aforesaid expression, the Supreme Court has indicated so:

> "..... Though, the words 'belonging' no doubt is capable of denoting an absolute title, is nevertheless not confined to connoting that sense. Even possession of an interest less than that of full

ownership could be signified by that word. In Webster, 'belong to' in explained as meaning inter alia 'to be owned by the possession of'. The precise sense which the word was meant to convey can, therefore, be gathered only by reading the document as a whole and adverting to the context in which it occurs .... "

It has been held by the Supreme Court in the aforesaid case that even if a person does not have an absolute right available to be an owner, but once as a user of the property certain rights have accrued to him, the property can be said to be belonging to him. It is observed by the Court in the aforesaid case that the expression 'belonging to' does not merely mean or include the right of ownership, but it includes something less than that and if certain rights are vested in a person to use the property, the property is said to be belonging to him. The Supreme Court has held that the words 'belonging to' does not mean the same thing as the expression 'owned by'. The two expression have two connotations. The expression 'belonging' will take within its sweep not only the right of an ownership, but also certain right lesser than that of an ownership.

12. If the aforesaid is the legal principle with regard to the definition of 'public premises' then any premise which is in the possession for the time being with the Government of India or its authority would be a 'public premises' and any person who without any authority occupies the said premises would be an 'unauthorized occupant', if his possession is shown to be without any legal right not only by way of ownership or title, but also otherwise. That being so, for a premise to come within the purview of 'public premises' it is not necessary that ownership of title of the property should be available with the Government of India. It is enough to show that they are in lawful possession as against a person who is claiming illegal possession without any legal right to ownership or possession. In this regard, apart from the findings recorded concurrently by the Estate Officer and the District Judge in the proceedings held under the Act of 1971, if the judgment rendered by the Second Civil Judge, Class II, Bhopal in Civil Suit No.220-A/06 is taken note of, it would be seen that the said suit was filed by the petitioner Shri Harnarayan and he sought a decree for declaration and injunction from restraining the respondents - Airport Authority of India, from disturbing his possession. The suit has been dismissed and in the judgment rendered by the Civil Court, it is found that the petitioners' right to possession and title over the property is not established. The eight issues framed in the suit have all been answered against the petitioner. The issues framed are as under and the answers to the same are in negative:

वाद प्रश्न		निष्कर्ष
1–	क्या वादी वादग्रस्त भूमि खसरा क्रमांक 62 रकबा 8 एकड़ स्थित ग्राम लाउखेडी जिसका विवरण वादपत्र के चरण क्रमांक 1 में उल्लेख किया है का भूमि स्वामी एवं आधिपत्यधारी है?	प्रमाणित नहीं।
2–	क्या वादी को वादग्रस्त भूमि पर विरोधी आधिपत्य के के आधार पर स्वतव प्राप्त हो गये है?	प्रमाणित नहीं।
3–	क्या प्रतिवादीगण वादी को वादग्रस्त भूमि से जबरन अवैधानिक रूप से बेदखल करना चाहते है?	प्रमाणित नहीं।
4–	क्या वादी का वादग्रस्त भूमि पर सिर्फ अतिक्रामक के रूप में आधिपत्य रहा है?	प्रमाणित।
5–	क्या वादी ने वाद का उचित मूल्यांकन कर पर्याप्त न्याय शुल्क अदा किया है?	प्रमाणित।
6–	क्या वादी का अवधि बाहर है?	प्रमाणित नहीं।
7–	अनुतोष एवं वाद व्यय?	वादी द्वारा प्रस्तुत वाद निरस्त किया गया।
	अतिरिक्त वाद प्रश्न :–	
8–	क्या प्रतिवादी क्रमांक 3 से वाद लंबित रहते हुए वादग्रस्त स्थान पर अवैधानिक रूप से आधिपत्य कर लिया है?"	प्रमाणित नहीं।

On the basis of evidence and material that came on record, the suit in question has been decided. The plaint filed by the petitioner is available on record and is filed by the petitioner himself alongwith I.A.No.7827/2009. The suit was filed by Harnarayan, it was a suit for declaration and injunction and it is for the same property as is indicated from the description of the property given in paragraph 1 of the plaint. In the plaint particulars of the orders passed by the Estate Officer and the District Judge under the Act of 1971 are indicated and pendency of these proceedings are also pointed out. Finally, the relief claimed for in this suit was that a declaratory decree be issued to the effect that the plaintiff be declared as owner and in possession of the suit property. The same has been considered and dismissed as indicated hereinabove and if some of the findings recorded by the learned trial court in its judgment and decree dated 30.11.2009 is taken note of, the following findings are recorded therein. It was the case of the plaintiff in the suit that in

the year 1945, the property was owned by Mohammed Asgar Sahib and it was given to Waliram @ Kashiram under 'Shikmi', but the plaintiff has not produced any evidence - documentary or oral, in support thereof, Ramcharan, one of the claimant, in his cross-examination admitted that he does not possess any document to substantiate the aforesaid contention. It is held by the Court that if the property was given by Mohammed Asgar Sahib to Waliram @ Kashiram in the year 1945, then there should have been some document or proof of the same. Instead, it is found that right from the year 1945 to 1949 in the revenue records - Exhibits P/12 to P/15, there is no mention about Waliram @ Kashiram being in possession of the suit property. Various judgments of the High Court and the Supreme Court are referred to and the finding recorded is that the petitioners have not acquired any Bhumiswami rights under the MP Land Revenue Code, 1959 nor had such a right accrued to Waliram @ Kanshiram. The Court has observed that except for oral statement made by witnesses Raees Khan, Mohammed Sharief Khan and Shafiq Mohammed, no documentary evidence is adduced. The only document available on record shows name of the petitioners entered in the land records for about six years between 1973-74 to 1980-81. That apart, there is nothing to show that the plaintiffs are in possession of the suit property. In paragraphs 34 and 35, the entire evidence is analysed and the claim of the petitioners to the effect that they are in peaceful possession of the suit property for more than 50-60 years is found not at all proved and even the claim of adverse possession is held not proved by the learned court below. It is held by the court that none of the witnesses examined by the plaintiff state that the respondents have forcefully dispossessed the petitioners and taken possession of the suit property. Keeping in view all this, the ultimate finding recorded is against the plaintiff, the suit is dismissed and the issues framed are answered in negative against the petitioners, as already indicated hereinabove.

13. Once a Court of competent jurisdiction on the basis of the evidence and material that came on record has come to the conclusion that petitioners are not entitled to Bhumiswami rights or possession and the finding is that they are not in possession. On the contrary when the revenue records of the relevant period show that the respondents are in possession of the property in question, this Court is not required to interfere into the matter. If the judgment rendered by the Civil Judge Class I, Bhopal on 30.11.2009, available on record, is perused, it would be seen that in a judgment running into more than 57 paragraphs, the learned court below has analysed each and every aspect of

the matter and has found that the petitioner is not entitled to any decree and the suit has been dismissed. Once the petitioner's right to retain possession of the suit property is dismissed by a court of competent jurisdiction and the possession of the respondents are established then in the light of the concurrent findings recorded by the Estate Officer and the District Judge, showing that the premise is a 'public premise', and the petitioner an 'unauthorized occupant' on the said premises, interference into the matter by this Court is not warranted.

14. The concurrent findings recorded by the authorities can be interfered with by this Court exercising limited jurisdiction available under Article 226 of the Constitution only if it is found that the findings are perverse, without jurisdiction or there is an error apparent on the face of the record. None of these factors are available and, therefore, it is not a fit case where interference into the matter now in these proceedings under Article 226 is called for.

15. Accordingly, finding no case for interference on the grounds raised, both the petitions are dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 2780
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P. No. 8454/2009 (Jabalpur) decided on 28 September, 2011

CHANDRIKA PRASAD SAHU ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 50 - Suo motu revision - Limitation - **Under normal circumstances the powers of suo motu revision could not be exercised after an inordinate period of time, but if fraud is seen to have been committed in the matter of obtaining the patta or showing the land to be in ownership of a particular person, the aforesaid restriction of limitation or action to be taken within a reasonable time will not arise.** (Para 14)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 – स्वप्रेरणा से पुनरीक्षण – परिसीमा – असाधारण समयावधि पश्चात सामान्य परिस्थितियों में स्वप्रेरणा से पुनरीक्षण की शक्तियों का प्रयोग नहीं किया जा सकता, किन्तु यदि पट्टा अभिप्राप्त

करने में कपट कारित होना देखा जाता है या भूमि किसी विशिष्ट व्यक्ति के स्वामित्वाधीन होना दर्शित होता है, परिसीमा का अथवा युक्तियुक्त समय के भीतर कार्यवाही करने का निर्बंधन लागू नहीं होगा।

***B. Constitution, Article 226 - Relief under - When may not be given* - Prima facie assessment regarding finding of fraud made by Board of Revenue, without conducting any proper enquiry into the matter and without giving proper opportunity to the petitioner to give their say in the matter - High Court does not deem it appropriate to overlook the aspect and grant relief to the petitioner - Instead, interest of justice requires that the allegations of fraud, if any exercised in seeking allocation of patta or mutation etc., should be inquired into and then only action taken.** (Para 16)

ख. संविधान, अनुच्छेद 226 – के अंतर्गत अनुतोष – कब दिया नहीं जा सकता – मामले में उचित जांच किये बिना एवं मामले में अपनी बात रखने के लिये याची को उचित अवसर दिये बिना राजस्व मंडल द्वारा कपट पाये जाने से संबंधित प्रथम दृष्ट्या निर्धारण – उच्च न्यायालय इस पहलू को अनदेखा करना और याची को अनुतोष प्रदान करना उचित नहीं मानता – बल्कि, न्यायहित की अपेक्षा है कि पट्टे का आवंटन अथवा नामांतरण इत्यादि चाहने में किसी कपट का प्रयोग किये जाने का अभिकथन यदि कोई हो तो उसकी जांच होनी चाहिये और केवल तभी कार्यवाही करनी चाहिये।

Cases referred :

(1969) 2 SCC 187, 1990 MPLJ 353, (1997) 6 SCC 71, 1999(1) MPLJ 178, 2001(3) MPLJ 389, 2002(3) MPLJ 189, AIR 1963 SC 1914, (1972) 4 SCC 730, (1990) SUPP. SCC 282, 2010(4) MPLJ 178.

Anshuman Singh, for the petitioner.

S.S. Bisen, G.A. for the respondents No. 1 to 4.

Brian D'Silva with *Alok Hoonka,* for the respondent No.5.

ORDER

RAJENDRA MENON, J. :–As common questions of law and facts are involved in these four writ petitions, all these petitions are being heard and disposed of by this common order.

2. For the sake of convenience, documents and material available in Writ Petition No.8454/2009 are being referred in this order.

3. In all these petitions, challenge made by the petitioners are to orders passed by the Collector, Commissioner and the Board of Revenue exercising suo motu powers of revision under section 50 of the M.P. Land Revenue

Code, 1959 (hereinafter referred to as 'Code'), and setting aside allocation of land made in favour of each of the petitioners. Orders passed and the reasons are common in all the cases.

4. It is the case of the petitioner, in Writ Petition No.8454/2009, that he alongwith his family was displaced when Rehand Dam was constructed, as a result he settled in Tehsil Waidhan, presently in District Singrauli, previously in District Sidhi. After settling down in Waidhan, it is the case of the petitioner that he applied to the Naib Tehsildar, Singrauli for grant of patta over the land in question. The Naib Tehsildar conducted proceedings as provided under the Code, all the procedural formalities with regard to publication of advertisement, public notice, inviting objections etc were completed and finally vide order-dated 9.1.1976 - Annexure P/1, patta was granted to the petitioner. In Writ Petition No.9891/2009, patta was granted vide Annexure P/1 dated 28.11.1978. In Writ Petition No.9890, patta was granted vide Annexure P/1 dated 9.1.1976. In Writ Petition No.8807/2009, patta was granted vide Annexure P/1 dated 28.11.1978. In all the four cases it is said that the patta was granted on similar consideration and after following the same procedure. According to the petitioners, their name was entered in the revenue records and Khasra entries in this regard are filed vide Annexure P/2, showing recording of petitioner's name in the Khasra i.e..... land records, for the period 1976-77 to 1980-81.

5. It is the case of the petitioners that ever since 1976/1978 they are in possession of the land as per allotment made vide Annexure P/1, issued on the dates as mentioned in paragraph 4, hereinabove.

6. In the year 2000, the State Government took a policy decision for establishing a Ultra Mega Power Project in District Singrauli. The Project was known as 'Sasan Ultra Mega Power Project' and the same was to be executed by respondent No.5 M/s Sasan Power Limited and for the said purpose proceedings for land acquisition were initiated. However, while these proceedings for acquisition were going on, after a period of 22 years of granting patta to the petitioners, it is stated that Additional Collector, Waidhan issued a show cause notice to each of the petitioner on 22.10.2007 vide Annexure P/4, and pointed out to them that the patta was granted illegally, without following due process and, therefore, the notice issued was as to why the patta granted be not cancelled. It is the case of the petitioners that show cause notice were issued to nine persons similarly including one Shri Chutkau.

On receipt of the show-cause notice - Annexures P/3 and P/4, petitioners submitted reply - Annexure P/5. Without considering the reply and without taking note of the averments made by them vide Annexure P/6 dated 28.4.2008, passed separately in each case. the Collector Waidhan cancelled the patta granted to the petitioner. Petitioner preferred revision before the Additional Commissioner, Rewa Division vide Annexure P/7. This was also dismissed by the Additional Commissioner vide order-dated 7.8.2008 - Annexure P/9. Petitioner preferred further revision before the Board of Revenue vide Annexure P/10, and the same having dismissed vide Annexure P/12 on 30.7.2009, petitioners are before this Court assailing the orders passed by the revenue authorities cancelling the patta granted to the petitioners.

7. Shri Anshuman Singh, learned counsel for the petitioners, emphasized that the show-cause notice - Annexure P/4 was issued to the petitioners on the basis of the communication made vide Annexure P/3 indicating irregularities in nine cases. In the notices issued, four irregularities were pointed out. All these irregularities pertain to non-following of procedure contemplated under the Code with regard to calling of objection, issuing advertisement, public notice, non-consideration of utility of the land, non-consideration of the fact as to whether forest land can be allocated or not etc, however in the show cause notice no allegation of fraud in obtaining the patta was made against the petitioners. Even though finding illegality to have been committed, the Collector and the Commissioner cancelled the patta of the petitioners, the Board of Revenue while assessing the matter in revision found that apart from the irregularities certain fraud is committed by the petitioners in the matter of producing false and fabricated documents with regard to allocation and, therefore, the Board of Revenue has rejected the revision.

8. It is the case of the petitioners that once patta was granted in the year 1976/1978, the powers of suo motu revision under section 50 of the Code could not be exercised by the authorities concerned after such an inordinate period of time. Accordingly, it is stated that the Collector and the Commissioner committed error in exercising the powers of suo motu revision after such a long period of time and to overcome the aforesaid legal objection raised by the petitioner, which was to be upheld in view of various judgments of the Supreme Court and this Court, it is stated that the Board of Revenue introduced a new concept of fraud into the matter only to frustrate the objection of the petitioner with regard to delay in exercising the powers of suo motu revision. Accordingly, the submissions made by Shri Anshuman Singh was two folded:

(a) His first contention was that the power of suo motu revision could not be exercised after a period of more than 20 years and in view of various judgments cited by him, including judgment of the Full Bench of this Court, it is stated that in view of the delay the action taken is illegal; and,

(b) The second limb of his argument was that when the powers of suo motu revision was exercised only on the ground of irregularity followed in the procedure for allotment and when the said power could not be exercised after such a long period of time, the concept of fraud was introduced by the Board of Revenue, the same is illegal, as no opportunity of hearing to explain the fraud alleged is given to the petitioner.

It is emphasized that in the show cause notice there was no allegation of fraud and in the absence of charging the petitioner with having committed fraud for obtaining the patta and without conducting an appropriate enquiry into the so called fraud cancellation of patta on the ground of fraud is said to be illegal.

9. Apart from the aforesaid two submissions it was pointed out that in the case of Shri Chutkau against whom also similar allegation was raised, Commissioner Rewa Division has allowed his revision vide order-dated 24.1.2008 - Annexure P/8 and finding that the power of suo motu revision cannot be exercised after such a long period of time, in his case the entire action is quashed. It is stated that similar benefit is denied to the petitioners without any justification.

10. Inviting my attention to the following judgments Shri Anshuman Singh tried to bring home his arguments. The judgments cited are: *The State of Gujarat Vs. Patil Raghav Natha and Others,* (1969) 2 SCC 187 - to point out that the powers of suo motu revision should be exercised within a reasonable time and not thereafter. For the same proposition the following judgments were also cited to emphasize that after a period of more than 20 years, the powers of suo motu revision cannot be exercised. *Ushadevi wd/o Shankarrao and others Vs. State of MP and others*, 1990 MPLJ 353; *Mohammad Kavi Mohammed Amin Vs. Fatma Bai Ibrahim* (1997) 6 SCC 71; *Sitaram S/o Bhagatram Vs. State of MP and others*, 1999(1) MPLJ 178; *State of MP and others Vs. Harcharan Singh,* 2001(3) MPLJ 389; and, *Ram Bharosi Sharma Vs. State of MP and others,* 2002(3) MPLJ 189.

11. That apart, pointing out that if fraud was the allegation for cancelling the patta, then the petitioners should have been charged for the same and then only action could be taken after enquiry as the same is not done, the action is illegal. In support, the following judgments are relied upon: *The Management of Ritz Theatre (Private) Limited, Delhi Vs. Its Workmen*, AIR 1963 SC 1914; (1972) 4 SCC 730; and, *State of Haryana Vs. Om Prakash, Constable,* (1990) Supp SCC 282.

12. Respondents represented by Shri Brian D'Silva, learned Senior Advocate, and Shri S.S. Bisen, learned Government Advocate, have refuted the aforesaid and point out that the petitioners have committed a fraud in the matter of getting the land allotted in their name and on the basis of false and fabricated documents pertaining to mutation in their name are claiming the benefit. It is stated that the petitioners if they were granted the patta in the year 1976, should have got the land mutated in their name within a reasonable point of time. Referring to the documents filed by the petitioner i.e... Annexure R/5/3, the application for mutation, Shri Brian D'Silva, learned Senior Advocate, argues that it is not known as to why the petitioner submitted the application for mutation only on 17.3.2006 when the land was already allocated to him in the year 1976. Infact it is the case of the respondents that land was never allotted to the petitioners and the allocation order - Annexure P/1 is a fabricated document. Taking me through the findings recorded by the Board of Revenue, learned counsel for the respondents argued that the petitioners have based their claim on the revenue entries for the year 1976-77 to 1980-81. On enquiry and on communication received from the Dy. Collector, Singrauli it was found that in the revenue records from 1987-88 to 2000-2001, in Column No.3, the land is shown in the name of Government of Madhya Pradesh and when the petitioners produced the land records for the period 1976-77 to 1980-81, the Dy. Collector is said to have verified the records and after verification it is found that certified copies of the revenue records produced by the petitioners for this period are false and fabricated documents, even the Chief Copyist and the Section Writer have given statement that the certified copies were never issued by them. Referring to the findings recorded in paragraph 6 and 7 by the Board of Revenue in the impugned order, learned counsel emphasized that as the claim made by the petitioners was based on a fraud committed, the Board of Revenue has rightly refused to interfere in the matter and in rejecting the claim of the petitioners it is argued that the authorities have not committed any error.

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

14. As far as the question of exercising the powers of suo motu revision and the principles laid down in various judgments relied upon by Shri Anshuman Singh is concerned, the said question is considered and decided by a Full Bench of this Court recently in the case of *Ranveer Singh (deceased) through LRs Kishori Singh and others Vs. State of MP*, 2010 (4) MPLJ 178, and after taking note of the various principles, it is held that powers of suo motu revision cannot be exercised after a considerable period of time, but if it is found that fraud has been committed in the matter of allocation of land or obtaining the benefit, it is held that the powers of suo motu revision can be exercised without any limitation being imposed. Finally, it is held that the power of suo motu revision has to be exercised within a period of 180 days from the date of knowledge of illegality or impropriety. That being so, I am of the considered view that under normal circumstances the powers of suo motu revision could not be exercised after such an inordinate period of time, but if fraud is seen to have been committed in the matter of obtaining the patta or showing the land to be in ownership of a particular person, the aforesaid restriction of limitation or action to be taken within a reasonable time will not arise. Even though in the show cause notice issued to the petitioner vide Annexure P/4 and in the consequential orders passed by the Collector and the Commissioner, there is no finding recorded with regard to any fraud being committed by the petitioner, but when the matter travelled to the Board of Revenue, records indicate that the Board of Revenue considered the entire aspects in detail and found that petitioners have produced certified copies of the land records for the period 1976-77 to 1980-81 and in Column No.3 of these documents the name of the petitioner was recorded as owner. However, the Government Advocate produced the land records for the period 1987-88 to 2000-2001, and in Column No.3 of these record, the State Government was shown as owner. As some confusion has arisen with regard to the entry made, the matter was inquired into and the Dy. Collector Singrauli issued a letter after enquiry on 10.7.2009 and it was indicated in this report that the certified copies of the revenue records for the period 1976-77 to 1980-81 filed by the petitioner before the Board of Revenue are fabricated and fraudulent documents and this report was submitted on the basis of the statement of the head copyist and the section writer, who denied their signatures and issuance of such a certified copy.

15. It was also tried to be established before the Board of Revenue that even the orders-dated 9.1.1976, 28.11.78, 9.1.1976 and 28.11.1976 i.e... Annexure P/1 in all the petitions respectively, on the basis of which the

petitioners claim allotment made was said to be a false document. On prima facie assessment of the same and for the reasons indicated in para 6 of the order, the Board of Revenue has found that even the orders-dated 9.1.1976, 28.11.78, 9.1.1976 and 28.11.1976 i.e... Annexure P/1 in all the petitions respectively, are fabricated and false documents and it cannot be relied upon. Finding recorded is that the document appears to be a false and fabricated document. Infact the finding recorded by the Board of Revenue is that in none of the revenue records name of the petitioner is shown in Column No.3 as owner. Instead, in all the revenue records even now in Column No.3 MP Government is shown as owner of the land. Under such circumstances, it is held by the Board of Revenue that the petitioners' are trying to claim their ownership over the land on the basis of false and fabricated documents, which cannot be permitted. Once such a finding is recorded, the question before this Court exercising jurisdiction in a writ petition under Article 226 of the Constitution would be as to whether on the ground of delay in exercising powers of suo motu revision, the fraud if actually committed can be precipitated and a relief granted to the petitioner. At the same time the finding of fraud recorded by the Board of Revenue is a prima facie assessment made by it without conducting any proper enquiry into the matter and without giving proper opportunity to the petitioner to give their say in the matter.

16. The judgments relied upon by Shri Anshuman Singh do say that action on charges of fraud can not be taken without proper enquiry and to that extent Shri Anshuman Singh may be right in contending that the fraud alleged against the petitioner by the Board of Revenue is not only illegal as it is recorded without grant of opportunity of defence/explanation to the petitioners. Shri Anshuman Singh may be correct in so asserting, but once the allegations of fraud are made and certain material available on record, particularly the report of the Dy. Collector dated 10.7.2009 relied upon by the Board of Revenue, indicates that as a prima facie case is made out to draw a presumption of fraud in the matter of allotment of patta then an enquiry into the matter has to be held and this Court does not deem it appropriate to overlook the aforesaid important aspect and grant relief to the petitioner. Instead, interest of justice requires that the allegations of fraud, if any exercised in seeking allocation of patta or mutation etc, should be inquired into and then only action taken.

17. Keeping in view the aforesaid, it is held by this Court that the exercise of suo motu powers of revision by the respondents in the matter after a period of 21 years has to be assessed and a decision taken after an enquiry into the

so-called fraud committed by the petitioner is inquired into. That apart, the question would be as to whether the petitioner's possession should be protected and execution of the Power Project stayed only because of pendency of the enquiry into the matter.

18. As far as land acquisition proceedings for establishing the Power Plant is concerned, the same has already been concluded and there is no challenge to the land acquisition. The land acquisition proceedings are in order and even if the relief is to be granted to the petitioner, the same would be only with regard to grant of compensation for acquisition of land. The petitioners cannot claim retaining of possession even if the petitions are allowed in its totality. That being so, interest of justice requires that the petitioner should be directed to hand over possession of the property to respondent No.5 within a reasonable time, so that the project and public interest is not adversely affected, and the enquiry into the right of the petitioners should go on as the result of this enquiry would decide the entitlement of the petitioner to receive compensation for the acquisition.

19. Keeping in view the totality of the facts and circumstances of the case, the following directions are issued:

(a) On the petitioners' filing a certified copy of this order before the Collector of the District concerned, the Collector shall cause an enquiry into the allegations of fraud said to have been committed by the petitioners, as is indicated in paragraphs 6 and 7 of the order passed by the Board of Revenue vide Annexure P/12 dated 30.7.2009, and after hearing the petitioners and all concerned, conclude the enquiry into the matter within a period of 60 days from the date of appearance of the petitioners.

(b) If on enquiry it is found that the petitioners has committed fraud, the Collector shall be free to cancel the allocation made in favour of the petitioners and in such an event, the petitioners shall not be entitled to any further benefit.

(c) However, on such enquiry it is found that the petitioners were not responsible for any fraud or no fraud is committed and the allocation is only irregular, then in view of the law laid down by the Full Bench in the case of *Ranveer Singh* (supra), the proceedings for suo motu powers initiated shall be deemed to be quashed and

petitioners shall be entitled to benefits for the acquisition in accordance with law.

(d) Till such enquiry is not completed by the Collector, possession of the petitioner shall be protected, but in any case the petitioner shall hand over possession of the land in question free from all encumbrances to respondent No.5 within a period of 60 days from the date of receipt of certified copy of this order, even if the proceedings before the Collector are not concluded within 60 days.

(e) The handing over of possession to respondent No.5 in terms of this order shall be subject to the condition that petitioners are paid all the compensation as per entitlement in case the finding of fraud alleged against them is not established.

20. With the aforesaid, all the petitions stand allowed and disposed of.

Petition allowed.

I.L.R. [2011] M. P., 2789
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 2560/2011 (Jabalpur) decided on 1 October, 2011

RAMBHAU VISHWAKARMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Work Charged and Contingency Paid Employees, Pension Rules M.P. 1979, Rule 2(h)& (b) - Entitlement of Pension **- Petitioner was never engaged as a contingency or a work charged employee nor was he recruited in accordance with the procedure prescribed under the M.P. Work Charged Contingency Paid Employees Recruitment and Conditions of Service Rules of 1977 - He does not fall within the definition of work charged employee or contingency paid employee nor can he be categorized as a permanent employee - He is not entitled to any pension.** (Para 5)

कार्यभारित तथा आकस्मिकता निधि कर्मचारी पेंशन नियम म.प्र. 1979, नियम 2(एच) व (बी) – पेंशन की हकदारी – याची कभी भी आकस्मिक अथवा कार्यभारित कर्मचारी के रुप में नियुक्त नहीं था, न ही उसकी भर्ती म.प्र. कार्यभारित आकस्मिकता निधि कर्मचारी भर्ती तथा सेवा शर्तें नियम 1977 के अंतर्गत विहित प्रक्रिया के अनुसार

की गयी थी – वह कार्यभारित कर्मचारी या आकस्मिकता निधि कर्मचारी की परिभाषा के भीतर नहीं आता, न ही उसे स्थायी कर्मचारी के रुप में वर्गीकृत किया जा सकता है – वह किसी पेंशन का हकदार नहीं।

Cases referred :

2003(4) MPLJ 376, 2011(3) MPLJ 210.

Pushpendra Singh Baghel, for the petitioner.
Vivek Sharma, PL for the respondent/State.

ORDER

R.S. JHA, J.;–Return having been filed, with the consent of the learned counsel for the parties the matter is heard finally.

2. The petitioner has filed this petition being aggrieved by order dated 25.5.2010 by which respondent no.3 has considered and rejected the claim of the petitioner for grant of pension under the provisions of the M.P. (Work Charged and Contingency Paid Employees) Pension Rules, 1979 (hereinafter referred to as the Pension Rules of 1979).

3. It is submitted by the learned counsel for the petitioner that the petitioner was initially engaged on muster roll and thereafter he became a Work Charged employee. It is submitted that in view of the circular of the State Government, Annexure P-1, dated 1.12.1997 the petitioner should have been given status of a permanent employee under the provisions of the M.P. Work Charged and Contingency Paid Employees Pension Rules, 1979 and the entire services rendered by him since his initial engagement in the establishment of the respondent from 1.10.1979 as a labour should be counted and pension should be given to him. The learned counsel for the petitioner has relied upon the decision of this Court rendered in the case of *Shrikrishan Shrivastava vs. State of M.P.*, 2003(4) MPLJ 376, in support of his submission.

4. The respondents, per contra, submits that the petitioner was a muster roll employee from the very beginning and continued to remain as muster roll employee till the very end of his service and in such circumstances, as a muster roll employee is not entitled to pension under the provisions of the Pension Rules of 1979, the claim of the petitioner has been rightly rejected. It is submitted that the impugned order passed by the authorities is in accordance with the directions issued by this Court in the previous petition filed by the petitioner i.e. W. P. No. 14059 (2007) which had been disposed of by order dated 22.3.2010 directing the respondents to consider and decide the

petitioner's case for grant of pension by passing a speaking order after duly taking into consideration the Division Bench decision of this Court rendered in the case of *Shrikrishan Shrivastava* (supra).

5. I have heard the learned counsel for the parties at length. From a perusal of the record it is clear that the petitioner was initially engaged as muster roll daily wager on 1.10.1979 and continued to be engaged in that capacity till 31.1.2008. It is also clear and undisputed that the petitioner was never engaged as a contingency or a work charged employee nor was he recruited in accordance with the procedure prescribed under the M.P. Work Charged Contingency Paid Employees Recruitment and Conditions of Service Rules of 1977 (hereinafter referred to as the Recruitment Rules of 1977). In such circumstances, it is clear that the petitioner does not fall within the definition of workcharged employee or contingency paid employee under Rule 2(h) and (b) respectively nor can he be categorized as a permanent employee under Rule 6 of the Recruitment Rules of 1977 and, therefore, he is not entitled to any pension under the Pension Rules of 1979 which necessarily requires that a person should have rendered minimum period of qualifying service as a permanent employee before he becomes entitled to pension.

6. The reliance placed by the learned counsel for the petitioner, in the case of *Shrikrishan Shrivastava* (supra), is also misconceived in view of the fact that the law in this respect has subsequently been clarified and laid down by a Full Bench of this Court in the case of *Mamta Shukla vs. State of M.P. and others,* 2011 (3) MPLJ 210, after duly considering the case of *Shrikrishan Shrivastava* (supra) and it has been categorically held that the Pension Rules of 1979 cannot be read in isolation and have to be read in consonance with and in harmony with the Recruitment Rules of 1977 and on doing so it is clear that only those persons who have been duly appointed in accordance with the procedure prescribed by the Recruitment Rules of 1977 are entitled to pension under the Pension Rules of 1979 on completion of the qualifying period of service in the following terms in paras 12 & 24:-

> "12. The Pension Rules of 1979 are not independent Rules in regard to regulating the condition of service of workcharged and contingency paid employees. There are specific rule, i.e., Recruitment Rules of 1977 in regard to condition of service including appointment, qualification, procedure for recruitment and promotion, seniority list, conduct and procedure for imposing penalty. Hence, the

Pension Rules of 1979 be read in consonance with the Recruitment Rules of 1977, because the object of Pension Rules, 1979 is to provide benefit of pension to certain class of employees and that has to be construed to employees who have been recruited in accordance with the provisions of Recruitment Rules of 1977, because if the Pension Rules of 1979 be read in isolation or independently then the Recruitment Rules of 1977 would become redundant.

24. On the basis of the above discussion, we hold in regard to the substantial questions of law Nos.2 & 3 that an employee is eligible to count his past service as qualifying service in accordance with Rule 6 of the Pension Rules, 1979, if he was appointed in accordance with the provisions of Recruitment Rules of 1977. We further hold than an employee, who was not appointed in accordance with the provisions of Recruitment Rules framed by the concerned department, i.e., the Recruitment Rules of 1977, would not be eligible to count his past service as qualifying service for the purpose of grant of pension in accordance with the Pension Rules of 1979 and we answer the substantial questions of law Nos.2 and 3 accordingly."

7. In the instant case, as the petitioner has admittedly not been appointed or engaged in accordance with the Recruitment Rules of 1977 and has throughout been a muster roll employee whose services cannot be said to be that of a permanent employee, as defined under the Pension Rules of 1979, in the opinion of this Court the claim of the petitioner has rightly been rejected by the respondent authorities in view of the decision of the Full Bench of this Court in the case of *Mamta Shukla* (supra). The reliance placed by the petitioner on the circular of the State Government, Annexure P-1, dated 1.12.1997 is also misplaced and misconceived as that circular relates to and has been issued in respect of Gangman who are duly appointed in accordance with the procedure prescribed under the Recruitment Rules of 1977 and does not relate to daily wages or muster roll employees like the petitioner and, therefore, no benefit thereunder can be claimed by the petitioner.

8. In the circumstances, I do not find any merit in the present petition which is, accordingly, dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 2793

ELECTION PETITION

Before Mr. Justice R.C.Mishra

Election Petition No. 30/2009 (Jabalpur) decided on 14 July, 2011

DOMAN SINGH NAGPURE ...Petitioner

Vs.

PRADEEP JAISWAL ...Respondent

A. Civil Procedure Code (5 of 1908), Order VII Rule 11, Representation of the People Act (43 of 1951), Sections 83, 86, 87 & 123 - Election Petition - **Material Facts and particulars of corrupt practices - In absence of averment that respondent did incur the expenditure of hiring vehicles for specified number of days or that he had authorized his election agent for hiring such vehicles or that he had authorized any other person for hiring such vehicles to whom he has undertaken to reimburse the amount, it must be held that material facts in relation to an allegation of corrupt practice are lacking - Mere assertion that returned candidate was guilty of corrupt practice in as much as he had not maintained/furnished true and correct accounts of expenditure incurred or authorized would not satisfy the requirements of pleadings in an election petition based on corrupt practice.** (Para 10 & 11)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश VII नियम 11, लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 83, 86, 87 व 123 – चुनाव याचिका – भ्रष्ट आचरण के महत्वपूर्ण तथ्य तथा विवरण – इस प्रकथन के अभाव में कि प्रत्यर्थी ने विनिर्दिष्ट दिनों के लिये वाहन किराये पर लेने के लिये व्यय किया अथवा उसे अपने चुनाव एजेंट को ऐसा वाहन किराये पर लेने हेतु प्राधिकृत किया अथवा किसी अन्य व्यक्ति को जिसको उसने रकम की प्रतिपूर्ति करने का वचन दिया, ऐसा वाहन किराये पर लेने हेतु प्राधिकृत किया, यह माना जाना चाहिये कि भ्रष्ट आचरण के आरोप के संबंध में महत्वपूर्ण तथ्यों का अभाव है – यह प्रकथन मात्र कि अभ्यर्थी भ्रष्ट आचरण के दोषी थे जहां तक कि उन्होंने किये गये अथवा करवाये गये व्यय का सही हिसाब–किताब प्रस्तुत नहीं किया, चुनाव याचिका भ्रष्ट आचरण पर आधारित अभिवचनों की अपेक्षाओं को पूरा नहीं करती।

B. Representation of the People Act (43 of 1951), Section 77 - Expenditure - **Pleadings in the election petition as to the expenses incurred by return candidate per vehicle per day and the total number of vehicles used by him were not the material facts and therefore, it can not be said that by themselves they proved that he had incurred in an expenditure exceeding the prescribed limit.** (Para 11)

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 77 – व्यय – चुनाव याचिका में निर्वाचित अभ्यर्थी द्वारा प्रतिदिन, प्रति वाहन पर किये गये व्यय तथा उसके द्वारा इस्तेमाल की गयी वाहनों की संख्या संबंधी अभिवचन महत्वपूर्ण तथ्य नहीं थे अतएव, यह नहीं कहा जा सकता कि उसके द्वारा ही उन्होंने यह सिद्ध कर दिया कि उन्होंने निर्धारित सीमा से अधिक व्यय किया।

Cases referred:

(1977) 1 SCC 511, AIR 2002 SC 599, AIR 1999 SC 252, AIR 1972 SC 515, AIR 2010 SC 1227, AIR 1987 SC 1577.

L.D.S. Baghel, for the petitioner.

P.D. Gupta, for the respondent.

ORDER

R.C. MISHRA, J.:–This order shall govern disposal of the following interim applications moved on behalf of the respondent -

(i) I.A. No.55/2009, which is an application, under Order VII Rule 11 of the Code of Civil Procedure (for brevity 'the Code') read with Sections 83, 86 and 87 of the Representation of the People Act, 1951 (for short 'the Act') for rejection of the petition inter alia on the ground that the petition does not disclose any cause of action as it does not contain material facts and particulars of the alleged corrupt practices.

(ii) I.A. No.56/2009, which is an application, under Order VI Rule 16 of the Code read with Sections 83, 86 and 87 of the Act for striking out the pleadings contained in Para No.5.1 to 5.12 on the ground that they are unnecessary, scandalous, frivolous or vexatious and tend to prejudice or embarrass the trial.

2. In this petition, validity of election of the returned candidate viz. the respondent to the M.P. Legislative Assembly Constituency No.112 Waraseoni (hereinafter referred to as the 'Constituency') has been called in question on the ground of corrupt practices as contemplated under sub-Sections (4) and (6) of Section 123 of the Act. According to the petitioner, the respondent not only contravened the provisions of Section 77 of the Act by incurring excess expenditure than what was permissible thereunder but also deliberately propagated a false statement that he had already withdrawn his candidature in favour of the respondent. However, in reply to I.A. No.55/2009 (supra), the petitioner has candidly conceded that he has challenged the election mainly on

the ground that expenditure incurred by the respondent in connection therewith, had exceeded the prescribed limit of authorized expenses, under Rule 90 of the Conduct of Election Rules, 1961.

3. Petitioner's pleadings relevant to the alleged corrupt practice by incurring/ authorizing expenditure above the limit may be summed up as under -

> In the accounts of expenditure furnished to the District Election Officer, the respondent admitted on oath that during the election campaign, he had incurred a total expenditure of Rs.7,23,994/- including Rs.3,72,800/- towards fuel expenses in respect of the vehicles used therefor whereas on the basis of the prevailing rates as mentioned in the circular-dated 14/11/2008 (Annexure P-4) issued by Additional Collector, an amount of Rs.6,02,000/- ought to have been added as rent of the vehicles described in the statement of accounts. Thus, the actual expenses incurred by the respondent were much above the prescribed limit of Rs.10 lacs.

4. In the wake of objection that the pleadings were vague and incomplete, the petitioner, by way of I.A. No.62/2009, sought permission to amend the election petition by adding -

> (a) averments as to source of information regarding the number of days on which vehicles were put to service by the respondent during the election campaign.
>
> (b) statement of expenditure as against the fuel consumed in the vehicles as well as that of the hire charges.
>
> (c) names of party workers viz. Anand Vasnik and Charandas Chichkhede as the persons who had seen Meena Rusia, supporter of the respondent, distributing calendars, posters and pamphlets (Annexures P/1, P/2 and P/3) to the voters residing in village Lalpur on 25.11.2008 at about 9 a.m..
>
> (d) name of party worker viz. Dulichand Uike who had seen Swapnil Dongre, Block President of Congress Party and agent of the respondent, distributing calendars, posters and pamphlets to the voters residing in village Mangejhari on 25.11.2008 at about 10 a.m.

(e) name of party worker viz. Adme Guriji, who had seen Sayeed Khan, Vice President of District Congress and agent of the respondent, distributing calendars, posters and pamphlets to the voters residing in village Dongergoan on 25.11.2008 at about 11 a.m.

(f) name of party worker viz. Tiwarilal Lillare, who had seen Gokul Gautam, a member of the Zila Panchayat and agent of the respondent, distributing calendars, posters and pamphlets to the voters residing in village Aarambha on 25.11.2008 at about 5 p.m.

However, for the reasons recorded in the order-dated 03.02.2010, the IA No.62/2009 under Order VI Rule 17 of the Code read with Section 86(5) of the Act, was allowed in part and the petitioner was permitted to incorporate the proposed amendment in respect of expenses incurred on the vehicles.

5. According to the respondent, even the petition in its amended form would not satisfy necessary requirements of the pleadings with regard to the corrupt practice envisaged in sub-section (6) of Section 123 of the Act.

6. Meanings of the words 'material facts', 'full particulars' as used in clauses (a) and (b) of sub-Section (1) of Section 83 of the Act have already been explained by the Apex Court in a series of decisions. However, it is not essential to burden this order with various authorities on the point. For the purpose of the present discussion, suffice, would be, to refer to the following elucidation of the expressions as provided in Para 42 and 43 of the decision rendered in *Shri Udhav Singh v. Madhav Rao Scindia* (1977) 1 SCC 511 -

"42. All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are 'material facts'. In the context of a charge of corrupt practice 'material facts' would mean all the basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner is bound to substantiate before he can succeed on that charge. Whether in an election petition, a particular fact is material or not, and as such required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon and the special circumstances of the case. In short, all those facts which are essential to clothe the petitioner with a complete cause of action are 'material facts' which must be pleaded, and failure to plead even a single

material fact amounts to disobedience of the mandate of Section 83(1)(a).

43. 'Particulars' on the other hand are 'the details of the case set up by the party'. 'Material particulars' within the contemplation of clause (b) of Section 83(1) would therefore mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative."

7. Coming to the pleadings in the present case, it may be observed that some clerical/typographical errors have crept in the petition. Learned counsel for the petitioner, while acknowledging the existence of errors, has submitted that for deciding the interim applications, the particulars given by the respondent as to number of the vehicles, (b) make of the vehicles and (c) respective days on which the vehicles were put to use, may be taken as true and correct. As per the statement, vehicles of the following descriptions were deployed on the respective days, constituting a total of 987 days.

S. No.	Types of Vehicle	Number	Days
1	Jeep	1	8
2	Tata Sumo	51	831
3	Qualis	2	38
4	Marshall	3	53
5	Scorpio	1	10
6	Bullero	1	5
7	Maruti Car	1	15
8	Pick-up	2	27
	Total	62	987

8. A bare perusal of the circular (Annexure P-4) would reveal that the candidates were required to assess the expenditure incurred on conveyances on the basis of the following rates -

S. No.	Types of Vehicle	Specified rates of hiring
1	Jeep	Rs.500/-
2	Tempo	Rs.200/-
3	Tata Sumo	Rs.600/-
4	Qualis	Rs.700/-
5	Car	Rs.500/-
6	Three Wheeler	Rs.450/-
7	Cycle Rickshaw	Rs.150/-
8	Truck	Rs.1500/-

9. The controversy, therefore, lies within a very narrow compass. The point for determination is as to whether the hiring charges of conveyances ought to have been included in the total expenditure by assessing the same on the basis of the rates mentioned in the circular (Annexure P-4).

10. However, in absence of averment that the respondent did incur the expenditure of hiring the aforesaid vehicles for the specified number of days or that he had authorized his election agent for hiring such vehicles or that he had authorized any other person for hiring such vehicles to whom he has undertaken to reimburse the amount, it must be held that material facts in relation to an allegation of corrupt practice within the meaning of Section 123(6) read with S.77 of the Act are lacking (*Kamalnath v. Sudesh Verma* AIR 2002 SC 599 referred to). In that case, the petitioner had averred that an helicopter had been used for a number of hours and the normal rate of hiring a helicopter being in the minimum Rs. 2,12,000/- per day and the helicopter having been used for 14 days, the returned candidate must have been required to pay more than the prescribed limit towards the expenses of the helicopter. Observing that this cannot be held to be an assertion of material fact and on the other hand, it would be in the realm of conjecture, requiring the Court to draw inference by adopting an involved process of reasoning and that would not satisfy the requirement of the pleadings of material facts, the Supreme Court set aside the order passed by a co-ordinate Bench of this Court, dismissing the application for rejection of election petition for want of material facts.

11. Moreover, as pointed out by the Apex Court in *L.R. Shivaramagowda v. T.M. Chandrashekar* AIR 1999 SC 252, mere assertion that the returned candidate was guilty of corrupt practice inasmuch as he had not maintained/ furnished true and correct accounts of expenditure incurred or authorized would not satisfy the requirements of pleadings in an election petition based on the ground contemplated in Section 123(6) read with 100(1)(b) of the Act. For a ready reference, the relevant observations may be reproduced as under -

> *"Sub-sections (1) and (2) of S.77 deal only with the maintenance of account. Sub-section (3) of S.77 provides that the total of the election expenses referred to in sub-section (1) shall not exceed such amount as may be prescribed. Rule 90 of the Conduct of Election Rules prescribes the maximum limit for any Assembly Constituency. In order to declare an election to be void, the grounds were set out in S. 100 of the Act. Sub-section (1)(b) of S. 100 relates to any corrupt practice committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent. In order to bring a matter within the scope of sub-section (1)(b), the corrupt practice has to be one defined in S. 123. What is referred to in sub-section (6) of S. 123 as corrupt practice is only the incurring or authorising of expenditure in contravention of S.77. Sub-section (6) of S. 123 does not take into its fold, the failure to maintain true and correct accounts. The language of sub-section (6) is so clear that the corrupt practice defined therein can relate only to sub-section (3) of S. 77 i.e. the incurring or authorising of expenditure in excess of the amount prescribed. It cannot by any stretch of imagination be said that the non-compliance with S. 77(1) and (2) would also fall within the scope of S. 123(6). Consequently, it cannot fall under S.100(1)(b)".*

As explained further, the pleadings in the election petition as to the expenses incurred by the appellant per vehicle per day and the total number of vehicles used by him were not the material facts and therefore, it cannot be said that by themselves they proved that he had incurred an expenditure exceeding the prescribed limit.

12. Needless to say that the petitioner cannot be permitted to bring the

case within the ambit of Section 100(1)(d)(ii)or(iv) of the Act, for the purpose of which it is necessary to plead specifically that the result of the election in so far as it concerns the returned candidate has been materially affected due to the said corrupt practice or non-compliance with the instruction contained in the circular (Annexure P-4).

13. For these reasons, even if the averments made in the election petition are taken at their face value and accepted in their entirety, no triable issue between the parties would arise in absence of complete, precise and specific pleadings in respect of the alleged corrupt practice. The corresponding pleadings, being deficient, can be directed to be struck down under Order VI Rule 16 of the Code and the petition itself can be rejected as not disclosing a cause of action under Clause (a) of Rule 11 of Order VII of the Code (See. *Hardwari Lal v. Kanwal Singh* AIR 1972 SC 515 that has been followed recently in *Ram Sukh v. Dinesh Aggarwal* AIR 2010 SC 1227). Need for striking a balance in ascertaining the purity of election and at the same time in preventing waste of public time and money and in keeping the sword of Damocles hanging on the head of returned candidate for an indefinite period of time was also emphasized in *Dhartipakar Aggarwal v. Rajiv Gandhi* AIR 1987 SC 1577. Accordingly, non-compliance with the provisions of Section 83 of the Act should lead to dismissal of the petition if the matter falls within the scope of the Order VI Rule 16 and Order VII Rule 11 of the Code.

14. In the result, both the I.As are allowed and the petition stands rejected, under Order VII Rule 11(a) of the Code, for want of any cause of action. The parties shall bear their own costs.

15. A copy of this order be forwarded to the Election Commission as well as to the Speaker of the State Legislative Assembly.

Petition rejected.

I.L.R. [2011] M. P., 2801

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

F.A. No. 179/1996 (Indore) decided on 7 May, 2011

RASHID KHAN & anr. ...Appellants

Vs.

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

A. Evidence Act (1 of 1872), Section 3 - Proof of Title - **If the title of the plaintiff is challenged, he is not only bound to prove his title but he has to further prove the title of his vendor also.** (Para 12)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – हक का सबूत – यदि वादी के हक को चुनौती दी गयी है, तब वह न केवल अपना हक सिद्ध करने के लिए बाध्य है बल्कि उसे और आगे अपने विक्रेता का हक भी साबित करना होगा।

B. Specific Relief Act (47 of 1963), Section 34 - Further Relief - **If in some revenue proceedings an order has been passed to evict the plaintiffs, unless and until the same is challenged by the plaintiffs and relief is sought for its quashment, the suit is hit u/s 34 of the Act.** (Para 13)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – अतिरिक्त अनुतोष – यदि किसी राजस्व कार्यवाही में वादीगण को बेदखल करने के लिए आदेश पारित किया गया है, जब तक कि वादीगण द्वारा उसे चुनौती नहीं दी जाती और उसे अभिखंडित करने हेतु अनुतोष नहीं चाहा जाता, वाद अधिनियम की धारा 34 के अंतर्गत प्रस्तुत।

C. Civil Procedure Code (5 of 1908), Order 41 Rule 27 - Additional Evidence - **Photocopy of Certificate of Municipality, certifying that in the Municipal Register house is in dilapidated condition, the ownership of 'S' has been entered - Held - Application can not be accepted on the ground that the document which is filed is the photocopy of some certificate and that certificate itself is not a primary evidence.** (Para 11)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 – अतिरिक्त साक्ष्य – नगर पालिका के प्रमाण पत्र की प्रति प्रमाणित करती है कि नगर पालिका रजिस्टर में मकान जीर्ण अवस्था में है, 'एस' के स्वामित्व की प्रविष्टि की गयी है – अभिनिर्धारित – इस आधार पर आवेदन स्वीकार नहीं किया जा सकता कि दस्तावेज जिसे प्रस्तुत किया गया है वह किसी प्रमाण पत्र की प्रति है और वह प्रमाण पत्र अपने आप में प्राथमिक साक्ष्य नहीं है।

D. Evidence Act (1 of 1872), Sections 64 & 77 - Photocopy of Certificate of Municipality - **Certificate prepared from the entry made in the register at page No. 149 of the Municipality certifying that in the Municipal Register house is in dilapidated condition, the ownership of 'S' has been entered - Held - The document filed is nothing but a waste paper because it is a photocopy of some certificate and photocopy of a document is inadmissible in evidence - Indeed, the certified copy of the Municipal register which is a public document ought to have been filed.** (Para 11)

घ. साक्ष्य अधिनियम (1872 का 1), धाराएँ 64 व 77 – नगर पालिका के प्रमाण पत्र की प्रति – नगर पालिका के रजिस्टर में पृष्ठ क्र. 149 पर की गयी प्रविष्टि से प्रमाण पत्र तैयार किया गया कि नगर पालिका रजिस्टर में मकान जीर्ण अवस्था में है, 'एस' के स्वामित्व की प्रविष्टि की गई है – अभिनिर्धारित – प्रस्तुत दस्तावेज बेकार कागज है, क्योंकि वह किसी प्रमाण पत्र की प्रति है और दस्तावेज की प्रति साक्ष्य में अग्राह्य है – निश्चित रुप से, नगर पालिका रजिस्टर की प्रमाणित प्रति प्रस्तुत करनी चाहिये थी जो कि लोक दस्तावेज है।

Cases referred :

1980 LJL 581, 1999 R.N. 328, AIR 2010 SC 965, 1967 R.N. 507, AIR 1971 SC 761.

Amit Agarwal with *Rohit Mangal,* for the appellants/plaintiffs.
Yashpal Rathore, PL for the respondents/State/defendants.

JUDGMENT

A.K. SHRIVASTAVA, J. :–This is plaintiffs' first appeal since their suit for declaration and injunction has been dismissed by learned Trial Court.

2. The facts necessary for the disposal of this appeal lie in narrow compass. Suffice it to say that a suit for declaration and injunction in respect of a house, the description whereof has been mentioned in the plaint and which is the subject matter of the suit has been filed by the plaintiffs against the defendants/ respondents on the averments, that they have purchased the suit property from Mohammad Sabir on 27.07.1990 and 16.02.1990 by two registered .sale deeds' Exhibits P-1 and P-2 and entered into possession of the suit property. Further the case of the plaintiffs is that their vendor purchased the suit property from Qamal Abbas Khan who was the surviving heir of Musharraf Jahan Begum the owner of the suit property vide registered sale deed dated 02.12 1986 and thus, they are the owner of the suit property, but,

the respondents/defendants are trying to interfere into their possession.It is the further case of plaintiffs that Sub-Divisional Officer/Additional District Magistrate vide order dated 05.10.1991 in Case No. 10A/68/1991-92 by holding that the suit property is government property, has directed to evict the plaintiffs and hence, the present suit has been filed.

3. The plint averments were refuted by the defendants by filing written statement. Their stand is that the suit property is owned by the government and has been recorded in the revenue record as Nazul land, therefore, not only the plaintiffs but their predecessors were also not the title holder of the suit property and therefore, status of the plaintiffs is that of a tress-passer only and rightly the order has been passed by the Sub-Divisional Officer directing them to evict the suit premises.

4. Learned Trial Court on the basis of the averments made in the plaint and denial in the written statement framed necessary issues and after recording the evidence of the parties dismissed the suit.

5. In this manner this appeal has been filed by the plaintiffs.

6. It has been put forth by learned counsel for the appellants that suit property was owned by Musharraf Jahan Begum whose heir sold the property to the vendor of the plaintiffs and thus, the title of the plaintiffs has been proved. Learned counsel submits that plaintiffs have not only proved their sale deeds but have also proved the sale deed of their vendor, hence, they are the title holder of the suit property, this has been emphatically proved. It has also been put forth by learned counsel that if the land is in the vicinity of the Municipality,the provisions of Section 248 of the M.P. Land Revenue Code, 1959 (hereinafter referred to as "the Code") are not attracted and in this regard he has placed reliance on the Division Bench decision of this Court *Sind Mahajan Exchange Ltd., Lashkar v. State of M.P. and another,* 1980 LJL 581.

7. Two applications; I.A. No. 4268/1996 under Order VI Rule 17 CPC and I.A. No. 4222/1996 under Order XLI Rule 27 CPC are also filed before this Court.Learned counsel for the appellants has addressed on these two applications also and has submitted that by allowing these two applications the case be remanded back to learned Trial Court.

8. On the other hand, Shri Yashpal Rathore, learned counsel appearing for the respondents/State argued in support of the impugned judgment.

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

10. So far as the contention of learned counsel for the appellants that since the land is in the Municipal area, the provisions of Section 248 of the Code are not applicable is concerned, the entire argument is based on the pivot of the dictum laid down by the Division Bench of this Court *Sind Mahajan* (supra) which has been reversed by the Supreme Court *State of M.P. and another v. Sind Mahajan Exchange Ltd.,* 1999 R.N. 328. Hence, this contention cannot be accepted that in the Municipal area the provisions of Section 248 of the Code are not attracted.

11. So far as the other contention of learned, counsel that they have proved their title is concerned, suffice it to say that Exhibits P-1 and P-2 which are the sale deeds dated 27.07.1990 and 16.02.1990 respectively have been filed by them in order to prove that Mohammad Sabir sold the suit property to them by these two sale deeds. Learned counsel has also invited my attention to sale deed Exhibit P-8 dated 02.12.1996 executed by Qamal Abbas in favour of his vendor and submitted that Qamal Abbas was the owner of the suit property being the heir of Musharraf Jahan Begum and therefore, validly the title has been proved. However, the plaintiffs have not filed any document in respect of the title of Musharraf Jahan Begum in the Trial Court. Along with application I.A. No.4222/1996 under Order XLI Rule 27 CPC also only a photocopy of certificate of Municipality Jaora dated 26.08.1996 has been filed certifying that in the Municipal register 1966-67, Halka No.1 on Page No. 149 of the register of Municipality, house no.618/2 which is in dilapidated condition, the ownership of Sahabjadi Musharraf Jahan Begum has been entered. According to me, the document which has been filed alongwith the application is nothing but a waste paper because it is a photocopy of some certificate. The photocopy of a document is inadmissible in evidence, since it is neither primary nor secondary evidence. Even if the original would have been filed it could not be a pimary evidence because on bare perusal of this document itself it appears that this certificate has been prepared from the entry made in the register at page No.149 of the Municipality. Indeed, the certified copy of the Municipal register which is a public document ought to have been filed and if it would have been filed, under Section 77 of the Evidence Act, mere production of it would have been sufficient because under this provision the production of the certified copy of a public document would be the proof of the public document. Thus. this application cannot be accepted

on the ground that the document which is filed is the photocopy of some certificate and that certificate itself is not a primary evidence. Needless to say that under Section 64 of the Evidence Act if primary evidence is available, the secondary evidence is inadmissible. In this context. I may profitably place reliance on the decision of Supreme Court *Tukaram S. Dighole v.Manikrao Shivaji Kokate,* AIR 2010 SC 965 (para-17).

12. It is well settled law that if the title of the plaintiff is challenged, he is not only bound to prove his title but he had to further prove the title of his vendor also. In this context, I may cite a decision of this Court *Sabrani v. Muniya,* 1967 RN 507. Since the plaintiffs have utterly failed to prove the title of their predecessor, according to me, learned Trial Court did not err in dismissing the suit of plaintiffs holding that they had failed to prove their title in the suit land.

13. Apart from this, the plaintiffs are also basing their case that there is an order of Sub-Divisional Officer/Additional District Magistrate dated 05.10.1991 against them passing an order to evict them as they are tress-passers on the suit property and they have been further directed to deposit fine of Rs. 500/-. Indeed, plaintiffs have based this order as a cause of action to file this suit. According to me, if in some revenue proceedings an order has been passed to evict the plaintiffs, unless and until the same is challenged by the plaintiffs and relief is sought for its quashment, the suit is hit under Section 34 of the Specific Relief Act. In this context, I may profitably place reliance on the decision of Supreme Court *Jugraj Singh and another v. Jaswant Singh and others,* AIR 1971 SC 761.

14. So for as the amendment application of the appellants to amend the plaint is concerned, I have gone through that application and I find that the plaintiffs are now shifting their case on the basis of adverse possession. According to me, having lost from the Court below, now at this stage they cannot shift over their stand because it will prejudice the respondents and the entire case will be reopened. Indeed, it is apparent that in order to fill up the lacuna this amendment application has been filed. Thus, this application is hereby dismissed.

15. Resultantly, this appeal fails and is hereby dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 2806
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 375/1987 (Jabalpur) decided on 18 May, 2011.

PRATAP SINGH ...Appellants
Vs.
MANGAL KHAN & anr. ...Respondents

Specific Relief Act (47 of 1963), Section 5 - Recovery of Possession **- Plaintiff having better possessory title was dispossessed by the defendants having no better title than him - He can sue for the restoration of possession.**

Plaintiff has been held to be the occupancy tenant on the lands (including suit land) by Naib Tahsildar vide its order dated 31.5.1974 by holding further that he was possessing those lands in that capacity - Thus, the plaintiff was having better possessory title and when he has been dispossessed by the defendants (having no better title than him) he can sue for the restoration of possession - The learned trial Court has rightly decreed the suit for possession of the plaintiff. (Para 16)

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 5 – कब्जे का वापस लिया जाना – बेहतर कब्जा विषयक हक रखने वाले याची को प्रतिवादियों द्वारा बेकब्जा कर दिया गया जिनका उससे बेहतर हक नहीं था – वह कब्जा वापस किये जाने के लिए मुकदमा कर सकता है।

Cases referred :

AIR 1994 SC 532, AIR 1972 SC 2299, AIR 1937 NAG. 281, AIR 1968 SC 1165.

J.L. Soni, for the appellants/plaintiffs.
Prashant Sapre, for the respondents/defendants.

JUDGMENT

A.K. SHRIVASTAVA, J. :–This second appeal has been filed at the instance of plaintiff against the reversing judgment of learned First Appellate Court allowing the appeal of defendants and setting aside the judgment and decree of learned Trial Court decreeing the suit of plaintiff.

2. The plaintiff-appellant filed suit for possession and injunction in respect of certain agricultural land which is the subject matter of the suit and the

description whereof has been mentioned in the plaint. According to the plaintiff, he is the Bhumiswami of the suit property and the defendants who are father and son have encroached upon the suit property area 0.75 acres delineated in the map filed along with the plaint in Asad Samwat 2036 (June 1979). The suit has been filed on the basis of occupancy tenancy right which was conferred to plaintiff vide order dated 31.5.1974 passed by the Naib Tahsildar in Case No.7A/46/73-74 and it was directed that his name be entered as occupancy tenant in the revenue record. It is the further case of plaintiff that he submitted an application in the Revenue Court which was registered as Case No.32A/12/1979-80 and the measurement of his land was made by the Revenue Court and it was found that defendants are illegally possessing 0.75 acres of land of which the plaintiff is the occupancy tenant. Despite the plaintiff served notice on the defendants they did not remove their illegal possession and hence, the suit has been filed for possession on the basis of title of occupancy tenancy right against the defendants who are strangers and trespassers according to the plaintiff.

3. The defendants filed written statement and denied the plaint averments. According to them, the land was owned by one Harbans Singh who is residing for years together in Delhi and left the village Kanjiya. The inhabitants of the village have illegally taken possession of his land. The plaintiff and defendants have also encroached upon the land of said Harbans Singh. According to them, the Revenue Court wrongly found the plaintiff to be the occupancy tenant of said Harbans Singh and further that he is possessing the land as an occupancy tenant. The defendants further pleaded that they are possessing the suit property for last 25 years (the written statement was filed on 5.11.1981) and denied this fact that they encroached upon the suit property in June, 1979 (No revenue record has been filed by them). A plea of adverse possession has also been set up by the defendants. Hence, it has been prayed that the suit be dismissed.

4: Learned Trial Court framed necessary issues and after recording the evidence of the parties came to hold that the plaintiff was possessing the suit property as occupancy tenant, however, the defendants have encroached upon the suit property and hence, decreed the suit.

5. The defendants filed first appeal before learned lower Appellate Court which has been allowed by the impugned judgment and decree and suit of plaintiff has been dismissed. However, learned First Appellate Court did not

find that defendants have acquired the *Bhumiswami* right by way of adverse possession.

6. In this manner this appeal has been filed by the plaintiff. The defendants have not filed cross-objections claiming that they have acquired *Bhumiswami* right by adverse possession. Hence, the fact that they did not acquire the said right by adverse possession has attained finality.

7. This Court on 12.1.1988 admitted the appeal on the following substantial question of law:

> Whether the document Ex.P-1 gives any or at least better title to the appellant as compared with the respondents and whether on that account the appellant is entitled to remain in possession of the suit lands?"

8. I have heard Shri J.L. Soni, learned counsel for the appellants and Shri Prashant Sapre, learned counsel for the respondents. Having heard learned counsel for the parties I am of the view that this appeal deserves to be allowed.

9. On bare perusal of the pleadings of plaintiff this Court finds that there is specific plea of the plaintiff in his plaint that that he acquired occupancy tenancy right on Survey Nos.251 area 0.344 acres, 252 area 0.328 acres, 253 area 0.368 acres, 254 area 0.242 acres, 255 area 0.385 acres, 256 area 0.146 acres, 257 area 178 acres, 260 area 0.321 acres and Survey No.261 area 0.360 acres and there is an order dated 31.5.1974 of Naib Tahsildar, Khurai in this regard which is Ex.P-1 holding that appellant is the occupancy tenant and is possessing these lands as occupancy tenant. On bare perusal of the certified copy of this order (Ex.P-1) this Court finds that on the basis of occupancy tenancy right the plaintiff claimed the said right and also prayed that his name be entered as occupancy tenant in the revenue record. Before passing this order the Naib Tahsildar issued the proclamation notice and invited objections but none of the inhabitants of the village including the defendants, although they are the residents of the same village, filed any objections. The Naib Tahsildar after adopting due procedure prescribed under the M.P. Land Revenue Code, 1959 (herein after referred to as "the Code") and also after calling the report of the Patwari found that the plaintiff is entitled to get his name entered as occupancy tenant since such right has been acquired by him and he is also possessing the lands in that capacity. The defendants did not assail the above said order of Naib Tahsildar before S.D.O. in appeal.

10. The stand of defendants in the written statement is that Harbans Singh was the Bhumiswami of the suit property and he started residing in Delhi, resultantly, the inhabitants of the village including the defendants have encroached upon the lands of Harbans Singh. Thus, the defendants themselves have stated that they are the tress-passers on the suit property.

11. Learned First Appellate Court in para-8 held that the plaintiff did not acquire occupancy tenancy right on the lands of Harbans Singh, Survey Nos. 251 to 257, 260 and 261, the description of which is mentioned in the plaint (para-1) and also on the suit land (area 0.75 acres) which is the part of these lands. But, according to me, when the order of the Revenue Court was not challenged by the defendants and it became final and without challenging that order even by filing counter-claim in the Civil Court, learned First Appellate Court by misconstruing the order of Naib Tahsildar dated 31.5.1974 (Ex.P-1) has allowed the appeal of the defendants by dismissing the suit of plaintiff.

12. The order dated 31.5.1974 (Ex.P-1) was never challenged any where. It was not even challenged by Harbans Singh. Hence it became final and was also implemented by entering the name of the plaintiff in the Revenue record. In the said order it has been held that plaintiff is possessing the land as occupancy tenant. Thus, the plaintiff was having title of occupancy tenant which certainly is a better title than that of defendants, who according to their own showing in the written statement, are the trespassers on the suit land.

13. The Supreme Court *Sundra Naicka Vadiyar (Dead) By LRs. And Another vs Ramaswami Ayyar (Dead) By His LRs,* AIR 1994 SC 532 has held that if a finding has been arrived at by ignoring an important document, High Court can interfere in the findings rendered by two Courts below. In the case of *Sundra Naicka* (supra) also there was an order of Revenue Court which was misinterpreted by the Courts below and therefore, High Court interfered in the judgment passed by learned two Courts below. The Supreme Court held that judgment of the High Court shows that there were good reasons for treating the finding on the question of possession recorded by the first two Courts to be vitiated. The Supreme Court further held that if the finding has been arrived at by ignoring some of the documents which were vital for deciding the question of possession, the High Court rightly vitiated the finding on the question of possession recorded by Trial Court as well as First Appellate Court under Section 100 CPC. The Apex Court affirmed the judgment of the High Court vitiating the said findings of two Courts below.

14. According to me, when the order of the Revenue Court (Ex.P-1) in favour of plaintiff became final and it was never challenged by the defendants either in the superior Revenue Court by filing the appeal under the Code or by filing counter-claim in the Civil Court praying to set aside the said order, the learned First Appellate Court was not justified in holding the said order is bad in law.

15. Admittedly in the order dated 31.5.1974 (Ex.P-1) the Naib Tahsildar held that plaintiff is possessing the lands mentioned in para-1 of the plaint (including the suit land) as occupancy tenant and thus, according to me the plaintiff is having better title than that of defendants who according to their own stand in the written statement are the trespassers. The Supreme Court *M. Kallappa Setty v. M.V. Lakshminarayana Rao,* AIR 1972 SC 2299 has held that the plaintiff who is in possession of the suit property, on strength of his possession, resist interference from defendant who has no better title than himself and get injunction restraining defendant from disturbing his possession. According to me, same analogy can also be applied for suit for possession against a third person who is not having better title than that of plaintiff.

16. A person who enters into peaceful possession of land claiming it as his own although he might not have any title to the land, can sue another person who has forcibly ousted him of possession and who has no better title to that land, because although he (in the present case the plaintiff) might not have any legal title, had at least possessory title and had commenced to prescribe for a legal title (see *Pannalal Bhagirath Marwadi vs. Bhaiyalal Bindraban Pardeshi Teli,* AIR 1937 Nagpur 281). The case in hand is on better footings because in the instant case the plaintiff has been held to be the occupancy tenant on the lands (including suit land) by Naib Tahsildar vide its order dated 31.5.1974 (Ex.P-1) by holding further that he was possessing those lands in that capacity. Thus, the plaintiff was having better possessory title and when he has been dispossessed by the defendants (having no better title than him) he can sue for the restoration of possession. The learned Trial Court has rightly decreed the suit for possession of the plaintiff. In this context it would be fruitful to place reliance on the decision of Supreme Court *Nair Service Society Ltd. vs. K.C. Alexander and others,* AIR 1968 SC 1165.

17. Thus, the substantial question of law is answered in favour of appellant and against the respondents and it is hereby held that appellant/plaintiff is having better title (occupancy tenant) as compared with the respondents on the basis of which he can retain the possession of the suit property.

18. This appeal is accordingly allowed. The impugned judgment and decree passed by learned First Appellate Court is hereby set aside and the decree passed by learned Trial Court is hereby restored. The appellant shall be entitled for cost of this appeal. Counsel fee of Rs.2,000/- if pre-certified.

Appeal allowed.

I.L.R. [2011] M. P., 2811
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 141/1994 (Jabalpur) decided on 7 July, 2011

ORIENTAL FIRE & GENERAL INSURANCE CO. LTD. ...Appellant
Vs.
SAIFUDDIN & anr. ...Respondents

A. Contract Act, 1872 (9 of 1872), Sections 124 & 125, Limitation Act (36 of 1963), Article 27 & 113 - Cause of Action and Limitation **- Respondent No.1 is a forest contractor - Govt. of M.P. directed him to furnish bank guarantee of Rs. 20,000 for due performance of the forest contract - Respondent No.1 deposited with plaintiff/bank a margin money of Rs. 3,000 by way of Fixed Deposit and appellant agreed to insure the rest of the guarantee amount that in case Govt. invokes the guarantee, appellant will reimburse the said amount to the extent of amount of policy - On account of default committed by defendant No.1, Govt. of M.P. invoked the guarantee - Plaintiff/bank paid the entire amount of claim to Govt. on 31.8.1978 - Appellant pleaded that policy was valid only upto 31.12.1971 and suit was filed on 06.10.1979 and therefore is time barred - Held - Under a contract of indemnity, cause of action would arise only when the damage is suffered by plaintiff and if a suit is brought before actual loss, it will be a premature suit - Thus, the cause of action arose only on 30.08.1978 when the plaintiff/bank paid the amount to the Govt. - Suit filed on 06.10.1979 within limitation - Appellant also jointly and severally liable to pay decreetal amount.** (Paras 11 to 20)

क. संविदा अधिनियम (1872 का 9), धाराएँ 124 व 125, परिसीमा अधिनियम (1963 का 36), अनुच्छेद 27 व 113 – वादकारण तथा परिसीमा – प्रत्यर्थी क्र. 1 एक वन ठेकेदार – म.प्र. सरकार ने उसे संविदा के उचित पालन हेतु 20,000/– रुपये की बैंक गारंटी प्रस्तुत करने हेतु निर्देशित किया – प्रत्यर्थी क्र. 1 ने वादी/बैंक के पास

सावधि जमा के रुप में 3,000/– रुपये अंतर राशि जमा कर दी तथा अपीलार्थी ने शेष गारंटी की रकम हेतु बीमा की सहमति दी कि यदि शासन गारंटी पर अवलम्ब करेगी तो, अपीलार्थी पॉलिसी की सीमा तक उक्त रकम की प्रतिपूर्ति कर देगा – प्रतिवादी क्र. 1 द्वारा किये गये व्यतिक्रम के कारण सरकार ने गारंटी पर अवलम्ब किया – दिनांक 31.08.1978 को वादी/बैंक ने दावे की पूर्ण राशि का सरकार को भुगतान कर दिया – अपीलार्थी ने अभिवचन किया कि पॉलिसी दिनांक 31.12.1971 तक ही वैध थी तथा वाद दिनांक 06.10.1979 को प्रस्तुत किया गया अतएव, यह अवधि बाधित है – अभिनिर्धारित – क्षतिपूर्ति की संविदा के अंतर्गत वाद कारण तभी उत्पन्न होगा जब कि वादी को क्षति होगी तथा यदि बिना वास्तविक हानि के कोई वाद लाया जाता है तो यह समयपूर्ण वाद होगा – इस प्रकार, वाद कारण केवल 30.08.1978 को ही उत्पन्न हुआ जब वादी/बैंक ने सरकार की रकम का भुगतान किया – दिनांक 06.10.1979 को प्रस्तुत वाद परिसीमा के भीतर – डिक्री रकम का भुगतान करने हेतु अपीलार्थी भी संयुक्त एवं पृथक रुप से दायी है।

***B. Civil Procedure Code, (5 of 1908), Section 100 - Second Appeal - New Plea* - Applicability of Article 43 of Limitation Act not at all has been pleaded by appellant in its written statement - This plea is having nexus with the facts, therefore, can not be raised for the first time at the stage of Second Appeal.** (Para 21)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – नया अभिवचन – जबाव दावे में अपीलार्थी ने परिसीमा अधिनियम के अनुच्छेद 43 के लागू होने का अभिवचन नहीं किया – इस अभिवचन का तथ्यों से संबंध है, अतएव, द्वितीय अपील के प्रक्रम पर नहीं उठाया जा सकता।

Cases referred:

AIR 1935 LAHORE 974, AIR 1940 BOMBAY 161, AIR 1935 NAGPUR 147, AIR 1970 SC 839, AIR 1977 SCC 890.

S.K. Rao with *Vineet Pandey*, for the appellant.
None, for the respondents.

JUDGMENT

A.K. SHRIVASTAVA, J. :–This second appeal has been filed by defendant No.2 against the judgment of reversal. The suit of plaintiff-respondent No.2 was decreed against defendant No.1 and was dismissed against appellant-defendant No.2. However, learned First Appellate Court has decreed the suit against the present appellant also.

2. The plaintiff/respondent No.2 - Bank of Baroda filed a suit 32 years ago on 6.10.1979 for realisation of Rs.14,259.10 arraying Saifuddin- as

defendant No. 1 while Oriental Fire and General Insurance Company Ltd. - appellant was arrayed as defendant No.2. The suit of plaintiff is that the plaintiff is a Nationalised Bank. Defendant No.1 - Saifuddin is a forest contractor and for due performance of the forest contract the Government of Madhya Pradesh through the Divisional Forest Officer, Balaghat directed defendant No.1 to execute a guarantee bond and furnish the Bank guarantee in respect of Coupe No.B Calcutta Range-Godri Range for Rs.20,000/-. The defendant No.1 (respondent No.1) accordingly approached the plaintiff-Bank (respondent No.2) and requested for issuance of a Bank guarantee. He also deposited with plaintiff Bank a margin money of Rs.3,000/- by way of fixed deposit. For the rest of the guarantee amount, defendant No.2-appellant agreed to insure the same and in case the plaintiff is required to pay the amount to the Government when the Government invokes the guarantee, to reimburse the said amount to the extent of the amount of the policy.

3. It is the further case of plaintiff-Bank that it issued one Bank guarantee No.Gua/4/234 for Rs.20,000/- to the Government of Madhya Pradesh for defendant No.1. The defendant No.1 executed an agreement of counter indemnity in favour of plaintiff-Bank on 11.8.1970 agreeing to hold the Bank harmless and fully indemnified against all losses, claims etc. which may arise out of the guarantee furnished to the Government of Madhya Pradesh.

4. On account of the default committed by defendant No.1 in execution of the forest contract, the Government of Madhya Pradesh through Divisional Forest Officer, Balaghat invoked the guarantee and demanded a sum of Rs.17,446.20 during the subsistence of the guarantee. The plaintiff-Bank accordingly lodged a claim with the defendant No.2-appellant during the currency of the insurance policy. Since then, the defendants were avoiding to pay the amount claimed by the Government for one reason or the other under the terms of the guarantee. Since the plaintiff Bank could not dishonour its guarantee furnished to the State Government, it ultimately paid the entire amount of claim i.e. Rs.17,446.20 to the Government (Divisional Forest Officer, Balaghat) on 31.8.1978. Hence, according to plaintiff-Bank, it had become entitled to realise the said amount from the defendants and after deducting the margin money deposited by the defendant No.1 and interest accrued on it, a suit has been filed in the Trial Court for realisation of Rs.14,259.10 and also prayed interest pendente-lite against both the defendants and prayed that they are jointly and severally liable to pay the said amount.

5. Despite defendant No.1 - Saifuddin was served, he did not appear and the learned Trial Court proceeded ex-parte against him.

6. The appellant - defendant No.2 filed written statement and admitted that it had agreed to insure defendant No.1 in case the plaintiff is required to pay the amount to the Government when the Government invokes the guarantee, to reimburse the amount to the extent of the policy. However, it has been pleaded that the policy was valid only upto 31.12.1971 and therefore, the suit which has been filed by plaintiff on 6.10.1979 is time barred. Hence, it has been prayed that it be dismissed.

7. Learned Trial Court framed necessary issues and after recording the evidence of the parties decreed the suit only against defendant No.1 - Saifuddin and dismissed against the appellant being time barred.

8. The plaintiff - Bank preferred first appeal before learned First Appellate Court which has been allowed and the suit has been decreed against appellant-defendant No.2 also by the impugned judgment and decree.

9. In this manner this second appeal has been filed by the appellant - defendant No.2 in this Court.

10. This Court on 8.3.1995 admitted the second appeal on the following substantial questions of law:

> "1. Whether in the facts and circumstances of the case, the present suit against the appellant could at all be decreed on account of the condition embodied in Ex.P-5, the Indemnity Bond?
>
> 2. Whether in the facts and circumstances of the case the appellant can take benefit of Article 43 of the Indian Limitation Act?"

11. By inviting my attention to Ex.P-5, a guarantee policy of the appellant it has been contended by learned Senior Counsel Shri Rao that since it has been embodied in the policy that it shall remain in force upto 31.12.1971 only, therefore, the present suit which has been filed on 6.10.1979 is ex-facie time barred against it and therefore, learned First Appellate Court erred in substantial error of law in decreeing the suit of plaintiff-respondent No.2 against appellant also.

12. Having heard learned senior counsel for the appellant and after going through the record, I am of the view that this appeal deserves to be dismissed.

Regarding Substantial Question of Law No.1:

13. On going through the finding of learned First Appellate Court as well as that of learned Trial Court this Court finds that true the guarantee policy (Ex. P-5) was valid upto 31.12.1971 and by this document the insurance company has indemnified the Bank that in consideration of the premium if the Bank becomes liable to pay any amount on behalf of the contractor (defendant No.1) under the guarantee, the insurer company will indemnify the Bank against all amounts which the Bank may so pay, but, not exceeding Rs.20,000/-. This arrangement being a contract and under this contract it was agreed between the plaintiff Bank and Insurance Company that whenever the damages would be caused to the plaintiff-Bank, the insurance company shall be liable to pay the amount upto the extent of Rs.20,000/-. This would also mean that the cause of action for a claim against the promisor (insurance company) in a contract of indemnity accrues to promisee (plaintiff-Bank) when the promisee is damnified and if a suit is filed before the actual loss has occurred it would be a premature suit.

14. A finding has been recorded by learned First Appellate Court that even if the State Government had made demand from the Bank on 16.10.1971 but until the plaintiff-Bank makes actual payment by encashing the Bank guarantee submitted to it by the State Government, it cannot be said that any damages have been caused to the plaintiff-Bank. A finding of fact has been recorded by the Courts below that the Bank paid a sum of Rs.17,446.20 paise to the State Government only on 30.8.1978 vide Bank Draft No.G/0111/073 and therefore, the actual damage caused to the plaintiff-Bank was on this date (30.8.1978) when it had made the said payment to the State Government and for this purpose only the insurance company executed the policy (Ex.P-5). Hence, according to me, the case of plaintiff cannot be diluted or it would never fail on the count that policy (Ex.P-5) was valid upto 31.12.1971 only.

15. Section 124 of the Indian Contract Act, 1872 pertains to the definition of "Contract of indemnity" and Section 125 speaks about "Rights of indemnity-holder when sued". According to the definition of "Contract of indemnity", a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called a "Contract of indemnity". According to Section 125, the

promisee in a contract of indemnity, acting within the scope of his authority is entitled to recover from the promisor:-

> "(1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
>
> (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;
>
> (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit."

16. These provisions have been taken into account by Lahore High Court in *Sham Sundar vs. Chandu Lal and others,* A.I.R. 1935 Lahore 974 and it has been held that Section 125 of the Contract Act has to be read in context to Article 83 of the Limitation Act, 1872. It has been further held that under a contract of indemnity, cause of action would arise only when the damage is suffered by plaintiff and if a suit is brought before actual loss it will be a premature suit. The same proposition has been held by Bombay High Court in *Shankar Nimbaji Shintre and others vs. Laxman Supdu Shelke and others,* A.I.R. 1940 Bombay 161 and the *Judicial Commissioner of Nagpur in Ranganath vs. Pachusao and others,* A.I.R. 1935 Nagpur 147 has also reiterated the same law. In the case of *Ranganath* (supra) a suit was filed by the plaintiff before actual damages caused to it and it was held that the same is premature. In this context I shall also place reliance on Mulla's Indian Contract and Specific Relief Acts, Twelfth Edition Vol.II page 1733 wherein the eminent author has mentioned that "*...It has also been held that the cause of action for a claim against the promisor in a contract of indemnity accrues to the promisee when the promisee is damnified; a suit before actual loss being premature*".

17. Applying the aforesaid propositions of law in the present facts and circumstances of the case, since the actual damages were caused to plaintiff-Bank only on 30.8.1978 when it paid the amount of Rs.17,446.20 paise to

the State Government, the cause of action accrued to it on this date and not earlier to it and within three years from this date the suit has been filed which is within limitation in terms of Article 113 and 27 of the Limitation Act, 1963 (hereinafter referred to as "the Act of 1963").

18. Article 113 is the residuary article, according to which a suit for which no period of limitation is provided elsewhere, three years limitation has been fixed by the legislature to file the suit when the right to sue accrues. Under Article 27 of the Act of 1963 the compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency, three years' period is prescribed for filing the suit from the date the time specified arrives or the contingency happens. It will be profitable to quote Article 27 of the Act of 1963 which reads, thus:

Description of suit	Period of limitation	Time from which period begins to run
For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.

According to me, the word "or" is having a great significance in this Article as this word also authorises plaintiff to sue when the contingency has happened. On going through the document Ex.P-5 this Court finds that there is a contract between the plaintiff and the insurance company that if the Bank becomes liable to pay any amount on behalf of the contractor (defendant No.1) under the guarantee, the insurance company will indemnify the Bank against all amounts which the Bank may so pay but not exceeding the sum of Rs.20,000/-. Thus, under Article 27 since the word "or" has been used in the column of 'description of suit', it empowers to file suit "upon the happening of a specified contingency" as well as in the column 'time from which period begins to run' the words "or the contingency happens" authorises plaintiff to sue within three years from the date when loss is actually caused to it. Thus, the cause of action accrued to the plaintiff only on 30.8.1978 when on encashment of the Bank guarantee by the State Government, the plaintiff-Bank paid an amount of Rs.17,446.20 paise to the State Government and within three years from 30.8.1978 it had filed the suit.

19. I have gone through the reasonings assigned by learned First Appellate

Court holding that appellant - defendant No.2 is also liable to pay the said amount. According to me, the said findings are based on correct appreciation of law and evidence placed on record.

20. The substantial question of law No.1 is thus answered against the appellant and it is hereby held that appellant-defendant No.2 is also jointly and severally liable to pay the decreetal amount and the condition embodied in Ex.P-5 would not come in the way.

Regarding Substantial Question of Law No.2:

21. According to me, the applicability of this Article has not at all been pleaded by defendant No.2 - appellant in its written statement. This objection is being taken by it for the first time in this second appeal. This plea is having nexus with the facts, therefore, same cannot be raised for the first time and in this context I may place reliance upon the decision of Supreme Court *C. Mackertich vs. Steuart & Co. Ltd.,* AIR 1970 SC 839 as well as *Siddu Venkappa Devadiga vs. Smt. Rangu S. Devadiga and others,* AIR 1977 SC 890. Apart from this, there is no plea of appellant - defendant No.2 that it had paid in excess to his own share. The substantial question of law No.2 is, thus, answered against the appellant.

22. Resultantly, this appeal fails and is hereby dismissed. The impugned judgment and decree passed by learned First Appellate Court is hereby affirmed. Since nobody has appeared on behalf of the plaintiff-respondent No.2, the parties are hereby directed to bear their own cost of this appeal.

Appeal dismissed.

I.L.R. [2011] M. P., 2818
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 105/1996 (Jabalpur) decided on 26 July, 2011

SANTOSH KUMAR & anr. ...Appellants
Vs.
SMT. PARWATI BAI ...Respondent

Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(h) & 12(7) **- No pleading that plaintiff is having a plan or estimate of reconstruction and she is also having necessary funds with her - In**

absence of such a pleading and further by not proving those ingredients by any documentary evidence like filing of plans and estimates and the bank account etc., it can be held that learned two Courts below have grossly erred in passing the decree of eviction u/s 12(1)(h) of the Act - Appeal allowed. (Para 15)

स्थान नियंत्रण अधिनियम, मॅ.प्र. (1961 का 41), धाराएँ 12(1)(एच) व 12(7) – कोई अभिवचन नहीं कि याची के पास योजना या पुनर्निमाण का प्राक्कलन है और उसके पास आवश्यक निधि भी है – ऐसे अभिवचन की अनुपस्थिति में और आगे उन तथ्यों को किसी दस्तावेजी साक्ष्य जैसे कि योजना तथा प्राक्कलन एवं बैंक खाता इत्यादि को प्रस्तुत करके साबित नहीं किये जाने से यह धारणा की जा सकती है कि निचले दो विद्वान न्यायालयों ने अधिनियम की धारा 12(1)(एच) के अंतर्गत डिक्री पारित करने में गंभीर त्रुटि की है – अपील मंजूर।

Shobha Sharma, for the appellants.

Z.M. Shah with *Sandeep Koshtha,* for the respondent.

JUDGMENT

A.K. SHRIVASTAVA, J. :–The tenants-defendants having lost from both the Courts below have knocked the doors of this Court by filing this second appeal assailing the judgment and decree passed by the two Courts below for eviction on the ground envisaged under Section 12(1)(h) of the M.P. Accommodation Control Act, 1961 (in short "the Act").

2. No exhaustive statement of facts are required to be narrated for the purpose of disposal of this appeal. Suffice it to say that a suit for eviction on the relationship of landlord and tenant has been filed by the landlord-respondent on the ground envisaged under Section 12(1)(h) of the Act against the appellants-defendants on the averments that their father late Mathura Prasad Pandey obtained the suit premises on tenancy basis @ Rs.12/- per month from the husband of plaintiff. The said Shri Mathura Prasad Pandey had died on 5.12.1985. After his death, the defendants have become her tenant. A notice dated 6.5.87 was sent by the plaintiff to the defendant no.1 Santosh Kumar terminating his tenancy. In the notice, it has been mentioned that the house is in dilapidated condition and, therefore, it needs to be repaired which cannot be carried out without defendants being evicted. Thereafter, the suit was filed on 22.7.1987. Hence, it has been prayed that a decree of eviction be passed.

3. The defendants by filing their written statement denied the plaint

averments and pleaded that neither they nor their father Mathura Prasad Pandey was the tenant of the plaintiff-respondent. Indeed, the suit property was gifted to Mathura Prasad Pandey by plaintiff's husband Raghunath Prasad Dubey in lieu of *Guru-dakshina*. The rate of rent Rs.12/- per month is also denied. Further it has been pleaded by the appellants that they have acquired ownership right on the suit property on account of adverse possession.

4. Learned Trial Court framed necessary issues and after recording evidence of the parties decreed the suit on the ground envisaged under Section 12(1)(h) of the Act by further holding that appellants are the tenant of plaintiff-respondent and they have not acquired any ownership right on the suit property by way of adverse possession.

5. The First Appeal which was filed by the appellants has been dismissed by the impugned judgment and decree .

6. In this manner, this second appeal has been filed by the appellants.

7. This Court on 13.2.1996 admitted the appeal on the following substantial questions of law:-

(i)"Whether in absence of any cogent evidence, on record to prove that the appellants were the tenants of the respondent, the suit was liable to be decreed?"

(ii)"Whether the appellants have perfected their title to the suit property by adverse possession?"

(iii) "Whether a decree under Section 12(1)(h) of the M.P. Accommodation Control Act could be passed without complying the mandatory conditions mentioned in Section 12(7) of M.P.Accommodation Control Act ?"

8. The contention of Smt. Shobhna Sharma, learned counsel for the appellants is that plaintiff-respondent has utterly failed to prove the relationship of landlord and tenant and if that would be the position, learned two Courts below erred in substantial error of law in decreeing the suit of eviction on the ground of Section 12(1)(h) of the Act. By addressing substantial question of law no.2, it has been contended by her that father of appellants namely Mathura Prasad Pandey acquired ownership right on the suit property by adverse possession and hence the decree of eviction has been wrongly passed by learned two Courts below. Lastly by hammering the findings of learned two

Courts below decreeing the suit of plaintiff-respondent under Section 12(1)(h) of the Act, it has been put forth by her that in absence of any pleading and evidence of the plaintiff in respect to the essential ingredients of Section 12(7) of the Act, the learned two Courts below grossly erred in passing a decree of eviction under sub-clause (h) of sub-section (1) of Section 12 of the Act. On these premised submissions, it has been put forth by her that by allowing this appeal, the judgment and decree passed by the learned two Courts below be set aside and suit of plaintiff be dismissed by further holding that appellants are the owners of the suit property.

9. Combating the aforesaid submissions of learned counsel for the appellants, Shri Z.M. Shah and Shri Sandeep Koshta, learned counsel for respondent-plaintiff argued in support of the impugned judgment and submitted that learned two Courts below after appreciating the pleadings and evidence placed on record came to hold that plaintiff is the owner of the suit property while father of defendants was the tenant and after his death the appellants by virtue of law have become her tenant and, therefore, it has been rightly held by the learned two Courts below that the relationship of landlord and tenant is existing between the parties and Mathura Prasad Pandey (father of defendants) did not acquire ownership right over the suit property. It has been further contended by learned counsel that there is specific plea of plaintiff as well as she has also proved in her testimony the ground envisaged under Section 12(1)(h) of the Act and, therefore, the decree of eviction is rightly passed. On these premised submissions, it has been put forth by learned counsel that this appeal deserves to be dismissed.

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

Regarding Substantial Question of Law No.1

11. The plaintiff has filed the instant suit on the relationship of landlord and tenant. The relationship of tenancy has been specifically denied by the appellants in their written statement. According to them, the suit property was gifted by plaintiff's husband in favour of their father namely Mathura Prasad Pandey in lieu of *Guru-dakshina* and hence firstly Mathura Prasad Pandey and after his death, the defendants have become the owners of the suit property. However, it is borne out from the evidence that the said alleged gift deed was oral. Indeed, since there is no gift deed on record and it has also not been registered according to me, in view of Section 123 of the Transfer of Property

Act, it cannot be said that the suit property was gifted by plaintiff's husband in favour of defendants' father Mathura Prasad Pandey in lieu of *Guru-dakshina*. I have gone through the findings rendered by learned two Courts below and I find that a very detailed judgment has been passed by the learned two Courts below in this regard holding that the suit property was not gifted to defendants' father Mathura Prasad Pandey and thus rightly it has been arrived by learned two Courts below that Mathura Prasad Pandey did not become the owner of the suit property

12. The question now hinges is to whether the defendants are still tenants or not. True, in the written statement the relationship of landlord and tenant has been denied by them but there is overwhelming oral evidence of the plaintiff Parwati Bai and her witnesses Ramlal (PW-2), Udai Shankar (PW-3), Phool Singh (PW-4), Jammu Singh (PW-5) and Kailash Chand Dubey alias Kuttan (PW-6) that firstly the father of defendants 1 to 3 and husband of defendant no.4 Mathura Prasad Pandey was the tenant of plaintiff's husband Raghunath Prasad Dubey and after the death of original tenant the defendants became the tenant of plaintiff. Needless to say after the death of her husband Raghunath Prasad, plaintiff became the landlord of the defendants. The oral evidence of defendants' witness Anusuiya Bai (DW-1) is that neither Mathura Prasad Pandey nor the defendants are the tenants. However, looking to the documentary evidence Ex..P/2 which is the receipt of the Municipality, Damoh mentioning the name of Mathura Prasad Pandey (defendants' predecessor) as tenant, Ex. P/3 house tax assessment register of Municipality, Damoh dated 7.12.1981 mentioning the name of Mathura Prasad Pandey as the tenant of plaintiff's husband Raghunath Prasad Dubey and Ex. P/3 another document of Municipality, Damoh issuing the bill to Raghunath Prasad Dubey (husband of plaintiff) for the payment of house tax mentioning Mathura Prasad Pandey to be the tenant, therefore, I am of the view that the oral evidence of the plaintiff is corroborated by documentary evidence also and it is hereby held that defendants' predecessor Mathura Prasad Pandey was the tenant of Raghunath Prasad Dubey. Since Mathura Prasad Pandey had died, after his death the defendants are the tenants of the plaintiff. The findings recorded by the learned two Courts below holding that the defendants are the tenant of plaintiffs are pure finding of facts and cannot be interfered with in this appeal. Hence, the said finding of the learned two Courts below is hereby affirmed.

13. The substantial question of law No.1 is thus answered that by placing cogent evidence on record, the plaintiff-respondent has successfully proved

that appellants are her tenants and this substantial question of law is thus answered against the appellants.

Regarding Substantial Question of Law No.2

14. Since I have already held while deciding substantial question of law no.1 that appellants are the tenants of plaintiff-respondent, therefore, this substantial question of law is to be decided against the appellants and it cannot be held that defendants have perfected their title by way of adverse possession.

Regarding Substantial Question of Law No.3

15. On bare perusal of the plaint (para 3) only this much is gathered that the tenanted premises is in dilapidated condition and it can fall at any moment of time and the plaintiff has sent the notice in this regard which is Ex. P/1 but the said premises has not been vacated by the defendants. By refuting the averments made in para 3 of the plaint, it has been pleaded by the defendants in their written statement denying the fact that the suit premises is in dilapidated condition and can fall at any moment. They have also denied that any notice was ever given to them. However there is no pleading of plaintiff in respect to the ingredients of Section 12(7) of the Act. According to this provision, no order for eviction of a tenant can be made on the ground specified in clause (h) of sub-section (1) of Section 12 of the Act unless the Court is satisfied that the proposed reconstruction will not radically alter the purpose for which the accommodation was let or that radical alteration is in the public interest, and that the plans and estimates of such reconstruction have been properly prepared and that necessary funds for the purpose are available with the landlord. There is no pleading that the plaintiff is having any such plan or estimate of reconstruction and she is also having necessary funds available with her. In absence of such a pleading which is the essential requirement to obtain a decree under Section 12(1)(h) of the Act and further by not proving those ingredients by any documentary evidence like filing of plans and estimates and the bank account etc. to prove that she is having necessary funds to get the premises reconstructed, according to me, learned two Courts below had grossly erred in passing the decree of eviction under Section 12(1)(h) of the Act. The decree under this clause is accordingly set aside.

16. The substantial question of law No.3 is thus answered in favour of appellants and against the respondent-plaintiff.

17. Resultantly, this appeal is allowed. The impugned judgment and decree

of eviction passed under Section 12(1)(h) of the Act is hereby set aside and the suit of plaintiff for eviction on that ground is accordingly dismissed. However, the judgment passed by the learned two Courts below holding the plaintiff-respondent to be the landlord of the appellants is hereby upheld. Looking to the facts and circumstances, the parties are hereby directed to bear their own costs throughout.

Appeal allowed.

I.L.R. [2011] M. P., 2824
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
F.A. No. 215/2005 (Indore) decided on 3 August, 2011

SARDAR SURENDRA SINGH BEDI ...Appellant
Vs.
DHANNALAL ...Respondent

A. Contract Act, (9 of 1872), Section 25, Limitation Act (36 of 1963), Section 18 - Document executed after expiry of limitation - **Loan amount taken against 12 Hundis between 03.10.1992 to 25.02.1993 - On 10.07.1999 the lonee executed a document acknowledging the non-payment of Hundis which comes to Rs. 62,116/- and also agreed to pay the amount of debt by clearing payment of each Hundi on monthly basis - Held - Though the debt was barred by law of limitation on the date when the document was executed, however, by this document appellant promised to pay the amount on account of debt which is a fresh contract, therefore, the Court below committed no error in decreeing the suit.** (Para 10)

क. संविदा अधिनियम (1872 का 9), धारा 25, परिसीमा अधिनियम (1963 का 36), धारा 18 – परिसीमा समाप्त हो जाने के पश्चात निष्पादित दस्तावेज – 03.10.1992 से 25.02.1993 के बीच 12 हुंडियों के बदले ऋण रकम ली गयी – 10.7.1999 को ऋणी ने हुंडियों के भुगतान जो रुपये 62,116/– बनती है नहीं किये जाने की अभिस्वीकृति का दस्तावेज निष्पादित किया और प्रत्येक हुंडी के मासिक भुगतान द्वारा ऋण की रकम के संदाय के लिये भी सहमति दी – अभिनिर्धारित – यद्यपि परिसीमा विधि द्वारा उस तिथि को, जब दस्तावेज निष्पादित किया गया था ऋण वर्जित हो गया था, तथापि, इस दस्तावेज द्वारा अपीलार्थी ने ऋण की रकम का संदाय करने का वचन दिया, जो कि नयी संविदा है, अतएव वाद डिक्रीत करने में निचले न्यायालय ने कोई त्रुटि कारित नहीं की।

B. Limitation Act (36 of 1963), Sections 36 & 37 - Limitation

under - **Document containing the terms of repayment in monthly installments executed on 10.07.1999 - Under the terms of document, the amount was required to be repaid in twelve months - Held - Since the amount was repayable in installment and the first installment was due on or before 10.08.1999 and last installment was due on 10.07.2000 and the suit was filed on 26.07.2002, therefore, the suit filed by the respondent was in time - Appeal dismissed.** (Paras 11 & 13)

ख. परिसीमा अधिनियम (1963 का 36), धाराएँ 36 व 37 – के अंतर्गत परिसीमा – दस्तावेज जिसमें मासिक किश्तों में प्रतिसंदाय की शर्तें अंर्तविष्ट थी, दिनांक 10.07.1999 को निष्पादित किया गया – दस्तावेज की शर्तों के अंतर्गत, रकम बारह महिनों में प्रतिसंदाय करना अपेक्षित था – अभिनिर्धारित – चूंकि रकम का प्रतिसंदाय किश्तों में किया जाना था और प्रथम किश्त 10.08.1999 को या उसके पूर्व देय थी तथा अंतिम किश्त 10.07.2000 को देय थी और वाद 26.07.2002 को प्रस्तुत किया गया, इसलिये, प्रत्यर्थी द्वारा प्रस्तुत वाद समय के भीतर था – अपील खारिज।

Cases referred :

AIR 1999 SC 1047, AIR 1958 MP 21, AIR 1961 MP 346, 2002(1) MPLJ 356, 1977 JLJ 751, 1986 II MPWN 146.

Vandana Kasrekar, for the appellant.

None, for the respondent.

JUDGMENT

N.K. Mody, J.:– Being aggrieved by the judgment dated 28/02/2005 passed by XXI ADJ, Indore in civil regular appeal No.48-B/2003 whereby suit filed by the respondent for recovery of Rs.77,000/- alongwith interest @ 6% per annum was decreed, the present appeal has been filed.

2. Short facts of the case are that respondent filed a suit on 26/10/2002 for recovery of Rs.77,000/- alleging that respondent is Proprietor of M/s Kaillash Finance Agency and is in the trade of finance. It was alleged that appellant took a loan from the respondent and executed Hundi in favour of respondent. It was alleged that on 10/07/1999 appellant acknowledged in his own hand-writing about the Hundi. It was alleged that total transactions which took place between the parties were 12 in number and amount which was outstanding against the appellant was Rs.62,160/-. It was alleged that vide document dated 10/07/1999 appellant promised to pay the amount of each of the Hundi on every month. In the suit it was alleged that transaction took place between appellant and respondent for which Hundis were executed are w.e.f. 03/10/1992 to 25/02/1993. It was alleged that on account of repayment

of loan amount cheques were given by the appellant on 04/02/1998, 06/04/1998 and 12/11/1999 which were dishourned. In the suit it was alleged that on 10/10/2002 appellant made demand of dishourned cheques which was amounting Rs.14,147/-. It was alleged that after deducting the aforesaid amount outstanding amount has to be paid. It was prayed that decree be passed. The suit contested by the appellant by filing the written statement wherein all the plaint allegations were denied. It was denied that any amount is outstanding against the appellant. It was prayed that suit be dismissed. After framing of issues and recording of evidence learned Court below decreed the suit filed by the respondent against which present appeal has been filed.

3. Learned counsel for the appellant submits that the impugned judgment passed by learned Court below is illegal, incorrect and deserves to be set-aside. It is submitted that the transaction which took place between the appellant and respondent is for the period from 03/10/1992 to 25/02/1993. It is submitted that the alleged acknowledgement is dated 10/07/1999 since the amount was repayable within 3 years and there was no acknowledgement within that period, therefore, even if it is assumed that document dated 10/07/1999 was executed by the appellant, then too, since it was after expiry of period of limitation, therefore, limitation cannot be extended on the basis of that document. Learned counsel placed reliance on a decision in the matter of *Sampuran Singh Vs. Niranjan Kaur* AIR 1999 SC 1047 wherein Hon'ble Apex Court held that the acknowledgement if any, has to be prior to the expiration of the prescribed period for filing the suit, in other words, if the limitation has already expired, it would not revive under this section. It is only during subsistence of period of limitation, if any such document is executed, the limitation would be revived fresh from the said date of acknowledgement. It is submitted that appeal filed by the appellant be allowed and the impugned judgment passed by learned Court below be set-aside.

4. Learned counsel for the respondent submits that since it was the fresh agreement, therefore, no error is committed by the learned Court below in decreeing the suit. Learned counsel placed reliance on a decision in the matter of *Bhansarlal Paramsukh Vs. Navalkishor Mungalal* , reported in AIR 1958 MP 21 wherein Division Bench of this Court held that the acknowledgment of liability contained an express promise to pay the debt and even if it was made after the expiry of limitation it constituted a fresh promise to pay within the meaning of Section 25(3) of Contract Act and as such the suit based thereon was maintainable. It was further held that it is well settled

that a time-barred debt is a good consideration for a fresh promise to pay. Further reliance is placed on a decision in the matter of *Gorilal Baldeodas Vs. Ramjeelal Bhuralal,* reported in AIR 1961 MP 346, wherein it was held that passing a cheque written by a borrower is payment for the purpose of Sec.20 and if other conditions are fulfilled, a fresh term of limitation starts from the date of the handing over of the cheque whether or not it is subsequently honoured. Further reliance is placed on a decision in the matter of *Govind Prasad Patel Vs. Dhani Ram Patel,* reported in 2002(1) MPLJ 356, wherein this Court held that promise to pay time-barred debt furnishes a fresh cause of action. It was further held that it depends upon the language of the document under consideration whether a statement contained in it is a mere acknowledgment within the meaning of Section 18 of the Limitation Act,1963 or whether it is a promise to pay within the meaning of Section 25(3) of the Contract Act. On the strength of aforesaid position of law learned counsel submits that appeal filed by the appellant has no merit and the same be dismissed.

5. In the plaint filed by the respondent on 26/10/2002 respondent has specifically stated that the loan which was taken by the appellant was against Hundis. Details of Hundis of which the amount has not been paid are stated in the plaint, which are 12 in number of which details are as under :-

Sl. No.	Date of Hundis	Amount
1.	03/01/1992	Rs.4,500/-
2.	03/01/1993	Rs.4,164/-
3.	03/01/1993	Rs.3,805/-
4.	20/12/1992	Rs.5,172/-
5.	20/01/1993	Rs.5,172/-
6.	20/02/1993	Rs.5,172/-
7.	07/01/1993	Rs.5,172/-
8.	07/02/1993	Rs.5,172/-
9.	07/03/1993	Rs.5,172/-
10.	25/02/1992	Rs.6,205/-
11.	25/12/1993	Rs.6,205/-
12.	25/02/1993	Rs.6,205/-

6. Thus, these Hundis are between 03/10/1992 to 25/02/1993. Further case

of the respondent is that on 10/07/1999 appellant has executed a document wherein appellant has acknowledged the non-payment of Hundis. It was further alleged that appellant agreed that amount of Hundis which comes to Rs.62,116/- shall be paid by the appellant on monthly basis by depositing the amount of each of the Hundi per month. Sub-Section 1 of Section 18 of the Limitation Act reads as under :-

> **"18. Effect of acknowledgement in writing.** - (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed."

7. From bare perusal of Section 18 of the Limitation Act, it is evident that the acknowledgement must be before the expiration of the prescribed period for a suit. In the present case if the document are treated as acknowledgement, then, undoubtedly it was not before the expiration of prescribed period for a suit from the date of transaction which are between 03/1/1992 to 25/02/1993.

8. Section 25 of the Indian Contract Act, 1972 deals with the agreement without consideration. Sub-section 3 of Section 25 of the Indian Contract Act reads as under :-

> **25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law.**- An agreement made without consideration is void, unless -
>
> (1) .....
>
> (2) .....
>
> (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases such an agreement is a contract.

9. The illustration (e) of Section 25 reads as under :-

(e) A owes B Rs.1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs.500 on account of the debt. This is a contract.

10. In the present case by the document Ex.P/1 dated 10/07/1999 appellant agreed to pay the amount of debt for which the Hundis were executed by the appellant from time to time between 03/1/1992 to 25/02/1993 by clearing payment of each of the Hundi on monthly basis. Appellant also agreed that appellant undertook to clear the account in one stroke if possible. In the said letter appellant also stated that after payment of the amount reasonable amount of interest shall be paid as agreed mutually. From perusal of the aforesaid document Ex.P/1, it is evident that the debt was barred by law of limitation on the date when the document Ex.P/1 was executed, however, by this document appellant promised to pay the amount on account of debt which is a fresh contract, therefore, the learned Court below committed no error in decreeing the suit.

11. From perusal of the record, it is evident that Ex.P/1 is dated 10/07/1999 which contains 12 transactions which took place between the parties between 03/10/1992 to 25/02/1993. Suit was filed by the respondent on 26/10/2002 which is not within 3 years from the date of execution of document dated 10/07/1999. Since the document Ex.P/1 contains the terms of repayment in monthly installments, therefore, the amount was required to be repaid in twelve months. Article 36 and 37 of Limitation Act deals with the law of limitation relating to money suit for recovery of money where the loan has to be repaid in installments which reads as under :-

Article 36 and 37

Description of suit	Period of limitation	Time from which period begins to run
36. On a promissory note or bond payable by installments.	Three years	The expiration of the first term of payment to the part then payable; and for the other parts, the expiration of the respective terms of payment.

37.On a promissory note or bond payable by installments, which provides that, if default be made in payment of one or more installments, the whole shall be due.	Three years	When the default is made, unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver.

12. In the matter of *Bhagwant Rao Vs. Mohammad Khan* 1977 JLJ 751 wherein the money was repayable in installments this Court has held that plaintiff has no right to bring the suit for the whole amount before expiry of 10 months from the date of demand, therefore, the cause of action accrued by the plaintiff after expiry of 10 months. In the matter of *United Law Publisher Vs. Mohammad Hussain* 1986 II MPWN 146 this Court has held that right to sue accrues after expiry of full period of installments.

13. Since the amount was repayable in installment and the first installment was due on or before 10/08/1999 and last installment was due on 10/07/2000 and the suit was filed on 26/07/2002, therefore, the suit filed by the respondent was in time. In view of this appeal filed by the appellant deserves to be dismissed and is hereby dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 2830

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

F.A. No. 301/2002 (Indore) decided on 24 August, 2011

RAMA SHARMA (SUSHRI) ...Appellant

Vs.

TAJBI @ BADBI (SMT.) & ors. ...Respondents

Contract Act (9 of 1872), Section 25 - Consideration - Proof of - **Consideration for the purpose of mortgage - May be even the money advanced in past - Past liability on the mortgagor would serve the purpose of consideration, which is permissible under law.**

The defendants did not lead any evidence at all to refute the past liability of Rs. 52,400/- - In the absence of any evidence in rebuttal, case of the

plaintiff to the tune of Rs.52,400/- is found established and the plaintiff in turn is found entitled to recover the said amount from the mortgaged property. (Paras 9 & 10)

संविदा अधिनियम (1872 का 9), धारा 25 – प्रतिफल – का सबूत – बंधक के प्रयोजन हेतु प्रतिफल – पूर्व में अग्रेषित रकम भी हो सकती है – बंधककर्ता पर पूर्व दायित्व प्रतिफल के प्रयोजन की पूर्ति करेगा, जो विधि अंतर्गत अनुज्ञेय है।

M.K. Jain, for the appellant.
B.L. Jain, for the respondents.

JUDGMENT

ABHAY M. NAIK, J.:–This appeal has been preferred by the plaintiff against dismissal of her suit for recovery of Rs.1,32,000/- through sale of the mortgaged property or otherwise vide impugned judgment and decree dated 08.02.2002 passed by the Court of II Additional District Judge, Ujjain in civil suit no.74A/2001.

2. Short facts leading to this appeal are that the defendant/respondents are legal heirs of Abdul Wajid Khan, who executed simple mortgage deed in respect of his house no.29 (old no.4/1742) on 16.11.1993 for consideration of Rs.88,000/-. Interest @ 1.50% per month was payable under the said mortgage deed. Period of redemption was fixed upto 09.11.1996. It was agreed that in case of failure in payment of mortgage money with interest, plaintiff shall have a right to recover the amount by sale of the mortgaged property. Abdul Wajid Khan made payment once only of Rs.1,800/- towards interest. It was duly entered in the book. After the death of Abdul Wajid Khan on 15.01.1996, defendant no.2 paid Rs.1000/- each for the month of April and May, 1996 towards interest. Thus, total sum of Rs.3,800/- was paid towards interest and nothing was paid towards the principal amount. Thus, in addition to the mortgage money, plaintiff is entitled to Rs.39,760/- towards interest which was not paid despite demand notice. Hence, the suit for recovery of Rs.1,32,000/- with future interest @1.50% per month. Additionally, relief for realization of money through sale of mortgaged property was also prayed for.

3. Defendant/respondents no.1 to 4 submitted joint written statement refuting thereby the claim of the plaintiff. It has been further stated that no payment was made to Abdul Wajid Khan on 16.11.1993. It seems from the document itself that the alleged loan was quite old and suit is therefore barred

by limitation. It is further revealed that no money was received by Abdul Wajid Khan on 16.11.1993 since the document dated 16.11.1993 itself reveals that the sum of Rs.88,000/- was not paid at all to Abdul Wajid Khan. Accordingly, the suit is liable to be dismissed.

4. Learned trial Judge after framing the issues recorded the evidence and found that the plaintiff failed to prove that the alleged loan of Rs.88,000/- was received by Abdul Wajid Khan from the plaintiff on 16.11.1993 with interest @1.50% per month. No interest was shown to have been paid. Accordingly, the suit has been dismissed. Hence, the present appeal.

5. Shri M.K.Jain, learned counsel appearing for the appellant and Shri B.L.Jain, learned counsel appearing for the respondents made their respective submissions.

It has been contended on behalf of the appellant that the case of the appellant has been duly proved and the mortgage deed having been duly established, the suit ought to have been decreed in plaintiff's favour. Contrary to this, Shri B.L.Jain, learned counsel appearing for the respondents supported the impugned judgment.

6. Plaintiff's suit for recovery of Rs.1,32,000/- is based on registered mortgage deed dated 16.11.1993 (Ex.P-1). According to the plaintiff, Abdul Wajid Khan who executed the said mortgage deed had obtained a loan of Rs.88,000/- from the plaintiff on interest @ 1.50% per month which was not repaid. Sum of Rs.43,732/- was due towards interest in addition to principal amount of Rs.88,000/-. This has been recited in the registered mortgage deed Ex.P-1 which has been found proved. The impugned judgment and decree of dismissal of plaintiff's suit is not sustainable in law. It is also contended that no rebuttal evidence was adduced by the defendants. In view of the plaintiff's oral and documentary evidence, the case of the plaintiff having been duly established, the suit ought to have been decreed. Learned trial court has acted illegally in acting contrary.

7. Learned trial Judge while dismissing the suit has found that the registered mortgage deed contained in Ex.P-1 is without consideration and that it is legally proved. No money was paid at the time of execution of Ex.P-1. Thus, mortgage deed was found to be without consideration and the suit was accordingly dismissed by the learned trial Judge.

8. On perusal of the registered mortgage deed marked as Ex.P-1, it is

observed that it contains a recital that Abdul Wajid Khan had received loan in the past from the plaintiff. It is also recited that Abdul Wajid Khan purchased the property under mortgage from his brother for which he needed loan to meet the expenses of registering the same. On account of non-payment, the earlier loan accumulated to the tune of Rs.52,400/- which has been acknowledged and accepted to be subsisting at the time of execution of Ex. P-1. Thus, the learned trial Judge has committed grave error in dismissing the suit merely on the basis that payment of money in cash was not made on the date of execution of the registered mortgage deed Ex.P-1. According to Section 58 of the Transfer of Property Act, 1882, a mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

9. Keeping in view the aforesaid definition, it may be conveniently observed that the past liability on the mortgagor would serve the purpose of consideration, which is permissible under law. Thus, acceptance of Abdul Wajid Khan about the past liability of Rs.52,400/- on account of earlier loan is a consideration for the purpose of mortgage which has been ignored by the learned trial Judge. Case of the defendant/respondents is merely that no payment of money was made by the plaintiff to Abdul Wajid Khan at the time of execution of Ex.P-1. Consideration for the purpose of mortgage as per the definition may be even the money advanced in past. The defendants did not lead any evidence at all to refute the past liability of Rs.52,400/-. In the absence of any evidence in rebuttal, case of the plaintiff to the tune of Rs.52,400/- is found established and the plaintiff in turn is found entitled to recover the said amount from the mortgaged property described in Ex.P-1.

10. It may be further seen that the plaintiff had promised to pay a further sum of Rs.35,600/- to the defendant as mentioned in Ex.P-1. Out of the sum, Rs.30,000/- is stated to have been paid to Abdul Wajid Khan by bank cheque. Plaintiff in her statement stated that in addition to the liability of Rs.52,400/-, the plaintiff had given cheque to Abdul Wajid Khan for a sum of Rs.30,000/-. Rs.5,600/- is also stated to have been advanced by the plaintiff in cash. However, the plaintiff has not summoned the bank record to prove that any such cheque was given by her to the defendant-Abdul Wajid Khan and that any such cheque was encashed by the mortgagee. Similarly, there is no cogent proof to reverse the finding of the trial Court that the plaintiff had failed to

prove the advancement of Rs.5,600/- to Abdul Wajid Khan. Since, no evidence in rebuttal was adduced, adverse inference to the extent of the liability of Rs.52,400/- may be drawn against the defendants. However, learned trial Judge without considering the admitted past liability of Rs.52,400/- has dismissed the suit in its entirety, which is not sustainable in law. Accordingly, it is held that the plaintiff/appellant is entitled to recover a sum of Rs.52,400/- from the defendants. In case of failure of payment by them, it may be recovered by sale/auction of the mortgaged property described in registered mortgage deed marked as Ex.P-1. Since, the defendants are not proved to have inherited any other movable or immovable property (except the mortgaged property) from Abdul Wajid Khan, it is made clear that no recovery shall be made from the personal property belonging to defendants/respondents.

11. In the result, appeal is allowed in part in the manner indicated below:-

a. Impugned judgment and decree contrary to the aforesaid, is hereby set aside and the suit is decreed in the aforesaid manner. Decree be modified accordingly.

b. Plaintiff/appellant is found entitled to recover sum of Rs.52,400/- from the mortgaged property described in Ex.P-1.

c. Defendant/respondents shall have right to pay to the plaintiff or deposit a sum of Rs.52,400/- within six months. In case of failure, the plaintiff/appellant shall have right to recover the money from the mortgaged property described in the mortgage deed Ex.P-1.

No order as to costs.

C.C.as per rules.

Appeal partly allowed.

I.L.R. [2011] M. P., 2834

APPELLATE CIVIL

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain

F.A. No. 351/2011 (Jabalpur) decided on 24 August, 2011

STATE OF M.P. ...Appellant

Vs.

WATER RESOURCE DEPARTMENT ...Respondent

***Land Acquisition Act (1 of 1894), Section 18 - Collector's Guidelines* - Market price assessed by reference Court considering**

the guidelines issued by Collector for collecting stamp duty - Held - Guidelines can be a basis for ascertaining the market value of land, at the relevant time - When the State can charge stamp duty on the basis of such guidelines than for assessing market value of the land the Courts can very well take into consideration the guidelines for assessing the market value of the land at the relevant time. (Para 3)

भूमि अर्जन अधिनियम (1894 का 1), धारा 18 – कलेक्टर के मार्गदर्शक सिद्धांत – स्टाम्प शुल्क संग्रहण करने हेतु कलेक्टर द्वारा जारी किये गये मार्गदर्शक सिद्धांतों पर विचार करके संदर्भ न्यायालय द्वारा बाजार मूल्य का निर्धारण किया गया – अभिनिर्धारित – भूमि के बाजार मूल्य निर्धारण हेतु सुसंगत समय के मार्गदर्शक सिद्धांत आधार बन सकते हैं – जब ऐसे मार्गदर्शक सिद्धातों के आधार पर राज्य स्टाम्प शुल्क प्रभारित कर सकता है तब भूमि के बाजार मूल्य का निर्धारण करने हेतु न्यायालय समुचित रुप से भूमि के बाजार मूल्य के निर्धारण हेतु सुसंगत समय के मार्गदर्शक सिद्धांत को विचार में ले सकता है।

Vivek Agrawal, G.A. for the appellant.

None, for the respondent.

ORDER

The Order of the Court was delivered by **K. K. LAHOTI, J. :–I.A. No. 5637/11 u/s 5 of the Limitation Act for condonation of delay in filing this appeal :**

For the reasons stated in the application supported by an affidavit, the delay of 165 days in filing this appeal is condoned.

Heard on admission.

1. This appeal is directed against an award (judgment) dt.16.8.2010 passed by First Addl. District Judge, Raisen in Reference Case No. 15/2008 by which the Addl. District Judge enhanced the compensation.

2. Learned counsel for the appellant submitted that the Reference court erred in enhancing the amount of compensation placing reliance on the guidelines issued by the Collector in respect of the land which was acquired for construction of the Tank in question.

3. From perusal of the award, we find that the Reference court has considered various sale-deeds of the area and on the basis of the aforesaid assessed the price. Apart from that, the guidelines issued by the Collector for the relevant period were also taken into consideration for. assessment of the

price of the land. The acquired land was having tube-well, standing trees etc. The Reference Court assessed the price of the land @ Rs.1.40 lakh per acre and Rs.70,000/- for the trees. In respect of tube-well compensation was assessed @ Rs.30,000/-. On the aforesaid amount solacium and interest u/s 23 of the Act was also awarded. From the perusal of the aforesaid; it is apparent that not only the guidelines,but, also various sale-deeds were taken into consideration by the reference Court which are referred in para 15 to 21 of the judgment. The Reference Court assessed the price pased on various sale-deeds of the area and also the guidelines issued by the Collector fixing the price of lands for the purposes of charging stamp duty on sale of the land. When the State can charge stamp duty on the basis of guidelines issued by the Collector concern then how State can say that for the purpose of awarding compensation such guidelines should not be taken into consideration..The guidelines are issued by the Collector under the provisions of the M.P. Preparation and Revision of Market Value Guidelines Rules 2000 after following the process envisaged in the Rules. For ascertaining price of the land, for the purposes of awarding compensation under the Land Acquisition Act the guidelines can be a basis for ascertaining the market value of land, at the relevant time. When the State can charge stamp duty on the basis of such guidelines than for assessing market value of the land the Courts can very well take into consideration the guidelines for assessing the market value of the land at the relevant time, and the State cannot object on such assessment merely on the ground that to ascertain market value such guidelines were taken into consideration. State cannot adopt two yardstick in the matter. The assessment of Reference Court for enhancing compensation on the basis of guidelines is fully justified.

4. In view of the aforesaid, we do not find any error in the impugned award. This appeal is found without merit and dismissed at the admission stage with no order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 2837
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui
Cr.A. No. 2239/1997 (Jabalpur) decided on 27 July, 2011

RAJESH KUMAR GOSWAMI ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Criminal Procedure Code, 1973 (2 of 1974), Sections 161 & 162, Evidence Act, (1 of 1872), Section 3 - Statement read over to witness before examination in chief*** **- Witness admitted that statement recorded under Section 161 was read over to him by Advocate before entering into witness box - Testimony of witness becomes valueless.** (Para 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 161 व 162, साक्ष्य अधिनियम (1872 का 1), धारा 3 – मुख्य परीक्षण से पूर्व साक्षी को कथन पढ़कर सुनाया गया – साक्षी ने स्वीकार किया कि कठघरे में प्रवेश करने से पूर्व धारा 161 के अंतर्गत अभिलिखित कथन उसे अधिवक्ता द्वारा पढ़कर सुनाया गया – साक्षी की परिसाक्ष्य मूल्यहीन हो जाती है।

B. ***Evidence Act, (1 of 1872), Section 3 - Independent Witness*** **- Witness happened to be a witness of 3-4 raids conducted by C.B.I. - One witness works in the same department of the appellant - Witnesses can not be said to be independent - No reliance can be placed.** (Para 19)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – स्वतंत्र साक्षी – साक्षी, सी.बी. आई. द्वारा संचालित 3–4 छापों का साक्षी था – एक साक्षी अपीलार्थी के ही विभाग में कार्यरत – साक्षियों को स्वतंत्र साक्षी नहीं कहा जा सकता – कोई विश्वास नहीं किया जा सकता।

C. ***Prevention of Corruption Act, (49 of 1988), Section 13(1)(d) - Acceptance of illegal gratification*** **- Complainant did not substantially support the prosecution case - Spot map shows that tainted money was kept on table - Witnesses deposing that tainted money was recovered from the pocket of appellant - Evidence of complainant that he kept the money on table probable - It is suspicious as to where from the money was recovered - Appellant acquitted - Appeal allowed.** (Para 23)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – अवैध परितोषण को स्वीकार करना – शिकायतकर्ता ने अभियोजन मामले का पर्याप्त रुप से

समर्थन नहीं किया है – घटना स्थल का नक्शा दर्शाता है कि दूषित रकम टेबिल पर रखी थी – साक्षियों का कथन कि दूषित रकम अपीलार्थी के पॉकेट से बरामद की गई थी – शिकायतकर्ता की साक्ष्य कि उसने टेबिल पर रुपये रखे थे संभाव्य है – रकम कहां से बरामद की गयी इस बारे में संदेह है – अपीलार्थी दोषमुक्त – अपील मंजूर।

Cases referred:

AIR 1987 SC 2402, AIR 2010 SC 1589, 1984 MPLJ 492, AIR 1941 PC 75, 1968 CRLJ 54, AIR 1976 SC 91, AIR 1984 SC 1453, 1995 CR.L.J. 3656, AIR 1974 SC 1024, AIR 1980 SC 873.

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

Vikram Singh, for the respondent/CBI.

JUDGMENT

The Judgment of the Court was delivered by **RAKESH SAKSENA, J. :**–Appellant has filed this appeal against the judgment dated 22nd October, 1997 passed by Fifth Additional Sessions Judge/Special Judge (C.B.I.) Jabalpur in Special Case No. 08/1989, convicting him under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and sentencing him to rigorous imprisonment for two years with fine of Rs. 5000/- on each count respectively. Substantive sentences have been directed to run concurrently.

2. In short, facts of the case are that in the month of November, 1989, appellant R.K.Goswami was functioning as Branch Manager of Nagan-Deori Branch of Chhindwara-Seoni, Kshetriya Gramin Bank at Nagan-Deori, District Seoni. This Bank was sponsored by the Central Bank of India. On the application of complainant Mohanlal Uikey, a loan for a sum of Rs. 6000/- was sanctioned. As first installment, a sum of Rs. 1,000/- was paid to him by the appellant on 14.4.2008. When complainant Mohanlal approached to appellant for remaining amount of Rs. 5000/- on 31.10.1989, appellant demanded Rs. 500/- by way of illegal gratification for disbursement of the said amount.

3. Since, complainant did not want to give bribe, he went to C.B.I. Office Jabalpur and submitted a written complaint Ex. P/12. Superintendent of Police, C.B.I. recorded the first information report Ex. P/17 and deputed Inspector R.K.Shukla (PW6) to inspect the matter. Inspector R.K.Shukla requisitioned services of two independent witnesses namely K.K.Sareen (PW3) and Dr. A.K.Verma (PW4), who were the employees of Oriental Insurance Company. These Officers on 2.11.1989 verified the facts from the complainant. R.K.Shukla (PW5) obtained Rs. 500/- from the complainant and demonstrated the effect of

Phenolphthalein powder to complainant and other witnesses. He arranged for a trap and asked complainant to hand over the bribe money of Rs. 500/- to appellant and give a signal. A pre trap panchnama Ex. P/13 was prepared.

4. On 2.11.1989, complainant and the members of the trap party reached the Bank Nagan-Deori, where appellant was working. Complainant handed over tainted currency notes of Rs. 500/- to appellant and gave prefixed signal to C.B.I. people. Inspector R.K.Shukla and other members of the trap party caught appellant's hands and washed them with sodium carbonate solution which turned pink. Tainted currency notes were recovered from the pocket of appellant. When pocket of the pants of appellant was washed with sodium carbonate solution, it also turned pink. All the solutions were seized and a memorandum of the trap proceedings Ex. P/14 was drawn. On the same day, loan file of the complainant was seized vide memorandum Ex. P/15 and spot map Ex. P/16 was drawn. After further investigation and obtaining the requisite sanction Ex. P/1, charge sheet was filed in the Court of Special Judge.

5. On charges being framed appellant pleaded false implication. His defence as per his statement under Section 313 of the Code of Criminal Procedure was that complainant had given Rs. 500/- to him for getting them deposited in his saving bank account. He had handed over the said amount to cashier Ramesh Maravi. He had sanctioned the loan to complainant according to rules and had asked him to bring license from the forest department. According to him, in the past also complainant often handed over money to him for depositing in the saving account. Receipts were used to be issued by the cashier later on.

6. Prosecution examined six witnesses to establish its case viz. Sudhakar Trimbak Karkhanis (PW1), Hemant Jha (PW2), K.K.Sarin (PW3), Dr. A.K.Verma (PW4), Inspector R.K.Shukla (PW5) and complainant Mohanlal Uikey (PW6). Appellant, to substantiate his defence, examined Ramesh Kumar Maravi (DW1) and Somnath Nema (DW2). Learned Special Judge, after trial and upon appreciation of the evidence adduced in the case, convicted and sentenced the appellant of the charges under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. Aggrieved by his conviction, appellant has challenged the impugned judgment in this appeal.

7. We have heard the learned counsel for the parties.

8. It was no longer disputed that at the relevant time appellant was working

as Branch Manager in Chhindwara-Seoni, Kshetriya Gramin Bank and as such he was a public servant.

9. So far as the sanction Ex. P/1 for the prosecution against the appellant is concerned, it was proved by Sudhakar Trimbak (PW1), who on 23.12.1989 was functioning as Chairman of Chhindwara-Seoni Kshetriya Gramin Bank, Chhindwara. He categorically stated that he had accorded sanction after thorough study of the documents produced before him. He perused the evidence of witnesses, complaint, recovery memorandum and loan file etc. Even otherwise, learned counsel for the appellant has not challenged the validity of sanction accorded by Sudhakar Trimbak (PW1).

10. Hemant Jha (PW2), who in the month of November, 1989 was posted in the head quarter of the said Bank as District Coordinator deposed that appellant was posted in Nagan-Deori Branch as a Branch Manager. He was empowered to sanction loans to the extent of Rs. 10,000/-. He had sanctioned loan of Rs. 6000/- to Mohanlal Uikey. This fact was not disputed by the appellant himself in his statement under Section 313 of the Code of Criminal Procedure.

11. Learned counsel for the appellant contended that complainant (PW6) had turned hostile. He did not say in the Court that he gave Rs. 500/- to appellant by way of bribe. There was no evidence on record to indicate that appellant made any demand of illegal gratification. The person, who scribed the complaint Ex. P/12 was not examined in the Court, therefore, it was not established that any demand was made by the appellant.

12. Complainant (PW6) deposed that appellant asked him to bring the license of carpenter and said that only then his remaining amount of loan would be paid. He also asked him to deposit Rs. 500/- before bringing license. Since, he had no money at that time, he went away and discussed the matter with some persons who advised him to go to Jabalpur C.B.I. He submitted a written complaint in the C.B.I. Office. He got the said complaint written by Ramesh Shrivastava. He stated that the complaint Ex. P/12 was written according to his instructions. He, however, stated that the word 'bribe' in it was not written on his instruction, but rest of the part of the complaint was got written by him. Complainant (PW6) admitted his signatures on Ex. P/12. In these circumstances, merely the non examination of Ramesh Shrivastava, who scribed the complaint, in our opinion, does not affect the credibility of complaint Ex. P/12.

13. According to prosecution case, K.K.Sarin (PW3) and Dr. A.K.Verma

(PW4) verified from the complainant about his making the complaint. Learned counsel for the appellant submitted that K.K.Sarin (PW3) was a stock witness of C.B.I.. He had appeared as witness for C.B.I. in 3-4 cases, therefore, no reliance could be placed on his evidence. As far as Dr. A.K.Verma (PW4) is concerned, he was also working in the same Office in which K.K.Sarin (PW3) was working, therefore, his evidence was also not trustworthy. Learned counsel submitted that the evidence of Dr.A.K.Verma (PW4) was also not reliable because his statement under Section 161 of the Code of Criminal Procedure was read over to him before he entered the witness-box and he was asked to give evidence in the Court on the same lines. In these circumstances, trial Court committed error in placing reliance on the evidence of the aforesaid witnesses. He further submitted that the evidence of Inspector R.K.Shukla (PW5) was inconsistent with the evidence of aforesaid witnesses. It was not proved beyond doubt that tainted currency notes were recovered from the pocket of the pants of the appellant. From the spot map Ex. P/16, it seemed that the said notes were recovered from the table of accused kept in the office. Inspector Devendra Singh, who had drawn the said map (Ex. P/16) was not examined in the Court, therefore, learned Special Judge committed error in convicting the appellant. Learned counsel placed reliance on the decisions rendered by the Apex Court in *G. V. Nanjundiah Vs. State (Delhi Administration)*-AIR 1987 SC 2402, *Banarsi Dass Vs. State of Haryana*-AIR 2010 SC 1589 and Division Bench judgment of this Court namely *Ramvilas Ramdin and others Vs. State of M.P.*- 1984 MPLJ 492.

14. K.K.Sarin (PW3), who was Assistant Manager in Oriental Insurance Company, Regional Office, Jabalpur admitted that he appeared as witness in three trap cases of C.B.I.. Dr. A.K.Verma (PW4) also worked in the same Office.

15. For appreciating the evidence of such witnesses, in the case of *G.V. Nanjundiah* (supra) the Apex Court observed:

> " Learned Special Judge and also the High Court have placed much reliance upon the evidence of R.L.Verma and R.N.Khanna and the Deputy Superintendent of Police as to the acceptance of the bribe by the appellant and recovery of the bribe amount from him. R.L. Verma and R.N.Khanna have been stated to be two independent witnesses. So far as R.N. Khanna is concerned, he categorically admitted in his cross examination that he had earlier joined three or four such raids for traps organised by the C.B.I.. Khanna and Verma

work in the same office and there is substance in the contention made on behalf of the appellant that both of them are very much known to the police. It was the Deputy Superintendent of Police who had called them from their office for the purpose of being trap witnesses. We do not think that in the circumstances, either of them can be called an independent witness."

16. At the relevant time, Dr. A.K.Verma (PW4) was also posted as Assistant Regional Manager in the Oriental Insurance Company in which K.K.Sarin (PW3) was posted. Apart from it, Dr. A.K.Verma (PW4) in para-6 of his statement admitted that an Advocate read over to him his previous statement in the verandah of the Court and that he was asked to give same statement before the Court. That Advocate told to him that since the incident had occurred long back, therefore, he was making him to recollect the same. In *Ramvilas Ramdin* (supra) Division Bench of this Court dealt with this aspect in great detail and held that earlier statement of a witness recorded under Section 161 of the Code of Criminal Procedure read over to him and witness asked to give the same in Court renders his testimony valueless. It was further held that the statement made by the witness to the police during the course of investigation was made use of in contravention of section 162, Criminal Procedure Code. Nobody can say what the witness would have said had his memory not been refreshed in that manner before he entered the witness box. It does not make any difference that the statement was narrated to him not when he was in the witness-box but shortly before entering the witness-box because the fact remains that it was narrated to him for the purpose of giving evidence at the trial. That tantamount to making use of the statement at the trial. AIR 1941 PC 75 and 1968 Cri. L.J. 54.

17. Learned counsel for the appellant contended that since the evidence of alleged independent witnesses was not trustworthy, appellant cannot be convicted merely on the evidence of complainant, who turned hostile and gave discrepant and inconsistent versions, and on the evidence of Investigating Officer R.K.Shukla (PW5), whose evidence appeared contrary to the spot map Ex. P/16. Counsel placed reliance on the decision of *Banarsi Dass* (supra) in which complainant and another witness turned hostile. The Apex Court dealt with the matter as under:

" PW2 insisted on changing the Khasra Girdawaris and after she got annoyed, she got him falsely implicated. Money alleged to have

been recovered from him, in fact, was lying on the table without his knowledge or demand. PW-2 has also stated in her statement that she kept the money on the table after some altercation with the accused. In these circumstances, it is difficult for the Court to hold that the prosecution has established the offence against the accused, that he accepted the money voluntarily as illegal gratification. The effect of the statement of PW2 and PW4 has a substantial adverse effect on the case of the prosecution. There are other witnesses examined by the prosecution which are formal witnesses and in the absence of support of PW2 and PW4, the prosecution has not been able to establish the charge (demand and acceptance of illegal gratification by the accused), thus entitling him to some benefit on the technical ground of two witnesses i.e. PW2 and PW4 turning hostile.

In the light of the statement of two hostile witnesses PW2 and PW4, the demand and the acceptance of illegal gratification alleged to have been received by the accused for favouring PW2 by recording the Khasra Girdawaris in the name of her mother cannot be said to have been proved by the prosecution in accordance with law. We make it clear that it is only for the two witnesses having turned hostile and they having denied their statement made under Section 161 of the Cr.P.C. despite confrontation that the accused may be entitled to acquittal on technical ground. But, in no way we express the opinion that the statement of witnesses including official witnesses PW10 and PW11, are not accepted by the Court. Similarly, we have no reason to disbelieve the recovery of Ex. P-1 to P-4 vide Ex. P-D."

18. On perusal of the evidence of complainant (PW6), it is apparent that he stated that though the complaint Ex. P/12 was written according to his instructions, but he did not mention therein the word `bribe'. This indicates his deliberate expression that he did not want to impute criminality on the part of appellant. Of course, it is not always necessary that while demand is made by an accused, either accused or the complainant should use specifically the word `bribe', but here complainant clarified that Manager asked him to deposit Rs. 500/-. When he went in the Office, on asking of the Manager, he put the money on the table and gave signal to C.B.I. team. When trap party entered the Office, the money was not found with the Manager, it was found on the table of cashier Maravi along with Rs. 150/- of some body else which was separated by the Officers of C.B.I. He admitted that Manager told him that unless he deposited Rs. 500/- he

would not get remaining amount of Rs. 5,000/-, therefore, he made a complaint with C.B.I. In cross examination, he admitted that he did not give bribe money to appellant. He had two accounts in the Bank. Often Bank Manager took money from him and deposited in his accounts. According to him, when the appellant demanded money, he thought that money was to be deposited in his one of the accounts. Complainant further admitted that he had got Rs. 1,000/- towards loan, but appellant had told him that unless he brought a license from the Forest Department for furniture, he would not get remaining amount. Thus, while examining the evidence of complainant Mohanlal (PW6) in the light of ratio of the decision of Apex Court in *Banarsi Dass*, we find that trial Court committed error in placing reliance on his testimony.

19. In view of the observations made by the Apex Court in *G.V. Nanjundiah,* we are unable to place reliance on the evidence of K.K.Sarin (PW3) and Dr. A.K.Verma (PW4) who worked in the same Office and one of them namely K.K.Sarin (PW3) happened to be a witness of 3-4 raids conducted by police C.B.I. Apart from it, Dr. A.K.Verma (PW4) gave his statement before the Court after he was read over his previous statement and was asked to state the same in the Court. In case of *Raghbir Singh Vs. State of Punjab*- AIR 1976 SC 91 Apex Court observed:

> "We must take this opportunity of impressing on the officers functioning in the anti-corruption department to insist on observing this safeguard as zealously and scrupulously as possible for the protection of public servants against whom a trap may have to be laid. They must seriously endeavour to secure really independent and respectable witness so that the evidence in regard to raid inspires confidence in the mind of the court and the court is not left in any doubt as to whether or not any money was paid to the public servant by way of bribe."

20. Learned counsel for the C.B.I. submitted that even if the trap witnesses turn hostile or found not independent, the Court may accept the prosecution version on the basis of evidence of complainant and the police officers. He placed reliance on the decision of the Apex Court rendered in the *State of U.P. Vs. Dr. G.K. Ghosh* AIR 1984 SC 1453, wherein it was held that in case of an offence of demanding and accepting illegal gratification, depending on the circumstances of the case, the Court may feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the police officers even if the trap witnesses turn hostile or are found not to be

independent. When besides such evidence there is circumstantial evidence which is consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty in upholding the prosecution case.

21. In the case in hands besides the evidence of trap witnesses, we have found that the complainant Mohanlal (PW6) himself did not substantially support the prosecution version and was, therefore, declared hostile. Though, he supported the prosecution story to some extent about the demand of Rs. 500/- by the appellant and handing over the tainted money to him, but he in clear terms stated that it was not bribe. On several occasions he gave money to appellant or appellant himself fetched money from him for depositing the same into his accounts. He never took the demand of money made by the appellant as a demand of illegal gratification. In these circumstances, we find the facts and circumstances of the present case different from the case of *Dr. G.K. Ghosh* (supra). Similarly the decision of the Apex Court in *Ramesh Gupta Vs. State of M.P.* -1995 Cr.L.J. 3656 wherein it was observed that in a bribery case, for demand and acceptance of bribe corroboration to the evidence of complainant can be by way of circumstantial evidence also, has no application since in the present case the complainant himself in substance did not support the prosecution version.

22. Learned counsel for the C.B.I. Placing reliance on the decisions of Apex Court in *Gian Singh Vs. State of Punjab*- AIR 1974 SC 1024 and *Hazari Lal Vs. The State (Delhi Admn.)*-AIR 1980 SC 873 contended that in a trap case the conviction of accused may be based on the evidence of police officer who laid the trap, if his evidence is trustworthy. In case of *Hazari Lal* (supra), Supreme Court observed:

> "Where the evidence of the Police Officer who laid the trap is found entirely trustworthy, there is no need to seek any corroboration. There is no rule of prudence, which has crystallized into a rule of law, nor indeed any rule of prudence, which requires that the evidence of such officers should be treated on the same footing as evidence of accomplices and there should be insistence on corroboration. In the facts and circumstances of a particular case a Court may be disinclined to act upon the evidence of such an officer without corroboration, but, equally, in the facts and circumstances of another case the Court may unhesitatingly accept the evidence of such an Officer. It is all a matter of appreciation of evidence and on

such matters there can be no hard and fast rule, nor can there by any precedential guidance."

23. In the light of above proposition when we examine the evidence of R.K.Shukla (PW5), we find that he requisitioned two officers of Oriental Insurance Company as independent trap witnesses though he must have knowledge that K.K.Sarin (PW3) had been a witness in about 3-4 raids conducted by C.B.I. He stated that the spot map Ex. P/16 was drawn by Inspector Devendra Singh wherein it was mentioned that tainted money of Rs. 500/- was lying on the table, but he did not say that the map was wrong. Inspector Devendra Singh was not produced by the prosecution in evidence. The aforesaid spot map was witnessed by K.K.Sarin (PW3) and Dr. A.K.Verma (PW4), but none of them pointed out the said mistake. On the contrary, Inspector R.K.Shukla (PW5) and K.K.Sarin (PW3) stated that the money was recovered from the pocket of appellant and they did not know how it was marked in Ex. P/16 that tainted money was lying on the table. In these circumstances, the evidence of complainant Mohanlal (PW6) that appellant kept the money on the table appears probable. It is true that the complainant Mohan Lal as well as Ram Kumar Maravi (DW1), cashier of the Bank stated that tainted currency notes were seized from the table of Maravi, but in view of the inconsistencies appearing in the evidence, it becomes suspicious as to where from the money was recovered.

24. In view of the aforesaid infirmities occurring in the prosecution case, we are unable to hold that the prosecution succeeded in establishing that demand of illegal gratification was made by the appellant and that the appellant accepted tainted money as a bribe/illegal gratification, and thus to prove the guilt of appellant beyond all doubts, in our opinion learned Special Judge committed error in holding the appellant guilty.

25. After careful consideration of the evidence adduced by the prosecution, the statement of appellant under Section 313 of the Code of Criminal Procedure and the submissions made by learned counsel for the parties, we are of the view that prosecution has failed to prove guilt of appellant beyond a reasonable doubt.

26. For the reasons aforesaid, appeal is allowed. The order of conviction and sentence as passed by the learned Special Judge is set aside. Appellant is acquitted of the charges. His bail bond and personal bond are discharged.

Appeal allowed.

I.L.R. [2011] M. P., 2847
APPELLATE CRIMINAL

Before Mrs. Justice Sushma Shrivastava

Cr.A.No. 850/1996 (Jabalpur) decided on 29 July, 2011

KHEMRAJ @ GANNU ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code, (45 of 1860), Section 363 - Kidnapping - Determination of age **- Prosecutrix stated that her date of birth is 13.02.1976 - Scholar register of school mentions the same date of birth which according to the father of the prosecutrix was recorded on the basis of entry in Kotwar Diary - Held - There is cogent and authentic evidence as to date of birth of prosecutrix and same can not be brushed aside merely for want of her radiological examination.** (Paras 8, 9 &15)

क. दण्ड संहिता (1860 का 45), धारा 363 – व्यपहरण – आयु का निर्धारण – अभियोक्त्री का कथन कि उसकी जन्म तिथि 13.02.1976 है – विद्यालय के स्कालर रजिस्टर में वही जन्म तिथि उल्लिखित है जो अभियोक्त्री के पिता के अनुसार कोटवार डायरी में प्रविष्टि के आधार पर अभिलिखित की गयी थी – अभिनिर्धारित – अभियोक्त्री की आयु के बारे में प्रबल एवं अधिप्रमाणित साक्ष्य है और इसे मात्र उसके विकिरण चिकित्सीय परीक्षण के अभाव में खारिज नहीं किया जा सकता।

B. Penal Code, (45 of 1860), Section 363 - Kidnapping **- Appellant took away the minor girl out of the keeping of his lawful guardianship, without his consent - Appellant is guilty of committing offence under Section 363 of I.P.C. - However, sentence of 5 years R.I. is reduced to 3 years R.I.** (Paras 18 &19)

ख. दण्ड संहिता (1860 का 45), धारा 363 – व्यपहरण – अपीलार्थी अप्राप्तवय बालिका को उसकी विधिपूर्ण संरक्षकता से उसकी सहमति के बिना ले गया – अपीलार्थी आई.पी.सी. की धारा 363 के अंतर्गत अपराध कारित करने का दोषी है – तथापि, दण्डादेश 5 वर्ष के सश्रम कारावास से घटाकर 3 वर्ष सश्रम कारावास किया गया।

Cases referred:

1988 SUPP SCC 604, (2010) 1 SCC 742, AIR 2004 SC 227.

A.S. Jha with *B.M. Prasad,* for the appellant.

R.K. Kesharwani, PL, 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 Sessions Judge, Seoni in S.T. No.122/93, decided on 30.04.96.

2. Appellant has been convicted under Section 363 of IPC and sentenced to rigorous imprisonment for five years with fine of Rs.5,000/-, in default further rigorous imprisonment for one year, by the impugned judgment.

3. According to prosecution, on 21.1.93 the victim girl aged about seventeen years, who was living with her parents in village Pindrai-Kala, was found missing from the house at night. Her missing report was lodged by her father Tarachand with the Police Barghat on 22.1.93. Later on complainant Tarachand came to know that his daughter was seen roaming with appellant Khemraj and his wife Munnibai in Jabalpur. He then informed the Police Barghat on 4.6.93, whereupon after enquiry an offence was registered at P.S. Barghat against the appellant and co-accused Munnibai and was investigated. The victim girl was recovered from the appellant. Her statement was recorded and the victim was sent for medical examination. Appellant was also arrested and sent for medical examination. The vaginal slides of the victim and the seminal slide of appellant Khemraj were sent for forensic examination. The investigation revealed that the appellant and his wife Munnibai used to live in the house of complainant Tarachand at the relevant time and having no children, they induced the minor daughter of the complainant to marry with the appellant and kidnapped her. Appellant Khemraj took the victim to the various places including Jabalpur and also committed rape with her. After due investigation, appellant and co-accused Munnibai were prosecuted under Section 363, 366 and 376/34 of IPC and put to trial.

4. Appellant Khemraj @ Gannu was charged under Section 366 and 376 of IPC, while co-accused Munnibai was charged only under Section 366 of IPC. Appellant and co-accused Munnibai abjured the guilt and pleaded false implication.

5. Learned Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, acquitted co-accused Munnibai of the charge under Section 366 of IPC, also acquitted appellant Khemraj of the charges under Section 376, 366 of IPC, but found him guilty for the lesser offence under Section 363 of IPC, convicted and sentenced him as aforesaid, by the impugned judgment, which has been challenged in this appeal.

6. Learned counsel for the appellant mainly submitted that the trial court gravely erred in holding that the victim was under the age of 18 years and erroneously convicted the appellant under Section 363 of I.P.C.

7. Learned counsel for the State, on the other hand, justified the conviction of the appellant.

8. The entire evidence on record has been closely examined. The victim (P.W.-2) categorically deposed in her evidence that her date of birth is 13.02.1976, as recorded in her school. Tarachand (P.W.-3), the father of the victim deposed that she was 17 years of age at the time of occurrence. According to Tarachand (P.W.-3), the date of birth of his daughter(victim) was recorded in her school register on the basis of the entry in the diary of village Kotwar. The school teacher of Govt. Girls' Primary School, Pindrai-Kala, Sammilal Dhurve (P.W.-4), also produced the scholar register of Govt. Girls' Primary School, Pindrai-Kala before the trial court and deposed that the date of birth of the victim was entered in the scholar register as 13.02.1976. The photocopy of the relevant extract of the aforesaid register (Ex. P-4) was also placed on record. According to Sammilal Dhurve (P.W.-4), as per entries in the scholar register, the victim was admitted in his school on 01.07.1981. Her school leaving certificate (Ex. P-12) as well as scholar register was also seized by ASI D.C. Tiwari (P.W.-6), vide seizure memo (Ex. P-9). The school leaving certificate (Ex. P-12) also indicates that the victim studied in the Government Primary Girls' School, Pindrai-Kala from 1.7.81 to 30.4.86.

9. A perusal of the photocopy of the extract of the scholar register (Ex. P-4) also reveals that the date of birth of the victim was recorded in the school register as 13.02.76. In the last column of the relevant entry in the register, there is also a verification by her father Tarachand Deshmukh as to the correctness of her date of birth being 13.02.76. It clearly transpires from the evidence of victim (P.W.-2), her father Tarachand (P.W.-3) and the evidence of school teacher Sammilal Dhurve (P.W.-4) that the victim had studied in the Govt. Girls' Primary School, Pindrai-Kala and had taken admission on 1.7.81 and her date of birth in the scholar register was recorded as 13.2.76, much prior to the date of occurrence on 21.01.93. The mere fact that full address of father of the girl was not mentioned in the scholar register (Ex. P-4) could not be a ground to discard the entry in the scholar register (Ex.P-4) particularly when the father of the victim namely Tarachand was resident of village Pindrai-Kala. There are no reasons to doubt the entries as to the date of birth of the

victim in the scholar register (Ex.P-4), particularly when the father of the girl (victim) testified that her date of birth was entered in the scholar register on the basis of diary of village Kotwar, and he had stated the age of the girl according to the entry in the school register. Besides there was no challenge to the entry in the last column of the scholar register (Ex. P-4), regarding verification of date of birth of the victim by her father Tarachand.

10. The Apex Court in the case of *Birad Mal Singhvi Vs. Anand Purohit* reported in 1988 (Supp) SCC page 604 has observed that if the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value, but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value. In the instant case, it is elicited from the evidence of Tarachand (P.W.-4), the father of the victim that the date of birth of the victim was entered in the scholar register on the basis of entry made in the diary of village Kotwar. It is also clearly evident from the entries made in the scholar register (Ex. P-4) that the date of birth of victim was verified to be correct by her father Tarachand (P.W.-3).

11. The mere fact that Tarachand (P.W.-3) could not recollect the date of birth of the victim on the date of recording of his evidence before the court, would not be a ground to discard his testimony that his daughter was of 17 years of age at the time of incident. As per the date of birth of the victim, mentioned in the scholar register, verified by him to be true as 13.2.76, the age of the victim at the time of incident comes to be nearly 17 years.

12. In view of the aforesaid facts, the finding of the trial court, on the basis of date of birth of the victim as recorded in the scholar register, that the victim was under 18 years of age at the time of occurrence, does not suffer from any infirmity.

13. Learned counsel for the appellant strenuously urged that the lady doctor Smt. V. Jatar (P.W.-1), who had medically examined the victim (P.W.-2) had advised for radiological examination of the victim regarding confirmation of her age, but her radiological examination was not done and in absence of report of her radiological examination or ossification test, her age could not be correctly ascertained to be below 18 years. Reliance was placed in this behalf on the decision of the Apex Court in the case of *Sunil Vs. State of Haryana* reported in (2010) 1 SCC page 742.

14. Dr. V. Jatar (P.W.-1) deposed that the age of the victim was between 15 to 18 years and she had advised for her radiological examination for confirmation of her age. The investigating officer D.C. Tiwari (P.W.-6), explained that after obtaining school certificate of the girl, her radiological examination or ossification test as to her age was not considered necessary. The Apex Court in the case case of *Sunil Vs. State of Haryana* (supra) cited by learned Senior Counsel, though observed that that the failure of getting the prosecutrix examined from the Dental Surgeon or the radiologist was a serious flaw, in the facts of that particular case, also observed as under:-

> "We are not laying down as a rule that all these tests must be performed in all cases, but in the instant case, in the absence of primary evidence, reports of the dental surgeon and the radiologist would have helped us in arriving at the conclusion regarding the age of the prosecutrix."

15. Thus, in the instant case, when there was cogent and authentic evidence as to the date of birth of the victim (P.W.-2) as recorded in the scholar register, the same could not be brushed aside merely for want of her radiological examination. In this view of the matter, the submission made by learned counsel for the appellant in this behalf sans merit. Thus, as stated hereinabove, the trial court rightly held that the age of the victim on the basis of entry of her date of birth in the school register coupled with the other evidence on record was below 18 years on the date of occurrence.

16. It is also evident from the testimony of Tarachand (P.W.-3), the father of the victim that his daughter (victim) was found missing from his house at night and her missing report (Ex. P-3) was lodged with the police. The FIR (Ex. P-8) recorded by ASI D.C. Tiwari (P.W.-6), which also reproduces the missing report entered in the rojnamcha, indicates that the victim was found missing from the house of Tarachand (P.W.-3) in the night intervening 21st and 22nd January, 1993. Tarachand (P.W.-3) deposed that his daughter was recovered by police personnels from the appellant after 3-4 months. The evidence of ASI D.C. Tiwari (P.W.-6) also clearly reveals that the victim was recovered from the custody of the appellant in village Gorakhpur at the house of Radhe Dehariya on 13.6.93 vide recovery memo (Ex. P-13). The aforesaid facts have remained totally unchallenged in the cross-examination. The victim (P.W.-2) also deposed that the appellant had taken her away without the consent of her parents.

It was thus clearly deducible from the evidence on record that the victim, who was under the age of 18 years on 21.1.93, was taken away from the custody of her father without his consent and out of the keeping of his lawful guardianship on 21.1.93 and was recovered from the custody of the appellant after nearly five months on 13.6.1993. The consent of the minor girl, if any, in going with the appellant was immaterial for the purpose of the offence under Section 363 of I.P.C. It would be profitable to refer to the following observations made by their Lordships in this behalf in the case of *Parkash Vs. State of Haryana* reported in AIR 2004 SC page 227 :-

> "The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor.....out of the keeping of the lawful guardian of such minor" in Section 361, are significant. The use of the word "Keeping" in the context connotes the idea of charge, protection, maintenance and control; further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever, necessity arises. **On Plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuation by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the Section."**

17. In the instant case, even if love letters (Ex D-1 to D-6), written by the victim (P.W.-2) are taken note of, it would appear, as the evidence on record reveals, that the appellant, who was a tenant in the house of Tarachand (P.W.-3), committed breach of confidence reposed in him and even being a married person, he entangled his young minor daughter in love affair and persuaded her to leave her parental house and exploited her for four-five months, till she was recovered from his custody.

18. Be that as it may, when the appellant took away the minor girl of Tarachand (P.W.-3), below 18 years of age, out of the keeping of his lawful guardianship, without his consent, he was guilty for committing the offence under section 363 of I.P.C. Thus the trial Court committed no error in finding the appellant guilty and convicting him under Section 363 of I.P.C. His conviction under Section 363 of I.P.C., therefore, deserves to be affirmed.

19. As regards the sentence, looking to the nature and gravity of the offence, appellant does not deserve much indulgence. However, in view of the fact that incident occurred in the year 1993, it would be just and proper in the facts and circumstances of the case, to reduce the impugned sentence of imprisonment awarded to the appellant to a period of three years' rigorous imprisonment.

20. Accordingly, the appeal is partly allowed. The conviction of the appellant under section 363 of I.P.C. is maintained. The impugned sentence of imprisonment awarded to him is reduced to a period of three years' rigorous imprisonment. The impugned sentence of fine imposed on the appellant, shall, however, remain undisturbed. Needless to add that the imprisonment already undergone by the appellant shall be set off against his modified term of imprisonment.

21. Appellant is on bail. He shall surrender forthwith to his bail bonds to serve out the remaining part of his sentence.

Appeal partly allowed.

I.L.R. [2011] M. P., 2853
APPELLATE CRIMINAL
Before Mrs. Justice Sushma Shrivastava
Cr.A. No. 693/1996 (Jabalpur) decided on 16 August, 2011

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

Narcotic Drugs and Psychotropic Substances Act, (61 of 1985), Sections 8(b), 18, & 54 - Exclusive Possession **- 135 plants of opium were seized from field - No evidence on record to show that appellant himself cultivated the opium poppy plants or the land where the plants were found exclusively belonged to him and was in his exclusive**

possession - On the contrary evidence on record is that land is recorded in the joint names of appellant and his brothers and father - In view of joint possession and joint ownership, the possibility of cultivation of prohibited plants by joint owners or joint cultivator can not be ruled out - It can not be safely concluded beyond all reasonable doubts that it was the appellant who cultivated the opium plants - No presumption under Section 54 can be drawn - Appeal allowed. (Paras 16 to 18)

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8(बी), 18 व 54 – अनन्य कब्जा – खेत से अफीम के 135 पौधे जब्त किये गये – यह दर्शाने के लिये अभिलेख पर कोई साक्ष्य नहीं कि अपीलार्थी ने स्वयं वे अफीम के पौधे उगाये थे अथवा भूमि जहां पर पौधे उगाये गये थे अनन्य रुप से उसकी थी तथा वह उसके अनन्य कब्जे में था – इसके विपरीत अभिलेख पर यह साक्ष्य है कि भूमि संयुक्त रुप से अपीलार्थी, उसके भाईयों तथा पिता के नाम पर दर्ज थी – संयुक्त कब्जे तथा स्वामित्व को देखते हुये प्रतिषिद्ध पौधों के संयुक्त स्वामियों अथवा कृषकों के द्वारा उगाये जाने की संभावना से इंकार नहीं किया जा सकता – युक्तियुक्त संदेह के परे यह निष्कर्ष नहीं निकाला जा सकता कि अपीलार्थी ने ही अफीम के पौधे उगाये थे – धारा 54 के अंतर्गत कोई उपधारणा नहीं की जा सकती – अपील मंजूर।

Cases referred:

1997 CRLJ 3783, AIR 2004 SC 2907.

Surendra Singh with *Manish Mishra,* for the appellant.

R.P. Tiwari, G.A. for the respondent/State.

JUDGMENT

SUSHMA SHRIVASTAVA, J. :–Appellant has, preferred this appeal challenging his conviction and order of sentence .passed by Special Sessions Judge, Sehore in Special Case No.106/95, decided on 02.04.96.

2. Appellant has, been convicted under Section 18 read with Section 8(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as ' NDPS Act') for unlawfully cultivating opium plants and sentenced to rigorous imprisonment for ten years with fine of Rs.1 Lac, in default further rigorous imprisonment for two years, by the impugned judgment.

3. According to prosecution on 09.04.95 Sub-Inspector Chandramani Dwivedi, Station House Officer of P.S. Bilkisganj received a secret information that in village Kulas-Khurd appellant Ramesh Chandra had unlawfully cultivated opium poppy in his field known as *'Chamarwali Thon'*. After

recording the information in the Rojnamcha, Sub-Inspector Chandramani Dwivedi alongwith Police force left for village Kulas-Khurd, reached the field of the appellant known as *Chamarwali Thon* alongwith public witnesses and a photographer and found that appellant had cultivated opium poppy plants in his field amidst the crop of soyabean and sugarcane without any permit or licence. The aforesaid opium plants were uprooted, counted and they were in all 135 in number. The uprooted plants of opium poppy were seized from the appellant in presence of the witnesses and were duly sealed on the spot, Appellant was arrested and taken to the Police Station Bilkisganj alongwith seized plants, where an offence was registered against him under Section 8/18 of the NDPS Act and was investigated. The seized plants were sent for chemical analysis. After analysis, each of the 135 plants answered to the test for opium alkaloid and meconic acid and were found to be opium poppy within the meaning of Section 2(xvii) of the NDPS Act. After due investigation, appellant was prosecuted under Section 8/18 of the NDPS Act and was put to trial.

4. Appellant abjured the guilt and pleaded false implication at the instance of Mehar Ali due to enmity.

5. Learned Special Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellant guilty for unlawfully cultivating opium poppy plants in violation of Section 8(b) of the N.D.P.S. Act, convicted and sentenced him under Section 18 of the Act as aforesaid, by the impugned judgment which has been challenged in this appeal.

6. Learned Senior Counsel appearing on behalf of the appellant submitted that the trial court gravely erred in convicting the appellant without there being any cogent evidence that the appellant cultivated the opium poppy plants or the land where the prohibited plants were allegedly grown. He further submitted that the land bearing khasra no. 178/3, where the plants of opium poppy were found sown, as projected by the prosecution evidence, was recorded jointly in the names of the appellant and his two brothers. Nandkishore; and Gendalal. The trial court also recorded a finding in para 21 of the impugned judgment that the land bearing khasra no.178/3, from where the opium poppy plants were uprooted and seized, was in the joint possession of the appellant and his two brothers and was recorded in their joint names and it did not exclusively belong to the appellant and was not in his exclusive possession: in such a case, appellant could not be held guilty for unlawfully cultivating the prohibited plants without there being any evidence in this behalf.

7. Learned counsel for the State, on the other hand, justified and supported the conviction of the appellant.

8. Record of the trial court perused. There is ample evidence on record that 135 plants of opium poppy were found grown amidst the crop of soyabean and sugarcane in the field known as *'Chamarwala Field'* in village Kulas-Khurd and they were uprooted and seized from the aforesaid field. Sub-Inspector Chandramani Dwivedi (PW-7), Station House Officer of Police Station Bilkisgang stated in his evidence that on 9.4.95 upon receiving a secret information that appellant Ramesh had unlawfully cultivated the opium poppy plants in his field known as 'Chamarwali Thon' at village Kulas-Khurd, and after recording such information in Rojnamcha, reached the field at village Kulas-Khurd with Police force and the public witnesses, located the 'Chamarwali Thon' with the help of witnesses and found that several opium poppy plants were grown amidst the crop of soyabean and sugarcane. According to Chandramani Dwivedi (P.W-7), he had enquired from the appellant if he had any licence or permit to cultivate opium poppy, but he had none. The opium plants were then uprooted and counted, all the 135 plants were seized by him vide seizure memo (Ex.P-2) in the presence of witnesses and duly sealed on the spot and sent for chemical analysis.

9. A.S.I.Onkar Datt Mishra (P.W-8) and Constable Suganlal (P.W-9) who claimed to be in the Police party alongwith Sub-Inspector Chandramani Dwivedi (P.W-7), also corroborated the aforesaid version. The public witnesses, namely, Devkaran (P.W-1), Imrat Singh (P.W-2) and Mehar Ali (P.W-5) also testified that the Police had come to village Kulas-Khurd on the day of Ramnavmi and found some plant growing amidst the crop of sugarcane and soyabean and those plants were got uprooted, counted, which were 135 in number, and were seized on the spot.

10. There is also evidence of Head Constable Balram (P.W-4) and Constable Suganlal (P.W-9) to the effect that the seized 135 opium poppy, plants were duly sealed and kept in 'Malkhana' and sent to the Forensic Laboratory, Neemach for chemical analysis. As per report of FSL (Ex. P-20), each of the 135 seized plants answered to the test for opium alkaloid and meconic acid and were found to be opium poppy plants.

11. There was no challenge to the seizure of 135 plants of opium poppy from the field at village Kulas-Khurd. The main thrust of the submission of learned counsel for the appellant has been that the land bearing khasra

no.178/3, from where the opium poppy plants were uprooted and seized, being in the joint possession and recorded in the joint names of the appellant and his brothers, appellant could not be held guilty for unlawful cultivation of the plants, without there being any evidence that appellant cultivated the prohibited plants or the land where the plants of opium poppy were found and seized. Reliance was placed in this behalf on the decision of Rajasthan High Court rendered in the case of *Raya Vs. State of Rajasthan* reported in 1997 Cr.L.J.page 3783.

12. In view of the aforesaid submission, the entire evidence is closely examined and the evidence of Patwari Ramprasad Saxena (P.W-3) assumes significance. Patwari Ramprasad Saxena (P.W-3) prepared the trace map (Ex.P-4) depicting the land bearing khasra no.178/3 in the possession of appellant Ramesh and his two brothers Nandkishore and Gendalal. Patwari Ramprasad Saxena (P.W-3) categorically stated that the land bearing khasra no 178/3, known as 'Chamarwala field', measuring 3.44 acres was recorded at the relevant time in khasra entries (Ex.P-7) in the name of appellant Ramesh and his two brothers, Nandkishore and Gendalal: it was only the land bearing khasra no.173/4 also known as 'Chamarwala field' admeasuring 0.96 decimal, which was recorded exclusively in the name of appellant Ramesh. According to Patwari Ramprasad Saxena (P.W-3), the land in question, as shown in the Police map (which is Ex. P-22 prepared by P.W-8 A.S.I. Onkar Datt Mishra) formed part of either land bearing-khasra no.178/1, 178/3 or khasra no.179/1. Thus, it was not stated to be part of khasra no.178/4, which, as per khasra entries (Ex.P-7), exclusively belonged to the appellant and was recorded in his name. It further transpires from the evidence of Patwari Ramprasad Saxena (P.W-3) that soyabean and sugarcane crops were cultivated in khasra no.178/3 and there was a *'medh'* between the land bearing khasra no. 178/3 and 178/4.

13. The public witnesses, namely, Devkaran (P.W-1), Imrat Singh (P.W-2), Mehar Ali (P.W-5) have also deposed that the land from which the plants of opium poppy were uprooted and seized was in the joint possession and joint cultivation of the appellant and his brothers and father. The trial court has also recorded a finding that the land bearing khasra no.178/3 known as 'Chamarwali Thon', from where the opium poppy plants were seized, did not exclusively belong to the appellant and was not in his exclusive possession, but it was in the joint possession of the appellant, his brothers and father and was recorded in the revenue record in their joint names.

14. There was also no cogent and positive evidence on record that the appellant himself cultivated the opium poppy plants, uprooted by him on being asked by the Police official or that he cultivated the land from where the opium poppy plants were uprooted and seized. None of the prosecution witnesses said that appellant himself cultivated the opium poppy plants or the land where those plants were found sown amidst the soyabean and sugarcane crops. On the other hand, the public witnesses, who hailed from village Kulas-Khurd, though treated hostile by the prosecution, have said that the aforesaid land was jointly cultivated by the appellant, his father and brothers and their Hali.

15. According to Devkaran (P.W-1) and Imrat Singh (P.W-2), Ramesh was not present in the field at the time when the Police came there, but he was called by the Police from the temple and appellant had uprooted the plants from the field on asking by the Police Officer. Although defence witnesses Ramcharan (D.W-1) and Asharam (D.W-2), the father of the appellant acceded to the suggestion made in the cross-examination that appellant looked-after and cultivated the field known as 'Chamarwali Thon', but both of them hastened to add that it was jointly cultivated and thus they disowned their earlier statement. The statement of Sub-Inspector Chandramani Dwivedi (P.W-7) that the appellant told him that he had cultivated the land known as 'Chamarwali Thon', being in the nature of confession to the Police Officer, cannot be accepted. Needless to add that as per the evidence of Patwari Ramprasad Saxena (P.W-3) even khasra no.178/4, which as per revenue records, exclusively belonged to the appellant, was also known as 'Chamarwala Field' and evidently it was the land other than the one where the prohibited plants were found sown and uprooted.

16. Thus, there was no legal, cogent and positive evidence on record that the appellant himself cultivated the opium poppy plants or the land where the plants of opium poppy were found, uprooted and seized or that land exclusively belonged to him and was in his exclusive possession. Rather there was authentic evidence on record based on khasra entries (Ex.P-7) that the land bearing khasra no.178/3 was in the joint possession and recorded in the joint names of appellant and his brothers and father. In view of the joint possession and joint ownership in the land in question, the possibility of cultivation of prohibited plants by joint owners or joint cultivator cannot be ruled out. The joint owners or joint cultivators of the land in question, however, are not prosecuted. In view of such facts, it cannot be safely concluded beyond all

reasonable doubts that it was the appellant, who cultivated the opium poppy plants or the land where the opium poppy plants were found sown amidst soyabean and sugarcane crops. As such, no presumption under Section 54 of the N.D.P.S. Act could be drawn against the appellant.

17. It would be profitable to reproduce here the following observation made by their lordships in the case of *Alakh Ram Vs. State of U.P,* reported in AIR 2004 Supreme Court page 2907 in para 6 of the judgment:-

> "Appellant Alakh Ram, his father and brothers owned 70 bighas of land. The prosecution has not produced any document to show that the property from which the Ganja plants were uprooted belonged to appellant Alakh Ram exclusively. The witnesses who were examined in support of the prosecution also have not given any evidence to show that this property belongs to appellant Alakh Ram. There is no satisfactory evidence either oral or documentary to show that the appellant has a right over the property from which the Ganja plants were recovered. There is no evidence that the appellant cultivated these Ganja plants. Having regard to the extent of the property and the number of plants recovered from that property, it cannot be said that these plants had been the result of cultivation. They may have been sprouted there by natural process and the appellant or anybody who is the owner of the property must not have been diligent in destroying the plants"

18. Although in the instant case, the possibility of sprouting of as many as 135 opium plants by natural process, is little, nevertheless, as said hereinabove, in view of the joint possession and joint cultivation of the land in question, the possibility of sowing and cultivation of prohibited opium plants in that land by joint owner or joint cultivator cannot be ruled out. Therefore, in absence of cogent and positive evidence to the effect that appellant himself cultivated the opium poppy or the land where its plants were found grown, appellant cannot be held guilty for unlawful cultivation of opium poppy. It needs no emphasis that when there is stringent punishment for an offence under N.D.P.S. Act, it should be proved beyond any shadow of doubt.

19. In the wake of aforesaid, the conviction of the appellant under Section 8/18 of the N.D.P.S. Act cannot be safely maintained, as he is entitled to benefit of doubt.

20. Appeal is, therefore, allowed. The conviction of the appellant and sentence awarded to him under Section 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985, are hereby set aside and the appellant is acquitted of the charge.

Appellant is on bail. His bail bonds shall stand discharged.

Appeal allowed.

I.L.R. [2011] M. P., 2860
APPELLATE CRIMINAL

Before Mr. Justice S.N. Aggarwal & Mr. Justice Anil Sharma

Cr.A. No. 119/1999 (Gwalior) decided on 16 August, 2011

VIJAY BAHADUR ...Appellant

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 302, 201, 404 - **Trial Court found two circumstances against appellant to have been proved by the prosecution and they are (i) recovery of the dead body of the deceased from a well pursuant to his disclosure statement and (ii) recovery of Rs. 90,000/- from his house pursuant to his disclosure statement and Rs. 5,000/- from PW 17 pursuant to his disclosure statement - However, trial Court disbelieved the circumstance of last seen relied upon by the prosecution as one of the circumstances in the chain of circumstances - Held - The widow of the deceased has testified that the disclosure statement of the appellant was extracted by the Police from him by use of third degree method - Trial Court has strangely taken the circumstance of recovery of the dead body at the behest of the appellant as proved only on the basis of uncorroborated testimony of the investigating officer - No cogent evidence on record to show that the deceased was last seen in the company of the appellant before his dead body was recovered -- Evidence of the investigating officer which has been made the sole basis of conviction of the appellant is of very weak type and does not inspire our confidence - Conviction of the appellant is legally unsustainable.** (Paras 9, 11 & 13)

दण्ड संहिता (1860 का 45), धाराएँ 302, 201, 404 – विचारण न्यायालय ने अपीलार्थी के विरुद्ध दो परिस्थितियां अभियोजन द्वारा साबित की जाना पाया और वे हैं (1) उसके प्रकटन कथन के अनुसार मृतक के मृत शरीर की कुएँ से बरामदगी और (2)

उसके प्रकटन कथन के अनुसार उसके मकान से रु. 90,000/– की बरामदगी तथा पीडब्ल्यू. 17 से उसके प्रकटन कथन के अनुसार रु. 5,000/– की बरामदगी – किन्तु, विचारण न्यायालय ने अंतिम बार देखे जाने की परिस्थिति पर अविश्वास किया जिस पर अभियोजन द्वारा परिस्थितियों की श्रृंखला में से एक परिस्थिति होने का विश्वास किया गया था – अभिनिर्धारित – मृतक की विधवा ने साक्ष्य दी है कि अपीलार्थी से प्रकटन कथन उगलवाने के लिए पुलिस द्वारा उस पर थर्ड डिग्री का उपयोग किया गया – विचारण न्यायालय ने विलक्षण रुप से केवल अन्वेषण अधिकारी की असंपुष्ट परिसाक्ष्य के आधार पर अपीलार्थी की निशादेही पर लाश की बरामदगी की परिस्थिति साबित होने की धारणा की – अभिलेख पर यह दर्शाने के लिए कोई प्रबल साक्ष्य नहीं कि मृतक की लाश की बरामदगी से पूर्व उसे अंतिम बार अपीलार्थी की संगत में देखा गया था – अन्वेषण अधिकारी की साक्ष्य जिसे अपीलार्थी की दोषसिद्धि का एकमात्र आधार बनाया गया है वह अति दुर्बल प्रकार की है और विश्वास उत्पन्न नहीं करती – अपीलार्थी की दोषसिद्धि विधिक रुप से अपोषणीय।

Madhukar Kulshreshtha, for the appellant.
Prabal Solanki, PP for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by **S.N. AGGARWAL, J.**;– Challenge in this criminal appeal is to the judgment of the Sessions Court dated January 21st,1999 in Sessions Trial Case No.123/99 whereby the appellant has been convicted for the offences under sections 302,201 and 404 IPC and sentenced to undergo various terms of imprisonment, maximum of which is life imprisonment besides fine with default stipulation.

2. As per the prosecution case, the deceased had left his village in Etawah, Uttar Pradesh on January 1st, 1996 after telling his wife that he was going to the house of the appellant at Navalpura, District Bhind in connection with sale of his land in village Puleh which he got from his in-laws. As the deceased had not returned to his home till January 4th ,1996 his wife sent her son Vijendra (PW 12) to the house of his 'Nandoi' Ramnath (PW 11) in search of her husband. PW 11 Ramnath on enquiries made at Navalpura, District Bhind came to know that the deceased had sold his land in village Puleh to PW 22 Raghuveer Singh on January 3rd,1996 in presence of two witnesses namely appellant's father Jai Shriram and another witness PW 19 Mansaram. PW 11 Ramnath is also alleged to have come to know that the deceased was murdered by the appellant and his father Jai Shriram with an intent to dishonestly misappropriate the amount of Rs.1,03,000/- which the deceased had got on sale of his land to PW 22 Raghuveer Singh on January 3rd,1996.

3. A missing report about missing of the deceased Kishorilal was lodged by his brother PW 5 Nathuram with the Police of Police Station, Umri,

District Bhind on January 10th,1996. Thereafter, the dead body of deceased Kishorilal was taken out by the Police on January 22nd ,1996 from a dry well situated in the field of Harnath in village Puleh. The appellant was arrested vide arrest memo Ex.P/27 on January 22nd,1996. The appellant in his confessional statement (Ex.P/1) given to the Police while in police custody on January 22nd,1996 confessed to his guilt and stated that he could recover the dead body of the deceased from the well. Two more disclosure statements of the appellants were recorded by the Police next day, i.e. on January 23rd,1996 and they are Ex.P/2 and P/13 in which the appellant had allegedly disclosed that he could get Rs.90,000/- recovered from his house concealed there and Rs.5000/- given by him to Ashok Kumar Jain (PW 17) for purchase of clothes, shoes etc. The Police is alleged to have recovered Rs.90,000/- from the house of the appellant on January 23rd,1996 pursuant to his disclosure statement, Ex.P/2 and Rs.5,000/- from PW 17 Ashok Kumar Jain on January 23rd,1996 pursuant to appellant's disclosure statement, Ex.P/13. FIR, Ex.P/29 was registered with the Police of Police Station, Umri on January 22nd,1996 with regard to the murder of deceased Kishorilal. The appellant's father Jai Shriram was arrested by the Police on 11th April, 1996. After completion of investigation into the case, challan was filed by the prosecution against the appellant and his father Jai Shriram for proceeding against them for the offences under sections 302,201 and 404 IPC.

4. The appellant alongwith his father Jai Shriram was charged by the Trial Court for the offences under sections 302,201 and 404 IPC to which they pleaded not guilty and claimed trial. The prosecution has examined total 22 witnesses in order to prove its charges against the appellant and his father. These witnesses are PW 1 Harnath, owner of the well from where the dead body of the deceased was taken out by the Police on January 22nd ,1996; PW 2 Rajendra Singh and PW 3 Bharat Singh are the witnesses to the disclosure statement of the appellant (Ex.P/1) pursuant to which the dead body of the deceased was recovered by the Police from the well; PW 4 Urmila Devi is the widow of the deceased and she was examined to prove that the deceased had left his house on January 1st ,1996 after telling her that he was going to the house of the appellant at Navalpura, District Bhind in connection with sale of his land in village Puleh; PW 5 Nathuram is the brother of the deceased and was examined to prove the missing report lodged by him with the Police of Police Station, Umri on January 10th,1996; PW 6 Jagram, PW 7 Mahendra, PW 9 Shiv Kumar and PW 10 Raj Kumar are the relatives of

the deceased and were examined to prove the recovery of the dead body of the deceased in their presence; PW 11 Ramnath is the sister's husband of the deceased and was examined to prove that he had gone in search of the deceased at Navalpura on being told about missing of the deceased from his house since January 1st,1996; PW 12 Vijendra Singh is the son of the deceased; PW 13 Rameshwar Dayal is a stock witness of the Police as admitted by him in his cross-examination and he was examined to prove the slip taken by the Police in possession to show that PW 22 Raghuveer Singh had promised to pay the balance sale consideration of Rs.18,000/- to the deceased after sometime; PW 14 Man Singh was a witness to the seizure memos Exs.P/13 to P/19 and he was examined by the prosecution to prove the seizure of mattress, quilt, shirt and pant of the deceased and also of Rs.5,000/- seized from PW 17 Ashok Kumar Jain pursuant to disclosure statement, Ex.P/13 of the appellant; PW 8 Gauri Shankar, PW 15 R.S.Chourasiya and PW 18 Inspector Umesh Singh Tomar are the Police witnesses connected to the investigation of the crime; PW 16 Kashi Prasad is the Patwari who had prepared the site plan,Ex.P/23; PW 17 Ashok Kumar Jain is the person from whom the investigating officer had recovered Rs.5,000/- pursuant to disclosure statement of the appellant, Ex.P/13; PW 19 Mansaram was a witness to the sale document by which the deceased had sold his land in village Puleh to PW 22 Raghuveer Singh; PW 20 Sonelal is the brother of the deceased; PW 21 Dr. Madhup Kumar had conducted autopsy of the deceased on January 25th,1996 and was examined to prove his postmortem report, Ex.P/31; and PW 22 Raghuveer Singh is the person to whom the deceased had sold his land in village Puleh on January 3rd,1996.

5. After the prosecution had closed its evidence, statement of the appellant and his father Jai Shriram under section 313 Cr.P.C. were recorded in which they denied the incriminating evidence that came on record against them and pleaded that they were falsely implicated by the Police in the present case.

6. The Trial Court on the basis of evidence that was adduced before it, acquitted appellant's father Jai Shriram, but convicted the appellant for the offences under sections 302,201 and 404 IPC as it found two circumstances against him to have been proved by the prosecution and they are (i) recovery of the dead body of the deceased from a well pursuant to his disclosure statement and (ii) recovery of Rs.90,000/- from his house on January 23rd,1996 pursuant to his disclosure statement, Ex.P/2 and Rs.5,000/- from PW 17 Ashok Kumar Jain pursuant to his disclosure statement Ex.P/13. The

circumstance of last seen relied upon by the prosecution against the appellant was not believed by the Trial Court.

7. A perusal of the impugned judgment would show that all the public witnesses examined by the prosecution before the Trial Court have turned hostile and did not support the case of prosecution at all. The conviction of the appellant for various offences under sections 302,201 and 404 IPC by the Trial Court is only on the basis of uncorroborated testimony of the investigating officer PW 18 Umesh Singh Tomar.

8. The only question that calls for our consideration in the present appeal is whether it would be safe to sustain the conviction of the appellant merely on the basis of solitary uncorroborated testimony of the investigating officer, more so, when all the public witnesses, most of whom were related to the deceased have turned hostile to the prosecution case on material aspects."9.

9. As far as the principle of law applicable to the case is concerned, we have no doubt that an accused can be convicted on the solitary evidence of the investigating officer, provided it is reliable and credit worthy. On giving our anxious consideration to all the facts and circumstances of the case and the evidence of prosecution available on Trial Court's record, we are of the view that it may not be safe to sustain the conviction of the appellant only on the basis of uncorroborated testimony of the investigating officer PW 18 Umesh Singh Tomar. In our opinion, no credence can be given to the testimony of PW 18 Umesh Singh Tomar. The appellant was arrested by the Police vide arrest memo, Ex.P/27 at 17.05 Hrs. on January 22nd,1996. His disclosure statement, Ex.P/1 pursuant to which the dead body of the deceased was recovered from a well was recorded before his arrest at 12.30 Hrs. The dead body of the deceased was recovered from the well vide memo Ex.P/4 at 14.10 Hrs. before the appellant was arrested at 17.05 Hrs. The widow of the deceased (PW 4 Urmila Devi) has testified that the disclosure statement of the appellant, Ex.P/1 was extracted by the Police from him by use of third degree method. We find that missing report of the deceased was lodged by his brother with the Police on January 10th,1996. Though suspicion was raised on the appellant and his father in the missing report on January 10th,1996, but there was no headway in the investigation till the dead body of the deceased was recovered from the well on January 22nd,1996. It is not the case of the investigating officer that when he had visited the house of the appellant after receiving the missing report of the deceased on January 10th,1996 the appellant

was found missing from his house. Rather, the investigating officer PW 18 Umesh Singh Tomar has stated in his evidence before the Trial Court that at the time of his visit to the house of the appellant, he was very much present there. If that was so, there is no explanation on record why the appellant was not interrogated by the investigating officer then and there instead of waiting till recovery of the dead body of the deceased from the well on January 22nd,1996. Does it not create a strong suspicion on the involvement of the appellant in the crime. In our view, it does create a suspicion on his complicity in the crime.

10. Furthermore, we find as per testimony of the deceased's widow PW 4 Urmila Devi that the deceased had left his house at Etawah, Uttar Pradesh on January 1st,1996 after telling her that he was going to the house of the appellant at Navalpura, District Bhind in connection with sale of his land in village Puleh and if it was so then why the deceased's widow sent her son PW 12 Vijendra to the house of her 'Nandoi' in search of her husband. This also, in our opinion, creates strong suspicion on the prosecution version regarding involvement of the appellant in the murder of the deceased.

11. PW 2 Rajendra Singh and PW 3 Bharat Singh are both witnesses to the disclosure statement of the appellant, Ex.P/1. But they both have turned hostile to the prosecution case and say that the disclosure statement, Ex.P/1 was not recorded by the investigating officer in their presence. This fact has been noticed by the Trial Court in the impugned judgment, but despite that the Trial Court has strangely taken the circumstance of recovery of the dead body at the behest of the appellant as proved only on the basis of uncorroborated testimony of the investigating officer PW 18 Umesh Singh Tomar.

12. The Trial Court also seems to have over looked the material contradiction in the testimony of the deceased's widow Urmila Devi (PW 4) and deceased's brother Sonelal (PW 20) regarding the purpose for which the deceased had left his house at Etawah, Uttar Pradesh on January 1st,1996. As per the deceased's widow (PW 4), the deceased had left his house on January 1st,1996 after telling her that he was going to the house of the appellant at Navalpura in connection with sale of his land in village Puleh whereas, as per PW 20 Sonelal he was informed by the deceased's widow that the deceased had left his house on January 1st,1996 in search of a bridegroom for his daughter.

13. There is no cogent evidence on record to show that the deceased was

last seen in the company of the appellant before his dead body was recovered from a well on January 22nd,1996. In fact, the Trial Court itself has disbelieved the circumstance of last seen relied upon by the prosecution as one of the circumstances in the chain of circumstances to prove involvement of the appellant in the murder of the deceased. In our opinion, evidence of the investigating officer (PW 18) which has been made the sole basis of conviction of the appellant is of very weak type and does not inspire our confidence to prove the involvement of the appellant in the murder of the deceased. Hence, we have no hesitation in holding that the conviction of the appellant for the offences for which he has been convicted by the Trial Court is legally unsustainable.

14. For the foregoing reasons, this appeal is allowed. The impugned judgment of the Trial Court is set aside. Bail bonds of the appellant are discharged. Fine, if already deposited by him, be returned to him forthwith. Trial Court's record be sent back. This appeal stands disposed of accordingly.

Appeal allowed.

I.L.R. [2011] M. P., 2866
APPELLATE CRIMINAL
Before Mr. Justice T.K. Kaushal
Cr. A. No. 91/2006 (Jabalpur) decided on 27 August, 2011

SHYAM LAL ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 114(g) - Non examination of Prosecurtix - **Prosecutrix, aged 15 years, a mentally retarded girl, suffering with 60% mental disability - She was not able to speak - Her non examination would not be fatal to the prosecution.** (Para 2)

क. साक्ष्य अधिनियम (1872 का 1), धारा 114(जी) – अभियोक्त्री का परीक्षण नहीं किया जाना – अभियोक्त्री 15 वर्ष आयु की विक्षिप्त बालिका 60 प्रतिशत मानसिक दुर्बलता से ग्रसित – वह बात करने में सक्षम नहीं थी – उसका परीक्षण नहीं किया जाना अभियोजन के लिये घातक नहीं होगा

B. Penal Code (45 of 1860), Section 376 - Rape - Consent - **Prosecutrix was suffering 60% mental retardedness - It can safely be gathered that prosecutrix had no sense of discretion to give her consent or to express her opposition as well.**

In view of the aforesaid evidence, it is clear that prosecutrix was not only a girl of imbecile mind having lack of understanding like stupid person rather she was mentally retarded girl - Meaning thereby her mental age was not matching with her physical age - As per medical report she was far below in her mental age, as compared to her physical age, shown to be 15-16 years - On the basis of aforesaid medical evidence it can safely be gathered that prosecutrix had no sense of discretion to give her consent or to express her opposition as well. (Para 8)

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्संग – सहमति – अभियोक्त्री 60 प्रतिशत मानसिक दुर्बलता से ग्रसित – यह सुरक्षित रुप से समझा जा सकता है कि अभियोक्त्री को अपनी सहमति देने अथवा अपना विरोध प्रकट करने के लिए कोई स्वविवेक की समझबूझ नहीं थी।

***C. Penal Code (45 of 1860), Sections 376 & 450 - House Tresspass & Rape* - Mother of the prosecutrix upon information reached the house and saw the house closed from inside - She peeped inside from a hole of door and saw the appellant committing rape on her daughter - On raising alarm the appellant ran away - Contradictions regarding activities and posture are minor and inconsequential - Evidence of mother is worthy of credence even without corroborations from any other independent witness - Conviction upheld.** (Paras 2 & 12)

ग. दण्ड संहिता (1860 का 45), धारा 376 व 450 – गृह अतिचार तथा बलात्संग – सूचना मिलने पर अभियोक्त्री की मां घर पहुंची और देखा घर अंदर से बंद था – उसने दरवाजे के छेद से अंदर झांका ओर देखा कि अपीलार्थी उसकी पुत्री के साथ बलात्संग कारित कर रहा है – शोर मचाने पर अपीलार्थी भाग गया – क्रियायें और शारीरिक मुद्रा के संबंध में विरोधाभास गौण एवं असंगत है – माता की साक्ष्य किसी अन्य स्वतंत्र साक्षी से अभिपुष्टि के बिना भी विश्वास योग्य है – दोषसिद्धि कायम।

K.K. Pandey, for the appellant.

Vinod Fouzdar, PL for the respondent.

JUDGMENT

T.K. KAUSHAL, J.:--This appeal has been preferred under Section 374 of the Code of Criminal Procedure, 1973 (in short the Code) against judgment dated 09/12/2005 passed by IInd Additional Sessions Judge, Satna, District-Satna in S.T. no. 344/2002 convicted the appellant under Section 376 and 450 of IPC for committing rape on prosecutrix aged about 16 years after

committing house trespass and sentenced to 10 years and 5 years R.I and fine of Rs.500/- and 200/- respectively.

2. Facts of the case in short are that on 17/09/2002 at about 9.00 am in village Giduri Amodha, District- Satna, Sundariya, mother of the prosecutrix went out of his house at rivulet (Nala) for cleaning clothes. Sundarlal, father of the prosecutrix had gone out of his house for labour work. Prosecutrix, aged 15 years, a mentally retarded girl, was in the house with her younger sister Seema, aged 8 years. Appellant came in the house and asked Seema to go out of the house for calling her mother (PW-2). Appellant closed the door of the house from inside and committed rape on the prosecutrix. Sundariya, mother (PW-2) was informed by her younger daughter Seema that appellant was calling her. Mother (PW-2) reached to the house and saw the house closed from inside, but could peep inside the house from a hole of the door and saw that appellant was committing rape on her daughter the prosecutrix. On raising alarm, appellant opened the door and ran away from the house.

3. Sundariya, mother (PW-2) lodged FIR Ex.P-2 at police station Kotwali, Satna. A case at crime no. 682/2002 was registered under Section 376 of IPC against the appellant. Prosecutrix was sent for her medical examination at District Hospital Satna by police along with request letter Ex.P-7. Prosecutrix was examined by Dr. Sudha Jain (PW-5). MLC report Ex.P-8 was prepared by the doctor. For ascertaining age of the prosecutrix on 18/09/2002, she was subjected to ossification test at District Hospital Satna. Dr. Arvind Saraf, Radiologist (PW-8) took X-ray of wrist and elbow of the prosecutrix and prepared report Ex.P-10 on the basis of X-ray plate Ex. P-11.

4. Since, the prosecutrix was unable to speak, was sent for her medical examination by ENT Expert at Satna. On 01/10/2002, Dr. U.S. Thakur (PW-1) examined and prepared report Ex.P-1, finding nothing abnormal in her nose, ear, throat except loss of speech and referred for her examination by expert of mental hospital. On 08/10/2002 prosecutrix was examined by Dr. Pradeep Kumar (PW-10) at Medical College Rewa and was observed that prosecutrix suffered with 60% mental disability and prepared report Ex. P-12. In the meantime, i.e. on 23/09/2002, appellant was arrested and was sent for his medical examination. Dr. B.L. Gupta (PW-12) observing him fit for physical intercourse, prepared MLC report Ex.P-13.

5. After completing investigation, citing 22 witnesses, police City Kotwali,

District- Satna submitted charge sheet under section 376/450 of IPC in the court of concerned JMFC. Case was committed to the court of session for trial. Charges under Section 376/450 of IPC were framed on the appellant. Appellant abjured guilt. To substantiate case of the prosecution, statements of Dr. U.S. Thakur, ENT Expert (PW-1), Sundariya, mother of the prosecutrix (PW-2), Sundarlal,father of the prosecutrix (PW-3), Mahesh Prasad Yadav (PW-4), Dr. Sudha Jain (PW-5), Sukhlal (PW-6), Mithailal (PW-7),Dr. Arvind Saraf, Radiologist (PW-8), Shobha Namdeo, Head Constable (PW-9), Dr. Pradeep Kumar (PW-10), Ram Kishore, Home Guard Saink (PW-11), Dr. B.L. Gupta, Medical Specialist (PW-12), Bheem Sen Tiwari, Constable (PW-13), Nathulal (PW-14), D.K. Singh, ASI/Investigation Officer (PW-15) were recorded. Defence of the appellant was that of false implication on account of election based political rivalry in the village.

6. Though prosecutrix was produced before the trial court, but vide order dated 30/08/2005, trial court chose not to record her statement for the reason that appellant was dumb since birth and even Investigation Officer did not record her statement during investigation. Appreciating the aforesaid evidence, trial court convicted and sentenced the appellant as above.

7. This appeal has been preferred by the appellant on the grounds that appreciation of evidence is not proper. Case of the prosecution is suffering from lapses like non-examination of prosecutrix and her younger sister Seema aged 8 years, and independent witnesses though said to be present on the scene of occurrence. According to medical reports, prosecutrix was a major and consenting party, hence, conviction and sentence under Section 376 of IPC is bad in law. On the other hand, Learned Panel Lawyer supported the finding of conviction and sentence both.

8. On perusal of evidence of Dr. U.S. Thakur, ENT Expert (PW-1) and MLC report Ex.P-1, Dr. Pradeep Kumar (PW-10) and report Ex.P-12, it is clear that prosecutrix age 15 years, was able to hear, but was not able to speak and was mentally retarded. She was suffering 60% metal retardedness. In view of the aforesaid evidence, it is clear that prosecutrix was not only a girl of imbecile mind having lack of understanding like stupid person rather she was mentally retarded girl. Meaning thereby her mental age was not matching with her physical age. As per medical report she was far below in her mental age, as compared to her physical age, shown to be 15-16 years. On the basis of aforesaid, medical evidence it can safely be gathered that

prosecutrix had no sense of discretion to give her consent or to express her opposition as well.

9. In view of the evidence of Dr. Sudha Jain (PW-5) and Dr. Arvind Saraf, Radiologist (PW-8), it is clear that prosecutrix had an old rupture of hymen, and was found experienced of intercourse. No definite opinion was given by doctor regarding commission of rape. As per ossification test, she was found to be girl aged 14 to 15 years. Presumption of plus (+) minus (-) 3 years age can be added after keeping it in mind that 2 years margin has already been given by the doctor. Age of the prosecutrix was shown 14-15 years. In any case, she was below 17 years.

10. In this case non-examination of prosecutrix, would not affect the credibility of the prosecution much because she was not able to speak. It would be difficult for the Court to record her statement. It would be equally difficult for the appellant to cross-examine such a witness or to understand her expression while she was not able even to speak. In back ground of these peculiar facts in this case, it is not fatal for prosecution that prosecutrix was not examined. Observation of trial court is also on record. As per order sheet dated 30/08/2005, trial court exercised its discretion to not to record the statement of the prosecutrix though she was present in the court. In such a situation, no prejudice has been caused to the appellant by non-examination of the prosecutrix.

11. Further in view of the evidence of mother of the prosecutrix (PW-2), it is apparently clear that appellant was found inside the house with prosecutrix in compromising position. There are contradictions in her statement regarding the way she saw activities and posture of the appellant from outside the house. But these are minor and inconsequential. Her evidence is free from doubts and discrepancies regarding the fact that appellant was seen by her inside the house in compromising position and on raising alarm having opened the door, appellant ran away from the house wearing a towel only.

12. In present case evidence of mother of the prosecutrix (PW-2) is worthy of credence even without corroboration from any other independent witnesses, those said to have been assembled outside the house on raising cries by her. Appreciation of evidence done by the trial court in this respect is proper and is in right perspective.

13. Defence of the appellant was that of consent of the prosecutrix and

false implication on account of election rivalry. Both such defences do not inspire the confidence. Prosecutrix was a mentally retarded girl aged about 16-17 years and had no sense of discretion to give consent or to offer resistance, no case of consent is made out. Similarly for taking revenge of election rivalry, it does not inspire confidence that a false report will be lodge by mother of the prosecutrix at police station involving her daughter in such act.

14. I see no error in appreciation of evidence done by the trial court. However, in view of the totality of facts and circumstances of the case, in my considered opinion 10 years jail sentences seem to be harsh, rather it should be 7 years R.I.

15. As discussed above, appeal is partly allowed on the point of sentence only. Findings of conviction of appellant under section 376 and 450 of IPC are maintained. Sentence of appellant under Section 376 of IPC is reduced from 10 years to 7 years R.I. Sentence of appellant under Section 450 of IPC is maintained. Sentence of fine is maintained.

16. Appellant shall be entitled to have benefit of custody period spent by him pending investigation, trial and appeal.

Appeal partly allowed.

I.L.R. [2011] M. P., 2871
APPELLATE CRIMINAL
Before Mr. Justice T.K. Kaushal
Cr. A. No. 1356/1995 (Jabalpur) decided on 27 August, 2011

SHYAM LAL & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 306 - Abatement of Suicide - **Within period of 3 years of marriage deceased committed suicide in her matrimonial house by pouring kerosene and setting herself on fire - Nothing has been suggested by the witnesses that prior to the incident of suicide something specific was done by the appellants with the deceased worth driving her to commit suicide - Normal instances of ill-treatment by way of neglecting the deceased or by quarreling with the deceased are not sufficient to constitute the abatement on the part of the appellants - There must be some more evidence showing specific**

acts during the last spell of the stay of the deceased in her matrimonial house suggestive of mens rea to instigate the deceased to commit suicide - Not a sufficient evidence for holding appellants guilty for abatement of suicide. (Para-16&17)

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – विवाह के तीन वर्ष के भीतर मृतिका ने अपने ससुराल में मिट्टी का तेल उडेलकर स्वयं को आग लगाकर आत्महत्या कारित की – साक्षियों द्वारा कोई सुझाव नहीं कि आत्महत्या की घटना से पूर्व अपीलार्थीगण द्वारा मृतिका के साथ ऐसा कुछ विनिर्दिष्ट रुप से किया जिससे वह आत्महत्या करने के लिये दुष्प्रेरित हुयी हो – मृतिका की उपेक्षा अथवा मृतिका के साथ झगड़े की सामान्य घटनायें अपीलार्थीगण की ओर से दुष्प्रेरण गठित करने के लिये पर्याप्त नहीं है – मृतिका के उसके ससुराल में अंतिम काल में रहने के दौरान मृतिका को आत्महत्या कारित करने के लिये दुष्प्रेरण के दुराशय की ओर इंगित करने वाले विनिर्दिष्ट कृत्य दर्शाने वाली और अधिक साक्ष्य होनी चाहिये – अपीलार्थीगण को आत्महत्या के दुष्प्रेरण हेतु दोषी मानने के लिये पर्याप्त साक्ष्य नहीं है।

Cases referred :

AIR 2010 SC 327, AIR 2008 SC 3212.

Satyam Agrawal with *Gitesh Singh Thakur*, for the appellants.

Vinod Fouzdar, PL for the respondent.

JUDGMENT

T.K. KAUSHAL, J. :–This appeal has been preferred under Section 374 of the Code of Criminal Procedure, 1973 (in short the Code) against judgment dated 25/09/1995 passed by IVth Additional Sessions Judge, Chhatarpur in S.T no.127/1994 convicting the appellants under Section 498A and 306 of Indian Penal Code (in short IPC) for committing cruelty, harassment and abatement of the suicide to Savitri (since deceased) wife of the appellant no.1 and sentenced to 1 year R.I. and 3 ½ years RI and with fine of Rs.500/- and Rs.1000/- respectively.

2. Facts, in short, are that on 06/12/1990 by about 6.00 am in her matrimonial house Savitri deceased set herself on fire. Deceased was married to appellant no.1 about 3 years prior to the incident. On 05/12/1990, after meals in the night, deceased insisted appellant no.1 to take her to her parents house. In the morning, deceased again insisted and started crying. Appellant no.1 left the house for a while. Deceased pouring kerosene set herself on fire. After hearing shrieks of the deceased, appellant no.4 Ku. Prabha, sister of the appellant no.1, rushed towards him and informed about the incident. Appellant no.1 and 2 rushed to their house. Deceased succumbed to her burn injuries on the spot after some time. At about 10.15 am, appellant no.1 informed

the incident at police station-Bakashwaha, District- Chhatarpur. Vide Ex. P-15 Marg proceeding under section 174 of the Code at no.22/1990 was initiated.

3. On 06/12/1990, appellant no.3 Ram Rani was also sent for medical examination for burn injuries received by her in thumb of her right hand. Dr. Ashok Botke (PW-8) examined her and prepared MLC Report Ex.P-6.

4. On 07/12/1990, Post Mortem of deceased was conducted by Dr. Ashok Botke (PW-8) along with two other doctors at about 4.00 pm in PHC Bakashwaha, District- Chhatarpur. Cause of death was shown to be external burns. There had been 75% burn on the body of the deceased. Cause of death was shock due to excessive burning. On 08/12/1990, Vide Ex.P-12 FIR, a case at crime no. 135/1990 under Section 498A, 306 and 304B was registered against the husband, father-in-law, mother-in-law and Sister-in-law of the deceased. Spot Map Ex.P-10 was prepared. Vide Arrest Memo Ex.P-13 and Ex.P-14 appellants were arrested on 08/12/1990.

5. Pending investigation, among other witnesses, statements of father, brother, sister-in-law (bhabhi) of the deceased were also recorded by the police, stating instances of cruelty, harassment and acts of abatement committed by the appellants to the deceased.

6. After completing investigation, citing 16 witnesses, charge sheet under Section 498A, 306, 304B was submitted in the Court of concerned Magistrate. Case was committed in the court of sessions. Trial Court framed charges under Section 306, 304B and 498A of IPC against the appellants. Appellants abjured guilt. To substantiate case of prosecution, statements of Ratanlal (PW-1), Mohanlal Shrivastava (PW-2), Dr. Ram Kumar Khare (PW-3), Smt Kusum, sister-in-law (PW-4), Churaman, brother of deceased (PW-5), Gyasilal, father of deceased (PW-6), Ramdayal (PW-7), Dr. Ashok Botke (PW-8), Bhadur Singh (PW-9), Harnarayan, Constable (PW-10), Jagannath Singh (PW-11), and Mukesh Tiwari, Sub Inspector (PW-12) were recorded. Defence of the appellant in Trial Court was that of false implication by the parents of the deceased. After appreciating evidence, Trial Court acquitted the appellants under Section 304B of IPC, however, convicted and sentenced them under Section 498A, 306 of IPC and sentenced as above.

7. This appeal has been preferred on the ground that appreciation of the evidence is not proper. Findings of trial court are based on surmises,

conjectures and wrong presumptions. Deceased was never subjected to harassment and cruelty whatsoever by none of the appellants. There are material contradiction, omissions and improvements in the statement of the prosecution witnesses. Conviction is bad in law. Sentence is too harsh. On the other hand, learned Panel Lawyer for the State supported the judgment of the trial court.

8. For holding a person guilty for abatement of suicide evidence as per provision of Section 107 of the IPC should be available on following grounds:-

> **Section 107 Abatement of a thing**-A person abets the doing of a thing, who-
>
> First.- Instigates any person to do that thing; or
>
> Secondly.-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.
>
> **Explanation 1**
>
> A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
>
> **Explanation 2**
>
> Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

9. For abatement of suicide Apex Court observed in AIR 2010 SC 327 *(Ganula Mohan Reddy Vs. State of A.P.)* as follows in Para 18, 20 and 21:-

> 18. In the instant case, the deceased was undoubtedly hypersensitive to ordinary petulance, discord and differences which happen in our day-to-day life. Human sensitivity of each individual differs from the other. Different people behave differently.

20. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

21. The intention of the Legislature and the ratio of the case decided by this court is clear that in order to convict a person under section 306, IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he committed suicide.

10. For ascertaining the fact whether cruelty or harassment has been committed by the appellants on the deceased. According to the provisions of Section 498A of IPC, evidence is required as follows:-

Explanation

For the purpose of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

11. Since in present case, deceased expired within the period of 7 years of the marriage by setting fire herself in her matrimonial house, Evidence Act, 1972 provides presumption in favour of the deceased as per Section 113 (A) of Evidence Act as follows:-

113A. Presumption as to abetment of suicide by a married woman.- When the question is whether the commission of suicide by a women had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the

case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation

For the purposes of this section, "cruelty" shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860).

12. In respect of applicability of the presumption, it is observed by the Apex Court in AIR 2008 SC 3212 *(Rajbabu & another Vs. State of M.P.)* as follows :-

> "... Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the above said three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression- "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. Inspite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption....."

13. It is no longer disputed that within period of 3 years of marriage deceased committed suicide in her matrimonial house by pouring kerosene and set herself on fire. Trial Court has appreciated the evidence and extended the benefit of doubt to the appellants holding that it is not proved beyond doubt that deceased was subjected to cruelty and harassment in respect of demand of dowry by the appellants soon before her death and acquitted them of the charge under Section 304B of IPC.

14. Smt Kusum, sister-in-law of the deceased (Bhabhi) (PW-4) stated that deceased used to tell her according to in-laws she did not know to cook "chapaties" and was ugly also. Churaman, brother of deceased (PW-5) stated that though marriage of her sister with the appellant was settled in *"Parichay*

Sammelan", but appellant demanded some money. His sister used to tell her that she was not getting good treatment from her in-laws. This complaint was made after a year of the marriage. PW-4 and PW-5 are living separately from their parents for last about 12 years in separate village. Most of the instances of alleged harassment have been stated by the witnesses first time in the court only.

15. Gyasilal, father of deceased (PW-6) stated that deceased told to her sister-in-law (PW-4) and she told to him the facts about cruelty and harassment. Father-in-law of the deceased had taken her with him to her matrimonial house. After about 8-10 days, he informed that deceased was not keeping well and suffering from some ailment. After about 5-6 days, thereof, suicides was committed.

16. It had come on record that deceased was subjected to cruelty and harassment by uttering words by the appellants, in casual manner, but nothing has been suggested by the witnesses that prior to the incident of suicide something specific has been done by the appellants with the deceased worth driving her to commit suicide. None of the witnesses stated that after the last visit of the deceased to her matrimonial house, i.e. within 15-20 days of her suicide any of the appellant committed any act that may hold them responsible to drive the deceased to commit suicide. Normal instances of ill-treatment by way of neglecting the deceased or by quarreling with the deceased are not sufficient to constitute the abatement on the part of the appellants.

17. The evidence is sufficient for holding the appellants guilty under Section 498A of IPC. However, for convicting the appellants under Section 306 of IPC there must be some more evidence showing specific acts during the last spell of the stay of the deceased in her matrimonial house suggestive of mens rea to instigate the deceased to commit suicide. Since, the deceased had committed suicide, her parent's family members recollected all instances of ill-treatment narrated by her during last three years and were stated by them in the Court. This is not a sufficient evidence for holding appellants guilty for abatement of suicide as described under Section 107 of the IPC.

18. Trial Court has rightly held that presumption under Section 113(b) of the Evidence Act is not attracted. Similarly Trial Court should have held that presumption under Section 113(a) of the Evidence Act was also not attracted. There is no sufficient evidence available on record which can hold appellants liable for abatement of the suicide committed by the deceased. Allegation of

cruelty and harassment, however, are proved on the basis of the prosecution evidence.

19. As discussed above, conviction and sentence of the appellants under Section 306 of IPC deserves to be set aside and is hereby set aside. Conviction under Section 498A of IPC is maintained.

20. It is submitted by learned Counsel for the appellants that more than 2 months jail sentence have been suffered by appellant no.3 Ram Rani, mother-in-law and appellant no.4 Prabha, sister-in-law and more than 3 months custody has been suffered by appellant no.1 Shayamlal, husband of the deceased, pending investigation, trial and appeal. After about a period of 21 years of the incident, no useful purpose would be served in sending them back in jail.

21. In my considered opinion, in addition to undergone jail sentence of the appellants, fine of Rs.5,000/- each would be sufficient and will meet the ends of justice. Appellants stand convicted under Section 498A of IPC and sentenced to undergone jail sentence and fine of Rs.5000/- each, in default of payment of fine accused persons shall undergo 3 months simple imprisonment.

22. Appellants are directed to appear before the Trial Court to deposit the balance fine amount or to undergo default sentence on or before 17th October, 2011, as the case may be.

Appeal is allowed in part. Conviction and sentence of appellants under Section 306 of IPC is set aside. Conviction under Section 498A is maintained and sentenced as indicated above.

Appeal partly allowed.

I.L.R. [2011] M. P., 2878

APPELLATE CRIMINAL

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

Cr. A. No. 1841/1999 (Jabalpur) decided on 21 September, 2011

CHARANLAL ...Appellant

Vs.

STATE OF M.P. ...Respondent

*A. **Prevention of Corruption Act (49 of 1988), Section 7 - Demand of Bribe** -* **Complainant is said to have informed about demand to 'S' but 'S' was not examined in the Court - Shadow witness, happened to be the friend of complainant, but he did not say that complainant told**

to him about the alleged demand by the accused - Joint Collector though stated that complainant told to him that accused demanded bribe and that he gave an application to Collector for the trap of accused, but the complainant denied of having given any application to Collector - No such application/complaint was proved in the Court - Held - Except the uncorroborated evidence of complainant there appeared no other evidence to assure that accused made a demand of bribe from him - Sole uncorroborated evidence of complainant about the demand of bribe by the accused, does not inspire confidence. (Para 13)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 – रिश्वत की मांग – मांग के बारे में कथित रुप से शिकायतकर्ता ने 'एस' को सूचना दी थी किन्तु 'एस' का न्यायालय में परीक्षण नहीं किया गया – छाया साक्षी शिकायतकर्ता का मित्र था, परंतु उसने यह नहीं कहा कि शिकायतकर्ता ने उसे अभियुक्त द्वारा अभिकथित मांग के बारे में बताया था – संयुक्त कलेक्टर ने यद्यपि यह कथन किया कि शिकायतकर्ता ने उसे बताया था कि अभियुक्त ने रिश्वत मांगी और उसने अभियुक्त को ट्रेप करने हेतु कलेक्टर को आवेदन दिया था, परंतु शिकायतकर्ता ने कलेक्टर को कोई आवेदन दिया जाना अस्वीकार किया – ऐसा कोई आवेदन/शिकायत न्यायालय में साबित नहीं की गयी – अभिनिर्धारित – शिकायतकर्ता की असंपुष्ट साक्ष्य के अलावा यह सुनिश्चित करने के लिये कोई अन्य साक्ष्य प्रकट नहीं हुयी कि अभियुक्त ने उससे रिश्वत की मांग की थी – अभियुक्त द्वारा रिश्वत की मांग के बारे में शिकायतकर्ता की एकमात्र असंपुष्ट साक्ष्य विश्वास उत्पन्न नहीं करती।

***B. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) r/w 13(2)* - Notes were not found in appellant's clothes and the money was found kept in a polythene bag, found hanging inside the room, which was seized - Complainant and shadow witness categorically stated that no 'Likha-Padhi' was done at the place of incident - Members of the trap party did not give their search before proceeding for trap - During the proceeding Phenolphthalein powder was not used - Evidence of Joint Collector, who played prominent role in the trap proceedings, also appears suspicious - Possibility that everything was managed by 'S' and the money was planted in the house of accused can not be ruled out - Held - It can not be held with certainty that accused voluntarily accepted/obtained marked money from the complainant - Special Judge did not appreciate the evidence on record in correct perspective - Appeal allowed.** (Paras 15, 18, 19 & 20)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) सहपठित

13(2) – नोट अपीलार्थी के कपड़ों में नहीं पाये गये और रुपये पॉलीथीन बैग में रखे पाये गये, जो कमरे के अंदर टंगा था जिसे जब्त किया गया – शिकायतकर्ता तथा छाया साक्षी ने स्पष्ट कथन किया है कि घटना स्थल पर कोई लिखा पढ़ी नहीं की गयी थी – ट्रेप पार्टी के सदस्यों ने ट्रेप कार्यवाही से पूर्व अपनी तलाशी नहीं दी – कार्यवाही के दौरान फिनाल्फ्थेलीन पाउडर का उपयोग नहीं किया गया – ट्रेप कार्यवाही में अहम भूमिका निभाने वाले संयुक्त कलेक्टर की साक्ष्य भी संदेहास्पद प्रतीत होती है – संभावना कि सब कुछ 'एस' द्वारा प्रबंधित किया गया था और रुपये अभियुक्त के मकान में रखे गये थे से इंकार नहीं किया जा सकता – अभिनिर्धारित – यह निश्चित धारणा नहीं की जा सकती कि अभियुक्त ने स्वेच्छापूर्वक शिकायतकर्ता से चिन्हित रुपये स्वीकार/प्राप्त किये – विशेष न्यायाधीश ने सही परिप्रेक्ष्य में अभिलेख की साक्ष्य का अधिमूल्यन नहीं किया – अपील मंजूर।

Cases referred :

(1985)1 SCC 28, (2005) 6 SCC 211.

Vivek Shukla, for the appellant.

S.K. Rai, GA for the respondent.

JUDGMENT

The Judgment of the Court was delivered by **RAKESH SAKSENA, J.;**–Appellant has filed this appeal against the judgment dated 07.07.1999 passed by Special Judge (Prevention of Corruption Act), Chhindwara in Special Case No.4/92 convicting the appellant under sections 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 and sentencing him to rigorous imprisonment for one year with fine of Rs.500/- on each count, respectively. Sentences of imprisonment on both counts concurrent.

2. The accusation against the appellant is that on 26.7.1990, he as a public servant being Patwari of village Khunajhirkhurd, demanded and accepted Rs.500/- by way of illegal gratification from complainant Sabba for providing him Pavti of his agricultural land.

3. According to prosecution, M.V.Bhandare, S.D.O. Police, Chhindwara on 26.7.1990 received an application from Joint Collector/Vigilance Officer, Chhindwara namely Manish Shrivastava wherein complainant Sabba had made a written complaint to Collector, Chhindwara that Patwari Charanlal Dhurve was demanding Rs.1000/- for making mutation of his land and giving Pavti in respect to it. According to complainant, about a year back, he had purchased four acres and 26 decimal agricultural land through registered sale deed from Manak Gabli. On the basis of the said registry when he approached to Patwari for obtaining Pavti, he demanded Rs.1000/-. He agreed for the payment of

said money in instalments of Rs.500/-. It was agreed that first instalment of Rs.500/- would be paid on 26.7.1990 at his residence. Since he wanted Patwari to be caught taking bribe, he submitted the said application to Collector which was marked to Joint Collector Manish Shrivastava. On the said complaint, Manish Shrivastava, R.S.Thakur, Deputy Collector, M.S. Verma, SDO (P), Chhindwara, Arvind Kumar Shukla and Sopchand planned a trap. They obtained five currency notes of Rs.100/- each from the complainant, M.V.Bhandare and Manish Shrivastava made their initials on the notes and prepared a panchnama recording the numbers of the aforesaid notes. They handed over these notes to complainant and asked him to go with Sopchand to the house of accused and deliver the same to him. He was also instructed to give a signal when the said money was accepted by the accused. Complainant and Sopchand went at the house of accused and other members of the trap party followed them. Complainant went in the house of accused and after two minutes came out and gave prefixed signal to the trap party. Immediately the members of the trap party went in the house of accused and caught him. Accused informed them that the money received by him was kept by him in his polythene bag on the other side of partition of the room. Aforesaid currency notes of Rs.500/- were recovered from the polythene bag and immediately memorandum Ex.P/9 and Ex.P/10 were prepared. Sanshodhan Panji and sale deed were also seized. Numbers of currency notes tallied with the numbers recorded in memorandum.

4. After the trap, report Ex.P/7 was recorded by SDO(P) M.V.Bhandare. The said report was then sent to police station Mohkhed where Crime No.151/1990 under section 3(1&2) was registered. After investigation, sanction for prosecution Ex.P/8 was obtained and the case was put up for trial in the Court of Special Judge.

5. On charges being framed, accused abjured his guilt and pleaded false implication. According to him, he did not accept any money as bribe. He also examined Teekaram (DW-1) in his defence. As per the statement of accused under section 313 Cr.P.C., complainant concocted the story of demand of bribe on the move of Munna @ Arvind Shukla who was inimical to him. The reason for delay in making Pavti was that Teekaram had made objection for the mutation of the name of complainant. Since the competent authority did not allow the amendment of the name, the name of complainant's father was not mutated in the revenue record and no Rin Pustika could be prepared. He examined Teekaram (DW-1) in his defence.

6. Prosecution examined complainant Sabba @ Sobharam (PW-1), Sopchand (PW-2), jeweller Pradhuyuman Kumar (PW-3), patwari G.R.Deshmukh (PW-4), head constable Sukhram (PW-5), Girvar Singh (PW-6), head constable Shankerlal (PW-7), S.D.O Prabhat Kumar Shrivastava (PW-8), S.D.O(P) M.S.Verma (PW-9), Deputy Collector Manish Shrivastava (PW-10) and Land Acquisition Officer Officer R.S.Thakur (PW-11) to prove its case. Learned Special Judge relying on the evidence adduced by the prosecution held the appellant guilty, convicted and sentenced him as mentioned above.

7. Learned counsel for the appellant submitted that appellant was falsely implicated by the complainant in connivance with Arvind Shukla who was inimical towards him. From beginning to end, it was Arvind Shukla who advised and supported the complainant. Evidence of complainant was discrepant and contradictory to other witnesses. Evidence of other prosecution witnesses namely S.D.O.(P) M.S.Verma (PW-9), Deputy Collector Manish Shrivastava (PW-10) and R.S.Thakur (PW-11) was also unreliable and they did not take any precaution to rule out the possibility of planting of the money in the room of accused. Before initiating the trap, none of the witnesses gave his personal search. Main investigating officer M.V.Bhandare was not examined in the Court. The learned Special Judge misappreciated the evidence on record and committed error in holding the appellant guilty of the charges. On the other hand, learned counsel for the State submitted that the evidence of prosecution witnesses was trustworthy and reliable. Finding of conviction of the appellant recorded by the trial Court was justified and no interference was called for in the impugned judgment of conviction.

8. We have heard the learned counsel for the parties and perused the evidence and material on record.

9. Complainant Sabba (PW-1) deposed that his father Godelal had purchased the land from Manak. He wanted the name of his father entered in the revenue record, therefore, he handed over the sale deed to accused/Patwari and asked him to record the name of his father by next day. After 2-4 days, when he contacted accused, he demanded Rs.1000/-. He then contacted one Arvind Shukla. Arvind Shukla took him to some officers and made him to put thumb impressions on some papers. He asked him to give Rs.500/- for handing over to accused, so he managed the said money by pledging his silver ornaments. Three officers made their initials on the currency notes and asked him to come next day. In the next morning, he along with Arvind Shukla and

other officers went to village Khunajhir. Officers gave him the same currency notes of Rs.500/- and asked him to handover the said notes to accused and give signal to them. He along with Sopchand (PW-2) then went to the house of accused and after giving him aforesaid currency notes gave signal to the members of the trap party. Officers reached at the house of accused and searched him. The money was not found on the person of accused, instead the money was found kept in a bag hanging inside the room. The notes were taken out from the bag and were seized. All the persons along with accused were carried to Chhindwara. This witness clearly stated that when the money was not found in the clothes of accused, the house of accused was searched. As soon as officers entered the house of accused,he had come out of the house, therefore, he did not know what transpired inside the house of accused. The evidence of this witness appears discrepant. He admitted that Arvind Shukla had taken him to the office of Collector where he was asked to put his thumb impression on papers. After the trap when he reached back to Chhindwara again his thumb impressions were taken on number of papers. According to him, he did not remember whether there had been any *Likha-Padhi* at the house of accused, but when he returned to Chhindwara his thumb impressions were obtained.

10. Complainant (PW-1) deposed that the sale deed in favour of his father was executed in the year 1986. After elapse of about 3 years, gave sale deed to accused for entering the name of his father. He admitted that he never made any complaint about the demand made by the accused to any Revenue Inspector or Tehsildar instead he contacted Arvind Shukla. He admitted that Teekaram (DW-1) told that the land which was purchased by his father belonged to his share. He did not know whether Teekaram made any objection about the entry of their names in the record. He, however, admitted that because of the said sale deed Teekaram stopped them from passing through his field.

11. Learned counsel for the appellant submitted that the whole episode of trap was managed by Arvind Shukla, but deliberately he was not examined as a witness in the Court. In para 17 of his deposition, complainant (PW-1) stated that when he along with Arvind Shukla went to the office of Collector, he did not give any application but his thumb impressions were obtained on several papers. He put his thumb impression on being asked by the officer who talked to Arvind Shukla. He did not know what was written on those papers. He kept on sitting outside the office and Arvind Shukla talked to officer inside the room.

12. According to complainant, for the first time when he contacted accused he demanded Rs.1000/- but later on he demanded Rs.2000/-. In para 22, he stated that he neither gave written application in the office of Collector complaining that accused demanded Rs.1000/- from him nor he told that he wanted accused to be caught red handed.

13. As far as the demand of bribe by the accused is concerned, complainant (PW-1) is said to have informed about it to Arvind Shukla, but Arvind Shukla was not examined in the Court. Though Sopchand (PW-2) who was examined by the prosecution as a shadow witness, happened to be the friend of complainant, but even he did not say that complainant told to him about the alleged demand by the accused. Joint Collector Manish Shrivastava (PW-10) though stated that complainant told to him that accused demanded bribe from him and that he gave an application to Collector for the trap of accused, but the complainant denied of having given any application to Collector. According to him, Arvind Shukla and other officers obtained his thumb impressions on papers, but neither anybody inquired from him nor he inquired anything from them. No application/ complaint allegedly made by the complainant (PW-1) was proved in the Court. First Information Report Ex. P/7 was recorded by M.V.Bhandare, SDO(P) Chhindwara, but M.V.Bhandare was not examined in the Court. Though it was mentioned in Ex.P/7 that an application marked by Collector Chhindwara was handed over to him by Joint Collector Manish Shrivastava, but no such document was produced in the Court. Thus, except the uncorroborated evidence of complainant (PW-1) there appeared no other evidence to assure that accused made a demand of bribe from him. In view of the fact that everything was managed by Arvind Shukla, who was not on good terms with the accused, the sole uncorroborated evidence of complainant about the demand of bribe by the accused, in our opinion, does not inspire confidence.

14. In respect to the trap proceeding and acceptance of bribe money by the accused, it has to be noted that no scientific method by using phenolphthalein powder was adopted. Had the currency notes, which allegedly were to be delivered to accused by way of bribe, been treated by the phenolphthalein powder, there could have been further assurance that accused accepted the money voluntarily or had conscious possession of bribe money. A cursory explanation by SDO(P) M.S.Verma (PW-9) that since phenolphthalein powder was not available at that time, it was not applied on the notes, cannot be held to be satisfactory or reliable. Apex Court in *Khilli Ram Vs. State of Rajasthan* -

(1985) 1 SCC 28 observed that "Ordinarily in cases of this type the powder treatment is made. There is no material at all on record to explain why such a process was not followed in the instant case even though detection is alleged to have been handled by experienced people of Anti-Corruption Department. It has been in vogue for well over three decades now. If such powder treatment had been made, the passing of the bribe would not have been difficult to be proved. Without powder treatment, for the absence of which no explanation has been advanced in this case, and in view of an overall assessment of the matter which indicates that the story advanced by the prosecution is not true and the defence version seems to be more probable, the prosecution story becomes liable to be rejected." In *Ganga Kumar Srivastava Vs. State of Bihar* - (2005) 6 SCC 211, Apex Court with approval quoted the observations made by it in *Raghbir Singh Vs. State of Punjab* -(1976) 1 SCC 145 as follows: "We may take this opportunity of pointing out that it would be desirable if in cases of this kind where a trap is laid for a public servant, the marked currency notes, which are used for the purpose of trap, are treated with phenolphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of the public servant."

15. In these circumstances, when we examine the evidence on record, we find that complainant (PW-1) along with Sopchand went to the house of accused, gave him currency notes of Rs.500/- and gave signal to the trap party. Officers of the trap party reached there and searched the clothes of accused, but the notes were not found in his clothes. The money was found kept in a polythene bag. The notes were taken out of the bag and seized. The bag was found hanging inside the room. When officers entered the house of accused, PW-1 went out, therefore, he did not know what transpired inside the room. He did not remember whether there had been any *Likha-Padhi* at the house of accused, but, as stated by him, he was made to put his thumb impressions on some papers in police station, Chhindwara. Immediately after the recovery of money, he and accused were carried from village Khunajhir to Chhindwara. PW-1 stated that at the time when he gave money to accused, Girwar (PW-6) was present. When he asked accused to take money and to do his work, he took money after going behind the partition where the bag was hanging. Shadow witness Sopchand did not go inside the room and remained standing outside. He admitted that he had good relations with accused.

He frequently visited his house. Accused lived alone, none of his family members lived with him. He also disclosed that there had been a quarrel between Teekaram and Arvind Shukla. Arvind Shukla wanted that accused should get the house of Teekaram demolished but accused did not yield to his demand, therefore, Arvind Shukla was annoyed with accused.

16. Learned counsel for the appellant, in this background, submitted that the possibility that in connivance with Arvind Shukla, complainant planted the marked currency notes in the house of accused could not be ruled out. He also pointed out from paragraph 27 of the evidence of PW-1 that when officers of the trap party went in the house of accused and inquired about the money, accused expressed his ignorance, then they searched the room, but the accused kept on standing there unmoved. The officers went behind the partition and recovered marked money from the polythene bag after about 10-20 minutes. He further admitted that the officers who searched the house of accused did not give their personal search to anybody.

17. Sopchand (PW-2) stated that though he went with complainant (PW-1) but remained standing near the door of the house of accused. He saw accused taking money from the complainant but he did not see where he kept the money. Since he remained out of the house, he did not know whether there was any *Likha-Padhi* at the house of accused. Evidence of Sopchand (PW-2) seems suspicious in view of the evidence of complainant that he gave money to accused behind the partition whereas according to Sopchand he saw complainant giving money to accused from outside of the door of the house. Sopchand stated that after complainant gave signal, officers of the trap party entered the room of accused and he and complainant remained outside the house. He did not know what they did inside the room. One of the officers, who was searching the room, told that the money was found in the polythene bag. Sopchand (PW-2) was confronted with his police statement Ex.D/4 wherein he stated that complainant gave Rs.500/- to accused and accused put that money in the polythene bag hanging on the wall of the room. According to him, when officer came out of the house of accused, the polythene bag was in his hand. Thereafter they all went to Chhindwara. There was no *Likha-Padhi* at the house of accused. In view of the discrepant evidence of this witness, in our opinion, no reliance can be placed on him.

18. Evidence of SDO(P) M.S. Verma (PW-9) also appears contradictory to the evidence of Complainant (PW-1) and Sopchand (PW-2). This witness

stated that as soon as they received signal from complainant, they reached into the house of accused. When SDO(P) Bhandare inquired from accused as to where he kept bribe money received from the complainant, accused told that he put money in the polythene bag. None of the other witnesses stated that accused told to the members of trap party that he put money in the polythene bag. According to him, seizure memo Ex.P/10 was drawn at the spot whereas complainant (PW-1) and Sopchand (PW-2) categorically stated that no Likha-Padhi was done at the place of incident. He though stated that before entering in the house of accused, members of trap party gave their search to accused, but no memorandum in that regard was drawn. In these circumstances, it cannot be accepted that members of the trap party gave their search before proceeding for trap.

19. Evidence of Joint Collector Manish Shrivastava (PW-10), who played prominent role in the trap proceeding, also appears suspicious. He stated that it was not possible for him to say when trap party reached at the house of accused after receiving the signal from the complainant and in which room the accused was present. He did not remember whether accused was alone in the house or other persons were present there. He did not remember who caught the accused and searched him. It is also important to note that this witness stated that the money was found in the bag of accused which was kept beside him. He firmly stated that money was recovered from the polythene bag, but he denied that the bag was in another room. According to him, bag was with the accused. Apparently the evidence of this witness runs counter to the evidence of complainant and other witnesses. Similar is the position of Deputy Collector R.S.Thakur (PW-11) who though stated that bribe money was seized from the accused, but he did not know who found that money. M.V.Bhandare and Manish Shrivastava searched and inquired about the money but he only remained standing. He did not know how many rooms were there in the house of Patwari. The money was recovered from the polythene bag which was hanging on a pole inside the room. There was no partition in the room of accused. Initially this witness stated that the seizure memorandum was recorded in the house of accused but later he disclosed that memorandum was recorded in the office of Collector.

20. In view of the above contradictory and discrepant versions given by the prosecution witnesses, in our opinion, it cannot be held with certainty that accused voluntarily accepted/obtained marked money from the complainant. The possibility that everything was managed by Arvind Shukla and the money

was planted in the house of accused cannot be ruled out. The best possible evidence about the acceptance of bribe money by the accused could have been made available by the use of phenolphthalein powder, but the same was not used. Number of persons including Arvind Shukla appeared to have entered the house of accused. In these dubious circumstances, it cannot be held that prosecution established the fact of demand and acceptance of bribe money by the accused beyond a reasonable doubt. We are of the view that learned Special Judge did not appreciate the evidence on record in correct perspective.

21. After an overall assessment of the matter, it appears that the story advanced by the prosecution is not true and the defence version seems probable. In these circumstances, the impugned judgment of conviction of appellant under sections 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act and the sentence awarded to him is set aside. He is acquitted. His bail bond and surety bond are discharged.

22. Appeal allowed.

Appeal allowed.

I.L.R. [2011] M. P., 2888

CIVIL REVISION

Before Mr. Justice N.K. Mody

C.R. No. 11/2011 (Indore) decided on 4 July, 2011

PARVATIBAI(SMT.) ...Applicant

Vs.

MOHD. SHARIF & anr. ...Non-applicants

Civil Procedure Code (5 of 1908), Order IX Rule 13 - Setting aside of ex parte decree **- Show cause notice was issued on the application filed by the respondent No. 2 under Order 39 rule 1 & 2 CPC on which Court proceeded ex parte against respondent No. 1 - No copy of the plaint was pasted alongwith summons - Process server, who served notice by affixture admitted that he did not record the statement or to obtain signature of the witnesses in whose presence summons were served by affixture - Held - The second proviso to Rule 13 of Order IX not applicable - No satisfaction can be drawn that respondent No. 1 had notice of the date of hearing and had sufficient time to appear and answer the claim of respondent No.2.** (Paras 13, 14 & 15)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश IX नियम 13 — एकपक्षीय डिक्री

का अपास्त किया जाना – प्रत्यर्थी क्र. 2 द्वारा सीपीसी के आदेश 39 नियम 1 व 2 के अंतर्गत प्रस्तुत आवेदन पर कारण बताओ नोटिस जारी किया गया जिस पर न्यायालय ने प्रत्यर्थी क्र. 1 के विरुद्ध एक पक्षीय कार्यवाही की – समन के साथ वादपत्र की कोई प्रति संलग्न नहीं की गयी – प्रोसेस सर्वर जिसने चस्पे द्वारा नोटिस की तामील की, ने स्वीकार किया कि उसने कथन अभिलिखित नहीं किये ना ही उन साक्षियों के हस्ताक्षर प्राप्त किये जिनकी उपस्थिति में समन चस्पा द्वारा तामील किया गया था – अभिनिर्धारित – आदेश IX नियम 13 का द्वितीय परंतुक लागू नहीं होगा – कोई संतुष्टि नहीं निकाली जा सकती कि प्रत्यर्थी क्र. 1 को सुनवाई के दिनांक की सूचना थी और उसके पास प्रत्यर्थी क्र. 2 के दावे का उत्तर देने के लिये एवं उपस्थित होने के लिये पर्याप्त समय था।

Cases referred :

AIR 1971 SC 2324, AIR 1966 SC 153, (2000) 3 SCC 54.

R.D. Sonwane, for the applicant.

O.P. Sharma, for the non-applicant No.1.

ORDER

N.K. Mody, J.:–Being aggrieved by order dated 10.12.2010 passed by XII Additional District Judge, Indore in Misc.Appeal No.03/2009 whereby order dated 27.11.2009 passed in MJC No. 02/2009 by II Civil Judge, Class 2, Indore whereby the application filed by the respondent No.1 u/o IX rule 13 CPC for setting aside ex parte decree dated 08.09.2007 passed in CS No.273A/2006 was dismissed, was set aside, present petition has been filed.

2. Short facts of the case are that a suit for eviction was filed by the respondent No.2 against respondent No.1 on 15.12.2006 wherein it was alleged that respondent No. 1 is the tenant of the respondent No.2 @ 450/- per month. It was alleged that decree of eviction be passed against respondent No.1 under S.12(1)(c) and (f) of the Madhya Pradesh Accommodation Control Act (for short, "the Act"). Suit proceeded ex parte against respondent No.1 vide order dated 3.2.2007. After recording of evidence, ex parte decree was passed on 18.09.2007 in favour of the petitioner whereby the respondent No.1 directed to be evicted from the suit accommodation on the grounds available under S.1(1)(c) and (f) of the Act. In compliance of the ex parte decree dated 18.09.2007, an execution Petition was filed by the respondent No.2 on 14.12.2007 in which possession was taken by respondent No.2 on 6.4.2008 from respondent No.1 through Court. Thereafter, on 7.4.2008 an application was filed by the respondent No.1 u/o IX r.13 CPC which was registered as MJC No.02/2009. After holding summary enquiry application

was dismissed vide order 27.11.2009 against which an appeal was filed by the respondent No.1 which was numbered as 03/2009 and was allowed vide order dated 10.12.2010 whereby order dated 27.11.2009 and judgment dated 18.9.2007 was set aside and the case was remanded to the leaned trial Court to decide the suit on merits. Being aggrieved by the impugned order, present petition has been filed.

3. Leaned counsel for the petitioner argued at length and submits that petitioner examined two process servers to demonstrate that respondent No.1 was duly served. It is submitted that, again one more process server was examined to demonstrate that in execution case also respondent No.1 was duly served. It is submitted that the evidence which was relied upon by the learned trial Court was completely ignored by the learned appellate Court while allowing the appeal. Learned counsel submits that learned appellate Court also ignored the proviso of Order IX r.13 CPC.

4. Learned counsel placed reliance on a decision in the matter of *Bhabia Devi v/s Permanand Pd Yadav* (AIR 1997 SC 1919) wherein in the case of setting aside ex parte decree, where the plea was of absence of notice, Hon'ble Court observed that "Facts and evidence of process server, however, revealed that petitioner refused to put her sign or thumb impression on summon when they were handed to her She also refused to acknowledge the registered service, which is indicative of refusal to accept notice. It was held that Ex parte decree rightly passed.

5. Further reliance was placed on a decision in the matter of *Parimal V/ s Veena* (AIR 2011 SC (Civil) 556) wherein Hon'ble Apex Court had an occasion to consider Second proviso to O.9 r.13 CPC and it was held that it makes it obligatory on appellate Court not to interfere with an ex parte decree unless it meets the statutory requirement.

6. Learned counsel submits that after getting vacant possession of the suit accommodation, suit-property was demolished as it was in a dilapidated condition and the property was also sold by the respondent No.2 to the petitioner vide sale deed dated 9.12.2007. Learned counsel placed reliance on a decision in the matter of *Vannattankany Ibrayl v/s Kunhabdyulla Hajee* [2001(1) RCJ 268 (SC)] wherein shop was completely destroyed, Hon'ble Apex Court observed that "tenancy right stood extinguished for want of subject matter of demise and Section 108(B)(e) has no application in case of premises governed by Rent Control Act when it is completely destroyed

by natural calamities. It was held that remedy available is civil suit for recovery of possession of land.

7. On the strength of the aforesaid position of law, learned counsel submits that petition filed by the petitioner be allowed and the impugned order passed by the leaned appellate Court be set aside.

8. Mr. O.P.Sharma, learned counsel for the respondent No.1 submits that respondent No.1 was having no knowledge about ex parte decree. It is submitted that summons were never served on respondent No.1. It is submitted that for the first time, respondent No.1 came to know about the decree when the possession of the suit accommodation was taken by the respondent No.2 through Court. It is submitted that immediately, thereafter, respondent No.1 moved an application u/o/ IX rule 13 CPC. It is submitted that suit accommodation was never in dilapidated condition. It is submitted that to avoid restitution the respondent No.2 sold the suit-property to the petitioner, who has demolished the accommodation to avoid restitution. Learned counsel further submits that this Court is having limited scope in revision and therefore, no interference can be made by this Court while exercising jurisdiction. For this contention, learned counsel placed reliance on a decision in the matter of *M/s D.L.F Housing and Construction Co.(P) Ltd. v/s Swroop Singh and others* (AIR 1971 SC 2324) wherein Hon'ble Apex Court has observed that While exercising the jurisdiction under S. 115 it is not competent to the High Court to correct errors of fact, however, gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words "illegally" and "with material irregularity" as used in Cl.(c) do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision and not to errors either of fact or of law, after the prescribed formalities have been complied with."

9. Reliance is also placed on a decision in the matter of *Pandurang Dhondi Chougle v/s Maruti Hari Jadhav and others* (AIR 1966 SC 153) wherein Hon'ble Apex Court has observed that "It can only do so when the said errors have relation to the jurisdiction of the Court to try the dispute itself. It is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked.

10. Reliance is also placed on a decision in the matter of *Shilanath Mallik and others v/s Balabhadra Sutradhar and others* (AIR 1962 Gauhati 121), wherein it was held that ex parte decree cannot be passed merely on Process server's report. It was also held that enquiry by Court about defendant's willful absence is necessary. Lastly, reliance is placed on a decision in the matter of *G.P. Srivastava v/s R.K.Raizada and others* [(2000)3 SCC 54] wherein Hon'ble Apex Court had an occasion to consider O IX rule 13 CPC wherein it was held that while setting aside decree in ex parte the word "defendant", was prevented by any sufficient cause from appearing" it must be liberally construed where defence is reasonable, defendant approaches court for setting aside ex parte decree within statutory period and non-appearance is not malafide or intentional.

11. On the strength of the aforesaid position of law, learned counsel for the respondent No.1 submits that no illegality has been committed by the learned appellate Court in allowing the appeal filed by the respondent No.1. It is submitted that revision petition filed by the petitioner be dismissed.

12. From perusal of the record it is evident that along with the suit filed by the respondent No.2 an application was also filed u/o 39 rule 1 ad 2 CPC of which show cause notice was issued to the respondent No.1. Thus on the basis of the show cause notice which was issued on the application filed by the respondent No.2 u/o 39 rule 1 and 2 CPC on which Court proceeded ex-parte against respondent No.1.

13. Apart from this, from the evidence which has been adduced by the petitioner it is evident that no copy of the plaint was pasted along with summons. It is true that petitioner has examined three process servers. NAW/1 Suryasngh Chouhan Process Servant has stated that notice was returned by him as unserved. Similarly, NAW/3 Dhreej Singh is the process server who has served notice in the execution proceedings which is of no consequences. It is only NAW/2 Jagdish Yadav, Process Server, who has served notice by affixture. He has admitted that he has not bothered to record the statement or to obtain signature of the witnesses in whose presence summons were served by affixture. The notices which were served by affixture are marked as Ex.P/3 and P/4 which are the show cause notice of the application filed u/o 39 r 1 and 2 CPC.

14. In the facts and circumstances of the case, this Court is of the view that no illegality has been committed by the learned appellate Court in passing the impugned order whereby the appeal filed by the respondent No.1 was allowed

and the order passed by the trial Court was set aside whereby the application filed by respondent No.1 u/o 9 r.13 CPC was dismissed. Apart from this, revisional jurisdiction of this Court is limited. So far as second proviso to rule 13 of Order IX is concerned, the same is not applicable in the present case as there is nothing on record on the basis of which satisfaction can be drawn that respondent No.1 had notice of the date of hearing and had sufficient time to appear and answer the claim of respondent No.2.

16. In view of this, petition has no merits and the same is hereby dismissed.

Revision dismissed.

I.L.R. [2011] M. P., 2893
CIVIL REVISION
Before Mr. Justice N.K. Mody
C. R. No.262/2007 (Indore) decided on 10 August, 2011

MUKESH & anr. ...Applicants
Vs.
SHANTILAL & ors. ...Non-applicants

***Benami Transactions (Prohibition) Act, 1988, Section 4(1) - Plea of Benami* - Plaint allegation itself is evident that suit property was purchased benami - No evidence was required to be recorded for deciding the preliminary issue - The suit is not maintainable.**

Plaint allegation itself is evident that suit property was purchased by grand-father of respondent No. 1 in the name of father of respondent No. 1 before 20 years as Benami which was sold by the father of respondent No. 1 to the petitioner and other respondent on 03.11.2003 - After coming into force of the Act no evidence was required to be recorded for deciding the preliminary issue as in view of Section 4(1) of the Act the suit itself was not maintainable. (Para 9)

बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 4(1) – बेनामी होने का अभिवाक् – वाद पत्र के अभिकथन अपने आप में प्रकट करते हैं कि वाद सम्पत्ति बेनामी क्रय की गयी – प्रारिंभक विवाद्यक के निश्चय हेतु कोई साक्ष्य अभिलिखित करना अपेक्षित नहीं था – वाद पोषणीय नहीं है।

Cases referred :

1994(1)MPWN 113, 2000(1)MPWN 104, 2006(2) MPLJ 603, AIR 2003 PUNJAB & HARYANA 29, AIR 1995 MPLJ 402.

Mangesh Bhachawat, for the applicants.
R.L. Patidar, for the non-appilcant No.1.
Vivek Phadke, GA for the non-appilcant No.4.

ORDER

N.K. Mody, J. :– Being aggrieved by the order dated 10/07/07 passed by II ADJ, Mandsaur in Case No.22-A/04, whereby preliminary issue No.8 framed on the instance of the petitioners was decided against the petitioners, present petition has been filed.

2. Short facts of the case are that respondent NO.1 filed a suit for declaration and permanent injunction against the petitioners and also against rest of the respondents alleging that the suit land is situated at village Petlawad which is an agricultural land. It was alleged that the suit property was purchased by the Grand father of respondent NO.1 in the name of Radhakishan father of respondent No.1, therefore, in the revenue record name of father of respondent No.1 was recorded as Bhumi-swami. It was alleged that before 20 years grand father of respondent No.1 gave suit land to the respondent No.1 with the consent of father of respondent No.1 and since then respondent No.1 is in occupation of the land, but the name in the revenue record continued in the name of father of respondent No.1. It was alleged that father of respondent NO.1 sold the land in favour of petitioners and rest of the respondents vide sale deed dated 03/11/03, which is illegal. In the suit it was prayed that it be declared that the sale deed is void and permanent injunction be issued in favour of respondent No.1.

3. The suit was contested by the petitioners on various grounds including on the ground that as per provisions of Benami Transaction Act the suit itself is not maintainable and the same be dismissed. On the basis of pleadings of parties learned trial Court framed the issues. Issue No.8 was as under:-

> *"Whether in the light of provisions of Benami Transaction Act the suit is not maintainable?"*

4. After hearing the parties issue No.8 was decided against the petitioners, hence this petition.

5. Learned counsel for the petitioners argued at length and submits that the impugned order passed by the learned trial Court is illegal, incorrect and deserves to be set aside. It is submitted that respondent No.1 is claiming interest in the disputed property on the basis of Benami purchase by his grand

father in the name of his father, which was given to the respondent No.1 in partition, therefore, the suit filed by respondent No.1 was barred under Section 3 & 4 of Benami Transaction (Prohibition) Act, 1988. It is submitted that the learned trial Court committed error in holding that since the transaction of purchase by Radhakishan is prior to the commencement of Benami Transaction Act, therefore, recording of evidence is necessary. It is submitted that in the facts and circumstances of the case, petition filed by the petitioners be allowed and the impugned order passed by the learned Courts below be set aside.

6. Learned counsel for respondent No.1 submits that after due appreciation of fact on record learned trial Court has decided the issue against the petitioners, which requires no interference. It is submitted that the petition filed by the petitioners be dismissed.

7. The Benami Transaction (Prohibition) Act, 1988 (which shall be referred hereinafter as 'Act') came in force w.e.f. 05/09/1988. Section-3 of the Act restrains from entering into any benami transaction. Section-4 of the Act deals with the prohibition of the right to recover property held benami. Sub-Section-(1) of Section 4 of the Act lays down that no suit can be filed to enforce any right in respect of any property held benami.

8. In the matter of *Uma Gupta Vs. Smt. Susheela,* 1994(1) MPWN, Note 113 Divison Bench of this Court has held that a suit to obtain declaratory decree that defendant is only Benamidar while plaintiff is the real owner cannot be filed and the plaint is liable to be rejected. In the matter of *Sukhdeo Prasad Vs. Halkeram,* 2000(1) MPWN, Note 104 wherein in a suit it was alleged that suit property was purchased by plaintiff and the name of defendant averred to have been mentioned nominally, it was held that the suit is hit by the provisions of Benami Transaction Act. In the matter of *Jagdish Prasad Agrawal Vs. Rajkumar,* 2006(2) MPLJ 603 wheein the allegation was that the consideration was paid by the father to purchase the property in the name of son, this Court held that since the agreement was in favour of the person for a consideration paid by another person the transaction is certainly "Benami" and after coming into force of the Act the agreement of Benami transaction cannot be enforced by the Court. In the matter of *Rajinder Prasad Malik Vs. Shanti Devi Mali,* AIR 2003 Punjab & Haryana 29 wherein married woman having salary income purchasing house from her saving and loan and there was no contribution from joint family property of her husband, Punjab

& Haryana High Court held that purchase of property by her could not be viewed as purchase by Benamidar, even if her husband or relations made some contribution. In the matter of *R. Rajagopal Reddy Vs. Padmini Chandrasekharan,* AIR 1995 MPLJ 402 Hon'ble Apex Court has held that Section-4 of the Act has not been expressly made retrospective in operation. However, bar against filing, entertaining an admission of suits as provided in Section 4(1) would take in its sweep past benami transaction sought to be litigated upon after coming into force of Section 4(1).

9. In the present case from the plaint allegation itself it is evident that suit property was purchased by grant-father of respondent No.1 in the name of father of respondent No.1 before 20 years as Benami which was sold by the father of respondent No.1 to the petitioner and other respondent on 03/11/03. After coming into force of the Act no evidence was required to be recorded for deciding the preliminary issue as in view of Section 4(1) of the Act the suit itself was not maintainable. Learned Trial Court was not justified in holding that the issue cannot be decided without recording the evidence. On the contrary issue ought to have been decided on the basis of plaint allegations and keeping in view the provisions of law. In view of the facts stated hereinabove and keeping in view the position of law the petition filed by the petitioners is allowed and the impugned order passed by the learned Court below is set aside holding that the suit filed by respondent No.1 is barred under Section 4(1) of the Act.

With the aforesaid observations, petition stands disposed of.

No order as to costs.

Petition disposed of.

I.L.R. [2011] M. P., 2896

CRIMINAL REVISION

Before Mr. Justice G.D. Saxena

Cr. Rev. No. 74/2005 (Gwalior) decided on 28 July, 2011

NEMICHAND ...Applicant

Vs.

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

Prevention of Food Adulteration Act (37 of 1954), Section 7(v) r/w Section 16(1)(a), Prevention of Food Adulteration Rules 1955 - Rule 32(a) **- Food Inspector purchased the sample of 450 gm of 'Vital' Pure**

Refined Cooking Oil (Soya Oil) from open tin of 10 Kg. for the purpose of examination - Sample was divided into three parts and were sealed and one sample was sent to State Food Laboratory - Report of Public Analyst that sample contravenes the Rule 32(a) and the sample was mis-branded -To ascertain whether the provisions of Rule 32(a) of the Rules are violated he sought an inquiry from the Public Analyst, which was not answered by him - Held - Prosecution has failed to establish the case against the petitioner-accused beyond reasonable doubt - Accused discharged, prior to the stage of charge. (Para 11)

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 7(v) सहपठित धारा 16 (1)(ए), खाद्य अपमिश्रण निवारण नियम 1955 – नियम 32(ए) – खाद्य निरीक्षक ने परीक्षण हेतु 10 कि.ग्रा. के खुले टिन से 450 ग्रा. 'वाईटल' शुद्ध रिफाइंड कुकिंग ऑयल (सोया तेल) का नमूना क्रय किया – नमूना तीन भागों में विभाजित किया गया तथा मुहरबंद किया गया और एक नमूना राज्य खाद्य प्रयोगशाला भेजा गया – लोक विश्लेषक की रिपोर्ट कि नमूना नियम 32(ए) का उल्लंघन करता है और नमूना मिथ्या छापवाली है – यह सुनिश्चित करने के लिए कि क्या नियम 32(ए) के उपबंधों का उल्लंघन हुआ है उसने लोक विश्लेषक से जांच की मांग की जिसका जवाब उसने नहीं दिया – अभिनिर्धारित – अभियोजन याची–अभियुक्त के विरुद्ध संदेह से परे प्रकरण स्थापित करने में असफल रहा है – अभियुक्त आरोपित करने के प्रक्रम से पूर्व उन्मुक्त किया गया।

Case referred :

1999(1) FAJ 25.

Sanjay Bahrani, for the applicant.

Mohd. Irshad, PL for the non-applicant/State.

ORDER

G.D. SAXENA, J. :–This revision petition under Section 397/401 of the Code of Criminal Procedure 1973 preferred by the petitioner/accused is directed against an order dated 6th December 2004 passed in criminal case No. 490/2003 by the Judicial Magistrate First Class, Gwalior (M.P.), dismissing thereby the application under Section 245(2) of Cr.P.C. of the petitioner-accused for his discharge from the alleged offence, the stage of framing charge.

2. In brief, the facts of the case are that on 21st January 1992, from the shop of petitioner situated at Gwalior Trade Fair Ground, the Food Inspector duly authorized, purchased sample of 450 gm. of 'Vital' Pure Refined Cooking oil (Soya Oil) from open ten of 10 Kg. for the purpose of examination under Prevention of Food Adulterations Act. The sample was divided into three

parts and were sealed as per Rules/Law. One sample was sent to State Food Laboratory) Sagar. The Report from Public Analyist State Food Laboratory reveals that the sample contravenes the Rule 32 (a) of the PFA Rules 1955. After completing all formalities, the complaint was filed before the court of Judicial Magistrate First Class, Gwalior.

3. The contention of the learned counsel for the petitioner/accused is that the impugned order dated 06th December 2004 is against the law/rules and the principles of natural justice. The provisions of Rule 32(a) of the Rules 1955 are not applicable to present case because the sample was collected from the open tin, containing 10 Kg oil. It is submitted by the counsel that there was no chance for the petitioner-accused to show the name, address of the manufacturer of the sold item. On such evidence, if not rebutted, the accused can not be punished and there was no justification to continue the criminal proceeding against the accused. Hence, it is prayed for discharge the petitioner-accused, at previous stage of charge.

4. Learned Panel Lawyer for the State, on the other hand, supported the impugned order and prayed for dismissal of the revision.

5. Heard the learned counsel for the parties and also perused the record of the trial Magistrate vis-a-vis the law with relevant rules applicable to the case.

6. On perusal of the record of the trial court, it transpires that as per report dated 13th February, 1992 of the Public Analyst the article seized contravenes the Rule 32(a) of the PFA Rules 1955. In this manner, the accused is found violating the provisions of Rule 32 (a) of the Prevention of Food Adulteration Rules 1955 and thereby committed the offence under Section 7(v), punishable under Section 16(A) (1) of the PFA Act, 1954.

7. In the case of *State of Maharastra Vs. Pravin Virjang Gala* (1999 (1) FAJ 25), the High Court of Maharastra held as under:-

> " Therefore ,what this definition clause requires is that for an article of food to come within the scope of Section 2 (ix) (e) false claim about its contains must be made upon the label or otherwise. As stated above it is undisputed and made out from the punchnama dated 10-9-1986 that the tin did not have any labels. There is no averment in the panchnama that any such labels indicating that the tins had refined cotton seed oil were there. In fact through the evidence of Sharad Kulkarni, the Food Inspector, it has come from

the record that the edible oil was kept for sale in two loose tins which were having no labels and it was the accused who disclosed that the oil was refined cotton seed oil. "

8. At this juncture, it would be useful to reproduce Section 2 (ix) of the Act, which runs as is below:-

Section 2 (ix).- "misbranded"— an article of food shall be deemed to be misbranded-

(a) if it is imitation of, or is a substitute for, or resembles in a manner likely to deceive, another article of food under the name of which it is sold, and is not plainly and conspicuously labelled so as to indicate its true character;

(b) if it is falsely stated to be the product of any place or country;

(c) if it is sold by a name which belongs to another article of food;

(d) if it is so coloured, flavoured or coated, powdered or polished that the fact that the article is damaged is concealed or if the article is made to appear better or of greater value than it really is;

(e) if false claims are made for it upon the label or otherwise;

(f) if, when sold in packages which have been sealed or prepared by or at the instance of the manufacturer or producer and which bear his name and address, the contents of each package are not conspicuously and correctly stated on the outside thereof within the limits of variability prescribed under this Act;

(g) if the package containing it, or the label on the package bears any statement, design or device regarding the ingredients or the substances contained therein, which is false or misleading in any material particular; or if the package is otherwise deceptive with respect to its contents;

(h) if the package containing it or the label on the package bears the name of a fictitious individual or company as the manufacturer or producer of the article;

(i) if it purports to be, or is represented as being, for special dietary uses, unless its label bears such information as may be prescribed

concerning its vitamin, mineral, or other dietary properties in order sufficiently to inform its purchaser as to its value for such uses;

(j) if it contains any artificial flavouring, artificial colouring or chemical preservative, without a declaratory label stating that fact, or in contravention of the requirements of this Act or rules made thereunder;

(k) if it is not labelled in accordance with the requirements of this Act or rules made thereunder:

9. Rule 32 (1) of the Prevention of Food Adulteration Rules 1955 is as follows:-

32. Package of food to carry a label. - Every package of food shall carry a label and unless otherwise provided in these rules, there shall be specified on every label-

(a) the name, trade name or description of food contained in the package.

10. Section 245 of Cr.P.C. is as follows :-

S.245 When accused shall be discharged-

(1) xxxxx xxxxxx xxxxx xxxxxx

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if,for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

11. On bare perusal of the complaint and the documents filed alongwith the complaint, it clearly shows that on 21st January 1992 at Gwalior trade Fair Ground, from the shop of petitioner, the Food Inspector duly authorized, purchased sample 450 gm. 'Vital ' Pure Refined Cooking oil (Soya Oil) from open tin of 10 Kg. for the purpose of examination under the Prevention of Food Adulteration Act. Thereafter, the sample was divided into three parts and were sealed as per Rules/Law. The one sample was sent to the State Food Laboratory Sagar. The Report from Public Anaylist State Food Laboratory opined that the sample contravenes Rule 32 (a) of the Rules 1955. The evidence collected during investigation shows that the Food Inspector purchased the sample of 450 gm. of 'Vital ' Pure Refined Cooking oil (Soya

Oil) from open tin of 10 Kg. for the purpose of examination under the Prevention of Food Adulteration Act from the vendor. Under the circumstances, to ascertain whether the provisions of Rule 32(a) of the Rules 1955 are violated by the petitioner- accused and the rule governs the case; he sought an inquiry from the Public Analyst, which was not answered by him. In the instant case except giving the properties of the seized oil, there is no definite opinion given by the Public Analyst as to what type of oil was seized and it is merely stated that the sample was mis-branded. In the set of facts, the decision rendered in the case of *State of Maharastra* (supra) shall fully cover the case.

12. In that view of the matter, the prosecution has failed to establish the case against the petitioner-accused beyond reasonable doubt.

13. Consequently, by allowing the revision petition, the order dated 06th December 2004 is hereby set aside and accused is discharged, prior to the stage of charge.

Revision Allowed.

I.L.R. [2011] M. P., 2901
CRIMINAL REVISION
Before Mr. Justice G.D. Saxena
Cr. Rev. No. 421/2006 (Gwalior) decided on 28 July, 2011

RAMU ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 391 - Further/ Addtional Evidence **- Appellate Court remanded the case back to the trial Court with a direction to provide an opportunity to prosecution for exhibiting and proving the report of examination of seized liquor by the Excise Department and decide the case on merits afresh - Held - The Section nowhere authorises the appellate Court to set aside the conviction and remand the whole case back to the trial Judge for the sole purpose of examining a particular witness and then deciding the matter afresh after recording his evidence.**

The section is not intended to remedy the negligence or laches of the prosecution. (Paras 2, 3 & 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 391 – इसके अलावा अतिरिक्त

साक्ष्य – अपीलीय न्यायालय ने विचारण न्यायालय को उत्पाद शुल्क विभाग द्वारा जब्त मदिरा के परीक्षण की रिपोर्ट प्रदर्शित एवं साबित करने हेतु अभियोजन को अवसर प्रदान करने के निर्देश तथा प्रकरण को गुणदोषों पर पुनः निर्णित करने के निर्देश के साथ प्रकरण प्रतिप्रेषित किया – अभिनिर्धारित – धारा कहीं भी अपीलीय न्यायालय को दोषसिद्धि को अपास्त करने के लिए और विशिष्ट साक्षी के परीक्षण के एकमात्र प्रयोजन हेतु और उसकी साक्ष्य अभिलिखित करने के पश्चात मामला पुनः निर्णित करने के लिए विचारण न्यायालय को संपूर्ण प्रकरण प्रतिप्रेषित करने के लिए प्राधिकृत नहीं करती।

धारा अभियोजन की उपेक्षा अथवा गफलत को सुधारने के लिए नहीं है।

Cases referred :

AIR 1997 SC 1579, AIR 1955 SC 792.

R.K. Upadhyay, for the applicant.

R.K. Shrivastava, PL for the Non-applicant/State.

ORDER

G.D. SAXENA, J. :–This revision petition under Section 397/401 of the Code of Criminal Procedure 1973, preferred by the petitioner/accused is directed against Judgment dated 04th May 2006 passed in Criminal appeal No. 75/2006 by the Additional Sessions Judge Chachoda, district Guna, setting aside thereby the Judgment dated 27th January, 2006 passed in Criminal Case No. 411/2001 by the Judicial Magistrate First Class, Chachoda, convicting the appellant for commission of offence punishable under Section 34(A) of the M.P. Excise Act and sentencing him to suffer one year's R.I. with a fine of Rs. 500/-, and in default to suffer three months' rigorous imprisonment, while remanding the case back to the trial court for fresh trial and decision as per law.

2. In brief, the facts of the case are that on 6th April 2000, at about 4.30 p.m., at Lambachak Badoda Road, on information from reliable sources, Manoj Mishra, the In-charge of Police Station Kumbhraj, intercepted the Jeep No. MP 08/F 1293, which was being driven by Ramu (the present appellant) and seized 23 boxes out of which 21 were containing around 48-48 quarters of Piano Company and two boxes were containing quarters of XXX Champion. It is alleged that the accused-petitioner was indulged in transporting the liquor in an illegal manner and driving the said vehicle without any valid licence. He was arrested on the spot. After investigation, the charge-sheet was filed before the criminal court. The trial court after trial, found the appellant guilty and hence convicted and sentenced him for the said offence. On appeal, the appellate court by the impugned judgment while setting aside the Judgment of

conviction and sentence, remanded the case back to the trial court with a direction to provide an opportunity to prosecution for exhibiting and proving the report of examination of seized liquor by the Excise Department and decide the case on merits afresh.

3. The contention of the learned counsel for the petitioner is that the impugned judgment is manifest illegal, arbitrary and contrary to law. It is contended that the appellate Judge prima facie, exceeded his jurisdiction by providing an opportunity to the prosecution to fill-up the lacuna. In support of his submission, learned counsel placed reliance on the decision of the Apex Court in the case of *D.G.D.U. Vs. State of Maharashtra* (AIR 1997 SC1579). Hence, it is prayed that by allowing the petition,the appellate court be directed to pass the judgment on the basis of the material available on record.

4. The leaned Panel lawyer, on the other hand, supported the impugned judgment and prayed for dismissal of the revision.

5. Heard the learned counsel for the parties and perused the records of both the courts as well as the law governing the situation.

6. On perusal, it appears that alongwith the charge-sheet, the report dated 22nd April 2000 submitted by A.W. Khan Assistant Excise Inspector has been filed, but the prosecution did not bother to produce the said witness for examination before the trial court, despite pendency of the case for six years before the trial Magistrate. Hence, there was ample time for the prosecution to deal with every possible point in the case but it failed to establish the essential parts thereof. The section is not intended to remedy the negligence or laches of the prosecution. Therefore, in the opinion of this court, the appellate court may take the additional evidence itself, as the intention of the Legislation in enacting the section is to empower the appellate court to see that justice is done between the prosecutor and the person prosecuted. It nowhere authorises the appellate court to set aside the conviction and remand the whole case back to the trial Judge for the sole purpose of examining a particular witness and then deciding the matter afresh after recording his evidence.

7. In the case of *Manchander Vs. State of Hyderabad* (AIR 1955 SC 792), the Hon. Apex court held that Justice is not one side, while it is incumbent on court to see that the guilty do not escape, it is even more necessary to see that persons accused of crime are not indefinitely harassed.

8. The present case is also governed by the decision of the Apex Court in the case of *Man Chander* (supra). Thus, in the background of the case, the lower appellate court seems to have committed an error in remanding the whole matter for the sole purpose of examining the witness by setting aside the conviction and sentence of the appellant. The appellate court, in the facts and circumstances, if thinks additional evidence of an Expert to be necessary for proving the contraband article, it shall call a witness under the relevant provisions contained in Section 391 Cr.P.C., within a period of one month from the receipt of order of this Court and decide the case, in accordance with law.

9. In the result, the revision stand allowed and the impugned judgment passed by the appellate court is hereby set aside.

Revision Allowed.

I.L.R. [2011] M. P., 2904
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No.1121/2011 (Jabalpur) decided on 23 August, 2011

ARVIND SINGH RAJPUT ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Penal Code (45 of 1860), Section 304-A - Speed of vehicle - **No technical and scientific investigation like the tyre makes or its photo graph were collected by the investigating agency - Exact or approximate speed and the factum of negligence on the part of the applicant could have been ascertained .**

In the lack of such evidence mere on the vague depositions of the above mentinoned witnesses the speed of the vehicle could not be deemed to be rash and negligent - In fact in the lack of any specific evidence regarding speed in the deposition of said witnesses the same have lost their values and in such premises no inference could be drawn against the applicant to hold the alleged vehicle was driven by him in rash and negligent manner. (Para 7)

क. दण्ड संहिता (1860 का 45), धारा 304–ए – वाहन की गति – अन्वेषण एजेंसी द्वारा कोई तकनीकी एवं वैज्ञानिक अन्वेषण जैसे कि टायर की बनावट या उसकी

चित्रप्रति एकत्रित नहीं की गई – निश्चित अथवा अनुमानित गति तथा आवेदक की ओर से उपेक्षा के तथ्यों का अभिनिश्चय नहीं किया जा सकता।

***B. Penal Code (45 of 1860), Section 304-A - Rash and Negligent Driving - Proof of* - Prosecution did not make any attempt to prove the exact speed from any of the witnesses - Possibility that deceased might have fell down because of his own fault from the tractor could not be ruled out - Mere on basis of the version of the witnesses, stating the high speed or the allegation of negligent driving of the offending vehicle, the person like applicant could not be convicted - Revision allowed.** (Paras 10, 11 & 13)

ख. दण्ड संहिता (1860 का 45), धारा 304–ए – उतावलेपन से या उपेक्षापूर्वक वाहन चलाना – सबूत – अभियोजन ने किसी भी साक्षी से निश्चित गति साबित करने का कोई प्रयत्न नहीं किया – मृतक अपने स्वयं के दोष के कारण ट्रेक्टर से नीचे गिरने की संभावना से नकारा नहीं जा सकता, मात्र साक्षियों के कथनों के आधार पर कि आक्रामक वाहन की उच्च गति अथवा उपेक्षापूर्ण वाहन चलाने के अभिकथन के आधार पर आवेदक जैसे व्यक्ति को दोषसिद्ध नहीं किया जा सकता – पुनरीक्षण मंजूर।

Case referred :

1973 MPLJ 240.

Alok Vagrecha, for the applicant.

Nirmala Nayak, G.A. for the non-applicant/State.

ORDER

U.C. MAHESHWARI, J. :–The applicant-accused has directed this revision under Section 397/401 of Cr. P. C. being aggrieved by the JUDGMENT dated 22.6.2011 passed by Special Judge, constituted under S. C. S. T. (Prevention of Atrocities), Act Sagar in Criminal Appeal No.224/10 dismissing his appeal by affirming the judgment dated 16.7.2010 passed by JMFC, Sagar in Cr. Case No.5584/2009 convicting and sentencing the application under Section 304-A of IPC for RI one year with fine of Rs.500/-, in default of depositing the find further RI two months.

2. The case of the prosecution in short are that on 2.8.2001 at about 8.45 in the morning the applicant Kallu @ Arvind was driving the tractor bearing No. MP 15-A/0233 along with trolley in rash and negligent manner, consequently one Bharat Ahirwar, who was standing in the trolley, was fell down and his head was run over by the trolley, resultantly he died on the spot. On lodging the report by one Ramlal Ahirwar an offence under Section 304-

A of IPC was registered against the applicant, postmortem of dead body was carried out, in which it was revealed that he died because of the injury sustained in the alleged accident. On completion of investigation, the applicant was charge sheeted for the offence under Section 279 and 304-A of IPC. On framing the charge of Section 304-A of IPC the applicant abjured the same, on which the evidence was recorded and on appreciation of the same holding that the alleged accident was the cause and consequences of rash and negligent driving of aforesaid tractor by the applicant he was convicted and sentenced as stated above. On filing the appeal by affirming the judgment of the trial court, the same was dismissed by the appellate court, on which the applicant has come forward with this revision.

3. Shri Alok Vagrecha, learned counsel for the applicant after taking me through the evidence led by the prosecution along with exhibited papers said that the prosecution has utterly failed to prove the direct nexus between any negligental act of the applicant and the alleged accident in which said Bharat Ahirwar had died. In continuation he said that in any case in the lack of any specific/ expert evidence showing the exact speed of the tractor at the time of accident mere on the basis of general testimony that tractor was driven by the applicant in rash and negligent manner, the applicant could not be convicted for the alleged offence. According to him one person may say the speed of 10-15 miles per hour is high speed while other person may say the speed of 20-30 miles per hours a reasonable speed, in the lack of exact speed mere on the presumption and assumption or probable speed the person like applicant could not be convicted for the alleged offence. In support of this contention he placed his reliance on a decision of the Apex Court in the matter of *Mohantalal Saha Vs. State of West Bengal* reported in 1968 ACJ 124. He also placed his reliance in the matter of *"Suleman Rahiman Mulani v. State of Maharashtra"* reported in AIR 1968 S.C. 829 and prayed to acquit the applicant by for setting aside the impugned judgment by allowing this revision.

4. On the other hand responding the aforesaid arguments Smt. Nirmala Nayak, learned G. A. by justifying the impugned judgment and conviction of the applicant said that the same is based on proper appreciation of evidence and also in accordance with the settled legal position, the same does not require any interference at this stage either for extending the acquittal or even for reducing the jail sentence.

5. Having heard the parties keeping in view their arguments on perusing

the record I am of the considered view that the conviction of the applicant under the aforesaid offence is not sustainable under the law.

6. In order to prove the case the prosecution has examined as many as fifteen witnesses out of them Ramnath (PW1), Premlagan (PW2), Halli (PW3), Kallu (PW6), Dasoda (PW7), Betibai (PW8) and Kashiram (PW12) are examined as eyewitnesses of the incident as they were also travelling in the same trolley in which the deceased Bharat Ahirwar was travelling. It appears from the deposition of all the aforesaid witnesses, they being labour, any of them did not have any experience of driving of the vehicle and have also not stated regarding exact speed of the offending vehicle plied on the road. The above mentioned all witnesses had recorded in their deposition only that the tractor was driven by the applicant in rash and negligent manner, resultantly on the way said Bharat Ahirwar was failed down and his head was run over by the wheel of the trolley. No one has stated the exact speed of the tractor. Therefore, this court has to consider and answer the question whether mere on the deposition of said witnesses that the tractor was driven by the applicant in rash and negligent manner, in the lack of any experience of the witnesses about the operation of the vehicle and to assess the exact speed relying on their testimony could the applicant be held guilty for driving the offending tractor negligently or in rash and negligent manner and whether there was direct nexus between the act of the applicant and the accident.

7. Before proceeding further I would like to mention here that in order to prove the speed of the alleged vehicle no technical and scientific investigation like the tyre makes or its photo graph were collected by the investigating agency otherwise in the light of such technical and scientific evidence considering the testimonies of aforesaid witnesses the exact or approximate speed and the factum of negligence on the part of the applicant could have been ascertained. In the lack of such evidence mere on the vague depositions of the above mentioned witnesses the speed of the vehicle could not be deemed to be rash and negligent. In fact in the lack of any specific evidence regarding speed in the deposition of said witnesses the same have lost their values and in such premises no inference could be drawn against the applicant to hold the alleged vehicle was driven by him in rash and negligent manner. My aforesaid view is also fortified by the principle laid down by the Apex Court in the matter of *Nageshwar Shrikrishna Choubey Vs. State of Maharashtra* reported in 1973 MPLJ 240.

8. Now coming to consider the another question of the case whether mere on the aforesaid depositions of the said witnesses the speed of offending tractor could be held to be high speed when none of said examined witness has stated the exact or approximate speed of tractor.

9. Long before the Constitutional Bench of the Apex Court on arising the occasion answered this question in the matter of *Mohantalal Saha* (Supra) in the following words:

> "No attempt was made to find what this witness understood by high speed. To one man a speed of even 10 or 20 miles per hour may appear to be high, while to another even a speed of 25 or 30 miles per hour may appear to be reasonable speed. On the evidence in this case, it could not be held that the appellant was driving the bus at a speed which would justify holding that he was driving the bus rashly and negligently."

10. On examining the case at hand in view of the aforesaid principle of Apex Court, the same is applicable. As in this case also the prosecution has not made any attempt to prove the exact speed from any of the witnesses. In such premises mere on the basis of the version of the witnesses, stating the high speed or the allegation of negligent driving of the offending vehicle, the person like applicant could not be convicted.

11. It is apparent from the case of the prosecution that the deceased was travelling in the trolley attached at back side of the tractor and tractor was driven by the applicant at different dimension. It is also apparent from the record that besides the deceased some other persons including the aforesaid eyewitness were also travelling in the same trolley and out of them except the deceased no one was failed down or sustained any injuries in the alleged accident. Therefore, the possibility the the deceased might have fail down because of his own fault from the tractor could not be ruled out. Unfortunately after failing down from the trolley the deceased was run over by the wheel of the trolley and not the tractor. Under such circumstances also the applicant could not be held negligent in his driving. In such premises, the approach of the courts below could not be held to be sustainable at this stage.

12. In view of the aforesaid discussion, it is apparent that the prosecution has failed to establish any negligence in the driving of the offending tractor by the applicant. In such premises direct nexus between the act of the applicant

and the alleged accident has also not been established. Therefore, in view of the principle laid down by the Apex Court in the matter of *Suleman Rahiman Mulani* (Supra), also the impugned conviction and sentence of the applicant could not be sustained.

13. In view of the aforesaid discussion the impugned judgment as well as conviction and sentence of the applicant being perverse and contrary to law, is not sustainable under the law, resultantly, by allowing this revision the impugned judgment of the courts below are set aside and the applicant is acquitted from the alleged charge of Section 304-A of IPC. The amount of fine imposed by the courts below, if deposited by the applicant then after due verification same be refunded to him

14. The applicant is facing the jail sentence since 22.6.2011 in compliance of the impugned judgment of the appellate Court, hence in view of aforesaid acquittal he is directed to set at liberty immediately, if his presence is not required in any other case.

Revision is allowed, as indicated above.

Revision allowed.

I.L.R. [2011] M. P., 2909
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1948/2010 (Jabalpur) decided on 2 September, 2011

SACHIN TAMRAKAR ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228, Penal Code (45 of 1860), Section 306 - Framing of Charge - **Whenever the deceased visited the market either to go school or for some other purpose, she was always subjected to harassment/humiliation and torture with funny acts by the applicant - Due to such activities and behaviour of the applicant she felt herself insulted in family as well in the community and pursuant to such instigation, she proceeded to commit suicide and committed the same - In such premises, only one inference could be drawn that she was instigated to commit suicide by the applicant - Prime-facie ingredients of abetment to commit suicide is available in**

the charge-sheet - Trial Court committed no error in framing the alleged charge. (Para 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228, दण्ड संहिता (1860 का 45), धारा 306 – आरोप विरचित करना – जब भी मृतिका मॉर्केट/बाजार जाती थी या तो स्कूल जाने के लिये या किसी अन्य प्रयोजन हेतु, उसे आवेदक द्वारा प्रायः उत्पीड़ित/अपमानित किया जाना एवं अशिष्ट कृत्यो से प्रताड़ित किया जाता था – आवेदक के ऐसे कृत्य एवं व्यवहार के कारण वह परिवार में तथा समाज में स्वयं को अपमानित महसूस करती थी और ऐसे दुष्प्रेरण के अनुसरण में उसने आत्महत्या की – ऐसी स्थिति में केवल एक निष्कर्ष निकाला जा सकता है कि उसे आत्महत्या करने के लिये आवेदक द्वारा दुष्प्रेरित किया गया – आत्महत्या के दुष्प्रेरण के प्रथम दृष्टया घटक आरोप पत्र में उपलब्ध है – अभिकथित आरोप विरचित करने में विचारण न्यायालय ने कोई भूल नहीं की।

Cases referred :

AIR 2009 SC 2532, AIR 2005 SC 359.

Aditya Sharma, for the applicant.

Alok Tapikar, PL for the non-applicant.

ORDER

U. C. Maheshwari J.:–On behalf of the applicant -accused, this revision is directed under Section 397/401 of Cr.P.C being aggrieved by the order dated 11.11.2010 passed by the IVth Additional Sessions Judge, (Fast Track), Katni in S.T. No. 243/10 framing the charge against the applicant for the offence under Section 306 of IPC.

2. The facts giving rise to this revision in short are that on dated 6.8.2010 at about 9.30 on receiving the information from one Manoj Kumar regarding unnatural death of Ku. Meghna a merge intimation bearing no. 63/10 was registered at P.S. Kuthla. As per averments of such inquest at about 2.45 in the noon on dated 5.8.2010 said Meghna had committed suicide by hanging in her home.

3. In the course of enquiry of inquest report on making the interrogation from the parents, brother and relatives of the deceased-Meghna, it was revealed that accused being resident of same village used to humiliate and harass her regularly with funny acts by which she felt herself humiliated and under such instigation and abetment of the applicant committed suicide by hanging in her home, on which the FIR was registered at the same Police Station on 15.9.2010 against the applicant for the above mentioned offence. In the course of

interrogatory statements of the parents of the deceased namely Vinod Kumar Gupta and Premila Gupta, brother Mayank Gupta, the nearest Neeraj relatives Manoj Kumar and Pushpalate, Subhdeo Nayak, Ramesh and Pradeep Kumar were recorded. On completion of the investigation, the applicant was charge sheeted for such offence. After committing the case to the Sessions Court, considering the charge sheet, the charge of Section 306 of IPC was framed against the applicant. He abjured the same. Thereafter being dis-satisfied with such order has come to this court with this revision for quashment of the charge.

4. Shri Aditya Sharma, learned appearing counsel for the applicant after taking me through the papers of the charge sheet alongwith the impugned order and also the papers, which are not the part of charge sheet, placed on behalf of the applicant on record said that on taking into consideration the face value of the prosecution case as it is, even then the applicant could not be convicted for the above mentioned offence as any of the ingredients of the abetment as defined under Section 107 of IPC are not made out against him. By referring the interrogatory statements of brother and other relatives and neighbourers recorded under Section 161 of Cr.P.C said that on such statements also the ingredients of abetment have not been established. Thus, in the lack of such prima facie evidence the aforesaid charge framed by the trial court is not sustainable. In continuation he said that there is no evidence in the charge sheet showing the applicant has instigated to the deceased by committing or practicing any funny acts with her which could be deemed to be sufficient to commit the suicide. Merely on the fact committing suicide by Ku. Meghna, the charge of alleged offence could not be sustained against him. He further said that before committing suicide the deceased Ku. Meghna in her life time had given a written note like suicidal note, Annexure A-2 to the applicant contending in Hindi Language that she is writing the same in her full conscience and she being 18 years of the age has absolute right on her life and because of the torture of the family members and the community, she is committing suicide. The same was also signed by the deceased. Although such document was not seized by the Police during investigation, therefore, same was not filed as part of the charge sheet, but subsequent to death of Ku. Meghna alongwith a report in writing a copy of such note was given to the Superintendent of Police, Katni on behalf of the applicant with a prayer to make proper enquiry regarding death of Ku. Meghna. In this respect he also said that on taking into consideration such suicidal note also the case of Section

306 of IPC is not made out against him even for framing the charge and by placing his reliance on various reported cases prayed for setting aside the impugned charge by admitting and allowing this revision.

5. On the other hand, learned PL by justifying the impugned order of framing charge against the applicant said that the same is in consonance with the papers of the charge sheet as well as the provision of Section 306, r/w Section 107 of IPC. According to him as per collected evidence by the investigating agency, it is apparent that due to funny activities of the applicant towards the deceased in regular course of life, she felt herself insulted and humiliated in her family and society. Pursuant to such instigation she has committed suicide. He further said that in view of the settled legal position the suicidal note submitted by the applicant being not part of the charge sheet could not be taken into consideration for setting aside the charge. Such document could be used by the applicant at the appropriate stage of the trial in his defence. But on that basis he could not be discharged. He also argued that for the sake of argument, if the suicidal note is taken into consideration, even then the applicant could not be discharged because after receiving the suicidal note from the deceased in her life time the applicant came to know that she is going to commit suicide, inspite that he did not inform such fact to any of her family members or the public authority to save her life and thereby omitting this duty, he facilitated and instigated the deceased for committing suicide and disclosed such suicide note only after committing suicide by her. So in such premises, also he could not be discharged in the matter and prayed for dismissal of this revision.

6. Having heard, keeping in view the arguments, advanced by the counsel after going through the copy of the charge sheet and other papers available on record including the aforesaid suicidal note placed by the applicant's counsel on record- Annexure A-2, I am of the considered view that the trial court has not committed any error in framing the aforesaid charge against the applicant.

7. It is apparent from the interrogatory statements of the parents of the deceased, brother and other relatives that Ku. Meghna in her life time was regularly subjected to harassment humiliation and under torture because of the funny activities of the applicant towards her. Whenever she visited outside the house, on the way by carrying out the funny activities, the applicant insulted and humiliated her and thereby he instigated her to commit suicide. At this stage only to discharge the applicant different interpretations to the interrogatory

statement of the above mentioned witnesses could not be given by the court. As per settled proposition on availability of prima facie ingredients of the alleged offence in the charge sheet against the accused, the court has no option except to frame the charge of such offence irrespective of fact whether on holding the trial, the case will be culminated in conviction or not.

8. At the stage of framing the charge of Section 306 of IPC the Court has to see whether prima facie ingredients of the abetment on the part of the accused towards the deceased for committing the suicide are available in the charge sheet or not, undisputedly the definition of abetment of a thing has not been provided separately in Section 306 of IPC. The same is defined under Section 107 of IPC. As per settled proposition, the abetment to commit suicide is always examined in view of the ingredients defined under Section 107 of IPC. Thus, before proceeding further as ready reference the provision of Section 306 and Section 107 of IPC is reproduced here. The same is read as under:-

> ***"306. Abetment of suicide.—***
>
> *(i) If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*
>
> ***"Section 107 Abetment of a thing :- A person abets the doing of a thing, who—***
>
> *First.— Instigates any person to do that thing; or*
>
> *Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or*
>
> Thirdly.— Intentionally aids, by any act or illegal omission, the doing of that thing."

9. According to aforesaid Section 107 of IPC on juxtapose reading of aforesaid both the Sections, then it is apparent that to form the charge of Section 306 of IPC, there must be prima facie evidence in the charge sheet that by any act or omission of the accused, the deceased was instigated to commit suicide or/and the concern abetor engaged some one or involved himself

with other in some conspiracy pursuant to their any act or omission the deceased proceeded for and committed suicide or/and the accused intentionally by any act or omission had given aid to deceased to commit suicide and pursuant to that such person committed suicide. In the light of these ingredients on examining the case at hand, it is apparent from the interrogatory statements of the parents, brother and other relatives of the deceased that whenever the deceased visited the market either to go school or for some other purpose, she was always subjected to harassment humiliation and torture with funny acts by the applicant and due to such activities and behaviour of the applicant she felt herself insulted in family as well in the community and pursuant to such instigation, she proceeded to commit suicide and committed the same. In such premises, only one inference could be drawn that she was instigated to commit suicide by the applicant and not others. Accordingly prime facie ingredients of abetment to commit suicide is available in the charge sheet against the applicant. In such premises, the trial court has not committed any error in framing the alleged charge.

10. My aforesaid view is fully fortified by the decision of the Apex Court in the matter of *Dammu Sreenu Vs. State of Andhya Pradesh* reported in AIR 2009 SC 2532, in which it was held that due to any wrongful or illegal activities, conduct and behaviour of the accused if a person (deceased) after feeling himself insulted and humiliated committed suicide, then it shall be deemed that the deceased was instigated by such accused for committing the suicide. Although such case was decided on different context taking into consideration the illicit relations of the wife of deceased with some other person by which the deceased felt himself to be humiliated and insulted and committed suicide. But in any case the ratio of such principle laid down in the cited case till the aforesaid extent is applicable to the case at hand.

11. Coming to consider the another aspect of the case that the suicidal note, Annexure A-2, which is not part of the charge sheet, filed by the applicant on record could be taken into consideration at the stage of framing the charge. In the light of the Constitutional Bench decision of the Apex Court in the matter of *State of Orissa Vs. Devendra Nath Padhi* reported in AIR 2005, SC 359 holding that at the stage of framing the charge document filed by the accused in his defence could not be taken into consideration. The same could be used by the accused in his defence at the appropriate stage of the trial. In such premises, I am of the considered view that taking into consideration the alleged suicide note placed by the accused- applicant on record by allowing

this revision, in the case at hand, the applicant could not be discharged. Such document could be used by the applicant in his defence at the appropriate further stage of the trial and not the stage of framing the charge.

12. Apart the above, for the sake of arguments, if the aforesaid suicidal note placed by the applicant, which is not part of the charge sheet, is taken into consideration at the stage of the charge, even then in the case at hand, the applicant could not be discharged because as per case of the applicant such suicidal note was given to him by the deceased in her life time before committing the suicide. On receiving such suicide note, the applicant came to know that for the reasons stated in such note, she (Ku. Meghna) is going to commit suicide, then to save her life the applicant could have informed such fact to any of the family members or the public authority, but he did not do so. By this act of omission also the applicant involved himself in such conspiracy with the deceased and thereby facilitated and instigated, the deceased Ku. Meghna to commit suicide. In such premises, also prima facie it could not be said that the applicant had not given the alleged abetment to deceased to commit suicide.

13. In view of the aforesaid discussion, I have not found any perversity, illegality or irregularity in the impugned order framing the charge against the applicant. So far the case laws cited on behalf of the applicant are concerned, in the available set of facts of the case, as discussed stated above, the same being distinguishable on facts are not helping to the applicant. Resultantly, this revision being devoid of any merits is hereby dismissed at the stage of motion hearing.

14. The revision is dismissed as indicated above.

Revision dismissed.

I.L.R. [2011] M. P., 2916

INCOME TAX APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma

I.T.A.No. 21/2011 (Indore) decided on 8 July, 2011

COMMISSIONER OF INCOME TAX-1, INDORE ...Appellant

Vs.

SHRI GUJRATI SAMAJ(REGD.), INDORE ...Respondent

A. Income Tax Act (43 of 1961), Section 32 - Claim of Depreciation.- **A Charitable trust is entitled for claim of depreciation on the assets owned by it.** (Para 7)

क. आयकर अधिनियम (1961 का 43), धारा 32 – अवक्षयण का दावा – धार्मिक न्यास उसके स्वामित्व की अस्तियों पर अवक्षयण का दावा करने के लिए हकदार है।

B. Income Tax Act (43 of 1961), Section 11(1)(a) - Income from Property - **Expenses for charitable and religious purposes have been incurred in the earlier year and adjusted against the income of a subsequent year - The income of that year can be said to have been applied for charitable and religious purposes in the year in which expenses incurred for charitable and religious purposes had been adjusted.** (Para 8)

ख. आयकर अधिनियम (1961 का 43), धारा 11(1)(ए) – सम्पत्ति से आय – पूर्व वर्ष में पूर्त एवं धार्मिक प्रयोजनों हेतु व्यय उपगत किये गये और पश्चातवर्ती वर्ष की आय में समायोजित किये गये – जिस वर्ष में पूर्त एवं धार्मिक प्रयोजनों हेतु किये गये खर्चे समायोजित किये गये हैं, उसी वर्ष की आय को पूर्त एवं धार्मिक प्रयोजनों हेतु उपयोग किया जाना माना जा सकता है।

Cases referred :

1989(180) ITR 579, 1984 146 ITR 28, 1987 ITR (164) 439.

Veena Mandlik, for the appellant.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. :–This order shall govern disposal of ITA Nos.22 and 23 of 2011 as common questions of law are involved in all these appeals and they arise out of the common order.

2. All these appeals under section 260-A of the Income Tax Act, 1961

(for short, the Act) are against the order dated 31.01.2011 passed by the Income Tax Appellate Tribunal, Indore Bench (for short, the Tribunal) by which the Tribunal has decided I.T.A. No.171/Ind/2010 for the assessment year 2004-05, I.T.A. No.172/Ind/2010 for the assessment year 2005-06 and I.T.A. No.173/Ind/2010 for the assessment year 2006-07.

3. Briefly stated, the respondent assessee is a charitable trust formed with the main object to run educational institutions for the benefit of public. In the course of assessment under section 143(3) of the Act the A.O. vide order dated 8.12.2006 disallowed assessee's claim for depreciation on the fixed assets. The AO also denied the claim of the assessee to carry forward deficit in the application of funds. The said order of the AO was challenged before the CIT (A). The CIT (A) vide order dated 4.01.2010 partly allowed the assessee's appeal to the extent it held that the assessee shall be entitled for claim of depreciation on the assets owned by it. About the claim to carry forward deficit, the CIT (A) affirmed the decision of the AO of not allowing the carry forward of loss. Aggrieved by the said order of the CIT (A) the Revenue and the assessee had approached the Tribunal by filing their respective appeals.

4. The Tribunal vide impugned order dated 31.01.2011 allowed the assessee's appeal and dismissed the appeals of the Revenue. Aggrieved the revenue has filed the present appeal.

5. Having heard learned counsel for the appellant, we find no ground to interfere into the impugned order passed by the Tribunal.

6. We find that the question, whether a charitable trust is entitled to depreciation under section 32 of the Act in respect of assets owned by it, was dealt with by a Division Bench of this Court in *Commissioner of Income Tax vs. Raipur Pallottine Society* 1989 (180) ITR 579 by placing reliance on a Division Bench Judgment of *Karnataka High Court in CIT Vs. Society of the Sisters of St. Anne* [1984] 146 ITR 28 and has held that depreciation is nothing but decrease in value of property through wear, deterioration or obsolescence and allowance is made for this purpose in book keeping, accountancy, etc. It is the exhaustion of the effective life of a fixed asset owning to 'use' or obsolescence. It may be computed as that part of the cost of the asset which will not be recovered when the asset is finally put out of use. The object of providing for depreciation is to spread the expenditure, incurred in acquiring the asset, over its effective lifetime; the amount of the provision, made in respect of an accounting period, is intended to represent the proportion

of such expenditure, which has expired during that period. If depreciation is not allowed as a necessary deduction in computing the income of a charitable trust, then there would be no way to preserve the corpus of the trust. A charitable trust is, therefore, entitled to depreciation in respect of the assets owned by it. (Also see Spicer and Pegler's Book Keeping and Accounts, 17th edn. Pp 44, 45 and 46)

7. Having regard to the aforesaid settled legal position in our considered view, the Tribunal has rightly decided the issue about disallowance of claim of depreciation while computing the income of charitable trust and has rightly held that the assessee being a charitable trust is entitled for claim of depreciation on the assets owned by it. We, accordingly, affirm the view taken by the Tribunal in that regard.

8. Coming to the next question as to whether the order of the Tribunal holding that the assessee is entitled for carry forward and set off excess [of expenditure incurred during the year over its income. We find that in view of section 11(1)(a) of the Act, it can not be said that the expenditure incurred in the earlier year cannot be met out of the income of the subsequent year and utilization of such income for meeting the expenditure of the earlier year would not amount to such income being applied for charitable or religious purposes. Having regard to Section 11(1)(a) of the Act in our view when the income of the trust is used or put to use to meet the charitable or religious purposes it is applied for charitable purpose and the said application of the income for charitable or religious purposes takes place in the year in which the income is adjusted to meet the expenses incurred for charitable or religious purposes. Thus even if the expenses for charitable and religious purposes have been incurred in the earlier year and the said expenses are adjusted against the income of a subsequent year, the income of that year can be said to have been applied for charitable and religious purposes in the year in which expenses incurred for charitable and religious purposes had been adjusted. There are no words of limitation in section 11(1)(a) of the Act explaining that the income should have been applied for charitable or religious purposes only in the year in which the income had arisen. [See *Commissioner of Income-Tax vs. Maharana of Mewar Charitable Foundation* 1987 ITR (164) 439]. In our considered view the Tribunal has rightly applied the ratio of the judgment and order passed by the Division Bench of Rajasthan High Court in *Commissioner of Income-Tax vs. Maharana of Mewar Charitable Foundation* (supra) and has committed no error in holding this issue in favour of the assessee.

9. In the circumstances, in our considered view, no case is made out to interfere into the order passed by the Tribunal. Accordingly, the appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 2919
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.D. Saxena
M.Cr.C.No. 1149/2011 (Gwalior) decided on 19 May, 2011

INCOME TAX OFFICER ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457 - Supurdnama - Conditions therefore* - Condition of deposit of value of seized silver worth Rs. 1,40,00,000 imposed while directing supurdnama to Income Tax Authorities - Held - Income Tax Authority is a Statutory Authority under Income Tax Act which is responsible to its higher authorities/tribunals and Courts of law having jurisdiction - Conditions imposed by Magistrate superfluous and redundant - Application allowed.** (Para 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 451 व 457 – सुपुर्दनामा – की शर्तें – सुपुर्दनामा आयकर प्राधिकारियों को निदेशित करते समय, रुपये 1,40,00,000 कीमत की जब्तशुदा चांदी का मूल्य जमा करने की शर्त – अभिनिर्धारित – आयकर प्राधिकारी आयकर अधिनियम के अंतर्गत कानूनी प्राधिकारी है जो उससे उच्चतर प्राधिकारियों/अधिकरणों और आधिकारिता वाले न्यायालयों के प्रति उत्तरदायी है – मजिस्ट्रेट द्वारा अधिरोपित शर्तें अतिशयोक्ति और अनावश्यक है – आवेदन मंजूर।

Case referred:
1990 JLJ 734.

M.B. Mangal, for the applicant.
R.K. Shrivastava, PL for the non-applicant/State.

ORDER

G.D. Saxena, J.: -This petition under Section 482 of the Code of Criminal Procedure 1973, is directed against an order dated 13th January 2011, passed in Miscellaneous Case No. 0/ 2005 in connection with Crime No. 03/90, registered by the Police Station G.R.P.,Gwalior.

2. The learned Chief Judicial Magistrate Gwalior (M.P.) by the aforesaid order dated 13th January 2011, decided the application under Sections 451 and 457 of Cr.P.C. filed by Income Tax Officer Circle-3 (3) Mathura, (U.P.) for delivery of silver ornaments weighing 285.871 k.g., allegedly seized from one Nirbhay Kumar Sharma, who was traveling on 9th June 1990 through Delhi bound Kerala Express from Selam Junction (Tamilnadu) to Mathura Junction (Uttar Pradesh) and intercepted by Government Railway Police at Gwalior Junction under the apprehension of carrying some stolen property and directed for delivery of the seized articles from Government Treasury Gwalior which were kept under the directions of this court vide order dated 31st July 1995 in Writ Petition No.1716/90, provided that the petitioners shall furnish Supurdnama worth Rs.1,40,00,000=00, equivalent to the price value of the silver ornaments with condition that on receiving the seized property on Supurdginama, the petitioners shall submit an undertaking to the effect that they shall further deposit the worth value of silver ornaments on the directions by the court and shall also ensure compliance of order of the court/Superior court/High Court in future. Being aggrieved by the imposition of said condition in Supurdginama, the petitioners have presented this petition before this court.

3. The contentions of the learned counsel for the petitioner are that the impugned order passed by the Court of Chief Judicial Magistrate for imposing the condition in Supurginama with regard to delivery of the property seized and kept under the orders of this Court, in Government treasury Gwalior are not in consonance with the orders passed by this Court and the Income Tax Law and Criminal Procedure Code. It is contended that the seized property has no concern with any pending or disposed of criminal Case, therefore, nobody except the Income Tax Authorities as per the provisions of the Income Tax Act can claim over the seized property. The Tax Authorities has accessed the tax liabilities of the Concerned Firms and after assessment of the tax liabilities and penalties imposed by the Income Tax Authorities, the properties belonging to the concerned should be returned by the Assessment Authorities. The petitioners are the appointed authorities of the Central Government. The authorities are bound by law to comply all directions passed by the Superior Authorities and the directions passed by any court of law. Therefore, the condition of production of Supurdginama before the trial court for delivery of the seized properties from the Government Treasury Gwalior is unnecessary and embossing to the authorities who are persona and destinate responsible, therefore, it is requested to set aside the condition imposed under the impugned order.

4. In Writ Petition No. 1716/1990 vide order dated 31st July 1990, Single Bench of this Court issued certain directions, which read as are under:-

(i) Criminal Court had no authority to order handing over of the property, i.e., Jewellery or cash to the persons claiming it;

(ii) Satisfaction of the authority issuing the warrants is to be determined as per the situation existing on the date when the warrant is issued and the requisite satisfaction satisfy the test of judicial review;

(iii) lack of territorial jurisdiction is not fatal to the issuance of the warrant;

(iv) Once an assessment is over the seized property is to be disposed of as per determination made by the assessing authority;

(v) Where assessment is not complete the authority issuing the warrant shall take further steps within the stipulated period as required under Section 132 (5) of the Income Tax Act.

(2) Thus writ Petitions No. 1705, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718 and 1719 of 1990 filed by the Union of India are allowed. The silver ornaments shall be deemed to in custody of the Income Tax Department (though in reality these shall remain custody in Government Treasury Gwalior.

(3) So for as Writ Petition No. 1853 of 1991 and Writ Petition No. 1984 of 1990 are concerned. There are disposed of with a direction that further steps in terms of Section 132 (5) be taken and completed. Even the Assessing authority at Mathura would be at liberty to proceed further. As a matter of fact it could have completed the proceeding pending before it. There was no prohibitory order in existence.

(4) So for as writ petition No. 2155 of 1990 is concerned the same is dismissed. Assessment order having been passed the custody of the cash in question is not required to be given to the officer issuing the warrant. In writ Petition No. 2003/1990 a direction is given to handover the cash to the parties after clearance is given by the assessing authority that all liabilities have been met.

(5) Writ petition No. 1689 of 1991 is dismissed. Assessing authority would be at liberty to apply the seized property to meet the demand raised by the the Assessing Authority.

6. So for as Writ Petition No. 1475 of 1990 is concerned the same is disposed of with the direction that officer issuing the warrant would now complete the proceeding within the stipulated period in the terms of Section 132 (5) of the Income Tax Act.

5. Prior to above, in the case of *Union of India Vs. Police Station Janakganj* [1990 JLJ 734], the Division Bench of this court held that

> "According to us the police officer, who had seized the money from the respondent No. 3 on being served with the order of the Income Tax Authority and Warrant of Authorization, and for that matter learned Magistrate also suffered statutory handicap to deal with the money in any other manner than as contemplated under the special law enacted as aforesaid, Be it noted in this connection that the police had not registered any crime against respondent no.3 and the Income Tax Department on being apprised of the seizure had laid claim to that money and to custody thereof in accordance with previous afore-quoted. Neither, S.H.O. Janakganj Police Station, nor learned Magistrate had any jurisdiction to enquire into the validity of the warrant of Authorization for delivery of that money to the Income Tax Authority nor of the competence of the officer. Indeed, we are further of the view that this court also in this matter, is not at all concerned with the validity of the warrant of Authorization."

6. Now, adverting to the provision of Section 457 of Cr.P.C. which deals with seizure of property by the police.

> **"457.Procedure by police upon seizure of property:-**
>
> (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.
>
> (2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying

the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation. "

7. On perusal of the the impugned order passed by the Chief Judicial Magistrate Gwalior, it appears that the condition as imposed under the impugned order for delivery of the seized goods kept in the Government Treasury Gwalior is to the effect that the petitioners shall furnish Supurdnama worth Rs.1,40,00,000=00, equivalent to the price value of the silver ornaments with condition that on receiving the seized property on Supurdginama, the petitioners shall submit an undertaking to the effect that they shall further deposit the worth value of silver ornaments on the directions by the court and shall also ensure compliance of order of the court/Superior court/High Court in future is superfluous and redundant because the Income Tax Authority is a Statutory Authority under the Act, which is responsible to its higher authorities/ tribunals and the Courts of law having jurisdiction.

8. Consequently, the petition is allowed and it is directed that the condition that the petitioners shall furnish Supurdnama worth Rs.1,40,00,000=00, equivalent to the price value of the silver ornaments with condition that on receiving the seized property on Supurdginama, the petitioners shall submit an undertaking to the effect that they shall further deposit the worth value of silver ornaments on the directions by the court and shall also ensure compliance of order of the court/Superior court/High Court in future, is hereby waived, for the reasons mentioned in the preceding paragraphs.

Petition allowed.

I.L.R. [2011] M. P., 2923

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.S. Solanki

M.Cr.C. No. 1701/2011 (Jabalpur) decided on 6 September, 2011

DASHRATH P. BUNDELA & ors. ...Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Penal Code (45 of 1860), Section 498-A, Dowry Prohibition Act (28 of 1961), Section 3/4 **- Complainant/respondent No. 2 lodged an FIR on 11.03.2006 at police station Bina against the petitioners alongwith her**

husband with allegation that her father gave sufficient dowry at the time of her marriage but she was continuously being harassed by petitioners for getting the less dowry from her father - It is undisputed on record that respondent No. 2 is living separately since one year as mentioned by herself in the FIR - It is also undisputed that she is having three children - No specific allegation that when demand was made, when she was beaten, by whom, no specific year, month, date or time was mentioned - Further the report was lodged on 11.03.2006, just after the filing of the divorce petition against the respondent No. 2 and date of appearance on the aforesaid case i.e. 10.03.2006 - Held - No prima facie case made out against these petitioners, near relatives of husband of respondent No. 2 and permitting to continue such criminal proceeding against them would be abuse of process of law - Prosecution against the petitioners is liable to be quashed. (Paras 2, 8 & 15)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड संहिता (1860 का 45), धारा 498–ए, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 3/4 – परिवादी/प्रत्यर्थी क्रं. 2 ने 11.03.2006 को अपने पति सहित याचीगण के विरुद्ध पुलिस थाना बीना में इस अभिकथन के साथ एफ.आई.आर. दर्ज की कि उसके विवाह के समय उसके पिता ने पर्याप्त दहेज दिया था परंतु उसे याचीगण द्वारा अपने पिता से कम दहेज प्राप्त होने के लिये लगातार प्रताड़ित किया जाता था – यह अभिलेख पर अविवादित है कि प्रत्यर्थी क्र. 2 एक वर्ष से अलग रह रही है जैसा कि उसने स्वयं एफ.आई.आर. में उल्लिखित किया है – यह भी अविवादित है कि उसकी तीन संताने हैं – कोई विनिर्दिष्ट अभिकथन नहीं कि मांग कब की गयी, किसके द्वारा उसे कब मारा पीटा गया, कोई विनिर्दिष्ट वर्ष, महिना, दिनांक या समय उल्लिखित नहीं किया गया – इसके अलावा रिपोर्ट 11.03.2006 को दर्ज की गयी, प्रत्यर्थी क्र. 2 के विरुद्ध विवाह विच्छेद याचिका प्रस्तुती तथा उपरोक्त प्रकरण में उपस्थिति के दिनांक अर्थात 10.03.2006 के तुरंत पश्चात – अभिनिर्धारित – इन याचीगण, प्रत्यर्थी क्र. 2 के पति के नजदीकी रिश्तेदारों के विरुद्ध प्रथम दृष्ट्या कोई मामला नहीं बनता और उनके विरुद्ध ऐसी दाण्डिक कार्यवाहियां जारी रखने की अनुमति देना न्याय की प्रक्रिया का दुरुपयोग होगा – याचीगण के विरुद्ध अभियोजन अभिखंडित किये जाने योग्य है।

Cases referred :

(2010) 9 SCC 667, (2010) 10 SCC 673.

Vijay Nayak, for the applicants.

Amit Pandey, PL for the non-applicant/State.

J.A. Shah, for the non-applicant No.2.

ORDER

G.S. SOLANKI, J. :–Petitioners, being near relatives of husband of

respondent No.2 (Smt. Gayatri Bundela), invoking extra ordinary jurisdiction of this Court Under Section 482 of the Code of Criminal Procedure for quashing their prosecution under Section 498-A/34 of Indian Penal Code and Section 3/4 of the Dowry Prohibition Act in connection with Crime No. 112/2006 registered at police station Bina, Sagar pending as Criminal Case No. 1424/2006 before Judicial Magistrate First Class Bina, Sagar, have filed this petition.

2. Facts giving rise to this petition are that respondent No.2 Smt. Gayatri Bundela was married with Sharda Prasad Bundela on 25/6/1999. Petitioners No. I and 2 are the father and mother of Sharda Prasad respectively. Petitioners No. 3 and 5 are the younger brothers and petitioner No. 2 is sister, of Sharda Prasad. Complainant/respondent No.2 lodged an FIR on 11.3.2006 at police station Bina against the petitioners alongwith her husband Sharda Prasad with allegation that her father gave sufficient dowry at the time of her marriage but she was continuously being harassed by petitioners for getting the less dowry from her father.

3. It is further alleged that complainant Gayatri Bundela was beaten by petitioners alongwith her husband. It is also alleged that all of them demanded Rs. 1,00,000/- (Rupees one lac) and they threatened her to be deserted from her matrimonial house if demand is not fulfilled, therefore, she is living separately at Bina in her parental house. On the basis of aforesaid report, a criminal case under Section 498- A/34 of IPC with Section 3/4 of the Dowry Prohibition Act was registered.

4. After investigation, petitioners were prosecuted alongwith husband of respondent no.2 before the Judicial Magistrate First Class, Bina.

5. Learned counsel for the petitioners submitted that respondent No.2, Gayatri Bundela, is having three children. Since in the year 2001, her husband Sharda Prasad filed a petition for divorce against her when-process issued and date was fixed for her appearance on 10.3.2006, then respondent no.2, in order to save herself malafidely, as a counter blast lodged a false report against these petitioners. He further submitted that petitioner no. I Dashrath P. Bundela, retired person lodged a report on 11.9.2003 at Jabalpur police station and expressed apprehension that respondent may falsely implicate him. A copy of the same is Annexure-A/5. He further submitted that as per FIR, respondent No.2 Gayatri Bundela was living at her parental house since last one year and there is no specific year, month or any date has been stated

by her regarding demand of dowry or cruelty committed by the petitioners. He further submitted that petitioner No.4 Smt. Rajni @ Rukkobai is a married woman and living separately from the other petitioners after her marriage. She rarely visited to the matrimonial house of Gayatri Bundela. Since the allegation against these petitioners are omnibus allegation, without mentioning any year, month, date or time therefore, their implication is only mean to harass them and permitting such prosecution to continue would be abuse of process of law, hence he prays for quashment of prosecution as far as it relates to these petitioners. He placed reliance on (2010) 9 SCC 667, *Preeti Gupta and another Vs. State of Jharkhan and another* and (2010) 10 SCC 673, *Manoj Mahavir Prasad Khaitan Vs. Ram Gopal Poddar and another.*

6. Learned counsel appearing on behalf of the respondent No. 2 submitted that there is no strong prima facie case against these petitioners reveals from the evidence collected during investigation of Crime No. 112/2006, therefore he prays for dismissal of the Petition.

7. I have perused the FIR of Crime No. 112/06 and evidence of Gayatri Bai, complainant, Sunder Bai and Laluram, mother and father of complainant and Laxmi Narayan, brother of complaint alongwith the documents filed with this petition.

8. It is undisputed on record that respondent no. 2 Gayatri is living separately since one year as mentioned by herself in the FIR. It is also undisputed that she is having three children. On perusal of Annexure-A/1, it reveals that her husband Sharda Prasad filed a divorce petition against her in which she required to appear before Family Court on 10/3/2006. Thereafter FIR was lodged on 11/3/2006 with allegation that she was being harassed by these petitioners, since after the marriage, i.e. since 1999. It is on record that she gave birth of three children and she did not complained about the harassment or demand of dowry by these petitioners to anybody till the date of lodging the report i.e. 11.3.2006, therefore, this prosecution of petitioners would be seen in backdrop of the matrimonial case filed against the respondent no. 2 Gayatri Bundela by her husband.

9. One more fact is important to assess the possibility of false implication that Dashrath Prasad Bundela, retired Major, had already filed a report on 11/9/2003 and apprehending his false implication

10. On perusal of statement of mother, father and brother of respondent

No.2 as mentioned hereinabove, I found that there is an omnibus statement regarding demand of dowry and harassment. No specific year, month, date or time is mentioned. Petitioner No. 4 Smt. Rajni @ Rukkobai is a married sister of husband of respondent no.2. Obviously she would live with her husband and occasionally she visited to the matrimonial house of respondent No.2.

11. In the case of *Manoj Mahavir Prasad Khaitan* (supra), the Apex Court has observed that:

> "We reiterate that when the criminal court looks into the complaint, it has to do so with an open mind. True it is that that is not the stage for finding out the truth or otherwise in the allegations; but where the allegations themselves are so absurd that no reasonable man would accept the same, the High Court could not have thrown its arms in the air and expressed its inability to do anything in the matter. Section 482 of Cr.P.C. is a guarantee against injustice. The High Court is invested with the tremendous powers thereunder to pass any order in the interests of justice. Therefore, this would have been a proper case for the High Court to look into the allegations with the openness and then to decide whether to pass any order in the interest of justice. In our opinion, this was a case where the High Court ought to have used its powers under Section 482 Cr.P.C."

12. In the case of *Preeti Gupta* (supra), the Apex Court has observed that allegations of harassment of husband's close relatives who had live separately and rarely visited the place of matrimonial house of complainant are required to be scrutinized with great care and circumspection. Their Lordships' also remind the social responsibility and obligation of the learned member of Bar to ensure that the social fibre of family life is not ruined or demolished because majority of the complaints are filed either on the advice or with concurrence.

13. It is a matter of our common experience that when a matrimonial dispute arises between the parties of marriage they lead to multiple cases, therefore, the Apex Court expected from the learned member of Bar that they should also ensure that one complaint should not lead to multiple cases.

14. In the light of aforesaid principle of law, I have carefully considered the

allegations made in FIR and statement recorded under section 161 of Cr.P.C. in relation to demand of money and alleged harassment to respondent no. 2. There is no specific allegation that when demand was made, when she was beaten, by whom, no specific year, month, date or time was mentioned. Further the report was lodged on 11/3/2006, just after the filing of the divorce petition against the respondent no.2 and date of appearance on the aforesaid case i.e. 10/3/2006.

15. Considering the aforesaid facts and circumstances of the case, I am of the view that there is no prima facie case made out against these petitioners, near relatives of husband of respondent No.2 and permitting to continue such criminal proceeding against them would be abuse of process of law. Hence, prosecution against these petitioners is liable to be quashed.

16. Thus, the petition is allowed and the prosecution launched against these five petitioners on the basis of Crime No. 112/2006 registered at police station Bina, Sagar for offence punishable under Section 498-A/34 of IPC and Section 3/4 of the Dowry Prohibition Act, is hereby quashed.

Petition allowed.
