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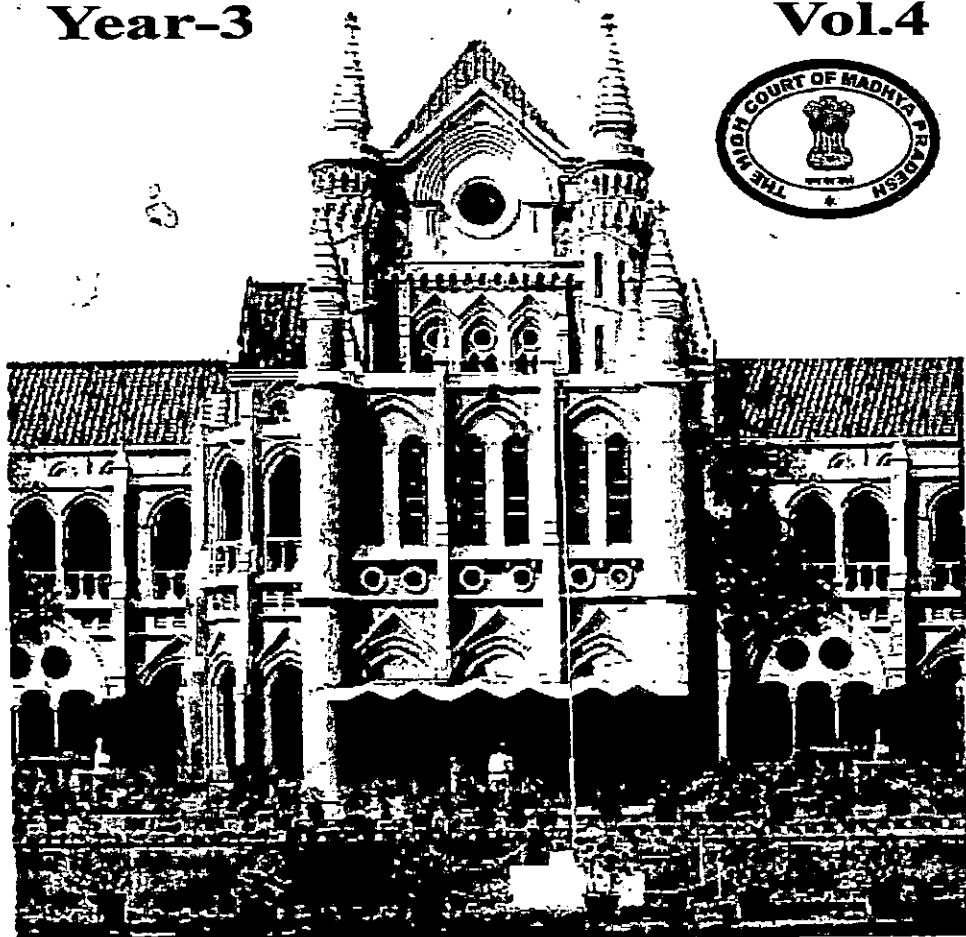
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Farewell



Justice Abhay M. Naik

Born on 8th September, 1949. Completed LL.B. degree in 1st Division from MLB Arts & Commerce College, Gwalior. Also passed NCC 'B' & 'C' Certificates and represented 14th M.P. Battalion in All India NCC at Alandi (Pune) Maharashtra. Participated in inter Collegiate Badminton Championship. Was Member, Prefect Board, Govt. Science College Gwalior and Member, Law Committee MLB Arts & Commerce College, Gwalior. Was Chairman, Disciplinary Committee, State Bar Council, Gwalior. Was practicing at Gwalior Bench of the High Court for more than 32 years. Worked as junior of Late Justice Shri H.G. Mishra. Was designated as Senior Advocate in the year 2002. Appeared in number of important cases relating to Municipal Corporation, Gwalior, M.P. Housing Board, M.P. Pollution Control Board, M.P. Audhoyogik Kendra Vikas Nigam, M.P. Hastashilp Vikas Nigam, Gwalior Development Authority, State Bank of India, Bank of India etc. Imparted practical training to Final year students of various Colleges affiliated to Jiwaji University, Gwalior. Has toured extensively in India, Nepal and Europe.

Elevated as Additional Judge of High Court of Madhya Pradesh on 13th April, 2005. Took oath as Permanent Judge on 25-11-2005. Decided 11,737 cases and did not earn single reversal from Hon'ble the Supreme Court of India, during tenure as Judge of High Court. Demitted office on September 07, 2011.

We wish Shri Justice Abhay M. Naik a healthy, happy and prosperous life.

**Hon'ble Mr. Justice K. K. Lahoti, Administrative Judge,
High Court of M. P., Jabalpur bids farewell to the demitting
Judge :—**

We have assembled here today to bid a farewell to brother Justice Abhay M. Naik on his retirement as a Judge of High Court of Madhya Pradesh, after completing his successful, bright and illustrious tenure of 6 years 4 months. Justice Naik hails from a family of educationist. His father Shri B.M. Naik was initially a school teacher. In his career there is a great contribution of his father and family members, who belongs to academic side. He was born on 8th September, 1949. After earning his degree of Law in 1st Division, he was enrolled as an Advocate on 30.9.1972. He practised at the High Court, State Administrative Tribunal, Central Administrative Tribunal and District Court at Gwalior for 32 years in civil, service and constitutional side. He was known as an expert in civil side. He conducted numerous cases, argued various appeals, both in High Court and District Court, besides large number of writ petitions in which he had appeared in the High Court. He was keen in sports and other cultural activities. He toured extensively in various parts of the country, Nepal, Europe, Great Britain and others. Looking to his outstanding career, he was designated as Senior Advocate by the Full Court in the year 2002. He had represented various institutions, banks and authorities while working as an advocate. He was also Member Prefect Board, Government Science College, Member of Law Committee, MLB Law and Commerce College. Looking to his merits and outstanding performance in the Bar, he was elevated as additional Judge of the High Court of Madhya Pradesh on 13.04.2005 and was appointed as permanent Judge of the High Court of MP on 25.11.2005.

Today we are here to express to him the affection which every one has for him and our pride and admiration for his work as a Judge of this Court. It is proud privilege to speak for him for the High Court, but I realise how inadequate my words must appear to this gathering, if I try to say, that all, that is in our hearts and minds today. I have one advantage that I have been at the Bar with him for several years and has knowledge of his personality which comes from working together for common ends and for sharing happy occasions of a great profession. His devotion to the work shown at all times not only where he was most active and busy member of the Bar, but also an efficient Judge of the Bench. Justice Naik has always kept with him the company of great thoughts, the inspiration of great ideas, example of great achievements. He thus brought to his work as a lawyer and judge not only a first class mind; but of values as a true Judge.

On the occasion of his elevation in reply to the ovation he had spoken few words, I quote "You have spoken nice about me. It is more in the nature of expectations. As regards myself, I may not prefer to speak much. The obvious reason is that from today onwards you are there to judge me. I entertain a thought right from the beginning that the common object of the Bar and the Bench and also of the judicial system is to provide justice and with your kind cooperation, I will make a sincere endeavour to see that justice should not be lost", unquote.

Today we are here to appreciate his work and deeds. His tenure was of a great success. Justice Naik has delivered various landmark judgments. Out of 11,737 cases, which have been decided by him most of the judgments which are published in Law Journals are landmark judgments. The judgments are published in the All India Reporter, Madhya Pradesh Law Journal, Madhya Pradesh Judicial Reporter and other legal journals. His contribution to the legal fraternity is an asset and he will be remembered always for his deeds. His retirement as a Judge of High Court will be a great loss for all of us.

Justice Naik and Mrs. Anjali Naik have been very affectionate and warm to my brother and sister Judges, bar and to me and my wife. We shall never forget the wonderful time we have spent with them. On the occasion of his retirement, I on my own behalf and on behalf of my brother and sister Judges, Officers of the Registry and High Court, wish both Justice Naik and Mrs. Naik a long, healthy and happy life.

Shri Manoj Dwivedi, Additional Advocate General of M. P., bids farewell :-

आज माननीय न्यायमूर्ति श्री अभय नाईक सा. एक न्यायमूर्ति के रूप में अपने कार्यकाल को पूर्ण कर रहे हैं। माननीय नाईक सा. का कार्यकाल अद्वितीय रहा है। स्वयं माननीय न्यायमूर्ति भी आज अपने कार्यकाल से पूर्णतः संतुष्ट होंगे। प्रत्येक व्यक्ति जब उसकी कहीं नियुक्ति होती है, तब ही वह कौतूहलवश ही सही अपनी सेवानिवृत्ति की तिथि अवश्य स्मरण कर लेता है। किसी कार्यकाल का समाप्त होना एक नए युग की शुरुआत का द्योतक होता है।

जीवन के 62 वसन्त पूर्ण होना भी एक सोपान है। आज मैं यह महसूस कर रहा हूँ कि यह आयु तो सक्रियता की आयु है और सेवामुक्ति मात्र अल्पविराम है। भारतीय इतिहास में आंकने से यह प्रमाण अवश्य मिलेगा कि सक्रियता कभी आयुष्य की मोहताज नहीं रही और 62 वर्ष की आयु का व्यक्ति वृद्ध नहीं होता, हाल ही में देश में घटित एक घटनाक्रम में 74 वर्षीय युवा ने भी यह साबित किया और पूरे राष्ट्र को आंदोलित कर दिया।

प्रत्येक व्यक्ति अपने जीवन में पूर्णता का आंकलन प्राप्त उपलब्धियों के आधार पर करता है। माननीय नाईक सा. ने अपने जीवन में न्यायमूर्ति मनोनीत होने के पूर्व भी अनेक सोपान प्राप्त किए हैं। चाहे वह कालेज की बैडमिंटन टीम के कप्तान के रूप में हो, एनसीसी के मध्यप्रदेश के 14वीं बटालियन के सीनियर अंडर ऑफीसर के रूप में हो, ऐसी कई उपलब्धियाँ माननीय नाईक सा. ने हासिल की हैं। इन उपलब्धियों से माननीय नाईक सा. की समग्रता का अहसास होता है। आज इस संक्षिप्त समय में मैं शायद आपकी उन उंचाईयों का पूर्ण वर्णन नहीं कर पाऊंगा, परन्तु यह निर्विवादित है कि आपके सद्व्यवहार से इंदौर खंडपीठ का कोई भी अधिवक्ता अछूता नहीं रहा है। न्यायालय में आपके द्वारा पूछे जाने वाले सटीक प्रश्न सदैव आपके कार्यकाल का स्मरण कराते रहेंगे।

सेवानिवृत्ति उपरांत भी आपका सफर स्वर्णिम होगा, ऐसी मैं मनोकामना करता हूँ। यह आशा भी करता हूँ कि आपकी जिम्मेदार व परिपक्व सोच समाज को नई दिशा प्रदान करने में सदैव तत्पर रहेगी। मुझे विश्वास है कि अभी आपके लिए बहुत सारे कार्य बाकी हैं, भारतीय दर्शन चरैवेति चरैवेति का संदेश देता है।

जैसा कि मैंने पूर्व में कहा एक कार्यकाल की समाप्ति दूसरे कार्यकाल की शुरुआत का द्योतक होती है। मैं एवं मेरे सभी साथियों एवं राज्य शासन की ओर से आपके स्वस्थ, प्रसन्न एवं दीर्घायु जीवन की कामना करता हूँ व साथ ही ईश्वर से यह प्रार्थना करता हूँ कि वह सदैव आपका मार्ग प्रशस्त करें।

Shri Vinay Zelawat, President, High Court Bar Association, Indore, bids farewell :-

भारतीय संस्कृति में उसी जीवन को जीवन कहा गया है, जिसमें शांति, तुष्टि, पवित्रता और आनंद जैसे परम तत्त्व समाहित हों। निवृत्ति भी एक ऐसा ही अवसर है जिसमें ये सब तत्त्व सम्मिलित हैं। संयोग अच्छे हों या बुरे, दोनों स्थायी नहीं होते हैं। संयोग और वियोग संसार की नियति हैं। सूरज उगा है तो अस्ताचल को भी जाएगा। हमें सूरज का उगना अच्छा लगता है लेकिन डूबना नहीं सुहाता है। यह निसर्ग का नियम है। बिदाई के क्षण हमेशा भावुक होते हैं। विछोह मन को दुःखी करता है। लेकिन फिर मन में यह भाव उत्पन्न होता है कि जो आया है वह जाएगा। सब कुछ अस्थायी है अनित्य है। यह विचार मन को तसल्ली देता है।

माननीय महोदय, आपका जन्म 8 सितम्बर 1949 को ग्वालियर में हुआ। आपने सन् 1972 से सुप्रसिद्ध विधिवेत्ता स्वर्गीय श्री हरगोविंद मिश्रा एवं तत्पश्चात् इस न्यायालय के न्यायाधीश के साथ अपना विधि व्यवसाय प्रारंभ किया। आप दिवानी एवं संवैधानिक मामलों में सफल अभिभाषक रहे। काफी आग्रह के बाद 13 अप्रैल 2005 को आपने इस उच्च न्यायालय के न्यायाधीश पद को सुशोभित किया।

माननीय न्यायमूर्ति नाईक साहब, आपका और हमारा साथ कुछ ही महिनों का रहा है। एक दूसरे को समझने की एक लम्बी प्रक्रिया है। लेकिन इन कुछ ही दिनों में हमने आपको देखा, समझा

और परखा। जैसे-जैसे एक न्यायाधीश एवं व्यक्ति के तौर पर हम आपके नजदीक आए हमने आपको एक निष्पक्ष न्यायाधीश एवं एक निर्मल व्यक्ति पाया। एक न्यायाधीश को जब कसौटी पर परखा जाता है, तो उसके लिए एक "भला व्यक्ति" होना नितांत आवश्यक है। विधि का ज्ञान एवं काम के प्रति समर्पण का क्रम इसके बाद आता है।

महोदय, आज का अवसर एक ऐसा अवसर है, जब "बार" एक "न्यायाधीश" पर अपना फैसला सुनाती है। आज हम यह फैसला सुनाते हैं कि आप तीनों कसौटियों पर खरे उतरे हैं। इन्दौर खण्डापीठ में आपका कार्यकाल न केवल एक "न्यायाधीश" के रूप में वरन् एक "व्यक्ति" के रूप में भी सफल रहा है। आपने न केवल अपने विधिक ज्ञान एवं कौशल का परिचय दिया बल्कि आपने एक "भले व्यक्ति" होने का परिचय देते हुए इस बार के सदस्यों के साथ सदैव सम्मानपूर्ण व्यवहार किया। इस बार के युवा सदस्यों को भी आपने हमेशा प्रोत्साहित किया।

माननीय महोदय, जीवन सपाट मैदान नहीं है। मनुष्य के जीवन में अनुकूलता एवं प्रतिकूलताएँ आती रहती हैं। वृत्ति, प्रवृत्ति और परिणाम ये तीन शब्द जीवन में महत्वपूर्ण हैं। वृत्ति हमारे मन में उत्पन्न होती है, उससे हमारी प्रवृत्ति बनती है और जैसी प्रवृत्ति बनती है, जीवन में वैसा परिणाम उत्पन्न होता है। आज आपके कार्यों के फलस्वरूप जो परिणाम हमारे सामने हैं, उनके लिए हम आपका साधुवाद करते हैं। हम आपको एक कर्मठ एवं भले न्यायाधीश के तौर पर याद रखेंगे।

माननीय न्यायमूर्ति नाईक साहब, हमारा यह मानना है कि यह सितम्बर का माह आपकी लाखों मुरादें पूरी करने के लिए आया है। आप अपनी डलिया में हमारी लाखों दुआएँ रखें। आपका भावी जीवन सुखद, स्वस्थ, प्रसन्नचित्त एवं सक्रिय हो। आप एवं श्रीमती अंजली नाईक परिजनों के साथ अपनी वे सब कामनाएँ पूरी करें जो इस व्यस्तता के कारण आप पूर्व में पूर्ण न कर पाए हों।

बच्चनजी ने एक जगह कहा है -

"पूर्ण कर दे वह कहानी,
जो शुरू की थी सुनानी,
आदि जिसका हर निशा में,
अंत चिर अज्ञात।

साथी, मौन, कर कुछ बात।"

आपको ढेर सारी शुभकामनाएँ।

**Shri Pratap Mehta, Member, State Bar Council of M. P.,
bids farewell :-**

आज हम बड़े आत्मीय और भावभीने वातावरण में उच्च न्यायालय के माननीय न्यायमूर्ति सम्माननीय श्री अभय नायक जी के सेवानिवृत्ति के अवसर पर उन्हें बिदाई देने के लिए एकत्रित हैं। निःसंदेह यह क्षण बहुत महत्वपूर्ण और रेखांकित करने योग्य इसलिये हो जाता है कि वर्तमान परिप्रेक्ष्य से सहसम्मान अपनी सेवाओं को कर्तव्यनिष्ठा, ईमानदारी एवं न्यायिक सूझबूझ के साथ नये आयामों को रचते हुए सेवाकाल को पूर्ण करना और कल बेंच पर उनका न दिखाई देना हमेशा हमारे मानस पर अमिट स्मृति के रूप में अंकित रहेगा।

यह हमारे लिए सदैव गौरव का विषय रहा है कि आपने संपूर्ण सेवाकाल में अपने न्यायिक अनुभव विद्वत्ता के आधार पर नीर-क्षीर न्याय के माध्यम से जिन न्यायिक मूल्यों को स्थापित किया है वह आने वाले समय के लिए दीपशिखा की तरह आने वाली पीढ़ी का मार्ग दर्शन करते रहेंगे।

म.प्र. राज्य अधिवक्ता परिषद् के लिए यह गौरव का विषय है कि आप वर्ष 2003 से 2005 तक ग्वालियर स्थित परिषद् की अनुशासन समिति के अध्यक्ष भी रहे हैं।

इस अवसर पर मैं कहना चाहूँगा कि -

“ बस कि दुश्वार है हर काम का आसां होना,
हर आदमी को मयस्सर नहीं ईसा होना। ”

दुनिया में बहुत कम लोग ऐसे होते हैं जो एक सच्चे इंसान की तरह न्याय के क्षेत्र में एक निर्दोष आम आदमी की पीड़ाओं और संवेदनाओं को बड़ी गहराई से अपने हृदय में महसूस कर न्याय आसंदी पर बैठकर निर्णय देते हैं। उन्हीं में से एक आप हैं, ऐसा मैं मानता हूँ।

वस्तुतः वर्तमान परिप्रेक्ष्य में नौकरी करना एक साधारण सी बात है। लेकिन अपने सम्मोहनकारी व्यक्तित्व, सद्गुण एवं गंभीरता से अपनी अमिट छाप छोड़ना जिसे लोग वर्षों तक याद रखें। यह बहुत कम न्यायमूर्तियों को नसीब होता है। माननीय न्यायमूर्ति अभय नायक जी ने अपने सत्कर्मों की जो सुगंध इस न्याय मंदिर में फैलाई है, उसने हम सब के अंतरमन को सुगंधित किया है।

सेवानिवृत्ति शासकीय प्रक्रिया का एक अंग है। लेकिन एक न्यायाधीश के रूप में मैं आपसे यह अपेक्षा करूँगा कि आप हमारी संस्कृति की भावना के अनुकूल जीवेद् शरद् शतम् की तरह सौ वर्षों तक स्वस्थ, निरोग एवं आनंदमय जीवन जीयें। यह प्रार्थना परम परमात्मा श्री महाकालेश्वर से करता हूँ। किसी शायर ने सही लिखा है -

“ जो करते हैं हंसी किरदार से तारीख को रोशन,
जमाना ऐसे लोगों को हमेशा याद करता है।

हम आपके न्यायिक अवदानों को हमेशा याद रखेंगे।

आपके सपरिवार स्वस्थ, दीर्घायु एवं यशस्वी रहने की मैं कामना करता हूँ।

4) **Shri Vivek Sharan, Adv., Asstt. Solicitor General of India, bids farewell :-**

I feel privileged in offering this farewell ovation to Hon'ble Shri Justice A.M.Naikji

It is said by Hon'ble Shri Justice R.C. Lahoti, in an article :

"The conduct of judges must be exemplary and should set an example for the society. Judges, by reason of their office and nature of their work, are expected not to get involved in controversial matters, or be concerned with political issues or policies undertaken by political parties as a part of their political agenda". He further added : "The conduct of judges in private too has a great impact on the independence and impartiality of the judicial office. He is constantly under the public gaze and his is a tough life. Once appointed as a judge, his time and talent ceases to be his own; they become the property of the nation, held in trust by him."

I wish on this occasion to express my sense of gratitude to Justice Naik who, with the blessings of his mother and father Late Shri M. B. Naik, started his career in the office of Late Shri Justice H. G. Mishra and later on became a distinguished lawyer at Gwalior. In the year 2002, he was designated as Senior Advocate and on 13th April, 2005, Justice Naik took oath as Judge of the High Court.

Hon'ble Justice Naikji is at Indore since last about 8 months and whoever appeared before him, knows and would share my feelings : when I say that this High Court is glorified and known by his honesty, integrity, compassion and industry. Everybody knows of his genius, forcefulness of his character, his extraordinary talent and off course his fearless temperament.

Mayor La Guardia was once presiding a New York City Night Court. The weather was cold and wintry. All of a sudden, a trembling man was brought in and charged with stealing a loaf of bread. When questioned, the man explained that he had to steal in order to feed his starving family. La Guardia declared, "I have to punish you. There can be no exception to law. I fine you \$10." As he gave his verdict, he pulled \$10 from his pocket and paid the fine. Furthermore, he declared, I am going to fine everybody in the court room 50 cents 'for living in a city where a man has to steal bread in order to eat'.

The above act of a judge, is a reflection of what *Lord Mansfield* said :

"Justitia Fiate Ruat Caelum" means Justice shall be done though heaven may fall but at the same time it is also reflects that.

" Judicial verdict may not change heart but certainly can prevent people from becoming heartless."

As we all know that the role of a judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic cenario to make the ideals enshrined in the Constitution, meaningful. Justice Naik is no exception to this role of a judge. Many landmark and path-breaking judgements are to his credit, be it in the field of Constitution, Civil, Service Matters, Income Tax or Election Petitions

Speaking for the full Bench, in the matter of 'Vimlabai and Others Vs Sharif Khan and Others', he held that "In the case of negligence on the part of the offending motor vehicle, the liability of compensation shall have to be fastened alongwith the Insurance Company, on the owner also and consequently the Insurance Company alone cannot be made liable to make payment of compensation." In yet another, landmark judgement, in the matter of 'A.D.N. Bajpai Vs The State of M.P''; he observed : "That, the decision making process is also liable to be considered by the High Court under Article 226 of the Constitution of India".

The tenure of Hon'ble Naikji as judge of this Court reminds me what my father (Justice Dr. Maithli Sharan) says about the four utmost qualities of a Judge : Honesty and Integrity, Judicious Consciousness, Good Behaviour and Knowledge.

Your lordship had always been an inspiring force for the young lawyers of this Bar. Under your command, we yearned to improve, strife with determination to forge ahead and create a niche for ourselves both within the system as also in the community.

Sir, you will always enjoy a special position in the records of this court as well as in the hearts of all advocates of this Bar.

I, on my behalf, on behalf of the Union of India and on behalf of my colleagues, offer our greetings, good wishes to my lord Hon'ble Justice Shri A. M. Naikji.

farewell Speech delivered by Hon'ble Shri Justice Abhay M. Naik :-

First of all, I express my heartfelt thanks for the good words spoken about me. I really don't know how much do I deserve and how much do I not. As a human weakness, it normally gives pleasure. Whatever good is expressed at the time of elevation of a Judge, it is more in the nature of expectations. Expression made about him at the time of demitting the office may be an analytical revelation. I accept this with a sincere thought that unpleasant remarks might have been avoided.

On lighter side, it reminds me of a play in which a person dies. God asked him that how did he come to know that he has died. He said that he was on death fence counting moments. People gathered there were discussing that there were no chances of survival. Small children were quite curious in watching that how does the death occur. Atmosphere was quite ponderous. Suddenly, there was a silence for a minute and all thereafter started praising me. I realized that I am dead. It is absolutely on lighter side except the reality that today is my last day of appearance as a sitting Judge. I know my shortcomings but you avoided to point out them, which shows your magnanimity. This is the second reality.

Perhaps, few of you may be knowing that I was initially at the time of elevation posted at Indore. Our the then CJI Respected Hon'ble Mr. Justice R.C. Lahotiji told me that I will more enjoy Indore Bar, on account of thorough and extraordinary preparation of stalwarts here. Evaluation made by him is undoubtedly absolutely correct. I really enjoyed my tenure here. I express my thanks to senior advocates like respected Mr. G.M. Chaphekar, Mr. A.M. Mathur, Mr. A.X. Chitale, Mr. P.K. Saxena, Mr. B.L. Pavecha, Mr. S.C. Bagadia, Mr. T.N. Singh, Mr. M.L. Agrawal, Mr. Shekhar Bhargava, Mr. A.K.. Sethi and other senior advocates for providing me the meaningful assistance and purposeful guidance. I may make a special mention about respected Mr. Girish Desai, learned advocate whose gravity could be experienced on few occasions.

Now, you may allow me to speak to young generation. During my stay here, I found that young Members of this Bar have a tremendous potential. What is little bothering me is that young generation is more concerned about 'reputation' than "character". Character means what you really are 'and reputation means what you are in the opinion of others. Character is always value based, whereas reputation need not necessarily be so. Character gives

you inner strength and satisfaction as well; whereas, reputation gives you fame and money. You have to build up character, whereas reputation may be managed. Character may bring you reputation, but not vice-versa. It is often said that so and so lawyer does not stand without charging fees in six figures. It is his reputation. When it is known to all that so and so lawyer stands for needy persons for rightful cause with no reference about fees, it is his character as well as reputation both. Friends, it is not that I do not understand the importance of money but one has to create balance between character and reputation in this profession. Yes, it is a profession and not business. Business is profit oriented whereas profession is values and ethics based. I am sure that once you create a balance between these two, you would be able to lead the life in a more happy and peaceful manner. You will not be purposeful for your family alone but would be purposeful for the society and the nation. It would be achievement of life in true sense.

Another thing which pains me is lethargy in drafting. I will give an example. We know that Section 5 of Limitation Act now-a-days stands diluted for advancement of substantive justice. Normally, such applications under this provision are allowed. We take it for granted that it would be allowed. Our this mental perception should not reflect in drafting. It does not mean that while drafting an application for condonation, one should ignore the requisite ingredients. On the contrary, drafting is to be made keeping in mind the legal requirements and the Judge-made law as well. Deviation in this will surely lower down your drafting skill and I am afraid that slowly and slowly such a habit may enter into arena of drafting of every kind.

I would further say to the lawyers of young generation that they must assess their own potential and must try to explore them with all permissible kind of efforts. Swami Vivekanand said that controlled desire leads to the highest result. Our great former President Hon'ble Shri A.P.J. Abdul Kalam says that one must see the dreams. Friends, you first assess your potential correctly and then see the dreams. You may call it desire when you make sincere efforts for it's achievement. It is this juncture where dream and desire coincide. If you see the dreams only with no efforts, they remain "Mungerilal Ke Hasin Sapne". Swami Vivekanand said that purity, patience and perseverance are the three essentials for success. What is 'purity' in this profession? If you deny a brief when you know that you can achieve nothing from Court of law for the client, it is the utmost 'purity'. If you apprise him of weaknesses of his case and assures him of best efforts, it is 'purity' within the acceptable norms. If you make him entertain big dreams about the result,

despite knowing fully well about absence of merits, it would be a case of absence of 'purity',

Now, coming to 'patience', I may remind you, that professional stalwarts like Mr. G.M. Chaphekar and others senior advocates are not product of any period shorter than your age. Try to follow their footprints. Have you ever noticed the result of Horse race? It has fascinated me right from the childhood. It is like this - Horse X won, Y lost. Others A, B, C, D etc. also ran. Make efforts that you must be X or at least Y. I consider the advocates who make money only as A, B, C, D etc. I cannot say I may be wrong even.

I may again quote Swami Vivekanand who said Arise, Awake and Stop not till the goal is reached. Word 'Awake' is highly significant. It comprises in it the values, ethics, conscience and what not positive, friends, assess your own potential correctly and explore it to the best of your positive ability with purity, patience and perseverance in order to achieve the object so that you may be purposeful for the profession, needy litigants, society and the nation as well and the Indore Bar would be proud of you. I wish you all the best.

I express my heartfelt thanks to my colleague Judges here at Indore as well as at Jabalpur and Gwalior, who extended full cooperation during my tenure as a Judge. I am thankful to the respected senior advocates who enriched me by their eloquent presentation. I have got privilege or discharging my duty at all the three places; Jabalpur, Gwalior and Indore. I am thankful to the Registrar General and Principal Registrars and staff of Registry at all the three places. I express my thanks to personal staff also. Here, I would like to make a special mention of three persons; they are Accountant Mr. Gopilal Vyas, my P.S. Mr. R.C. Pithawe and Jamadar Mr. Devram who were exceptionally caring for me. I express my this feeling from this Dias. I am thankful to my other personal staff and protocol officers also.

I congratulate Mr. Vinay Zelawat, President of High Court Bar Association, Executive Members and Team Members for organizing law lectures successfully during the golden celebration year of this Bar.

I am extremely lucky that I was elevated with the blessings of our former dynamic Chief Justice of India Hon'ble Mr. Justice R.C. Lahoti and I am demitting the Office with an amulet or well wishes provided by his brother Mr. K.K. Lahoti, Administrative Judge as well as by all of you present here.

I feel indebted to brother Mr. Justice K.K. Lahoti and Bhabhiji for being here in this function for presiding over the same.

I will be failing in duty unless I express my thanks to Mr. Samvatsar and Bhabhiji who treated me as younger brother and provided tips for being accustomed in this profile.

Lastly, I express **my thanks to all those who are** present here. including family members, relatives and friends. I specially thank my younger brother Dr. Ashok M. Naik, who has come from New Bombay and all the well-wishers from Gwalior, Bhopal and Delhi who have taken pains to come to attend this ceremony at Indore, despite rainy season.

Till today, I used to listen you all daily. Today, you granted me an opportunity to speak. Finally, I thank you all for listening me with rapt attention.

Thanks a lot.

NOTES OF CASES SECTION

Short Note

*(121)

Before Mr. Justice A.K. Sharma

S.A. No. 58/2007 (Gwalior) decided on 21 July, 2011

ASHARFI DEVI (SMT.)

...Appellant

Vs.

HARI PRASAD & ors.

...Respondents

A. Succession Act, (39 of 1925), Section 63(c), Evidence Act (1 of 1872), Section 68 - Proof of Will - Will executed by father in favour of his son - Execution of will admitted by wife and other children (except one) of the Executant - Held - Their admission is to be considered for holding that will has been executed by executant - In absence of any evidence to the effect that Executant was of unsound mind due to ill health or old age at the time of execution of will, it can not be said that findings arrived at by the Courts below are perverse.

क. उत्तराधिकार अधिनियम (1925 का 39), धारा 63(सी), साक्ष्य अधिनियम (1872 का 1), धारा 68 - वसीयतनामे का सबूत - पिता द्वारा पुत्र के पक्ष में वसीयतनामा निष्पादित किया गया - वसीयतनामे का निष्पादन निष्पादिती की पत्नी तथा अन्य संतानों द्वारा (एक के अलावा) स्वीकार किया गया - अभिनिर्धारित - उनकी स्वीकृति को विचार में लेना चाहिए यह धारणा करने हेतु कि वसीयतनामे का निष्पादन, निष्पादिती द्वारा किया गया है - इस आशय की किसी साक्ष्य के अभाव में कि वसीयतनामा निष्पादित करते समय निष्पादिती अस्वस्थता अथवा वृद्धत्व के कारण चित्त विकृति से ग्रसित था, यह नहीं कहा जा सकता कि निचले न्यायालयों द्वारा निकाले गये निष्कर्ष अनुचित है।

B. Civil Procedure Code (5 of 1908) - Order 41 Rule 27 - Examination of signatures of Executant - There is no evidence that will is a forged document - At the stage of Appeal, prayer for getting the signatures examined by handwriting expert can not be allowed.

ख. सिविल प्रक्रिया संहिता (1908 का 5) - आदेश 41 नियम 27 - निष्पादिती के हस्ताक्षरों का परीक्षण - कोई साक्ष्य नहीं कि वसीयतनामा कूटरचित्त दस्तावेज हैं - अपील के प्रक्रम पर, हस्तालेख विशेषज्ञ द्वारा हस्ताक्षरों का परीक्षण कराये जाने हेतु प्रार्थना स्वीकार नहीं की जा सकती।

Cases referred:

(2009) 4 SCC 780, 2009(2) MPLJ 525, (2009) 3 SCC 687, (2005) 2 SCC 784, 2007(1) MPLJ 499, 2009(4) MPLJ 21, 2010(3) MPLJ 379, AIR 1955 SC 363, 2008(2) JLJ 327, 2003(8) SCC 537, (2004) 2 SCC 321, (2005) 1 SCC 280, (2007) 2 SCC 619.

NOTES OF CASES SECTION

H.D. Gupta with S.K. Agrawal, for the appellant.

V.K. Bharadwaj with Raja Sharma, for the respondent No.1.

Short Note (DB)

*(122)

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

W.A. No. 406/2008 (Gwalior) decided on 10 August, 2011

JINENDRA KUMAR JAIN

...Appellant

Vs.

UNION OF INDIA & ors.

...Respondents

A. Constitution, Article 226 - Distributorship of LPG - Selection - Challenge as to - Respondent No. 4 challenged the selection on the ground that appellant was not eligible for consideration for allotment of LPG Distributorship on the date of application as he did not have the title of the land mentioned by him in his allotment application - Held - Appellant undisputedly acquired an enforceable right in respect of the land and, therefore, it can not be said that he was ineligible for his consideration for allotment of LPG Distributorship in terms of the advertisement.

As per clause (1) the advertisement, the person applying for LPG Distributorship was required to submit detailed information of the land which he would make available for distributorship - It was provided that if the person applying for dealership would offer such land for sale or lease to the IOCL on a price agreed by it, then he shall be given preference in the matter of awarding of LPG Distributorship - Appellant had paid the entire sale consideration at the time of agreement to sale of land in question dated 12.12.2001, he undisputedly acquired an enforceable right in respect of the said land and, therefore, it can not be said that he was ineligible for his consideration for allotment of LPG Distributorship in terms of clause (1) of the advertisement.

क. संविधान, अनुच्छेद 226 - एलपीजी की डिस्ट्रीब्यूटरशिप - चयन - को चुनौती - प्रत्यर्थी क्र. 4 ने इस आधार पर चयन को चुनौती दी कि एलपीजी के डिस्ट्रीब्यूटरशिप के आवंटन हेतु विचार किये जाने के लिए अपीलार्थी आवेदन के दिनांक को पात्र नहीं था क्योंकि आवंटन आवेदन में उसके द्वारा उल्लिखित भूमि पर उसका हक नहीं था - अभिनिर्धारित - अपीलार्थी ने भूमि के संबंध में अविवादित रूप से प्रवर्तनीय अधिकार अर्जित किया है और यह नहीं कहा जा सकता कि विज्ञापन की शर्तों के अनुसार एलपीजी डिस्ट्रीब्यूटरशिप के आवंटन के लिए विचार किये जाने हेतु वह अपात्र था।

NOTES OF CASES SECTION

B. Constitution, Article 226 - Distributorship of LPG - Assessment process - Three members committee made their independent assessment of all the eligible candidates who appeared for interview and found appellant to be the best suitable person for allotting LPG Distributorship - Held - Awarding of marks under various sub-heads was exclusively within the domain of the selection Board - Exclusion of marks under the orders of the Court is outside the scope of judicial review.

Respondent No. 4 had not challenged the selection of the appellant on the ground of any malafide against any member of the selection board constituted by the IOCL - Merits of all the candidates who appeared for interview before it on 01/10/2003 was independently assessed by all the three members under five different heads - The assessment to be totally fair and transparent - It was not within the domain of the Writ Court to have reviewed the assessment process.

ख. संविधान, अनुच्छेद 226 - एलपीजी की डिस्ट्रीब्यूटरशिप - निर्धारण प्रक्रिया - तीन सदस्यीय समिति ने सभी पात्र अभ्यर्थियों का स्वतंत्र रूप से निर्धारण किया जो साक्षात्कार हेतु उपस्थित थे और अपीलार्थी को एलपीजी डिस्ट्रीब्यूटरशिप के आवंटन हेतु अति उपयुक्त व्यक्ति पाया - अभिनिर्धारित - विभिन्न उपशीर्षों के अंतर्गत अंक प्रदान करना अनन्य रूप से चयन बोर्ड के अधिकार क्षेत्र में था - न्यायालय के आदेशों के अधीन अंकों का अपवर्जन न्यायिक पुनर्विलोकन की व्याप्ति से बाहर है।

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

Cases referred :

(2003) 10 SCC 681, 2011(1) MPLJ 203, (2009) 1 SCC 297, (2002) 6 SCC 127.

R.D. Jain with *D.P.S. Bhadoriya*, for the appellant.

None, for the respondent No.1 Union of India.

N.K. Jain with *Anil Kumar Jain*, for the respondents No. 2 & 3.

Prateep Visoriya, for the respondent No.4.

Short Note

*(123)

Before Mr. Justice G.D. Saxena

Cr. Rev. No. 799/2010 (Gwalior) decided on 4 August, 2011

KASTOORCHAND

...Applicant

Vs.

STATE OF M.P. & ors.

...Non-applicants

**Criminal Procedure Code, 1973 (2 of 1974), Section 216 -
Alteration of Charge - The Court is empowered to alter or add to any**

NOTES OF CASES SECTION

charge at any stage before the judgment is pronounced - The Section is comprehensive and includes not only the correction of an error in framing the charge but will also include non-framing of a charge - Hence, even though the charges for offences under sections are made at initial stages, the Court has jurisdiction or power to alter that charge and frame a new charge as it has the power to correct the omission.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 - आरोप का परिवर्तन - न्यायालय, निर्णय घोषित करने से पूर्व किसी भी प्रक्रम पर, किसी भी आरोप में परिवर्तन अथवा परिवर्धन करने के लिए समर्थ है - धारा व्यापक है और न केवल आरोप के विरचित किये जाने में हुई त्रुटि का सुधार सम्मिलित है बल्कि आरोप को अविरचित करना भी सम्मिलित है - इसलिए, यद्यपि प्रारंभिक प्रक्रम पर धाराओं के अंतर्गत अपराध के लिए आरोप लगाये जाते हैं, तथापि, न्यायालय को उस आरोप को परिवर्तित करने की तथा नये आरोप विरचित करने की अधिकारिता एवं शक्ति है जैसा कि उसे लोप सुधारने का अधिकार है।

Cases referred :

AIR 2006 SC 2747, AIR 1970 SC 359.

S.K. Shrivastava, for the applicant.

R.K. Shrivastava, PL for the non-applicant No.1/State.

None for the non-applicants No. 2 to 22.

Short Note

*(124)

Before Mr. Justice K.K. Trivedi

W.P. No. 3885/2009 (Jabalpur) decided on 27 July, 2011

MUKESH PRASAD

Vs.

STATE OF M.P. & ors.

...Petitioner

...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 37(3) & 86(2) - Appointment on the post of Panchayat Karmi - Respondent No. 6 working on the post of Sarpanch when advertisement was issued for appointment of Panchayat Karmi and last date for submission of form was 10.8.2009 - Another advertisement was got issued and the last date for submission of form was 30.8.2009 - Resignation submitted by Respondent No. 6 was accepted by Deputy Director on 30.8.2009 and on the same day, respondent No. 6 submitted his application form - Held - Dy. Director was not competent to accept resignation and therefore, there was no valid resignation nor there was

NOTES OF CASES SECTION

any question of its acceptance - Further more Petitioner was more meritorious than respondent No. 6 as he was not entitled to additional marks for higher education and experience - Collector was well within his competence to set aside such an illegal selection and directing for proper selection.

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 37(3) व 86(2) - पंचायत कर्मों के पद पर नियुक्ति - प्रत्यर्थी क्र. 6 सरपंच के पद पर कार्यरत था जब पंचायत कर्मों की नियुक्ति हेतु विज्ञापन जारी किया गया और फार्म जमा करने हेतु अंतिम तिथि 10.8.2009 थी - एक और विज्ञापन जारी करवाया गया और फार्म जमा करने की अंतिम तिथि 30.08.2009 थी - प्रत्यर्थी क्र. 6 द्वारा प्रस्तुत त्यागपत्र, उप निदेशक द्वारा 30.8.2009 को स्वीकार किया गया और उसी दिनांक को, प्रत्यर्थी क्र. 6 ने अपना आवेदन फार्म जमा किया - अभिनिर्धारित - उप निदेशक त्यागपत्र स्वीकार करने के लिए सक्षम नहीं था और इसलिए वैध पदत्याग नहीं था और ना ही उसकी स्वीकृति का कोई प्रश्न था - आगे और, याची, प्रत्यर्थी क्र. 6 से अधिक गुणवान था क्योंकि वह उच्चतर शिक्षा एवं अनुभव के लिए अतिरिक्त अंकों का हकदार नहीं था - ऐसे अवैध चयन को अपास्त करने एवं उचित चयन करने के लिए निर्देशित करने हेतु कलेक्टर पूरी तरह सक्षम था।

Cases referred:

2008(1) MPLJ 219, AIR 1966 SC 328, AIR 1988 SC 94.

Bhagwan Singh Thakur, for the petitioner.

Sanjeev Kumar Singh, PL for the respondents No. 1 to 3.

Tabrej Sheikh, for the respondent No. 4.

Narendra Sharma, for the respondent No.6.

Short Note (DB)

**(125)*

Before Mr. Justice S.K. Gangele & Mr. Justice Sheel Nagu

W.P. No. 3599/2011 (Jabalpur) decided on 22 July, 2011

P.A.C.L. INDIA LIMITED

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Criminal Procedure Code, 1973 (2 of 1974), Section 144 - Prohibitory Order - When can be issued - Petitioner-company, in the business of accepting deposits from the investors, it may be using the amount in real estate business and various activities - Company though receiving huge deposits from customers and investing the amount in certain activities, but deliberately concealing from the Court, District

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administration and Police authorities - Amount invested in purchasing of land is a drop in ocean in comparison to the amount collected by the Company - On asking by District and Police authorities, the company has not furnished the vital information as to how much money it had collected and how much land it had purchased - Petitioner-company would have created serious disturbances of grave character in the society -- Held - There is no illegality or irregularity in passing the order u/s 144, Cr.P.C. prohibiting the business of the petitioner-company.

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 144 - प्रतिषेधात्मक आदेश - कब जारी किया जा सकता है - याची कम्पनी, निवेशकों से जमा राशियाँ स्वीकार करती है, वह रकम को जमीन जायदाद के कारोबार एवं विभिन्न क्रियाकलापों में उपयोग कर सकती है - यद्यपि कम्पनी ग्राहकों से विशाल जमा राशियाँ अभिप्राप्त कर रही थी तथा कतिपय क्रियाकलापों में रकम का निवेश कर रही थी तथापि न्यायालय, जिला प्रशासन एवं पुलिस प्राधिकारियों से जानबूझकर छिपाव किया - भूमि के क्रय हेतु निवेश की गई रकम, कम्पनी द्वारा एकत्रित की गयी रकम की तुलना में सागर में एक बूंद मात्र है - जिला प्रशासन एवं पुलिस प्राधिकारियों द्वारा पूछे जाने पर कम्पनी ने महत्वपूर्ण जानकारी प्रस्तुत नहीं की है कि उसने कितनी रकम एकत्रित की है और कितनी भूमि उसने क्रय की है - याची-कम्पनी ने समाज में गंभीर स्वरूप का घोर उपद्रव निर्मित किया होता - अभिनिर्धारित - याची कम्पनी का कारोबार प्रतिषिद्ध करने वाले दण्ड प्रक्रिया संहिता की धारा 144 के अंतर्गत पारित आदेश में कोई अवैधता अथवा अनियमितता नहीं।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 144 - Prohibitory Order - Magistrate passed an order u/s 144, Cr.P.C. on 4th May, 2011 prohibiting the business of the petitioner-company - The order was valid for a period of two months - During pendency of the petition another order was passed by the District Magistrate dated 1st July 2011, prohibiting the business of the company-petitioner - No material on record to show that any request was made by the District Magistrate or other authority to the State Government to extend the period of the order - State Government has not accorded approval to the District Magistrate for extending the period of the order passed earlier - Held - Second order passed on 1st July 2011 u/s 144, Cr.P.C. by the District Magistrate is beyond his power and authority.

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 144 - प्रतिषेधात्मक आदेश - मजिस्ट्रेट ने याची-कम्पनी के कारोबार को धारा 144, द.प्र.सं. के अंतर्गत प्रतिषिद्ध करने का आदेश 4 मई 2011 को पारित किया - आदेश दो महिनों की अवधि तक विधिमन्य

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था - याचिका लंबित रहने के दौरान जिला मजिस्ट्रेट द्वारा कम्पनी-याची का कारोबार प्रतिषिद्ध करने का आदेश दिनांक 1 जुलाई 2011 को पारित किया - अभिलेख पर यह दर्शाने हेतु कोई सामग्री नहीं कि जिला मजिस्ट्रेट अथवा अन्य प्राधिकारी द्वारा आदेश की अवधि बढ़ाये जाने के लिए राज्य सरकार से कोई निवेदन किया - राज्य सरकार ने पूर्व में पारित आदेश की अवधि बढ़ाने के लिए जिला मजिस्ट्रेट को मंजूरी प्रदान नहीं की - अभिनिर्धारित - दिनांक 1 जुलाई 2011 को दण्ड प्रक्रिया संहिता की धारा 144 के अंतर्गत जिला मजिस्ट्रेट द्वारा पारित द्वितीय आदेश उसके किसी प्राधिकार एवं शक्ति के बाहर है।

C. Constitution, Article 226 - Writ Petition - Petitioner-Company has not placed all the facts before the Court rather it has concealed material facts in order to camouflage its activities - Prima-facie, the petitioner-company has played fraud with the Court - The petitioner-company is not entitled to any relief under Article 226 of the Constitution, which is a discretionary and equitable relief.

ग. संविधान, अनुच्छेद 226 - रिट याचिका - याची-कम्पनी ने न्यायालय के समक्ष सभी तथ्य प्रस्तुत नहीं किये बल्कि अपनी क्रियाकलापों को छिपाने के उद्देश्य से उसने तात्त्विक तथ्यों को छिपाया है - प्रथम दृष्टया, याची-कम्पनी ने न्यायालय के साथ छल किया है - याची-कम्पनी संविधान के अनुच्छेद 226 के अंतर्गत किसी अनुतोष की हकदार नहीं है, जो कि विवेकाधीन एवं साम्यापूर्ण अनुतोष है।

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

Cases referred :

AIR 1984 SC 51, AIR 1971 SC 2486, AIR 1961 SC 884, AIR (39) 1952 SC 16, AIR 1978 SC 851, AIR 1988 SC 94, (2008) 12 SCC 481, (2007) 8 SCC 449, (2003) 9 SCC 401, (2010) 8 SCC 660, (2011) 5 SCC 708, 2008 AIR SCW 7923, (1999) 8 SCC 16.

A.K. Ganguli with Debesh Panda & V.K. Bharadwaj with Anand Bharadwaj, for the petitioner.

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

Short Note

*(126)

Before Mr. Justice R.S. Jha

W.P. No. 4031/2009 (Jabalpur) decided on 18 August, 2011

PADAM SINGH SHAKYA

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

Service Law - Departmental Enquiry - Compulsory retirement - Petitioner, working as a constable in CISF was charge-sheeted on

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ground that he had permitted his sister-in-law to stay alongwith his family in the Government quarter allotted to him without obtaining prior permission from the concerned authorities and introduced her to a constable with the intention of establishing a matrimonial relationship - After enquiry report a punishment of compulsory retirement was imposed upon the petitioner - Held - Rule 8 of the House Rent and City Compensatory allowance Rules 'sister-in-law' has specifically been mentioned in Rule 8(iii) as a close relative who can live in the Government quarter alongwith a Government servant - Act of petitioner in permitting his sister-in-law to stay with him, does not fall foul of any of the instructions issued by the respondents or any of the conduct rules and, therefore, does not amount to a misconduct under the provisions of the Act and the Rules - Order of imposition of punishment upon the petitioner can not be sustained - Petitioner directed to be reinstated.

सेवा विधि - विभागीय जांच - अनिवार्य सेवानिवृत्ति - सीआईएसएफ में आरक्षक के पद पर कार्यरत याची को इस आधार पर आरोपित किया गया कि उसने संबंधित प्राधिकारियों से पूर्वानुमति अभिप्राप्त किये बिना अपनी साली को अपने परिवार के साथ उसे आवंटित किये गये सरकारी क्वार्टर में रहने की अनुमति दी और वैवाहिक संबंध स्थापित करने के उद्देश्य से उसे एक आरक्षक से परिचय कराया - जांच रिपोर्ट के पश्चात याची पर अनिवार्य सेवानिवृत्ति की शास्ति अधिरोपित की गई - अभिनिर्धारित - मकान किराया और नगर मत्ता नियम के नियम 8, नियम 8(iii) में 'साली' को करीबी रिश्तेदार के रूप में विनिर्दिष्ट रूप से उल्लिखित किया गया है, जो सरकारी कर्मचारी के साथ सरकारी क्वार्टर में रह सकती है - अपनी साली को अपने साथ रहने की अनुमति देने का याची का कृत्य, प्रत्यर्थी द्वारा अथवा किसी आचरण नियमों द्वारा जारी किये गये किसी अनुदेशों के साथ छल नहीं है, इसलिए अधिनियम तथा नियमों के उपबंधों के अंतर्गत अवचार की कोटि में नहीं आता - याची पर शास्ति के अधिरोपण का आदेश कायम नहीं रखा जा सकता - याची को बहाल करने के लिए निर्देशित किया गया।

A.P. Singh, for the petitioner.

Vikram Singh, for the respondents.

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Short Note

*(127)

Before Mr. Justice Rajendra Menon

W.P. No. 18870/2010 (Jabalpur) decided on 3 August, 2011

PARAS LIFESTYLES PRIVATE LIMITED & anr.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

Municipal Corporation Act, M.P. (23 of 1956), Section 292A & B - Amending Provision - Limit to the extent of application - Petitioners, private colonizer submitted application for development & building permission on 23.12.2009 - Requisite deposits were made by petitioners with regard to fees payable - Amended provision came into force on 19.04.2010 - **Held -** Applications for building permission or development of colony submitted have to be processed and decided in accordance to the statutory provisions applicable on the date permission or sanction is accorded - In insisting on doing so the respondents committed no error - **Petition dismissed.**

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 292ए व बी - संशोधी उपबंध - उपयोजन के विस्तार की सीमा - याचीगण, निजी उपनिवेशों ने विकास एवं निर्माण की अनुज्ञा हेतु 23.12.2009 को आवेदन प्रस्तुत किया - देय फीस के संबंध में याचीगण द्वारा आवश्यक निधि जमा की गई - संशोधित उपबंध 19.04.2010 को लागू हुआ - अभिनिर्धारित - कॉलोनी के विकास एवं निर्माण अनुमति हेतु प्रस्तुत आवेदनों को उस तिथि को उपयोज्य कानूनी उपबंधों के अनुसार प्रसंस्कृत कर निर्णित किया जाना होगा जिस तिथि को अनुज्ञा अथवा मंजूरी प्रदान की गई - ऐसे करने का आग्रह करके प्रत्यर्थियों ने कोई भूल नहीं की - याचिका खारिज।

Cases referred :

AIR 1960 SC 980, (1974) 1 SCC 567, (1976) 1 SCC 88, AIR 1990 SC 405, AIR 1990 SC 1233, (1994) 5 SCC 593, AIR 1995 SC 142, AIR 2000 SC 3282, (2001) 8 SCC 24, (2007) 8 SCC 705, (2007) 9 SCC 665, (2007) 15 SCC 406, (2004) 8 SCC 733, (2004) 1 SCC 663, (2007) 11 SCC 40, (2006) 5 SCC 702, (1996) 5 SCC 268, 2007 AIR SCW 4387, AIR 1981 SC 711, 1995 MPLJ 710, W.P. 619/2004 decided on 28.06.2011, (2006) 8 SCC 502, (1999) 7 SCC 314.

Sidharth Gupta, for the petitioners.

S.M.Lal, G.A. for the respondents No. 1, 2, 3 & 5.

Sanjay K. Agrawal, for the respondent No.4.

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Short Note (DB)

*(128)

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

M.Cr.C. No. 1983/2011 (Jabalpur) decided on 22 July, 2011

RAHIS AHMED

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

A. Penal Code (45 of 1860), Section 420 - Cheating - Company was extended benefit of ICD by MPSIDC without obtaining adequate security for repayment thereof - No resolution was passed by Board of Directors of Company for securing financial assistance in the form of ICD - Company was facing financial crisis and ultimately winded up - Held - Suppression of material facts as to adverse financial status of Company of which petitioner was Managing Director for securing loan by way of ICDs prima facie amount to cheating.

क. दण्ड संहिता (1860 का 45), धारा 420 - छल - एमपीएसआईडीसी द्वारा कम्पनी को आईसीडी का लाभ दिया गया, उसके प्रतिसंदाय हेतु पर्याप्त प्रतिभूति अभिप्राप्त किये बिना - कम्पनी के निदेशकों के बोर्ड द्वारा आईसीडी के रूप में वित्तीय सहायता प्रतिभूत करने हेतु कोई संकल्प पारित नहीं किया गया - कम्पनी वित्तीय संकट का सामना कर रही थी और अंततः परिसमापन किया गया - अभिनिर्धारित - आईसीडी के जरिये ऋण प्रतिभूति हेतु कम्पनी, जिसका याची प्रबंध निदेशक था, की विपरीत वित्तीय स्थिति के महत्वपूर्ण तथ्य का छिपाव, प्रथम दृष्ट्या, छल की कोटि में आता है।

B. Penal Code (45 of 1860), Section 120A - Conspiracy - It is a distinct offence - The very agreement, concert or league is the ingredient of the offence - Not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-participants in the main object of conspiracy - There may be so many devices and techniques adopted to achieve the common goal of conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator be interested - There must of unity of object or purpose but there may be plurality of means some times even unknown to the others - Only relevant fact is that all means adopted and illegal acts done must be purported to be in furtherance of the object of conspiracy.

ख. दण्ड संहिता (1860 का 45), धारा 120ए - षडयंत्र - यह सुभिन्न

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अपराध है – सहमति, सामान्य मति या सन्धि, अपराध का घटक है – आवश्यक नहीं है कि सभी षडयंत्रकारियों को षडयंत्र के प्रत्येक व्यौरे की जानकारी होनी चाहिए, जब तक कि वे षडयंत्र के मुख्य उद्देश्य में सहभागी हैं – षडयंत्र के सामान्य उद्देश्य को प्राप्त करने के कई साधन एवं तरीके अंगीकृत किये जा सकते हैं और वास्तविक लक्ष्य को हासिल करने के समान उद्देश्य, जिसमें प्रत्येक सहयोगी हितबद्ध होगा, ऐसे उद्देश्य के साथ किये कृत्यों की श्रृंखला में कार्यों का विभाजन हो सकता है – उद्देश्य या प्रयोजन की समानता होनी चाहिए किन्तु ऐसे साधनों का बहुत्व भी हो सकता है जो अन्य को अज्ञात है – सुसंगत तथ्य केवल यह है कि अंगीकृत किये गये सभी साधन एवं किये गये सभी अवैध कृत्य षडयंत्र के उद्देश्य के अग्रसरण में होने का तात्पर्य निकलना चाहिए।

C. Prevention of Corruption Act (49 of 1988), Section 13(1)(d)
- Status of accused - Non-Public Servant - Applicant is Managing Director of a Company - Status of applicant is of no relevance as the offences under the Act can be abetted by or committed in conspiracy with non-public servants also.

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – अभियुक्त की स्थिति – अलोक सेवक – आवेदक कम्पनी का प्रबंध निदेशक है – अभियुक्त की स्थिति का कोई औचित्य नहीं क्योंकि अधिनियम के अंतर्गत अपराधों को अलोक सेवकों द्वारा भी अवप्रेरित किया जा सकता है अथवा उनके साथ षडयंत्र रचकर भी कारित किया जा सकता है।

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

Cases referred:

(2010) 10 SCC 660, (2010) 10 SCC 479, (2009) 2 SCC (CRI) 1113, (2009) 2 SCC (CRI) 103, (2008) 2 SCC (CRI) 686, (2008) 2 SCC (CRI) 692, 2006(1) CRIMES 65 (SC), JT 2011 (2) SC 586, AIR 2010 SC 2835, (2010) 2 SCC (CRI) 1113, (2009) 10 SCC 48, (2007) 12 SCC 788, (2007) 5 SCC 103, (2007) 3 SCC (CRI) 203, (2007) 3 SCC 693, (2006) 10 SCC 581, (2005) 8 SCC 89, AIR 1998 SC 128, AIR 1957 SC 340, AIR 1965 SC 682, AIR 1971 SC 885, AIR 1977 SC 2433, AIR 1999 SC 2556, (2005) 13 SCC 540, AIR 1960 SC 866, AIR 1992 SC 604, (2005) 1 SCC 122.

Kishore Shrivastava with S.A. Khan, for the applicant.
Umesh Pandey, for the non-applicant/State.

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Short Note

*(129)

Before Mr. Justice G.D. Saxena

Cr.Rev. No. 959/2006 (Gwalior) decided on 20 July, 2011

RAMBABU SHARMA

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 197 - Sanction for prosecution - Appellant was charged for offence punishable under Section 409 of I.P.C. - Provision of Section 197 has no application when a public servant is prosecuted for such offence.

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 - अभियोजन के लिए मंजूरी - अपीलार्थी को आई.पी.सी. की धारा 409 के अंतर्गत दण्डनीय अपराध हेतु आरोपित किया गया - धारा 197 के उपबंध की कोई प्रयोज्यता नहीं जब ऐसे अपराध हेतु लोक सेवक को अभियोजित किया जाता है।

B. Penal Code (45 of 1860), Section 409 - Misappropriation of funds - Appellant working as Manager on deputation for a short time of four months - No cash/cheque was entrusted to him nor he misappropriated the cash property - Accused No. 2 who had received the money did not make entry about of payment received and about transaction in stock register, thereby causing wrongful gain to himself and loss to society - If some body on whom one relies commits theft, he can not be held criminally liable for the other - Appellant/accused No. 1 entitled for acquittal.

ख. दण्ड संहिता (1860 का 45), धारा 409 - निधि का दुर्विनियोजन - अपीलार्थी प्रबंधक के रूप में प्रतिनियुक्ति पर चार माह के अल्पकाल के लिए कार्यरत था - ना तो उसे कोई रकम/चेक सौंपा गया और न ही उसने रकम सम्पत्ति का दुर्विनियोजन किया - अभियुक्त क्र. 2, जिसने रकम प्राप्त की, अदायगी की प्राप्ति और संव्यवहार के बारे में स्टॉक रजिस्टर में प्रविष्टि नहीं की जिस कारण स्वयं को सदोष अभिलाम और समाज को हानि कारित की - यदि कोई व्यक्ति किसी पर विश्वास करता है, वह चोरी करता है, तो उसे अन्य के लिए दण्डिक रूप से दायी नहीं ठहराया जा सकता - अपीलार्थी/अभियुक्त क्र. 1 दोषमुक्ति का हकदार।

Cases referred:

(2006) 2 SCC 737, 1992(2) MPWN S.N. 1, 2006(4) MPLJ 56, 2002 (2) MPLJ 208, 2005(1) MPLJ 44, AIR 2006 SC 2211.

Rakesh Kumar Dubey, for the applicant.

R.K. Shrivastava, PL for the non-applicant/State.

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Short Note (DB)

*(130)

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

W.P. No. 8910/2007 (Jabalpur) decided on 3 August, 2011

RAMKISHORE TIWARI

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Constitution, Article 226 - Alternative Remedy - Bar - Alternative remedy is not an absolute bar and it is a self imposed restriction - Once the High Court entertains the writ petition and hears the same on merits, the petition thereafter can not be rejected on the ground that statutory remedy is not availed off.

क. संविधान, अनुच्छेद 226 - वैकल्पिक उपचार - वर्जन - वैकल्पिक उपचार आत्यांतिक वर्जन नहीं है और यह स्वतः अधिरोपित निर्बंधन है - एक बार जब उच्च न्यायालय रिट याचिका ग्रहण करता है और गुणदोषों पर उसे सुनता है, तत्पश्चात याचिका को इस आधार पर अस्वीकार नहीं किया जा सकता कि कानूनी उपचार का अवलंब नहीं लिया गया।

B. Constitution, Article 226 - Election Process - Maintainability of writ petition - Where there is material on record to demonstrate that the entire election process is sham and it has no sanctity in the eye of law the entire election process stands vitiated - Writ Petition maintainable.

ख. संविधान, अनुच्छेद 226 - चुनाव कार्यवाही - रिट याचिका की पोषणीयता - जहां यह दर्शाने हेतु अमिलेख पर सामग्री है कि संपूर्ण निर्वाचन प्रक्रिया मिथ्या है और विधि की दृष्टि में उसकी कोई मान्यता नहीं है, संपूर्ण निर्वाचन प्रक्रिया दूषित हो जाएगी - रिट याचिका पोषणीय।

C. Election - Co-operative Society - Mass rejection of nomination papers resulting in unopposed election of members - Even State Counsel could not dispute that nomination papers were rejected on factually incorrect grounds and the candidates whose nomination papers were rejected were entitled to contest the elections - Irresistible conclusion is that entire process of election was sham and it was no election in the eye of law and entire election process was vitiated - Petition allowed.

ग. चुनाव - सहकारिता समिति - बड़े पैमाने पर नामनिर्देशन पत्रों की नामजूरी के परिणामतः सदस्यों का निर्विरोध निर्वाचन - राज्य अधिवक्ता भी इसका

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विरोध नहीं कर पाये हैं कि नामनिर्देशन पत्रों को तथ्यात्मक रूप से अनुचित आधारों पर नामंजूर किया गया था और जिन प्रत्याशियों के नामनिर्देशन पत्र नामंजूर किये गये थे वे चुनाव लड़ने के लिए हकदार थे – अप्रतिरोध्य निष्कर्ष यह है कि निर्वाचन की संपूर्ण प्रक्रिया मिथ्या थी तथा विधि की दृष्टि में वह कोई निर्वाचन था ही नहीं एवं संपूर्ण निर्वाचन प्रक्रिया दूषित थी – याचिका मंजूर।

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

Cases referred:

(1987) 1 SCC 227, (2005) 5 SCC 598, (2007) 4 SCC 380, 2010(1) MPHT 273, AIR 1971 SC 33, AIR 1952 SC 64, (1988) 2 SCC 277, (2004) 7 SCC 492, AIR 1978 SC 851, 1989 MPLJ 208, W.P. No. 2090/2007, (1973) 4 SCC 225, (1975) SUPP. SCC 1, (2006) 8 SCC 212, (1987) 1 SCC 727, (2003) 7 SCC 546.

A.M. Trivedi with Naveen Dubey, for the petitioner.

Sanjay Dwivedi, G.A. for the respondents No. 1 to 3.

Ashok Tiwari, for the respondents No. 5 to 12.

Short Note (DB)

*(131)

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

Cr. A. No. 278/2000 (Jabalpur) decided on 14 July, 2011

RAVI KUMAR RAJWANI

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Demand - Appellant directed complainant to handover money to accused No. 2 - Money handed over to accused No. 2 which was recovered from him - There is a clear evidence of demand - Appellant guilty of commission of offence punishable under Section 13(1)(d) of P.C. Act.

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – माँग – अपीलार्थी ने अभियुक्त क्र. 2 को रकम हस्तांतरित करने का शिकायतकर्ता को निर्देश दिया – रकम अभियुक्त क्र. 2 को सौंपी गयी जिसे उसके पास से बरामद किया गया – माँग की स्पष्ट साक्ष्य है – अपीलार्थी पी.सी. अधिनियम की धारा 13(1)(डी) के अंतर्गत दण्डनीय अपराध कारित करने का दोषी।

B. Prevention of Corruption Act (49 of 1988), Section 7 - Abatement - Accused No. 2 accepted money from the complainant on the directions of the accused No. 1 - No explanation given by accused No. 2 except that no money was recovered from him - Held - Once

NOTES OF CASES SECTION

accused comes into possession of tainted money, the only inference is that he accepted the same and thus obtained the pecuniary advantage - Appeal dismissed.

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 - उपशमन - अभियुक्त क्र. 2 ने अभियुक्त क्र. 1 के निर्देशों पर शिकायतकर्ता से रकम स्वीकार की - अभियुक्त क्र. 2 द्वारा, उससे कोई रकम बरामद नहीं हुई, के अलावा और कोई स्पष्टीकरण नहीं दिया गया - अभिनिर्धारित - एक बार जब अभियुक्त दूषित रकम का कब्जा ले लेता है, केवल यह निष्कर्ष निकलता है कि उसने वह स्वीकार की है और इस प्रकार घनीय लाभ अभिप्राप्त किया - अपील खारिज।

The judgment of the Court was delivered by :
M.A. SIDDIQUI, J.

Cases referred:

AIR 2004 SC 1242, AIR 2008 SC 108, (1998) 9 SCC 268, AIR 1996 SC 490, AIR 1956 SC 217(1), AIR 2002 SC 486, AIR 2006 SC 836, AIR 1974 SC 1516, AIR 1979 SC 1191, AIR 2000 SC 3377, (2009) 3 SCC 779, (1995) 3 SCC 567, (2006) 11 SCC 473, (2006) 12 SCC 277, AIR 1976 SC 1497, AIR 1979 SC 1408, (2001) 1 SCC 691, (2000) 9 SCC 752.

S.C. Datt with Siddharth Datt, for the appellant.
Vikram Singh, for the respondent/CBI.

Short Note

*(132)

Before Mr. Justice A.K. Shrivastava

W.P. No.1041/2004 (Jabalpur) decided on 28 April, 2011

THELA GUMTI FOOTPATH VYAPARI SEVA SAMITI ...Petitioner
Vs.

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

A. Evidence Act (1 of 1872), Section 115 - Promissory Estoppel
- Estoppel should always be clear, unambiguous and certain - Promise should be definite and beyond any doubt - It can only arise from a clear definite statement - Not necessarily susceptible of only one interpretation but such as will reasonably be understood in the senses contended for and for this purpose the entire material must be looked upon.

क. साक्ष्य अधिनियम (1872 का 1), धारा 115 - वचन विबन्ध - विबन्ध सदैव स्पष्ट, असंदिग्ध, एवं निश्चित होना चाहिए - वचन निश्चित एवं संदेह से परे होना चाहिए - यह केवल स्पष्ट निश्चित विवरण से उत्पन्न हो सकता है - आवश्यक रूप से केवल एक निर्वचन का पात्र नहीं बल्कि ऐसा, जैसा कि तर्क के बोध में युक्तियुक्त

NOTES OF CASES SECTION

रूप से समझा जाएगा और इस प्रयोजन हेतु संपूर्ण सामग्री का परीक्षण किया जाना चाहिए।

B. Constitution, Article 226 - Allotment of shops - Promissory Estoppel - Petitioners were carrying on their small business on the land which was used for constructing huge complex - Petitioners relied upon pamphlet and invitation card to contend that there was promissory estoppel to allot shops to them - Held - There is nothing in pamphlet and invitation card which could have triggered the principle of promissory estoppel - Petitioner not entitled for the relief they have claimed.

ख. संविधान, अनुच्छेद 226 - दुकानों का आवंटन - वचन विबंध - याचीगण उस भूमि पर अपना लघु व्यवसाय चला रहे थे जिसे भव्य कॉम्पलेक्स हेतु उपयोग किया जा रहा था - याचीगण ने उन्हें दुकानें आवंटित करने का वचन विबंध होने का तर्क प्रस्तुत करने हेतु, पुस्तिका एवं आमंत्रण पत्र को आधार बनाया - अभिनिर्धारित - पुस्तिका एवं आमंत्रण पत्र में ऐसा कुछ नहीं जिससे वचन विबंध लागू होता हो - याचीगण उनके द्वारा दावित अनुतोष के हकदार नहीं।

C. Constitution, Article 21 - Livelihood - Petitioners were carrying on their small business by putting gumtis on the site where the huge complex has been constructed - State is under obligation as well as constitutionally bound to rehabilitate them as they were carrying on their business in the said compound before the construction of the complex - If kiosks in said complex are not allotted to the vendors then they may be provided suitable alternative place where they can earn their livelihood.

ग. संविधान, अनुच्छेद 21 - आजीविका- याचीगण अपना लघु व्यवसाय उस स्थान पर गुमटी लगाकर चला रहे थे जहां भव्य कॉम्पलेक्स का निर्माण किया गया है - राज्य उन्हें पुनर्स्थापित करने के लिए बाध्यताधीन है तथा संवैधानिक रूप से आबद्ध है क्योंकि वे अपना व्यवसाय उक्त परिसर में कॉम्पलेक्स के निर्माण के पूर्व से चला रहे थे - यदि उक्त कॉम्पलेक्स में विक्रेताओं को छोटी दुकानें आवंटित नहीं की गई हैं तब उन्हें उपयुक्त वैकल्पिक स्थान उपलब्ध कराया जा सकता है जहां वे अपनी आजीविका अर्जित कर सकें।

Cases referred:

AIR 2008 SC 2045, (1891) 3 CH.D. 82, AIR 1979 SC 621.

Imtiyaz Hussain, for the petitioner.

Kapil Patwardhan, PL for the respondents No. 1 & 2.

Sanjeev Singh, for the respondent No.3.

I.L.R. [2011] M. P., 2309

SUPREME COURT OF INDIA

Before Mr. Justice Harjit Singh Bedi & Mrs. Justice Gyan Sudha Misra

Criminal Appeal No. 146-147/2008 decided on 19 July, 2011

PRAHALAD SINGH & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3, Penal Code (45 of 1860), Section 302 - Appreciation of Evidence - Murder case - Weapon and ammunition used is of uncertain make and quality - Normal pellet pattern based on standard weapons and ammunition, can not be applied with accuracy - Distance from which the shots fired can not therefore have the effect of dislodging a credible eye-witness account. (Para 6)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता (1860 का 45), धारा 302 - साक्ष्य का मूल्यांकन - हत्या का प्रकरण - उपयोग किये गये हथियार और गोला बारुद अनिश्चित बनावट एवं क्वालिटी के हैं - मानक हथियार और गोला बारुद पर आधारित सामान्य छर्रे का नमूना शुद्धता से लागू नहीं किया जा सकता - जिस दूरी से गोलियां चलाई गईं, उससे विश्वसनीय प्रत्यक्षदर्शी साक्षी का कथन प्रभावित नहीं हो सकता।

B. Evidence Act (1 of 1872), Section 3, Penal Code (45 of 1860), Section 149 - Common object - Appellants though armed with lathis did not use lathis in any manner - Only allegation against them is that they had exhorted their co-accused to fire at the opposite party - Possibility, that these accused were roped in on account of animosity, can not be ruled out - Benefit of doubt on that score must be given. (Para 7)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता (1860 का 45), धारा 149 - सामान्य उद्देश्य - अपीलार्थीगण यद्यपि लाठियों से सुसज्जित थे किन्तु उन्होंने किसी प्रकार से लाठियों का उपयोग नहीं किया - उनके विरुद्ध केवल यह अभिकथन है कि उन्होंने अपने सह अभियुक्त को विरोधी पक्षकार पर गोली चलाने के लिए प्रोत्साहित किया - इस संभावना से इंकार नहीं किया जा सकता कि इन अभियुक्तों को वैमनस्यता के कारण आलिप्त किया गया हो - इस कारण संदेह का लाभ देना होगा।

ORDER

This Order will dispose of all the above appeals as they arise from a common judgment.

The facts of the case are as under:

1. At 12.50 p.m. on the 30th September, 1996 as the deceased Ganeshram accompanied by his relative Annilal (PW.2) and his son Chandan Singh (PW.5) were about to cross the Narmada river on a boat, the five accused, Rammilan Lodhi and Babulal Lodhi, both armed with shot guns, and Dullam, Hukum and Prahlad armed with lathis came out of a bush. On seeing Ganeshram and the others Prahlad, Hukum and Dullam exhorted Rammilan and Babulal to fire at Ganeshram. On this exhortation Rammilan first fired a shot at Ganeshram which hit him on the abdominal area killing him instantaneously and a shot fired by Babulal caused a severe injury on the head of Annilal (PW.2). Chandan Singh (PW.5) who was behind them at some distance answering the call of nature witnessed the entire incident. He rushed to the spot and first removed the injured Annilal (PW.2) to the village and thereafter conveyed the information about the incident to PW.6 Saheb Singh – his brother. He also arranged for a tractor on which Annilal was carried to the hospital at Narsinghpur about 20 k.m. away and the first information report was lodged in the police station Narsinghpur at about 2.30 p.m. The Investigating Officer thereafter reached the place of incident and made the necessary inquiries and also sent the dead body for its post-mortem examination. The post-mortem examination revealed a large number of pellet injuries on the person of the deceased. Rammilan was also arrested and on his disclosure statement under Section 27 of the Evidence Act a muzzle loading shot gun was seized along with pellets, gun powder and brass metal caps.

2. During the course of the trial Annilal(PW.2) did not support the prosecution as he was equally related to the complainant as well as the accused party. The prosecution accordingly relied on the statement of PW.5-Chandan Singh and PW.6-Saheb Singh, as also the medical evidence. The Trial Court however found that the evidence of PW.2 partly supported the other evidence inasmuch that he had admitted his presence and that of Chandan Singh at the time of the incident. The Trial Court also noted that as the charge against the accused was under Sections 302, 307, 148 and 149 of the IPC, all the accused (notwithstanding the fact that they had not fired either at the injured or the deceased) were liable to be roped in on a charge of murder. The Trial Court accordingly convicted all the accused under Sections 302 and 307 read with Section 149 and sentenced them to undergo several terms of imprisonment; all the sentences to run concurrently.

3. An appeal was thereafter taken by the accused to the High Court and

during the pendency of the appeal Babulal, one of the main accused is said to have died. The High Court vide its judgment dated 11th September 2007 which has been impugned before us dismissed the appeal on facts and findings similar to ones recorded by the Trial Court. It is in this background that the matter is before us and after grant of leave and has been heard by us today.

4. Mr. Shiv Sagar Tiwari, the learned counsel for the appellants-Prahlad, Dullam and Hukum in CrI.A. Nos. 146- 147/2008 at the very outset pointed out that Annilal (PW.2) having disowned the prosecution story, the entire story hinged on the statement of PW.5 and that as there was no evidence to suggest that the appellants had caused any injury to either of the victims although they were armed with lathis, clearly ruled out their participation. He has also urged that the fact that the parties appeared to be at logger heads on account of election rivalries was said to be the reason for murder but as per the statement of Saheb Singh (PW.6), the election dispute was between Gendalal the father of the Rammilan and the deceased but he had subsequently withdrawn his nomination form, and as such the dispute no longer existed. He has also pointed out that it is by now well settled that in the case of a solitary witness the evidence of that witness had to be wholly credible before the conviction could be recorded thereunder.

5. Mr. V.P. Apan, the learned counsel representing Rammilan the appellant in CrI.A.No. 1800/2008, has in addition referred to the defence evidence of Sita Ram (DW.1) the Contractor at the river crossing who testified that he had not seen any of the accused and only Annilal had been present and he had told him that some incident had taken place.

6. We have considered the arguments advanced by the learned counsel for the parties and perused the record. We must emphasise that the evidence of Chandan Singh (PW.5) is wholly reliable. The First Information Report had been recorded in the police station 20 k.m. away within 2 hours of the incident. The very spontaneity of the FIR indicates that Chandan Singh had been present at the murder site. Likewise Sahab Singh (PW.6) who had arranged the tractor to take Annilal to the police station clearly supports the view that Chandan Singh had been present at the site and the two had carried the injured to the hospital. Annilal, too supported the prosecution to the extent that he admitted the presence of PW.5 at the time of incident. The medical evidence also supports the eyewitnesses account. It is the admitted case that Babulal and Rammilan were both armed with muzzle loading 12 bore shotguns which could have

2312 B. D. Sharma (M/s) Vs. Western Coal. Ltd.(SC) I.L.R.[2011] M.P., caused the injuries found on the person of the deceased as well as on Annilal (PW.2). Some arguments had been occasioned before the courts below with regard to the distance from which shots had been fired. The Courts have found that the shots had been fired from a short distance. We must however emphasis that where the weapon and ammunition used is of uncertain make and quality the normal pellet pattern based on standard weapons and ammunition, cannot be applied with accuracy. The distance from which the shots have been fired cannot therefore have the effect of dislodging a credible eyewitness account in such a case.

7. The appellants Prahlad, Hukum Singh and Dullam were armed with lathis which had not been used by them in any manner and the only allegation against them is that they had exhorted their co-accused to fire at the opposite party. We are therefore of the opinion that the possibility that these three accused have been roped in on account of animosity cannot be ruled out and we must give them the benefit of doubt on that score.

8. The appeal of Rammilan i.e. Crl. A. No. 1180/2008 is dismissed whereas Crl. Appeal Nos. 146-147/2008 are allowed. The accused – appellants Prahlad, Dullam and Hukum are said to be in custody. They shall be released forthwith if not required in connection with any other case.

Fee of the amicus curiae is fixed at Rs.7,000/-.

Order accordingly.

I.L.R. [2011] M. P., 2312

SUPREME COURT OF INDIA

Before Mr. Justice R.V. Raveendran & Mr. Justice A.K. Patnaik

Civil Appeal No. 5847-5848/2011 decided on 20 July, 2011

B.D. SHARMA FIRM (M/S)

...Appellant

Vs.

WESTERN COALFIELDS LIMITED

...Respondent

Arbitration Act (10 of 1940), Sections 30 & 33 - Arbitral awards can be interfered only on limited grounds - The Court does not sit in appeal over the findings of the Arbitrator - It will interfere with an award if there is an error apparent on the face of the award or if there are apparent inconsistencies in the award or if the Arbitrator has misconducted himself or the proceedings.

(Para 5)

माध्यस्थम् अधिनियम (1940 का 10), धाराएँ 30 व 33 – माध्यस्थम अवार्ड में केवल सीमित आधारों पर हस्तक्षेप किया जा सकता है – न्यायालय माध्यस्थ के निष्कर्षों पर अपील के लिए नहीं बैठता – वह अवार्ड में हस्तक्षेप करेगा यदि त्रुटि अवार्ड से स्पष्ट रूप से प्रकट होती हो अथवा यदि अवार्ड में दृष्यमान असंगतियां हैं अथवा यदि माध्यस्थ ने स्वयं या कार्यवाही में अवचार किया हो।

Case referred :-

2007(2) SCC 453.

ORDER

Leave granted. Heard.

2. The appellant made several claims against the respondent and they were referred to arbitration. The Arbitrator made an award dated 12.8.1996 and granted the following amounts:

(a)	Infructuous overheads	-	Rs.5,85,960/-
(b)	Loss of profits	-	Rs. 43,088/-
(c)	Loss due to idel labour	-	Rs. 50,000/-
(d)	Escalation	-	Withdrawn
(e)	Interest on delayed payments	-	Rs. 27,190/- (at 12% p.a.)
(f)	Refund of security deposit	-	Rs.1,00,000/-
(g)	Interest	-	Not awarded
(h)	Payment of final bill	-	Direction issued to record final measurement and then make payment in accordance with the agreement rates for quantities not covered by earlier bills.
(i)	Pendente lite interest and future interest	-	12%p.a. pendente lite [15%p.a. in case of delay beyond 30 days]

3. The respondent challenged the said award under Section 30 and 33 of Arbitration Act, 1940. The Civil Court, by judgment dated 10.4.2000, rejected the objections and made the award, a rule of the Court. Feeling aggrieved, the respondent filed an appeal before the High Court. The High Court allowed the appeal in part by judgment dated 28.2.2007. It set aside the award in regard to claims (a), (b), (c), (e), (g) and (i) on the ground that the arbitrator had travelled beyond the express terms of the contract and

2314 B. D. Sharma (M/s) Vs. Western Coal. Ltd.(SC) I.L.R.[2011] M.P., granted claims which were expressly barred by the provisions of the agreement. It, however, upheld the award in regard to claims (f) and (h). The said judgment of the High Court is challenged in these appeals by special leave.

4. The High Court has 'interfered with the award in regard to items (a), (b) & (c) on the assumption that the same were contrary to Clause 3.2.0 which reads thus:-

"3.2.0. If there be any dislocation in the issue of cement beyond the control of Western Coal Fields Limited, the Contractor/ Agency shall not have any claim whatsoever for the same, and in such an eventuality, extension of time of completion only to a suitable extent will be considered."

The High Court, relied upon the decision of this Court in *Ramnath international Construction Pvt. Ltd. Vs. Union of India*, (2007) 2SCC 453, wherein the Court held that where the contract provided that if in cases of delays attributable to employer, the contractor will be entitled for only extension of time and if the contractor had sought and obtained extension of time, he would not be entitled to claim any compensation on the ground of such delay.

5. The Arbitral awards can be interfered only on limited grounds. The Court does not sit in appeal over the findings of the Arbitrator. It will interfere with an award if there is an error apparent on the face of the award or if there are apparent inconsistencies in the award or if the Arbitrator has misconducted himself or the proceedings. If clause 3.2.0 is to be invoked to deny a claim of the contractor, there should be a clear finding (a) that the delay was only on account of issue of cement, and (b) such delay in issue of cement was for reasons beyond the control of the respondent (Western Coal Fields Limited). If the delay was on account of several grounds and if there is no pleading or proof by the respondent that the dislocation in issue of cement was for reason beyond its control, clause 3.2.0 will not operate. In this case, the award clearly showed that the delay alleged was not only the delay in supply of cement but also on several other grounds one of which was failure to clear the appellant's monthly bills in time as stipulated in the contract and such delay went upto 780 days as against the stipulated one month period. There was also no specific claim nor finding that the delay in supply of cement was due to circumstances beyond the control of the respondent.

6. Having regard to the limited scope of interference in regard to arbitral award, we are of the view the High Court was not justified in interfering with the award in regard to claims (a), (b) and (c).

7. It may also be noted that as long back as 21.5.1999, the respondent had suggested that if the appellant's claim for interest is given up, the respondent will consider and agree for the award in regard to other claims, by way of out of court settlement. The appellant has agreed to give up the interest if the other claims under the award were paid.

8. In view of the above, these appeals are allowed in part. The judgment of the High Court, in so far as claims (a), (b) and (c) is reversed. The judgment of the High Court in regard to claims (f) and (h) is upheld. In so far as the award of interest under claims (g) and (i), they are set aside as given up, as stated in para 7 above. Claim (d) was given up even before the Arbitrator.

9. If the amount due as per the award is not paid or deposited in the trial Court within three months from today, the appellant will be entitled to interest on the amount outstanding at the rate of 12% per annum from the date of the award till the date of payment. Parties to bear their respective costs.

Appeal partly allowed.

I.L.R. [2011] M. P., 2315

WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma

W.A. No. 804/2008 (Indore) decided on 20 June, 2011

STATE OF M.P. & anr.

...Appellants

Vs.

SHAIENDRA

...Respondent

Service Law - Civil Services (Classification Control and Appeal) Rules, M.P. 1966, Rule 10 - Respondent was charge-sheeted for major misconduct but the minor penalty was imposed - In view of the circular dated 13.01.2005, he was entitled for full salary of the entire period of suspension.

Not granting the full salary of the said period on the ground that during the period of suspension the respondent did not report the Headquarter

any show cause notice or opportunity of hearing was ever given to the respondent - In the circumstances, in the absence of any show cause notice or opportunity of hearing, in our considered view the benefit of the salary of the said period could not have been denied to the respondent.

However, we make it clear that in case the appellants find that the respondent had remained absent from the Headquarter without permission and has violated any circular or rule to that effect, it will be open for the competent authority of the appellants to proceed against the respondent in terms of the circular dated 26.09.1968 issued by the General Administration Department of the State Government vide Gyapan Kra. 21709 CR 260-I(3) 68 by holding departmental enquiry after issuing charge sheet for such indiscipline. (Paras 7 & 9)

सेवा विधि -सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम म.प्र., 1966, नियम 10, - प्रत्यर्थी को घोर कदाचार के लिए आरोपित किया गया परंतु लघु शास्ति अधिरोपित की गई - परिपत्र दि. 13.01.2005 को दृष्टिगत रखते हुए, निलंबन की संपूर्ण अवधि का पूर्ण वेतन पाने के लिए वह हकदार था।

Case referred :

2004(1) MPHT 22.

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

A.K. Sethi with Rahul Sethi, for the respondent.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. :-By filing this writ appeal the appellants have challenged the order dated 13.05.2008 passed by the learned Single Judge of this Court in Writ Petition No.7434/2006 (s).

2. Brief facts necessary for disposal of this writ appeal are that the respondent was working on the post of Sub-Engineer in the Energy Department of the State Government. He was suspended on 22.12.2001 for the misconduct. Thereafter, a charge sheet about major misconduct was issued to him on 02.02.2002. After holding departmental enquiry he was inflicted with the penalty of withholding of two increments without cumulative effect under Rule 10 of the M.P.Civil Services (Classification Control and Appeal) Rules, 1966. The respondent submitted a representation claiming full salary of the suspension period (22.12.2001 to 29.04.2005). When no order was passed on his representation he approached this Court by filing a writ petition No.3475/

2006 (s). The said writ petition was disposed of by a learned Single Judge vide order dated 11.08.2006 directing the appellants herein to consider the respondent's prayer for grant of full salary during the period of suspension and pass a reasoned order keeping in view the law laid down by this Court in the case of *Y.S.Sachan Vs. State of M.P. & others* 2004 (1) MPHT 22.

3. In pursuance to the aforesaid directions issued by this Court the respondent's representation was considered by the appellants and vide order dated 26.10.2006 the same was rejected by holding that during the said period of suspension the respondent was not present at the Headquarter, Ratlam fixed while suspending him. The said order dated 26.10.2006 was assailed by the respondent by filing Writ Petition No.7434/2006 (s).

4. When the said writ petition came up for hearing it was not disputed by the learned Dy. Govt. Advocate for the appellants herein that the controversy involved is covered by the judgment of this Court in the case of *Y.S.Sachan Vs. State of M.P. & others* (supra). Accordingly, the learned Single Judge disposed of writ petition holding that the respondent herein shall be entitled to full salary for the period he had remained under suspension as per his entitlement. Feeling aggrieved the appellants/State has filed this writ appeal.

5. It is not in dispute that the departmental proceedings instituted against the respondent who remained suspended during the period, for the imposition of a major penalty, finally ended with imposition of minor penalty of withholding of two increments without cumulative effect. In the circumstances in view of the Circular dated 13.01.2005 which was filed with the writ petition as Annexure P-8, as also in view of the law laid down in the case of *Y.S.Sachan Vs. State of M.P. & others* (supra) the respondent was very much entitled for full salary of the period of his suspension. Para 6 of the said Circular reads thus :-

“मुख्य शास्ति हेतु संस्थित विभागीय जांच में यदि किसी निलंबित शासकीय सेवक पर जांच उपरांत लघु शास्ती ही अधिरोपित की जाती है तो उसका निलम्बन औचित्यपूर्ण नहीं माना जा सकता। अतः राजस्व मंडल ने निर्णय लिया है कि ऐसे मामलों में संबंधित शासकीय सेवक की निलम्बन अवधि को मूलभूत नियम 54 बी के परिप्रेक्ष्य में कर्त्ताव्य अवधि मान्य कर निलम्बन अवधि के सम्पूर्ण वेतन-भत्ते (शासकीय सेवक को निलम्बन अवधि में भुगतान किए गए “जीवन निर्वाह भत्ते” की राशि कस समायोजन कर दिए जाए) यह निर्णय इस ज्ञापन के प्रसारित होने की तिथि से लागू होगा तथा जिन प्रकरणों में निर्णय लिया जा चुका है, वे पुनः नहीं खोले जाएंगे।”

6. From the order dated 26.10.2006 which was subject matter of challenge in the writ petition, we find that the appellants had denied the benefit of the said circular to the respondent on the ground that he did not report at the Headquarter Ratlam and, therefore, he is not entitled for the salary of the said period of his suspension.

7. The learned Dy. Govt. Advocate could not point out as to whether for not granting the full salary of the said period on the ground that during the period of suspension the respondent did not report the Headquarter any show cause notice or opportunity of hearing was ever given to the respondent. In the circumstances, in the absence of any such show cause notice or opportunity of hearing, in our considered view the benefit of the salary of the said period could not have been denied to the respondent in view of the circular. Admittedly, the respondent was charge-sheeted for major misconduct but the minor penalty was imposed upon him, therefore, in view of the circular dated 13.01.2005 he was entitled for full salary of the entire period of suspension. In the circumstances, in our view the order passed by the learned Single Judge needs no interference.

8. Accordingly, the writ appeal deserves to be and is hereby dismissed. The appellants are directed to pay the full salary of the said period of suspension to the respondent within 3 months from the date of receipt of copy of this order.

9. However, we make it clear that in case the appellants find that the respondent had remained absent from the Headquarter without permission and has violated any circular or rule to that effect, it will be open for the competent authority of the appellants to proceed against the respondent in terms of the Circular dated 26.09.1968 issued by the General Administration Department of the State Government vide Gyapan Kra. 21709 CR 260-1 (3) 68 by holding departmental enquiry after issuing charge sheet for such indiscipline.

10. With the aforesaid observations, the writ appeal stands dismissed.

Appeal dismissed.

I.L.R.[2011]M.P., Kala Bai Prajapati (Smt.) Vs. State of M. P. (DB) 2319

I.L.R. [2011] M. P., 2319

WRIT APPEAL

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

W.A. No.623/2010 (Gwalior) decided on 9 August, 2011

KALABAI PRAJAPATI (SHRIMATI)

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Work Charged and Contingency Paid Employees Pension Rules M.P. 1979 - Family Pension - The services of muster roll employee/daily wager can not be taken into account for the purpose of computing qualifying service for grant of family pension - Writ appeal dismissed.

(Para 7)

सेवा विधि - कार्यभारित तथा आकस्मिकता निधि कर्मचारी पेंशन नियम, म.प्र. 1979 - परिवार पेंशन - मस्टर रोल कर्मचारी/दैनिक वेतन भोगी की सेवाओं को, परिवार पेंशन प्रदान करने के लिए अर्हकारी सेवा की गणना के प्रयोजन हेतु विचार में नहीं लिया जा सकता - रिट अपील खारिज।

Case referred :

2011(3) MPLJ 210.

Yogesh Singhal, for the appellant.

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

ORDER

The Order of the Court was delivered by S.N. AGGARWAL, J. :- This is an intra-Court appeal filed by the appellant seeking to challenge the order of the learned Single Judge dated 21st September, 2010 by which her writ petition for grant of family pension was dismissed.

2. Briefly stated, the facts of the case, giving rise to this appeal are that the husband of the appellant was employed as a gangman by the respondents on daily wage basis since 01st May, 1973. His services were regularised under the provisions of the Madhya Pradesh Irrigation Department Work Charged And Contingency Paid Employees Recruitment And Conditions of Service Rules, 1977 (for brevity, "Contingency Rules of 1977") with effect from 09th April, 1991. Said regularisation was in terms of recommendations of the selection committee. The husband of the appellant died on 03rd August, 1997,

2320 Kala Bai Prajapati (Smt.) Vs. State of M. P. (DB) I.L.R.[2011] M.P.,
i.e. almost within six years of regularisation of her late husband in the service of the respondents. After his death, the appellant being his widow, applied for family pension which was declined by the respondents and aggrieved therefrom, she filed a writ petition for directions against the respondents to grant her family pension on account of death of her husband and the impugned order which is assailed by her in the present appeal has been passed by the learned Single Judge in the said writ petition.

3. Mr. Yogesh Singhal, learned counsel appearing on behalf of the appellant has argued that the service rendered by the late husband of the appellant while he worked on muster roll during the period from 01st May, 1973 till the date of his regularisation, i.e. 09th April, 1991 should also be counted towards qualifying service required for grant of family pension. In sum and substance, the contention of the learned counsel for the appellant is that the service rendered by the late husband of the appellant on muster roll from 01st May, 1973 to 09th April, 1991 was also service under the Contingency Rules of 1977 as he was always paid salary on monthly basis. In support of his contentin, learned counsel has placed reliance on the definition of contingency paid employee given in Rule 2 (b) of Contingency Rules of 1977 which reads as under :

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

4. The contention of Shri Singhal is that since the late husband of the appellant was paid salary on monthly basis when he was working on muster roll, his employment as muster roll employee falls under the Contingency Rules of 1977 and, therefore, the service rendered by him as muster roll employee has be counted for the purpose of qualifying service required for grant of family pension,

5. We have given our anxious consideration to the above contention urged on behalf of the appellant, but we are sorry, we have not been able to persuade ourselves to agree with this submission. It may be mentioned that Rule 6 of the Contingency Rules of 1977 which contains provisions for classification of the employees provides only two categories of employees, i.e. temporary and permanent. Contingency Rules of 1977 nowhere provide for employment on muster roll basis and hence, in our opinion, employment of the late husband of

I.L.R.[2011]M.P., Kala Bai Prajapati (Smt.) Vs. State of M. P. (DB) 2321
the appellant on muster roll basis during the period from 01st May, 1973 to 09th April, 1991 does not fall within the ambit and scope of Contingency Rules of 1977.

6. Full Bench of this Court in the case of *Mamta Shukla vs. State of M.P.*, [2011 (3) MPLJ 210] has held in penultimate paragraph of the said judgment as under :

"24. On the basis of above discussion, we hold in regard to the substantial questions of law Nos. 2 and 3 that an employee is eligible to count his past service as qualifying service in accordance with Rule 6 of the Pension Rules, 1979, if he was appointed in accordance with the provisions of Recruitment Rules of 1977. We further hold that an employee, who was not appointed in accordance with the provisions of Recruitment Rules 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 view of the above judgment of the Full Bench of this Court, the appellant is not entitled to family pension because the employment of her late husband on muster roll basis cannot be counted for counting the qualifying service required for grant of such pension to her. It is not the case of the appellant that her late husband had, after regularisation with effect from 09th April, 1991, put in the qualifying service required for grant of pension on the day he died on 03rd August, 1997. His service on the date of his death fell short of qualifying service required under the Contingency Rules of 1977 for grant of family pension to his widow. Hence, in the opinion of this Court, there is no infirmity or illegality in the impugned order of the learned Single Judge declining family pension to the appellant, which may require our interference in exercise of our appellate jurisdiction in the present appeal. This appeal is devoid of any merit and is, therefore, dismissed but with no order as to costs.

Appeal dismissed.

2322 Narendra K. Rathor Vs. State of M. P. (DB) I.L.R.[2011] M.P.,

I.L.R. [2011] M. P., 2322

WRIT APPEAL

Before Mr. Sushil Harkauli, Acting Chief Justice &

Mr. Justice K.K. Trivedi

W.A.No.386/2008 (Jabalpur) decided on 12 August, 2011

NARENDRAKUMAR RATHOR

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 9 Rules 8 & 9, Order 17 Rules 2 & 3 - Restoration of Proceeding - If a decision is rendered (whether on merits or otherwise) in absence of plaintiff or petitioner, he has a right to apply for restoration of the case, provided of course that the litigant is able to establish that there was sufficient cause for non-appearance when the case was called on for hearing - This right is not curtailed only because the Court or the Tribunal has examined the merits of the matter. (Para 5)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 8 व 9, आदेश 17 नियम 2 व 3 - कार्यवाही का प्रत्यावर्तन - वादी या याची की अनुपस्थिति में यदि निर्णय दिया गया (या तो गुणदोषों पर अथवा अन्यथा), उसे मामले के प्रत्यावर्तन हेतु आवेदन करने का अधिकार है परंतु निश्चित रूप से यह भी कि वादकारी यह स्थापित करने में सक्षम है कि अनुपस्थिति के लिए पर्याप्त कारण था जब प्रकरण सुनवाई हेतु पुकारा गया - यह अधिकार केवल इसलिए कम नहीं होगा कि न्यायालय अथवा अधिकरण ने मामले के गुणदोषों का परीक्षण किया है।

Cases referred :

AIR 1946 ALL. 353(FB), AIR 1970 ALL 257(FB), AIR 1918 MAD. 143(FB).

Mukesh Agrawal, for the appellant.

ORDER

The Order of the Court was delivered by SUSHIL HARKAULI, AG. C. J. :—In this intra-court appeal, the appellant is challenging the order of a learned Single Judge on the ground that vital record was over-looked by the learned Single Judge while holding that there was no requirement in the policy that the person to be selected for the post of Guruji (teacher) should be a local resident

2. It has further been argued by the learned counsel for the appellant that

this over-sight took place because the learned counsel for the appellant (who was the petitioner before the learned Single Judge) could not reach the Court when the case was called out and the case was decided without hearing him.

3. Upon being asked why he did not seek restoration on the principles of Order IX Rule 9 C.P.C., the learned counsel replied that he did not do so because the order had been passed by the learned single Judge 'on merits'.

4. This common misconception must be dispelled. Unless the order has been passed and is permissible to be passed under Order XVII Rule 3 C.P.C. the provisions of Order IX apply. See AIR 1946 All. 353 (FB) and also AIR 1970 All 257 (FB). The decision in AIR 1918 Mad 143 (FB) is a departure only to the limited extent that when the order purports to be passed under Order XVII Rule 3, Order IX cannot be invoked on the ground that the circumstances did not justify passing of the order under that provision. But even this decision of Madras says that if the order passed is not under Order XVII Rule 3 then Order IX will apply.

5. Thus the law is that if a decision is rendered (whether on merits or otherwise) **in absence of the plaintiff** or petitioner, he has a right to apply for restoration of the case, provided of course that the litigant is able to establish that there was sufficient cause for non-appearance when the case was called on for hearing. This right is not curtailed only because the Court or the Tribunal has examined the merits of the matter. **Rules 8 and 9 of Order IX and Rules 2 and 3 of Order XVII C.P.C.** may not apply in terms to writ proceedings, but the principles apply.

6. The litigant also has the right to apply for review if any ground for review permissible in law, exists.

7. In view of aforesaid remedies available to the appellant we are not inclined to interfere in this appeal.

8. Accordingly, this appeal is dismissed, with liberty to pursue such of the aforesaid remedies as the appellant may be advised.

Appeal dismissed.

I.L.R. [2011] M. P., 2324

WRIT APPEAL

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

W.A. No. 342/2010 (Jabalpur) decided on 5 September, 2011

DISTRICT COOPERATIVE CENTRAL BANK LTD.,

SATNA & ors.

...Appellants

Vs.

SUNDERLAL & anr.

...Respondents

Service Law - Powers of appellate authority - Service of the respondent was terminated by the appellant bank after a departmental enquiry - Appellate authority directed reinstatement of the employee without any back wages - Employee did not prefer any appeal or cross objection against the denial of back wages - The denial of back wages became final - Granting of back wages (by Writ Court) was beyond the jurisdiction.

(Paras 1 & 4)

सेवा विधि - अपीलीय प्राधिकारी की शक्तियां - अपीलार्थी बैंक ने विभागीय जांच के उपरांत प्रत्यर्थी की सेवायें समाप्त की - अपीलीय प्राधिकारी ने कर्मचारी को बिना किसी पूर्व वेतन के बहाली का निर्देश दिया - कर्मचारी ने पूर्व वेतन के प्रत्याख्यान के विरुद्ध कोई अपील या प्रत्याक्षेप प्रस्तुत नहीं किया - पूर्व वेतन का प्रत्याख्यान अंतिम बना - पूर्व वेतन प्रदान करना रिट न्यायालय की अधिकारिता के बाहर था।

ORDER

The Order of the Court, was delivered by
SUSHIL HARKAULI, AG. C. J. :-We have heard both the sides.

The service of the respondent No. 1 of this appeal was terminated by the appellant bank after a departmental enquiry. The employee went before the Asstt. Registrar who directed reinstatement of the employee without any back wages. The bank preferred an appeal before the Joint Registrar. The employee did not prefer any appeal or cross objection before the Joint Registrar against the denial of back wages. Therefore, the denial of back wages became final.

2. In the appeal of the bank, the Joint Registrar maintained the reinstatement order of the Asstt. Registrar, but made it conditional upon payment by the employee of the amount of Rs. 94,846/- which was alleged to be the loss caused to the bank on account of the alleged misconduct of the employee.

The employee preferred an appeal before the Cooperative Tribunal. The Tribunal quashed both the orders of the Joint Registrar as well as the Asstt. Registrar although the bank had not preferred any appeal before the Tribunal.

3. When the employee did not challenge denial of back wages by filing appeal before the Joint Registrar, that chapter was closed and the only question which could legally survive before the Joint Registrar was regarding reinstatement against which the bank was aggrieved and preferred an appeal before the Joint Registrar. In the appeal before it the Cooperative Tribunal also therefore had to be confined the question of reinstatement and the terms of reinstatement, and could not expand the scope of the appeal by going into other questions.

4. Against the order of the Cooperative Tribunal, the employee alone preferred writ petition before the learned Single Judge and therefore the jurisdiction of the learned Single Judge again was confined to examining whether reinstatement was or was not permissible, and the correctness of the terms (deposit/recovery of loss) subject to which reinstatement had been upheld by the Joint-Registrar. Granting of back wages was beyond the jurisdiction and in any case the grant of back wages from the date of the order of the Tribunal does not appear to be justified by any reason given by the learned Single Judge. Even on the question of reinstatement and its terms, we do not find any cogent reason as to why reinstatement should or should not be ordered, and whether it should be made subject to the deposit/recovery.

5. We, therefore, set aside the order of the learned Single Judge dated 10.2.2010 passed in W.P. No.401/2001 and remand the matter to the learned Single Judge to examine, with reasons, the only two questions which remain open. The decision will be taken by the learned Single Judge expeditiously having regard to the time which has already lapsed.

The writ appeal is accordingly allowed.

Appeal allowed.

2326 Munni Shrivastava (Ku.) Vs. State of M. P. (DB) I.L.R.[2011] M.P.,

I.L.R. [2011] M. P., 2326

WRIT APPEAL

Before Mr. Sushil Harkauli, Acting Chief Justice &

Mr. Justice K.K. Trivedi.

W.A. No. 783/2011 (Jabalpur) decided on 5 September, 2011

MUNNI SHRIVASTAVA (KU.)

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

Constitution, Article 226 - Writ petition - Justifiable excuse for delay in filing - Filing of a review and its pendency would be a justifiable excuse for delay, provided such review is permissible under the relevant service rules - A review application filed without any legal provision can not provide an excuse for delay or laches. (Para 4)

संविधान, अनुच्छेद 226 - रिट याचिका - प्रस्तुत करने में विलंब का न्यायोचित कारण - पुनर्विलोकन की प्रस्तुती तथा उसका लंबित रहना, विलंब के लिए न्यायोचित कारण होगा, परंतु यह तब जब ऐसा पुनर्विलोकन सुसंगत सेवा नियमों के अंतर्गत अनुज्ञेय है - बिना किसी विधिक उपबंध के प्रस्तुत किया गया पुनर्विलोकन आवेदन, विलंब अथवा गफलत के लिए कारण उपलब्ध नहीं कर सकता।

Sanjay Verma, for the appellant.

Prashant Singh, Addl. A.G. for the respondents.

ORDER

The Order of the Court was delivered by :
SUSHIL HARKAULI, AG. C. J. :-By the impugned order dated 6.7.2011, the learned Single Judge has dismissed the writ petition of the petitioner/appellant on the ground of laches.

2. The order under challenge by the writ petitioner before the learned Single Judge was dated 17.8.2004 by which a departmental punishment of stoppage of two increments has been inflicted and the appeal had been dismissed by order dated 30.9.2005. The writ petition was filed in 2011 and therefore the learned Single Judge was of the impression that the writ petition, which was filed after six years from the date of appellate order, suffered from laches.

3. In paragraph No.4 of the writ petition filed before the learned Single Judge, it was mentioned that a review petition has been preferred by the writ petitioner on 12.10.2005 before the appellate authority which had dismissed the appeal by order dated 30.9.2005. It was also stated in the said paragraph

of the writ petition that the review is still pending and therefore there was no delay in filing the writ petition.

4. Filing of a review and its pendency would be a justifiable excuse for delay provided such review is permissible under the relevant service rules. A review application filed without any legal provision for filing of review cannot provide an excuse for delay or laches.

5. Under Rule 29 which is to be found in Part VIII of the Madhya Pradesh Civil Services (Classification, Control & Appeal) Rules, 1966, the appellate authority has been conferred with a power of entertaining review application within six months from the date of the order.

6. In the circumstances, we are unable to accept the reason given in the impugned order of learned Single Judge that the writ petition was barred by laches.

7. Accordingly, we set aside the order of learned Single Judge dated 6.7.2011 passed in W.P. No.10123/2011(S) after hearing learned counsel for the appellant as well as learned counsel for the State. Further, we dispose of this appeal with the direction to the appellate authority to examine the pending review petition and, if it has not been decided so far, to decide the same within three months from the date on which a certified copy of this order is presented before the appellate authority alongwith full particulars of the pending review petition. A copy of the order so passed in the review petition will be communicated to the petitioner.

The appeal is disposed of.

Appeal disposed of.

I.L.R. [2011] M. P., 2327

WRIT PETITION .

Before Mr. Justice Sushil Harkauli & Mr. Justice Prakash Shrivastava

W.P. No. 9183/2008 (Jabalpur) decided on 28 April, 2011

O.R.G. INFORMATICS LTD.

...Petitioner

Vs.

MADHYAPRADESH STATE ELECTRONICS

DEVELOPMENT CORPORATION LTD. & ors.

...Respondents

A. Commercial Bid - Withdrawal from a consortium of a material member, without whose presence in the consortium the consortium could not have qualified all or any of the stages of the bids

evaluation, the same should be treated as withdrawal of the bid by the concerned consortium. (Para 16)

क. वाणिज्यक बोली – संघ से महत्वपूर्ण सदस्य की वापसी जिसकी संघ में उपस्थिति के बिना, संघ बोली के मूल्यांकन के सभी अथवा किसी भी प्रक्रम की अर्हता नहीं रख सकता था, उसे संबंधित संघ द्वारा बोली की वापसी समझी जानी चाहिए।

B. Commercial Bid - Principles of fair play and opportunity of hearing - Even in a contractual matter, an instrumentality of State must follow the principles of fair play and give an opportunity of hearing to the person whose rights would be affected by the decision in which such instrumentality has more than one option.

If one or more of the conditions has been violated by a bidder, even then there is an option or discretion given to the first respondent, which option or discretion affects a civil right of the bidder by way of forfeiture - The first respondent is undoubtedly an instrumentality of State - Therefore, notwithstanding that this is a contractual matter, it must follow the principles of fair play and give an opportunity of hearing to the person whose rights would be affected by the decision in which the first respondent has more than one option. (Para 22)

ख. वाणिज्यक बोली – निष्पक्ष व्यवहार और सुनवाई के अवसर का सिद्धांत – संविदात्मक मामले में भी, राज्य के परिकरण को निष्पक्ष व्यवहार के सिद्धांतों का पालन करना होगा और उस व्यक्ति को सुनवाई का अवसर देना होगा जिसके अधिकार उस निर्णय द्वारा प्रभावित होंगे जिसमें ऐसे परिकरण के पास एक से अधिक विकल्प हैं।

ORDER

The Order of the Court was delivered by SUSHIL HARKAULI, J. :-The first respondent invited bids by way of tenders for a certain project. The tenders consisted of three parts namely (1) pre-qualification bid (2) technical bid and (3) financial bid. The tender conditions permitted the tenders to be submitted by any organization/company or a consortium.

2. The writ petitioner formed a consortium (hereinafter in this order referred to as the *consortium*) with the third respondent i.e. Wipro Ltd. Amongst the members of the *consortium*, the petitioner declared itself as the prime bidder. 'Prime bidder' means some kind of a managing partner of a consortium, who acts on behalf of the consortium and with whom interaction in respect of the bidding activities is to take place. In respect of the tender

submitted by it, the said *consortium* qualified in evaluation of the pre-qualification bid and thereafter also qualified in the evaluation of the technical bid. However, for passing these two stages, membership of the Wipro in the *consortium* played an important and material role as is mentioned in paragraph No. 15 of the return of the first respondent.

3. According to that paragraph no. 15, under the parameters prescribed for the purpose, the *consortium* obtained a total of 77 marks because of which the *consortium* qualified. Out of those 77 marks, the petitioner obtained 17 marks while Wipro obtained 60 marks. Thus it is absolutely clear that but for the membership of Wipro in the *consortium*, the petitioner could have cleared these initial two stages i.e. the stage of pre-qualification bid and thereafter the stage of technical bid.

4. The tender conditions required each bidder to furnish a bid security in the form of a demand draft/bank guarantee of Rs. 250 lakhs in favour of the first respondent. This condition is found in Clause 6.2 of the tender conditions. The tender also required that in the bids submitted it should be mentioned that the bid is valid for 6 (six) months from the date of submission of the bids, and that the bid validity period could be required to be extended further.

4-A. Factually, the bid submitted by the *consortium* stated that it was valid upto 28.4.2008. By a letter dated 21.4.2008 (Annexure P/8) the first respondent requested the petitioner to extend the validity period of the bid made by the *consortium* by 3 months i.e. upto 28.6.2008.

5. However, by a letter dated 28.4.2008, copy of which has been filed as Annexure R/10 to the additional reply of the first respondent, the period of bid validity was extended by the petitioner upto 28.7.2008.

6. Within the period of the validity of the bid, the bidders were prohibited from withdrawing the bid. According to Clause 7.1.8 a bidder was allowed to modify or withdraw its submitted bid only upto any time prior to the last date prescribed for receipt of bids, by giving a written notice to the tenderer. Subsequent to the last date of receipt of bids and upto the expiry of the specified bid validity period, the bid could not be withdrawn by the bidder. It is provided in the said Clause that such withdrawal may result in the forfeiture of the EMD (bid security) of the bidder.

7. Clause 6.2 of the tender conditions also specifically provided that the bid security could be forfeited at the discretion of MPSEDC if a bidder withdraws its bid during the period of bid validity.

9. As stated above, the extended period of bid validity was upto 28.7.2008, and by then the pre-qualification bids and the technical bids had been opened, in both of which the *consortium* was successful. Only the financial bid remained to be opened. On 8.7.2008 the third respondent i.e. Wipro withdrew from the membership of the *consortium*, and sent a letter to that effect to the first respondent. Even uptill now it is not the case of the petitioner that Wipro has been brought back into the *consortium*; meaning thereby that the decision taken by the Wipro and communicated by the letter dt 8th July 2008 was firm and final and has remained firm.
10. Upon receiving that letter from Wipro, the first respondent sent a letter dated 9.7.2008 to the petitioner, a copy of which is enclosed as Annexure P/10. In that letter it was mentioned that first respondent had received the letter from Wipro stating that they have withdrawn from the consortium which had submitted the tender. It was also stated that because the technical evaluation score and assessment of pre-qualification was based on the credentials of Wipro to a large extent, therefore, in the event of Wipro withdrawing from the *consortium*, the bid of the *consortium* was likely to be disqualified. The response of the petitioner was sought by that letter dated 9.7.2008.
11. The petitioner responded to that letter on 12.7.2008. A copy of response dated 12.7.2008 has been filed as Annexure P/11. In its response, petitioner asked the first respondent for a copy of the letter of Wipro and said that the petitioner would approach the Wipro Management to sort out the matter. However, as mentioned above, the matter could not be sorted out between the petitioner and Wipro even till date.
- 11-A. Thereafter the security in the form of bank guarantee furnished by the petitioner was encashed by the first respondent by means of letter dated 22.7.2008. The financial bids of other bidders excluding the *consortium* were opened and the contract was awarded to the best bidder.
12. We have heard learned counsel for the petitioner, learned counsel for respondent no. 1, learned counsel for respondent no. 2 and the learned counsel for respondent no. 5 at great length.
13. It could not be shown to us by the learned counsel for the petitioner that there was any possibility of the *consortium* qualifying in the first round of pre-qualification bid or in the second round of technical bid, if Wipro had not

been part of the *consortium*. Therefore, in view of the withdrawal of the Wipro from the *consortium*, there remains no question of consideration of the financial bid of the *consortium*.

14. No relief therefore, can be granted to the petitioner in regard to the consideration of the financial bid of the *consortium*, and the decision of the first respondent in not considering that financial bid cannot be faulted.

15. The next and only major question which survives for consideration in this writ petition is :-

"Whether the disqualification of the consortium as a result of withdrawal of Wipro from the consortium during the period of bid validity, could be treated as withdrawal of the bid of the consortium thereby inviting the liability of forfeiture of security..?"

16. Having thought over the matter carefully and after having heard learned counsel for the parties after specifically pointing out the above precise question to them during the course arguments, and considering the consequences of taking either of the two views possible, we are of the opinion that it must laid down that withdrawal from a consortium of a material member, meaning a member without whose presence in the consortium the consortium could not have qualified all or any of the stages of the bids evaluation, the same should be treated as withdrawal of the bid by the concerned consortium. Only such an interpretation of law will serve the purpose for which the bid security is taken and also the purpose for which withdrawal of bids is not permitted during the validity period of the bid.

17. We are unable to accept the view suggested by the petitioner that it should be held that such withdrawal of a material member from the consortium which results in disqualification of a consortium should not be treated as withdrawal of the bid as a consequence of which view the bid security escapes forfeiture. The reason is that such a law would give a wrong handle in the hand of unscrupulous consortiums whose members can collude to make one or more members of the consortium to withdraw from the consortium causing disqualification and thereby achieve the same result as withdrawal of the bid, without the risk of forfeiture of bid security. Proving such collusion will be next to impossible.

18. The High Court and the Supreme Court do not merely decide cases but

also lay down the law for future, because of which there is the age old principle that hard cases do not justify laying down of bad law. We are thus of the considered opinion that where the bidder or any of the members of the bidder consortium by his or their own voluntarily act incur a disqualification thereby opting out of the bidding process during the bid validity period, it must be treated as withdrawal of the bid by such bidder. A consortium is akin to a partnership where each partner is liable for action of other partners. In this view of the matter we hold that the withdrawal from the *consortium* by Wipro amounts to withdrawal of the bid by the bidder which in this case is the *consortium*.

19. One other issue remains and that is whether the first respondent was obliged to give a notice informing the petitioner of its intention with reasons, to forfeit the bid security on the ground that the withdrawal of Wipro from the *consortium* and the consequent disqualification of the *consortium* amounted to withdrawal of the bid by the *consortium* within the extended period of bid validity. The letter/notice dated 9.7.2008 sent to the petitioner by the first respondent (referred in paragraph no. 10 of this order) does not fulfill this requirement as that letter does not mention anything about forfeiture of the bid security.

20. By giving, of the notice contemplated above regarding forfeiture of bid security, the bidder would get an opportunity to respond as to why the entire bid security or any part of it should not be forfeited. The response of the 'bidder should be considered by the first respondent by a reasoned decision, and only thereafter the action as decided by the first respondent towards the forfeiture should be taken.

21. Giving of such notice is prompted by the fact that both in Clause 7.1.8 as well as Clause 6.2 of the tender conditions there is a discretion conferred on the first respondent to forfeit or not to forfeit the bid security if the bidder is guilty of violating any of the conditions mentioned in the aforesaid clauses.

22. If no such condition has been violated, obviously there is no question of forfeiture of the bid security. But if one or more of the conditions has been violated by a bidder, even then there is an option or discretion given to the first respondent, which option or discretion affects a civil right of the bidder by way of forfeiture. The first respondent is undoubtedly an instrumentality off State. Therefore, 'notwithstanding that this is a contractual matter, it must follow the principles of fair play and give an opportunity of hearing to the person whose rights would be affected by the decision in which the first respondent has more than one option.

23. In view of what has been held above, we quash that part of the decision of the first respondent by which it has been decided to forfeit the bid security of the petitioner and allow the first respondent liberty to issue a proper show cause notice in the light of what has been stated above and to pass a reasoned order after considering the response of the petitioner, if any such response is received within the time permitted by the first respondent for such response.

24. The writ petition is allowed to the above extent.

Petition allowed.

I.L.R. [2011] M. P., 2333

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

W.P.No.7741/2008 (Indore) decided on 28 June, 2011

PUSHPA JAJODIA (SMT.) & ors.

...Petitioners

Vs.

M.P. HOUSING BOARD, BHOPAL & ors.

...Respondents

Constitution, Article 226 - Writ Petition - Transfer fee - Petitioner purchased a plot from previous owner and on 27.03.2008 made an application for transfer - On 21.05.2008, Rs. 600/- as lease rent were also deposited - Before consideration of petitioner's application the transfer fee was enhanced from 1% to 3% vide circular dated 06.05.2008 - Held - Increased transfer fee in force at the time of consideration of transfer application, would be payable. (Paras 3 & 16)

संविधान, अनुच्छेद 226 - रिट याचिका - अंतरण फीस - याची ने पूर्व के स्वामी से प्लॉट क्रय किया और 27.03.2008 को अंतरण हेतु आवेदन दिया - 21.05.2008 को पट्टा माड़ा के रूप में रु. 600/- भी जमा किये गये - याची के आवेदन पर विचार किये जाने से पूर्व, परिपत्र दि. 06.05.2008 द्वारा अंतरण फीस 1 प्रतिशत से बढ़ाकर 3 प्रतिशत की गयी - अभिनिर्धारित - अंतरण आवेदन पर विचार करते समय करते समय बढ़ी हुई अंतरण फीस देय होगी।

Cases referred :

1981(2) SCC 205, AIR 1996 SC 3461, 1999(7) SCC 314, 2004(1) SCC 663, 2010(5) SCC 186.

A.K. Sethi with Rahul Sethi, for the petitioners.

Rajesh Chourasiya, for the respondents.

ORDER

PRAKASH SHRIVASTAVA, J. :- This writ petition is directed against the demand notice dated 28.6.2008 (Annexure P/8) issued by the respondents demanding the transfer fee of Rs.1,07,650/-.

2. Petitioners had purchased plot no.D-35-HIG Colony (Chhoti Khajrani), Indore by registered sale deed dated 30.3.2007 from its previous owner Smt. Nirmal Kumari Bahari and made an application dated 27.3.2008 to respondent Housing Board for transferring plot in their favour. The public notice was got published by the petitioners on 15.5.2008 and an amount of Rs.6,00/- was deposited on 21.5.2008 as lease rent. The respondents thereafter issued notice dated 28.6.2008 requiring the petitioners to deposit the transfer fee of Rs.1,07,650/-. The said notice was issued on the basis of the circular dated 6.5.2008, by which the transfer fee for the residential property was enhanced from 1% to 3% of the sale price. Being aggrieved with the notice dated 28.6.2008, the petitioners have filed the present writ petition.
3. The writ petition has been opposed by the respondents by taking the plea that the transfer fee has been demanded from the petitioners on the basis of the lease conditions, Collector guidelines and the relevant circular, therefore, the demand of fee is in accordance with law.
4. Learned counsel appearing for the petitioners submits that the transfer fee has wrongly been charged at the rate of 3% of the sale price on the basis of the circular dated 6.5.2008 ignoring the fact that the petitioners had moved an application for transfer on 27.3.2008, therefore, the rate which were prevailing as on the date of the filing of the application would apply and subsequent circular enhancing the rate will not be applicable. He submitted that the circular dated 27.3.2008 is not retrospective, therefore, it has no application to the case of the petitioners.
5. Learned counsel appearing for the respondents opposing the writ petition submitted that the transfer fee has rightly been demanded in accordance with law and the circular squarely applies to the case of the petitioners since on the date of consideration of the petitioners' application, the circular was in force.
6. I have heard the learned counsel for the parties and perused the record.
7. The sole issue which arises for consideration is as to whether the petitioner is liable to pay transfer fee at the rate prevailing on the date of filing

of the transfer application or at the enhanced rates in force at the time of consideration of the petitioners' application?

8. It is undisputed that the petitioners had filed an application on 27.3.2008 and the circular dated 6.5.2008 enhancing the transfer fee from 1% to 3% of the sale price was subsequently issued and was in force at the time of consideration of the petitioners' application.

9. On the examination of the entire material on record, it is found that in the present case the petitioners had no vested right to get the plot transferred in their name by paying 1% transfer fee. The transfer is done on fulfillment of certain conditions. The transfer fee is charged by the respondents for affecting the transfer of plot/lease in the name of the respective purchaser, therefore, the rates prevailing at the time of taking a decision to transfer the name, will be applicable. In the absence of any vested right, the transfer fee chargeable as per rate prevailing on the date of consideration of the application, is payable and the petitioners' contention that they are liable to pay the fee at the rate in force at the time of making of the application, can not be accepted.

10. Some what similar issue had come up before the Supreme Court in the matter of *State of Tamil Nadu Vs. M/s. Hind Stone and others* reported in 1981(2) SCC 205, where the application for grant of mining lease was kept pending by the authorities and in the meanwhile the rules were changed and a claim was made by the applicant for deciding the application on the basis of the rules in force at the time of making of the application. The Supreme Court held that :-

"13. While it is true that such applications should be dealt with within a reasonable time, it cannot on that account be said that the right to have an application disposed of in a reasonable time clothes an applicant for a lease with a right to have the application disposed of on the basis of the rules in force at the time of the making of the application. No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in anyone, an application for a lease has necessarily to be dealt with according to the rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of the application. We are, therefore, unable to accept the sub-

mission of the learned counsel that applications for the grant of renewal leases made long prior to the date of G.O. Ms. No.1312 should be dealt with as if Rule 8-C did not exist.”

11. In the matter of *P.T.R. Exports (Madras) Pvt. Ltd. and others V. Union of India and others* reported in AIR 1996 SC 3461 there was a change in the export and import policy for the textile sector and a claim was made for issuing the licence on the basis of the previous policy existing on the date of the application. The Supreme Court took the view that such an applicant has no vested right to have export or import licences in terms of the policies in force on the date of his making the application but grant of licence depends upon the policy prevailing as on the date of grant of licence and the Court would not bind the Government with a policy which was existing on the date of the application.
12. In the matter of *Union of India and others V. Indian Charge Chrome and Another* reported in 1999(7) SCC 314 while considering the similar issue in reference to the registration of the contract, the Supreme Court held that mere making of an application for registration does not confer any vested right on the applicant. The application has to be decided in accordance with the law applicable on the date on which the authority granting the registration is called upon to apply its mind to the prayer for registration.
13. In the matter of *Howrah Municipal Corpn. and others V. Ganges Rope Co. Ltd. and others* reported in 2004(1) SCC 663 a claim was made for sanction of building plan on the basis of the building rules as they stood on the date of making of application for sanction regardless of the subsequent amendment before consideration of the application. The Supreme Court considered the meaning of vested right in detail and held that the petitioner had no vested right to obtain sanction and amended building rules will apply.
14. In the matter of *State of Kerala and Another V. B. Six Holiday Resorts Private Limited and others* reported in 2010(5) SCC 186 there was a change in policy decision pending the applications for grant of licence. The Supreme Court took the view that where the applicant does not have a vested interest for grant of licence and where grant of licence depends on various factors, eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application.

15. Though the aforesaid judgments of the Supreme Court are in reference to the different enactments but ratio of these judgments is relevant for deciding the present controversy. It has been constantly held in these judgments if an applicant has no vested right to the claim made in the application, then a change in law, before consideration of the application, will apply while deciding the application.

16. In the present case also, as stated above, the petitioners had no vested right to pay the transfer fee at a particular rate, therefore, increased transfer fee in force at the time of consideration of transfer application, would be payable.

17. Even otherwise it is worth noting that the respondents have placed on record the circular dated 27.1.2009 as R-1 (additional document), which clarifies that the circular dated 27.5.2008 would be applicable to the pending applications and the applications decided after the said circular will be charged with the enhanced transfer fee. This circular is not under challenge, hence no case is made out in favour of the petitioner.

18. In view of the aforesaid, I do not find any merit in the writ petition and the same is accordingly dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 2337

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 15396/2006 (Jabalpur) decided on 12 July, 2011

DINESH PAWAR

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Panchayat Service (Discipline and Appeal) Rules, M.P. 1999, Rules 5, 6 & 7 - Complaints regarding misuse of funds of various scheme such as S.G.R.Y. Food Scheme, Indira Awas Scheme, Mid Day Meal against petitioner, a Panchayat Karmi, appointed in accordance with Panchayat Karmi Yojna 1995 - Services of petitioner terminated by the impugned resolution of Panchayat - Held - No charges are framed nor any enquiry under Rule 9 has been held, the termination order vide impugned resolution can not be withheld. (Paras 3 & 4)

क. पंचायत सेवा (अनुशासन और अपील) नियम, म.प्र. 1999, नियम 5, 6 व 7 – याची, पंचायत कर्मी योजना 1995 के अनुसार नियुक्त पंचायत कर्मी के विरुद्ध एस. जी.आर.वाय. अन्न योजना, इंदिरा आवास योजना, मध्यान्ह भोजन जैसी विभिन्न योजनाओं की निधियों के दुरुपयोग संबंधी शिकायतें – पंचायत के आक्षेपित संकल्प द्वारा याची की सेवा समाप्त की गई – अभिनिर्धारित – न तो कोई आरोप विरचित किये गये, और न ही नियम 9 के अंतर्गत कोई जांच की गई, आक्षेपित संकल्प द्वारा सेवा समाप्ति के आदेश की पुष्टि नहीं की जा सकती।

B. Constitution, Article 226 - Writ Petition - Alternative Remedy - Challenge of termination order being on the basis of non-compliance of the Rules of 1999 - Alternative remedy will not bar the writ petition. (Para 10)

ख. संविधान, अनुच्छेद 226 – रिट याचिका – वैकल्पिक उपचार – सेवा समाप्ति के आदेश को चुनौती नियम 1999 के अननुपालन के आधार पर होते हुए – वैकल्पिक उपचार रिट याचिका को वर्जित नहीं करेगा।

Cases referred :

2003(4) MPLJ 284, 2008(3) MPLJ 648, 2008(4) MPLJ 546, AIR 1990 SC 1402, AIR 1991 SC 471.

Mukesh Kumar Agarwal, for the petitioner.

S.P. Rai, G.A. for the respondents No. 1 to 5.

N.K. Jain, for the respondent No. 6.

ORDER

SANJAY YADAV, J. :- Heard.

Resolution dated 21.7.2006 is being challenged in this petition under Article 226 of the Constitution of India.

2. By said resolution services of the petitioner as Panchayat Karmi, Gram Panchayat, Bijakwada, Janpad Panchayat Parasiya, District Chhindwara has been terminated.

3. The petitioner was appointed as Panchayat Karmi of said Gram Panchayat on 13.10.2001 in accordance with Scheme, i.e, Panchayat Karmi Yojana, 1995.

4. That, there were complaints against the petitioner regarding misuse of funds of various scheme such as S.G.R. Y Food Scheme, Indira Awas Scheme, Mid-day meal. As also misuse of funds in purchasing materials for the Panchayat. These allegations paved the foundation for passing of impugned resolution.

5. Petitioner challenges the resolution on the ground that the same has been passed without affording any opportunity of hearing and on the basis of enquiry held behind his back.

6. Placing reliance on the decision in *Kunjan Singh vs. State of M.P. and others* [2003 (4) MPLJ 284] and *Kailash Babu Rai v. State of M.P. and others* [2008 (3) MPLJ 648] it is contended by the learned counsel for the petitioner that being in the Panchayat Service, the petitioner is governed by the provisions of Madhya Pradesh Panchayat Service (Discipline and Appeal) Rules, 1999. It is contended that since his service as Panchayat Karmi has been terminated without following the procedure laid down in the Rules of 1999, the same stand vitiated and is liable to be quashed. Furthermore, while rhetorting to the objections raised on behalf of respondent that the petition against resolution is not maintainable, learned counsel for the petitioner while placing reliance on the decision in *Abdul Hasan Qureshi v. State of M.P. and others* [2008 (4) MPLJ 546] has to submit that the resolution having been held to be an order is assailable before this Court, as it has the effect of terminating the service of the petitioner.

7. Respondents 1 to 4 besides raising the preliminary objection as to maintainability of the petition have to submit that the petitioner having been appointed under the Scheme has been removed on the basis of misconduct after following the procedure laid down in the scheme. It is contended that the Panchayat found petitioner guilty of misconduct; therefore, he was removed from post of Panchayat Karmi.

8. Respondent No. 6 vide its return has to submit that the petitioner was afforded the opportunity of hearing by issuing show cause notice. It is contended that the petitioner avoided to receive show cause; therefore, the Panchayat was constrained to pass the resolution as there were ample material on record indicating the misuse of Panchayat fund by the petitioner while working as Panchayat Karmi/Secretary. It is urged that since lawful action has been taken against the petitioner no interference is warranted.

9. Considered the rival submissions.

10. Regarding the preliminary objection as to maintainability of petition because of availability of alternative remedy, it is observed that the challenge of termination order being on the basis of non-compliance of the Rules of 1999; an alternative remedy will not bar the writ petition; therefore, the objection raised regarding maintainability of the petition is negatived.

11. Petitioner is a Panchayat Karmi and as held in *Lalla Prasad Burman v. State of M.P. and others* the Rules of 1999 are applicable to such Panchayat Karmis, they being member of Panchayat Karmi. It was held therein :

5. After hearing learned Counsel for the parties, we find that the Collector, Shahdol has lost sight of the Madhya Pradesh Panchayat Service (Discipline and Appeal) Rules, 1999 (for short 'the Rules, 1999') while passing the order dated 29-6-2007 denotifying the appellant as Panchayat Secretary under Section 69 (1) of the Act. Sub-rule (3) of Rule 1 of the Rules, 1999 states that except otherwise provided by or under these rules, they apply to all persons employed in connection with the affairs of inter alia the Gram Panchayat and discharging the functions of Gram Panchayat. Secretary of Gram Panchayat is employed in connection with the affairs of Gram Panchayat and discharging the functions of Gram Panchayat. Hence, the Rules, 1999 are applicable to him. It is not disputed that the appellant was notified as Panchayat Secretary as far back as on 12-10-1999 and is working as such Panchayat Secretary for about eight years. Hence any action against the appellant for misconduct could only be taken in accordance with the Rules, 1999 and not otherwise.

Rule 5 of the Rules, 1999 lays down the penalties which can be imposed. Rule 6 provides for the authority who can impose penalty. Rule 7 lays down procedure to be followed before imposing minor or major penalties.

12. Admittedly in the case at hand the procedure as prescribed in the Rules of 1999 has not been followed. No charges are framed, nor any enquiry as contemplated under Rule 7 of Rules 1999 has been held; therefore, the termination order vide impugned resolution cannot be withheld.

13. In *Neelima Misra v. Harindar Kaur Paintal* (AIR 1990 SC 1402) it is observed in the context of quasi judicial and administrative function:

19. An administrative function is called quasi-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice. Where there is no such obligation. the decision is called 'purely administrative' and there is no third category. This is what was meant by Lord Reid in *Ridge v. Baldwin*, [1963] 2 All E.R. 66, 75-76:

"In cases of the kind with which I have been dealing the Board of Works was dealing with a single isolated case. It was not deciding, like a judge in a law suit, what were the rights of the persons before it. But it was deciding how he should be treated- something analogous to a judge's duty in imposing a penalty So it was easy to say that such a body is performing a quasi-judicial task in considering and deciding such a matter and to require it to observe the essentials of all proceedings of a judicial character the principles of natural justice. Sometimes the functions of a minister or department may also be of that character and then the rules of natural justice can apply in much the same way"

14. Scope of a domestic enquiry and its importance was noted in *Union of India v. Mohd. Ramzan Khan* (AIR 1991 SC 471)

"13.... There is a charge and a denial followed by an inquiry at which evidence is led and assessment of the material before conclusion is reached. These facets do make the matter quasi-judicial and attract the principle of natural justice. As this Court rightly pointed out in the *Gujarat case* (AIR 1969 SC 1294), the disciplinary authority is very often influenced by the conclusions of the Inquiry Officer and even by recommendations relating to the nature of punishment to be inflicted. With the Forty-Second Amendment, the delinquent officer is not associated with the disciplinary inquiry beyond the recording of evidence and the submissions made on the basis of the material to assist the Inquiry Officer to come to his conclusions. In case his conclusions are kept away from the delinquent officer and the Inquiry Officer submits his conclusions with or without recommendation as to punishment, the delinquent is precluded from knowing the contents thereof although such material is used against him by the disciplinary authority. The report is an adverse material if the Inquiry Officer records a finding of guilt and proposes a punishment so far as the delinquent is concerned. In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching conclusion, rules of natural justice would be affected....."

15. Having thus considered the impugned resolution dated 21.7.2006 is

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hereby quashed. The respondents are, however, at liberty to initiate disciplinary proceedings in consonance with Rules of 1999. Since the charges against the petitioner are grave it would be lawful for the respondents even to place the petitioner under suspension under Rule 4 of 1999 Rules.

The petition is thus finally disposed of. However, no costs.

Petition disposed of.

I.L.R. [2011] M. P., 2342

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 2023/2010(S) (Jabalpur) decided on 12 July, 2011

H.P. UPADHYAY (DR.)

Vs.

STATE OF M.P. & ors.

...Petitioner

...Respondents

Service Law - Benefit of promotional post - Petitioner filed petition challenging his supersession - Petition was allowed and was given promotion to the post of Joint Director w.e.f. 1993 - He was given further promotion to the post of Director w.e.f. 1998 by order dated 29.5.2009 - Petitioner had already retired in 2003 - Order mentioned that Petitioner will be entitled for salary of promotional post only after giving joining on the promotional post - Respondents fully aware that petitioner has already retired and is not possible for him to give joining on promotional post - No fault can be attributed to petitioner for not giving him timely promotion - Petitioner was vigilant and respondent had not properly dealt with the claim of the petitioner - Petitioner entitled for benefit of pay of promotional post w.e.f. 1998 - He is entitled for arrears of pay with 9% interest p.a.
(Paras 6 to 9)

सेवा विधि - पदोन्नति के पद का लाभ - याची ने अपने अधिक्रमण को चुनौती देते हुए याचिका प्रस्तुत की - याचिका मंजूर की गई तथा संयुक्त निदेशक के पद पर 1993 से प्रभावी पदोन्नति प्रदान की गई - और आगे आदेश दि. 29.05.2009 द्वारा उसे निदेशक के पद पर 1998 से प्रभावी पदोन्नति दी गई - याची 2003 में पहले ही सेवानिवृत्त हो चुका है - आदेश में उल्लिखित था कि याची पदोन्नति के पद के वेतन का हकदार केवल पदोन्नति पद पर कार्यभार ग्रहण करने के पश्चात होगा - प्रत्यर्थागण को पूर्णतः जानकारी थी कि याची पहले ही सेवानिवृत्त हो चुका है और पदोन्नति पद पर कार्यभार ग्रहण करना उसके लिए संभव नहीं है - समय पर पदोन्नति नहीं दिये जाने

में याची की कोई गलती नहीं — याची सतर्क था और प्रत्यर्थागण ने याची के दावे पर उचित कार्यवाही नहीं की — याची 1998 से प्रभावी पदोन्नति पद के वेतन के लाभ के लिए हकदार — वह 9 प्रतिशत प्रतिवर्ष ब्याज के साथ वेतन के बकाया हेतु हकदार है।

D.K. Dixit, for the petitioner.

B.N. Mishra, G.A. for the respondents.

ORDER

K.K. TRIVEDI, J. :- The present petition under Article 226 of the Constitution of India has been filed challenging the orders dated 23.5.2008, 29.5.2009 and 10.2.2010 Annexures P/10, P/12 and P/16 respectively and relief is claimed to the effect that the respondent be commended to pay the benefits of revised pay scale on promotion of the petitioner on the post of Director, Health Services-w.e.f. 2.12.1998 till 31.3.2003 and all the arrears be calculated after proper fixation of pay and the same be paid to the petitioner with interest at the rate of 24% per annum. A further claim is made by the petitioner to revised pension and other retiral dues of the petitioner w.e.f. 1.4.2003 and to pay arrears of the same with interest at the rate of 24% per annum.

2. It is contended by the petitioner that he was appointed in the service was granted promotion timely up to the post of Dy. Director. However, he was superseded in the matter of promotion on the post of Joint Director, Health Services, which resulted in further supersession on the post of Director, Health Services. The petitioner was prosecuting his claim before the respondent by making constant applications / representations but till date of his retirement nothing was done. Ultimately, by orders he was given the benefits of promotion, but the monetary claims were denied. It is the case of the petitioner that since he was superseded illegally and ultimately such fact was found correct as was pointed out by the petitioner long back only in the year 2008, petitioner could not have been denied the benefit of monetary claims on account of promotion. It is said that while in service the petitioner suffered the loss in emoluments and he also suffered the loss after retirement when the pensionary claims were settled and is still suffering monetary loss as he is being paid lesser pension than what is otherwise due to him.

3. Writ petition was entertained by this Court, notice was issued and in response to the notice, reply / return is filed by the respondent, contending inter alia that the representations made by the petitioner were considered. There was no parity between the case of the petitioner and one Dr. C.M.

Sankhla, who came before the M.P. State Administrative Tribunal ventilating his grievance with regard to supersession and the said claim was decided, therefore, the benefit of promotion was given to said Dr. Sankhla with retrospective effect with all the monetary benefits. It is said that the case of Dr. Sankhla is distinguishable on other counts as Dr. Sankhla was superseded because his ACRs were not available in the Departmental Promotion Committee, which met for consideration of the cases for promotion on 28.4.1992. However, since the petitioner has now been promoted, he will be entitled to the notional fixation of salary of promotional post, but arrears of salary cannot be aranted to the petitioner. Thus, it is contended that that there is no parity between the claim of the petitioner and the benefit granted to Dr. Sankhla under the peculiar facts and circurnstances of the case. It is said that the respondent has passed a proper order which need not be interfered with by this Court.

4. I have heard learned counsels for the parties at length and perused the record.

5. On perusal of the impugned order dated 23.5.2008 (Annexure P/10) it is clear that promotion of the petitioner was ordered only because he approached M. P. State Administrative Tribunal by way of filing **Original Application No.486/1989**, which was decided on 16.8.1991. It is also clear that the petitioner was required to file yet another **Original Application No. 66/1998**, which was decided on 28.4.1998 and since the order was not complied, a **Contempt Petition No.67/1999** was filed before the State Administrative Tribunal Bench at Indore. It is said that the orders were passed giving promotion to the petitioner on the post of Joint Director, Health Services with seniority from the year 1993 on the said post. It is said that the review D.P.C with reference to the claim made by the petitioner through his representation was held on 20.3.2008. Tan-king into consideration the criterian as fixed by the DPC dated 26.11.1998, the petitioner was also considered found fit and was given promotion on the post of Director, Health Services w.e.f. 2.12.1998. However, what was the good reason not giving the benefit of monetary claims to the petitioner by the said order were not explained.

6. The criterian which the respondent has adopted for distinguishing the petitioner from the case of Dr. Sankhla would not be applicable in as much as the petitioner was also vigilant for making his claims. Not only, he

was making representations, but he also visited the Tribunal for seeking certain directions. Therefore, to say that the petitioner was not entitled to monetary claims because of any lapse on the part of the petitioner and that the petitioner was entitled to notional fixation only is not justified. The manner in which the claim of a person like the petitioner was being considered is apparent from the order dated 29.5.2009 (Annexure P/12) wherein it is said that the petitioner, who has retired w.e.f. 31.3.2003 would be entitled to the salary of the promotional post only after giving joining on the promotional post. The respondent State was fully aware of the fact that after six years of retirement of petitioner it was not possible for him to give joining on the promotional post. In fact the matter was considered in such a manner and pointing out the wrong fundamental rule, which is not applicable in the given circumstance, the claim as made was rejected, by such authority without verifying whether such rule was applicable under the law or not. At any rate, no fault can be attributed to the petitioner for not giving him timely promotion. He was making representation and thereafter claimed, promotion on the post of Joint Director. If his seniority was to be fixed with retrospective date of promotion on the post of Joint Director, again he become entitled to be considered for promotion on the post of Director, Health Services in the year 1998, when he was actually in the service. No reason has been assigned as to why such promotion was not granted to the petitioner and why only after his retirement the review D.P.C was held on 20.3.2008. If such were lapse on the part of the respondent, the benefit of monetary claims on promotion could not have been denied to the petitioner and as a result whereof the petitioner was entitled to the payment of salary of promotional post from the date he was found fit for such promotion.

7. Again when representation was made knowing fully well that the petitioner has retired on attaining the age of superannuation w.e.f. 31.3.2003 by the third impugned order of the respondent dated 10.2.2010 (Annexure P-16), it was said that only a notional fixation of pay would be done on promotion of the petitioner in the pay of Rs. 18400 - 500 -22400 and he will be entitled to the revision of his pension and grant of pensionary benefits as per rule 30 of Madhya Pradesh Civil Services (Pension) Rules 1976. Such course was not open to the respondent authority in as much as there was no rider put by any authority much less any judicial authority that the petitioner on being promoted, would not be entitled to the monetary benefits of the promotional post with retrospective effect. This being so, the equity demands that in case the petitioner is found fit for promotion by the review

DPC, he should be allowed all the monetary benefits of promotional post, including the payment of salary, revision of pay and other consequential benefits.

8. Had it been the case that petitioner himself was negligent in making claims with respect to his promotion on the higher post and has approached the Court of law at belated stage a different view would have been possible but because there are no lapse on the part of the petitioner, on the other hand, it is categorically found that the respondent was not properly dealing with the claim of the petitioner, the petitioner cannot be put to loss of monetary benefits. As has been categorically maintained by the petitioner he has suffered monetary loss while he was in service and is still suffering loss as he is not getting proper pension after his supersession.

9. In view of aforesaid, the present petition deserves to be and is hereby allowed. The part of the order dated 23.5.2008, whereby it is ordered that on promotion on the post of Director, Health Services, the petitioner will get only notional seniority and no monetary benefits would be paid to him, is hereby quashed. Respondent is hereby commended to extent the benefit of pay of the promotional post to the petitioner w.e.f. 2.12.1998, revised and re-fixed the salary of the petitioner on the promotional post in the scale applicable to the promotional post, calculate all the arrears of salary payable to the petitioner w.e.f. 2.12.1998 till the date of retirement of the petitioner and make payment of such arrears of salary to the petitioner with interest at the rate of 9% per annum from the date it become due till the date of actual payment.

Further writ of mandamus is issued to the respondent commanding the respondent to revised and re-fixed the pension of the petitioner with effect from 1st April, 2003, calculate all the arrears, retiral dues on the basis of revised pay and pay the said amount of arrears to the petitioner with interest at the rate of 9% from the date the amount become due till the date of actual payment.

Exercise in this respect be completed and the arrears of payment of salary as also pension, retiral dues be calculated and paid to the petitioner within two months from the date of receipt of certified copy of the order passed today.

Petition is thus allowed to the extent mentioned hereinabove. The respondent will also pay cost of Rs. 5000/- to the petitioner.

Ordered accordingly.

Petition allowed.

I.L.R. [2011] M. P., 2347

WRIT PETITION

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

W.P. No. 7560/2008 (Jabalpur) decided on 22 July, 2011

L.M.P. PRECISION ENGINEERING CO. PVT. LTD.

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

A. Constitution, Article 226 - Contract - Judicial Review -
Terms of invitation are not open to judicial scrutiny because invitation to tender is in the realm of contract - Authority inviting tender can fix its own terms of invitation to tender - Court can examine the decision making process and interfere only if it is found to have vitiated by malafide and arbitrariness - Authority is the best judge to prescribe the terms and conditions of tender and Courts can not say that whether the conditions prescribed in the tender under consideration were better than one prescribed in earlier tender invitations. (Para 8)

क. संविधान, अनुच्छेद 226 - संविदा - न्यायिक पुनर्विलोकन - आमंत्रण की शर्तों की न्यायिक संविदा नहीं की जा सकती क्योंकि निविदा आमंत्रण संविदा के परिमंडल में आता है - निविदा आमंत्रित करने वाला प्राधिकारी निविदा के आमंत्रण की स्वयं की शर्तें निर्धारित कर सकता है - न्यायालय, निर्णय करने की प्रक्रिया का परीक्षण कर सकता है और केवल तब हस्तक्षेप करेगा यदि उसे असदभाव एवं मनमानेपन से दूषित होना पाया जाता है - निविदा की शर्तें निर्धारित करने के लिए प्राधिकारी सर्वोत्तम निर्णोता है और न्यायालय नहीं बता सकता कि क्या विचाराधीन निविदा में विहित शर्तें, पूर्वतर निविदा आमंत्रणों में विहित शर्तों से बेहतर थी।

B. Tender - Performance Guarantee Clause - Petitioner in the past had supplied 6 machines out of which 5 machines had failed in achieving their target of 83% within a period of 12 months - Incorporation of performance guarantee clause in N.I.T. is to achieve the best quality machines which are having proven performance so that the production of coal does not suffer - Looking to the object and purpose of incorporation of aforesaid condition, the same by no stretch of imagination can either be said to be arbitrary or unreasonable. (Para 9)

ख. निविदा - संपादन प्रत्याभूति खंड - पूर्व में याची ने 6 मशीनें प्रदाय की जिसमें से 5 मशीनें, 83 प्रतिशत का उनका लक्ष्य 12 महिनो की अवधि के भीतर प्राप्त करने में असफल रही - निविदा आमंत्रण नोटिस में संपादन प्रत्याभूति खंड को सम्मिलित

2348 L. M. P. P. E. Co. (P.) Ltd. Vs. Union of India (DB) I.L.R.[2011] M.P., करने के पीछे सर्वोत्तम क्वालिटी की मशीनें प्राप्त करना है जिसकी कुशलता साबित की गई है जिससे कि कोयले का उत्पादन प्रभावित ना हो – उपरोक्त शर्तों को सम्मिलित करने के उद्देश्य एवं प्रयोजन को देखते हुए, उसे कल्पना से परे, मनमाना या अयुक्तियुक्त नहीं कहा जा सकता।

C. Tender - Fresh Tender Notice - First N.I.T was floated for supply of one drill machine - Second N.I.T. was floated for supply of two drill machines - First N.I.T. not being concluded and having been merged with second N.I.T. automatically stood cancelled - Authority inviting offer can withdraw the invitation even after receipt of offer so long as it is not accepted. (Para 12)

ग. निविदा – नयी निविदा नोटिस – प्रथम निविदा आमंत्रण नोटिस एक बेघन यंत्र (ड्रिल मशीन) की संपूर्ति के लिए निकाली गयी – द्वितीय निविदा आमंत्रण नोटिस, दो ड्रिल मशीनों की संपूर्ति के लिए निकाली गयी – प्रथम निविदा आमंत्रण नोटिस समाप्त नहीं की गई और द्वितीय निविदा आमंत्रण नोटिस में विलीन की गयी, अपने आप निरस्त हो गयी – प्रस्थापना आमंत्रित करने वाला प्राधिकारी, प्रस्थापना प्राप्ति के बाद भी आमंत्रण वापस ले सकता है जब तक कि उसे स्वीकार नहीं किया जाता।

Cases referred:

(2007) 8 SCC 1, (2008) 10 SCC 404, (2008) 5 SCC 772, AIR 1996 SC 11, AIR 2005 SC 469, AIR 2009 SC 1204, (1994) 6 SCC 651, (2000) 2 SCC 617, (2000) 5 SCC 287, (2004) 4 SCC 19.

Anil Khare with Harijas Singh Chhabra, for the petitioner.

Greeshm Jain, for the respondents No. 2 & 3.

ORDER

The Order of the Court was delivered by S.R. ALAM, C. J. :—In the instant writ petition the petitioner has questioned the validity of Clause 3(B)(i) of the Tender Notice dated 12.5.2008 whereby the Northern Coalfields Limited has invited tenders for supply of Rotary Blast Hole Drill machines. In order to appreciate the controversy involved in the case it would be apt to refer few relevant facts which are as under.

2. The petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of manufacture of waterwell drilling rigs, blast hole drills, vertical turbine pumps, etc. The respondent No.2 is a government company having eight subsidiaries. The respondent No.3, namely, Northern Coalfields Limited is one of the subsidiary of respondent No.2-company and is registered under the Companies Act. The respondent No.3 for excavation of coal requires various mechanical equipments, one of which is Rotary Blast

Hole Drill machine. In order to meet the aforesaid requirement a Notice Inviting Tender ('NIT') dated 05.4.2005 was issued for procurement of one 160 MM Rotary Blast Hole Drill machine. The petitioner in pursuance to the aforesaid NIT submitted its offer dated 11.4.2005. On a request being made by the respondent No.3, the petitioner-company extended the validity of its offer upto 15.11.2005. Thereafter, by communication dated 20.10.2005 the petitioner was informed that price bid shall be opened on 24.10.2005. However, on 24.10.2005 vide a Fax Message, the petitioner was informed that opening of price bid has been deferred. Thereafter, by communication dated 11.11.2005 the petitioner was asked to extend the validity of its offer upto 31.12.2005. The petitioner accordingly extended the validity of its offer upto 31.12.2005.

3. However, without finalizing the Tender Notice dated 05.4.2005, again another NIT (Annexure-P-13) was issued for procurement of two 160 MM Rotary Blast Hole Drill machines. The petitioner once again submitted its bid. The petitioner was asked to extend the validity of its offer upto 30.3.2007. Thereupon by communication dated 16.2.2007 the petitioner extended the validity of its offer upto 31.3.2007. Thereafter, again on a request being made by respondent No.3 the petitioner extended the validity of its offer upto 30.4.2007 and subsequently upto 30.6.2007. The petitioner thereafter was informed that price bid shall be opened on 02.6.2007. However, vide letter dated 01.6.2007 the petitioner was apprised that opening of the price bid has been kept in abeyance until further communication. Once again, on a request being made by respondent No.3-company, the petitioner extended the validity of its offer upto 29.2.2008. However, the aforesaid NIT was not finalized.

4. However, without finalizing the second Tender Notice (Annexure-P-28) was issued. The petitioner once again submitted the bid in response to the aforesaid notice. Once again on a request being made by respondent No.3 the petitioner extended the validity of its bid upto 31.8.2007. However, even the aforesaid NIT was not finalized.

5. Thereafter, a fresh Notice Inviting Tender dated 12.5.2008 was issued for procurement of thirteen 160 MM Rotary Blast Hole Drill machines. The tender contains Clause 3(B)(i), which reads as under:

"Clause 3(B)(i) – Procurement against this tender shall be done only for proven equipment. Equipment offered by a bidder shall be considered proven provided:

"The bidder must have supplied atleast 03 (three) nos. of the type and the model of equipment offered, to mining industry and/or all other industries (Private or Government/ Public Sector Undertaking Indigenous or Global) during the last 5 years (as on the date of opening of the tender) and atleast three equipments should have been performed satisfactorily for a minimum period of one year from the date of commissioning, at 03 (three) different locations."

It is the aforesaid clause by which the petitioner is aggrieved and therefore has challenged its validity.

6. Shri Anil Khare, learned counsel for the petitioner submitted that three previous Notice Inviting Tenders were cancelled by respondent no.3 without any justification with a malafide intention to oust the petitioner. It is urged that Clause 3 (B)(i) of the NIT is contrary to the principle of 'level playing field'. It is argued that impugned condition is violative of Articles 14 and 19(1)(g) of the Constitution of India. He further sought to argue that inclusion of Clause 3(B)(i) in NIT dated 12.5.2008 is malafide and is arbitrary. In support of his submissions reliance has been placed on the decisions of Supreme Court in *Reliance Energy Ltd. and another vs. Maharashtra State Road Development Corporation Ltd. and others*, (2007) 8 SCC 1, *United India Insurance Co. Ltd. vs. Manubhai Dharamsinghbhai Gajera*, (2008) 10 SCC 404, *S.S. & Company vs. Orissa Mining Corporation*, (2008) 5 SCC 772 and in the case of *Tata Cellular vs. Union of India*, AIR 1996 SC 11.

7. On the other hand, Shri Greeshm Jain, learned counsel appearing for respondent nos.1 and 2 has submitted that respondent no.3 is an independent company registered under the provisions of Companies Act, 1956 and is empowered to issue NIT setting forth the terms and conditions as per its requirements. The previous three NITs were cancelled without evaluating the offer made by any of the bidder. Clause 3(B)(i) has been inserted in the NIT to procure better quality machines which have proven performance so that work of production of coal is not adversely affected. It has further been submitted that NIT in question is a global tender and in response to the aforesaid NIT, five tenderers have submitted their bids. It is contended that in past the petitioner had supplied six machines to different subsidiaries of Coal India Limited, out of which five machines failed to achieve even the target of 83% within a period of 12 months from the date of their commission and, therefore,

subsidiaries of Coal India Limited were constrained to invoke the performance guarantees furnished by the petitioner. It has further been submitted that terms and conditions of invitation to tender are beyond judicial review. In support of his submissions learned counsel has placed reliance on the decisions of Supreme Court in *Tata Cellular vs. Union of India*, AIR 1996 SC 11, *Association of Registration Plates vs. Union of India and others*, AIR 2005 SC 469 and *Siemens Public Communication Pvt. Ltd. and another Vs. Union of India*, AIR 2009 SC 1204.

8. We have considered the submissions made on both sides. The scope of judicial review in the matters relating to tender or award of contract is no longer *res integra* and stands concluded by catena of decisions of Supreme Court. In *Tata Cellular vs. Union of India*, (1994) 6 SCC 651, it has been held that terms of invitation to tender are not open to judicial scrutiny because invitation to tender is in the realm of contract. In *Air India Limited Vs. Cochin International Airport Limited*, (2000) 2 SCC 617 it has held that authority inviting tender can fix its own terms of invitation to tender. The Court can examine the decision making process and interfere with the same only if it is found to have vitiated by malafide and arbitrariness. In *Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others*, (2000) 5 SCC 287, it has been held that authority calling for the tender is the best judge to prescribe the terms and conditions of the tender and even it is not open to courts to say whether the conditions prescribed in the tender under consideration were better than one prescribed in earlier tender invitations. It has further been held that the courts cannot strike down the terms of the tenders prescribed by the authorities merely because it feels that some other terms in the tender would have been fair, wiser or logical. The court can interfere when the terms of tender are shown to be arbitrary, discriminatory or malafide. Similar view has been taken by the Supreme Court in *Director of Education and others vs. Educomp Datamatics Ltd. And others*, (2004) 4 SCC 19. In *Siemens Public Communication Pvt. Ltd. and another Vs. Union of India*, AIR 2009 SC 1204, the Supreme Court has held that when the power of judicial review is invoked in the matters relating to tenders or award of contract the court must bear in mind that the contract is a commercial transaction and evaluation of tenders in awarding of contracts is essentially the commercial function.

9. In the backdrop of aforesaid well settled legal position and also in the facts of the case we now proceed to deal with the challenge to the impugned

2352 L. M. P. P. E. Co. (P.) Ltd. Vs. Union of India (DB) I.L.R.[2011] M.P., condition of N.I.T. The respondent No.3 undoubtedly has the authority to lay down the pre-conditions of qualifications of tenderers to ensure that they have the capacity and resources to successfully execute the contract awarded to them. One cannot lose sight of the fact that the petitioner in the past had supplied six machines to subsidiaries of Coal India Limited, out of which five machines have failed in achieving its target of 83% within a period of 12 months from the date of commission which compelled the subsidiary of respondent No.2 to invoke the performance guarantee clause for encashment of Bank guarantee. The object of incorporating clause 3(B)(i) is to achieve the best quality machines which are having proven performance so that the production of the coal does not suffer. Looking to the object and purpose of incorporation of the aforesaid condition, in our view, the same by no stretch of imagination can either be said to be arbitrary or unreasonable.

10. The contention advanced on behalf of petitioner that three previous Notice Inviting Tenders were cancelled with mala fide intention and without any justification has no force and cannot be accepted for the simple reason that the petitioner did not lodge any protest when successive Notice Inviting Tenders were issued. On the contrary, it participated in the same by submitting tenders. Besides, the respondent No.3, namely, Northern Coalfields Limited, has given the reasons and circumstances under which previous three NITs were cancelled. In paragraph 3 of reply to rejoinder of respondent No.3 it has been averred that one M/s.Revathi Equipment Limited, one of the tenderer who had submitted its bid pursuant to first Notice Inviting Tender dated 05.4.2005 made a representation dated 22.10.2005 whereunder it questioned the provenness of offered equipment by the petitioner on the ground that the Bank guarantee furnished by the petitioner in respect of five out of six machines which were supplied by the petitioner were encashed, on account of non-achieving of guaranteed availability as per terms of the respective orders by the Coal India hence the petitioner does not fulfil the eligibility criteria laid down in N.I.T.

11. In view of aforesaid representation the opening of price bid was postponed with a view to ascertain factual position on account of passage of time and withdrawal/unwillingness of one of the participating tenderer to continue with the tender, the tender for supply of one Drill was closed and the requirement of one Rotary Blast Hole Drill machine was clubbed with the second NIT. It has further been averred that prior to cancellation of subsequent tenders i.e. second and third NITs the matter was taken up with Coal India

Limited and the opinion of Additional Solicitor General was sought. A copy of the opinion has been annexed as Annexure-R-3. In the opinion it was stated that petitioner does not qualify the test of provenness and one machine supplied by him earlier cannot be given the certificate of provenness. No decision to finalize the second and third NITs could be taken as there were numerous complaints regarding quality of machines supplied by the petitioner. On account of passage of time, second and third NITs were also cancelled.

12. Thus from the aforesaid facts it is evident that in the first N.I.T. The tenders were invited only for one Rotary Blast Hole Drill machine, however, looking to the need of one more Rotary Blast Hole Drill machine the second N.I.T. Was floated for supply of two Rotary Blast Hole Drill machines, which included the Rotary Blast Hole Drill machine of first N.I.T. and thus the first N.I.T. not being concluded and having been merged with second N.I.T. automatically stood cancelled. Besides that, the same having not been concluded, no right accrued to any one including the petitioner. The authority inviting offer can withdraw the invitation, even after receipt of offer, so long as it is not accepted, hence there can be no exception to the order cancelling the N.I.T. before taking steps to finalize the same. The respondent No.3 even before cancellation of second and third N.I.T. by way of abundant caution and in all fairness, obtained, opinion of Additional Solicitor General and only after receipt of the opinion, the respondent No.3 decided to cancel second and third N.I.T.

13. Thus, we find that explanation given for cancellation of previous Notice Inviting Tenders on behalf of the respondents is plausible, convincing and as such the action of cancellation of NITs cannot be held to have been taken only to oust the petitioner from submitting the bid. Mere participation in the tender does not create any indefeasible or legally enforceable right on the petitioner and respondent No.3 is well within its right to cancel the NIT for cogent reasons, which have been referred to supra. No fault can be found with the action of respondent No.3 in cancelling the NIT in previous three NITS. Thus, the challenge to validity of clause 3(B)(i) of N.I.T. Dated 12.5.2008 cannot be sustained.

14. In the result, the writ petition fails and is hereby dismissed.

Petition dismissed.

WRIT PETITION

Before Mr. Justice S.K. Gangele & Mr. Justice Sheel Nagu

W.P.No.6156/2009 (Gwalior) decided on 26 July, 2011

BRJESH DUBEY & anr.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

A. National Security Act (65 of 1980), Section 3 - Detention order - Pre-execution stage - Power of Judicial Review - Purpose of detention is to afford protection to Society - Object is not to punish a man for having done something but to intercept before he does it and to prevent him from doing so. (Para 11)

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 - निरोध आदेश - निष्पादन पूर्व स्थिति - न्यायिक पुनर्विलोकन की शक्ति - निरोध का प्रयोजन समाज को सुरक्षा प्रदान करने के लिए है - इसका उद्देश्य किसी व्यक्ति द्वारा कुछ किये जाने के लिए दण्डित करना नहीं बल्कि उसके द्वारा ऐसा कुछ किये जाने से पूर्व रोकना तथा उसे ऐसा करने से निवारित करना है।

B. National Security Act (65 of 1980), Section 3, Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, (7 of 1980), Section 3 - Detention order - Petitioners engaged in manufacturing synthetic ghee - Words 'maintenance of supplies of commodities of essential to the community' means the natural commodity - Synthetic Ghee is not a natural commodity - Detention order under Section 3 of National Security Act within the power and authority of District Magistrate. (Para 18)

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3, चोरबाजारी निवारण और आवश्यक वस्तु प्रदाय अधिनियम (1980 का 7), धारा 3 - निरोध आदेश - याची बनावटी घी के विनिर्माण में लगा हुआ था - शब्द 'समुदाय के लिए आवश्यक वस्तुओं का प्रदाय' का अर्थ है प्राकृतिक वस्तु - बनावटी घी प्राकृतिक वस्तु/पदार्थ नहीं है - राष्ट्रीय सुरक्षा अधिनियम की धारा 3 के अंतर्गत निरोध आदेश जिला मजिस्ट्रेट की शक्ति एवं प्राधिकार के भीतर है।

C. National Security Act (65 of 1980), Section 3 - Grounds of Detention - Petitioners engaged in manufacturing synthetic ghee on large scale - There was a danger to the health and hygiene of the large

number of persons - Detention of the petitioners could not be said to be for wrong purpose. (Para 20)

ग. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 - निरोध के आधार - याचीगण बड़े स्तर पर बनावटी घी के विनिर्माण में लगे थे - बड़ी संख्या में व्यक्तियों के स्वास्थ्य एवं आरोग्य को खतरा था - याचीगण का निरोध अनुचित प्रयोजन हेतु होना नहीं कहा जा सकता।

Cases referred:

(2011) 5 SCC 244, 2010(2) MPLJ 59, (2010) 9 SCC 618, (2008) 16 SCC 14, 2003 (3) MPLJ 372, AIR 1990 SC 225, AIR 1989 SC 1282, AIR 1982 SC 469, AIR 1975 SC 1877, AIR 1968 SC 1303, (2008) 3 SCC 613, (1992) 4 SCC 154, 1992 SUPP. (1) SCC 496, AIR 2005 SC 4421, (2004) 9 SCC 278, (2011) 5 SCC 708.

Yogesh Chaturvedi, for the petitioners.

Deepak Khot, G.A. for the respondents.

ORDER

The Order of the Court was delivered by **S.K. GANGELE, J.** :—The petitioners have filed this petition against the order of detention dated 13-10-2009. By the aforesaid order the District Magistrate ordered that in order to maintenance of public peace, the detention of the petitioners is necessary, hence, the District Magistrate ordered detention of the petitioners under Section 3(2) of the National Security Act, 1980. The appropriate Government affirmed the order of the detention vide order dated 24-10-2009.

2. Initially the petitioners filed the petition against the order of detention and subsequently the petitioners amended the petition and also challenged the order of approval dated 24-10-2009. It is an admitted fact that the petitioners have filed this petition challenging the orders of detention and approval at pre-execution stage, meaning thereby the petitioners have filed this petition when they were not in detention.

3. It is submitted by the petitioners that they had been running a unit in the name of M/s Hind Diary and Food Products, which is partnership firm. The petitioners' firm had been producing Ghee in the name of Gwala Shri and Shri Anmol Pure Desi Ghee.

4. The Collector in the grounds of detention has mentioned that the petitioners had been producing synthetic Ghee and they were in the business

of production of aforesaid Ghee. By the aforesaid activities of the petitioners, there was danger to the health of general public and due to the aforesaid activities of the petitioners persons were not coming forward to depose against the petitioners. It has further been mentioned in the grounds of detention that the Food Inspector Mr. Dharmendra Kumar Soni and Shri Rajesh Kumar had taken samples of Ghee of Hindi Diary and Food Products on 8-11-2008 and both the samples were found adulterated and misbranded and the District Magistrate was found the petitioners guilty under Sections 420 & 188 of IPC. Again on 3-10-2009 a team of Food Inspectors inspected the premises of petitioners named as M/s Hind Diary and Food Products and during inspection it was found that there was 8380 litre synthetic Ghee. Samples were taken by the officers and sent for analysis to the State Food Analysis Laboratory and as per the report of the Laboratory dated 12-10-2009, the samples were found misbranded and adulterated. Earlier also a criminal case was registered before the Court of Chief Judicial Magistrate, Sheopur and in the aforesaid case vide judgment dated 13-1-2005 a punishment of one year with fine of Rs.300/- was imposed against the petitioners. In another case No.10/95, the Chief Judicial Magistrate Sheopur also imposed a punishment of one year with fine of Rs.300/- vide judgment dated 13-1-2005.

5. Looking to the aforesaid activities of the petitioners and the fact that the petitioners were involved in manufacturing of synthetic Ghee, the detention of the petitioners is necessary under National Security Act, 1980. Subsequently, the orders passed by the District Magistrate have been affirmed by the Government.

6. The petitioners in the writ petition have contended that earlier orders of detention were passed against one Bansilal and others persons. This Court vide order dated 14-12-2009 quashed the detention orders against the aforesaid persons, hence, the present petition is also liable to be allowed.

It has further been submitted that earlier samples were taken of the petitioners' firm, which were not found adulterated, in spite of that again and again samples were taken. It has further been submitted that there is a special law in regard to dealing with the offence under the provisions of Prevention of Food Adulteration Act, 1954 and also the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, hence, the District Magistrate has no power to invoke the provisions of National Security Act, 1980.

Learned counsel for petitioners raised same grounds in his arguments. He also submitted that the orders passed by the District Magistrate is against the provisions of Section 3 of the National Security Act, 1980 and the grounds mentioned along with the orders of detention are vague hence, this Court has power and authority to quash the order of detention at pre-execution stage also. In support of his contentions, learned counsel relied on the following judgments :-

- i) (2011) 5 SCC (Rekha Vs. State of Tamil Nadu Through Secretary to Government and another);
- ii) 2010 (2) MPLJ 59 (Tahsildar Singh Vs. State of M.P. & Others);
- iii) (2010) 9 SCC 618 (Pebam Ningol Mikoi Devi Vs. State of Manipur and others);
- iv) (2008)16 Sec 14 (Deepak Bajaj Vs. State of Maharashtra and another);
- v) (2003) 3 MPLJ 372 (Ravi Tiwari and others Vs. Union of India and others);
- vi) AIR 1990 SC 225 (T.A.Abdul Rahman Vs. State of Kerala and others);
- vii) AIR 1989 SC 1282 (Dharamdas Shamlal Agarwal Vs. The Police Commissioner and another);
- viii) AIR 1982 SC 469 (Smt. Bimla Dewan Vs. Lieutenant-Governor of Delhi);
- ix) AIR 1975 SC 1877 (Krishna Murari Aggarwala Vs. The Union of India and others); and
- x) AIR 1968 SC 1303 (Rameshwar Lal Patwari Vs. The State of Bihar).

7. Contrary to this, learned Government Advocate has submitted that the District Magistrate has power to invoke the provisions of National Security Act because the provisions of Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 have no overriding effect over the provisions of National Security Act, 1980.

He further submitted that at pre-execution stage, the Court has limited power of judicial review of the order of detention passed under the National Security Act, 1980. He further submitted that there are grounds to pass an order of detention against the petitioners because the petitioners were in the trade of manufacturing of synthetic Ghee, which is harmful and dangerous to the life of citizens. In spite of that they had been continuing the business even after conviction by the courts. Hence, the order is in accordance with law. In support of his contentions, learned counsel "relied on the following judgments :-

- i) (2008)3 SCC 613 (*State of Maharashtra and others Vs. Bhaurao Punjabrao Gawande*); and
- ii) (1992) 4 SCC 154 (*David Patrick Ward and another Vs. Union of India and others*).

8. The question of consideration before this Court is what are the grounds available under Article 226 of the Constitution of India against the order of detention passed under the provisions of National Security Act, 1980 of pre-execution stage because it is an admitted fact that in the present petition, the petitioners did not surrender before the appropriate authority in compliance to the orders of detention. They filed this petition at pre-execution stage.

9. The Three Judges Bench of Hon'ble Supreme Court in the case of *Additional Secretary to the Government of India and others Vs. Smt. Alka Subhash Gadia and another*, reported in 1992 Supp (1) SCC 496 has considered the power of judicial review under Article 226 of the Constitution of India of detention order when it has been challenged at pre-execution stage and held as under :-

"28. It is to prevent the possible abuse of this draconian measure that the legislature has taken care to provide certain salutary safeguards such as (1) the obligation to furnish to the detenu the grounds of detention ordinarily within five days and in exceptional circumstances and for reasons to be recorded in writing not later than 15 days from the date of detention, (ii) the right to make representation against the order of detention, (iii) the constitution of Advisory Board consisting of persons who are or have been qualified to be appointed as Judges of the High Court, (iv) the reference of the case of the detenu to the Advisory Board within five weeks of the date of detention, (v) the hearing of the detenu by the Advisory

Board in person and the submission by the board of its report to the government within 11 weeks from the date of detention, (vi) the obligation of the government to revoke the detention order if the Advisory Board reports that there is in its opinion no sufficient cause for the detention of the person concerned, (vii) the provision of the maximum period for which a person can be detained and (viii) revocation of the detention order by the government on the representation of the detenu independently of the recommendation of the Advisory Board, etc. In addition, the detenu or anyone on his behalf has a right to move the High Court and the Supreme Court by way of a habeas corpus petition challenging the detention on various grounds which are already pointed out above while discussing the various authorities. It must further be appreciated that the validity of the Act in question being permitted to be enacted by the Constitution, has also been upheld by this Court with all its present provisions as they stand. Howsoever, repugnant the notion of preventive detention may be to the champions of individual liberty, it has also to be remembered that the power to make such a law even during peacetime has been incorporated in the Constitution many of whom had tasted the bitter fruits of such detention law during the struggle for freedom. Whatever may, therefore, be one's own notions about the dimensions of individual liberty, one must accept the provisions of the Constitution as enacted by the mature vision and seasoned experience of the Constitution-makers. We must also not lose sight of the fact that over the years, by and large, the judiciary has interpreted the Act and the orders made thereunder strictly so as to give to the detenu the benefit of every unexplained error of omission and commission and has either struck down the order itself or has held its further operation illegal.

29. The whole thrust of the first three contentions advanced by Shri Jain for the respondent is not only directed against the impugned order but also against the provisions of the Act and the Constitution. His contention that since the individual has an absolute right to liberty, the burden is on the State to satisfy that it is necessary to deprive the individual of his liberty before apprising him of the grounds of his detention, is clearly against the relevant provisions of Article 22 of the Constitution. The right to liberty protected by Article 21 has

been limited by Article 22 which permits arrest for punitive and preventive detention, provided the safeguards mentioned therein are observed. The provisions of Article 22(3) (b) permit the arrest or detention of a person under any law providing for preventive detention without complying with the provisions of sub-clause (1) and (2) of Article 22 which require that no person who is arrested shall be detained in custody, among other things, without being informed "as soon as may be" of the grounds of such arrest and that he shall not be detained the right to consult and to be defended by a legal practitioner. He shall also be required to be produced before the nearest magistrate within twenty-four hours of his arrest. Although sub-clause (5) of Article 22 also requires that the person detained under a preventive detention law would be communicated the grounds of his detention "as soon as may be", it also does not specify the maximum period within which the grounds are to be so communicated. In other words, the provisions of the Constitution permit the legislature to make a law under which a person may be arrested and detained without first communicating to him the grounds of his arrest. The provisions of Section 3(3) of the present Act which are made for the purpose of Article 22(5) of the Constitution provide that ordinarily the grounds of arrest shall be communicated within the maximum period of 5 days, and in exceptional circumstances and for reasons to be recorded in writing they shall be communicated within a period of 15 days from the date of the detention. These provisions of the Act have not been faulted on any account. In the face, therefore, of the clear provisions of the Constitution and of the valid Act, it is not open to contend that the provisions of Articles 14, 19 and 21 of the Constitution prevent a person being deprived of his liberty without first apprising him of the grounds of his arrest. For this very reason, it is also not open to contend that since the State has all the facts in its possession which require the arrest and detention of the person, it must first disclose the said facts before depriving him of his liberty. Since the provisions of Article 22 of the Constitution pointed out above and of the Act made thereunder permit the State to arrest and detain a person without first disclosing the grounds, even though they are in its possession before or at the time of his arrest, this argument is not tenable in law. It must further be remembered that though the

provisions of the Constitution and the law enacted for the purpose enable the State or its delegate the detaining authority to detain a person without first disclosing the grounds of detention they do not preclude them from serving the grounds of detention on the detenu along with the order of detention. In fact very often they do so. But Shri Jain's argument goes still further and requires that the order of detention and the grounds of detention should be served on the proposed detenu in advance to enable him to challenge them in a court of law before submitting to the order. In advancing this contention, Shri Jain not only wants to secure to the proposed detenu the right to seek the judicial review of the detention order even before it is executed but also to enable him thereby to by-pass the procedure laid down by the law to challenge it after it is executed. To that extent this contention requires the Court to go a step further and to do something more than what it does or would do while entertaining grievances against orders passed under other law. The justification advanced to claim this superior right is that under the detention law what is infringed is the liberty of the individual and no individual should be required to surrender it without a prior right to challenge the order in question. As has been elaborately discussed above, however vital and sacred the liberty of the individual, for reasons which need not be discussed over again here, the responsible framers of the Constitution although fully conscious of its implications have made a provision for making a law which may deprive an individual of his liberty without first disclosing to him the grounds of such deprivation. It is not, therefore, possible for us to accept the three contentions.

30. As regards his last contention, viz., that to deny a right to the proposed detenu to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this argument is also not well merited based and it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the

powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and inconformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Article 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detenu is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope

and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the act and under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."

The Hon'ble Supreme Court has clearly held that the Court has very limited scope in regard to judicial scrutiny of a detention order at pre-execution stage and six circumstances have been enumerated by the Hon'ble Supreme Court on which the Court has power of Judicial scrutiny of a detention order under Article 226 of the Constitution of India.

10. The aforesaid judgment has further been considered by another Three Judges Bench of the Hon'ble Supreme Court in the case of *Naresh Kumar Goyal Vs. Union of India and others*, reported in AIR 2005 SC 4421 and has held as under :-

"9. It is trite law that an order of detention is not a curative or reformatory or punitive action, but a preventive action, avowed object of which being to prevent the anti-social and subversive elements from imperiling the welfare of the country or the security of the nation or from disturbing the public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. It, therefore, becomes imperative on the part of the detaining authority as well as the executing authority to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenu and executing the detention order

because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of preventive action and turn the detention order as a dead letter and frustrate the entire proceedings. Inordinate delay, for which no adequate explanation is furnished, led to the assumption that the live and proximate link between the grounds of detention and purpose of detention is snapped. (See : *P.U. Iqbal v. Union of India and others* (1992) 1 SCC 434 ; *Ashok Kumar v. Delhi Administration* (1982) 2 SCC 403 and *Bhawarlal Ganeshmalji v. State of Tamil Nadu* (1979) 1 SCC 465.

10. It is not necessary for us to multiply authorities because no exception can be taken to the above proposition enunciated by this Court in a series of decisions.

11. Mr. B.B. Singh, learned counsel appearing on behalf of the State of Bihar, submitted before us that the question involved in the instant appeal is not whether the order of detention should be struck down on the ground that the State of Bihar has not taken necessary steps to implement the order of detention, but whether at the pre-arrest stage the High Court should have exercised its jurisdiction under Article 226 of the Constitution of India to quash the order of detention on such grounds. He submitted that the decisions of this Court have taken the view that exercise of discretion under Article 226 of the Constitution of India can be justified only in appropriate cases and the scope for interference is very limited. Normally the Court would not interfere with the order of detention at a pre-arrest stage under Article 226 of the Constitution of India. He submitted that there are only 5 exceptions to this rule which would justify interference by the Court at the pre-execution stage with the order of detention. Those five situations have been enumerated in the case of *Additional Secretary to the Government of India and others v. Smt. Alka Subhash Gadia and another*, 1992 Supp(1) SCC46;

"As regards his last contention, viz., that to deny a right to the proposed detainee to challenge the order of detention and the grounds on which it is made before he is taken in custody is to deny him the remedy of judicial review of the impugned order which right is a part of the basic structure of the Constitution, we find that this

argument is also not well merited based as it is on absolute assumptions. Firstly, as pointed out by the authorities discussed above, there is a difference between the existence of power and its exercise. Neither the Constitution including the provisions of Article 22 thereof nor the Act in question places any restriction on the powers of the High Court and this Court to review judicially the order of detention. The powers under Articles 226 and 32 are wide, and are untrammelled by any external restrictions, and can reach any executive order resulting in civil or criminal consequences. However, the courts have over the years evolved certain self-restraints for exercising these powers. They have done so in the interests of the administration of justice and for better and more efficient and informed exercise of the said powers. These self-imposed restraints are not confined to the review of the orders passed under detention law- only. They extend to the orders passed and decisions made under all laws. It is in pursuance of this self-evolved judicial policy and in conformity with the self-imposed internal restrictions that the courts insist that the aggrieved person first allow the due operation and implementation of the concerned law and exhaust the remedies provided by it before approaching the High Court and this Court to invoke their discretionary extraordinary and equitable jurisdiction under Articles 226 and 32 respectively. That jurisdiction by its very nature is to be used sparingly and in circumstances where no other efficacious remedy is available. We have while discussing the relevant authorities earlier dealt in detail with the circumstances under which these extraordinary powers are used and are declined to be used by the courts. To accept Shri Jain's present contention would mean that the courts should disregard all these time-honoured and well-tested judicial self-restraints and norms and exercise their said powers, in every case before the detention order is executed. Secondly, as has been rightly pointed out by Shri Sibal for the appellants, as far as detention orders are concerned if in every case a detinue is permitted to challenge and seek the stay of the operation of the order before it is executed, the very purpose of the order and of the law under which it is made will be frustrated since such orders are in operation only for a limited period. Thirdly, and this is more important, it is not correct to say that the courts have no power

to entertain grievances against any detention order prior to its execution. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the courts are prima facie satisfied (i) that the impugned order is not passed under the Act under which it is purported to have been passed, (ii) that it is sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention orders prior to their execution on any other ground does not amount to the abandonment of the said power or to their denial to the proposed detainee, but prevents their abuse and the perversion of the law in question.

12. In *Union of India and others v. Parasmal Rampuria* (1998) 8 SCC 402, when the order of detention passed under the Act was sought to be challenged at the pre-arrest stage, this Court called upon the respondent first to surrender pursuant to the detention order and then to have all his grounds examined on merit.

13. In *Sayed Taher Bawamiya v. Joint Secretary to the Government of India and Others* : (2000) 8 SCC 630, an argument was advanced before this Court that the exceptions enumerated in *Alka Subhash Gadia* (supra) were not exhaustive. The submission was repelled and this Court observed :-

"As we see it, the present case does not fall under any of the aforesaid five exceptions for the court to interfere. It was contended that these exceptions are not exhaustive. We are unable to agree with this submission. *Alka Subhash Gadia* case shows that it is only in these five types of instances that the court may exercise its discretionary jurisdiction under Article 226 or Article 32 at the pre-execution stage".

14. In *Union of India and others, v. Muneesh Suneja* : (2001) 3 SCC 92, the challenge was to the order of the High Court quashing

the order of detention at the pre-arrest stage on two grounds, first that there had been delay in making the order of detention and second that after making the order of detention no effective steps had been taken to execute the same except to make a vague allegation that the respondent was absconding. This Court noticed the exceptional circumstances justifying interference by the High Court at pre-arrest stage enumerated in *Alka Subhash Gadia* (supra). This Court, thereafter, set aside the order made by the High Court observing :-

"This Court has been categorical that in matters of pre-detention cases interference of court is not called for except in the circumstances set forth by us earlier. If this aspect is borne in mind, the High Court of Punjab and Haryana could not have quashed the order of detention either on the ground of delay in passing the impugned order or delay in executing the said order, for mere delay either in passing the order or execution thereof is not fatal except where the same stands unexplained. In the given circumstances of the case and if there are good reasons for delay in passing the order or in not giving effect to it, the same could be explained and those are not such grounds which could be made the basis for quashing the order of detention at a pre-detention stage. Therefore, following the decisions of this Court in *Addl. Secy. to the Govt. of India v. Alka Subhash Gadia* and *Sayed Taher Bawamiya v. Jt. Secy. to the Govt. of India*, we hold that the order by the High Court is bad in law and deserves to be set aside".

11. From the aforesaid judgments of the Hon'ble Supreme Court, it is clear that the purpose of detention, is to afford protection to the society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. The Hon'ble Supreme Court further observed that the authority must be very vigilant to execute the order of detention because if there would be delay, a very purpose of preventive action would be defeated and the detention order be turned as a dead letter. The same principle can be applied in regard to right of a person against a detention order at pre-execution stage to approach the law court because if a casual approach be adopted then the purpose of order of detention of the statute would be frustrated.

12. Now, we shall scrutinize the order of detention on the basis of five

parameters enumerated by the Hon'ble Supreme Court in the judgment of **Additional Secretary to the Government of India and others** (supra)-

Firstly, the impugned order is not passed under the Act under which it is purported to have been passed.

Learned Counsel for the petitioner argued that as per Section 3(2) of the National Security Act, 1980, the District Magistrate has no power and authority to pass an order of detention of the petitioners in view of the provisions contained in the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980.

13. Section 3(2) of the National Security Act, 1980 and its Explanation is as under :-

"3. Power to make orders detaining certain persons.-

(1) xxxxxxxx

(2). The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation - For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the *Explanation* to sub-section (1) of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980(7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention shall be made under that Act."

14. Section 3(1) of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 is as under :-

"3. Power to make orders detaining certain persons.- (1)

The Central Government or a State Government or any officer of the Central Government, not below the rank of a Joint Secretary to that Government specially empowered for the purposes of this section by that Government, or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person that with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation- For the purpose of this sub-section, the expression "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" means :-

- (a) committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce, in any commodity essential to the community; or
- (b) dealing in any commodity :-
 - (i) which is an essential commodity as defined in the Essential Commodities Act, 1955; or
 - (ii) with respect to which provisions have been made in any such other law as is referred to in Clause (a),
with a view to making grain in any manner which may directly or indirectly defeat or tend to defeat the provisions of that Act, or other law aforesaid.

15. It is clear from both the Sections that in Section 3 of the Act No.7 of 1980 (i.e. Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980) the words have been used as 'prejudicial' to the maintenance of supplies of commodities essential to the community' and in the National Security Act, 1980, the words have been used as 'maintenance of supplies and services essential to the community it is necessary to do so.

However, the Act of Essential Commodities Act, 1955, the word has been used as 'maintenance of supplies of commodities essential to the community and the explanation explained further which means commodity or instigating any person to commit any offence punishable under the Essential Commodities Act or in regard to control the production, supply and distribution or trade and commerce in any commodities essential to the community.

16. The allegation against the petitioners is that they had been in the business of manufacturing synthetic Ghee. The Central Government promulgated the Milk and Milk Product Order, 1992 under Section 3 of the Essential Commodities Act, 1955. The object of the order is for maintaining and increasing the supply of liquid milk and for regulating supply and distribution of milk and milk product. Definitions 2 (g) of the Milk and Milk Product Order, 1992, defines the milk product which means Ghee or butter oil. The ingredients of the Ghee have been mentioned in the Prevention of Food Adulteration Act, 1955. As per the aforesaid rules. Ghee means a fine substance containing the following ingredients :-

(a)	Butyoro refractometer reading at 40°C	40.0 to 44.0
(b)	Minimum Reichert Value	26
(c)	Percentage of F.F.A.as Oleic Acid (Max.)	03
(d)	Percentage of Moisture(Max.)	0.5

So the provisions of supply of Essential Commodities Act would be applicable in regard to Ghee which fulfills the clarifications and it has clearly been stated in the rule that Ghee means pure clarified fat derived solely from milk or curd or from deshi (cooking) butter or from cream to which no colouring mater or preservative has been added. However, the case of petitioners is that they had been in the manufacturing of synthetic Ghee and the Ghee which was recovered from the possession of the factory premises of the petitioners was not a natural Ghee. In this view of the matter, in our opinion, the provisions of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 would not be applicable because these provisions are applicable in regard to supply of natural Ghee.

17. The Hon'ble Supreme Court in the case of *State of Orissa and others*

Vs. Joginder Patjoshi and another, reported in (2004) 9 SCC 278, has considered the earlier judgments of the Hon'ble Supreme Court in regard to interpretation of a statute and held as under :-

"12. Learned counsel appearing on behalf of the respondents' submission that subsequently another Department of the State of Orissa intended to grant a higher benefit is of no consequence. In this case, this Court is required to interpret Rule 8 of the Rules as it stood prior to the amendment and not the amended Rules. It is now well settled principle of law that where the language used in a Statute is clear and unambiguous, the question of taking recourse of any principle of interpretation would not arise. In *Padma Sundara Rao's case* (supra), this Court held : (see P. 542, para 542, para 14)

"14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *Rishabh Agro Industries Ltd. v. P. N. B. Capital Services Ltd.* (2000)5 SCC 515). The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in *Narasimhaiah case*. In *Nanjudaiah case* the period was further stretched to have the time period run from date of service of the High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted it would mean that a case can be covered by not only clause (1) and /or clause (ii) of the proviso to Section 6(1), but also by a non-prescribed period. Same can never be the legislative intent."

13. Similarly in *Hansoli Devi's case* (supra), this Court held:

"9. Before we embark upon an inquiry as to what would be the correct interpretation of Section 28-A, we think it appropriate to bear in mind certain basic principles of interpretation of a statute. The rule stated by Tindal, C. J. in *Sussex Peerage case* (1844) II CI and Fin 85: 8 ER 1034 still holds the field. The aforesaid rule is to the effect (ERP. 1057):

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

It is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the Court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In *Kirkness v. John Hudson and Co. Ltd.* (1955)2 All ER345 : 1955 AC 696 : (1955)2 WLR 1135 Lord Reid pointed out as to what is the meaning of "ambiguous" and held that (AIR 1955 366C-D):

"A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, C. J. in the case of *Aswini Kumar Ghose v. Arabinda Bose*, AIR 1952 SC 369 : 1953 SCR 1 had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In *Quebec Railway, Light Heat and Power Co. Ltd. v. Vandry*, AIR 1920 PC 181, it had been observed that the legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being

given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective. Bearing in mind the aforesaid principle, let us now examine the provisions of Section 28-A of the Act, to answer the questions referred to us by the Bench of two learned Judges. It is no doubt true that the object of Section 28-A of the Act was to confer a right of making a reference, (sic on one) who might have not made a reference earlier under Section 18 and, therefore, ordinarily when a person makes a reference under Section 18 but that was dismissed on the ground of delay, he would not get the right of Section 28-A of the Land Acquisition Act when some other person makes a reference and the reference is answered. But Parliament having enacted Section 28-A, as a beneficial provision, it would cause great injustice if a literal interpretation is given to the expression "had not made an application to the Collector under Section 18" in Section 28-A of the Act. The aforesaid expression would mean that if the landowner has made an application for reference under Section 18 and that reference is entertained and answered. In other words, it may not be permissible for a landowner to make a reference and get it answered and then subsequently make another application when some other person gets the reference answered and obtains a higher amount. In fact in *Pradeep Kumari's case* the three learned Judges, while enumerating the conditions to be satisfied, whereafter an application under Section 28-A can be moved, had categorically stated (SCC p. 743, para 10), "the person moving the application did not make an application to the Collector under Section 18". The expression "did not make an application", as observed by this Court, would mean, did not make an effective application which had been entertained by making the reference and the reference was answered. When an

application under Section 18 is not entertained on the ground of limitation, the same not fructifying into any reference, then that would not tantamount to the effective application and consequently the rights of such applicant emanating from some other reference being answered to move an application under Section 28-A cannot be denied. We, accordingly, answer Question I (a) by holding that the dismissal of an application seeking reference under Section 18 on the ground of delay would tantamount to not filing an application within the meaning of Section 28-A of the Land Acquisition Act, 1894."

14. In *Dayal Singh's case* (supra), a three Judge Bench of this Court, in which both of us were members, observed as under :

"37. If is a well settled principle of law that the Court cannot read anything into the statutory provision which is plain and unambiguous. The Court has to find out legislative intent only from the language employed in the statutes. Surmises and conjectures cannot be restricted to for interpretation of statutes. (See *Union of India v. Filip Tiago De Gama*, (1990)1 SCC 277 : AIR 1990 SC 981).

38. This Court in *Bhavanagar University v. Palitana Sugar Mill (P) Ltd.* (2003)2 SCC 111 : (2002) 9 Scale 102, has observed (SCC p. 121, para 25)

"25. Scope of the legislation on the intention of the legislature cannot be enlarged when the language of the provision is plain and unambiguous. In other words statutory enactments must ordinarily be construed according to its plain meaning and no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute."

From the aforesaid judgment of the Hon'ble Supreme Court, where the Hon'ble Supreme Court, as quoted earlier, the judgment of the Court in the case of *Aswini Kumar Ghose Vs. Arabinda Bose*, reported in AIR 1952 SC 369, Patanjali Sastri, C.J., where it has been stated that "it is not a sound principle of construction to brush aside words in a statute as being inapposite

surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."

18. After applying the principle of law laid down by the Hon'ble Supreme Court, in our opinion, the words used in Section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 that 'maintenance of supplies of commodities of essential to the community' means the natural commodity. As stated earlier the petitioners were in the business of manufacturing synthetic Ghee, which is not a natural commodity (Ghee), hence, in our opinion, the power of District Magistrate for passing of the order of detention against the petitioners cannot be said contrary to the explanation of Section 3(2) of the National Security Act, 1980 and we hold that the detention order passed by the District Magistrate in the present case is within the power and authority of the District Magistrate.

19. Coming to the second ground, which has been stated by the Hon'ble Supreme Court as to whether the order sought is to be executed against a wrong person- that ground is also not available to the petitioner because the orders have not been passed or executed against the wrong persons.

20. Thirdly, whether the order is passed for a wrong purpose. In the grounds of detention the District Magistrate has clearly mentioned that the petitioners had been in the business of manufacturing of synthetic Ghee due to the aforesaid action of the petitioners, there was a danger to the health and hygiene of the large number of societies. It is also a fact that at the time of inspection of the factory premises of the petitioner, more than 8000 litres of synthetic Ghee was found. Looking to the quantity of the synthetic Ghee, certainly there was a danger to the health and hygiene to the society and consumers. It has specifically been mentioned in the order of detention that earlier also the factory premises of the petitioners was inspected and it was found that the petitioners had been in the business of manufacturing synthetic Ghee, that was found proved from the report of the State Food Analysis Laboratory. In spite of that, the petitioners did not stop the manufacturing of synthetic Ghee.

In our opinion, the detention of the petitioners could not be said to be wrong purpose.

21. So far as the fourth ground is concerned, as per the judgment of the Hon'ble Supreme Court, judicial scrutiny is as to whether the order of

detention is based on vague, extraneous and irrelevant grounds - in this regard, there are concrete proof against the petitioners that they had been in the business of manufacturing of synthetic Ghee. The Chief Medical and Health Officer in his letter dated 12-10-2009 reported to the District Magistrate that the petitioners were in the business of manufacturing synthetic Ghee and the cost of the aforesaid Ghee was quite less in comparison to natural Ghee and it was dangerous to the health and hygiene of the public. The samples were taken from the premises of the petitioners and it was found that there were adulterated. A case under Sections 420 & 188 of IPC was also registered against the petitioners at the police station. It has further been stated that the petitioners had been in the aforesaid business for a quite long time.

In such circumstances, it cannot be said that the orders of detention of the petitioners are passed on vague, extraneous and irrelevant grounds.

22. Last point fixed by the Hon'ble Supreme Court for scrutiny is as to whether the authority who passed the orders of detention, had no authority to do so.

As held earlier by us in the present case, the District Magistrate has power and authority to pass the order.

23. Except these grounds, no other grounds are available for judicial scrutiny of order of detention challenged at pre-execution stage. Hence, various arguments advanced by the learned counsel for the petitioners in support of the petition, could not be entertained because those grounds are available to the petitioners after execution of the order of detention. Learned counsel also relied an order of the Division Bench of this Court passed in W.P.No.12015/2009 (*Banshilal Agrawal Vs. State of M.P. & Another*) and other connected writ petitions, decided on 14-12-2009. In the aforesaid order one person had challenged the order of detention at pre-execution stage and other persons had challenged the detention orders after execution of the orders of detention. In the aforesaid case, this Court has not considered the criteria of judicial scrutiny of a detention order at pre-execution stage. In our opinion, it is vital and important as per the judgments of the Hon'ble Supreme quoted above. Hence, the order passed by this Court in W.P.No.12015/2009 is not binding before this Court in deciding the present petition.

24. Hon'ble the Supreme Court in the case of *Sushil Suri Vs. Central Bureau of Investigation and another*, reported in (2011) 5 SCC 708, has held, as under about precedents -*ratio decidendi*:-

"32. It needs little emphasis that even one additional or different fact may make a world of difference between the conclusions in two cases and blindly placing reliance on a decision is never proper. It is trite that while applying ratio, the Court may not pick out a word or sentence from the judgment divorced from the context in which the said question arose for consideration. (See *Zee Telefilms Ltd. v. Union of India*, (2005) 4 SCC 649. In this regard, the following words of Lord Denning, quoted in *Haryana Financial Corpn. v. Jagdamba Oil Mill*, (2002) 3 SCC 496, are also quite apt : (SCC p 509, para 22)

"22.... 'Each case depends on its own facts and a close similarity significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

25. Consequently, we do not find any merit in this petition. It is hereby dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 2377

WRIT PETITION

Before Mr. Justice N.K. Mody

W.P. No. 14510/2010 (Indore) decided on 27 July, 2011

HARINARAYAN

...Petitioner

Vs.

GULABCHANDRA & ors.

...Respondents

Court Fees Act (7 of 1870), Section (iv)(c) - Fixed Court Fee - Petitioner not a party to the sale deed - Allegation of the petitioner in the plaint is that the sale deed is void to the extent of his share - Held - The Court below was not correct in holding that the petitioner is liable to pay ad valorem Court fee - Impugned order stands set aside. (Paras 6 & 7)

न्यायालय फीस अधिनियम (1870 का 7), धारा (iv)(c) - निश्चित न्यायालयीन शुल्क - याची विक्रय विलेख का पक्षकार नहीं - वाद पत्र में याची का अभिकथन है कि उसके शेयर की सीमा तक विक्रय विलेख शून्य है - अभिनिर्धारित - यह धारणा करने

में निचले न्यायालय ने गलती की कि याची मूल्यानुसार न्यायालय फीस अदा करने के लिए दायी है — आक्षेपित आदेश अपास्त।

Cases referred :

2010(4) MPLJ 431, 1987-II MPWN 33, 2010(1) MPLJ 50.

Milind Phadke, for the petitioner.

Vinay Gandhi, for the respondents No. 3 & 4.

Seema Sharma, G.A. for the respondent No. 5.

ORDER

N.K. MODY, J. :- Being aggrieved by the order dated 01/10/10 passed by Civil Judge, Class-II, Sitamhow in Civil Suit No.116-A/08, whereby learned trial court directed the petitioner to pay ad valorem Court fee on the market value of the suit property, present petition has been filed.

2. Short facts of the case are that the petitioner filed a suit for declaration to the effect that the sale deed dated 11/06/08 executed by respondent Nos. 1 & 2 in favour of respondent Nos. 3 & 4 be declared void so far as it relates to the share of petitioner and also permanent injunction. The suit was contested by the respondent Nos. 3 & 4, who have purchased the property from respondent Nos. 1 & 2, wherein it was alleged that the petitioner cannot challenge the validity of the sale deed unless and until petitioner pays the ad valorem Court fee. It was alleged that the respondent Nos. 1 & 2 sold the property to respondent Nos. 3 & 4 for a consideration of Rs.5,51,000/-, therefore, petitioner is liable to pay ad valorem Court fee. It was prayed that the petitioner be directed to pay ad valorem Court fee on the amount of sale deed. The application filed by respondent Nos. 3 & 4 under Order VII Rule 11 CPC was opposed by the petitioner on various grounds including on the ground that since the petitioner is not party to the sale deed, therefore, petitioner is at liberty to value the suit as per his discretion and is not liable to pay ad valorem Court fee. It was prayed that the application be dismissed. After hearing the parties, learned trial Court allowed the application filed by respondent nos. 3 & 4 and directed the petitioner to pay ad valorem Court fee, against which present petition has been filed.

3. Learned counsel for the petitioner argued at length and submits that the impugned order passed by the learned Court below is illeal, incorrect and deserves to be set aside. It is submitted that since the petitioner was not party to the sale deed, therefore, learned Court below committed error in holding

the petitioner liable for payment of ad valorem Court fee. Learned counsel placed reliance on a decision in the matter of *Sunil Vs. Awadh Narayan*, 2010(4) MPLJ 431 wherein Full Bench of this Court had a occasion to take into consideration Section 7(iv)(c) and Schedule-II, Article 17(iii) of the Court Fees Act and held that when the plaintiff makes an allegation that the instrument is void and hence not binding on him and a declaration simplicitor is prayed, then he is not required to pay ad valorem Court fee. In such case, a fixed Court fee under Article 17, Schedule-II of the Court Fees act will be payable. It was further held that in a suit for permanent injunction and for declaration, when document was alleged to be illegal, void and executant had not signed the document, it was not necessary to make payment of ad valorem Court fee. On the strength of aforesaid position of law, learned counsel submits that the petition filed by the petitioner be allowed and the impugned order whereby petitioner has been directed to pay ad valorem Court fee be set aside.

4. Learned counsel for respondent Nos. 3 & 4 submit that the petitioner is not a stranger, but son of respondent No.1 and brother of respondent No.2. It is submitted that the petitioner is claiming his right over the suit property through respondent No.1. It is submitted that since respondent No.1 has sold the property to the petitioner and the petitioner is challenging the validity of the sale deed, therefore, petitioner is bound to pay ad valorem Court fee. Learned counsel placed reliance on a decision in the matter of *Ashok Kumar Vs. Hari Shankar*, 1987-II MPWN, Note-33 wherein sale deed challenged as fraudulent and without consideration, this Court held that ad valorem Court fee on amount of consideration is payable. Reliance is also placed on a decision in the matter of *Israt Jahan Vs. Rajlia Begum*, 2010(1) MPLJ 50 wherein suit for declaration that the registered sale deed executed by husband of the plaintiff No.1 and father of plaintiff Nos. 2 to 7 is illegal and void and the suit was valued for the purpose of declaration at Rs.5,64,400/- being the valuation of sale deed, Divisional Bench of this Court held that the sale deed would be governed by Section 7(iv)(c) and an ad valorem Court fees would be payable as setting aside the sale deed is implicit in the declaratory relief sought by the plaintiff. On the strength of aforesaid position of law, learned counsel submits that the petition filed by the petitioner be dismissed.

5. Learned counsel for respondent No.5/State submits that the petitioner has not valued the suit property. It is submitted that the petitioner has paid the fix Court fee, while petitioner is bound to pay the Court fee as per Article 1-A of Schedule (I) of Court Fees Act, which lays down that the ad valorem

Court fee has to be paid. It is submitted that in the facts and circumstances of the case, petition filed by the petitioner be dismissed.

6. From perusal of the record it is evident that respondent No.1 is father of petitioner while respondent No.2 is brother of the petitioner. Respondent Nos. 1 & 2 have sold the property to respondent Nos. 3 & 4 vide registered sale deed dated 11/06/08. The property is an agricultural land situated at village Risthal. Claim of the petitioner is that the petitioner has got interest in the suit property vide will dated 15/07/96 executed by deceased Kashiram and the petitioner got share in the suit property in a partition. Relief claimed by the petitioner is that the sale deed executed by respondent Nos. 1 & 2 are void to the extent of the share of the petitioner.

Section 7(iv)(c) of Court Fees Act reads under:-

7. Computation of fees payable in certain suits - The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

(a)

(b)

(c) **for a declaratory decree and consequential relief** –
to obtain a declaratory decree or order, where consequential relief is prayed;

In all such suits the plaintiff shall state the amount at which he values the relief sought.

Schedule I of the Court Fees Act deals with the cases in which ad valorem Court fees is payable. Schedule II deals with the fixed Court fees. Sub-clause (iii) of Article 17 reads as under:-

17. **Plaint or memorandum of appeal in each of the following suits:-**

(i)

(ii)

(iii) to obtain a declaratory decree where no consequential relief is prayed;

When presented to the Court of
Civil Judge Class-II

[Five Hundred Rupees]

When presented to the Court of
Civil Judge Class-I [One Thousand Rupees]
When presented to the Court of
ADJ or DJ [Two Thousand Rupees]

7. Since the petitioner is not party to the sale deed which were executed by respondent Nos. 1 & 2 in favour of respondent Nos. 3 & 4 and the allegation of the petitioner in the plaint is that the sale deed is void to the extent of his share, therefore, learned Court below was not correct in holding that the petitioner is liable to pay ad valorem Court fee. In view of this, petition filed by the petitioner is allowed and the impugned order passed by the learned Court below whereby learned Court below has directed the petitioner to value the suit as per value of the sale deed and pay the ad valorem Court fee cannot be allowed to sustain. In view of this, petition filed by the petitioner is allowed and the impugned order stands set aside with a direction to the learned Court below to proceed with the case in accordance with law.

With the aforesaid observations, petition stands disposed of.

Petition disposed of.

I.L.R. [2011] M. P., 2381

WRIT PETITION

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

W.P. No. 8073/2007 (Jabalpur) decided on 1 August, 2011

KALYANI MINERALS PVT. LTD. (M/S)

...Petitioner

Vs.

ADDITIONAL COMMISSIONER OF
COMMERCIAL TAX & ors.

...Respondents

Entry Tax Act, M.P. (52 of 1976), Sections 2(d)(f), 3, 7 & 14, Commercial Tax Act, M.P. 1994 (5 of 1995), Sections 17 & 43 - Levy of Entry Tax - Petitioner Company made purchases from industrial units having facility of exemption from payment of entry tax and commercial tax - Entry Tax is a tax on the entry of goods into local area for consumption, use or sale in course of business of dealer of Schedule II goods - Petitioner made purchase of goods at Panna and caused entry of goods into another local area namely Satna - Since taxable event

2382 K. M. Pvt. Ltd. (M/s) Vs. A.C. of C. Tax (DB) I.L.R.[2011] M.P.,
had occurred therefore, the petitioner has incurred the liability to make
payment of tax - Petition dismissed. (Paras 10 to 12)

प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धाराएँ 2(डी)(एफ), 3, 7 व 14,
वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धाराएँ 17 व 43 - प्रवेश कर
लगाना - याची कम्पनी ने, प्रवेश कर और वाणिज्यिक कर के भुगतान से छूट प्राप्त
औद्योगिक ईकाईयों से क्रय किया - प्रवेश कर स्थानीय क्षेत्र में अनुसूची II के माल के
डीलर के व्यवसाय के क्रम में उपभोग, उपयोग अथवा विक्रय हेतु माल के प्रवेश पर कर
लगाना, प्रवेश कर है - याची ने पन्ना में माल क्रय किया और अन्य स्थानीय क्षेत्र, सतना
में माल का प्रवेश कराया चूंकि, इससे कर लगने योग्य घटना घटित हुई इसलिए याची
कर का भुगतान करने के लिए दायी होगा - याचिका खारिज।

Cases referred:

29 VKN 243, 18 VKN 53 & (2006) 8 STJ 595.

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

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

ORDER

The Order of the Court was delivered by
S.R. ALAM, C. J. :- In the instant writ petition the petitioner has assailed the
validity of the order Annexure-P-4 dated 20.1.2005 passed under Section
14 of the Entry Tax Act and the order passed in revision authority dated
11.4.2007 by which the order passed by the Assessing Officer has been upheld.
The petitioner has also challenged the propriety of action of respondents in
levying penalty and interest.

2. Facts necessary for adjudicating the controversy involved in the writ
petition briefly stated are that the petitioner is a company registered under the
provisions of Companies Act. The petitioner-company is engaged in the business
of sale and purchase of coal and is a registered dealer under the provisions of
Commercial Tax Act, 1994. The petitioner purchased coal from M/s. Pawan
Wires Limited, Panna and M/s. Vandana Fuels, Panna. Since the petitioner had
made purchases from registered dealers, therefore, the same were presumed to
be tax paid purchases. Accordingly, the petitioner submitted the return in respect
of commercial tax as well as entry tax for a period from 1.4.98 to 31.3.99.

3. The Assistant Commissioner, Commercial Tax, Satna initiated proceeding
for assessment of tax under Section 14 of the Entry Tax Act in respect of
goods purchased by the petitioner from aforementioned two registered dealers.
The respondent No.2 vide order dated 28.9.2000 rejected the petitioner's

contention that in the absence of statement as provided under section 7(1) of the Act, the valid presumption arose in favour of the petitioner that the goods purchased by it are entry tax paid goods and, therefore, the petitioner is not liable to pay entry tax. Being aggrieved by the aforesaid order the petitioner preferred a revision before the Additional Commissioner, Commercial Tax. By order dated 11.2.2002 the matter was remanded to the Assessing Officer.

4. The Assessing Officer once again vide order dated 20.1.2005 held the petitioner liable for payment of entry tax. It was found by the Assessing Officer that the petitioner had made purchases from registered dealers i.e. M/s.Pawan Wires Ltd. and M/s.Vandana Fuels, which were new industries and were exempted from payment of commercial tax as well as entry tax. The goods purchased by the petitioner from aforementioned units were therefore not tax paid goods in the hands of the petitioner. Accordingly, the petitioner was held liable for payment of entry tax which was quantified at Rs.4,49,935/-. Being aggrieved by the aforesaid order the petitioner once again preferred the revision. However, the order of the assessing officer was upheld by the revisional authority vide order dated 11.4.2007 (Annexure-P-6). In the aforesaid factual backdrop the petitioner has visited this Court.

5. The respondents have filed return inter alia stating that an inspection was carried out on 8.1.99 and certain records were seized and thereupon, the proceedings under section 14 of the Entry Tax Act were initiated against the petitioner. The petitioner had made purchases from new industrial units which were enjoying facility of exemption from payment of entry tax and commercial tax. In the bills issued by the aforesaid units, seal has been affixed by the dealers stating that goods are exempted from entry tax and, therefore, the petitioner is liable to pay the entry tax. It has further been contended that since the petitioner has evaded payment of entry tax, therefore, it has to discharge its statutory liability. The tax has rightly been levied, and the penalty and interest has rightly been imposed on the petitioner.

6. Mr.G.N.Purohit, learned senior counsel appearing for the petitioner, contended that in view of proviso appended to section 3 (1) of the Entry tax Act the petitioner is not liable to make payment of entry tax as the goods were purchased from the registered dealers. While referring to Section 7(1) of the Entry Tax Act it was contended that if the registered dealer does not affix the seal on the sale voucher stating that "local goods for (name of local area) entry tax not paid" then the presumption arises in favour of the purchasing

dealer that goods are entry tax paid goods. He has further invited our attention to Rule 7 of M.P. Entry Tax Rules, 1976 which prescribes the manner of issue of bill, cash memo or invoice under section 7 of the Act and provides for the statement to be made affixing a rubber stamp that goods are local goods and are entry tax not paid goods. While referring to sub-section (1) of Section 17 of Commercial Tax Act, 1994, learned senior counsel has contended that there could be variety of exemptions i.e. qua the dealer, class of dealer, the goods as well as class of goods. He has also drawn our attention to section 43 of Commercial Tax Act, 1994 which requires issuance of bills by a registered dealer stating that the unit is availing exemption facility and tax has not been paid on such goods. Reference has also been made to Rule 66 of the Commercial Tax Rules which prescribes the format of rubber stamp to be affixed by the exempted registered dealer on the bill as per sub-sections (3) and (4) of Section 43 of the Commercial Tax Act. Learned senior counsel has argued that burden of proof on the purchasing registered dealer is discharged by production of bills in which proper rubber stamp, as required by law, is not affixed. He has placed reliance on Full Bench decision of this Court in *Mohan Singh and Sons vs. Commissioner of Sales Tax, MP 29 VKN 243*, *Ranomal Ramesh Kumar vs. State of MP 18 VKN 53* and in the case of *Marble City Motors, Jabalpur v. Assistant Commissioner of Commercial Tax and others*, (2006) 8 STJ 595.

7. On the other hand, Mr. Kumaresh Pathak, learned Dy. Advocate General appearing for the State has contended that exemption from payment of tax under section 3 of the Act applies only when the entry tax is payable or paid by the selling registered dealer. Admittedly, petitioner has made purchases from units which were exempted from payment of entry tax. Therefore, the petitioner cannot be absolved from its liability to pay entry tax. He has also referred to proviso sub-section (2) of section 7 of the Act to contend that it was not necessary to make a statement referred to in sub-section (1) where goods are purchased by a registered dealer who effects the entry of such goods into a local area other than the local area, in relation to which such goods are local goods. It has further been pointed out in sale vouchers which have been filed by the petitioner cumulatively as Annexure-P-1, a seal has been affixed to the effect that goods are entry tax exempted goods and, therefore, non affixture of seal as required by the rules would not absolve the petitioner from payment of tax.

8. We have considered the submissions made on both sides. Before

proceeding to deal with the merits of the case it would be useful to refer to certain relevant provisions of the Entry Tax Act, 1976. Section 2(d) & (f) which define the expressions "local area" and "local goods" read as under:-

"2(d) "local area" means the area comprised within the limits of a local authority.

2(f) "local goods" in relation to a local goods means goods of local origin as distinct from goods which enter into that local area.

Section 3 of the Entry Tax Act reads as under:-

"3. Incidence of taxation-(1) There shall be levied an entry tax-

(a) on the entry in the course of business of a dealer of goods specified in Schedule-II, into each local area for consumption, use or sale therein; and

(b) on the entry in the course of business of a dealer of goods specified in Schedule-III into each local area for consumption or use of such goods but not for sale therein;

and such tax shall be paid by every dealer liable to pay tax under the Vanijyik Kar Adhiniyam who has effected entry of such goods:

Provided that no tax under this sub-section shall be levied-

(i) in respect of goods specified in Schedule-II other than the local goods, purchased from a registered dealer on which entry tax is payable or paid by the selling registered dealer;"

Section 7(1) is reproduced for the facility of ready reference.

"7. Registered dealers to issue bill etc., stating that goods sold are local goods- (1) Every registered dealer who, in the course of his business, manufactures, produces or grows any goods specified in Schedule-II in a local area in such manner that the goods become local goods in relation to that local area, shall, on the sale of such local goods to any other registered dealer, issue to him a bill, invoice or cash memo specifically

stating in such manner as may be prescribed that the goods being sold are local goods in relation to such local area and that no entry tax has been paid on such goods."

Rule 7 of M.P. Entry Tax Rules, 1976 reads as follows:-

"7. Manner of issue of bill, cash memo or invoice under section 7- A registered dealer required to issue bill, cash memo or invoice under sub-section (1) or sub-section (2) Section 7 shall, for each sale of local goods effected by him to another registered dealer, issue a bill, cash memo or invoice after recording therein the statement referred to in sub-section (1) of Section 7. The statement may be recorded by affixing a rubber stamp and, as far as may be, read as follows:-

"local goods for(enter here name of local area), entry tax not paid."

Every such dealer shall also maintain the counterfoil or duplicate or each of such bill, cash memo or invoice and preserve it till the completion of assessment."

9. Section 17(1) of the Commercial Tax Act, 1994 empowers the State Government to exempt any class of dealers. Section 17(1) reads as under:-

"17. Saving- (1) The State Government may by notification and subject to such restriction and conditions as may be specified therein, exempt whether prospectively or retrospectively,

(i) (a) any class of dealers; or

(b) any goods or class of goods, in whole or in part,

from payment of tax under this act for such period as may be specified in the notification."

Section 43(3) of Commercial Tax Act, 1994 requires issuance of bill by registered dealer stating unit is availing exemption and tax is not paid on such goods. Section 43(3) is reproduced below for the facility of ready reference:-

"43. Certain dealers to issue bills or cash memoranda.-

(3) Every registered dealer, who in the course of his

business sells any goods specified in schedule-II, which have been manufactured by an industrial unit in respect of which such unit is availing the facility of exemption from payment of tax in whole under any notification issued under the act repealed by this act or under this act, in pursuance of any scheme of the state government, shall issue to the purchaser a bill, invoice or cash memo specifically stating in such manner as may be prescribed, that the goods being sold are goods manufactured by an industrial unit availing the facility of exemption from payment of tax in whole and no tax has been paid on such goods."

Rule 66(2) of the Commercial Tax Rules which prescribes the particulars required in a bill and cash memorandum reads as under:-

"66. Particular required in a bill or cash memorandum.-

(2) A registered dealer required to issue a bill, cash memo or invoice under sub section (3) or sub section (4) of Section 43 shall for each sale of goods effected by him to another registered dealer, issue a bill, cash memo or invoice entering all the particulars as specified in sub-rule (1) and also record a statement as referred to in sub-section (3) of Section 43. The statement may be recorded by affixing rubber stamp which read as follows:-

"Goods sold are manufactured by industrial unit holding eligibility certificate/eligible for exemption and are exempt from payment of tax- Commercial Tax not paid"

Every such dealer shall also maintain the counterfoil or duplicate of each of such bill, cash memo or invoice and preserve it till the completion of assessment."

10. After having noticed the relevant provisions of law we may now advert to the facts of the case. Admittedly, the petitioner has made purchases from new industrial units having facility of exemption from payment of entry tax and commercial tax. From perusal of sale vouchers which have been annexed cumulatively as Annexure-P-1 by the petitioner, it is apparent that it bears the seal to the effect that goods are exempted from payment of entry tax and commercial tax. The petitioner-company is situate at Satna whereas the

industries from whom the purchases have been made are situate in Panna. The petitioner has caused the entry of the goods into another local area, namely, Satna for sale.

11. The entry tax is a tax on the entry of goods into a local area for consumption, use or sale in course of business of dealer of Schedule-II goods. The entry tax is a single point tax. Once entry tax is paid or liability is incurred on entry of Schedule-II goods into local area, entry tax is not leviable thereafter, though the goods are moved from that local area into another local area and so on. An assessee is liable to pay the entry tax only when he causes entry of goods into local area for consumption, use and sale therein. From clause (i) of proviso to Section 3(1) of the Entry Tax Act it is apparent that no tax under this sub-section shall be levied in respect of goods specified in Schedule-II other than the local goods purchased from a registered dealer on which the entry tax is payable or paid by the selling registered dealer. Admittedly, in the instant case, entry tax is neither payable nor paid by the registered selling dealer as the units from which the purchase has been made by the petitioner have been granted exemption from payment of tax.

12. In the instant case when the petitioner made purchase of goods at Panna and caused entry of goods into another local area, namely, Satna, the taxable event had occurred and, therefore, the petitioner has incurred the liability to make payment of tax. Clause (i) of proviso to section 3(1) clearly indicates that where the goods sold by registered selling dealer to the assessee are local goods, entry tax would not be payable by selling registered dealer and, therefore, when the goods are moved from that local area by the assessee, entry tax is payable. If a dealer seeks exemption from payment of tax, it is for him to show that taxable event had not occurred or that the goods had already moved from one local area to another local area and thereby enabling an inference to be drawn that taxable event had occurred with liability in another registered dealer to pay tax. That burden can be discharged by purchasing registered dealer by producing the bill which he receives from the selling registered dealer which does not contain the rubber stamp as required by Section 7 of the Entry Tax Act and Rule 7 of M.P. Entry Tax Rules to the effect that goods are local goods and Entry Tax has not been paid. By not affixing the rubber stamp endorsement selling registered dealer makes an implied representation that taxable event has already occurred with liability created either in him or in a registered dealer who dealt with the goods. Absence of rubber stamp endorsement is not conclusive but merely raises a

presumption in favour of purchasing registered dealer. However, in the instant case merely because rubber stamp as required by the provisions of Entry Tax Act, 1976 and Commercial Tax Act, 1994 and the Rules framed thereunder is not affixed, the petitioner cannot escape its liability from payment of tax, as purchase of local goods was made at Panna by the petitioner and petitioner caused entry of goods into another local area namely Satna, and the sale vouchers bears the seal that goods are exempted from entry tax and commercial tax.

13. The Full Bench decision of this Court in *Mohan Singh & Sons* (supra) and Division Bench decision of this Court in *Ranumal Ramesh Kumar* (supra) are of no assistance to the petitioner. Learned senior counsel has commended us to the observations made by Full Bench in paragraphs 15 & 16 of the judgment which have been made in different factual context. Our view that since petitioner has caused entry of goods into another local area, namely, Satna, taxable event had occurred and, therefore, the petitioner has incurred the liability to make payment of tax, finds support from the observations made by Full Bench in para 13 of its judgment. In *Ranumal Ramesh Kumar's case* also purchases were not made from registered dealers who were granted exemption from payment of tax. Similarly, in Full Bench decision of this Court also the purchases were not made from the units to whom exemption was granted from payment of tax. In *Marble City Motors*, supra the sale vouchers did not contain the seal, whereas in the instant case seal affixed on sale vouchers shows that goods are exempted from entry tax and commercial tax. For the aforesaid reasons, the decisions relied on by the learned senior counsel are distinguishable and do not apply in the obtaining factual matrix of the case.

14. In view of preceding analysis, we are of the considered opinion that Assessing Officer has rightly held the petitioner liable for payment of tax and has rightly imposed the penalty and interest. The aforesaid order has rightly been affirmed in the revision. The orders passed by the Assessing Officer and the revisional authority do not call for any interference.

15. Consequently, we do not find any merit in the writ petition. The same deserves to and is hereby dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 2390

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P.No. 14704/2007(Jabalpur) decided on 1 August, 2011

SATYENDRAPRATAP SINGH BUNDELA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(1) & 86(2) - Selection of Panchayat Karmi - Dispute raised in the meeting of the Gram Panchayat with respect to the selection of a candidate and because of the difference of opinion amongst the Panchas, the matter was referred to the Chief Executive Officer of Janpad Panchayat - This indicate that the instructions issued under sub-section (1) of Section 86 of the Act were not fully complied with by the Gram Panchayat - The only option left was to direct the competent authority to pass the order exercising the power of the Gram Panchayat as per the provisions of sub-section (2) of Section 86 of the Act - Writ petition dismissed. (Para 8)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(1) व 86(2) - पंचायत कर्मों का चयन - अम्यर्थी के चयन के संबंध में ग्राम पंचायत की सभा में विवाद उत्पन्न हुआ और पंचों के बीच मतभेद के कारण मामला जनपद पंचायत के मुख्य कार्यपालिक अधिकारी को निर्देशित किया गया - यह दर्शाता है कि अधिनियम की धारा 86 की उपधारा (1) के अंतर्गत जारी किये गये अनुदेशों का ग्राम पंचायत द्वारा पूर्णरूप से अनुपालन नहीं किया गया - अधिनियम की धारा 86 की उप धारा (2) के उपबंधों के अनुसार ग्राम पंचायत की शक्ति का प्रयोग करते हुए आदेश पारित करने के लिए सक्षम प्राधिकारी को निर्देशित करने का एकमात्र विकल्प बचता है - रिट याचिका खारिज।

*S.K. Mishra, for the petitioner.**Vivek Sharma, PL for the respondents No. 1 & 2.**Puneet Shrotri, for the respondent No.3.**None, for the respondent No.4.**S.D. Shukla, for the intervener Anupam Gupta.*

ORDER

K.K. TRIVEDI, J. :-By this writ petition under Article 226 of the Constitution of India, the petitioner has called in question the order dated 06.10.2007

(Annexure P-5) issued by the respondent No.2 stating that an advertisement was issued by the Gram Panchayat, Latagaon, Janpad Panchayat, Maihar, District Satna, pursuant to the instructions issued by the competent authority to make appointment on the post of Panchayat Karmi. The eligibility conditions were mentioned in the said advertisement, copy of which is placed on record as Annexure P-1.

2. It is contended that vide order dated 26.08.2007, the petitioner was appointed on the post of Panchayat Karmi and he joined on the post on 29.08.2007. He started working and when the matter was referred for notifying him as Secretary of the aforesaid Gram Panchayat impugned order was passed by the respondent No.2 referring the matter to the Chief Executive Officer of Janpad Panchayat, Maihar, District Satna, to take action in respect of appointment of Panchayat Karmi in the said Gram Panchayat so that action may be initiated for notifying the said person as Secretary of the Gram Panchayat. It is contended that such an action on the part of respondent No.2 was bad in law inasmuch as the direction issued by the competent authority was complied with by the Gram Panchayat and the provisions of sub-section (2) of Section 86 of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (herein after referred to as Act) were arrested and not applicable. No power for issuance of such direction could have been exercised by the respondent No.2 since the direction of the competent authority given under sub-section (1) of Section 86 of the Act was already complied with by the Gram Panchayat. It is, thus, contended that the action on the part of respondent No.2 was bad in law and such order was liable to be quashed. Therefore, the writ petition was required to be filed. The relief is claimed to this effect in the writ petition with a direction to the respondent authorities to allow the petitioner to continue on the post of Panchayat Karmi.

3. Writ petition was entertained and notices were issued. An interim stay was granted by this Court on 12.12.2007.

4. The respondents, after service of notice, have filed the return along with which they have produced the record to show that there was no resolution passed in favour of the petitioner for his appointment as Panchayat Karmi. It is categorically contended in the return of respondents No.1 and 2 that the petitioner has not given the proof of his selection as Panchayat Karmi by the Gram Panchayat in his petition and in fact he has not come with the clean hands before this Court. Undisputedly, after issuing the advertisement, receiving

the applications for appointment on the 'post of Panchayat Karmi, pursuant to the said advertisement, the meeting of the Gram Panchayat was held on 26.08.2007. However, while considering the applications filed by various persons, as many as 25 including the present petitioner, the Gram Panchayat reached to the conclusion that because of difference of the opinion expressed by the Panchas, selection of any candidate could not be done. It is categorically stated in the return that the resolution on that day was passed to refer the matter to the Chief Executive Officer of Janpad Panchayat, Maihar and the meeting was closed. It is contended that on drawing of the merit list, one Anupam Gupta was put at S.No.1 and four Panchas have expressed that looking to the merit of the said person, he should be appointed on the post of Panchayat Karmi. However, out of the present Panchas, 14 Panchas were in the favour that the appointment of present petitioner be made. Since the resolution was not required to be passed on the basis of voting, ultimately the Gram Panchayat resolved to refer the matter to the Chief Executive Officer of Janpad Panchayat without making any selection. Thus, it is contended that there was no wrong committed by the competent authority in case the matter was directed to be decided by the competent authority. It is, thus, stated in the return that the petition being misconceived, is liable to be dismissed.

5. The respondent No.4 has filed separate return but has simply said that despite the resolution dated 26.08.2007 and despite the fact that present petitioner was not appointed, yet the then Sarpanch of the Gram Panchayat issued the order of appointment in favour of the petitioner which could not have been done. It is further contended that the said earlier Sarpanch of the Gram Panchayat was required to be impleaded as a party by name but this was not done, therefore, present petition was liable to be dismissed. Nothing more has been stated in the return of respondent No.4 except that one Satsan Bharti was earlier working as Secretary of the Gram Panchayat, Latagaon, district Satna, who was transferred and in his place one Premlal Choudhary was posted, who has taken over charge and is working with effect from 12.06.2008.

6. One Anupam Gupta has filed an application for intervening in the writ petition to oppose the same stating that he was one of the candidates for appointment on the post of Panchayat Karmi and his application was considered by the Gram Panchayat. According to the merit order, the name of said Anupam Gupta was put at S.No.1 of the merit list but since other Panchas were not accepting the merit of Anupam Gupta, the matter was referred to the Chief

Executive Officer of Janpad Panchayat. As no action was being taken, the said person came before this Court by filing W.P. No.1656/2008, which was disposed of by this Court vide order dated 15.02.2008. The matter was directed to be referred to the Sub Divisional Officer under the provisions of Section 85 of the Act for conducting an enquiry. The Sub Divisional Officer is required to pass an order but because of interim stay granted in this writ petition, the said proceedings are not being completed. The intervener has contended that writ petition is, thus, liable to be dismissed.

7. Heard the Counsel of parties at length and perused the records.

8. In the considered opinion of this Court, the writ petition filed by the petitioner is liable to be dismissed straightway for the simple reason that there was no selection of petitioner for appointment on the post of Panchayat Karmi. The scheme made by the State Government specifically provides that a resolution is required to be passed by the Gram Panchayat/selecting a candidate for appointment on the post of Panchayat Karmi. One more person is required to be put in the waiting list, after examining the merit of each candidate. After selection is completed by Gram Panchayat, necessary orders are required to be passed by the Sarpanch of the Gram Panchayat. The Sarpanch on his own cannot issue any order of appointment in favour of any person appointing him as Panchayat Karmi. From a perusal of the resolution dated 26.08.2007 it is clear that because of the dispute raised in the meeting of the Gram Panchayat with respect to the selection of a candidate and because of the difference of opinion amongst the Panchas, the matter was referred to the Chief Executive Officer of Janpad Panchayat, Maihar. This indicate that the instructions issued under sub-section (1) of Section 86 of the Act were not fully complied with by the Gram Panchayat, Latagaon. In such circumstances, the only option left was to direct the competent authority to pass the order exercising the power of the Gram Panchayat as per the provisions of sub-section (2) of Section 86 of the Act. This being so, it cannot be said that the order issued by the respondent No.2 on 06.10.2007 was beyond his jurisdiction. In fact it was the duty on the part of the petitioner to place on record the resolution to indicate that he was duly selected by the Gram Panchayat on the date when the meeting was held. Instead he suppressed this material fact that the resolution was not passed with respect to any such person, who had made the application for appointment on the post of Panchayat Karmi in the meeting of the Gram Panchayat held on 26.08.2007. For the aforesaid reason, the petition is liable to be dismissed.

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9. For the reasons and the findings recorded herein above, this writ petition is hereby dismissed but with no order as to cost. The interim order of stay granted by this Court is hereby vacated.

Petition dismissed.

I.L.R. [2011] M. P., 2394

WRIT PETITION

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

W.P. No.3020/2003 (Jabalpur) decided on 3 August, 2011

CADILAHEALTH CARE LTD. & ors.

...Petitioners

Vs.

ADDITIONAL COMMISSIONER,

COMMERCIAL TAX & ors.

...Respondents

Commercial Tax Act, M.P. 1994 (5 of 1995), Entry 20(ii) of Part IV of Schedule II, Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhinyam, M.P. 1976, Entry 14 of Schedule II - Whether GRD Powder and GRD Bix falls within expression non-alcoholic drink and beverage - Expression Beverage in common understood means any liquid other than water, which may be consumed neat or after dilution - GRD Powder and GRD Bix are not in liquid form - Can not be said to fall with the relevant entries of 1994 Act and 1976 Act. (Para 13)

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), अनुसूची II के भाग IV की प्रविष्टि 20(ii) स्थानीय क्षेत्र में माल के प्रवेश पर कर अधिनियम, म.प्र. 1976, अनुसूची II की प्रविष्टि 14 - क्या जीआरडी पाउडर और जीआरडी बिक्स, अमद्यसारित मद्य एवं पेय शब्द प्रयोग के अंतर्गत आता है - शब्द पेय का सामान्यतः समझा जाने वाला अर्थ है, जल के अलावा कोई द्रव्य जिसका शुद्ध अथवा तनुकरण पश्चात प्राप्ति किया जा सकता है - जीआरडी पाउडर तथा जीआरडी बिक्स द्रव्य रूप में नहीं है, उसे अधिनियम 1994 और अधिनियम 1976 की सुसंगत प्रविष्टियों में होना नहीं माना जा सकता है।

Cases referred:

(2003) 1 STJ 318 (SC), (1995) 97 STC 407, (1992) 84 STC 334, (1989) 74 STC 185, (1989) 1 SCC 345, (1999) 6 SCC 617, (2008) 12 SCC 695, (2004) 1 SCC 256, (2006) 144 STC 210 (Ker.), AIR 1968 SC 922.

H.S. Shrivastava with Abhijeet Shrivastava & Sandesh Jain, for the petitioners.

Naman Nagrath, Addl. A.G. for the respondents.

ORDER

The Order of the Court was delivered by **S.R. ALAM, C. J.** :-The short question which arises for consideration in the instant writ petition is whether GRD powder and GRD Bix would fall within the expression "non-alcoholic drink and beverage" as employed by the legislature in Entry 20(ii) of Part - IV of the Schedule of the Madhya Pradesh Commercial Tax Act, 1994 (hereinafter referred to as 'the 1994 Act') and under Entry 14 of the Schedule- II of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter referred to as 'the Entry Tax Act'), so as to attract a higher rate of tax @ 10% and 2% respectively.

2. Facts, necessary for determination of the aforesaid question briefly stated are that the petitioner-company is a pharmaceutical company registered under the provisions of Companies Act, 1956. The petitioner-company deals in drugs and medicines and food supplements carrying brand names "GRD Powder and GRD Bix". The petitioner company is registered as a dealer under the provisions of the 1994 Act. The petitioner company filed the return and paid commercial tax @ 8% of total turn-over in respect of GRD Powder and GRD Bix, treating the same as goods falling under residuary clause in Part IV of Schedule II of the Act as goods not included in any other part of Schedule - II or Schedule - I of the 1994 Act.

3. During course of assessment proceedings for the period from 1.4.1997 to 31.3.1998, an explanation was sought from the petitioners as to why sales of GRD Powder and GRD Bix be not taxed @ 10% being covered under Entry 20(ii) of Part-IV of . Schedule-II of the 1994 Act. The petitioners filed their response to the explanation inter pointing out that products in question are not covered under the aforesaid entry. It was stated that products in question are food supplements which are sold by licensed chemists on prescription of doctors and are not available in grocery or general goods shop.

4. The Assistant Commissioner vide orders of assessment dated 07.4.2001 (Annexures-P-2 & P-3) rejected the explanation submitted by the petitioners and followed the order of Commissioner in the case of Bournvita as well as decisions of Gujrat and Madras high Courts and assessed the petitioners to commercial tax @ 10% with surcharge and held that items in question fall under Entry 20(ii) of Part-IV of Schedule-II of the 1994 Act. The Assistant Commissioner also levied entry tax @ 2% and held that items

2396 Cadila H. Care Ltd. (M/s) Vs. A.C.of C.Tax (DB) I.L.R.[2011] M.P., sold by the petitioners are covered under Entry 14 of Scheduled-II of the Entry Tax Act. Being aggrieved by the aforesaid orders of assessment, the petitioners filed revision before Additional Commissioner of Commercial Tax. The Additional Commissioner vide common order dated 30.9.2002 (Annexure-P/8) upheld the order of assessment of Assistant Commissioner.

5. Shri H.S.Shrivastava, learned senior counsel appearing for assessee has argued that if the words employed in the Entry 20(ii) of Part-IV of Schedule II of 1994 Act are read in its entirety it is clear that beverage has to be in liquid form. He has also been argued that it is a well settled principle of statutory interpretation that if certain words are used in the statute which are capable of construed in a popular sense; their common parlance meaning has to be taken in account. It has been further argued that in order to fall under the special entry, item should clearly come within the ambit and scope of the entry failing which it will fall under the residuary entry. In support of his submissions learned senior counsel has relied on decisions of the Supreme Court reported in *Commissioner of Central Excise, Mumbai vs. Amar Dey & Chemical Ltd.*, (2003) 1 STJ 318 (SC), *Commissioner of Sales Tax vs. Food Specialists Ltd.*, (1995) 97 STC 407, *Brooke Bond India Limited vs. State of Kerala*, (1992) 84 STC 334 and *Deputy Commissioner of Sales Tax(Law), Board of Revenue (Taxes), Ernakulam*, (1989) 74 STC 185.

6. On the other hand, Mr.Naman Nagrath, learned Additional Advocate General has taken us through the orders passed by the Assistant Commissioner as well as the order passed in revision by Additional Commissioner and has submitted that Assessing and Revisional Authorities have considered the matter in detail and have given cogent reasons. All aspects of the issue have been elaborately considered. It is also submitted that from perusal of documents filed by the petitioner itself, it is clear that petitioner is marketing the product as beverage. A beverage is not required necessarily to be in liquid form, and the end use of product will determine the nature of product. He has further submitted that relevant entries are broad and inclusive. In support of his submission, learned Additional Advocate General has relied on decisions reported in *Collector of Central Excise, Bombay-I and another v. M/s. Parle Exports (P) Ltd.*, (1989) 1 SCC 345, *Hamdard (Wakf) Laboratories vs. Collector of Central Excise, Meerut*, (1999) 6 SCC 617, *Pioma Industries and others vs. State of Kerala*, (2008) 12 SCC 695, *S.Samuel, M.D.Harrisons Malayalam and another vs. Union of India and others*, (2004) 1 SCC 256.

7. We have-considered the submissions made on both sides. It is well established rule of statutory interpretation that a taxing statute has to be construed strictly. In this connection we reproduce the relevant extracts from pages 815, 819 and 821 of Principles of Statutory Interpretation by Justice G.P.Singh, 12th Edition.

"The well-established rule in the familiar words of Lord WENSLEYDALE, reaffirmed by LORD HALSBURY and LORD SIMONDS, means: "The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words"

Bhagwati.J, stated the principle as follows: "In construing fiscal statutes and in determining the liability of a subject to a tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to prove into the intentions of the Legislature and by considering what was the substance of the matter. Shah, J., has formulated the principle thus:

"In interpreting a taxing statute, equitable consideration are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency. And K. Iyer, J., more recently observed: "Taxation consideration may stem from administrative experience and other factors of life and not artistic visualization or neat logic and so the literal, though pedestrian interpretation must prevail." Before taxing any person it must be shown that he falls within the ambit of the charging section by clear words used in the section.

Therefore, if the words used are ambiguous and reasonably open

to two interpretations benefit of interpretation is given to the subject. "

8. The question which arose for consideration before the Supreme Court in *Commissioner of Central Excise, Mumbai vs. Amar Dye & Chemical Ltd.*, (2003) 1 STJ 318 (SC) was whether 'Sharbat Rooh Afza' can be treated as beverage. In the aforesaid context, in paragraph 5, the Supreme Court held that beverage broadly speaking, are liquid for drinking, other than water, which may be consumed neat or after dilution. Similarly, Division Bench of Bombay High Court in a decision reported in *Commissioner of Sales Tax vs. Food Specialities Ltd.*, (1995) 97 STC 407 held that beverage as commonly understood means any liquid for drinking other than water. The Division Bench of High Court of Kerala while considering the question whether Coffee which is sold under the brand name of 'Bru' can be treated as a beverage, answered the aforesaid question in the negative and held that words in everyday use when come up for interpretation before the Court have to be understood in their popular sense.

9. Another Division Bench of High Court of Kerala. in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam*, (1989) 74 STC 185 has held that since 'Rasna is only a concentrate and not a liquid, therefore, it would not come within the ambit of the expression beverage.

10. In the backdrop of well settled Principles of Interpretation of Taxing Statutes and case law referred to supra following orincioles of law emerge:

- (i) A taxing statute has to be strictly construed. The subject is not to be taxed without clear words for that purpose.
- (ii) The provisions of the Act must be read according to natural construction of its words.
- (iii) No tax can be imposed by inference or by analogy or by trying to probe into the intention of the legislature.
- (iv) Before taxing any person, it must be shown that he falls within the ambit of charging section by clear words used in the section.
- (v) If certain words are used in the statute which are capable of construed in a popular sense, their common parlance meaning has to be taken into account.

11. Now we may advert to facts of the case. For facility of reference, relevant entries are reproduced below:

"Commercial Tax Act Schedule H Part IV

" 20 (ii) All kinds of non alcoholic drinks and beverages including syrups, cordials, distilled juice, ark and essences when sold in seales or capsuled or cork bottles or jars.

Entry Tax Act: Schedule II

14 All kinds of non-alcoholic drinks and beverages, ice cr'eams, Kulfi and ice-candy."

12. In *Lazarus Alosious v. State of Kerala*, (2006) 144 STC 210 (Ker.) the Full Bench of Kerala High Court held that in a generic sense any potable liquid except water is a 'beverage'. From perusal of the language employed by the legislature in Entry 20 (ii) of part IV of the 1994 Act, the intention of the legislature is clear that an item in order to fall under the aforesaid entry has to be in the liquid form which is manifest from the words "beverages including syrups, cordials, distilled juice, ark and essences when sold in sealed or capsuled or cork bottles or jars". In *South Bihar Sugar Mills Ltd. V. Union of India*, AIR 1968 SC 922 it has been held that Act does not define goods, the Legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and known to the market. In order to ascertain meaning of word 'Beverage' in common parlance, we may refer to its meaning as described in dictionaries, as the same has not been described in the Act. In Random House Unabridged Dictionary, Second Edition, word 'beverage' has been described to mean any potable liquid especially one other than water, as tea, coffee, beer or milk. In New English Dictionary and Theasaurus published by Geddes and Grosset, 'Beverage' is described a drink especially one other than water. Similarly Chambers 21st Century Dictionary, word 'Beverage' has been described a prepared drink especially a hot drink i.e. tea or coffee or an alcoholic drink. In New Concise Oxford English Dictionary 11th Edition, 'Beverage' is described as a drink other than water.

13. Thus, the expression 'Beverage' as is common understood means any liquid other than water, which may be consumed neat or after dilution. Thus, the products in question, namely, GRD Powder and GRD Bix which are

2400 Cadila H. Care Ltd. (M/s) Vs. A.C.of C.Tax (DB) I.L.R.[2011] M.P., admittedly not in liquid form cannot be said to fall within the relevant entries namely Entry 20(ii) of Part IV of Schedule II of 1994 Act and Entry 14 of Schedule II of Entry Tax Act.

14. The decision relied upon by the learned counsel for revenue are clearly distinguishable. In *Collector of Central Excise, Bombay-1 and another vs. M/s Parle Exports (P) Ltd.* (1989) 1 SCC 345, the question which arose for consideration before Supreme Court was whether non-alcoholic beverages bases are food products or food preparations. In *Pioma Industries and others Vs. State of Kerala*, (2008) 12 SCC 695, Supreme Court considered the question whether Rasna in a concentrate form would be a beverage in the context of Entry 87 of the relevant Act which include products like Horlicks, Boost Bournvita in beverage specifically in Entry 87. Therefore the aforesaid decision is also distinguishable. Counsel for revenue also placed reliance on *S.Samuel, M.D. Harrisons Malayalam and another vs. Union of India and others*, (2004) 1 SCC 256 to contend that Tea has been considered to be a beverage. Learned counsel for the respondent has drawn our attention of observation made by the Supreme Court in para 15 of the aforesaid judgment to contend that in a wider sense food may include not only solid substance but also a drink. However, the issue which was involved in the aforesaid case whether Tea is a food-stuff under the provisions of Essential Commodities Act, 1955. From perusal of para 17 of the judgment, it is apparent that Tea by itself is not a beverage until and unless water is added.

15. In view of the preceding analysis, the writ petition is allowed. The orders passed by the Assessing Authority as well as Revisional Authority contained in Annexures P-2 and P-3 dated 7.4.2001 and Annexures P/8 dated 30.9.2002 are hereby quashed. The respondents are directed to refund the tax collected in excess for the relevant period along with interest at the rate of 6% p.a.

Petition allowed.

I.L.R. [2011] M. P., 2401

WRIT PETITION

Before Mr. Justice Sushil Harkauli & Mr. Justice U.C. Maheshwari

W.P. No.13505/2008 (Jabalpur) decided on 3 August, 2011

SATYAPALANAND -

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Registration Act (16 of 1908), Section 69 - Power of Superintendence - Power of Superintendence does not include power to cancel the earlier registered document or modify any entries in the index - As soon as the Registrar register the documents presented to him for registration the function of performance for such document produced before him is over and thereafter become a functus officio. (Paras 15 & 17)

क. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 69 - अधीक्षण की शक्ति - अधीक्षण की शक्ति में पूर्ववर्ती रजिस्ट्रीकृत दस्तावेज निरस्त करने की शक्ति या अनुक्रमणिका में किसी प्रविष्टि को उपांतरित करने की शक्ति समाविष्ट नहीं है - जैसे ही रजिस्ट्रार उसके समक्ष रजिस्ट्रेशन हेतु प्रस्तुत दस्तावेजों को पंजीबद्ध करता है, उसके समक्ष ऐसे दस्तावेज के संपादन का कार्य समाप्त होता है और तत्पश्चात पदकार्य निवृत्त हो जाता है।

B. Constitution, Article 226 - Fraud - Allegations of fraud can not be adjudicated by High Court in Writ Petition - Same could be adjudicated by Civil Court under common Law after recording evidence and on appreciation of the same. (Para 16)

ख. संविधान, अनुच्छेद 226 - कपट - कपट के अभिकथन उच्च न्यायालय द्वारा रिट याचिका में न्यायनिर्णित नहीं किये जा सकते - उन्हें सिविल न्यायालय द्वारा साक्ष्य अभिलिखित किये जाने के पश्चात और उसका मूल्यांकन करने पर सामान्य विधि के अंतर्गत न्यायनिर्णित किया जा सकता है।

Cases referred:

AIR 2007 A.P. 57(FB), AIR 2010 MADRAS 18, AIR 1961 SC 787, AIR 2000 KARNATAKA 46.

Petitioner in person.

Naman Nagrath, Addl. A.G. for the respondents No. 1 to 3.

Ashok Lalwani, for the respondents No. 4 to 7.

ORDER

The Order of the Court was delivered by **U.C. MAHESHWARI, J.** :- Under Article 226 of the Constitution of India the petitioner/applicant has challenged the tenability and sustainability of Order bearing No.3408/Takniki/2008 dated 15.9.2008 (Annexure P-1) passed by Inspector General, Registration Bhopal dismissing his application, filed against the order dated 28.6.2008 passed by the Sub-Registrar dismissing his application for recording the cancellation of some registered documents, and held that under Section 69 of Registration Act (in short "the Act"), he has been vested only the powers of general superintendence over the registration offices and to make Rules in that regard and is not empowered to hear any proceedings against the order of Sub Registrar and directed the applicant to approach the competent court in that regard.

2. The facts giving rise to this petition in short are that the petitioner herein filed an application dated 4.2.2008 in the office of Sub- Registrar, Bhopal for cancellation of registered documents dated 9.8.2001, 21.4.2004 and 11.7.2006 registered with respect of immovable property i. e. Plot No.7-B Punjabi Bagh, Raisen Road, Bhopal. According to such application such plot was allotted to his mother Smt. Veeravali Anand by respondent No.4 Punjabi Housing Co-operative Society Ltd. Bhopal (In short "The Society"), vide sale deed dated 22.3.1962 registered on 30.3.1962. Smt. Veeravali Anand, died on 12.6.1988. Subsequent to her death the respondent No.4 Society through it is office bearer by executing a extinguished deed dated 9.8.2001 unilaterally cancelled the aforesaid allotment and thereafter on strength of such extinguished deed again executed a registered sale deed dated 21.4.2004 in favour of respondent No.5 Smt. Manjit Kaur who later on her tern executed another sale deed dated 11.7.2006 in favour of respondent No.6 and 7 Smt. Meenakshi and Shri S. C. Sharma. Such subsequent documents being got registered by the respondents practicing the fraud with the right of the petitioner ab-initio void the prayer for recording the cancellation in the record of the same was made.

3. In reply of private respondents by admitting the allotment of the plot to Smt. Veeravali in the year 1962, it is stated that subsequent to such allotment as per terms no steps were taken by such allottee for years together near about 35 years to make such construction on such plot. On which respondent No.4 Society got registered the extinguished deed dated 9.8.2001 in it's favour.

The same after taking the damages Rs.6,50,000/- was recognized by the petitioner by executing an agreement dated 6.7.2004. As per further averments the petitioner has also filed a dispute in this regard under Section 64 of Cooperative Societies Act before the Sub- Registrar Cooperative Society, Bhopal, the same is pending. Besides this in respect of the same plot some other litigations between the parties are also pending before different forum i. e. Joint Registrar, Cooperative Society, State Cooperative Tribunal and in the High Court.

4. On consideration, the Sub Registrar (Registration) vide order dated 28.6.2008 dismissed such application holding the question of sustainability of extinguished deed dated 9.8.2001 and interpretation of Clause 43 (1) of the Bye-Laws of Society are still pending before Sub-Registrar, Cooperative Society and other competent forum, therefore till declaring by the competent forum that Clause 43 (1) of Bye-Laws of the society was not applicable to the present dispute no finding with respect of aforesaid extinguished deed could be given by him. He also held that the jurisdiction of Sub-Registrar is limited only up to the extent to register the document and if any of the party wants its cancellation then the relevant parties may got registered the cancellation deed on proper stamp duty.

5. On filing the application against such order under Section 69 of the Act before the Inspector General of Registration, the same was dismissed holding the same is not entertainable with the direction to the petitioner to approach the competent court in this regard, on which the petitioner has come forward with this petition.

6. According to relief clause of the petition, the same is filed for declaring the above mentioned extinguished deed as well as the aforesaid subsequent sale deeds to be ab initio void with a further direction to respondent No.2 and 3 to record the cancellation of such documents in his record. Some other consequential relief is also prayed.

7. Inter-alia the aforesaid prayer are made alleging that said extinguished deed got executed unilaterally by practicing fraud, with the rights of said Smt. Veeravali after her death and without giving any intimation to the petitioner, in favour of respondent No.4 the same could neither be executed by the office bearer of the respondent 4, Society nor could be registered by the Sub-Registrar respondent No.3 without inquiry regarding previous document of title and contrary to the right of the said earlier owner. The aforesaid extinguished

deed was registered contrary to the provision of Section 17 (1) (b) of the Act by the respondent No.3, hence by virtue of Section 69 of the Act the respondent No.2 and 3 ought to have declared the same to be ab initio void and pursuant to it subsequent both the sale deeds executed on the strength of such extinguished deed should have also been declared void and consequently the cancellation of such documents should have also been recorded in the concerning index and the record of such respondent No.3. But such duty was not performed either by respondent No.3 or respondent No.2.

8. In return of respondent No.1 to 3 it is stated that after registration of the documents the Sub Registrar did not have any authority or power to register the cancellation of such documents under Section 69 of the Act. Such section 69 of the Act confers the power to respondent No.2, only for superintending the registration office and making the rules under the frame work of such section for the purpose of the administration of the offices of sub-registrar. Accordingly, such powers are only administrative powers, it does not give any judicial or quasi judicial power to consider the alleged dispute of the parties. It is further stated that as per settled proposition the cancellation of any registered document may be ordered by the competent forum or the court in a duly constituted suit under Section 31 of Specific Relief Act. Registering officer did not have any such power to delete any entries either from the index of book No.1-A or any extract from any document. It is also stated that while registering any of the aforesaid documents no fraud has been committed by any of these respondents. It is also stated that in pendency of the various litigations, with respect of the alleged disputes, before the different forums provided under the law the writ jurisdiction under Article 226 of Constitution of India could not be invoked in the matter for issuing any writ against the respondents and prayer for dismissal of the petition is made.

9. Having heard the petitioner in persons and the counsel of the respondents, we have carefully perused the record.

10. It is undisputed the alleged plot was initially allotted to the mother of the petitioner Smt. Veeravali vide sale deed dated 22.3.1962 registered in the office of respondent No.3 on 30.3.1962 and subsequent to it respondent No.4 through his office bearers unilaterally got registered the extinguished deed dated 9.8.2001 with respondent No.3. Thereafter on the strength of such extinguished deed respondent No.4 and his office bearer again sold such plot to respondent No.5 vide registered sale deed dated 21.4.2004 who on

her terms sold the same by way of sale deed dated 11.7.2006 to respondent No.6 and 7. It is also undisputed fact that subsequent to registration of aforesaid deeds various litigations including the dispute filed by the petitioner under Section 64 of the Society Act in the Court of Sub- Registrar Co-operative Societies are pending for adjudication. Those pending cases are to be decided by the competent forum, before whom the same are pending only after recording the evidence and on appreciation of the same. Under such circumstances, we are of the considered view that in pendency of said litigation before the alternative competent forum between the petitioners and the private respondents the power vested under Article 226 of the Constitution of India could not be invoked for issuing any writ.

11. The petitioner has cited so many reported cases but mainly placed his reliance on a minority view of the Full Bench decision of the Andhra Pradesh High Court in the matter of "*Yanala Malleshwari v. Ananthula Sayamma*" reported in AIR 2007 A. P. 57 (Full Bench), in which one of the Hon'ble Judge has expressed his view as under :

"111. Therefore, in my view, when a person transfers all his rights, his rights in the property get extinguished and if he tries to get back the property, it has to be done by challenging the sale deed which he has executed and which is registered by the Sub-Registrar.

112 . Section 23 of the Indian Contract Act, 1872 (hereinafter referred to as 'the Contract Act') is applicable to the present controversy. It lays down that an agreement is void if it deviates the provisions of any law. It further lays down that consideration or object of an agreement is lawful unless it is forbidden by any law or is fraudulent or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy. Therefore, such a document, in my view, is a fraudulent document within the meaning of Section 23 of the Contract Act and as such, cannot be registered. It is even against public policy.

113. I do not agree with my learned brother that the writs are not maintainable, as the remedy to the petitioners is at common law by going to a civil Court. The effect of registration of a cancellation deed is against public policy and it will create a chaos if such deeds are allowed to be registered. The purpose of

registration of a document is not only to see that the rights of the vendor are extinguished and rights of the vendee are created, but the purpose is much more than that. It has been consistently held by the Courts that the purpose of registration is to inform and give notice to the world at large that such a document has been executed. Registration of a document is a notice to all the subsequent purchasers or encumbrances of the same property. The doctrine of constructive notice can be extended to others besides subsequent purchasers or encumbrances, as has been held in *Tatyarao Venkatrao Vase v. Puttappa Kotrappa*, 12 Bom LR 940. Therefore, the effect of registration of a sale deed is not effecting the rights of the present petitioners alone, but that registration is a notice to everybody in the world that the property belongs to the petitioners and if such a right is violated by subsequent registration of a cancellation deed by the Sub-Registrar, it cannot be said that writ petitions are not maintainable.

12. While considering the same set of facts in above mentioned cited case the majority view has been expressed in the following words :

89. Registration Act would show that the registering authorities are creations of statutes and they are conferred powers under the statute to enable them to discharge statutory duties. A registering authority has a role of a catalyst in the sense of legitimizing certain transactions by registering as per law. By the action or inaction of registering authority, there is no involvement of the State or the Government as such, except to the extent of charging registration fee for the service of registration as well as keeping the registers. Therefore, any instrument between the two persons, is governed by private law principles and registration thereof does not play any pervading role in rendering the transaction legal or otherwise. For instance, if a contract is prohibited by reason of its being against public policy, the registration of the document evidencing such contract does not render it valid. Similarly, if two joint owners of immovable property decide to exchange properties and do so without going to registering authority, no law prohibits such exchange. However, if either of them wants to produce such deed as evidence, by reason of Section 49 (c) of Registration Act, the same cannot be received as evidence of transaction between them. The registration in certain

circumstances is notice of a transaction relating to immovable property to a limited extent. Therefore, Registration Act and registering authorities acting thereunder mainly deal and regulate transactions in the realm of private law. For this reason also, the writ petition cannot be entertained.

95. We, therefore, hold that whenever a person is aggrieved by a cancellation deed, the remedy is to seek appropriate relief in the civil Court and writ petition is not proper remedy. There are other reasons as well, as discussed below.

99. As already referred to in these cases, there are serious disputed questions of fact regarding the allegations of fraud and misrepresentation played by the vendors as well as vendees against each other, there are also questions raised regarding the competence and entitlement of a person executing the document. In some cases (W.P. Nos. 22298, 23005 and 23088 of 2004), the sale deeds were cancelled some time in August, 2003, but the writ petitions are filed with considerable delay. In some cases, there are complaints of cancellation of deeds/instruments after lapse of ten years after execution of the original deed. In the opinion of this Court, these are the matters which are to be decided based on evidence and the affidavit evidence available on record is hardly sufficient to decide the issues in such a manner to meet the ends of justice. Indeed, in some of the matters (W.P. Nos. 879, 880, 881, 882, 979, 980 and 981 of 2006), suits are already filed for injunction and the orders of status quo are in force. Therefore, this Court is of considered opinion that the parties should be relegated to the civil Court to file suit either under Section 31 or under Section 34 of Specific Relief Act. Point No. 2 is answered accordingly.

126. It is also to be seen that there are many disputed questions of fact, which this Court cannot delve under Article 226 of the Constitution of India. Further it is not as though the petitioners are without any remedy, they have alternative remedy before the competent civil Court, which will be in a position to adjudicate based on the evidence both oral and documentary available on record and, therefore, when an alternative and efficacious remedy is available, writ jurisdiction cannot be invoked.

13. The petitioner has also placed his reliance in this regard on a decision of the Madras High Court in the matter of *E. R. Kalaivan Vs. Inspector General of Registration* reported in AIR 2010 Madras 18. But the same is also not helping him in the present circumstances. The other citation on which the petitioner placed his reliance are mentioned by him in the written arguments placed on the record.
14. Keeping in view the aforesaid cited case of Andhra Pradesh High Court in the matter of *Yanala Malleshwari* (Supra) on examining the case at hand we are of the considered view that the same is fully covered with majority view of such case and therefore in view of minority view no benefit could be extended to the petitioner under the writ jurisdiction. The other cited cases being distinguishable on facts and circumstances and some of them also decided taking into consideration the provisions of some other laws, are not helping to the petitioner in the present scenario of the case at hand.
15. In view of aforesaid discussion we are of the view that after registration of the extinguished deed or other documents by the Sub Registrar, if any application is moved by any of the affected party of such document stating that the same was got registered by practicing the fraud with his right then Sub-Registrar in the lack of any specific provision in this regard could neither entertain nor adjudicate such application under the provisions of Section 17, 18 or 69 or some other provisions of the Act. Section 69 of the Act only confers the superintending power of registration offices and to make rules to the Inspector General respondent No.2. It does not give any rights to cancel the earlier registered documents or modifying any entries in the index or in other record at the instance of any of party . So, Section 17(1) (b) read with 69 of the Act is also not helping to the petitioner in this writ petition. Consequently, it is held that Sub-Registrar as well as Inspector General have not committed any fault in dismissing the application of the petitioner with direction to approach the competent forum for adjudication of his dispute.
16. Apart the above the alleged dispute and allegations of the alleged fraud could not be adjudicated by this Court under the writ jurisdiction. The same could be adjudicated by the civil Court under the common law after recording the evidence of the parties and on appreciation of the same in a duly constituted suit.
17. On arising the occasion, this question is also answered by the Apex Court in the matter of "*Government of U.P. v. Raja Mohammad Amir*

Ahmad Khan" AIR 1961 S. C. 787 , holding that as soon as registering officer registered the documents presented to him for registration, the function of performance for such document produced before him is over and thereafter become a functus officio and did not have power even to impound the document under Section 33 of the Act.

18. On arising the occasion such question was also considered and answered by the Karnataka High Court in the matter of "*M. Ramakrishna Reddy v. Sub-Registrar, Bangalore*" AIR 2000 KARNATAKA 46, in such case their Lordships Justice R. V. Raveendran, the then, held as under:

"when a person who claims to be the owner or a person interested in an immovable property, finds that some one else has executed and registered a sale deed or other deed in regard to his property, claiming to be the owner or a person interested in the property, the appropriate course for him is to file a suit for declaration and consequential reliefs. If he is satisfied such sale deed is executed by a person without any title and that the deed is void ab initio, he may even choose to ignore the same and leave it to the person claiming title under such deed to establish his title in appropriate proceedings. A Court of Law has the jurisdiction to declare a document to be void or even cancel a document. But under no circumstances, a person claiming to be the owner of a property or a holder of a property, can require the Registering Authority to cancel the registration of a document or to cancel the entry made in Book No. 1 in regard to registered document or to delete or remove the entry made in the indexes relating no Book No. 1. The Registering Officer has no such power. Consequently, the question of the Registering Officer deleting any entry either from the Indexes of Book No. 1 or the extracts therefrom contained in the Encumbrance Certificate by holding transaction covered by a registered instrument is illegal or void, does not arise.

19. In view of the aforesaid discussion, this writ petition being devoid of any merits is hereby dismissed. There shall be no order as to the costs.

Petition dismissed.

I.L.R. [2011] M. P., 2410

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 3824/2011 (Gwalior) decided on 9 August, 2011

VED PRAKASH MUKHARIYA

...Petitioner

Vs.

BALMUKUND SHARMA & ors.

...Respondents

Civil Procedure Code (5 of 1908), Section 151, Order 39 Rules 1 & 2, Order 43 Rules R(r) - Interim Injunction - Appeal from order - Trial Court passing ad interim order directing maintaining status quo between the parties - The order is necessarily an order passed under Order 39 Rules 1 & 2 of the Code - The aggrieved party has a remedy under Order 43 Rules 1(r) of the Code to prefer an appeal - Writ Petition dismissed with a direction to return the certified copy of impugned order. (Paras 4, 8 & 9)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151, आदेश 39 नियम 1 व 2, आदेश 43 नियम R(r) - अंतरिम व्यादेश - आदेश की अपील - विचारण न्यायालय ने पक्षकारों के मध्य यथा स्थिति बनाये रखने का निर्देश देते हुए अंतरिम आदेश पारित किया - आदेश, आवश्यक रूप से संहिता के आदेश 39 नियम 1 व 2 के अंतर्गत पारित आदेश - व्यथित पक्षकार को संहिता के आदेश 43 नियम 1(आर) के अंतर्गत अपील करने का उपचार उपलब्ध है - आक्षेपित आदेश की प्रमाणित प्रति वापस करने के निर्देश के साथ रिट याचिका खारिज।

Cases referred :

AIR 1982 NOC 5 (CAL.), AIR 1992 ALL. 215, (2010) 8 SCC 329.

Jitendra Sharma, for the petitioner.*D.D. Bansal*, for the respondent No.1.**ORDER**

SUJOY PAUL, J. :- With the consent of parties, the matter is finally heard.

At the outset, learned counsel for the parties agreed to address the Court on the question of preliminary objection raised by Shri D.D.Bansal, learned counsel appearing for the respondent No.1.

2. Shri Bansal submits that a bare perusal of impugned order dated 20.5.2011 shows that it is an ad interim order directing maintaining status quo between the parties, which is necessarily an order passed under Order XXXIX

Rr.1 and 2 of the Code of Civil Procedure. By passing the said order an interim injunction was granted and reply was directed to be filed on the application under Order XXXIX Rr.1 and 2, C.P.C. Thus, the respondent submits that it is, in fact, an order passed under Order XXXIX Rr.1 and 2, C.P.C. On the contrary, learned counsel for the petitioner Shri Jitendra Sharma submits that it is an application under Section 151 CPC, on which the stay order was passed and such an order is not appealable.

3. Per Contra, Shri D.D.Bansal submits that it is appealable under Order XLIII Rule 1 (r) of the Code of Civil Procedure, which reads as under:-

"Order XLIII-Appeal from orders--

1. Appeal from orders.-- An appeal shall lie from the following orders under the provisions of section 104, namely:-

(r) an order under rule 1, rule 2 [rule 2A], rule 4 or rule 10 of Order XXXIX;"

4. To elaborate, Shri Bansal submits that it is necessarily an order under Order XLIII Rule 1 CPC only and it is appealable. He relies on AIR 1982 NOC 5 (CAL.) (*Kamalendu Chanda v. Dilip Kumar Biswas*), wherein it is held that "order granting interim injunction under Order XXXIX Rule 1 or Rule 2 is an appealable order under Order XLIII Rule 1(r)". He further relies on the judgment of Allahabad High Court reported in AIR 1992 ALLAHABAD 215 (*Ishrat Husain Khan vs. Addl. District Judge, Gorakhpur and others*). In the said matter in paragraphs 6 and 7 the High Court opined as under:-

"6. As to whether an appeal was maintainable before the appellate court in respect of the ad interim injunction granted by the trial court is only a technical objection. The fact remains that interim injunction was granted which could be granted under Order 39, Rules 1 and 2 of the C.P.C. as also under the provisions of Section 151, C.P.C. If the trial Court has granted injunction under Section 151, C.P.C. the import of the injunction is the same which is of the order passed under Order 39 Rules 1 and 2, C.P.C. Therefore, the consideration of the appeal against the interim order by the first appellate court was not barred and the appeal could not be held to be untenable merely because Section 151, C.P.C. was invoked by the trial Court. The trial court does not say that such an injunction cannot be passed

under Order 39, Rules 1 and 2 C.P.C. Section 151 C.P.C. is generally invoked in the matter of grant of temporary injunction where the case is not covered by Order 39, Rules 1 and 2, C.P.C. It was held by the Supreme Court in the case of Manohar Lal Chopra vs. Rai Bhadur Rao Raja Seth Hiralal, reported in AIR 1962 SC 527 : (1963 All LJ 169) that there being on such expression in Section 94, C.P.C. which expressly prohibits the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code, the Courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39, C.P.C. if the court is of the opinion that the interests of justice require the issue of such interim injunction.

7. *The interim order granted by the trial court could have been granted under Order 39, Rules 1 and 2, C.P.C. also it was not a case where Order 39, Rules 1 and 2, C.P.C. would not apply to the grant of temporary injunction and the court could fall back on its inherent power under Section 151, C.P.C. The inherent power is not conferred on the court. It is a power inherent of the court by virtue of a duty to do justice between the parties before it. Looking to the nature of the interim order passed by the trial Court it is safe to infer that the trial court had passed the order under Order 39, Rules 1 and 2, C.P.C. because the case of the petitioner defendant before the trial court would squarely fall within the ambit of Order 39, Rules 1 and 2, C.P.C. By writing that the order was passed under Section 151, C.P.C. it cannot be inferred that such an order was not capable of being passed under Order 39, Rules 1 and 2, C.P.C. That being so, the appeal before the appellate Court was maintainable and the appellate court could examine the legality of the order passed by the trial Court."*

5. In nutshell, the contention of Shri Bansal is that the order is appealable under Order XLIII Rule 1(r), C.P.C. and writ petition is not maintainable.

6. Shri Jitendra Sharma, learned counsel for the petitioner submits that he has no serious objection to this objection but prays that the writ petition may be converted into an appeal.

7. I have heard the learned counsel for the parties at length and perused the record.

8. In para 7 of the judgment of Allahabad High Court in *Ishrat Husain Khan's case* (supra) it was made clear that by writing that the order was passed under Section 151, C.P.C., it cannot be inferred that such an order was not capable of being passed under Order 39, Rules 1 and 2, C.P.C. Accordingly, the High Court held that the appeal is very much available under Order XLIII Rule 1(r), C.P.C.. I respectfully agree with the view taken by Allahabad and Calcutta High Court in the aforesaid matters. Hence, the petitioner has a remedy under the aforesaid provision to prefer an appeal.

9. In a recent judgment of Supreme Court principles for exercising Article 227 jurisdiction are laid down in *Shalini Shyam Shetty and another vs. Rajendra Shankar Patil*, reported in (2010) 8 SCC 329, in para 49(c) the Supreme Court held as under:-

"(c) In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court."

10. Considering the aforesaid, it is held that the petitioner has a remedy under the Code of Civil Procedure and he may avail the same. Since the court fees for preferring appeal may be different, this petition is not converted into an appeal. Registry is directed to return the certified copy of the impugned order to enable the petitioner to file an appropriate appeal.

11. With the aforesaid, petition is dismissed. No costs.

Petition dismissed.

I.L.R. [2011] M. P., 2413

WRIT PETITION

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

W.P.No.5541/2004(S) (Jabalpur) decided on 10 August, 2011

PRAMOD SINGH

...Petitioner

Vs.

DIVISIONAL FOREST OFFICER & ors.

...Respondents

Industrial Disputes Act (14 of 1947), Section 25 F - Labour Court passed an award for reinstatement of petitioner but without back wages

and without assigning any reason for denying back wages to the petitioner - Held - The conferment of quasi judicial power implies that the person concerned must follow the rules of natural justice and must give reasons for making the order which he is empowered to make - Award to the extent denying back wages set aside and matter remanded for afresh decision on the point. (Paras 5 & 7)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ - श्रम न्यायालय ने याची की बढ़ाली हेतु अवार्ड पारित किया परंतु पिछले वेतन के बिना एवं याची को पिछला वेतन अस्वीकार करने हेतु कोई कारण नहीं दिया - अभिनिर्धारित - न्यायिककल्प शक्ति के प्रदान से अभिप्रेत है कि संबंधित व्यक्ति को नैसर्गिक न्याय के नियमों का पालन करना चाहिए और आदेश जिसे करने के लिए वह सशक्त है, करने के कारण देने चाहिए - पिछले वेतन की अस्वीकृति की सीमा तक का अवार्ड अपास्त तथा इस बिंदू पर नवीन निर्णय करने हेतु प्रकरण प्रतिप्रेषित।

Case referred :

(2000) 1 ALL ER 373 AT PAGES 377 & 378(CA).

Anoop Shrivastava, for the petitioner.

B.N. Mishra, G.A. for the respondents.

ORDER

The Order of the Court was delivered by **AJIT SINGH, J. :-**By this petition the petitioner has prayed for quashing of award dated 16.12.2003, passed in Case No.12/96/ID Act Reference, by the Presiding Officer, Labour Court, Bhopal to the extent he has been denied the back wages.

2. The case of petitioner before the Labour Court was that he worked continuously with respondent nos. 1 and 2 on the post of Driver from 1.2.1982 up to 30.9.1992 on which date his services were terminated without assigning any reason and holding enquiry. The petitioner also averred that respondent nos. 1 and 2 did not comply with the mandatory provisions contained in section 25F of the Industrial Disputes Act. Respondent nos. 1 and 2 denied the claim of petitioner and pleaded that he himself stopped coming for work from September 1992.

3. The Labour Court after appreciating the evidence held that the petitioner had worked for more than 240 days in the calendar year preceding the termination of his service and that his service was terminated without complying with the mandatory provisions contained in section 25F of the

Industrial Disputes Act. The Labour Court, therefore, passed an award for his re-instatement but without back wages.

4. It is argued on behalf of the petitioner that the Labour Court committed an illegality in denying back wages to him without assigning any reasons. The learned counsel also submitted that petitioner had clearly averred in the claim that he was not gainfully employed after the termination of his services and even deposed before the Labour Court in this regard.

5. It is now well settled that the conferment of quasi-judicial power implies that the person concerned must follow the rules of natural justice and must give reasons for making the order which he is empowered to make. Purely administrative bodies are also bound to act justly and fairly which may bring in the requirement of natural justice as also the duty to give reasons. Even a non-statutory private body which is not a state under Article 12 of the Constitution but which exercises public functions is bound to follow the principles of 'fairness' and 'good faith' and to act reasonably and its orders are amendable to judicial review under Article 226 of the Constitution. Section 4(1)d of the recently enacted statute, the Right to Information Act, 2005, also requires every public authority of India to 'provide reasons for its administrative or quasi-judicial decisions to affected persons'. (See Principles of Statutory Interpretation by Justice G.P.Singh Xth Edition, 2006 Page 410).

6. Under English Law a quasi-judicial authority need not give reasons unless required to do so by statute but now even there is also a definite shift in favour of the view that reasons should be given. In *Flannery V. Halifax Estate Agencies Ltd.* (2000)1 All ER 373 at pages 377 and 378 (CA) comments have been made that the duty to give reasons "is function of due process and, therefore, of justice. Its rationale has two principle aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. The second is that a requirement to give reasons concentrates the mind and if it is fulfilled the resulting decision is much more likely to be soundly based."

7. On perusal of the impugned award, we find that the Labour Court has not assigned any reason whatsoever for denying back wages to the petitioner. We accordingly quash the award to the extent petitioner has been denied back wages. We also remand the matter to the Labour court for afresh decision on the question of back wages to the petitioner. It is expected that the Labour

Court will decide the matter as expeditiously as possible but not later than 6 months from the date of receipt of the copy of this order.

8. The petition is allowed but without any order as to costs.

Certified copy as per rules.

Petition allowed.

I.L.R. [2011] M. P., 2416

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P.No. 1771/2008 (Gwalior) decided on 11 August, 2011

DEVKINANDAN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Transfer of Property Act (4 of 1882), Section 3 - Decree - Actionable Claim - Decree does not fall within the ambit of 'actionable claim.'*
(Para 14)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 3 - डिक्री - अनुयोज्य दावा - डिक्री अनुयोज्य दावा की परिधि में नहीं आती।

B. *Transfer of Property Act (4 of 1882), Section 136 - Purchase of decree by counsel - Counsel for the decree holders purchased the decree and his application for substitution of his name in place of original decree holders was allowed by the execution Court - Held - The decree is neither a 'share' nor 'interest' or 'actionable claim', it does not fall within the four corners of Section 136 of the Act - No legal error in passing the impugned order - Petition dismissed.* (Para 16)

ख. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 136 - अधिवक्ता द्वारा डिक्री क्रय की जाना - डिक्रीदारों के अधिवक्ता ने डिक्री क्रय की और मूल डिक्रीदारों के स्थान पर उसके नाम के प्रतिस्थापन हेतु उसका आवेदन, निष्पादन न्यायालय द्वारा मंजूर किया गया - अभिनिर्धारित - डिक्री न तो 'शेयर' है न ही 'हित' अथवा 'अनुयोज्य दावा', वह अधिनियम की धारा 136 की परिधि के भीतर नहीं आती - आक्षेपित आदेश पारित करने में कोई विधिक त्रुटि नहीं - याचिका खारिज।

Cases referred :

AIR 1921MADRAS 113, AIR 1955 SC 376.

Sanjeev Jain, for the petitioner.

Bhagwan Raj Pandey, G.A. for the respondent No.1/State.

ORDER

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

2. The respondent No.1-State of Madhya Pradesh acquired the land belonging to the petitioner and his mother namely Smt.Dhanwanti Bai for public purpose under the provisions of Land Acquisition Act. In lieu of the land acquired, the compensation was awarded by the Collector by his award. Since the award was not adequate, the petitioner and his mother and other claimants applied for reference under the said Act. The reference was made to the Reference Court, namely, the Court of Second Additional District Judge, Bhind under Section 18 of Land Acquisition Act. The said Court is hereinafter called as 'Reference Court'. The Reference Court enhanced the compensation by award dated 29.11.1996 (Annexure P/2). The award got stamp of approval by this Court in Appeal preferred by the State of Madhya Pradesh.

3. The case of the petitioner is that the said award is a "decree" within the meaning of Section 2 of the Code of Civil Procedure. For execution of said award, the petitioner filed an execution application jointly before the Reference/Executing Court on 28.3.1997 (Annexure P/3). The case was registered as Execution Case No. 8/92x97.

4. During pendency of execution proceedings, the decree-holders (present petitioner and his mother Dhanwanti Bai and other claimants) engaged Shri Ramnarayan Gupta, Advocate, as well as Shri Brijesh Kumar Gupta, Advocate (respondent No.2 in the present petition).

5. Shri Brijesh Gupta initially represented the decree-holders for some period, thereafter without the knowledge of decree-holders on his own as counsel for the decree-holders, submitted an application dated 4.7.2000 (Annexure P/5) alleging that the decree has been purchased by him by a registered sale deed dated 14.12.1999 and, therefore, in place of original decree-holders, his name be substituted as decree-holder.

6. Reference Court vide impugned order 'dated 11.10.2006 (Annexure P/1) has allowed the said application. Against which, the present writ petition has been filed.

7. Learned counsel for the petitioner Shri Sanjeev Jain has raised a singular ground. Shri Jain submits that as per Section 136 of the Transfer of Property Act, 1882 (hereinafter referred to as the T.P. Act'), the respondent No.2

Brijesh Kumar Gupta, Advocate could not have purchased the decree and Court below without examining the impediment of Section 136 aforesaid has committed a manifest error of law in allowing the application dated 4.7.2000 (Annexure P/5).

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

9. For ready reference, Section 136 of T.P. Act is reproduced here as under:-

"136. Incapacity of officers connected with Courts of Justice.- No judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid."

10. According to Shri Jain, learned counsel for the petitioner, the decree which is purchased by respondent No.2 falls within the four corners of Section 136 of the T.P. Act and, therefore, it could not have been done by the respondent No.2 and the Court below should not have permitted his application in the teeth of impediment under Section 136 of the T.P. Act.

11. Section 136 of the T.P. Act can be an impediment in receiving any "share", "interest" or any "actionable claim". Admittedly the decree cannot be said to be a 'share' or 'interest'. The only question which is required to be examined is whether decree can be said to be an 'actionable claim'?

12. Therefore, the singular question which now requires to be decided is whether the action of purchasing decree falls within the ambit of Section 136 of T.P. Act.

13. Meaning of word "actionable" as per Black's Law Dictionary is as under:

"Furnishing the legal ground for a lawsuit or other legal action <intentional interference with contractual relations is an actionable tort>"

As per Wharton's Concise Law Dictionary, the word "Actionable Claim" has following meaning:-

"actionable claim" means a claim to any debt, other than a debt

secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. "

"Actionable Claim" is defined in Section 3 of the T.P. Act as under:-

""actionable claim' means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent. "

Even on perusal of this definition, it is clear that the 'decree' does not fall within the ambit of "actionable claim". Thus, examining it from any angle whether as per the definition, clause or dictionary meaning, the 'decree' cannot be said to be an "actionable claim" and, therefore, the contention of the petitioner cannot be accepted. No other material, ground or authority is shown by learned counsel for the petitioner in support of his aforesaid contention.

14. Madras High Court in the case reported in AIR 1921 MADRAS 113 (*M. Govindarajulu Naidoo v. D.H. Ranga Rao and others*) held as under:-

"The next point taken before us is that the transfer of the decree to the petitioner who is a pleader was invalid by virtue of section 136 of the Transfer of Property Act (IV of 1882) since it is a transfer of an actionable claim which the law prohibits in favour of pleaders and certain functionaries of court. Decree does not come within the definition of an actionable claim as given in the Transfer of Property Act (IV of 1882), but partakes of the nature of property. "

15. The Apex Court in the case reported in AIR 1955 SC 376 (*Jugalkishore Saraf v. M/s. Raw Cotton Co. Ltd.*) held as under:-

"Per Bhagwati J. : A Judgment debt or decree is not an actionable claim for no action is necessary to realise it. It has already been the subject of an action and is secured by the decree. A decree to be passed in future also does not come as such within the definition of an actionable claim and an assignment or transfer thereof need not be effected in the manner prescribed by S. 130."

16. In view of aforesaid dictionary meaning and the judgment passed by Madras High Court and Supreme Court (supra), it is crystal clear that the decree, by no stretch of imagination, can be said to be an "actionable claim". Since in the opinion of this Court, the decree is neither a share nor interest or actionable claim, it does not fall within the four corners of Section 136 of the T.P. Act. Accordingly, there was no reason for the Court below to invoke Section 136 of the T.P. Act in the facts and circumstances of the case. In absence thereof, the Court below has committed no legal error in passing the impugned order.

17. Thus, there is no reason for invoking the jurisdiction under Article 227 of the Constitution of India. The result is inescapable that the petition is devoid of merit and substance and is accordingly dismissed. No costs.

Petition dismissed.

I.L.R. [2011] M. P., 2420

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 2688/2004 (Jabalpur) decided on 11 August, 2011

SUMANLATA GUPTA (SMT.)

Vs.

...Petitioner

CHAIRMAN-CUM-MANAGING DIRECTOR,
PUNJAB NATIONAL BANK, NEW DELHI & ors.

...Respondents

Service Law - Family Pension - Husband of petitioner retired on 30.06.1988 and died on 22.09.88 - On 22.09.1995, Punjab National Bank (Employees') Pension Regulation 1995 notified - Petitioner could not apply and comply other conditions necessary for pension within stipulated time and when she applied on 16.01.97 the application was turned down on the ground that proposal was not given within stipulated

time - Held - Petitioner had no information about coming in vogue of Pension Regulations, therefore, she can not be deprived of the benefit of her legitimate right despite that the petition has been filed in the year 2004 - Petition allowed. (Paras 3, 7 & 13)

सेवा विधि - परिवार पेंशन - याची का पति 30.06.1988 को सेवानिवृत्त हुआ और 22.09.88 को उसकी मृत्यु हो गई - 22.09.1995 को पंजाब नेशनल बैंक (कर्मचारी) पेंशन विनियमन 1995 अधिसूचित - याची निर्धारित समय के भीतर आवेदन नहीं कर पायी तथा पेंशन के लिए आवश्यक अन्य शर्तों का अनुपालन नहीं कर सकी और जब उसने 16.01.97 को आवेदन दिया, आवेदन इस आधार पर खारिज कर दिया गया कि प्रस्ताव को निर्धारित समय के भीतर नहीं दिया गया था - अभिनिर्धारित - याची को पेंशन विनियमन के प्रभावी होने की जानकारी नहीं थी इसलिए उसे उसके वैध अधिकार के लाभ से वंचित नहीं किया जा सकता, बावजूद इसके कि याचिका वर्ष 2004 में प्रस्तुत की गई है - याचिका मंजूर।

Mandeep Chaddha, for the petitioner.

Anoop Nair, for the respondents.

O R D E R

SANJAY YADAV, J. :-With consent, the petition is heard finally.

2. Non-grant of family pension to the petitioner is the cause for present writ petition under Article 226 of the Constitution of India.
3. Petitioner's husband Shri Rajkumar Gupta (since deceased) after working for nearly 40 years with the Punjab National Bank retired on attaining the age of superannuation on 30.6.1988, from the post of Regional Manager. He expired on 22.9.1988.
4. That in the year 1995 in exercise of the powers conferred by Clause (f) of sub-Section (2) of Section 19 of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970, the Board of Directors of Punjab National Bank after consultation with the Reserve Bank of India and with the previous sanction of the Central Government made the Regulations viz. Punjab National Bank (Employees') Pension Regulation, 1995 notified on 29.9.1995 (hereafter referred as Regulation 1995).
5. In terms of Regulation 1995 following categories of employees were covered, who-
 - (a)- were in the service of the Bank on or after the 1st day of January, 1986 but had retired before 1.11.1993.

- (b)- have retired on or after 1.11.1993 but before 29.9.1995.
- (c)- were in the service before 29.9.1995 and continue to be in service in the Bank.
- (d)- were in service on or after 1.11.1993 and had died after retirement but before 29.9.1995.
- (e)- were in service on or after 1.11.1993 but who have died while in service before 29.9.1995.
- (f)- were in service on or after 1.1.1986 and had died in the service on or before 31.10.1993 or had retired on or before 31.10.1993 but died before 29.9.1995.
- (g)- joined the service on or before 31.10.1993 and who died in service on or after 1.11.1993 but before 29.9.1995.
- (h)- joined the Bank on or after 29.9.1995.

6. These class of employees were eligible to join the Pension Scheme, subject to the fulfillment of following conditions-

“(a) In the case of categories of employers mentioned at (a), (b), (d), (e), (f) and (g) mentioned above, it is necessary that the employees concerned or their family members exercise an option in writing within 120 days from the notified date (i.e. by 27.1.1996) to become member of Pension Fund and refund within Sixty days after expiry of said period of 120 days the entire amount of bank's contribution to PF and interest accrued thereon together with a simple interest @ 6% p.a. from the date of settlement of PF account till the date of refund of aforesaid amount to the bank.

(b) In the case of category of employees mentioned at (c) above, it is necessary that they exercise option in writing within 120 days from the notified date to become member of the Pension Fund and authorize Punjab National Bank Provident Fund Trust to transfer the entire contribution of the Bank along with interest accrued thereon to the credit of Pension Fund constituted under these Regulations.

(c) In the case of category of employees mentioned at (h), above, i.e. the employees who have joined the service of the bank on or after the notified date i.e. 29.9.1995, are not required to exercise

option as they shall be governed by these regulations. However, the employee who joins the service of Bank on or after 29.9.1995 at the age of 35 years or more may, within a period of 90 days from the date of his appointment elect to forego his right to pension where upon the Pension Regulations shall not apply to him."

7. The regulation further stipulated that in case of category of employees who were in the service of the Bank during any time on or after the 1st day of January, 1986 and had died while in service on or before the 31st day of October, 1993 or had retired on or before the 31st day of October 1993, but died before the notified date in which case their family shall be entitled to the pension or the family pension as the case may be under these regulations, if the family of the deceased-

(a) exercise an option in writing within one hundred and twenty days from the notified date to become member of the Fund; and

(b) refund within sixty days of the expiry of the said period of one hundred and twenty days specified in clause (a) above the entire amount of the Bank's contribution to the Provident Fund and interest accrued thereon together with a further simple interest at the rate of six per cent annum from the date of settlement of the Provident Fund account till the date of refund of the aforesaid amount to the Bank; or

8. That vide personnel division Circular No.1520 dated 15.11.1995 (Annexure R/4) decision was also taken for forwarding of option, letters, forms etc:

9. Grievance of the petitioner is that though she opted for family pension vide her application dated 16.1.97, the same was turned down on 2.4.97 on the ground that the proposal was not given within stipulated time. It is contended that there was no personal information given by the Bank. It is urged that it is after knowing from different sources, she applied on 16.1.97. It is submitted that had she known that the option has to be given within 120 days from the date of notification i.e. 27.1.96, she would have applied within the stipulated time and would have complied with other conditions. Thus, as submitted on behalf of petitioner that it was want of information in time which prevented her from timely filing the application. Under these circumstances she claims that the respondents be directed to consider the proposal.

10. Respondents on their turn contends that wide publicity was given about

the Pension Regulations as also the fact that the proposal was to be given within 120 days of notification. It is urged that the option which has to be given on or before 27.1.1996 was tendered on 16.1.1997 which was turned down as there was no provision for relaxation. The respondents in paragraph 5.5 of the return also contends that notices was sent to all the present and past employees of respondent Bank about exercising the option for the pension however, the petitioner since did not opt within time, but opted after the stipulated period, her claim was declined. It is contended that record regarding communication of information could not be produced as they have been destroyed after 3 years. Thus in substance though the respondent does not dispute the entitlement, however submit that the petitioner having not applied within the stipulated time, but thereafter, her claim for pension was rejected.

11. After hearing learned counsel for the parties, the question which crops up for consideration is as to whether the respondents are justified in rejecting an otherwise legitimate claim of the petitioner for family pension on the ground that she applied after the expiry of cut of date.

12. True it is that Regulation 1995 lays down a condition that the option has to be exercised within 120 days. But equally true it would be in respect of the class of persons like the petitioner that they have no relations left with the Bank in capacity as an employer and since the Regulation Scheme was brought into existence after about seven years from the date of death of the petitioner's husband, it was incumbent upon the respondent to have ensured that the individuals who could be benefited from the Regulation are personally made Known of the Regulations and the stipulations therein. No efforts in that direction seems to have been made by the respondents. Merely by saying that they had informed by letters, the record whereof has been destroyed after three years, is not a sufficient proof that information was sent to the petitioner. No inference in absence of cogent material can be drawn against the claimant petitioner.

13. Why should a person who is to be benefited, life long of the provisions would cause delay in availing such benefits? is a question which stares at the submissions of respondents. Therefore, in absence of cogent material on record, the respondents' contention that the information was sent cannot be accepted. Consequently, it is to be observed that the petitioner had no information about coming in vogue of Pension Regulations. True it is that the petition has been filed in the year 2004, however, the same will not deprive the petitioner of her legitimate right though the petitioner may not get the interest on the arrears for the said period.

14. Therefore, in the given facts of this case, it is ordered that in case the petitioner fulfills the entire formalities as stipulated in the Regulation 1995 within three months from the date of communication of this order, the respondents shall sanction the family pension and the arrears thereon be paid to the petitioner within a period of one month thereof. The petitioner will however, be not entitled for the interest on the arrears in the peculiar facts of this case.

15. The petition is allowed, to the extent above. No costs.

Petition allowed.

I.L.R. [2011] M. P., 2425

WRIT PETITION

Before Mr. Justice Rajendra Menon & Mr. Justice Alok Aradhe

W.P. No. 5400/2000 (Jabalpur) decided on 23 August, 2011

S.B.BHARGAVA

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

A. Service Law - Departmental Enquiry - Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 14 - Non-supply of copy of statements - Material collected during the course of preliminary enquiry not relied upon by the enquiry officer in the departmental enquiry - It was not necessary to supply the copy of the statements of the witnesses recorded during the course of the preliminary enquiry.

Petitioner has not been able to demonstrate the prejudice which has been caused to him on account of non-supply of the statements of the witnesses recorded in course of preliminary enquiry - When the witnesses were examined, the petitioner has elaborately cross-examined them without any objection. (Para 12)

क. सेवा विधि - विभागीय जांच - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966 नियम 14 - कथनों की प्रति का असंदाय - विभागीय जांच में जांचकर्ता अधिकारी द्वारा प्रारंभिक जांच के दौरान एकत्रित सामग्री पर विश्वास नहीं किया गया - प्रारंभिक जांच की कार्यवाही के दौरान अभिलिखित किये गये साक्षियों के कथनों की प्रति उपलब्ध कराना आवश्यक नहीं था।

B. Service Law - Departmental Enquiry - Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 14 - Non-

supply of copy of documents - On 22.12.1995 and 23.01.1996 documents in 39 pages and 51 documents were supplied to the petitioner - Petitioner not able to point out the specific documents which were not supplied to him as a result of which prejudice is caused to him and further as to how the same could materially affect the out come of the enquiry - Held - Grievance of petitioner that the relevant documents were not supplied or were supplied after the statements of witnesses were recorded is not substantiated.

(Para 13)

ख. सेवा विधि - विभागीय जांच - सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966 नियम 14 - दस्तावेजों की प्रति का असंदाय - 22.12.1995 तथा 23.01.1996 को 39 पृष्ठों में दस्तावेज तथा 51 दस्तावेज याची को प्रदाय किये गये - याची उन विनिर्दिष्ट दस्तावेजों को इंगित करने में सक्षम नहीं जो उसे प्रदाय नहीं किये गये, जिसके फलस्वरूप उसे हानि कारित हुई और आगे यह कि वह किस प्रकार जांच के नतीजों को तात्त्विक रूप से प्रभावित कर सकते हैं - अभिनिर्धारित - याची की शिकायत कि सुसंगत दस्तावेज प्रदाय नहीं किये गये अथवा साक्षियों के कथन अभिलिखित किये जाने के पश्चात प्रदाय किये गये सिद्ध नहीं है।

C. **Service Law - Departmental Enquiry - Denial of legal assistance** - Charges levelled against the petitioner were not of complicated nature - Petitioner also not able to show any prejudice caused to him on account of denial of assistance of legal practitioner or judicial officer - No fault can be found with the departmental enquiry proceeding.

(Para 14)

ग. सेवा विधि - विभागीय जांच - विधिक सहायता नकारना - याची के विरुद्ध लगाये गये आरोप जटिल प्रकृति के नहीं थे - याची यह दर्शाने में मी अक्षम कि उसे विधिक व्यवसायी अथवा न्यायिक अधिकारी की सहायता देने से इंकार किये जाने के कारण उसे कोई हानि कारित हुई है - विभागीय जांच की कार्यवाही में कोई त्रुटि नहीं पायी जा सकती।

D. **Civil Services (Classification, Control and Appeal) Rules, M.P., 1966, Rule 15(3) - Imposing the punishment** - Order imposing the punishment of reversion not containing any reason - Held - Where disciplinary authority has agreed with the finding of the enquiry officer, the provisions of Rule 15(3) are not attracted - Order passed by the disciplinary authority can not be said to be violative of Article 15(3) of the Rules.

(Para 15)

घ. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र., 1966 नियम 15(3) - शास्ति अधिरोपित करना - पदावनत की शास्ति अधिरोपित करने के आदेश

में कोई कारण अंतर्विष्ट नहीं – अमिनिर्धारित – जहां अनुशासनात्मक प्राधिकारी जांचकर्ता अधिकारी के निष्कर्षों से सहमत है, नियम 15(3) के उपबंध आकर्षित नहीं होंगे – अनुशासनिक प्राधिकारी द्वारा पारित आदेश नियमों के अनुच्छेद 15(3) के उल्लंघन में नहीं कहे जा सकते।

Cases referred :

AIR 2001 SC 343, AIR 1972 SC 2178, AIR 1983 SC 109, AIR 1991 SC 1221, AIR 1961 SC 1623, AIR 1988 SC 117, AIR 1979 SC 1022, AIR 1999 SC 2881, AIR 2001 SC 2788, AIR 2010 SC 3055, (1993) 2 SCC 115, (2000) 1 SCC 416, AIR 1996 SC 1669, (2010) 5 SCC 349, (1995) 6 SCC 749, (2010) 11 SCC 278, (2011) 2 SCC 316, AIR 1986 SC 2118, AIR 1998 SC 308, AIR 2006 SC 3542, (1992) 3 SCC 124.

A.D. Deoras with R.K. Jaiswal, for the petitioner.

S.S. Bisen, G.A. for the respondent No.1.

V.S. Shrotri with Vikram Johri, for the respondent No.2.

ORDER

The Order of the Court was delivered by **ALOK ARADHE, J.** :- In this petition, the petitioner has challenged the validity of the order dated 17.10.1997 by which the petitioner has been reverted from the post of Additional District Judge to the post of Civil Judge, Class-I. In order to appreciate the petitioner's challenge to the impugned order few facts need mention which are stated infra.

2. The petitioner was appointed as Civil Judge, Class-II in 1979. The petitioner was promoted to the post of Civil Judge, Class-I in 1987 and was further promoted to the post of Chief Judicial Magistrate in 1990. The petitioner, thereafter, was promoted to higher judicial service in 1992 and posted as Additional District Judge, Khurai, district - Sagar. The petitioner joined at Khurai on 27.9.1992. The petitioner on 13.1.1995 issued a notice to one D.P. Thakur, advocate to show cause why he should not be prosecuted under Sections 191 and 192 of the Indian penal Code for fabricating false evidence. It appears that Bar Association, Khurai took a decision to boycott the court of the petitioner and delegation of senior advocates along with the President and the office-bearers met the District and Sessions Judge, Sagar on 17.1.1995 and informed him that since the said D.P. Thakur appeared on behalf of accused in proceeding under Section 157 of the Indian Penal Code and got the bail for the accused and since the petitioner was personally interested in the said case that is why the show-cause notice was issued to said D.P. Thakur with a view to wreak vengeance.

3. Accordingly, the District and Sessions Judge was informed that member of the Bar Association have taken a decision to boycott the Court of the petitioner. The District and Sessions Judge, Sagar vide communication dated 18.1.1995 apprised the High Court about the decision taken by the members of the Bar Association, Khurai. A complaint was also made by the Bar Association, Khurai to the Chief Justice. Thereupon Shri S.S. Saraf, the then Registrar (Vigilance) visited Khurai and conducted a preliminary enquiry. A show-cause notice dated 12.5.1995 along with article of charges, list of documents and witnesses was issued to the petitioner by which the petitioner was asked to file his reply to the charge-sheet within a fortnight. The petitioner on receipt of the charge-sheet by communication dated 23.5.1995 demanded the copy of the statement of witnesses as well as the documents on the basis of which the charge-sheet was issued to him to file the reply.
4. Thereafter vide communication dated 17.11.1995 an enquiry was directed to be conducted against the petitioner. The enquiry officer ordered the petitioner to appear on 4.12.1995 at Jabalpur failing which the petitioner was informed that ex parte proceeding would be taken against him. The petitioner once again vide communication dated 2.12.1995 requested for decision on the application which was submitted by him on 23.5.1995. The petitioner informed the Registrar General of the High Court vide communication dated 19.12.1995 that though the documents sought for by the petitioner were not supplied to him yet on the basis of his memory he is filing the reply to the article of charges.
5. The petitioner thereafter by another communication dated 19.12.1995 sought the assistance of a legal practitioner, namely, B.B. Bhargav. However, by communication dated 21.9.1996 the petitioner was informed that reply filed to the charge-sheet as well as application seeking assistance of legal practitioner has been rejected. The petitioner thereafter filed another application seeking assistance of Civil Judge Shri S.K. Choubey and Shri S.A. Naqvi, the then Additional Registrar of Gwalior Bench of this Court. However, the petitioner vide communication dated 16.2.1996 was informed that he has not been permitted to seek assistance of Shri Bhargav and Shri Naqvi. However, the petitioner was granted liberty to seek assistance of any other judicial officer.
6. On 19.12.1995, 31 documents were supplied to the petitioner. Thereafter on 22nd and 23rd January, 1996 the witnesses were examined. The petitioner cross-examined witnesses as well as examined 11 witnesses in his defence. The Enquiry Officer thereafter submitted his report to the disciplinary authority in which five charges out of six charges levelled against

the petitioner were found to be proved. A show-cause notice dated 24.7.1996 was issued to the petitioner along with copy of the enquiry report and the petitioner was asked to show-cause with regard to proposed punishment. The petitioner thereafter made a request to permit him to inspect the record of the departmental enquiry proceeding on 12.8.1996. The petitioner, submitted the reply to the show-cause issued by the disciplinary authority on 14.8.1996. Thereafter by order dated 17.10.1997 the punishment of reversion was imposed on the petitioner.

7. Mr. A. D. Deoras, learned senior counsel for the petitioner while referring to rule 14 (4) and 5 (a) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1996 (hereinafter referred to as 'the Rules') submitted that it was incumbent upon the disciplinary authority to obtain the reply of the petitioner to the charge-sheet. However, without obtaining the reply of the petitioner to charge-sheet the enquiry officer and presenting officer were appointed. In support of aforesaid submission, learned senior counsel has placed reliance on the decision in *State of Punjab v. V.K. Khanna* AIR 2001 SC 343. It was further submitted by him that the petitioner was denied the assistance of lawyer in the departmental enquiry proceeding which is violative of rule 14 (8) of the Rules. In support of aforesaid submission, learned senior counsel has placed reliance on the decision in *C.L. Subramaniam v. Collector of Customs, Cochin*, AIR 1972 SC 2178, *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and Others*, AIR 1983 SC 109 and *J.K. Aggarwal v. Haryana Seeds Development Corporation Ltd. and Others*, AIR 1991 SC 1221. It is also submitted by learned senior counsel that the petitioner was neither supplied the documents nor he was permitted to inspect the record of the departmental enquiry proceeding. It was pointed out that the witnesses of the departmental enquiry were examined on 22nd and 23rd January, 1996 and thereafter the documents were supplied to the petitioner in violation of Rule 14 (11) of the Rules which provides that the documents be supplied to the delinquent employee three days before commencement of examination of witnesses in the departmental enquiry. In support of the aforesaid submission, learned senior counsel has placed reliance on the decisions in *State of Madhya Pradesh v. Chintaman*, AIR 1961 SC 1623 and *Chandrama Tewari v. Union of India*, AIR 1988 SC 117.

8. It has further been submitted that the impugned order has been passed in violation of Rule 15 (3) of the Rules inasmuch as no reasons have been recorded while passing the order imposing the penalty on the petitioner. It

has also been urged that there is no material on record to prove that the charges leveled against the petitioner and in fact charge number 5 does not constitute the misconduct. In this connection reference was made to the decision of the Supreme Court in *Union of India and Others v. J. Ahmed*, AIR 1979 SC 1022. It is also submitted that there is no material on record to prove the charge number 4 and in respect of judicial work, the charges cannot be framed and disciplinary enquiry cannot be conducted. In support of his submission, learned senior counsel has relied on the decisions in *Zunjarrao Bhikaji Nagarkar v. Union of India*, AIR 1999 SC 2881 and *P.C. Joshi v. State of U.P. and Others*, AIR 2001 SC 2788.

9. On the other hand, Shri V.S. Shrotri, learned senior counsel for the respondent No.2 submitted that since the statements recorded in the preliminary enquiry were not relied in the departmental enquiry therefore, there was no need to supply the copy of the statements of the witnesses recorded in course of preliminary enquiry. While referring to the report of the preliminary enquiry it was submitted that preliminary enquiry was held in the knowledge of the petitioner. It was further submitted that the petitioner had 18 years of experience as judicial officer and taking into account the nature of charges, the denial of assistance of legal practitioner has not caused any prejudice to the petitioner. In support of his submission, learned senior counsel has placed reliance on the decision in *Dinesh Chandra Pandey v. High Court of Madhya Pradesh and Another*, AIR 2010 SC 3055. It is also submitted that the documents were supplied to the petitioner along with the charge-sheet. The petitioner has examined the witnesses. Learned senior counsel referred to the proceedings recorded by the enquiry officer on 11.12.1995 to demonstrate that the documents were supplied to the petitioner as well as he was permitted to inspect the record of the disciplinary enquiry proceeding. In support of his submission, learned senior counsel has placed reliance on the decision in *Crescent Dyes and Chemicals Ltd. v. Ram Naresh Tripathi*, (1993) 2 SCC 115. It is also urged that the findings recorded by the enquiry officer are based on material available on record and by no stretch of imagination, the same can be said to be perverse. The scope of judicial review with regard to findings recorded by the enquiry officer is limited. In this connection, learned senior counsel has relied on the decision in *High Court of Judicature at Bombay v. Shashikant S. Patil and Another*, (2000) 1 SCC 416. It is also submitted by him that it was not necessary to mention reasons in the order of punishment. The question of validity of the proceeding of the departmental enquiry has to be

examined on the touchstone of the prejudice which has been caused to the delinquent employee. In this connection reference has been made to the decisions in *State Bank of Patiala and Others v. S.K. Sharma*, AIR 1996 SC 1669 and *Union of India and Others v. Alok Kumar*, (2010) 5 SCC 349.

10. We have considered the submissions made by learned counsel for the parties. The scope of judicial review of the decision of disciplinary authority or in the proceeding in the departmental enquiry is well settled by catena of decisions of the Supreme Court. The judicial interference in the proceeding of the departmental enquiry is warranted where there is violation of principles of natural justice or of statutory rules or if the decision of the authority is so arbitrary or capricious that no reasonable person would have arrived at such a conclusion. It is well settled in law that if there is some evidence on which the finding in a departmental enquiry can be based then adequacy or reliability of the material is not a matter which can be canvassed in a writ petition under Article 226 of the Constitution of India. It is equally well settled that this Court cannot sit as a court of appeal on the findings recorded by the enquiry officer or disciplinary authority and re-appreciate the evidence. [See: *B.C. Chaturvedi v. Union of India and Others*, (1995) 6 SCC 749, and *Shashikant S. Patil* (supra) (2000) 1 SCC 416. Similarly, it is a well settled legal proposition that every violation of rules of natural justice may not be sufficient for invalidating the action of the disciplinary authority and the court may refuse to interfere if the decision due to such violation has not caused any prejudice to the delinquent employee. Reference in this connection may be made to the decisions in *Indu Bhushan Dwivedi v. State of Jharkhand and Another*, (2010) 11 SCC 278 and *State Bank of India and Others v. Bidyut Kumar Mitra and Others*, (2011) 2 SCC 316.

11. Keeping in mind the aforesaid well settled legal principles, we may advert to the facts of the case. The first ground of attack to the disciplinary enquiry proceeding is that the statements of witnesses recorded in the preliminary enquiry were not supplied to the petitioner. In *Kashinath Dikshit v. Union of India*, AIR 1986 SC 2118 it has been held that copy of the statements of witnesses recorded in the preliminary enquiry should be supplied particularly if those witnesses are proposed to examine in the departmental enquiry. It has also been held that non-supply of statements of witnesses in the preliminary enquiry would not vitiate the departmental enquiry proceeding unless it is shown that on account of non-supply of the documents any prejudice has been caused to the delinquent officer to his defence.

12. Similarly in *Chandrama Tewari* (supra) it has been held that statements of witnesses recorded in the preliminary enquiry should be supplied to the delinquent officer if the enquiry officer has relied upon the same in support for his findings. It has also been held that question whether non-supply of the statements of the witnesses recorded in course of preliminary enquiry has resulted in violation of principles of natural justice has to be tested on the touchstone of prejudice which is caused to the delinquent officer. Similar view has been taken in *Vishal Singh and Another v. State of M.P.*, AIR 1998 SC 308 as well as *Syndicate Bank and Others v. Venkatesh Gururao Kurati*, AIR 2006 SC 3542. In the instant case, from perusal of the enquiry report we find that the material collected during the course of preliminary enquiry has not been relied upon by the enquiry officer in the departmental enquiry. Therefore, in our view, it was not necessary to supply the copy of the statements of the witnesses recorded during the course of the preliminary enquiry. Besides that, the petitioner has not been able to demonstrate the prejudice which has been caused to him on account of non-supply of the statements of the witnesses recorded in course of preliminary enquiry. That apart, it can be seen from the proceedings of the enquiry that when the witnesses were examined, the petitioner has elaborately cross-examined them without any objection. Therefore, the first ground of attack to the departmental enquiry is hereby repelled.

13. From perusal of the ordersheet dated 21.12.1995 of the proceeding in the departmental enquiry, we find that enquiry officer had supplied the documents in 39 pages to the petitioner. The petitioner has acknowledged the receipt of aforesaid documents. Thereafter the proceedings were fixed for 22nd and 23rd January, 1996. On 22nd and 23rd January, 1996 the witnesses were examined. The aforesaid witnesses were cross-examined by the petitioner. From perusal of the document Annexure P-19, we find that on 23.1.1996, 51 documents were supplied to the petitioner. Thus, grievance of the petitioner that the relevant documents were not supplied to him and the documents were supplied to him after the statements of the witnesses were recorded in the departmental enquiry is not substantiated by the records of the departmental enquiry proceeding. The petitioner has not been able to point out the specific documents which were not supplied to him as a result of which prejudice is caused to him in this regard and further as to how the same could materially affect the final outcome of the enquiry. Therefore, the second ground of attach to the departmental proceeding must also fail.

14. The petitioner has assailed the departmental enquiry proceeding on yet another ground that he was denied the assistance of legal practitioner as well as assistance of judicial officer. In *Dinesh Chandra Pandey* (supra) while considering Rule 14 (8) of the Rules the Supreme Court has held that in case where an enquiry is held against the judicial officer, the rule permitting the delinquent employee to seek assistance of legal practitioner is not applicable. It has been held that in an enquiry against the judicial officer where Additional District Judge is appointed as presenting officer, he cannot be termed as legal practitioner. It is also relevant to mention here that the charges levelled against the petitioner are not of complicated nature. The petitioner has not been able to show any prejudice caused to him on account of denial of assistance of legal practitioner or assistance of judicial officer. Therefore, on this ground also no fault can be found with the departmental enquiry proceeding.

15. The impugned order imposing the punishment of reversion has also been assailed by the petitioner on the ground that the same has been passed in violation of Rule 15 (3) of the Rules inasmuch as it does not contain any reason. Rule 15 of the Rules deals with the action on the enquiry report. Rule 15 (2) provides that if the disciplinary authority disagrees with the findings of the inquiring authority on any article of charge, it shall record its reasons for such disagreement and record its own finding on such charge, if the evidence on record is sufficient. Rule 15 (3) provides that if the disciplinary authority having regard to the findings on all or any of the articles of charge is of the opinion that any of the penalties specified in rule 10 should be imposed, it shall notwithstanding anything contained in rule 16 make an order imposing such penalty but in doing so it shall record reasons in writing. If Rules 15 (2) and 15 (3) are read conjointly, it is clear that the disciplinary authority is required to record reasons in writing only in the case when it disagrees with the finding of the enquiry officer. In the instant case the disciplinary authority has agreed with the finding of the enquiry officer and, therefore, the provisions of Rule 15 (3) are not attracted in the facts and circumstances of the case. For the aforementioned reasons, the order passed by the disciplinary authority cannot be said to be violative of Article 15 (3) of the Rules.

16. In *Union of India and Others v. A.N. Saxena*, (1992) 3 SCC 124 it has been held that if a judicial officer commits serious acts of recklessness and negligence, the same is a conduct which amounts to misconduct in discharge of duty and, therefore, disciplinary action can be taken against him for maintaining the high standard of judicial discipline and propriety and for

upholding the confidence of people in judiciary. In *A.N. Saxena* (supra) the Supreme Court has stated contingencies in which disciplinary action can be taken against the delinquent officer. Therefore, the contention of the learned senior counsel that no charge can be framed in respect of judicial work cannot be accepted. In the aforesaid backdrop, we have gone through the records of the departmental enquiry proceeding. We find that the findings recorded by the enquiry officer are based on material available on record. The same, by no stretch of imagination, can be said to be either perverse or based on no evidence. This Court cannot act like an appellate authority and re-appreciate the material available on record. Thus, challenge to the findings recorded by the enquiry officer also deserves to be repelled.

17. For the aforementioned reasons, we do not find any merit in this petition. In the result, the writ petition, fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 2434

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 12645/2010(S) (Jabalpur) decided on 26 August, 2011

BHAGWAT SINGH THAKUR

...Petitioner

Vs.

STATE OF M.P.

...Respondent

Service Law - Compulsory retirement - Employees (employed in M.P. Road Transport Corporation) who completed 20 years of service or 50 years of age were compulsory retired by Corporation taking recourse to the direction of State Government in purported exercise of power u/s 34 of Road Transport Corporation Act 1950 adopted the circular No. C-3-24/2000/3/1 dated 22.08.2000, which lays down the procedure to be followed when a Government Servant is to be compulsory retired on his completion of 20 years of service or on attaining 50 years of age either under Fundamental Rule 56 or under Rule 42 of the M.P. Civil Service (Pension) Rules 1976 - Held - Determination of service of an employee of the Corporation by way of pre-mature retirement, except by way of punishment, has not been provided either in the M.P.S.R.T.C. Employees Service Regulations 1950 or in the Standard Standing Orders - Action of the respondents

Corporation in pre-mature retiring its employees in public interest also not in consonance with the provisions contained in the M.P. Industrial Relation Act 1961 - Action of the respondent Corporation can not be given the stamp of approval - The action is held to be without any authority/sanction of law, as such is void ab-initio. (Paras 20, 33 & 34)

सेवा विधि - अनिवार्य सेवानिवृत्ति - कर्मचारी (म.प्र. राज्य सड़क परिवहन निगम में कार्यरत) जिन्होंने 20 वर्ष की सेवा अथवा 50 वर्ष की आयु पूर्ण की है उन्हें निगम द्वारा अनिवार्य सेवानिवृत्त किया गया, सड़क परिवहन निगम अधिनियम 1950 की धारा 34 के अंतर्गत शक्ति के प्रयोग में राज्य सरकार के निर्देश का अवलंब लेकर परिपत्र क्र. सी-3-24/2000/3/1 दि. 22.08.2000 को अंगीकृत करते हुये जिसमें मूलभूत नियम 56 या म.प्र. सिविल सेवा (पेंशन) नियम 1976 के अंतर्गत किसी सरकारी कर्मचारी को उसके 20 वर्ष की सेवा अथवा 50 वर्ष की आयु प्राप्त करने पर अनिवार्य सेवानिवृत्त करने की अनुसरणीय प्रक्रिया अधिकथित है - अभिनिर्धारित - शास्ति के रूप में छोड़कर समय पूर्व सेवानिवृत्ति के द्वारा निगम के कर्मचारी की सेवा का निर्धारण न तो एमपीएसआरटीसी कर्मचारी सेवा विनियम 1950 में और न ही मानक स्थाई आदेशों में उपबंधित है - लोक हित में अपने कर्मचारियों को समय पूर्व सेवानिवृत्त करने की प्रत्यर्थी निगम की कार्यवाही, म.प्र. औद्योगिक संबंध अधिनियम 1961 में अंतर्विष्ट उपबंधों के भी अनुरूप नहीं - प्रत्यर्थी निगम की कार्यवाही का अनुमोदन नहीं किया जा सकता - कार्यवाही को बिना किसी प्राधिकार/विधि की मंजूरी के होने की धारणा की गई इसलिए प्रारंभ से शून्य है।

Cases referred :

AIR 2001 SC 1109, AIR 1968 SC 464, AIR 1976 SC 1027, (2004) 9 SCC 755, 1980 MPLJ 8.

P. Awasthy, Ajay Raizada, Sanjay Verma, Anubhav Jain, R.S. Verma, Akash Choudhary, Shekhar Sharma, P.K. Badoriya, D.K. Tripathi, Rohit Arya with D.K. Khare, & M. Pateria, for the petitioner.

P.C. Chandak, for the respondent.

Piyush Dharmadhikari, G.A. for the State.

ORDER

SANJAY YADAV, J.:-This order shall govern final disposal of Writ Petition Nos.10213/2010(S),13483/2010(S),11824/2010(S),16253/2010(S),13549/2010(S),8800/2010(S),11645/2010(S),12305/2010(S),12322/2010(S),12328/2010(S),12333/2010(S),12341/2010(S),12346/2010(S),12348/2010(S),12174/2010(S),14008/2010(S),13426/2010(S),13550/2010(S),12640/2010(S),12314/2010(S),13144/2010(S),13142/2010(S),15117/2010(S),11703/2010(S),12108/

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2010(S),12642/2010(S),9554/2010(S),12725/2010(S),13935/
2010(S),13927/2010(S),11421/2010(S),11831/2010 and 11828/2010(S).

2. Number of employees employed in the Madhya Pradesh Road Transport Corporation who completed 20 years of service or 50 years of age were compulsorily retired in public interest. It is these orders which are under challenge in these bunch of writ petition which were analogously heard.
3. Common uncontroverted facts are that, the petitioners are permanent employees of Madhya Pradesh Road Transport Corporation posted at various places in the State of M.P. Their service conditions, besides being governed by the Regulations framed by the Corporation are also subject to the provision contained in Madhya Pradesh, Industrial Relation Act 1961, Chapter VA of the Industrial Disputes Act, 1947 (hereinafter to be referred to as Act of 1947) as these statutes are applicable to the Corporation.
4. The main plank of submission on behalf of these employees is that, in absence of specific Regulation providing the compulsory retirement being one of the mode of premature retirement, their premature retirement in public interest is illegal and without any authority. On merit the submission is that on the basis of nonexisting facts the petitioners are been prematurely retired.
5. Respondent Corporation is a statutory Corporation duly constituted under Section 3 of Road Transport Corporation Act, 1950, which provides for that the State Government having regard to the advantages offered to the public, trade and industry by the development of road transport; the desirability of co-ordinating any form of road transport with any other form of transport; and the desirability of extending and improving the facilities for 'road transport in any area and for providing an efficient and economical system of road transport service therein, may, by notification with official gazette, establish a Road Transport Corporation for the whole or any part of the State under such name as may be specified in the notification. The respondent Corporation came to be established as 'public sector' undertaking in 1st June, 1962, styled as Madhya Pradesh State, Road Transport Corporation. Thereafter with the carving out of new State of Chattisgarh, the respondent Corporation is now Madhya Pradesh Road Transport Corporation.
6. Service conditions of the employees in the respondent Corporation is governed by the Regulation framed by the Corporation in exercise of its power under Section 45 of the Act of 1950, which, stipulates:

"45. Power to make regulations.-(1) A Corporation may, with the previous sanction of I [the State Government and by notification in the Official Gazette], make regulations, not inconsistent with this Act and the rules made thereunder, for the administration of the affairs of the Corporation.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:-

(a) the manner in which, and the purposes for which, persons may be associated with the 2[Board] under section 10;TC " (a) the manner in which, and the purposes for which, persons may be associated with the 2[Board] under section 10;"

(b) the time and place of meetings of the 3 [Board] and the procedure to be followed in regard to transaction of business at such meetings;

(c)the conditions of appointment and service and the scales of pay of officers and 4[other employees of the Corporation other than the Managing Director, the Chief Accounts Officer and the Financial Adviser or, as the case may be, the Chief Accounts Officer-cum-Financial Adviser]

(d) the issue of passes to the employees of the Corporation and other persons under section 19;

(e) the grant of refund in respect of unused tickets and concessional passes under section 19.]

7. That in exercise of powers conferred by Section 45 of the Act of 1950, the respondent Corporation' framed Regulations, viz, 'Madhya Pradesh State Road Transport Corporation Employees' Service Regulations, 1950 (referred to as Regulation 1950) and Madhya Pradesh State Road Transport Corporation Employees Conduct Discipline and Appeal Regulations, 1975 (referred to as Regulation 1975).

8. The Corporation being an establishment, the provisions of Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 and the Rules made thereunder are applicable and governs the service condition of the employees of respondent Corporation.

9. Besides, the State Government is also empowered under Section 34 of the Act of 1950 to give instruction to the Corporation regarding service conditions of its employees. It says:

"34. Direction by the State Government. (1) The State Government may, after consultation with a Corporation established by such Government, give to the Corporation general instructions to be followed by the Corporation, and such instructions may include directions relating to the recruitment, conditions of service and training of its employees, wages to be paid to the employees, reserves to be maintained by it and disposal of its profits or stocks.

(2) In the exercise of its powers and performance of its duties under this Act, the Corporation shall not depart from any general instructions issued under sub-section (1) except with the previous permission of the State Government."

10. Regulation 59 of the Regulations 1950, makes a provision regarding age of Retirement. It stipulates:

"59 राज्य परिवहन के कर्मचारी 58 वर्ष की आयु पूरी कर लेने की तारीख को अनिवार्य रूप से सेवानिवृत्त किये जा सकेंगे जब तक कि निगम द्वारा उसके बाद एक विनिर्दिष्ट अवधि के लिये उसका सेवा में बना रहना विनिर्दिष्ट रूप से अनुज्ञात न किया जाए, किन्तु राज्य शासन की मंजूरी के बिना उसे 60 वर्ष की आयु के बाद सेवा में बनाये नहीं रखा जाना चाहिए ।"

11. Regulation 32(vii) of Regulation 1975 lays down compulsory retirement as one of the penalties which can be inflicted on an employee of the Corporation for good and sufficient reason and after following the procedure prescribed under Regulation 36.

12. Explanation (vi) appended with Regulation 32 provides for that, a compulsory retirement of an employee in accordance with the provisions relating to his superannuation or retirement shall not amount to penalty within the meaning of regulation 32.

13. Under the Act of 1961 Section 3(b) and Section 6(3) makes a provision regarding power of the State Government to frame Standard Standing Order and make it applicable by framing Rules under Section 21.

14. Sub-Section (b) of Section 3 defines 'Standard Standing Orders' which means "rules framed under Section 21 relating to matters set out in the Schedule".

15. Sub-Section (3) of Section 6 stipulates that "Standard Standing Orders' made or amendments certified under this Act shall provide for every matter set put in the Schedule".

16. Section 21 of the Act of 1961 empowers the State Government to make rules. It stipulates:

"21. Power to make rules:-

- (1) The State Government may, by notification, make Rules to carry out the purposes of this Act.
- (2) In particular and without prejudice to the generality of the forgoing powers such rules may-
 - (a) provides for additional matters to be included in the Schedule;
 - (b) frame standard standing orders for the purpose of this Act and different standard standing orders may be framed for -
 - (i). different clauses of undertakings; and
 - (ii) different categories of employees;
 - (c) lay down the procedure to be followed by the Certifying Officer, the Labour Court or the Industrial Court;
 - (d) specify the fee which may be charged for furnishing copies of standing orders filed in the register under section 12;
 - (e) provide for any other matter which is to be or may be prescribed.
- (3) The rules made under this section shall be subject to the condition of previous publication in the Gazette.

17. It is pertinent to note that the "Age of retirement" was added in the Schedule appended with the Act of 1961 by notification dated 19.10.1973 published in M.P. Gazette Part 4(ga) dated 2.11.1973 at page 770-771. The said addition paved the path for insertion of Clause 14-A in the Standard Standing Order. The Clause makes a provision regarding retirement. It stipulates:

" 14-A: Retirement.: An employee shall retire from the service of the employer on the date he attains the age of 58 years. He may however, be retained in service by the employer after the date of attaining the age of 58 years if his services are necessary in the interest of the undertaking but he shall be not retained in service after the age of 60 years :

Provided that nothing in this clause shall adversely affect the operation of the terms of any contract, agreement, settlement, or award on this subject, if the age of retirement is not less than 58 years:

Provided further that before retiring an employee from the service in accordance with the provision contained in this clause, the employer shall give to the said employee atleast one month's intimation in writing of such retirement. However, failure to give such intimation will not entitle the employee to continue in service after attaining the age of retirement. On the employer's failure to give such intimation he shall be liable to pay to the employee concern one month's wages.

[(1-A) Notwithstanding anything contained in Sub-Clause 1 the age of retirement for working journalist as defined in Section 2 (f) of the Working Journalist and other Newspapers Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 (No.45/1955) shall be 60 years.]

(2) For the purpose of Clause (1) the age shall be reckoned by any of the following methods in order of priority;

- (i)- the date of birth as given by the employee at the time of employment accepted by the manager;
- (ii)- the date of birth as given in the Higher Secondary School certificate or equivalent examination certificate;
- (iii)- the certificate issued by the Local Authority of the place where the employee was born on the basis of the records maintained by such authority or certified copy of the entry in the birth and death register in which date of birth is mentioned;
- (iv)- the date of birth as declared by the employee in his declaration card for purpose of membership of the Employee's Provident Fund.

(3) Notwithstanding anything contained in the foregoing, 'clause if any dispute' arises regarding the date of birth intimated at the time of employment or declared in the declaration card for the purpose of membership of the employee's Provident Fund, as the case may be, then the date of birth shall be determined on the basis of School Leaving Certificate and in its absence, the date of birth determined by a Registered Medical Practitioner, not below the rank of Civil Surgeon, shall be considered as final but any such dispute shall not be entertained within the period of six months before the date of retirement."

18. The amendment in the Standard Standing Order was after taking recourse to the procedure prescribed under Section 6 and 8 of the Act of 1961.

19. Thus as a matter of general policy the Corporation cannot retire its employee until he completes the 'age of retirement'. Except by way of punishment as provided under Regulation 32 of Regulation 1975. — — —

20. The respondent Corporation, however, taking recourse to the direction dated 13.8.2009 and 31.8.2009 issued by the State Government in purported exercise of power under Section 34 of the Act of 1950 adopted the circular No.C-3-24/2000/3/1 dated 22.8.2000 which lays down the procedure to be followed when a Government Servant is to be compulsory retired on his completion of 20 years of service or on attaining 50 years of age either under Fundamental Rule 56 or under Rule 42 of the M.P. Civil Service (Pension) Rules, 1976. That in accordance therewith, the employees who are the petitioners before this Court are compulsory retired.

21. The reasons for mass compulsory retirement are as stated in the Return by the respondent Corporation.

22. It is stated that after initial years of sustenance, Corporation started running into losses and ever since 1994-95 it has been sustaining itself on the basis of financial grants either by Central or the State Government. The accumulated loss as on 31.3.2004 was Rs.735 Crores with outstanding being Rs.1033.68 Crores. It is urged that on 18.2.05, the Council of Ministers of State of M.P. resolved to wind up the Corporation. Consequent whereof the Board in its 10th meeting on 19.5.2005 floated a Voluntary Retirement Scheme 2005. It is urged that in 18th Board Meeting the Corporation floated a Voluntary Retirement Scheme 2010. Respondent further state that in Pursuance

to the voluntary retirement scheme large number of employees opted as a result whereof the strength which was 10800 at the time of introduction remained 300 as on date. It is urged that all the five workshops has been closed. Subsequently, the depots and divisional officers have also been closed and the corporation does not own any buses. It is urged that income of Corporation is 'nil' with effect from 30.9.10.

23. It appears from the pleadings of respondent Corporation that the employees who did not opt under the Voluntary Retirement Scheme 2005 or 2010, mode of Compulsory retirement was adhered to board out the remaining employees.

24. It was informed during course of hearing that the corporation took recourse to Section 25.0 of Industrial Dispute Act 1947 seeking closure which as per respondents still remains in vogue and the decision of Union of India is under challenge before this Court. Be that as it may.

25. The purpose for advertng to the fact regarding closure is that when the corporation has taken recourse to the provisions of Section 25.0 of Act of 1947, they could have very well invoked other provisions as they appear under Chapter VB of Act of 1947 like Section 25 N, if they are to wind up the Corporation.

26. It is not that the respondent Corporation cannot take recourse to premature retirement being one of the mode of compulsory retirement which can be on following terms as laid down in *State of Gujrat v. Umedbhai M. Patel*: AIR 2001 SC 1109-

"11- The law relating to compulsory retirement has now crystallized into definite principles, which could be broadly summarised thus:

(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead-wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even un-communicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure.

27. The question however, is whether, the Corporation could have taken shelter of State Government direction, by adopting a circular of the State Government regarding premature retirement, without taking recourse to cause an amendment in the Regulations 1950 or the Standard Standing Orders, in the manner provided under the Act of 1961 and the Rules 1963 framed thereunder.

28. No doubt, the direction by the State Government under Section 34 are imperative in nature. In *Mysore State Road Transport Corporation v. Gopinath Gundachar Char*: AIR 1968 SC 464, it was held:

"3..... If the State Government issues any directions under S.34 relating to the recruitment and conditions of service of the employees, the Corporation must obey those directions."

29. In *General Manager Mysore State Road Transport Corporation v. Devraj Urs and another*: AIR 1976 SC 1027 it was observed:

"13. It would thus be seen that until regulations are made with the previous sanction of the State Government the directions given under Section 34 in respect of the conditions of service has got the force of law."

30. But where there is a special law like the Act of 1961 which governs the undertakings, imperative it is for such undertaking to have first install the provisions either in the existing Regulations or the Standard Standing Order

as the case may be, in accordance with the procedure as laid down in the Act of 1961. (Section 6 and 8).

31. The Act of 1961 is a special law being enacted by the State Government in exercise of its exclusive power to enact a law regulating industrial relations and resolutions of labour dispute, will have precedence over the General Law, in the present, the Act of 1950, need no elaboration as has been settled at rest with the decision in *M.P. Vidyut Karmachari Sangh v. M.P. Electricity Board* (2004) 9 SCC 755 wherein it is held:

"30-This brings us to the question as regard the effect of the 1961 Act. In terms of Section 2, the 1961 Act, applies to every undertaking wherein the number of employees on any day during the twelve months preceding or on the day the said Act came into force or any day thereafter was or is more than twenty and such other class or classes of undertakings as the State Government may, from time to time, by notification, specify in this behalf. The undertaking of the Board indisputably was in existence in 1961. Per se, therefore, the provisions of the 1961 Act shall apply to the undertakings of the Board. Sub-Section(2) of Section 2 of the 1961 Act makes an exception to the applicability of the Act stating that nothing therein shall apply to the employees of an undertaking to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations or any other rules or regulations that may be notified in this behalf the State Government in the official gazette apply. For excluding the operation of the 1961 Act, it is imperative that an appropriate notification in terms of Section 2(2) of the 1961 Act is issued.

31-The Board adopted Fundamental and Supplementary Rules which per se were not applicable to the employees of their undertaking. They were adopted by the Board. The provisions of Fundamental and Supplementary Rules to the extent it was made applicable, having regard to the provisions contained in Section 79 (c) would, thus, be deemed to be the regulations governing the terms and conditions of the employees of the Board. The requisite notification under Section 2(2) of the 1966 Act was, thus, required to be issued by the State Government.

32- It is not in dispute that the State Government has not issued any notification in terms of Section 2(2) of the 1961 Act and in that view of the matter the provisions thereof shall apply to the employees of the State. The 1961 Act is a special law whereas the regulations framed by the Board under Section 79 (c) are general provisions. The maxim 'generalalia specialibus non derogant' would, thus, be applicable in this case. [See *D.R. Yadav and Another Vs. R.K. Singh and Another*, (2003) 7 SCC 110 and *Indian Handicrafts Emporium and Others Vs. Union of India and Others*.

33- The question need not detain us long in view of a 3-Judge Bench decision of this Court in *Hari Shankar Jain* (supra). This Court therein in no uncertain terms held that the provisions of the Standing Order Act are special laws in regard to the matters enumerated in the Schedule and, thus, the regulations made by the Electricity Board with respect to any of those matters are of no effect unless the regulations are either notified by the Government or certified by the certifying officer, holding:

"18 In regard to matters in respect of which regulations made by the Board have not been notified by the Governor or in respect of which no regulations have been made by the Board, the Industrial Employment (Standing Orders) Act shall continue to apply. In the present case the regulation made by the Board with regard to age of superannuation having been duly notified by the Government, the regulation shall have effect notwithstanding the fact that it is a matter which could be the subject matter of Standing Orders under the Industrial Employment (Standing Orders) Act..."

32. A Full Bench of this Court in *Madhya Pradesh State Road Transport Corporation v. Heeralal Ochhelal and others*: 1980 MPLJ 8 observed:

"10- The Road Transport Corporation Act, 1950 under which the petitioner Corporation is established is an Act to provide for incorporation and regulation of Road Transport Corporations. Section 45(2) (c) of the Act authorises the Corporation to make regulations to provide for the conditions of appointment and service and the scales of pay of officers and servants of the Corporation. The Act in so far it provides for establishment of Road Transport Corporations is a

special Act. But the power conferred under section 45(2) (c) on the Corporation to make regulations laying down 'conditions of service' is a general provision which is often found in statutes creating statutory Corporations. A general provision of this nature is not intended to affect a law designed to lay down conditions of employment for a special class of employees such as industrial workers governed by the Industrial Employment. (Standing Orders) Act, 1946, which is an Act to require employers in industrial establishments formally to define conditions of employment under them, or the corresponding Madhya Pradesh Act. i.e; the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961. The Standing Orders Acts are special laws dealing with conditions of employment of industrial workers and so on principles of construction their provisions prevail over the general provision contained in Section 45(2)(c) of the Road Transport Corporation Act. The regulations made, therefore, cannot have any effect on matters contained in the Schedule to the Standing Orders Acts on which Standing Orders can be made under those Acts for industrial workers. The regulations can, however, be operative even in respect of industrial workers on matters not included in the schedule to the Standing Orders Acts. The only method by which the regulations can be applied to matter contained in the schedule to the Standing Orders Acts is either to notify them under section 13 -B of the Central Standing Orders Act or Section 2(2) of the Madhya Pradesh Act, as the case may be, or to have them certified as standing orders in accordance with the procedure laid down in those Acts.

33. In the case at hand the determination of service of an employee of the Corporation by way of premature retirement, except, by way of punishment, having not been provided either in the Regulations of 1950, nor in the Standard Standing Orders, the action of the respondents Corporation in prematurely retiring its employees in public interest being not in consonance with the provisions contained in the Act of 1961 cannot be given the stamp of approval.

34. Since the very action of the respondent Corporation in retiring its employees prematurely by taking recourse to the circular dated 22.8.2001 issued by the State Government is held to be without any authority/sanction of law, as such is void ab-initio the respective merit of the matter of each individual employee is not gone into.

35. The petitions are thus, allowed to extent above. The petitioners would be entitled for consequential benefit except the backwages. As apparent, from the facts on record that the respondent Corporation is going through its worst financial crisis because of operational losses and because of its being deregulated by the State Government.

36. In the result petitions succeeds to the extent above. No costs.

Petition succeeds.

I.L.R. [2011] M. P., 2447

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P.No. 6506/2011 (Jabalpur) decided on 26 August, 2011

DHARMENDRA SINGH

...Petitioner

Vs.

COMMISSIONER, SHAHDOL & ors.

...Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994) - Panchayat Karmi Yojna dated 12.09.1995 clause 3.3 - Age limit - Scheme only prescribes the minimum age limit for appointment to the post of Panchayat Karmi and it is silent with regard to the maximum age limit - Panchayat fixed a maximum age limit - Decision of the Panchayat can not be termed as illegal - Petitioner found to be over-age can not seek the appointment. (Paras 8 & 9)

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1) - पंचायत कर्मी योजना दिनांक 12.09.1995 खंड 3.3 - आयु सीमा - पंचायत कर्मी के पद पर नियुक्ति के लिए योजना केवल न्यूनतम आयु सीमा विहित करती है और अधिकतम आयु सीमा के संबंध में वह मौन है - पंचायत ने अधिकतम आयु सीमा निश्चित की - पंचायत के निर्णय को अवैध नहीं कहा जा सकता - याची अधिक आयु का होने से नियुक्ति का हकदार नहीं।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(1) & 86(2) - Appointment of Panchayat Karmi - Respondent No. 5 was appointed by casting of majority vote - It is argued that this is contrary to the principles laid down in the policy dated 13.08.2007 issued by the State Government - Held - Prior, to 13.08.2007, the procedure for appointment by majority of vote was

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permissible - Provisions of appointment on merit in the circular dated 27.01.2006 will be applicable only if the appointment is made by the State Authorities u/s 86(2). (Para 10)

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 86(1) व 86(2) – पंचायत कर्मों की नियुक्ति – प्रत्यर्थी क्रं. 5 की नियुक्ति निर्णायक बहुमत द्वारा की गई – यह तर्क किया गया है कि यह राज्य सरकार द्वारा जारी की गयी नीति दिनांक 13.08.2007 में दिये गये सिद्धांतों के विपरीत है – अभिनिर्धारित – 13.08.2007 से पूर्व, बहुमत द्वारा नियुक्ति की प्रक्रिया अनुज्ञेय थी – परिपत्र दिनांक 27.01.2006 में योग्यता पर नियुक्ति के उपबंध केवल तब लागू होंगे यदि नियुक्ति धारा 86(2) के अंतर्गत राज्य प्राधिकारियों द्वारा की गई है।

Case referred :

W.P. 17319/2010.

Gagan Deep Singh, for the petitioner.

S.K. Singh, PL for the State.

S.S. Bisen & Renu Agrawal, for the respondent No. 5.

ORDER

RAJENDRA MENON, J.:—Challenging the order-dated 31.1.2011 - Annexure P/1 passed by the Commissioner; order-dated 28.3.2011 - Annexure P/8 passed by the Commissioner; and, the order-dated 21.3.2011 - Annexure P/7 passed by the Collector in the matter of cancellation of appointment of petitioner on the post of Panchayat Karmi, this writ petition has been filed.

2. Various facts that are relevant for deciding the present case are not correctly reflected in the writ petition or in the reply filed by the respondents. That being so, on the basis of the material available on record, the facts indicate that the Panchayat in question namely - Gram Panchayat of village Kamta, Tehsil Jaitpur under Janpad Panchayat Budhar, District Shahdol issued an advertisement on 17.3.2007, seeking application from willing candidates to submit their candidature for appointment to the post of Panchayat Karmi. Records indicate that in pursuance to the advertisement issued, about 15 candidates submitted their candidature of which 13 were found eligible for appointment. As the appointment in question was to be done in accordance to the Scheme that was in force as per the circular dated 12.9.1995 and as the policy with regard to merit criteria being given due weightage was not in force at that point of time when the recruitment process took place, it seems that the Gram Panchayat met, passed a resolution on 29.5.2007, and decided

to appoint respondent No.5, by majority. Respondent No.5 received 9 votes against the petitioner, who received 7 votes. Copy of this resolution dated 29.5.2007 is Annexure R/5/2. However, without cancelling this resolution, the Gram Panchayat again met on 7.7.2007, reconsidered the earlier resolution and on the basis of the merit qualification passed a second resolution on 7.7.2007 and prepared a merit list, in which petitioner and another person were shown at Serial Nos. 1 and 2. However, the Gram Panchayat again met on 21.7.2007, reconsidered the earlier resolution dated 7.7.2007, amended the same criteria and passed a new resolution - Annexure R/5/5 on 21.7.2007 and appointed the petitioner. Being aggrieved by this resolution, respondent No.5 filed an appeal, as appointment order was issued in favour of the petitioner on 26.8.2007. The appeal was filed before the prescribed authority - the Sub Divisional Officer, Jaitpur. This was dismissed vide Annexure P/9 on 10.1.2008. Being aggrieved thereof, respondent No.5 filed Writ Petition No.1885/2008 before this Court and in the said writ petition, vide order-dated 20.2.2008 - Annexure P/10, the following order was passed:

"Considering the aforesaid submissions, the petition is disposed of with an opportunity to the petitioner to move an appropriate application before the prescribed authority with respect to the earlier as well as impugned resolutions within a period of 15 days from the date of receipt of certified copy of this order."

Respondent No.5 thereafter filed an application purportedly under section 85(1) read with section 91 of the Panchayat Raj Adhiniyam before the SDO, which was rejected vide order-dated 3.6.2009 - Annexure P/11 as the SDO had no power to deal with the matter under section 85(1). Further revision was filed before the Collector, Shahdol and challenge was made to the subsequent resolution dated 21.7.2007. The Collector allowed this revision and remanded the matter back for fresh consideration. Copy of this order passed by the Collector on 22.3.2009 is Annexure P/5. The Gram Panchayat considered the applications on merit and vide order-dated 22.4.2010 - Annexure R/5/7, respondent No.5 was appointed as Panchayat Karmi and the Collector vide order-dated 22.4.2010 - Annexure R/5/6 notified respondent No.5 as Secretary under section 69(1), respondent No.5 joined vide Annexure R/5/8. Aggrieved by the order passed by the Collector, Shahdol on 22.3.2009, petitioner preferred an appeal before the Commissioner, the Commissioner quashed the order passed by the Collector on 22.3.2009; the order passed by the SDO on 10.1.2008 and also quashed the resolutions and

vide the impugned order-dated 31.1.2011 - Annexure P/1 remanded the matter back for proceeding by respondent No.5 in accordance to the directions issued by this Court on 20.2.2008, in W.P.No.1885/2008. Challenging the actions impugned, petitioner has filed this writ petition.

3. According to the petitioner the resolution dated 29.5.2007 was not passed in accordance to law as was existing on the said date and, therefore, the subsequent resolutions dated 7.7.2007 and 21.7.2007 which are in accordance to law, these resolutions for appointment of the petitioner was correct. During the course of hearing of the writ petition, Shri Gagan Deep Singh, learned counsel for the petitioner, mainly emphasized that the resolution passed on 29.5.2007 appointing respondent No.5 is an illegal resolution, which was not passed in accordance to law, it was passed by the Up Sarpanch in the absence of the Sarpanch, he emphasized that no such resolution even exists or was passed by the Panchayat.

4. On the contrary, respondents have resisted the aforesaid claim and according to respondent No.5 petitioner was over-age and was not entitled to participate in the selection procedure, as per the advertisement the minimum age limit prescribed was 18 years and the maximum age limit prescribed was 33 years and as petitioner was 36 years of age on the date of the advertisement, he was ineligible for appointment. It is argued by Shri S.S. Bisen that merely because in the scheme dated 12.9.1995, only the minimum age is given and no upper age limit is given that does not mean that the Panchayat cannot prescribe any upper age limit. Referring to Clause 3.3 of the Scheme dated 12.9.1995, Shri Bisen argued that in the absence of any upper age limit being fixed, the Panchayat is well within its right to prescribe an upper age limit and once the Panchayat has prescribed an upper age limit, the petitioner is ineligible and, therefore, he has no locus standi to challenge the selection process. That apart, Shri Bisen argued that when the appointment made is prior to 13.8.2007, when the policy for appointment on merit came into force for the first time, and when the scheme applicable at the time of appointment was by casting of vote and by majority, the action taken by the Panchayat in appointing the respondent is proper and the same does not warrant any interference.

5. Shri Gagan Deep Singh, learned counsel for the petitioner, refuted the aforesaid vehemently and argued that respondent No.5 has been appointed in an illegal manner even though no resolution was passed in accordance to law and, therefore, no relief can be granted to the respondent. It is further

emphasized that under the scheme dated 12.9.1995, only a minimum age limit of 18 years is prescribed and in the absence of upper age limit being prescribed in the policy, the fixation of 33 years as the upper age limit by the Gram Panchayat is illegal.

6. I have heard learned counsel for the parties at length and perused the record.

7. On a perusal of the order-dated 31.1.2011 - Annexure P/1 passed by Commissioner, Shahdol, it is clear that the Commissioner has taken note of the fact that the two resolutions passed by the Gram Panchayat on 21.7.2007 and 7.7.2007 are contrary to the provisions of section 45 of the Gram Panchayat Adhiniyam, 1993 which prohibits passing of a resolution when one resolution is already in operation. That apart, the Commissioner has found serious irregularities in the matter of action taken and orders passed by the SDO and the Collector; and has given liberty to respondent No.5 to proceed in accordance to the directions issued by this Court in W.P.No.1885/2008, on 20.2.2008. The question now is as to whether at the instance of the present petitioner interference into the matter is warranted, when the only order passed by the Commissioner is to proceed in accordance to the directions already issued by this Court in an earlier round of litigation.

8. For considering this question a very important aspect of the matter to be taken note of is with regard to the locus standi of the petitioner to participate in the process of selection. Admittedly, the petitioner is 36 years of age on the date of the advertisement and if the advertisement is taken note of, the maximum age limit prescribed is 33 years and on that count petitioner is ineligible to seek appointment. Contention of the petitioner is that under the policy dated 12.9.1995, the Gram Panchayat is not entitled to fix any upper age limit. This contention of the petitioner is wholly misconceived. Clause 3.3 of the Scheme dated 12.9.1995 reads as under:

“3.3 संबंधित ग्राम पंचायत उक्त वर्णित अर्हताओं के अलावा अन्य वांछनीय अर्हता प्रस्ताव पारित कर सम्मिलित कर सकेगी।”

9. If the aforesaid is the position, then apart from the criteria laid down in the Scheme dated 12.9.1995, the Panchayat is entitled to fix a reasonable criteria for selection to the post in question keeping in view the requirement of the Panchayat and if the Scheme itself gives power to the Panchayat to prescribe certain additional criteria, so long as the criteria fixed is not in contravention

to or in conflict to the Scheme in question, the Panchayat's decision has to be upheld. The Scheme only prescribes the minimum age limit for appointment to the post of Panchayat Karmi and it is silent with regard to the maximum age limit. Looking to the requirement of the Panchayat, if the Panchayat fixes a maximum age limit there is nothing brought to the notice of this Court on the basis of which this decision of the Panchayat can be termed as illegal.

10. During the course of hearing of the writ petition, it was also pointed out that ignoring the merit of the petitioner, respondent No.5 has been appointed by casting of majority vote, it is argued that this is contrary to the principles laid down in the policy dated 13.8.2007 issued by the State Government. The said question is considered by a Bench of this Court recently on 26.7.2011, in Writ Petition No.17319/2010 (*Kalpna Mishra Vs. State of MP and others*), and after taking note of the provision of sections 86(1) and 86(2) of the Panchayat Raj Adhiniyam, the policy dated 12.9.1995 and the circulars issued for prescribing the procedure for appointment of Panchayat Karmi on 27.1.2006 and again on 13.8.2007, it has been held by the learned Bench that in the light of the circulars issued on 27.1.2006, if the appointment is made under the provisions of sub-section (1) of section 86 by the Panchayat, then the merit criteria prescribed in the circular dated 27.1.2006 is not applicable. It is held that the provisions of appointment on merit in the circular dated 27.1.2006 will be applicable only if the appointment is made by the State Authorities under section 86(2). Thereafter, the circular dated 13.8.2007 is interpreted and it is held that with effect from the date this circular was issued on 13.8.2007 all appointments of Panchayat Karmi has to be done on the basis of merit and not otherwise. It is, therefore, clear from this judgment that prior to 13.8.2007, the procedure for appointment by majority of vote was permissible and, therefore, the contention of the petitioner that the merit has been ignored cannot be accepted in the present case, in view of the principle laid down in the case of *Kalpna Mishra* (supra).

11. In that view of the matter, prima facie the claim of the petitioner for seeking appointment is wholly unsustainable for the simple reason that the petitioner is found to be over-age and cannot seek appointment to the post in question. Under such circumstances, this Court does not find any ground to interfere into the matter. The Commissioner concerned having evaluated the entire aspects of the matter in its totality and having passed an order for proceeding in accordance to the directions already given by this Court on 20.2.2008, in Writ Petition No.1885/2008, no case is made out for interference

now at the instance of the petitioner. Consequently, the interim order passed on 20.4.2011 is also vacated.

12. Accordingly, finding no case for interference on the grounds raised, the petition is dismissed.

Petition dismissed.

I.L.R. [2011] M. P., 2453

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No.631/2000 (Jabalpur) decided on 27 August, 2011

CHAKRESH KUMAR JAIN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Constitution, Article 226 - Writ of certiorari - Non impleadment of necessary Party - Challenge made of an order passed by the Additional Commissioner, exercising power of an appellate authority under the Panchayats (Appeal and Revision) Rules, M.P. 1995 - The appeal before the Additional Commissioner was filed by 238 appellants and without impleading these 238 appellants who have been appointed in pursuance to the order passed - The writ petition is not maintainable.

This is case where an order of appellate authority is challenged and the appellants at the whose instance the impugned order is passed are not impleaded as party, this is a material lacuna and this Court can not interfere into the matter in the absence of the appellants at whose instance the impugned appellate order was passed, they are necessary parties and this petition suffers from misjoinder of the parties. (Paras 8, 9 & 10)

संविधान, अनुच्छेद 226 - उत्प्रेषण रिट - आवश्यक पक्षकार को पक्षकार नहीं बनाया जाना - पंचायत (अपील तथा पुनरीक्षण) नियम, म.प्र. 1995 के अधीन अपीलीय प्राधिकार की शक्ति का प्रयोग करते हुए अपर आयुक्त द्वारा पारित आदेश को चुनौती - अपर आयुक्त के समक्ष अपील 238 अपीलार्थियों द्वारा प्रस्तुत की गई थी और इन 238 अपीलार्थियों को जिन्हें पारित आदेश के अनुसरण में नियुक्त किया गया है, पक्षकार बनाए बिना - रिट याचिका पोषणीय नहीं है।

Cases referred :

1984(4) SCC 251, 2000(10) SCC 197, 2000(2) MPLJ 151, AIR 1996 SC 2552, AIR 1963 SC 786, (2011) 1 SCC (L & S) 208.

A.K. Jain, for the petitioner.

Rohni Prasad Tiwari, G.A. for the State.

Sanjay Dwivedi, for the interveners.

Manoj Rajak, for the respondent No.2 Janpad Panchayat.

ORDER

RAJENDRA MENON, J.:—As challenge in both these petitions are made to a common order passed by the Commissioner, Sagar Division Sagar in the matter of appointment of Shiksha Karmi Grade-III under Janpad Panchayat Bada Malahara, District Chhatarpur, both these petitions are being decided by this common order.

2. For the sake of convenience, pleadings and documents available in W.P.No.631/2000 are being referred to.

3. In the year 1999, an advertisement was issued by the Janpad Panchayat, Bada Malahara, advertising 264 vacant posts of Shiksha Karmi Grade-III, out of these 264 posts, 174 posts were under the School Education Department and the remaining 90 posts under Rajeev Gandhi Shiksha Mission. Appointment was to be made on the post of Shiksha Karmi Grade-III and it was to be made in accordance to the conditions stipulated by the State Government in circular dated 01-01-1998, issued in exercising of powers conferred on the State Government under the M.P. Panchayat Raj Adhiniyam, 1993 for conducting the process of selection in accordance to the statutory Rule, namely the M.P. Panchayat Shiksha Karmi (Recruitment and Service Conditions) Rules, 1997 Annexure P-4.

4. A selection committee was constituted, the selection committee consisted of respondent no.2 Chief Executive Officer, Janpad Panchayat Bada Malahara, respondent no.3 Block Education Officer, respondent no.4 President of Education Standing Committee, respondent no.5 Member of Standing Committee, respondent no.6 another member of Standing Committee, respondent no.7 member of Education Committee and respondent nos. 8 and 9, Subject Specialist alongwith respondent no.10 another Subject Specialist, another representative of M.L.A. one Devdatta Dwivedi is also alleged to have included in the selection committee. On the basis of the selection conducted, select list Annexure P-1 was issued.

5. On the ground that there are number of illegalities in the selection, near relatives of some of the members of the Selection Committee have been

appointed a, writ petition was filed before this court by the petitioners herein being W.P.No.4374/1998. This court finding statutory remedy of appeal available to the petitioners directed the petitioners vide order dated 25-09-1998 to take recourse to the remedy of appeal available before the Collector. The appeal was filed before the Collector and vide order Annexure P-2 dated 31-05-1999 this authority quashed the entire selection mainly on the ground that the selection was not conducted in accordance to the law. However, before the Collector, none of the 294 selected candidates were impleaded, none of them was heard and the Collector passed an order without notice to them and cancelled their appointments.

6. Being aggrieved by cancellation of their selection, 238 selected candidates filed further appeal before the Commissioner, Sagar Division, Sagar and the Commissioner, Sagar Division by the impugned order having allowed the appeal, the petitioners are before this court, challenging the order Annexure P-3 dated 21-12-1999, passed by the Additional Commissioner at the instance of 238 selected candidates who had filed the appeal.

7. Shri A.K.Jain, learned counsel for the petitioners taking me though the reasons given by the Collector in the order Annexure P-2 dated 31-05-1999 submitted that the Collector having found various irregularities in the matter of nepotism shown by the selection committee in appointing their near relatives and by pointing out certain error in the constitution of the selection committee tried to emphasize that the entire selection stands vitiated for the grounds indicated by the Collector, the order passed by the Commissioner interfering with a reasonable order of collector is unsustainable. It was emphasized by him that against the order of Collector, no appeal was maintainable before the Commissioner and therefore, the entire action is unsustainable.

8. Respondents particularly the interveners represented by Shri Sanjay Dwivedi has raised a preliminary objection. It is stated by them that the challenge in this writ petition is made of an order passed by the Additional Commissioner, Sagar, exercising power of an appellate authority under the Panchayat (Appeal & Revision) Rules, 1995. The appeal before the Additional Commissioner was filed by 238 appellants and without impleading these 238 appellants who have been appointed in pursuance to the order passed, it is argued that this writ petition is not maintainable. In support of his contention Shri Sanjay Dwivedi, invites my attention to the principles laid down by the Supreme Court in the case of *Prabodh Verma and others Vs. State of Uttar*

Pradesh and others, 1984 (4) SCC 251, in the case of *A.M.S. Sushanth and others Vs. M.Sujatha and others*, 2000(10)SCC 197 and in the case of *Arti Bhatnagar and others Vs. State of M.P. and others* 2000(2) MPLJ 151, it is argued by him that in the absence of the appellants who are parties before the Commissioner, this petition is not maintainable. Further taking me through the reasons given by the Additional Commissioner in his 36 pages order, so also the findings recorded by the Inquiry Officer appointed by the Collector to conduct an inquiry into the matter, Shri Sanjay Dwivedi, learned counsel for the interveners emphasized that the irregularities pointed out by the Collector were not at all established and merely because in the case of 3 persons, certain relatives were there in the selection penal, the entire selection would not be vitiated particularly when the finding recorded is that when these three candidates were interviewed, member of the selection committee were not present and the records indicate that each of candidate was selected on their own merit.

9. I have heard the learned counsel for the parties at length and perused the record. Before advertng to consider the rival contentions on merit, the moot question with regard to maintainability of this writ petition on the preliminary ground raised has to be taken note of. It is a fact that in this writ petition none of the selected candidates is impleaded. Apart from the fact that non of the selected candidates is impleaded, challenge in this writ petition is made to an order passed by the Additional Commissioner, Sagar on 21-12-1999 vide Annexure P-3. This appeal was filed at the instance of about 238 selected candidates and order Annexure P-3 allows the appeal filed by these 238 appellants but the petitioners want this court to quash the order passed by the appellate authority namely the Additional Commissioner, Sagar, without impleading the appellants therein i.e. 238 appellants. In this writ petition i.e. W.P.No.631/2000, none of the selected candidates or the appellants in the appeal before the Additional Commissioner are impleaded as parties, even though 13 respondents are impleaded, respondent no.1 is the State Government, respondent no.2 is the Janpad Panchayat Bada Malahara, respondents nos. 3 to 11 are the members of the selection committee, respondent no.12 is Collector, Chhatarpur and respondent no.13 is Additional Commissioner. Neither the selected candidates are impleaded as respondents nor the 238 appellants who had instituted the appeal before the Additional Commissioner impleaded. Even though some what similar position exists in W.P.No.44235/01 but 6 of the respondents therein are the

selected candidates and are alleged to be relative of the members of the selection committee, but in this appeal also the appellants who were parties before the Additional Commissioner have not been impleaded even in this writ petition. In the case of *Prabodh Verma*(supra) the Supreme Court has laid the principles that if the selected candidates are not impleaded as parties the writ petition is not maintainable. Even though Shri A.K.Jain, learned counsel for the petitioner by placing reliance on a judgment of the Supreme Court in the case of *Biswa Ranjan Sahoo and others Vs. Sushanta Kumar Dinda and others*, AIR 1996 SC 2552, tried to emphasize that the selected candidates need not to be impleaded as parties but the facts and circumstances of the present case are clearly distinguishable. In the present case challenge is made to an order passed by the Additional Commissioner, who has exercised power of an appellate authority under the M.P. Panchayat Raj Adhiniyam, 1993 and M.P. Panchayat (Appeal and Revision) Rules 1995. In the proceedings held before the Additional Commissioner in this statutory appeals, 234 persons had filed the appeal, their appeal has been allowed and they have been granted benefits in pursuance to the order passed in their favour by the statutory appellate authority, the petitioners want this court to quash this order of the statutory appellate authority and while doing so none of the appellants at whose instance the order was passed in the appeal by the Additional Commissioner on 21-12-1999, are before this court. Any order passed in this writ petition will have the effect of setting aside the appellate order passed by the Additional Commissioner would naturally will effect the appellants who were parties before the Additional Commissioner and who had filed the appeal. Therefore, this is case where an order of appellate authority is challenged and the appellants at the whose instance the impugned order is passed are not impleaded as party, this is a material lacuna and this court cannot interfere into the matter in the absence of the appellants at whose instance the impugned appellate order was passed, they are necessary parties and this petition suffers from misjoinder of the parties.

10. The aforesaid reasonings given by this court is based on the principles laid down by the constitution bench of the Supreme Court in the case of *Udit Narain Singh Malpaharia V. Additional Member Board of Revenue, Bihar and another*, AIR 1963 SC 786. In the aforesaid case it has been held by the Supreme Court that under law, a necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for

a complete and final decision on the question involved in the proceedings. It is held in this case that when a writ of certiorari is sought for and order of a Tribunal or a Authority is challenged and the prayer is made to quash such an order then all such persons who are parties and in whose favour order is passed by the Authority of Tribunal are necessary parties. It is held in this case that no order passed by the Tribunal or Authority can be quashed if a person who as a party before the Lower Tribunal and in whose favour the impugned order was passed is not joined as a party in the writ proceedings. In the present case also similar situation exists. The persons who were parties before the statutory appellate court i.e. the Commissioner and at whose instance the impugned orders are passed are not before this court.

11. The judgment rendered by the Supreme Court in the case of *Udit Narain Singh Malpaharia*(supra) so also in the case of *Prabodh Verma*(supra) was considered recently in the case of *Public Service Commission, Uttaranchal V. Mamta Bisht and others*, (2011)1 SCC (L&S) 208 and in para-9 the following principles have been laid down :

"9. In case Respondent 1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by nearly a Constitution Bench of this Court in *Udit Narain Singh Malpaharia V. Board of Revenue*, wherein the Court has explained the distinction between necessary party, proper party and pro forma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order 1, Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called "CPC") provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh V. State of Gujarat*, *Babubhai Muljibhai Patel V. Nandlal Khodidas Board and Sarguja Transport Service V. STAT*)."

12. Accordingly this court finds much force in the preliminary objections

raised by the learned counsel for the respondents the objection is upheld and the petition is dismissed.

13. The petition is pending since 2000 and it is seen that this objection has been raised at the earlier date also but inspite of objection raised, the petitioners have not cared to impleased the affected parties.

14. Accordingly in the facts and circumstances of the case, finding no merit in the claim made by the petitioners, both these petitions are therefore, dismissed, without any order so as to costs.

Petition dismissed.

I.L.R. [2011] M. P., 2459

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

M.A. No. 804/2006 (Jabalpur) decided on 26 April, 2011

KALAWATI (SMT.) & ors.

...Appellants

Vs.

HANEEF AHMAD & ors.

...Respondents

Motor Vehicles Act (59 of 1988), Section 166 - Quantum of Compensation - Deceased working as Electro Homeopathy Doctor - As he was a skilled and trained person in Electro Homeopathy his income from profession and agriculture is held to be Rs. 150 per day - Four persons were dependent upon him therefore, 1/4 of the income is deducted towards expenses on deceased - Annual dependency comes to Rs. 40,500 - As deceased was aged about 35 years therefore, multiplier of 16 would apply - Compensation amount comes to Rs. 6,48,000 + 20,000 towards traditional heads - Compensation enhanced to Rs. 6,68,000 with 6% interest from the date of filing of claim petition - Appeal allowed.

(Para 12)

मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर की मात्रा - मृतक इलेक्ट्रो होमियोपेथी डॉक्टर के रूप में कार्यरत था - चूंकि वह इलेक्ट्रो होमियोपेथी में निपुण व प्रशिक्षित व्यक्ति था, उसकी व्यवसाय व कृषि से आय रुपये 150/- प्रति दिवस निर्धारित की गई - चार व्यक्ति उस पर आश्रित थे, इसलिए मृतक के व्यक्तिगत खर्च के लिये 1/4 उसकी आय से घटा दिये - वार्षिक आश्रितता रुपये 40,500/- आती है - चूंकि मृतक 35 वर्ष की आयु का था, इसलिये 16 का गुणक लागू होगा - प्रतिकर राशी, रुपये 6,48,000. पारंपारिक खर्चों के मद में रुपये 20,000 बनती है - दावा याचिका

फाईल करने की दिनांक से प्रतिकर रुपये 6,68,000, 6 प्रतिशत ब्याज के साथ बढ़ाया गया - अपील मंजूर।

Case referred:

2009 ACJ 1298 (SC).

Ajay Sen, for the appellants.

N.K. Agarwal, G.A. for the respondents No. 3 & 4.

None for the respondents No. 1 & 2.

ORDER

U. C. MAHESHWARI, J.:—The appellants/ claimants have preferred this appeal under Section 173 of Motor Vehicle Act 1988 (For short "the Act"), for enhancement of the sum awarded by the 1st Additional Motor Accident Claims Tribunal Balaghat in M. V. Case No.90/05 vide award dated 21.11.2005 whereby their claim regarding vehicular death of Dr. Vijay Kumar Balle in the alleged accident has been awarded against respondent No.1, 3 and 4 by saddling their joint and several liability for the sum of Rs.75,000/- along with the interest @ 9% p. a. from the date of filing the claim petition i. e. 27.1.2005.

2. The facts giving rise to this appeal in short are that the deceased Dr. Vijay Kumar Balle, aged about 35 years the husband of the appellant No.1 while the father of remaining appellants was subject to road accident caused by the respondent No.1 while driving the truck of Forest Department bearing registration No. CPZ-5360 in rash and negligent manner, resultantly, he sustained grievous injuries and during treatment he succumbed to it. As per further averments of the claim petition the respondent No.1 drove such truck under the instruction of respondent No.2 working under the employment of respondent No.3 and 4. Such truck was registered in the name of respondent No.3 who was working under the authority of respondent No.4. The deceased Dr. Vijay Kumar Balle from his profession of Electro Homeopathy and also from his irrigated agricultural land was earning Rs.9,000/- p. m., due to his untimely death the appellants have been deprived from their dependency on the deceased while the appellant No.1 has also been deprived from the company of her husband. On receiving the information of the alleged accident at P. S. Kirnapur, an offence under Section 279 and 304-A of IPC was registered against the respondent No.1. After holding investigation, he was charge sheeted for such offence in the court of Judicial Magistrate First Class, Balaghat. With these averments the appellant have filed their claim for compensation of Rs.51,57,800/- along with the interest on it @ 9% p. a.

3. In reply of respondent No.1 and 2 by denying the averments of the claim petition regarding alleged accident, it is stated that on the date of incident respondent No.1 was driving such truck in normal speed, at the same time the deceased while riding his bicycle in zig-zag manner came in front of the truck, resultantly inspite taking all precautions to avoid the accident by the respondent No.1 the deceased collided with the truck due to his own negligence he sustained the injuries and letter succumbed to the same. It is further pleaded that the deceased being unemployed person was not the earning member of his family and no one was dependent on him. The compensation is also claimed at higher side on false pretext. The respondent No.2 is wrongly impleaded in the claim petition. With these pleading the prayer for dismissal of the claim by imposing the compensatory cost of Rs.5,000/- on appellants is made.

4. In reply of respondent No.3 and 4 by denying the averments of claim petition it is stated that at the time of accident the deceased Vijay Kumar was carrying some goods in a bag having the weight of 40-50 Kg. on his bicycle and due to such negligence of deceased the bicycle had become unbalanced and collided with the back side of the offending truck. In such premises the alleged accident was not the cause and consequence of any negligent driving of offending truck by respondent No.1. Such truck was never plied in rash and negligent manner by respondent No.1. The claim is also filed in excessive side without annexing any admissible documents in support of the same. With these averments the prayer for dismissal of the claim petition is made.

5. After framing the issues and recording the evidence on appreciation of the same holding that the alleged accident was the cause and consequences of rash and negligent driving of aforesaid offending truck by respondent No.1 under the employment of respondent No.3 and 4, the claim of the appellants was awarded for the sum as stated above. Being dissatisfied with the quantum of compensation the appellants have come forward with this appeal for further enhancement of the sum awarded by the Tribunal.

6. Shri Ajay Sen, learned counsel for the appellants' after taking me through the pleading, evidence and exhibited documents available on the record argued that the appellants have successfully proved that the deceased was working as Electro Homeopathy Doctor and besides such profession also cultivating his agricultural land as former and he was earning Rs.9,000/- p. m. In any case on proper appreciation of evidence and exhibited documents the Tribunal ought to have considered the monthly income of the deceased @ Rs.6,000/-

p. m. He also argued that in view of the decision of the Apex Court in the matter of *Sarla Verma and others Vs. Delhi Transport Corporation & others* reported in 2009 ACJ 1298 (SC) keeping in view the number of dependents on the deceased mentioned in the array of claim petition and also on the array of appeal memo the Tribunal ought to have deducted $\frac{1}{4}$ sum out of the income of the deceased regarding his expenses which would have spent on him had he been alive. With these submission he prayed for reasonable enhancement in the sum awarded by the Tribunal by allowing this appeal.

7. On the other hand responding the aforesaid argument Shri N. K. Agrawal, learned GA by justifying the findings of the Tribunal said that the same being based on proper appreciation of the evidence are in conformity with existing legal position. In such premises under the available circumstances the awarded sum being just and proper does not require any interference at this stage for further enhancement and prayed for dismissal of the appeal.

8. Having heard the counsel keeping in view their arguments, I have carefully gone through the record of the Tribunal as well as the impugned award. I am of the considered view that the Tribunal has committed grave error in awarding the claim of the appellants at very lower side only for the sum of Rs.75,000/-. Such approach of the Tribunal is neither inconsonance with the available evidence nor sustainable under the existing legal position.

9. In support of the claim petition on recording the deposition, by the appellant No.1 Kalawati Bai (A. W.1), categorically deposed that her husband being Electro Homeopathy Doctor was earning Rs.7,000/- p. m. from such profession and besides that he was also earning Rs.2,000/- p. m. from his irrigated agricultural land, out of such income he was used to give Rs.6,000/- p. m. to her for expenses of the family. On going through her cross examination I have not found any material circumstances destroying the version stated by her in chief. Her version is further supported by Krishna Kumar (A. W. 2) resident of same village who stated that the deceased being Doctor was earning Rs.7,000/- to 8,000/- p. m. from his profession and Rs.2,000/- p. m. from agricultural land. Such version is also remained intact in his cross-examination as the same has not been destroyed in any manner.

10. On behalf of the respondents to destroy the aforesaid version of the claimants' witnesses no positive evidence has been adduced on record. The deposition of witness of respondents namely Hanif Ahmad (N.A.W.1) could not be believed to hold or assess the income of the deceased because he

being resident of some other place never seen the professional activities of the deceased. Other witness Motilal Dwivedi (NAW 2), who was working as Forest Guard in the department of respondent No.3 and 4 could also not be believed in this regard, as he is also not the resident of the village of the deceased. Other examined witness of the respondent namely Mishrilal (NAW 3) has neither been examined to prove the income of the deceased nor he stated any material thing in this regard.

11. On re-appreciation of aforesaid evidence it is apparent that the deceased was working as Electro Homeopathy Doctor. It is true that in order to prove the income of the deceased neither any copy of the income tax return nor any account book or any other documents have been proved on the record. But one thing has been certainly proved on record by Ex.P.15 that the deceased was a Electro Homeopathy Doctor and in such premises it could be assumed that he was a skillfull and trained person in the Electro Homeopathy to provide the treatment to the villagers. Thus keeping in view overall available circumstances of the case the income of the deceased from his profession and the agriculture both is held to be Rs.150/- per day. In such premises his monthly income is held to be the Rs.4,500/-, the same is taken up to assess the compensation for awarding the claim of the appellants.

12. On taking up such monthly income of the deceased @ Rs.4,500/- his annual income comes to Rs.4,500 x 12 = 54,000/-. Out of it in view of the principal laid down by the Apex Court in the matter of *Sarla Verma* (Supra), taking into consideration four number of dependents on the deceased $\frac{1}{4}$ sum regarding expenses of the deceased which he would have spent on him had he been alive, then annual dependency of the appellants on the deceased comes to Rs.54,000- 13,500= 40,500/-. In view of the other principal laid down by the Apex Court in the aforesaid cited case of *Sarla Verma* (Supra) on adopting the multiplier of 16 which is applicable to the age of the deceased i. e. 35 years the total dependency of the appellants on the deceased come to Rs.40,500 x 16 = 6,48,000/-, the same is awarded to the appellants. Besides this the appellants are also entitled for the sum of Rs.20,000/- on the traditional heads like funeral expenses, expectancy of life, loss of estate and also the appellant No.1 on account of loss of company of her husband. The same is also awarded. I have not found any evidence showing that any amount was spent by the appellants on the treatment of the deceased, so on such head they are not entitled for any sum, so the argument of the counsel in that regard is hereby failed.

13. In view of the aforesaid discussion by allowing this appeal in part the sum of Rs.75,000/- awarded by the Tribunal to the appellants is enhanced from Rs.75,000/- to Rs.6,68,000/- as discussed above. The enhanced sum shall also carry the interest @ 6% p. a. from the date of filing the claim petition. The liability to indemnify the enhanced sum is saddled jointly and severally against respondent No.1, 3 and 4 as held by the Tribunal also. Till the aforesaid extent the impugned award is modified while the other findings of the same are hereby affirmed. In the available circumstances, there shall be no order as to costs.

14. The appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2011] M. P., 2464

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

F.A. No. 232/1998 (Indore) decided on 10 May, 2011

JAIRAM

...Appellant

Vs.

JASWANT SINGH ALIAS FAKIRCHAND & ors.

...Respondents

Workmen's Compensation Act (8 of 1923), Sections 3(5) & 19, Civil Procedure Code (5 of 1908), Section 9 - Jurisdiction of Civil Court - Suit for compensation for injury sustained by plaintiff during the course and business of duty - Civil Court was having jurisdiction and if claimant has chosen the forum of Civil Court, it can not be said that his claim is not maintainable in the Civil Court and is maintainable only under Compensation Act.

(Para 13)

कर्मकार प्रतिकर अधिनियम (1923 का 8), धाराएँ 3(5), व 19, सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 - सिविल न्यायालय की अधिकारिता - याची को अपने कर्तव्य के अनुक्रम तथा कार्य के दौरान कारित हुई क्षति के लिए प्रतिकर हेतु वाद - सिविल न्यायालय को अधिकारिता थी और यदि दावाकर्ता ने सिविल न्यायालय का वादमंच पसंद किया है, तब यह नहीं कहा जा सकता कि उसका दावा सिविल न्यायालय में पोषणीय नहीं है और केवल प्रतिकर अधिनियम के अंतर्गत पोषणीय है।

Cases referred:

1984 A.C.J. 276, AIR 1985 All. 124.

B.I Mehta & J.B. Mehta, for the appellant.

Sunil Jain, for the respondent No.1.

Yashpal Rathore, PL for the respondent No.2.

M.I. Khan, for the respondents No. 3 & 4.

J U D G M E N T

A.K. SHRIVASTAVA, J.:- This judgment passed in this appeal shall also govern the disposal of connected First Appeal No. 182/1998 (Bharatsingh & Anr. vs. Jaswantsingh & Ors.) filed on behalf of respondents No.3 and 4 namely Bharat Singh and Nathusingh who were arrayed as defendants No.1 and 2 in the suit.

2. This appeal has been filed by defendant No.3 against the judgment and decree passed by learned First Additional District Judge, Dhar in Civil Suit No.40-B/1996 decreeing the compensation upto Rs. 1,05,000/- holding that each defendant is liable to pay compensation of Rs.35,000/-.

3. The facts necessary for the disposal of this appeal lie in narrow compass. Suffice it to say that on 13.10.1991 in between 4-5 p.m. in Village Rogalia in the field of appellant Jairam, the wet Soyabean was being processed in the thresher machine. Plaintiff was employed as labour by Jairam and he was asked to operate the thresher machine, but, he put his inability to take out the grain of Soyabean from the thatches because the thatches were wet and it was impossible to take the grains from the wet thatches. The plaintiff further told that when the thatches of Soyabean would become dry then only the grains can be taken out but defendants did not care and they forced plaintiff/ respondent No.1 Jaswant Singh to process even the wet soyabean. Since the crop was wet, the thresher machine was not working properly and repeatedly it was being stopped, as a result of which the plaintiff was forced to take out the grains from the thatches manually by inserting his hand in the machine. While the plaintiff was taking out the grains of Soyabean from the thatches and his right hand was in the machine, at that juncture defendant No.1 namely Bharat Singh started thresher machine as a result of which plaintiff sustained serious injury and his hand turned into smithers.

4. The plaintiff was admitted in the hospital where his hand was amputated. During the entire treatment, plaintiff remained unconscious. The plaintiff was not even permitted by the defendants to contact his relatives. Ultimately the defendants by leaving the plaintiff as orphan snatched their hands from the treatment. After the discharge of the plaintiff from the hospital, he called his parents and other relatives and lodged the report in Police Station. A charge-

sheet has also been filed against the defendants. Thereafter, the plaintiff filed present suit for compensation in the Trial Court.

5. The defendants No.1 and 2 filed their joint written statement while defendant No.3/appellant (Jawant Singh) filed separate written statement.
6. Learned Trial Court after framing necessary issues and after recording the evidence of the parties, came to hold that plaintiff/respondent No.1 is entitled for compensation to the extent of Rs.1,05,000/- alongwith interest @ 6% per annum and same has been apportioned among defendants No.1 to 3 and directed that each defendant shall pay a sum of Rs.35,000/- alongwith interest to the plaintiff.
7. In this manner, this appeal has been filed by defendant No.3 Jairam and connected F.A. No.182/1998 has been filed by Bharat Singh and Nathusingh (defendants No.1 and 2).
8. The common contention of all the appellants in both the appeals is that Civil Court has no jurisdiction to try the suit for the simple reason that the same is barred under Section 19 of the Workmen's Compensation Act, 1923 (in short "Compensation Act") and therefore judgment and decree passed by learned Trial Court being without jurisdiction be set aside and this appeal be allowed.
9. Inter alia, Shri M.I. Khan learned Counsel appearing for appellant inconnected F.A.No.182/1998 submits that appellant No.2 Nathusingh (defendant No.2) has no role in the present episode and therefore learned Trial Court has illegally fastened the liability to pay compensation on him.
10. On the other hand Shri Sunil Jain, learned counsel for plaintiff/respondent argued in support of impugned judgment.
11. Having heard learned counsel for parties, I am of the view that this appeal deserves to be dismissed and connected First Appeal No. 182/1998 deserves to be allowed in part.
12. So far as the contention of maintainability of Civil Suit under Section 19(2) of the Compensation Act is concerned, according to me, the same is required to be read in juxtaposition to Section 3(5) of the Compensation Act. Under this provision option is given to claimant to enforce his claim for compensation either by instituting a suit in the Civil Court for damages in respect of inquiry against employer or to institute a claim for compensation in respect

of injury before the Workmen's Compensation Commissioner. However, he cannot avail both the remedies.

13. The Orissa High Court had an occasion to deal the aforesaid point in *Subasini Panda and others vs. State of Orissa and others*, 1984 A.C.J. 276, wherein, it has been held that it is the choice of the workman to choose the forum either to file claim case under Compensation Act or under Motor Vehicle Act and if the claimant has chosen the forum under the Motor Vehicle Act, his claim cannot be dismissed. The same view has been taken by Allahabad High Court also in *Smt. Kalawati vs. Balwant Singh and another*, AIR 1985 Allahabad 124. Thus, I am of the view that Civil Court was having jurisdiction and if the claimant/plaintiff has chosen the forum of Civil Court it cannot be said that his claim is not maintainable in the Civil Court and is maintainable only under the Compensation Act. Hence, the said argument is not accepted.

14. On going through the testimony of plaintiff this Court finds that there is no role assigned to Nathusingh. Merely because it has come in his testimony that Nathusingh was present when the incident occurred, I am of the view that the liability to pay compensation cannot be fastened on him although the thresher machine was owned by him. Appellant No.1 Bharatsingh (defendant No.1) of F.A. No. 182/1998 is the son of appellant No.2 Nathusingh (defendant No.2) of that appeal. From the pleadings and evidence placed on record it is proved that appellant of this appeal Jairam (defendant No.3) took the thresher machine from defendants No.1 and 2 and on his insistence the plaintiff was processing the thatches of Soyabean. It has also come in the evidence of plaintiff that defendant No.1 Bharat Singh as well as appellant Jairam both were insisting plaintiff to take out the grains manually and it has also come in the evidence that when the hand of the plaintiff was inside the thresher machine, the defendant No.1 Bharat Singh started the machine resulting into serious injury sustained by plaintiff in his right hand which was later on amputated during the period when he was undergoing the medical treatment. Since the thresher machine was taken by Jairam from defendants No.1 and 2 and he employed the plaintiff to take out the grains from Soyabean from the said machine for the wages, I am of the view that relationship between defendant No.3 Jairam and plaintiff was of master and servant. Because, defendant no.1 Bharat Singh was insisting plaintiff to take out the grains manually and he put on the machine when the hand of plaintiff was inside the machine, in these circumstances, I am of the view that defendant No.1 Bharat Singh is also liable to pay compensation. In

these state of affairs defendants No.1 and 2 namely Bharat Singh and Jairam are liable to pay compensation amount Rs.1,05,000/- with 6% interest as awarded by learned Trial Court. Let each of the defendants shall pay Rs.52,500/- alongwith 6% interest to the plaintiff.

15. Resultantly, this appeal fails and is hereby dismissed with costs. Counsel fee Rs.3000/- if pre-certified. However, F.A. No. 182/1998 is hereby allowed in part and it is hereby held that appellant No.2 Nathu Singh is not at all liable to pay any compensation however the appeal of Bharat Singh stands dismissed with costs. Counsel fee Rs.2000/- if pre-certified. The decree of learned Trial Court is accordinalv modified.

Appeal dismissed.

I.L.R. [2011] M. P., 2468

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No.129/1995 (Jabalpur) decided on 7 July, 2011

STATE OF M.P.

...Appellant

Vs.

RAM CHARAN & ors.

...Respondents

A. Ceiling on Agricultural Holdings Act, M.P. (20 of 1960) (Unamended) - Section 11(5) - Period of limitation - Respondents not a party to the ceiling proceedings before the competent authority although were in possession of the property for the last 40 years - They had filed certain objections but were not accepted by competent authority - Period of filing suit within 3 months for filing suit as per the provisions of un-amended Act would not apply to the suit filed by the respondents - Suit filed by respondents within 3 years is within limitation. (Para 22)

क. कृषि जेत अधिकतम सीमा अधिनियम म.प्र. (1960 का 20) (असंशोधित) - धारा 11(5) - परिसीमा अवधि - प्रत्यर्थीगण, सक्षम प्राधिकारी के समक्ष की अधिकतम सीमा की कार्यवाही के पक्षकार नहीं थे यद्यपि वे पिछले 40 वर्षों से सम्पत्ति के कब्जाधारी थे - उन्होंने कतिपय आक्षेप प्रस्तुत किये थे परन्तु सक्षम प्राधिकारी द्वारा उन्हें स्वीकार नहीं किया गया - असंशोधित अधिनियम के उपबंधों के अनुसार 3 महिनों के भीतर वाद प्रस्तुत करने की समय सीमा, प्रत्यर्थीगण द्वारा प्रस्तुत वाद को लागू नहीं होगी - प्रत्यर्थीगण द्वारा 3 वर्षों के भीतर प्रस्तुत किया गया वाद परिसीमा के भीतर है।

B. Ceiling on Agricultural Holdings Act, M.P. (20 of 1960) - Bar of Jurisdiction of Civil Courts - Respondents not a party to the ceiling

proceedings - Civil suit for declaration that order passed by competent authority be declared null and void is maintainable and Civil Court had jurisdiction at the time of filing of the plaint. (Para 25)

क. कृषि जोत अधिकतम सीमा अधिनियम म.प्र. (1960 का 20) - सिविल न्यायालयों की अधिकारिता का वर्जन - अधिकतम सीमा की कार्यवाही में प्रत्यर्थागण पक्षकार नहीं - इस घोषणा हेतु सिविल वाद कि सक्षम प्राधिकारी द्वारा पारित आदेश को अकूत एवं शून्य घोषित किया जाए, पोषणीय है और वादपत्र की प्रस्तुती के समय सिविल न्यायालय को अधिकारिता थी।

Cases referred:

1982 RN 373, 1973 MPLJ SN 29, 1998 RN 116.

N.K. Agarwal, G.A. for the appellant.

Divesh Jain, for the respondents.

J U D G M E N T

A.K. SHRIVASTAVA, J. :-This second appeal has been filed at the instance of defendant/State against the reversing judgment passed by the learned First Appellate Court decreeing the suit of plaintiffs/respondents.

2. Plaintiffs No.2 to 5 are the sons of Plaintiff No.1 Ram Charan, son of Haméer Singh. The case of the plaintiffs is that on the suit property which is agricultural land and the description whereof has been mentioned in the plaint is being possessed by them for the last 40 years from the date of the filing of the suit. Earlier the father of the plaintiff no.1 Ram Charan was possessing the suit property. In order to get the names of plaintiffs recorded in the revenue record, defendant no.2 Motilal executed a registered sale deed on 09.09.1971 in favour of plaintiffs but the Collector/Competent authority by holding that the transaction was in between 01.01.1971 and 07.03.1974 held the same to be illegal and void and was in contravention of the provisions of the M.P. Ceiling on Agricultural Holdings Act, 1960 (in short, the Act). The order of Collector was assailed before the Commissioner who vide its order dated 15.6.1976 remanded the matter to the competent authority to compute the land in excess in accordance with the choice of holder. The Collector/competent authority again decided the matter by passing the same order which was passed by him earlier against which again an appeal was filed on 21.4.1982 before Commissioner which was dismissed against which the plaintiffs filed revision application before the Board of Revenue and the same was dismissed in default on 9.3.1983.

3. It is the further case of the plaintiffs that the holder of the land (defendant no.2-Motilal) alienated the suit property prior to coming into force of the amended Act and the alienation was not in contravention to the provisions which were prevailing on the date of the alienation i.e. 9.9.1971. Under the un-amended Act which was in force during the period of alienation, the holder was entitled to retain 75 acres of land and at that juncture the holder (defendant no.2-Motilal) was having only 63 acres of land and, therefore, it was not necessary for the Collector to declare the suit land as surplus.
4. Further, it has been pleaded by the plaintiffs that the entitlement of the family members of the holder (defendant no.2-Motilal) which has been computed by the Collector/competent authority has been wrongly computed in contravention to Section 7 of the Act and held that second wife of the holder-Motilal as well as his mother were not entitled to hold separate land although both of them were entitled under the said provision.
5. By amending the plaint, it has been specifically pleaded by the plaintiffs that the plaintiffs were possessing the suit property in their independent right of Bhumiswami. According to the plaintiffs, without holding any enquiry under Section 4(1) of the Act, the competent authority had passed the order on 8.12.1975. The order of the competent authority is null and void and is also contrary to the provisions of the Act. Hence on these pleadings, it has been prayed by the plaintiffs that the order of competent authority dated 8.12.1975 and 11.7.1977 be declared null and void and it be further declared that the plaintiffs are the Bhumiswamis having possession on the suit property and defendants be restrained from interfering in their possession.
6. The State Government who was arrayed as defendant no.1 filed the written statement denying the plaint averments by pleading that the impugned transaction of sale dated 09.09.1971 has been made in order to defeat the provisions of the Act and the impugned transaction is in contravention to Section 5 of the Act.
7. Despite the plaintiffs amended their plaint by raising legal objection that the order of the Collector is null and void since it is in contravention to Section 7 and 4(1) of the Act because the entitlement of the mother of the holder and his second wife was not taken into account, the written statement was not amended and these averments were not denied.
8. Learned Trial Court framed necessary issues and after recording evidence

of the parties dismissed the suit of the plaintiffs. The plaintiffs assailed the judgment and decree of the learned Trial Court by filing First Appeal which has been allowed by the impugned judgment and decree by decreeing the plaintiffs' suit. While allowing the appeal, the learned First Appellate Court found and gave findings as under:-

(1) The plaintiffs are in possession of the suit property since the time of their fore fathers for last 40 years and this has been found proved on the basis of umpteen documents filed by the plaintiffs which are un-rebutted and in this regard after marshalling the evidence from para 9 onwards to para 16. In para 15 the learned First Appellate Court further held that plaintiffs acquired Bhumiswami rights on the suit property against the holder of the land Motilal-defendant no.2 by adverse possession also. On the basis of umpteen documents including the receipt of payment of land revenue for last 40 years, it was held by the learned First Appellate Court that plaintiffs are in possession of the suit property for the last 40 years and they are also paying land revenue since then. The land revenue receipts have been filed which are collectively marked as Exhibit P/1;

(2) in para 17 of the impugned judgment, learned First Appellate Court has held that impugned transaction of sale cannot be said to be in contravention of the Act or defeating any of the provisions of that Act. On the other hand, it was held that bonafidely the suit property was sold by defendant no.2-Motilal in favour of plaintiffs although they have already acquired Bhumiswami rights on it by adverse possession;

(3) The learned First Appellate Court after considering various authorities of this Court from para 17 onwards and by considering the various provisions of the Act further held that the impugned transaction of sale was not in contravention of the Act or to defeat any of the provisions of the Act and;

(4) from para 20 onwards it has been held by the learned First Appellate Court that the suit of plaintiffs is not time barred.

9. Thus, the learned First Appellate Court by allowing the appeal of plaintiffs decreed their suit by setting aside the judgment and decree of learned Trial Court dismissing the suit.

10. It is pertinent to mention here that no substantial questions of law have been framed in respect of the findings rendered in the impugned judgment passed by the learned First Appellate Court on point no.1, 2 and 3 and thus those findings rendered by the learned First Appellate Court became final since this appeal has not been admitted on those points.

11. This Court on 2.2.2000 admitted the appeal on the following substantial questions of law:-

- (i) "Whether the suit filed by the respondents is barred by time?"
- (ii) "Whether the Civil Court had jurisdiction at the time the plaint was filed under the provisions of Section 46 of the M.P. Ceiling on Agricultural Holdings Act, 1960?"
- (iii) "Whether the subsequent amendment in Section 46 of the aforesaid Act, if any, takes away the right of the respondents to file a suit?"

12. Respondent no.1 and 6 namely Ram Charan and Motilal have died during the pendency of this appeal and this was so expressed by learned counsel appearing for the respondents on 5.5.2009. Although learned State counsel took time on that day to file appropriate application to bring the legal heirs on record but till today no such application has been filed. However, the appeal does not abate for simple reason that legal heirs of respondent no.1 Ram Charan who are the respondents no.2 to 5 are already on record and respondent no.6 Motilal who was defendant no.2 appears to be formal defendant since the relief has been claimed in the plaint against the State Government-Defendant no.1

13. The contention of learned Government Advocate is that under Section 11(5) of the Act which was prevailing at the time of institution of the suit viz. 4.9.1984, the suit should have been filed within three months from the date of the order of the competent authority. Learned Government Advocate submits that the order of the competent authority was assailed by the plaintiffs/respondents by filing an appeal before the Commissioner which was dismissed on 21.4.1982 against which they filed revision application before Board of Revenue which was also dismissed in default on 9.3.1983 (Exhibit P/9) and, therefore, the suit should have been filed within three months from this date 9.3.1983 under Section 11(5) of the said Act and since it has been filed on 4.9.1984, the same is ex-facie time barred and therefore, the suit be dismissed.

14. By addressing substantial questions of law no.1 and 2, learned Government Advocate further submits that looking to the bar under Section 46 of the Act which was prevailing on the date of filing of the suit, the Civil Court was not having any jurisdiction. However, learned Government Advocate frankly submitted while addressing substantial question of law no.3 that the amendment in Section 46 which took place in Section 46 on 1.11.1988 is not applicable in the present case since the suit was filed much earlier to the commencement of the amended Act as it was filed on 4.9.1984. Hence it has been prayed that by allowing this appeal, the suit of plaintiffs be dismissed.

15. On the other hand, Shri Divesh Jain, learned counsel appearing for the respondent-plaintiffs argued in support of the impugned judgment and prayed that as per own showing of the defendant-State Government, the plaintiffs were not the party in the ceiling proceedings although they filed certain objections which were rejected and, therefore, the period of limitation of three months as envisaged under Section 11(5) of the un-amended Act would not be applicable on the plaintiffs because that provision provides for filing of the suit by any of party to the said proceedings and, therefore, by considering the various provisions of the Act as well as the law laid down by this Court in different case laws, the learned First Appellate Court rightly held that the suit is not time barred.

16. By replying the argument of learned Government Advocate on substantial question No.2 it has been submitted that under Section 46 of the un-amended Act, there is no absolute bar in filing the civil suit on the date when the plaint was presented by the plaintiffs and, therefore, there is no need to interfere in the impugned judgment and decree passed by the learned First Appellate Court and hence this appeal be dismissed.

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

18. Before answering to substantial questions of law which were framed by this Court on 2.2.2000 which I have quoted herein above in para 11 of this judgment, I would like to mention here that while admitting the appeal, no substantial questions of law in respect of the findings rendered by the learned First Appellate Court in the impugned judgment in respect of point no.1 to 3 have been framed and thus those findings have become final.

Regarding Substantial Question of Law No.1

19. On going through the record of the learned Trial Court and particularly the order of the competent authority (Exhibit P/19(c), this Court finds that before the competent authority the plaintiffs were not the party and the ceiling proceedings were initiated only against the holder of the land Motilal (Defendant No.2). True, certain objections were filed by the plaintiffs which were not accepted by the competent authority but they were not party to the ceiling proceedings. Since the plaintiffs were not party in the ceiling proceedings, the period of limitation of three months for filing the suit as envisaged under Section 11(5) of the un-amended Act which was prevailing on the date of filing of the suit was not applicable upon the plaintiffs because this provision enables any party before the competent authority to file civil suit within three months from the date of the order to set aside the decision of the competent authority. For ready reference, it would be condign to quote sub-section (5) of Section 11 of the un-amended Act which was prevailing on the date of filing of the suit and which reads as under:-

“11(5) The order of the competent authority under sub-section (4) shall not be subject to appeal or revision, but any party, may, within three months from the date of such order institute a suit in the civil Court to have the order set aside, and the decision of such Court shall be binding on the competent authority, but subject to the result of such suit if any, the order to the competent authority shall be final and conclusive”.

20. The plaintiffs were not the party to the ceiling proceedings before the competent authority under Sections 9 and 10 of the Act nor any notice was served on them as contemplated under sub-section 3 of Section 11 of the Act which pertains to publication of the draft statement. The plaintiffs were in possession since long (40 years prior to the date of filing of the suit at the time of their predecessors) and, therefore, it was incumbent upon the competent authority to serve notice on them and the proceedings should be initiated against them also but they were not impleaded as a party to the proceedings.

21. The Single Bench of this Court in *Jagat Singh Vs. State of M.P.* (presided over by Hon'ble Shri Justice G.L. Oza as His Lordship then was) 1982 RN 373 has held that the period of limitation of three months contemplated under Section 11(5) would be applicable only to the parties to the ceiling proceedings before the competent authority and, therefore, the suit was held to be within limitation and by allowing the appeal of the plaintiffs of

that case, the suit was decreed. In that case also certain objections were filed by the plaintiffs although they were rejected by the competent authority and even in that situation this Court held that merely the objections were filed by the plaintiffs which were rejected would not dis-entitle them to file the civil suit and the period of three months of filing suit was not applicable on the plaintiffs of that case. In the instant case also, the objections were filed by the plaintiffs which were rejected and, therefore, it was not incumbent upon them to file civil suit within three months as envisaged under Section 11(5) of the Act. This decision is squarely applicable in the present case because, in the present case also, the plaintiffs were not the party and no notice was served on them, therefore, Section 11(5) of the Act enabling a party to file civil suit within three months is not applicable on the plaintiffs.

22. Earlier to the decision of *Jagat Singh* (supra) in an another decision *Smt. Gulabrani Vs. State of M.P.* 1973 M.P.L.J. SN 29, the Single Bench of this Court has held the same proposition of law that Section 11(5) of the Act would be applicable to the party to the proceedings only and it will not apply to a person to whom the notice of proceedings was not served. The same view was taken in a later decision of this Court in *State of M.P. and another Vs. Lilabai and Others*, 1998 RN 116. Thus, according to me, the plaintiffs were not bound to file civil suit within three months as envisaged under Section 11(5) of the Act. The order of Commissioner dismissing the appeal of plaintiffs is dated 21.4.1982 and that of Board of Revenue dismissing the revision in default is dated 9.3.1983 and within three years, on 4.9.1984 the civil suit has been filed. Thus, according to me, the suit is not time barred.

23. In a very casual manner without indicating as to how and in what manner the suit is barred by prescribed period of limitation, the defendant-State Government in para 6 has pleaded that the suit is barred by time.

24. The substantial question of law No.1 is thus answered against the appellant and it is hereby held that the suit filed by the respondents was not barred by time.

Regarding Substantial Question of Law No.2

25. On bare perusal of Section 46 of the Act which was prevailing on the date of filing of the suit, it is luminously clear like noon day that there was no absolute bar in filing the suit. In the instant case particularly when the plaintiffs were not the party in the ceiling proceedings they were competent to file the civil suit for a declaration that the order passed by the competent authority be

declared null and void and the Civil Court had jurisdiction at the time of filing of the plaint i.e. 4.9.1984. For ready reference, it would be relevant to quote Section 46 which reads thus:-

“46. Bar of jurisdiction of Civil Courts- Save as expressly provided in this Act, no Civil Court shall have any jurisdiction-

- (i) to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the competent authority; and
- (ii) to grant stay in any case under this Act”.

Thus on the date of filing of the plaint, the Civil Court was having jurisdiction.

26. The Substantial Question of Law No.2 is thus answered in affirmative against the appellant and in favour of the respondents/ plaintiffs.

Regarding Substantial Question of Law No.3

27. Learned Government Advocate correctly submitted that the amended provisions of Section 46 which came into force with effect from 1.11.1988 is not applicable in the present case because the suit was filed much earlier to it, on 4.9.1984 and this provision is not having any retrospective effect. Hence, the amendment to this Section does not take away the right of the respondents to file the suit.

28. Substantial Question of Law No.3 is thus answered against the appellant and in favour of the respondents/plaintiffs.

29. For the reasons stated herein above, this appeal fails and is hereby dismissed. The impugned judgment and decree passed by the learned First Appellate Court is hereby affirmed with no order as to costs.

Appeal dismissed.

I.L.R. [2011] M. P., 2477

APPELLATE CIVIL

Before Mr. Justice R.S. Jha

S.A. No. 508/1994 (Jabalpur) decided on 25 July, 2011

SURESH KUMAR & ors.

...Appellants

Vs.

MOHAN LAL & ors.

...Respondents

A. Land Revenue Code, M.P. (20 of 1959), Sections 146 & 147 - Recovery of Land Revenue - Sale - No demand notice was issued to defaulters - The person (defaulter) against whom proceeding were taken up had already died prior to the initiation of such proceedings - Legal Representatives were not brought on record and no notice was given to them - Held - The sale which was without notice was null and void. (Para 14)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 146 व 147 - भूराजस्व की वसूली - विक्रय - व्यक्ति क्रमियों को कोई मांग नोटिस जारी नहीं किये गये - व्यक्ति (व्यक्ति क्रमी) जिसके विरुद्ध कार्यवाही की गई, उसकी मृत्यु से पहले ही ऐसी कार्यवाही आरंभ हो चुकी थी - विधिक प्रतिनिधिगण अभिलेख पर नहीं लाये गये और उन्हें कोई नोटिस नहीं दिया गया - अभिनिर्धारित - विक्रय जो बिना नोटिस के था, अकृत एवं शून्य है।

B. Limitation Act (36 of 1963), Article 99 - Sale proceedings initiated by the respondent/State authorities without issuing demand notice as required u/s 146 of the Land Revenue Code or following the procedure prescribed u/s 147 of the Land Revenue Code, are null and void - The suit for possession filed by appellant/plaintiffs is not barred by limitation. (Para 17)

ख. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 99 - प्रत्यर्थी/राज्य प्राधिकारियों द्वारा भू राजस्व संहिता की धारा 146 के अंतर्गत अपेक्षित मांग नोटिस जारी किये बिना अथवा भू राजस्व संहिता की धारा 147 के अंतर्गत विहित प्रक्रिया का अनुपालन किये बिना आरंभ की गई विक्रय की कार्यवाहियाँ अकृत एवं शून्य है - अपीलार्थी /वादीगण द्वारा कब्जे के लिए बाद परिसीमा द्वारा वर्जित नहीं होता।

Cases referred :

1962 J.L.J. 523, 1964 J.L.J. 363, 1971 R.N. 249, 1964 M.P.L.J. SN 36, 1989 R.N. 138, AIR 1988 SC 1977, (1994) 1 SCC 131, 1973 R.N. 502, 1963 J.L.J. 537, 1962 R.N. 70, 1966 J.L.J. 543.

Devesh Jain, for the appellants.

Rahul Kumar Jain, G.A. for the respondent No. 4/State.

J U D G M E N T

R.S. JHA, J. :-The appellant/plaintiffs have filed this appeal being aggrieved by the reversing judgment and decree dated 22-7-1994 passed by IIIrd Additional District Judge, Sehore, in Civil Appeal No. 19 of 1991 whereby he has set aside the judgment and decree dated 23-1-1978 passed by Civil Judge Class-II, Sehore, in Civil Suit No. 83-A of 1977.

2. This appeal was admitted by this Court by order dated 11-9-1996 on the following substantial questions of law :-

(1) Whether for the grounds urged in the plaint, the impugned sale was null and void ab initio ?

(2) Whether the suit of the plaintiffs is barred by limitation ?

3. The brief facts leading to the filing of the present appeal are that Bhanwar Lal, Shiv Narayan and Ranjit Singh were joint owners of Khasra Nos. 43, 44, 45, 46, 54, 55, 309 and 310, total area being 51.30 acres of village Dhankhedi, Tahsil & District Sehore. It is stated that Ranjit Singh died some time in the year 1959-60.

4. The respondent-authorities of the State undertook auction proceedings on 22-3-63 and sold the aforesaid land for the purposes of recovery of land revenue to one Bhanwar Lal Kasat who subsequently sold the land on 27-5-63 to respondent/defendants No. 1 and 2, Mohan Lal and Ram Prasad. The appellant/plaintiffs filed a suit on 6-8-1973 for possession and mesne profit in respect of the aforesaid land on the ground that no demand notices, as required by Section 146 of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter referred to as the 'Code') were issued to the appellant/plaintiffs, and that the entire auction proceedings were conducted against Ranjit Singh, who, admittedly, at that point of time had already expired without impleading his legal representatives as parties and, therefore, the entire proceedings being void the possession taken from them was contrary to law and, consequently, a prayer was made by the appellant/plaintiffs that their possession on the disputed land be restored and they be given mesne profit for the period during which the land was in occupation of the respondent/defendants No. 1 and 2.

5. The suit was opposed by the State as well as the auction purchasers on the ground that there was due notice to the respondents of the auction

proceedings and consequently the suit was barred by limitation as the same could have been challenged within the period of one year as prescribed by Article 99 of the Limitation Act.

6. The trial Court on recording a finding that the sale of the disputed land having been held in contravention of the provisions of Sections 146 and 147 of the Code was null and void and on that count the suit which has been filed for possession was within limitation, and accordingly decreed the same. However, the appellate Court on recording a finding to the effect that even if one person, namely, Shiv Narayan in the instant case had obtained a copy of the sale proclamation, it amounted to sufficient notice to all the respondent/defendants and in such circumstances reversed the judgment and decree of the trial Court.

7. I have heard the learned counsel appearing for the parties extensively and carefully scrutinized the record of the case.

8. From a perusal of the record it is apparent that the State did not adduce any oral or documentary evidence though it was impleaded in the suit and had also filed a written statement. It is also clear from a perusal of the written statement that the State has not stated therein that the notice of demand which is required to be issued under Section 146 of the Code prior to initiation of proceedings for recovery of arrears of land revenue had been issued to any of the appellant/plaintiffs. The written statement on the contrary states that the proclamation purportedly under Section 147 of the Code was issued by the authorities, a copy of which has been brought on record as Ex. P-10 and was distributed in the shape of pamphlets amongst villagers. It has been stated that as the copy of the pamphlet was served on Shiv Narayan, P.W.3, who is one of the joint holders and defaulter, it amounted to sufficient notice. From a perusal of the record it is further clear that the entire averments made in the written statement filed by the State only relate to the proclamation issued under Section 147 of the Code except for generally stating that notices were given and at the same time an alternative plea has been taken in the written statement in paragraph 3 thereof to the effect that even if no notices of the sale of the disputed land were served on all the persons, it would not vitiate the proceedings as Shiv Narayan, P.W.3 had knowledge of the same. It is also apparent that the fact that Ranjit Singh had died sometime in the year 1959-60, i.e. prior to the date of issuance of the proclamation for sale has been admitted in paragraph 2 of the written statement.

9. From a perusal of the record what clearly emerges is that the entire proceedings were taken up by the authorities against Bhanwar Lal, Shjiv Narayan and Ranjit Singh whereas Ranjit Singh had admittedly died prior to the initiation of the proceedings and his legal representatives were not brought on record. It is also clear that no notice as required by Section 146 of the Code was issued to any of the holders i.e. Bhanwar Lal, Shiv Narayan or Ranjit Singh. In fact, the trial Court in paragraph 13 of the judgment has clearly stated that in spite of several opportunities being given to the State the revenue record relating to the proceedings was not produced by the authorities to establish that demand notices as required by Section 146 or Section 147 of the Code were ever issued on the land holders including Ranjit Singh and on this basis the trial Court has drawn an adverse inference against the respondent/authorities.

10. It is also an admitted fact that apart from the demand notices the notices required to be issued under Section 146 of the Code the notice of the sale proclamation as required by Section 147 of the Code were also not issued to any of the land holders. In fact, the averment of the respondent/State in its written statement is that "pamphlets" regarding proclamation of sale were distributed which is not the manner or procedure prescribed by Section 147 of the Code for issuing notice. Before this Court, on the strength of the admission made by Shiv Narayan, P.W.3, in his statement to the effect that he got a copy of the proclamation within 2-3 days of its distribution, it is contended that sufficient notice had been served on the plaintiff/appellants. In fact, the State authorities have nowhere made a statement that specific individual notices were issued to any of the appellants on their addresses giving details of the arrears first; by way of a demand notice under Section 146 of the Code mentioning the amount of arrears of land revenue which was sought to be recovered or in respect of which the sale proceedings were sought to be taken up and secondly by individual notices under Section 147 of the Code. The documents filed by the authorities also indicate that even in the sale proceedings the authorities have not mentioned the outstanding amount of land revenue which was sought to be recovered by taking up the auction proceedings.

11. In view of the aforesaid established facts it is to be seen as to whether the proceedings for recovery initiated by the authorities without demand notice under Section 146 of the Code are null and void. In the case of *Narain Singh v. Board of Revenue*, 1962 J.L.J. 523 it has been held that a sale of land for recovery of arrears of land revenue without notice to the land holder is void in the context of the Land Revenue Act 1917. The aforesaid judgment

has been affirmed by a Division Bench of this Court in the case of *Premchand v. Board of Revenue*, 1964 J LJ 363. A similar view has again been taken up by a Division Bench of this Court in the case of *Bihari Singh v. Chatra & another*, 1971 R.N. 249 wherein it has been held that a sale without notice under Section 146 of the M.P. Land Revenue Code, 1959 is invalid. The same view has been taken up by a Division Bench of this Court in the case of *Abdul Ali v. D.F.O., Korea*, 1964 MPLJ SN 36. This Court in the case of *Chandragopal v. Bhagwangir & another*, 1989 RN 138 where the notice under Section 146 of the Code was defective, has held the sale to be a nullity relying upon several judgments of this Court quoted above as well as the judgment in the case of *Surinder Nath Kapoor v. Union of India*, AIR 1988 SC 1777 wherein it has been held that a sale without giving opportunity of showing cause to the person affected, is a nullity. In the case of *Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh*, (1994) 1 SCC 131 while dealing with proceedings under the Code of Civil Procedure, the Supreme Court has held that the requirement in regard to issuance of the notices is mandatory and has further held that a sale without notice is a nullity.

12. In view of the aforesaid law laid down by the Division Benches of this Court as well as the Supreme Court with which I am respectfully bound, it is hereby held that the sale in the instant case which was without notice to the appellant/plaintiffs under Section 146 of the Code was null and void.

13. It is pertinent to note that the Division Bench of this Court in the case of *Khubchand v. Board of Revenue & others*, 1973 RN 502 has held that the proceedings, even in cases where the amount sought to be recovered through proclamation for sale is more than the amount or different from the amount mentioned in the notice for sale or what is actually recoverable under the provisions of Section 147 of the Code, is void. In the instant case, admittedly, the amount sought to be recovered from the appellant/plaintiffs has in fact not been mentioned in the proclamation. It is pertinent to mention here that on going through the entire record it becomes evident that at no place the State authorities in the written statement or in the proclamation have stated as to what was the actual outstanding amount of land revenue which was sought to be recovered under the provisions of the Code and in such circumstances as the proclamation proceedings were initiated without specifying the amount of land revenue, it also suffers from patent illegality as has been held by this Court in the case of *Khubchand* (supra). Similar view has been taken by the Supreme Court in the case of *Parmanand v. Ganpatrao*, 1963 J LJ 537.

14. In the instant case, it is also noteworthy that the proceedings were initiated against Ranjit Singh who admittedly, had died some time in the year 1959-60 i.e. prior to initiation of the proceedings for recovery of arrears of land revenue without impleading his legal representatives or issuing any notices to them. A Division Bench of this Court in the case of *Madani Devi v. State*, 1962 RN 70, has held that in cases where the defaulter dies before the issuance of a sale proclamation, it is mandatory for the authorities to issue notice to his legal representatives and sale proceedings held without such notice are void. In the facts of the present case as the legal representatives of the deceased Ranjit Singh were not impleaded or noticed, in view of the law laid down by the Division Bench in the aforesaid judgment the proceedings initiated by the respondents are held to be null and void.

15. The next issue arises for consideration is as to whether under the facts and circumstances of the case, when the sale proceedings initiated by the State authorities have been held to be a nullity, the bar of limitation would be applicable to a challenge to the orders and the suit, as held by the appellate Court, would be barred under Article 99 of the Limitation Act. This Court need not delve deeply into this issue in view of a decision of the Supreme Court in the case of *Md. Murtiza Khan v. State of M.P. & others*, 1966 J LJ 543 wherein it has been held that where the proceedings are a nullity or the revenue authorities acted without jurisdiction, the affected person may file a suit for possession and he need not file a suit for setting aside the impugned orders or proceedings of the revenue authorities as they are in themselves without jurisdiction and a nullity.

16. In the instant case, as I have held that the entire proceedings for sale of the appellant/plaintiffs' property were a nullity, the bar under Article 99 of the Limitation Act would not apply and it cannot be held that the suit filed by the appellant/plaintiffs would be barred by limitation or that the suit for possession would not lie. Similar view has been taken by this Court in the case of *Laxminarayan v. Moharsingh and others*, 1989 J LJ 271 wherein it has been held that a sale in respect of the arrears of land revenue held without the issuance of a demand notice under Section 146 of the Land Revenue Code, 1959 is no sale in the eyes of law and in such circumstances, the period of limitation prescribed under Section 99 of the Limitation Act would not apply. This Court in paragraph 4, by relying upon the aforesaid judgment of the Supreme Court as well as this Court has held in the following terms :-

"4. Although in this Court, an attempt has been made to submit that the decision of the Courts below on the question of limitation is not sustainable inasmuch as Article 99 would apply, that contention must be repelled by authorities abound for the proposition of law accepted by the Courts below. I do not think if it can be disputed that when a "sale" is not conducted fulfilling the requirements of law, that cannot be regarded as a "sale within the meaning of Article 99. Indeed, a sale could be made for "any payment recoverable" within the meaning of term employed in Article 99, but it has to be established that a notice of demand was made and the sum due had therefor become "recoverable" on the demand not being satisfied."

16. In view of the aforesaid discussion, both the questions of law framed in second appeal are answered in favour of the appellant/plaintiffs. It is held that as the sale proceedings initiated by the respondent/State authorities without issuing demand notice as required under Section 146 of the Code or following the procedure prescribed under Section 147 of the Code are null and void and, therefore, the suit for possession filed by appellant/plaintiffs is not barred by limitation and they are entitled to possession of the land in question.

18. In the result, the judgment and decree dated 22-7-1994 passed by IIIrd Additional District Judge, Sehore, in Civil Appeal No. 19 of 1991 is accordingly set aside and the judgment and decree dated 23-1-1978 passed by Civil Judge Class-II, Sehore, in Civil Suit No. 83-A of 1977 is hereby affirmed. The appeal filed by the appellant/plaintiffs stands accordingly allowed. In the facts and circumstances of the case there shall be no order as to costs.

Appeal allowed.

I.L.R. [2011] M. P., 2483

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

M.A. No. 2242/2008 (Indore) decided on 27 July, 2011

SUNITA (SMT.) & ors.

...Appellants

Vs.

AKBAR & ors.

...Respondents

Motor Vehicles Act (59 of 1988), Section 166 - Just compensation
- Deceased (aged 43 years) was having his own business of Box making

- He was also Income Tax payee - It would be proper to assess the income @ 4000/- per month - Compensation enhanced from 3,80,000/- to 5,10,000/-.
(Paras 7 & 8)

मोटर यान अधिनियम (1988 का 59), धारा 166 - उचित प्रतिकर - मृतक (आयु 43 वर्ष) का स्वयं का बक्से बनाने का कारोबार था - वह आयकर दाता भी था - 4000/- प्रतिमाह की आय निर्धारित करना उचित होगा - प्रतिकर 3,80,000/- से बढ़ाकर 5,10,000/- किया गया।

Case referred :

2009 ACJ 1298.

Bhupesh Chouhan, for the appellants.

P.K. Gupta, for the respondent No.3.

ORDER

N.K. Mody, J. :- This is an appeal filed by the claimant under Section 173 of the Motor Vehicles Act against an award dated 22.4.2008, passed by Addl.MACT, Indore in claim case No.79/2007. By impugned award, the Claims Tribunal has awarded a total sum of Rs.3,80,000/- with interest to the claimants for the death of one Rajendra Devda, who died in vehicle accident. According to claimants, the compensation awarded is on lower side and hence, need to be enhanced. It is for the enhancement in the compensation awarded by the Tribunal, the claimant has filed this appeal. So the question that arises for consideration is whether any case for enhancement in compensation awarded by the Tribunal on facts / evidence adduced is made out in the compensation awarded and if so to what extent ?

2. It is not necessary to narrate the entire facts in detail, such as how the accident occurred, who was negligent in driving the offending vehicle, who is liable for paying compensation etc. It is for the reason that firstly all these findings are recorded in favour of claimants by the Tribunal. Secondly, none of these findings though recorded in claimants' favour are under challenge at the instance of any of the respondents such as owner/driver or insurance company either by way of cross appeal or cross objection. In this view of the matter, there is no justification to burden the judgment by detailing facts on all these issues.

3. As observed supra, it is a death case. On 16.4.2007, Rajendra Devda, aged 43 years, met with a motor accident and died, giving rise to filing of claim petition by legal representatives (appellants herein) out of which this

appeal arises seeking compensation for his death. The case was contested by the respondents. Parties adduced evidence. The Claims Tribunal by impugned award partly allowed the claim petition filed by claimants and as stated supra, awarded a sum of Rs.3,80,000/- breakup of which is as under :-

Rs.3,60,000/- Towards loss of dependency.

Rs. 20,000/- Towards other heads.

Rs.3,80,000/- Total

4. Learned counsel for the appellants submit that learned Tribunal assessed income of the deceased @ Rs.3,000/- per month and after deducting 1/3rd towards personal expenses applied multiplier of 15. It is submitted that there are four dependents. Reliance is placed on a decision in the matter of *Sarla Verma Vs. Delhi Transport Corporation*, reported in 2009 ACJ 1298. Learned counsel for the appellants submit that the income of the deceased was Rs.96,260/- as shown by him in his Income-tax return Ex.P/12, which was submitted by the deceased in his life time. It is submitted that appeal be allowed and amount of compensation be enhanced.

5. Learned counsel for respondent No.3, submits that the amount awarded by learned Tribunal is just and proper, which requires no enhancement. It is submitted that appeal be dismissed.

6. So far as the income of the deceased is concerned, it is true that the income of the deceased is shown as Rs.96,260/- in the Incometax return Ex.P/12. It is also true that the return was filed on 2.9.2005 while Rajendra died on 16.4.2007. However, that cannot be the basis for determination of the income of deceased because of following reasons. :-

1. Ex.P/12 is the photocopy. Original is not filed for the best reasons known to the appellants.

2. In the return for the year 2004-05, which has not been got exhibited by the appellants, the income of the deceased is shown as 29,950/- from the business.

3. How the income jumped in one year from Rs.29,950/- to Rs.96,260/-, there is no evidence.

7. I have gone through the evidence adduced by the claimants and also the law laid

down in the matter of Sarla Verma, keeping in view the formula given in first sub para of para 13, wherein the example quoted is identical to the situation of present case, this Court is of the view that deduction of 1/3rd towards personal expenses is just and reasonable. However, keeping in view the fact that deceased was having his own business, which he was carrying in the name and style of M/s Modern Box Makers and also the fact that deceased was Income-tax payee, this Court is of the view that income of the deceased is assessed on lower side. It will be proper to assess the income @ Rs.4,000/- per month. The appellants are entitled for the following amount :

Rs.4,80,000/-	Towards loss of dependency.
Rs. 5,000/-	Towards funeral expenses.
Rs. 5,000/-	Towards loss of consortium.
Rs. 5,000/-	Towards loss of estate.
Rs. 15,000/-	Towards love and affection.

Rs.5,10,000/-	Total

8. Thus, the appellants are entitled for Rs.5,10,000/-, instead of Rs.3,80,000/-. The enhanced amount of Rs.1,30,000/-, shall carry interest @ 8% p.a. from the date of accident. The amount awarded shall be deposited by the Insurance Company with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant No.1 in the nearest Nationalized Bank, in the area where the appellant No.1 is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant No.1, which shall be opened by the appellant No.1 from where appellant No.1 can withdraw the amount as per her needs. However, on an application by the appellant No.1 this condition could be modified by the learned tribunal in exceptional circumstances such as educational and marital needs of appellant Nos. 2, 3 and 4, if made out by the appellant No.1.

9. With the aforesaid modification the appeal stands disposed of. No order as to costs.

Appeal disposed of.

I.L.R. [2011] M. P., 2487

APPELLATE CIVIL

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain

F.A. No. 395/1995 (Jabalpur) decided on 1 August, 2011

ANIL KUMAR RATHORE

...Appellant

Vs.

SMT. SHASHI RATHORE

...Respondent

A. Hindu Marriage Act (25 of 1955), Section 13(1) - Divorce - General Allegations of Cruelty - Allegations in the nature of 'normal wear and tear' in matrimonial life of a couple - Can not fall within the field of Clauses (i-a) and (i-b) of Sub-section (1) of Section 13 of the Act. (Para 12)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) - विवाह विच्छेद - क्रूरता के सामान्य अभिकथन - दाम्पत्य जीवन में 'सामान्य टकराव' की प्रकृति के अभिकथन - अधिनियम की धारा 13 की उप धारा (1) के खंड (i-a) व (i-b) के क्षेत्र के भीतर नहीं आ सकते।

B. Hindu Marriage Act (25 of 1955), Section 13 (1) - Divorce - Allegations of Cruelty - Cruelty must be of such a nature that the parties can not reasonably be expected to live together. (Para 10)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) - विवाह विच्छेद - क्रूरता के अभिकथन - क्रूरता ऐसे स्वरूप की होनी चाहिए कि पक्षकारों को एक साथ रहने की युक्तियुक्त रूप से अपेक्षा नहीं की जा सकती।

Cases referred :

II (1993) DMC 568 (SC), AIR 1994 SC 710.

Umesh Shrivastava, for the appellant.

Priyank Awasthy, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by SMT. VIMLA JAIN, J. :-The appellant, being aggrieved by the order dated 20.4.1995 passed in R.C.S.No.221-A/90 by IIIrd Additional Judge to the Court of District Judge, Bhopal dismissing the suit of the appellant/plaintiff, has filed present first appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act).

2. Brief facts of the appeal are that the marriage of appellant was solemnized

with the respondent in the year 1975 and out of their wedlock, three children were born. Since the inception of their marriage, the respondent started misbehaving, abusing and ignoring him even in front of his friends and relatives. The respondent even did not care for the food of appellant and insulted him on many occasions at his shop. She used to visit the house of her parents, which is in Guna, without his prior permission or intimation to him. In the year 1990, without any reasonable cause, the respondent on her own alongwith her children left the home of the appellant and proceeded to Guna and on return to his home, she again repeated the same behaviour. The respondent also filed a complaint against the appellant under Section 498-A of Indian Penal Code, which is pending for consideration. The appellant submitted that the respondent behaved in cruel manner with him. Being dissatisfied with her, the appellant/husband has filed a suit under Section 13 of the Act for seeking divorce against the respondent on the ground that both of them are living separately and there is no possibility of amicable settlement between them in future.

3. The respondent/wife in her written statement pleaded that the allegations made by the appellant/husband were absurd and insulting. She also submitted that she never treated the appellant/husband with cruelty. According to her, the husband was ill-treating and misbehaving with her and making absurd allegations against her. Insofar as question of desertion was concerned, she contended that she was not living separately on her own accord but infact, she was forced to live separately because the appellant/husband was not ready and willing to live with her due to his illicit relationship with other ladies. He did not like her and used to abuse and beat her and ultimately deserted her.

4. It is submitted by the learned counsel for the appellant/husband that the Trial Court committed an error of law and fact in dismissing the divorce petition.

5. We have heard learned counsels for the parties and gone through the records.

6. For the sake of convenience, Section 13 of the Hindu Marriage Act, 1955 is extracted below:-

"13.Divorce-(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

[i] has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent."

7. Appellant/husband Anil Kumar Rathore in support of his case before the Trial Court examined himself as PW-1 and Mohammad Sadar Khan (PW.2) who is a tutor of his children and Syed Rahmat Ali (PW.3) who is his neighbour. On the other hand, respondent/wife Shashi Rathore examined herself as DW.1 to prove her case. Vide impugned judgment and decree dated 20.4.1995, the learned Additional District Judge has dismissed the petition filed by the appellant/husband on the grounds that the allegations of cruelty and desertion levelled by the appellant/husband in his petition could not be proved by him. Feeling aggrieved by the said judgment, the appellant/husband has preferred the present appeal.

8. The appellant/husband submitted two grounds (i) cruelty and (ii) desertion in his appeal. The appellant/husband stated before the Trial Court that the respondent/wife was misbehaving, abusing and ignoring him. She also ill-treated him before his friends, colleagues and relatives. She had willfully and without any reasonable cause left his company. He has further stated that she was insulting him at his shop. She had lodged a case against the appellant/husband Under Section 498-A of the Indian Penal Code. In his cross-examination, he stated that respondent "मुझे मां बहिन की गंदी गंदी गालियां बकती थी । " This statement of the appellant does not appear to be reliable because a lady is not expected to abuse in such a manner. The appellant's witness Mohammad Sadar Khan (PW.2) and Syed Rahmat Ali (PW.3) stated about a quarrel between both of them.

9. The respondent/wife clearly stated before the Trial Court that the appellant/husband was having illicit relationship with the ladies, namely, Raju, Poonam, Kavita and others and brought such ladies at his home. Due to such illicit relationship, the appellant/ husband used to ill-treat her, used to beat her and failed to discharge his obligations as husband as well as father of the children. She also stated that without her consent, the appellant/husband got her first pregnancy terminated and attempted to get second pregnancy terminated.

10. The petition was filed by the appellant for dissolution of his marriage on the ground of cruelty and desertion. Having regard to the evidence brought on record by both the parties, it has to be seen whether the appellant was put to cruelty at the hands of the respondent. Neither PW-I nor PW-2 and PW-3 have specifically stated in their evidence the acts of the respondent which constituted the cruelty. They simply stated that the respondent abused the appellant. These aspects would not constitute cruelty. Cruelty must be of such a nature that the parties cannot reasonably be expected to live together. We would like to mention that the appellant did not examine any of his family members or relatives in support of his case. Further, the appellant did not specifically pleaded the acts which tantamount to cruelty, in his petition.

11. As regards the term "Cruelty" the Apex Court observed in *V. Bhagat v. Mrs. D. Bhagat*, II (1993) DMC 568 (SC)=AIR 1994 SC 710, as under:-

"Mental cruelty in Section 13(1)(ia) of the Act can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already 'living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to

cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

12. We are of the view that there were general allegations of cruelty against the respondent/wife. Even if such allegations are accepted, these are in the nature of 'normal wear and tear' in matrimonial life of a couple which cannot fall within the field of Clauses (i-a) and (i-b) of sub-section (1) of Section 13 of the Act.

13. On appreciation of the entire evidence on record, we are of the opinion that the appellant-husband failed to establish the cruelty alleged to have been meted out to him by respondent-wife by adducing substantial evidence.

14. Therefore, having regard to the facts and circumstances of the case, we do not find any irregularity or illegality in the impugned order dated 20.4.1995 passed in R.C.S.No.221-A/90 by the learned Additional Judge in dismissing the divorce petition filed by the appellant-husband.

15. In the result, the appeal is dismissed. The appellant shall bear his own costs as well as that of the respondent.

Appeal dismissed.

I.L.R. [2011] M. P., 2491

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 99/1997 (Indore) decided on 12 August, 2011

RASTRITYA SOOT MILL MAZDOOR SANGH

...Appellant

Vs.

REGISTRAR, VAYAVSAYIK SANGH, M.P.

...Respondent

Trade Unions Act (16 of 1926), Section 11 - Registrar de-recognised and cancelled the registration of the Trade Union of the appellant - Order was assailed by appellant-Union by filing first appeal u/s 11 of the Act - Appeal was dismissed by Industrial Court - Second appeal is not permissible before the High Court under the State Amendment to Section 11 of the Act. (Paras 3 & 4)

व्यवसाय संघ अधिनियम (1926 का 16), धारा 11 - रजिस्ट्रार ने अपीलार्थी के

2492 Rastriya Soot Mill M.S. Vs. Reg., Vay. Sangh, M.P. I.L.R.[2011] M.P.,

व्यवसाय संघ के रजिस्ट्रीकरण की मान्यता को रद्द एवं निरस्त किया – अपीलार्थी संघ द्वारा अधिनियम की धारा 11 के अंतर्गत प्रथम अपील प्रस्तुत कर आदेश को चुनौती दी गयी – औद्योगिक न्यायालय द्वारा अपील खारिज की गयी – अधिनियम की धारा 11 राज्य संशोधन के अंतर्गत, उच्च न्यायालय के समक्ष द्वितीय अपील अनुज्ञेय नहीं।

A.K. Sethi with Harish Joshi, for the appellant.

Pramod Meetha, G.A. for the respondent.

J U D G M E N T

A.K. SHRIVASTAVA, J. :- This appeal has been filed by Rastriya Soot Mill Mazdoor Sangh (hereinafter referred to as "Union") under Section 11(4) of the Trade Unions Act, 1926 (in short "Act") against the order passed by the appellate authority dismissing the appeal.

2. Several contentions have been put-forth by learned Senior Counsel for the appellant by assailing the impugned order passed in Appeal No.2/I.T.U./1989 by President, Industrial Court of M.P. that the order is contrary to law. But, I am of the view that the contentions of learned Senior Counsel which are on merits cannot be accepted for the simple reason that this second appeal is not maintainable under Section 11 (4) of the Act.

3. The Registrar of Trade Union appointed under Section 3 of the said Act has de-recognised and cancelled the registration of the Trade Union of the appellant. The said order of registration dated 23.03.1989 was assailed by appellant-Union by filing first appeal under Section 11 of the said Act, which has been dismissed by the impugned order by learned Industrial Court.

4. On bare perusal of the M.P. State Amendment in Section 11 of the Act, this Court finds that any person aggrieved by any refusal of the Registrar to register a Trade Union or by the withdrawal or cancellation of a certificate of registration may within thirty days from the communication of such order to the Trade Union concerned, appeal to the Industrial Court, whose decision shall be final. The M.P. State Amendment was made applicable w.e.f. 31.12.1960, which would mean that on the date of passing of the order by Registrar on 23.03.1989 cancelling the registration of appellant-Union under the Act, it was in force and therefore rightly the first appeal was filed by appellant before learned Industrial Court, but against the appellate order of the Industrial Court, second appeal is not permissible before this Court under the State Amendment to Section 11 of the said Act.

5. Since there is no provision to file second appeal, this second appeal is not

maintainable. Eventually, this second appeal is hereby dismissed as not maintainable. The appellant shall be free to assail the impugned order before appropriate forum.

6. The certified copy of the impugned order passed by learned Industrial Court may be returned to learned counsel for appellant and a photocopy thereof be retained in this file.

7. This appeal is accordingly dismissed as not maintainable.

Appeal dismissed.

I.L.R. [2011] M. P., 2493

APPELLATE CIVIL

Before Mr. Justice Abhay M. Naik

S.A. No. 112/1996 (Indore) decided on 24 August, 2011

MUNICIPAL COUNCIL, JAORA

...Appellant

Vs.

CHAND KHAN

...Respondent

A. Civil Procedure Code (5 of 1908), Order 14, Rule 1 - Framing of issues - Suit merely for perpetual injunction - Plaintiff asserted his own title as well as possession - Defendant in written statement denied plaintiff's title as well as possession - It was obligatory on the part of trial Judge to raise specific issue whether the plaintiff is in exclusive possession of the disputed property on the date of institution of the suit - Without raising such an issue, the suit instituted by the plaintiff for perpetual injunction on the basis of his possession can not be legally decided - Judgment of Courts below granting decree for perpetual injunction in the absence of such issue stand vitiated. (Paras 2, 6 & 7)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 14, नियम 1 - विवादकों को विरचित किया जाना - मात्र शाश्वत व्यादेश हेतु वाद - वादी का स्वयं का हक तथा कब्जे का प्राख्यान - प्रतिवादी ने लिखित कथन में वादी का हक तथा कब्जे को अस्वीकार किया - विचारण न्यायाधीश को यह विनिर्दिष्ट विवादक उठाना बाध्यकारी था कि क्या वाद संस्थापित करने की तिथि को वाद सम्पत्ति वादी के अनन्य कब्जे में थी - ऐसा विवादक उठाये बिना, वादी द्वारा अपने कब्जे के आधार पर शाश्वत व्यादेश हेतु संस्थापित वाद विधिक रूप से निर्णित नहीं किया जा सकता - ऐसे विवादक की अनुपस्थिति में शाश्वत व्यादेश हेतु निचले न्यायालय का निर्णय दूषित हो जाता है।

B. Specific Relief Act (47 of 1963), Section 41 - Perpetual Injunction - Section lays down that when an injunction can not be granted - This section does not prohibit civil Court granting decree for perpetual injunction in the absence of the relief regarding declaration of title. (Para 8)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 41 - शाश्वत व्यादेश - धारा में दिया गया है कि कब व्यादेश प्रदान नहीं किया जा सकता - यह धारा सिविल न्यायालय को स्वत्व की घोषणा संबंधी अनुतोष के अभाव में शाश्वत व्यादेश हेतु डिक्री प्रदान करने से नहीं रोकती।

Case referred :

1997 RN 38.

S.R. Kochatta, for the appellant.

H.Y. Mehta, for the respondent.

J U D G M E N T

ABHAY M. NAIK, J.:-The appeal has been heard on the following two substantial questions of law: -

1. Whether Courts below were justified in decreeing the suit of respondent/plaintiff, only for permanent injunction, when the plaintiff had not claimed any further relief of declaration of title or possession thereof? (Formulated on 05.12.1996).
2. In view of refutal about plaintiff's possession and further assertion about appellant's possession, whether the suit for injunction could have been decided without raising any issue and recording any finding about possession? (Formulated on 28.07.2011)
2. Short facts giving rise to the present appeal are that the plaintiff/respondent instituted a suit merely for perpetual injunction with allegations that disputed piece of land ad-measuring 108 ft. 9 inch East-West x 24 ft 6 inch North-South situated in city of Jaora, District Ratlam is owned and possessed by the plaintiff. It was earlier owned and possessed by Gulab Khan s/o Noor Khan. There was a house constructed on a part of the disputed land, which was purchased by Gulab Khan in the year 1904 from Malooki wd/o Khushi Khan. After the death of Gulab Khan, his son Nahar Khan became the owner of the disputed property, which with the passage of time, was in ruined condition. On account of absence of the owner, adjacent plot holders opened their doors in the disputed property. Nahar Khan had no issue. Therefore, on 14.01.1985,

he orally gifted the disputed property to the plaintiff, which was accepted by the latter. Possession was also delivered simultaneously. Later on, a memorandum of oral gift (HIBA) was also executed by Nahar Khan on the same day. Municipal Council, Jaora on 15.01.1985 started constructing a Kharanja on the disputed property, which was opposed by the plaintiff. Hence, the suit for permanent injunction, restraining the defendant/appellant from making construction of Kharanja on the disputed piece of land and further, from interfering into plaintiff's possession.

3. Defendant/appellant submitted his written statement, refuting thereby the claim of the plaintiff. It is specifically stated in the written statement that Gulab Khan had no right, title or interest in the disputed property instead the same is, in fact, a municipal lane and not personal property of any individual. This being so, Kharanja was rightly constructed in the municipal land and drains were already constructed for the said lane by the Municipal Council. This apart, it is clearly averred in the written statement that the disputed property as shown has been municipal lane in the City Plan of the year 1959. Plaintiff did not oppose constructions of drains on the said municipal lane as the same has been municipal land. It being a municipal land, residents of the area have opened their doors in the disputed property and they have been using the same for last more than 50 years. Accordingly, the suit is liable to dismissal.

4. Learned trial Judge, after recording the evidence, granted the decree for perpetual injunction in favour of the plaintiff vide judgment and decree dated 25.11.1994. Aggrieved by it, defendant submitted Civil Appeal No.46-A/1994, which having been dismissed, present appeal has been preferred, which has been heard on the above mentioned substantial questions of law.

5. Shri S.R. Kochatta, learned counsel appearing for the appellant and Shri H.Y. Mehta, learned counsel appearing for the respondent made their respective submissions, which have been duly considered in the light of the material on record.

SUBSTANTIAL QUESTION OF LAW NO.2

6. Perusal of the plaint shows that the suit is merely for perpetual injunction. Plaintiff has asserted his own title as well as possession. Defendant in its written statement has clearly denied plaintiff's title as well as possession. Suit for permanent injunction merely proceeds on the consideration of factual position with regard to possession of the plaintiff on the suit property on the date of

institution of the suit. Although this was so pleaded by the plaintiff, but the same was denied in specific by the defendant in its written statement. Additionally, it was stated that the disputed piece of land is municipal lane and has been so shown in the Municipal Plan of the city for the year 1959. This being so, it was obligatory on the part of the learned trial Judge to raise specific issue whether the plaintiff is in exclusive possession of the disputed property on the date of institution of the suit. Learned counsel for the appellant submitted that no such issue was raised by the learned trial Judge, while deciding the suit in favour of the plaintiff. According to the learned counsel, suit for permanent injunction of the present nature cannot be legally decided without raising a specific issue about possession of the plaintiff on the suit property on the date of institution of the suit. Learned counsel for the respondent submitted that issue No.4 was in respect of possession, which has been decided in plaintiff's favour, after appreciating evidence vide paragraph 8 of the trial Court's judgment.

7. This Court has gone through the issues raised by the learned trial Judge. Issues No.1 and 2 are about title of the plaintiff and his predecessor. Issue No.3 is about purchase by the plaintiff's predecessor in the year 1904. Learned counsel for the plaintiff/respondent referred to issue No.4, which is to the effect that whether Gulab Khan, Fakhir Mohammad and Nahar Khan had been in possession of disputed piece of land. This issue pertains to past and not to the date of institution of the suit. According to the plaintiff himself, Nahar Khan had already gifted the suit property to the plaintiff on 14.01.1985 and was not in his possession on the date of the suit. Thus, issue No.4 does not deal with the factual position about possession of plaintiff on the date of the suit. Other issues also are not in respect of plaintiff's possession on the suit land on the date of institution of the suit. Thus, it is clear that there was no issue about requiring the trial Court to decide the factual position of possession of plaintiff on the suit property on the date of institution of the suit. Without raising such an issue, the suit instituted by the plaintiff for perpetual injunction on the basis of his possession cannot be legally decided and the judgment of Courts below granting decree for perpetual injunction in the absence of such issue stand vitiated.

SUBSTANTIAL QUESTION OF LAW NO.1

8. Chapter 8 of Specific Relief Act, 1963 (hereinafter referred to as the Act, for brevity) provides for grant of perpetual injunction and mandatory injunction. Sections 38 and 39 of the Act are reproduced below for convenience: -

“38. Perpetual injunction when granted. - (1) Subject to the other provisions contained in or referred to by this Chapter; a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely: -

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

39.Mandatory injunctions.- When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”

Proviso to Section 34 of the Act prohibits a Court from making any declaration where the plaintiff is able to seek further relief than merely declaration of title omits to do so. No such proviso is found in Chapter 8 which provides for perpetual injunction. Section 41 of the said Act lays down that when an injunction cannot be granted. This section does not prohibit civil Court granting decree for perpetual injunction in the absence of the relief regarding declaration of title. This Court in the case of *Ramkaran v Pyaribai & others* 1997 RN 38 has observed that if the plaintiff's title to the land in question is challenged seriously right from the beginning, the plaintiff in such a circumstance ought to have brought a suit not only for injunction simplicitor, but also for declaration of his title to the land.

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Since the matter is being remitted back to trial Court in view of answer to substantial question of law No.1, if so advised, the plaintiff may seek the relief of declaration of his title by way of amendment and the learned trial Judge may grant such an opportunity to the plaintiff in the facts and circumstances of the case. Substantial question of law No.1 is accordingly answered.

9. In the result, the appeal is allowed in part. Judgment and decree of Courts below are hereby set aside. Matter is remitted back to the learned trial Judge to re-decide the suit, in aforesaid manner. Trial Court is further directed to raise specific issue about possession on the suit property on the date of institution of the suit, and further, to re-decide the suit afresh, after granting sufficient opportunity for evidence to both the parties. Looking to the old pendency, learned trial Judge is directed to decide the suit expeditiously preferably within a period of six months from the date of appearance. Parties to appear on 26.09.2011 in the trial Court. Record be sent back.

No order as to costs.

C. c. as per rules.

Appeal partly allowed.

I.L.R. [2011] M. P., 2498

APPELLATE CRIMINAL

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

Cr.A. No.1063/2000 (Jabalpur) decided on 19 May, 2011

KAILASH KUMAR ROHITAS

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Prevention of Corruption Act (49 of 1988), Section 19 - Sanction - Merely because sanction order was drafted by the investigating agency was not sufficient to vitiate the sanction order - Even if a contrary view is taken, the validity of the consequent proceedings would remain unaffected as none of the defects has occasioned a failure of justice.
(Paras 19 to 21)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 - मंजूरी - मात्र इसलिए कि मंजूरी आदेश जांच एजेंसी द्वारा ड्राफ्ट किया गया, मंजूरी आदेश को दूषित करने के

लिए पर्याप्त नहीं था — यदि विरोधी दृष्टिकोण भी लिया जाए, परिणामिक कार्यवाहियों की वैधता अप्रभावित रहेगी क्योंकि किसी भी त्रुटिवश न्याय की हानि नहीं हुई है।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Competence of accused - Duty to process claim put forward by the complainant was assigned to the accused - merely because he was not entitled to have the claim passed was of no consequence - Contention is also misconceived in the light of explanation (d) appended to Section 7 of the Act. (Paras 22 to 24)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) — अभियुक्त की सक्षमता — शिकायतकर्ता द्वारा प्रस्तुत दावे की कार्यवाही का कर्तव्य, अभियुक्त को सौंपा गया था — मात्र इसलिए कि वह दावा पारित किये जाने के लिए हकदार नहीं था, कोई महत्व नहीं रखता — अधिनियम की धारा 7 के साथ संलग्न स्पष्टीकरण(डी) के आलोक में, यह तर्क भ्रामक भी है।

C. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Demand - Complainant not supported the prosecution story - However, for arriving at the conclusion as to whether all the ingredients of the offence like demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the Court has to take into consideration the facts and circumstances brought on record in their entirety. (Para 26)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) — माँग — शिकायतकर्ता ने अभियोजन कहानी का समर्थन नहीं किया — किन्तु, इस निष्कर्ष पर पहुंचने के लिए कि क्या अपराध के सभी तत्व जैसे कि अवैध परितोषण की रकम की माँग, स्वीकृति, एवं बरामदगी की संतुष्टि की गई है अथवा नहीं, न्यायालय को अभिलेख पर लाये गये तथ्यों एवं परिस्थितियों को उनकी संपूर्णता में उन्हें विचार में लेना होगा।

D. Evidence Act (1 of 1872), Section 3 - Witness - Merely because the panch witnesses had admitted that they had also witnessed trap proceedings in other CBI cases not sufficient to dub them to be accomplices per se or even as interested witness. (Para 29)

घ. साक्ष्य अधिनियम (1872 का 1), धारा 3 — साक्षी— मात्र इसलिए कि पंच साक्षियों ने स्वीकार किया है कि वे अन्य सीबीआई मामलों में भी ट्रेप कार्यवाहियों के साक्षी थे, वे प्रत्यक्ष सह-अपराधी होना या हितबद्ध साक्षी होना भी समझे जाने के लिए पर्याप्त नहीं है।

E. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Defence - Trap proceedings continued for a considerable period of 2

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½ hours - Complainant did not support the theory of hand loan - The very undisputed fact that tainted currency notes reached the hands of accused served as a sufficient corroboration to the evidence relating to trap.
(Para 33)

ड. **ग्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) - बचाव -** ट्रेप कार्यवाही 2) घंटे की दीर्घ अवधि तक जारी रही - शिकायतकर्ता ने दस्ती ऋण की बात को समर्थन नहीं दिया - अत्यंत अविवादित तथ्य कि दूषित करेंसी नोट, अभियुक्त के हाथों में पहुंचे, ट्रेप से संबंधित साक्ष्य की संपुष्टि के लिए पर्याप्त है।

Cases referred:

AIR 1999 SC 3706, AIR 1979 SC 1912, AIR 1955 SC 70, AIR 1968 SC 1292, 1993 C.R.L.J. 2051, AIR 1958 SC 148, 1986 C.R.L.J. 457, AIR 1992 SC 563, 1964(2) C.R.L.J. 65, (2004) 7 SCC 763, (1980) 2 SCC 390, (1972) 3 SCC 652, AIR 1976 SC 449, (1970) 3 SCC 933, AIR 1979 SC 1408, (2000) 8 SCC 571, (2004) 9 SCC 319.

K.P. Soni, for the appellant.

Vikram Singh, for the respondent/CBI.

J U D G M E N T .

The Judgment of the Court was delivered by **R.C. MISHRA, J.** :-This appeal has been preferred against the judgment-dated 11.04.2000 passed by the Special Judge [under the Prevention of Corruption Act, 1988 (for CBI cases)] [hereinafter referred to as 'the Act'] at Jabalpur in Special Case No.14/1998 whereby the appellant was convicted and sentenced as under -

Convicted under Section	Sentenced to
7 of the Act	undergo R.I. for 2 years and to pay fine of Rs.2000/- and in default, to suffer R.I. for 3 months.
13(1)(d) read with 13(2) of the Act	undergo R.I. for 2 years and to pay fine of Rs.2000/- and in default, to suffer R.I. for 3 months.

with the direction that the jail sentences shall run concurrently.

2. Prosecution story, in short, may be narrated thus -

(i) At the relevant point of time, the appellant was posted as

Accounts Clerk in the Office of DRM (Divisional Railway Manager), Jabalpur whereas complainant Moti Singh (PW5) had superannuated on 31.05.1997 from the post of Record Keeper in the Personal Department of the same office. The appellant was dealing with the application moved by Moti Singh for grant of Death Cum Retirement Gratuity (DCRG). However, on 19.08.1997, as the complainant approached the appellant for assistance, he demanded a sum of Rs.200/- as illegal gratification for forwarding the claim to the competent authority for sanction and also asked to pay the money on 26.08.1997.

(ii) Not being inclined to pay the bribe, Moti Singh made a complaint in writing (Ex.P-3) before S.P. (CBI) Jabalpur, who registered a case by recording an FIR (Ex.P-10) and entrusted the investigation to Inspector Dharendra Kumar (PW7).

(iii) Dharendra Kumar observed the pre-trap formalities in presence of panch witnesses namely J.P. Chaudhary (PW6), an officer of the Union Bank of India and Keshav Panda (PW4), an officer of the Maharashtra Bank. The Inspector took into possession four currency notes each in the denomination of Rs.50/- produced by the complainant and got the same treated with phenolphthalein powder and placed in the pocket of the shirt worn by the complainant, who was further directed not to touch the tainted money and to give signal by scratching his head by left hand only after handing over the same to the appellant.

(iv) At about 4.30 p.m., the trap party comprising Dharendra Kumar & other officials of CBI, panch witnesses and the complainant reached the DRM office. As per plan, the complainant along with J.P. Choudhary, the shadow witness, went inside the Settlement Office situated on the first floor where the appellant was found sitting on a chair. On seeing the complainant, the appellant asked him to accompany downstairs. J.P. Choudhary followed the appellant and the complainant upto the backside of the DRM office where on being asked to pay the amount, complainant Moti Singh took out the tainted money from his shirt pocket and handed over the same to the appellant who, in turn, kept the money in the left pocket of his trousers and entered into the Raj Bhasha Anubhag (Official Language Section).

(v) The complainant then gave the appointed signal and immediately thereafter, the Inspector along with panch witnesses rushed to Raj Bhasha Anubhag and brought the appellant out of it by holding his hands. Panch witness Keshav Panda recovered the tainted currency notes from the left pocket of the appellant's trousers. These notes were counted by him and their numbers were also tallied with the relevant details recorded in the pre-trap panchnama (Ex.P-4). Hands of the appellant, left pocket of his trousers and right hand of the complainant were washed with the solution of Sodium Carbonate and the corresponding parts turned pink. Samples of the resultant solutions were kept in separate bottles and sealed. These samples were forwarded to FSL, New Delhi wherefrom a positive report (Ex.P-11) suggesting presence of Phenolphthalein in the solutions was received.

3. Upon completion of the investigation, sanction for appellant's prosecution was obtained from Sharad Bhatia (PW1), the then Chief Accounts Officer, Jabalpur.

4. The appellant pleaded false implication and asserted that he had no authority to deal with the DCRG claim preferred by the complainant Moti Singh (PW5). In the cross examination of the complainant, it was suggested that in fact, he had handed over the money to the appellant by way of a loan. Validity of sanction (Ex.P-1) granted by Sharad Bhatia (PW1) was also questioned on a variety of grounds.

5. The prosecution sought to prove the charges by examining as many as 7 witnesses including R.S. Rawat (PW2) and Anita Patel (PW3), respectively the then Section Officer in Pension Branch and Head Clerk in DRM office. No evidence was led in defence.

6. Legality and propriety of the convictions have been challenged inter alia on the following grounds -

- (i) Invalidity of the sanction for the appellant's prosecution.
- (ii) Want of authority to deal with the complainant's DCRG claim.
- (iii) Non-maintainability of the application for payment of the DCRG in view of the fact that, admittedly, the complainant Moti Singh had not vacated the railway quarter allotted to him.

- (iv) Absence of evidence as to demand of bribe.
- (v) Contradictions in the testimony of the investigating officer Dharendra Kumar (PW7) and the panch witnesses namely Keshav Panda (PW4) and J.P. Choudhary who, according to the appellant, were the pocket witnesses of the CBI.
- (vi) Establishment of probability of the defence in the light of -
 - (a) admission made by the complainant that the amount in question was given by him as a loan to the appellant.
 - (b) inability of the panch witnesses to hear the conversation preceding passing of tainted money.
 - (c) Supportive testimony of panch witness J.P. Choudhary (PW6) reflecting that the appellant, after being trapped, asserted that he had taken the money as a loan from the complainant.

In response, learned counsel for the CBI, while making reference to the incriminating pieces of evidence on record, has submitted that the convictions are well merited. Inviting attention to the provisions of Section 19(3)(a) of the Act, he has further contended that even if it is assumed that the sanction suffered from any defect, the impugned convictions cannot be set aside.

7. Before proceeding further to deal with the appeal, it is necessary to decide I.A. No.5725/2011, which is an application preferred by the appellant to take additional documents indicating that (a) the appellant was appointed by Financial Advisor and Chief Accounts Officer (FA & CAO), Central Railway on compassionate ground and (b) he is handicapped to the extent of 40%.

8. However, the prayer for exercise of inherent powers preserved in Section 482 of the Criminal Procedure Code is not entertainable in view of availability of specific provision for the purpose, in the form of Section 391 thereof. Accordingly, it is to be ascertained as to whether the additional documentary evidence would be necessary for a just decision of this appeal.

9. As explained by the Supreme Court in *Central Bureau of Investigation v. V. K. Sehgal* AIR 1999 SC 3706, -

"Under the Act there is a special provision regarding appeal and revision which is incorporated in S. 27. Thus the powers of appeal and revision of the High Court conferred by

the Code of Criminal Procedure shall be "subject to the provisions of " the 1988 Act. It is worthwhile to notice that a trammel has been imposed on a Court of appeal and revision under S. 19(3)(a) of the 1988 Act. It is a further inroad into the powers of the appellate Court over and above the trammel contained in S. 465 of the Code. Under S. 19(3)(a) of 1988 Act no order of conviction and sentence can be reversed or altered by a Court of appeal or revision even "on the ground of the absence of sanction" unless in the opinion of that Court a failure of justice has been occasioned thereby. By adding the Explanation the said embargo is further widened to the effect that even if the sanction was granted by an authority who was not strictly competent to accord such sanction, then also the appellate as well as revisional Courts are debarred from interfering with the conviction and sentence merely on that ground."

10. In this view of the matter, the documents referred to in the I.A. do not assume any significance. It is, accordingly, rejected.

11. In order to appreciate their merits in a proper perspective, rival contentions may be dealt with under the following sub-heads -

SANCTION FOR PROSECUTION

12. Learned counsel for the appellant has termed the sanction (Ex.P-1) for his prosecution as invalid for the reasons that it was granted by the authority subordinate to the appointing authority and further that the same was granted mechanically and without application of mind.

13. To strengthen the objection as to competence of Sharad Bhatia (PW1), attention has been invited to the admission made by him to the effect that by way of letter (Ex.D-1), he had informed the Inspector of CBI that the authority competent to remove the appellant from his present post was FA & CAO whereas he was holding the post of Divisional Accounts Officer. However, in his cross examination, he further explained that by a subsequent communication, he was informed by the department that he was equivalent in rank to the appointing authority and was, therefore, empowered to remove the appellant from the service. But, for the reasons best known to him or the public prosecutor in-charge of the case, the supportive documents brought by him were not tendered in evidence. As such, the explanation remained unsubstantiated.

14. Placing reliance on a decision of the Apex Court in *Krishna Kumar v. Divisional Assistant Electrical Engineer, Central Railway* AIR 1979 SC 1912, learned counsel has submitted that even if the explanation given by Sharad Bhatia is taken at its face value, the subsequent delegation of power to him as the Divisional Accounts Officer would not confer power to remove the appellant, who was appointed by FA & CAO before the delegation. According to him, Divisional Accounts Officer did not cease to be subordinate in rank to the FA & CAO merely because the latter's power to make appointments to certain posts has been delegated to him. The other ruling cited by learned counsel on this aspect of the matter is *Mahesh Prasad v. State of U.P.* AIR 1955 SC 70 which is an authority for the proposition that the removal must be by very same authority, who made the appointment or by his direct superior.

15. For rejecting the aforesaid contention, learned trial Judge had taken recourse to Rules 102 and 104 of the Accounts Code Part I and as well as clause (c) of sub-Section (1) of Section 19 of the Act. For a ready reference, these provisions may be reproduced thus -

RULES

"102. Gazetted Officers of the Accounts Department -

The head of the Accounts Department of a Railway Administration is known as the Financial Adviser & Chief Accounts Officer. Below him are the Additional Financial Adviser and Chief Accounts Officer, the Deputy Chief Account Officers, Senior Accounts Officers, Junior Accounts Officers, and Assistant Accounts Officers, located in the Headquarters Office or attached to the Divisions, Workshops, Stores Depots and Construction Projects of the railway. The size of the organisation may vary depending on the nature and volume of work in the Accounts Department of each Railway Administration. For the sake of brevity, all Accounts Officers of a railway, including the head of the Accounts Department, are referred to hereafter as "Accounts Officer(s)". Where, however, it is necessary to refer particularly to the head of the Accounts Department of a railway the term "Financial Adviser and Chief Accounts Officer" has been used. The term "Accounts" has, in some places, been used to denote the Accounts Department.

104. The Divisional/Senior Divisional Accounts Officer in a Division, the Workshop Accounts Officer in a Workshop and the Stores Accounts Officer attached to the Stores Depot will function as Financial Advisers to their respective Executive Officers under the overall guidance of the Financial Adviser and Chief Accounts Officer.

SECTION

19. Previous sanction necessary for prosecution.-(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

(a) ...

(b) ...

(c) in the case of any other person, of the authority competent to remove him from his office."

16. In the light of these provisions, learned trial Judge rightly took the view that Sharad Bhatia, being the officer to remove the appellant from the post at the time when the offences were allegedly committed, was competent to accord sanction for prosecution.

17. On these facts, the decision in the case of *Sailendranath Bose v. State of Bihar* AIR 1968 SC 1292 is of no avail to the petitioner as in that case, the sanctioning authority viz. Chief Medical Officer was not competent to remove the accused Assistant Medical Officer from service.

18. To buttress the contention that the sanction (Ex.P-1) was granted without application of mind and in a mechanical manner, he has invited attention to the following facts -

(i) The words "satisfaction" did not find place in the sanction order.

(ii) Names of the witnesses and the documents were not referred to.

(iii) Although, Sharad Bhatia deposed that he had gone through all the relevant documents yet, this fact was not mentioned in the covering memo.

(iv) There was absolutely no need to annex the bio-data (Ex.D-1A) that contained an inconsistent statement to the effect that only FA & CAO was competent to remove the appellant from his post.

(v) Admittedly, Sharad Bhatia, after getting the draft sanction, as forwarded by the CBI, vetted by the legal department, had not preferred to make any change therein.

Further, in support of the argument that the sanction suffered from non-application of mind, attention has also been invited to the decision of the Bombay High Court in *N. P. Lotlikar v. C.B.I.* 1993 CRI. L. J. 2051.

19. However, the mere fact that the sanction order was drafted by the investigating agency, was not sufficient to vitiate the sanction (See. *Indu Bhusan Chatterjee v. State of W.B.* AIR 1958 SC 148). In this regard, it would also be useful to quote the following observations made by a Division Bench of Gujarat High Court in *Nareshkumar Kikabhai Tandel v. State of Gujarat*, 1986 CRI. L. J. 457 -

"there is no law which requires the Sanctioning Authority to draft the sanction himself. It is for him to decide whether a public servant who is appointed by him and who is liable to be dismissed by him is required to be prosecuted and the sanction is required to be given or not. At that time he has to apply his mind to the facts which are brought to him. It may be by precise concise statement, it may be that all prosecution papers, statements, panchnamas, complaint etc. may be placed before him and he may go through the same and if he is satisfied that the sanction is required to be given that sanction order could be drafted by any one in the office, even by a Law Officer kept for that purpose. The Sanctioning Authority thereafter is only required to go through that order, fully satisfy himself that what has been stated is according to what he wanted and if he finds it all right he could sign it and that would be a perfect legal sanction"

20. Similar view was taken in *State of T.N. v. Damodaran* AIR 1992 SC 563 wherein the Director of Vigilance and Anti Corruption had enclosed model sanction orders so as to enable the Revenue Divisional Officer to draft sanction order in those lines. Accordingly, it was held that sanction, based on all relevant materials placed before Sanctioning Authority, was perfectly valid. Reference

2508 Kailash Kumar Rohitas Vs. State of M. P.(DB) I.L.R.[2011] M.P., may also be made to the following observations made by a Constitution Bench in *R.S. Pandit v. State of Bihar* 1964 (2) Cri LJ 65 with reference to requirements of sanction as contemplated in Section 6 of the Prevention of Corruption Act, 1947 that corresponds to Section 19 of the Act of 1988 -

"Section 6 of the Act also does not require the sanction to be given in a particular form. The principle expressed by Privy Council in (Gokulchand Dwarkadas Morarka v. The King AIR 1948 PC 82), namely that the sanction should be given in respect of the facts constituting the offence charged equally applies to the sanction under Section 6 of the Act. In the present case all the facts constituting the offence of misconduct with which the appellant was charged were placed before the Government. The second principle, namely, that the facts should be referred to on the face of the sanction and if they do not so appear, the prosecution must prove them by extraneous evidence, is certainly sound having regard to the purpose of the requirements of a sanction."

21. Thus, viewed from any angle, the sanction for prosecution of the appellant could not be held to be invalid. Even if a contrary view is taken, the validity of the consequent proceedings would remain unaffected as none of the defects, as pointed out by learned counsel for the appellant, has occasioned a failure of justice as contemplated in sub-section (3) of Section 19 of the Act (See. *State v. T. Venkatesh Murthy* (2004) 7 SCC 763).

WANT OF AUTHORITY TO DEAL WITH CLAIM APPLICATION

22. Regarding competence of the appellant to deal with the application pertaining to DCRG claim, Head Clerk Anita Patel (PW3) has submitted that it was she, who had prepared the letter (Ex.P-2) for clearance of DCRG on 28.07.1997 i.e. before the incident in question. Thus, it was established that at the relevant point of time, the DCRG claim was pending. Besides this, R.S. Rawat (PW2), the then Senior Section Officer in the Pension Branch, also came forward to state that as Accounts Clerk, the appellant was under a duty to deal with the DCRG claim including the claim preferred by the complainant which was received on 04.08.1997 i.e. 21 days before the date of trap along with the letter (Ex.P-2). This witness categorically denied the suggestion that the appellant was not at all concerned with DCRG claim preferred by the complainant. According to him, as per distribution memo (Ex.D-3), pension

cases were allotted to Smt. Tara Gupta who, at the relevant point of time, had gone for training and as such, the work assigned to her was being looked after by the appellant. Further, contents of the complaint (Ex.P-3) made by Moti Singh, who was not a stranger to the appellant, clearly reflected that he was well aware of the functioning of the accounts department and the duties assigned to the appellant.

23. All this evidence clearly suggested that duty to process DCRG claim put forward by the complainant was assigned to the appellant. The fact that the complainant was not entitled to have the claim passed before vacation of railway quarter allotted to him was of no consequence.

24. This apart, the contention that the appellant was not authorized to deal with the claim application is also misconceived in view of the explanation (d) appended to Section 7 of the Act (which corresponds to the last explanation appended to Section 161 of the IPC [omitted by Prevention of Corruption Act, 1988, S. 31]) that reads as under -

"A motive or reward for doing." A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

ABSENCE OF EVIDENCE AS TO DEMAND OF BRIBE

25. Even though, the complainant Moti Singh (PW5) reiterated the circumstances leading to making of compliant (Ex.P-3) relating to the demand of bribe yet, he further clarified that it was made not against any particular clerk but against the working environment of the Accounts Section. In such a situation, he was declared hostile but in the cross-examination, he substantially corroborated the following facts -

(a) he had submitted the complaint and also handed over four currency notes, each in the denomination of Rs.50/- to Inspector Dharendra Kumar (PW7).

(b) Currency notes given by him to the Inspector were recovered from the pocket of the trousers worn by the appellant.

(c) His right hand as well as both the hands of the appellant and the trousers' pocket were washed with the solution that had turned pink.

26. It is true that, in his cross-examination by learned defence counsel, the complainant clearly accepted the suggestion that the amount recovered from the appellant's possession had been advanced by him as loan but his non-supportive evidence as to demand did not assume significance simply because, for arriving at the conclusion as to whether all the ingredients of the offence viz. demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the Court has to take into consideration the facts and circumstances brought on record in their entirety (See. *Hazari Lal v. State (Delhi Administration)* (1980) 2 SCC 390).

27. Further, Inspector Dhirendra Kumar (PW7) not only reiterated the contents of pre-trap panchnama (Ex.P-4) but also supported the circumstances culminating in recovery of tainted currency notes from the left pocket of appellant's trousers as reflected in the post-trap panchnama (Ex.P-5). Nothing could be elicited in his cross-examination so as to suggest that he was, in any way, interested in securing conviction of the appellant on absolutely false grounds. His evidence could not be rejected solely on the ground that he was concerned with the success of the trap.

28. Learned counsel for the appellant has strongly relied upon the decision rendered in *Ram Prakash Arora v. State of Punjab*, (1972) 3 SCC 652, where notwithstanding recovery of the two-marked ten rupee currency notes the accused was acquitted in a bribery charge. But, in that case, recovery of the currency notes, which was denied by the accused, assumed great importance and the fact that the same could not be established by reliable and independent search witness was considered by the Supreme court as one of the serious infirmities whereas the case in hand is not such a case.

29. Testimony of inspector Dhirendra Kumar drew ample support from the statements of the panch witnesses viz. Keshav Panda (PW4) and J.P. Choudhary (PW6) and admissions made by these panch witnesses that they had also witnessed trap proceedings in other CBI cases were also not sufficient to dub them to be accomplices per se or even as interested witnesses (*Maha Singh v. State (Delhi Administration)* AIR 1976 SC 449 relied on). The decision in *Hira Lal v. State of Haryana*, (1970) 3 SCC 933, relates to a case wherein a person had appeared as prosecution witness four to five times in police cases pertaining to a particular police station, is also not applicable to the facts of the present case. Moreover, evidence of Inspector Dhirendra Kumar and the panch witnesses Keshav Panda and J.P. Choudhary did not

suffer from any serious infirmity with regard to circumstances leading to the trap.

30. Learned Special Judge, therefore, did not commit any illegality in holding that an amount of Rs.200/- was demanded by the appellant as illegal gratification for processing the complainant's DCRG claim.

PROBABILITY OF THE DEFENCE

31. In the light of the defence that the appellant had received the amount in question from the complainant by way of a loan, the matter lies in a very narrow compass. The core question, therefore, is as to whether the appellant has been able to rebut the presumption under Section 20(1) of the Act.

32. As pointed out already, no evidence was adduced in defence. Highlighting the admissions made by complainant Moti Singh that his relations with the appellant had always remained cordial and that he used to render financial assistance to the appellant, learned counsel has strenuously contended that mere recovery of money was not sufficient to give rise to the statutory presumption under Section 20(1) of the Act. Attention has also been invited to the statement of J.P. Choudhary (PW6) that the appellant had claimed to have received the amount as a hand loan advanced by the complainant. However, fact of the matter is that this witness categorically stated that during the post-trap proceedings which continued for a considerable period of 2½ hours, the complainant had not supported the theory of hand loan.

33. Learned counsel still contended that the appellant was not required to prove the explanation for receiving the money beyond a reasonable doubt. To fortify the contention, strong reliance has been placed on the decision of the Apex Court in *Suraj Mal v. State (Delhi Administration)* AIR 1979 SC 1408. However, the very undisputed fact that the tainted currency notes reached the hands of the accused, served as a sufficient corroboration to the evidence relating to trap (See. *Madhukar Bhaskarrao Joshi v. State of Maharashtra* (2000) 8 SCC 571).

34. The ratio laid down in *Suraj Mal's* case (supra) is that in a case of bribery, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. However, in the instant case, quite apart from the admission, there is clear, cogent and creditworthy evidence to show that the appellant had accepted the tainted money from the complainant. In *State of*

A.P. v. V. Vasudeva Rao, (2004) 9 SCC 319, while distinguishing the decision in *Suraj Mal's* case, the Supreme Court laid down the under-mentioned guiding principles for invoking the statutory presumption in a trap case -

(a) *the expressions "may presume" and "shall presume" are defined in Section 4 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). The presumptions falling under the former category are compendiously known as "factual presumptions" or "discretionary presumptions" and those falling under the latter as "legal presumptions" or "compulsory presumptions". When the expression "shall be presumed" is employed in Section 4(1) of the Act, (that corresponds to Section 20(1) of the Act) it must have the same import of compulsion.*

(b) *When the sub-section deals with legal presumption, it is to be understood as in terrorem i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc. if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under Section 4 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. Direct evidence is one of the modes through which a fact can be proved. But that is not the only mode envisaged in the Evidence Act.*

(c) *Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning, which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in law of evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled.*

35. Accordingly, the defence was rightly rejected by learned trial Judge as inherently improbable in view of the background facts and circumstances leading to the trap. In this regard, the following illuminating observations made by the Supreme Court in *Madhukar Bhaskarrao Joshi's case* (above) may usefully be quoted -

"the premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act."

36. For these reasons, none of the contentions raised against legality and propriety of the convictions under challenge deserves acceptance.

37. This brings us to the question of sentence. Taking into consideration the nature of allegations found proved, social impact of the crime and other relevant circumstances of the case, interests of justice would be met if the terms of custodial sentences are reduced to one year, which is the minimum prescribed for the offence under Section 13(1)(d) read with S.13(2) of the Act.

38. In the result, the appeal is allowed in part. The impugned convictions and the fine sentences are hereby affirmed. However, the terms of consequent sentences of imprisonment are reduced from 2 years to 1 year with a further direction that the sentences shall run concurrently.

39. Appellant is on bail. He is directed to surrender to his bail bonds before the trial Court on or before 19th July 2011 for being committed to custody for undergoing remaining part of the sentence.

Appeal partly allowed.

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APPELLATE CRIMINAL

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

Cr.A. No. 1684/2001 (Jabalpur) decided on 20 May, 2011

KAMAL LAL GHARDE

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(e)

- Known Sources of Income - Income from legally forbidden sources can not be considered at all and on the other, income from any lawful source can be taken into account only when its existence is duly proclaimed under the relevant service rules - It can not be contended that known sources of income means sources known to accused. (Para 14)

क. घष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) - आय के ज्ञात स्रोत - विधिक रूप से निषिद्ध स्रोतों से आय का बिल्कुल विचार नहीं किया जा सकता और किसी विधिपूर्ण स्रोत से आय को केवल तब विचार में लिया जा सकता है जब उसका अस्तित्व, सुसंगत सेवा नियमों के अंतर्गत सम्यक् रूप से घोषित है - यह तर्क नहीं किया जा सकता कि आय के ज्ञात स्रोत का अर्थ अभियुक्त को ज्ञात स्रोत है।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(e), Evidence Act (1 of 1872), Sections 3 & 114 - Articles found in possession of accused - Electronic goods although purchased in the name of sister were found in possession of accused - Explanation for non-shifting of items from accused's house not plausible - Held - Fact is said to be proved when after considering the matters before it, the Court believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists - Court presume existence of any fact which it thinks likely to have happened having regard to the natural course of event, human conduct and public and private business - Trial Court did not commit any error in including the electronic items in appellant's movable assets. (Paras 24 & 25)

ख. घष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई), साक्ष्य अधिनियम (1872 का 1) धाराएँ 3 व 114 - अभियुक्त के कब्जे में पायी गयी वस्तुएं - इलेक्ट्रॉनिक माल यद्यपि बहिन के नाम पर क्रय किया गया तथापि उसे अभियुक्त के कब्जे

में पाया गया – वस्तुओं को अभियुक्त के मकान से स्थानांतरित नहीं किये जाने के बारे में स्पष्टीकरण स्वीकार योग्य नहीं – अभिनिर्धारित – तथ्य को साबित माना जाएगा जब न्यायालय उसके समक्ष मामलों पर विचार करने के पश्चात उसके अस्तित्व पर विश्वास करता है या उसके अस्तित्व को इतना संभावित मानता है कि प्रज्ञावान मनुष्य, विशिष्ट मामले की परिस्थितियों में, उसे अस्तित्वमान समझते हुए उस पर कार्य करेगा – न्यायालय किसी तथ्य के अस्तित्वमान होने की उपधारणा करेगा जिसे घटना के प्राकृतिक क्रम के संबंध में मानव आचरण तथा लोक एवं व्यक्तिगत व्यवसाय संभावित रूप से घटित होना वह मानता है – विचारण न्यायालय ने इलेक्ट्रॉनिक वस्तुओं को अपीलार्थी की चल सम्पत्ति में शामिल करने में कोई त्रुटि कारित नहीं की।

Cases referred:

AIR 1977 SC 796, AIR 1988 SC 88, 1993 CR.L.J. 2051, Cr.A. No. 35/1989 decided on 10.12.2004, Cr.A. No. 1060/2004 decided on 11.11.2006, AIR 1964 SC 464, AIR 1981 SC 1186, AIR 1999 SC 2556, AIR 2004 SC 517, AIR 1993 SC 313, AIR 2004 SC 2299, (2005) 5 SCC 258, AIR 2001 SC 2464, Cr.A. No. 931/2005 decided on 27.10.2010.

Sudhir K. Sharma, for the appellant.

Vikram Singh, for the respondent/CBI.

JUDGMENT

The Judgment of the Court was delivered by **R.C. MISHRA, J.** :- This appeal has been preferred against the judgment-dated 03/10/2001, whereby the appellant was convicted under Section 13(1)(e) read with 13(2) of the Prevention of Corruption Act, 1988 (for short "the 1988 Act") and sentenced to undergo R.I. for 2 years and to pay a fine of Rs.25,000/- and in default, to suffer R.I. for 1 year. Further, a direction was also given to confiscate the assets found disproportionate to the known sources of appellant's income.

2. During the check period from 1st January, 1984 to 25th Feb. 1994, the petitioner had remained posted in various Telecom Offices at Jabalpur as Junior Accounts Officer, Accounts Officer and Senior Accounts officer. In this period, he had received the salary and other allowances as reflected in the statements (Ex.P/1.1 to P/1.4, Ex.P/2.1 & P/2.2, Ex.P/3.1 to P/3.4 and Ex. P/4.1 and P/4.2). He had invested a sum of Rs.1000/- in Share (Ex.P/11) and spent (a) Rs.20,155/- to purchase a Motorcycle (b) Rs.4150/- to purchase a cooler (c) Rs.8950/- to purchase Luna Super and (d) Rs.800/- towards TMT Test and Rs.950/- and Rs.1745/- on LPG connection and cylinders. These facts are not in dispute.

3. The prosecution case, in short, may be stated thus:

(i) While working as a public servant in the aforesaid official capacities, during the check period, the appellant had amassed pecuniary resources and property disproportionate to his known sources of income. On 4/2/94, upon the corresponding information, the then S.P. (CBI) Jabalpur registered a case by recording the FIR (Ex.P/49) and entrusted the investigation to Inspector Dharendra Kumar (PW14). He, in turn, conducted a search on 25/2/1994 at the appellant's residence located at 813/6, Shiv Nagar, Garha, Jabalpur and seized documents described in the list (Ex.P/34) and valuables described in the list (Ex.P/35). The Inspector also searched the office chamber of the appellant and seized certain documents as per list (Ex.P/36).

(ii) During investigation, Padam Singh (PW3), an Assistant Engineer posted as Assistant Surveyor (Works) in the CPWD, Jabalpur, was requested to ascertain value of the house owned by the appellant.

(iii) Outcome of the investigation indicated that the appellant was found to be in possession of property/assets disproportionate to his known sources of income earned during the check period to the extent of Rs.3,31,382.46.

4. The appellant abjured the guilt. He not only furnished, in his examination, under Section 313 of the Code of Criminal Procedure, elaborate explanation for the disproportion in question but also sought to prove the corresponding facts by examining himself and 17 other witnesses as against 14 witnesses examined by the prosecution. Upon a critical appreciation of the entire evidence on record, learned trial Judge, for the reasons assigned in the impugned judgment, proceeded to hold that the appellant had not been able to satisfactorily account for acquisition of disproportionate assets to the extent of Rs.1,22,000/- and not that of Rs.3,31,382.46 as alleged by the prosecution. However, he was further of the opinion that, even after giving a benefit of 10% of the income in view of the principle laid down in *Krishnanand Agnihotri vs. State of M.P.* (AIR 1977 SC 796), the disproportionate assets would have been worth Rs.86,900/-.

5. Legality and propriety of the conviction in question have been challenged primarily on the following grounds -

(a) Non-consideration of the explanations given by the appellant in respect of every questioned item of the income, expenditure, movable and immovable assets in a proper perspective and;

(b) Mistakes in calculation.

6. According to learned counsel for the appellant, his conviction for being found in possession of assets disproportionate to the known sources of income to the extent of Rs.86,900/-, is not sustainable as even without giving margin of 10% of the total income, acquisition of additional pecuniary resources and property worth Rs.1,21,778/- could be satisfactorily explained from the evidence brought on record. To support the contention, he has given a detailed note showing that a total amount of Rs.1,21,778/- ought to have been deducted from the total value of the assets as per the following details :-

Income to be added -	59,650/-
Expenditure to be reduced -	15,453/-
Value of movable assets to be reduced -	34,800/-
Value of immovable assets to be reduced	11,875/-
Total	<u>1,21,778/-</u>

In response, learned counsel for the CBI, while making reference to the corresponding reasonings assigned by learned trial Judge, has submitted that the conviction for being found in possession of disproportionate assets worth Rs.86,900/-, is well-founded on merits.

7. In the light of the rival contentions, we, for the sake of convenience, propose to examine the material points in controversy under these heads :-

(i) Income	(ii) Expenditure
(iii) Movable assets	(iv) Immovable assets

INCOME

8. Learned counsel for the appellant has contended that a total sum of Rs.59,650/- ought to have been added to his income in view of the under-mentioned details -

Item	Particulars	Amount (in Rs.)
I/A	Savings during period preceding check period to the extent of	34150/-
I/B	Sale proceed of TVS Moped sold to L.C. Jaisinghani	4500/-
I/C	Financial assistance given by Ramesh in the year 1990 for purchasing motorcycle	10000/-
I/D	Interest	600/-
I/E	Price of dolomite tiles purchased on credit basis	10,400/-
Total		59,650/-

ITEM (I/A) (*Savings during the period preceding the check period claimed to be Rs.34150/- by the appellant*) -

9. As per statement of the appellant Kamal Lal Gharde (DW18), -he was appointed on 15.12.1971; was married to Shashikala in May, 1973 and at the time of commencement of the check period i.e. 1.1.1984, his family comprised of his wife and two sons namely, Pankaj and Utpal, who were then aged about 8½ years and 5¼ years. Making reference to certain documents relied on by the prosecution, Ex.P/21 and (Ex.P/1(2), P/1(4), P/1(3), he has submitted that during the period from 17/5/1977 to 13/12/1980, he had earned a total amount of Rs.24,042.90 as salary and during the period from December 1982 to December 1983, his income from salary was Rs.15,808.60. According to him, he had also proposed to examine other witnesses to show that during the period from 15/12/1971 to 16/5/1977, 1/1/1981 to 31/3/1982 and 1/4/1982 to 30/11/1982, he had received amounts of Rs.16,640/-, 11,382.50 and 6347.20/- as salary and other emoluments but his prayer was rejected vide order dated 1/6/2001. Attention has also been drawn to the contents of- (a) the document (Ex.P/1) suggesting that he had obtained an amount of Rs.3500/- as loan for purchasing TVS 50 and (b) sale-deed (Ex.P/43) reflecting that Prakash (PW6) had sold the plot of land whereupon appellant's house was constructed in favour of his wife Shashikala for a consideration of Rs.9135/-. As further pointed out, value of the articles relating to the check period was Rs.8,140/- whereas TVS was purchased in the year 1983 for Rs.6,000/-, out of which only Rs.3,500/- was received by way of government loan. In the light of the aforesaid facts, it has been urged that the

appellant's net savings, at the beginning of the check period, ought to have been calculated in the following manner -

- ❖ Notional Expenditure = 41% of Rs.74,221/- (total income)
= Rs.30,431/- (rounded up to Rs.30,430/-).
- ❖ Likely savings = Income minus Notional expenditure
= 74221 minus 30430
= Rs.43,790/-
- ❖ Net Savings = Likely savings Rs.43,790/- minus Rs.8140/-
(value of the articles pertaining to the check period) minus
Rs.2500 (used in purchase of TVS50 from own savings)
= Rs.34,150/- *[there is mistake in calculation and
difference should have been projected as Rs.33,150/-]*

10. This Court has also been requested to take judicial notice of the income and calculate likely savings during the period preceding the check period in accordance with the mode adopted by the trial Court for calculating the notional expenditure during the check period. To buttress the contention that the income during the period anterior to the check period ought to have been given credit as its existence was probablised from the evidence on record and, accordingly, corresponding savings should have been also included in the income of the appellant, learned counsel for the appellant has made reference to following precedents -

- (i) *Krishnanand's case* (AIR 1977 SC 796)
- (ii) *State of Maharashtra v. Pollonji Darabshaw Daruwalla* AIR 1988 SC 88,
- (iii) *N. P. Lotlikar v. C.B.I.* 1993 CRI. L. J. 2051
- (iv) Judgment rendered by single Bench of this Court on 10/12/04 in Cr.A. No.35/1989 (*A.G. Kale v. State of M.P.*) and
- (v) Judgment rendered by single Bench of this Court on 11/11/06 in Cr.A. No.1060/2004 (*Bhogilal Saran v. State of M.P.*).

In *N. P. Lotlikar's case* (supra), income of the accused, while serving the Government Department before joining the custom department in the year

1954, was taken into consideration whereas in *Bhogilal Saran's case* (above), learned single Judge had taken into account the salary drawn during the period preceding the check period to assess the total household expenses.

11. In *Krishnanand's case* (ibid), while considering the question as to whether the facts thereof justified the raising of presumption under Section 5(3) of the Prevention of Corruption Act, 1947 (for short "1947 Act"), the Supreme Court took into account items of income relating to the past period and proceeded to add (to his income) Rs.3,200/- as tuition charges received by the appellant during the period from 1943 to 1947 and Rs.1,240/- as the scholarships and fellowships earned by him during his college days. Observing that sub-section (3) of S.5 provides an additional mode of proving an offence punishable under sub-section (2) for which any accused person is being tried, the Apex Court in *Sajjan Singh v. State of Punjab* AIR 1964 SC 464, propounded that the pecuniary resources or property acquired before the enforcement of 1947 Act could be taken into consideration. However, by the Anti-Corruption Laws (Amendment) Act, 1964, sub-section (3) of S.5 was repealed and clause (e) in Section 5 of the 1947 Act, that corresponds to clause (e) of Section 13(1) of the 1988 Act, was added but clause (e) of Section 13(1) is materially different from clause (e) of Section 5(1) of the 1947 Act inasmuch as the presumption permitted to be raised under the explanation to Section 13(1)(e) was not available to be raised under Section 5(1)(e). The explanation reads -

Explanation.- For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

12. In this way, under the new clause, the earlier concept of "known sources of income" has undergone a radical change. As per the explanation appended, the prosecution is relieved of the burden of investigating into "source of income" of an accused to a large extent. Accordingly, in order to ascertain likely savings during the check period, the investigating agency is expected to prepare (a) statement containing details of movable assets including cash balance, bank balance, jewellery, household effects and that of immovable assets at the beginning of the check period (b) statement containing the details of verified moveable and immovable assets acquired by the public servant either in his

name or held on his behalf during the check period and (c) statement containing the progressive total income from all the known sources during the check period.

13. However, placing reliance on the observations made by the Supreme Court in *Pollonji's case* (supra), learned counsel has submitted that a somewhat liberal view ought to have been taken while determining as to what proportion of assets in excess of the known sources of income constitutes "disproportion". Reference has also been made to the decision of Apex Court in *State of Maharashtra v. Wasudeo Ramchandra Kaidalwar* (AIR 1981 SC 1186), wherein while explaining the nature of onus on the accused to satisfactorily account for his possession of the disproportionate assets, it was laid down that all that he need to do is to bring out a preponderance of probability. But, in that case, the Supreme Court also characterized the approach of the High Court as erroneous in holding that a public servant charged for having disproportionate assets in his possession for which he cannot satisfactorily account cannot be convicted of an offence under Section 5(1)(e) read with 5(2) of the 1947 Act unless the prosecution disproves all possible sources of income.

14. Further, as per the explanation to Section 13(1)(e), for the purpose of satisfying the Court, the "known sources of income" of the public servant should be "any lawful source" and it further enjoins that receipt of such income should have been intimated by the public servant in accordance with the provisions of any law applicable to such public servant at the relevant time (See. *P. Nallammal v. State rep. by Inspector of Police* AIR 1999 SC 2556). As an obvious corollary, on one hand, income from legally forbidden sources cannot be considered at all and on the other, income from any lawful source can be taken into account only when its existence is duly proclaimed under the relevant Service Rules. Moreover, it is not, and cannot be contended that 'known sources of income' means sources known to the accused. (*State of M.P. v. Awadh Kishore* AIR 2004 SC 517 referred to). In addition, as explained in *Pollonji's case* (supra) -

"in order to establish that a public servant is in possession of pecuniary resources and property, disproportionate to his known sources of income, it is not imperative that the period of reckoning be spread out for the entire stretch of anterior service of the public servant It is for the prosecution to choose what

according to it is the period which having regard to the acquisitive activities of the public servant in amassing wealth and characterise and isolate that period for special scrutiny".

15. Coming to the facts of the case, it may be observed that no cogent documentary evidence in the form of entries in any saving bank account etc. is available to prove existence of the so-called savings during the period anterior to the check period. The Investigating Officer Dharendra Kumar (PW14) clearly asserted that the appellant was not able to furnish information as to any Bank Account/NSC/FDR pertaining to the pre-check period. His statement that in January, 1984, the appellant was drawing a net salary of Rs.944.20, was not subjected to challenge. Admittedly, the appellant had to maintain a family comprising of wife and two school going children. Thus, there was hardly any scope for saving and availability of the fund at the beginning of the check period. It is relevant to note that out of the consideration payable under the sale-deed (Ex.P/43), only a sum of Rs.635/- was paid to the vendor viz. Prakash (PW6) on the date of its execution i.e.15/2/1984. On these facts, the decisions in the cases of *N.P. Lotlikar and A.G. Kale*, which relate to Cl. (e) of sub-section (1) of S. 5 of the 1947 Act are of no avail to the appellant.

16. In the light of the well-settled position of law on the subject, learned trial Judge, in absence of supportive documentary evidence, did not commit any illegality in declining to take into account the notional savings during the pre-check period as projected by the appellant.

17. **ITEM (I/B)** (*Sale proceed of TVS Moped sold to L.C. Jaisinghani - Rs.4500/-*)

Although L.C. Jaisinghani (DW7) corroborated the fact that he had purchased the Moped from the appellant for a consideration of Rs.4500/- yet, learned trial Judge declined to include the aforesaid sum in the income of the appellant for the following reasons:-

- In the record of the RTO, Jabalpur, the Moped was not found transferred in the name of L.C. Jaisinghani.
- L.C. Jaisinghani clearly deposed that amount of Rs.4500/- was paid in equal installments of Rs.500/- whereas the receipt (Ex.D/14) evidenced a single payment of Rs.4500/-.

However, fact of the matter is that Madhu Jaisinghani, in whose name the Moped was found transferred on 18/9/1989, is none other than the wife of L.C. Jaisinghani. Further, mode of payment of price also did not assume any significance in the light of the entry (Ex.D/17) regarding transfer of the vehicle as proved by R.K. Hela (DW10), Clerk in the office of the RTO. As such, this amount ought to have been included in the income.

18. ITEM (I/C) (*Financial assistance given by Ramesh in the year 1990 for purchasing motorcycle - Rs. 10,000/-*)

Learned trial Judge rejected the plea on two grounds - firstly, the appellant had not given any intimation to his department regarding receipt of the said amount from his brother Ramesh and secondly, he had taken a vehicle loan in August 1989 only. However, the grounds were not tenable in view of a categorical admission made by Subal Chand Rai (DW16), Additional General Manager (Administration), Telecom Stores, Calcutta that the permission to purchase Motorcycle was given only after taking into account the sources of income disclosed by the appellant in the corresponding intimation in the prescribed form (Ex.D/29-C). Hence, the amount of Rs.10,000/- (supra) should have been included in the income of the appellant (See. *M. Krishna Reddy v. State Deputy Superintendent of Police, Hyderabad* (AIR 1993 SC 313)).

19. ITEM (I/D) (*Interest - Rs. 600/-*)

As rightly pointed out by learned counsel for the appellant, while calculating the interest, the trial Court only considered the entries in the Pass-Books (EX:P-24 and P-25) pertaining to Saving Bank Account of Pankaj and Utkal whereas the Pass-Book (Ex.P/29) relating to Saving Bank Account of their mother Shashikala was also exhibited in evidence. Considering the entries made in that passbook, a total amount of interest ought to have been calculated as Rs.598.95/- (which can be rounded to Rs.600).

20. ITEM (I/E) (*Price of dolomite tiles Rs. 10,400/ taken on credit basis*) -

It is true that the credit vouchers (Ex.D/15 and Ex.D/16) seized during search suggested that on 13/9/93, -

- (i) dolomite tiles and Chips and Powder costing Rs.5916/- were purchased by Smt. Shashikala Gharde on credit basis from Tara Minerals, 600 Napier Town, Jabalpur.

(ii) Romano Tiles worth Rs.4500/- were purchased by her from Agrawal Glass and Frameworks.

But, Ramesh Delhiwal (DW9), examined as the common proprietor of both the firms, could not produce the carbon copies of the credit vouchers. Since the items were purchased from two different firms, entries in a common ledger brought by the Proprietor, would not have been sufficient to prove that the balance amounts against the vouchers were paid after expiry of the check period. Further, Ramesh clearly admitted that except the aforesaid items, he had not sold any other item to a private individual on credit basis for more than a month. Moreover, signature of the purchaser viz. Shashikala was also not available on anyone of the aforesaid documents. In these circumstances, learned trial Judge was justified on facts in rejecting the contention based on the credit vouchers.

EXPENDITURE

21. Submissions as to expenditures may be discussed under the following heads -

Item	Particulars	Amount sought to be deducted from expenditure (in Rs.)
E/A	Pankaj's admission fee and school fee payable for the academic session 1983-1984 (Ex.P/44)	410/-
E/B	Utpal's admission fee and school fee payable for the academic session 1983-1984 (Ex.P/44)	265/-
E/C	Electricity charges	2378/-
E/D	Expenditure on purchase of plot vide agreement dated 13/8/91	12,400/-
Total		15,453/-

ITEM (E/A) *(Admission fee and School fee, of Pankaj for the academic session 1983-1984 (Ex.P/44))*

As rightly pointed out by learned counsel for the appellant, an amount of Rs.410 (Rs.200/- as admission fee that was paid in the year 1981 and Rs.210/- as the fee for the period from 1/7/1983 to 31/12/1983) ought to have been excluded from the amount of Rs.620/- as assessed by the trial Court.

ITEM (E/B) *(Admission fee and School fee of Utpal for the academic session 1983-1984 (Ex.P/44))*

Learned counsel for the appellant is also right in contending that an amount of Rs.265/- (Rs.200/- as admission fee for the academic session 1983-1984 and Rs.65/- as the fee for the period from 1/7/1983 to 31/12/1983) ought to have been excluded from the amount of Rs.330/- as assessed by the trial Court.

ITEM (E/C) *(Electricity Charges (Ex.P/46 & Ex.P/47) -*

Out of the amount of Rs.9,696/- described by the prosecution, learned trial Judge deducted only an amount of Rs.1520/- as it was paid after the check period. However, as rightly submitted by learned counsel for the appellant, a further amount of Rs.2378/- ought to have been excluded as during the period from 1989 to 1994, only an amount of Rs.5,798/- was paid and not Rs.8,176/- as assessed by the trial Court.

ITEM (E/D) *(Expenditure of Rs.12,400/- on purchase of plot vide agreement dated 13/8/91)*

According to learned counsel for the appellant, he is a stranger to the agreement to sell (Ex.P/40) in view of the fact that it does not bear his signature. He is further of the opinion that the corresponding evidence of Ravi Anvore (PW4), son of S.K. Anvore (since dead), the executant of the document, did not assume any significance, as he was not expected to have a personal knowledge with regard to the transaction. To strengthen the argument that as an stranger, the appellant was entitled to lead evidence in rebuttal of the contents of the document, reliance has been placed on the following observations made by the Supreme Court in *Parvinder Singh v. Renu Gautam* (AIR 2004 SC 2299) -

"A stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document

or the fraudulent or illegal purpose for which it was brought into being."

However, the contentions are apparently misconceived in view of the following facts -

(i) The appellant was the only beneficiary under the agreement (Ex.P/40).

(ii) As defence witness no.18, the appellant Kamal Lal had not been able to explain satisfactorily as to why the agreement, purporting to be executed by S.K. Anvore, to sell a piece of land situated at village Karmeta in his favour for a consideration of Rs.30,400/- after obtaining a sum of Rs. Rs.12,400/- was found in his house.

(iii) The agreement was scribed on a stamp paper that was sold in favour of the appellant only.

(iv) Ravi duly corroborated the fact that the amount of Rs.12,400/- was actually paid as advance against the total consideration.

(v) It also came in Ravi's evidence that the piece of land described in the agreement was in existence.

Accordingly, the reasons assigned by the trial Court for declining to exclude the aforesaid amount from expenditure, deserves to be affirmed as justified.

MOVABLE ASSETS

22. Only two movable assets in the form of Colour TV and VCP, having a total value of Rs.34,800/-, are subject matter of the controversy. In order to support the argument that it must be presumed, unless contrary was shown by the prosecution, that the aforesaid electronic items belonged to Maya Ganveer (DW3), the sister-in-law of the appellant, in whose name they were purchased, learned counsel for the appellant has drawn our attention to the following observations made by the Supreme Court in *Krishnand's case* (supra) -

"It is well settled that the burden of showing that a particular transaction is benami and the appellant-owner is not the real owner always rests on the person asserting it to be so and this

burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstance unerringly and reasonable raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him, nor justify the acceptance of mere conjecture or surmises as a substitute for proof. It is not enough merely to show circumstances which might create suspicion, because the Court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence."

Making reference to the decision of the Apex Court in *Mukhtiar Ahmed Ansari v. State (N.C.T of Delhi)* (2005) 5 SCC 258, learned counsel has further urged that he could rely upon evidence of Mukund Shah (PW7), the Proprietor of M/s Shah Brothers, to the effect that he had sold the TV and the VCP to Maya Ganveer in view of the fact that Mukund was not declared hostile by the prosecution.

23. Although, the Bill (Ex.P/16) and Delivery Memo (P/15) reflect that an Uptronica Colour TV and Uptronica VCP were purchased from M/s Shah Brothers by Smt. Maya Ganveer (DW3) representing herself to be resident of Tumsar Road, Gondia, on 23/1/93 and 29/1/93 respectively yet, no evidence was brought on record to prove actual place of her residence. Moreover, none of these documents bore her signature. As per her statement, she had left these items at the residence of the appellant in view of the fact that only two or three days after her purchase a defect had cropped up in the TV with the result that no picture was visible on it. However, fact of the matter is that the VCP was purchased only six days after purchase of the TV. This apart, Mukund Shah (PW7) did not support the assertion that the TV was subjected to any repair within three days of its sale. Furthermore, Maya's other explanation for non-shifting of electronic items from the appellant's house for a considerable period of more than a year to the effect that she had a child in her lap, was far from being plausible. Admittedly, she had no source of income of her own. The fact that her husband was not even made aware of the purchase of such costly electronic items also created suspicion as to veracity of the claim that the electronic items, in fact, belonged to Maya. Her assertion that

the amount used for purchasing the TV and the VCP was gifted by relatives at the time of her marriage also remained unsubstantiated.

24. From a conjoint reading of Sections 3 and 114 of the Evidence Act, it can easily be concluded that the fact is said to be proved when after considering the matters before it, the Court believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. In coming to its belief the Court may presume existence of any fact which it thinks likely to have happened having regard to the natural course of event, human conduct and public and private business, in relation to the facts of each case. (See. *K. Ponnuswamy v. State of T.N.* (AIR 2001 SC 2464).

25. Upon analysis of the factual scenario and applying the principles of law as highlighted above, we are of the opinion that learned trial Judge did not commit any error of fact or of law in including aforesaid electronic items in appellant's movable assets.

IMMOVABLE ASSETS (Valuation of House Property) -

26. Even though, Padam Singh (PW3), the then Assistant Surveyor (Works) in CPWD Jabalpur, assessed the value of the house belonging to the appellant as Rs.2,30,000/- yet, learned trial Judge, while taking note of the certain discrepancies, proceeded to allow corresponding deductions as enumerated below -

(a) *As per map of ground floor (P/38A) width of room was shown as 3.08 meters but during calculation in the chart (P/38C) it has been taken as 3.80 meters. The cost of construction of 2 square meter i.e. Rs.1300 should have been reduced.*

(b) *Construction of porch in 10.20 sq. meter has been shown, but it has not been considered that full height walls and gates were not provided in the porch. Thus, a margin of Rs.5270 should have been allowed.*

(c) *Open space in the backside of the house was measured as 16.53 meters but in calculation cost of walls was not excluded. Although the accused had claimed 40% deduction but taking note of the fact that the space is surrounded by 4 rcc pillars and a room has been constructed on this space, only margin of 30% would be justified and as such, an amount of*

Rs.5000 should be reduced..

(d) Brick work at foundation and ground floor level was done by using mud mortar but valuation was done assuming it to be cement work. Further, the valuation was done on the basis of marble flooring in fact dolomite tiles were used for flooring. Even though no suggestion was made in the cross-examination of Padam Singh, the valuer, the version as to use of mud mortar and dolomite was acceptable and, accordingly, an amount of Rs.6000 and not Rs.8915 as difference in the cost of construction involving use of cement and mud mortar and an amount of Rs.5371 as claimed by the accused as a difference between cost of marble flooring and dolomite tiles are allowed.

(e) Service tax assessed as Rs.5000 should have been reduced from the valuation as there was no corresponding evidence.

(f) Cost of construction should be allowed to be reduced by 17% in view of the fact that the house was not constructed on contract basis and there was considerable difference in the prices of the construction material in Delhi and Jabalpur.

He, accordingly, assessed the value of the house as Rs.1,70,780/- and Rs.14,686/- as the cost of the land (including stamp duty & registration charges) and determined the total value of the immovable property as Rs.1,85,466/-. Still, as rightly pointed out by learned counsel for the appellant, in Para 74 of the judgment, learned Judge fell into an arithmetical error by deducting the excess amount of Rs.27,941/- (towards margins/reductions) from Rs.2,33,701/- instead of Rs.2,30,000/- ascertained by Padam Singh as the total value of the house vide his report (Ex.P-39). Thus, allowing a margin of 17%, the actual value of the construction would be Rs.1,67,708/- as 83% of Rs.2,02,059/- (Rs.2,30,000 minus Rs.27,941/-).

27. Learned counsel has next contended that the house should have been valued at Rs.1,59,355/- as per assessment made by Prakash Karve (DW17), an Architect and Govt. approved valuer. For this, he has pointed out that Padam Singh (PW3) had erred in applying consolidated cost index @ 517%, while valuing the services, by ignoring the facts that 2/3rd part of the ground floor construction was completed in the year 1987 and also that 1/3rd part on the first floor was constructed in the

year 1992 and even after admitting the facts that the electrical fittings of the ground floor were installed and further that the ground floor area was constructed in the year 1987 (when the cost index was 258%). According to him, following cost indices ought to have been applied for the purpose -

For the year	Index	In respect of constructed area
1987	258%	91.17 sqm
1992	517%	10.20 sqm
1992	517%	43.55 sqm

In the light of these facts, learned counsel has submitted that on 63% of services (proportionate to construction) cost index @ 258% and on remaining 37% services cost index @ 517% ought to have been applied and, therefore, total value of services should have been taken as Rs.15,922/- instead of Rs. 23,265/- as assessed by Padam Singh. He is further of the opinion that the cost of land should have been taken as Rs.14,191/- (and neither Rs.14,686/- as determined by learned trial Judge nor Rs.14,511/- as assessed by Padam Singh) in view of the fact that it also included an amount of Rs.320/- as Corporation Development Charges. The contentions deserve acceptance. In view of that, a total sum of Rs.11,875/- has to be deducted from Rs.1,85,466/-, the value of the immovable property as ascertained by learned trial Judge. In other words, total value of the house ought to have been taken as Rs.1,73,591/-.

28. To sum up, our findings are as follows -

- (a) Income to be added further $(I/B + I/C + I/D) = \text{Rs.}15,100/-$.
- (b) Expenditure to be reduced further $(E/A + E/B + E/C)$ by =
Rs.410/- + Rs.265 + Rs.2,378/- = Rs.3053/-
- (c) Valuation of the immovable assets to be reduced further
by = Rs.11,875/-

The obvious result would be -

- ❖ Total assets = Rs.3,30,500/- (as assessed by the trial Court) minus Rs.11875/- = Rs.3,18,625/-
- ❖ Total Income = Rs.3,51,000/- (as assessed by the trial Court) plus Rs.15,100/- = Rs.3,66,100/-
- ❖ Total expenditure = Rs.1,42,500/- (as assessed by the trial Court) minus Rs.3053/- = Rs.1,39,447/-

❖ Savings = Income minus expenditure.

Savings = Rs.3,66,100/- minus Rs.1,39,447 =
Rs.2,26,653/-

❖ Total Assets= Rs.3,18,625/- minus Rs.2,26,653 =
Rs.91,972/-

❖ Deducting allowance of 10% of total income = Rs.91,972/-
minus Rs.36,610/- = Rs.55,362/-

Thus, upon a re-appreciation of the evidence on record in the light of the rival contentions, we are of the opinion that the appellant could not satisfactorily account for assets worth Rs.55,362/-. Although, learned counsel, while making reference to a news item titled as "SC Snubs Govt for letting off 'big sharks, crocodiles'" published on 29/10/2010 in Deccan Herald covering decision of the Supreme Court in *Anantha Ramulu v. State of M.P.* (Cr.A. No.931/2005 decided on 27/10/10), has submitted that the disproportion in question being meager/moderate, deserves to be ignored as a probable fault of calculation yet, a bare reading of the judgment would reveal that no such guideline has been laid down by the Apex Court. Taking into consideration the nature of offence and its social impact, the fact that the extent of disproportion has been found to be 1/6th of what was alleged by the prosecution, would not be sufficient to absolve the appellant of the misconduct.

29. Coming to the question of sentence, it may be observed that a considerable period of more than 15 years has already elapsed after the search. Considering the quantum of disproportion and other relevant aspects of the sentencing policy, ends of justice would be met if the sentence of imprisonment is reduced from 2 years to 1 year, which is the minimum prescribed for the offence.

30. In the result, the appeal is allowed in part. The impugned conviction and consequent sentence of fine are hereby affirmed. However, the period of custodial sentence is reduced from 2 years to 1 year. It is further directed that instead of Rs.86,900/- only property worth Rs.55,362/- shall be confiscated.

31. Appellant is on bail. He shall surrender to his bail bonds before the trial Court on or before 20/7/11 for being committed to custody for undergoing the remaining part of the sentence.

Appeal partly allowed.

**I.L.R. [2011] M. P., 2532
APPELLATE CRIMINAL**

Before Mr. Justice G.S. Solanki

Cr.A. No.1632/1995 (Jabalpur) decided on 6 July, 2011

ASHOK KUMAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3 - Credibility of witnesses - Doctor, who wrote the tehrir for Dying declaration and Naib Tahsildar, who recorded the Dying declaration stating that deceased told them that she got burnt by stove while preparing the food - Both are Government Servants and are independent witnesses - Nothing in cross examination to disbelieve them - Held - The trial Court committed illegality in not placing reliance on testimony of these witnesses. (Para 13)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्षियों की विश्वसनीयता - चिकित्सक जिसने मृत्युकालिक कथन हेतु तहरीर लिखी तथा नायब तहसीलदार जिसने मृत्युकालिक कथन अभिलिखित किया है, का कथन कि मृतक ने उन्हें बताया कि वह खाना बनाते समय स्टोव से जली - दोनों ही सरकारी कर्मचारी हैं और स्वतंत्र साक्षी हैं - उन पर अविश्वास करने के लिए प्रति परीक्षण में कुछ नहीं - अभिनिर्धारित - विचारण न्यायालय ने इन साक्षियों पर विश्वास नहीं करके अवैधता कारित की।

B. Penal Code (45 of 1860), Section 498-A - Cruelty - Behaviour of appellant towards deceased was aggressive - Appellant humiliated and assaulted her in front of near relatives - Deceased was also beaten when she tried the appellant to stop his illicit relationship with other ladies - It is proved that the deceased was subjected to cruelty by the appellant within the meaning of Section 498-A. (Para 18)

ख. दण्ड संहिता (1860 का 45), धारा 498-ए - क्रूरता - अपीलार्थी का मृतक के प्रति व्यवहार आक्रामक था - अपीलार्थी ने उसे करीबी रिश्तेदारों के सामने अपमानित किया और उस पर हमला किया - मृतक को तब भी मारा पीटा गया जब उसने अपीलार्थी को अन्य स्त्रियों से अवैध संबंध से उसे रोकने का प्रयास किया - यह साबित किया गया है कि धारा 498-ए के अर्थात्गत अपीलार्थी द्वारा मृतक के साथ क्रूरता कारित की गई।

Case referred :

AIR 2010 SC 979.

Surendra Singh with Shivam Singh, for the appellant.

Sushila Paliwal, G.A. for the respondent/State.

J U D G M E N T

G.S. SOLANKI, J. :-The appeal has been preferred by appellant being aggrieved by judgment dated 30.11.1995 passed by First Additional Sessions Judge, Murwara (Katni) in S.T. No. 5/88 whereby the appellant has been convicted under section 304-B, 498-A of IPC and sentenced to R.I. for 7 years and R.I. for 2 years & fine of Rs. 2000/- with default stipulation.

2. The prosecution case, in short, is that marriage of appellant Ashok Kumar was solemnized with Rita Bai on the eve of Basant Panchmi in the year 1984. On 27.8.1987 she was admitted in Government Hospital, Katni in burnt condition. Dr. O.P.Shrivastava admitted her and sent a report (Ex.P-4) to the Police Station. During the treatment, she succumbed to the burn injuries. Investigating Officer Surendra Singh (PW-17) prepared Panchnama (Ex.P-17), dead body of deceased was sent for post mortem. Two stoves, a lamp, burnt pieces of Saree, Mangalsutra and match box were seized from the Kitchen, seizure memo (Ex.P-18) was prepared.

3. Technical Officer Dr. Subhash Pathak (PW-7) inspected the spot and prepared report (Ex.P-10). Dr. A.S.Thakur (PW-13) performed autopsy and opined that she died by shock due to extensive burn injuries (98%). He prepared post mortem report (Ex.P-8).

4. After usual investigation, appellant along with the co-accused persons was charge sheeted before Additional Chief Judicial Magistrate, Katni, who committed the case to the Court of Sessions. Additional Sessions Judge, Murwara (Katni) framed the charges under sections 498-A, 304-B of IPC against the appellant and co-accused.

5. The appellant abjured the guilt and pleaded false implication. Dhanna Lal Bakawle (DW-1) was examined as defence witness.

6. On appraisal of evidence on record, learned Additional Sessions Judge, though acquitted the co-accused persons however, appellant has been convicted and sentenced as mentioned hereinabove, hence this appeal.

7. Learned counsel for the appellant has submitted that the trial Court has failed to appreciate the evidence on record in its proper perspective. He has further submitted that during investigation Dhanna Lal Bakawle (DW-1) recorded the dying declaration of deceased in which she specifically stated that she burnt accidentally during preparation of food. Counsel has further

submitted that since dying declaration was recorded without any undue influence, therefore, the trial Court committed illegality in disbelieving the same. He further submitted that there are number of letters written between appellant and family members of deceased but in those letters fact of cruelty or demand of dowry was not mentioned. Counsel has prayed for setting aside the impugned judgment and for acquittal of the accused.

8. Learned counsel for the State has supported the judgment and justified the finding recorded by the trial Court.

9. I have perused the impugned judgment, evidence and other material on record. It is undisputed that deceased died within 7 years of her marriage due to burning. As per prosecution she committed suicide, however, as per defence she burnt accidentally. The trial Court placed reliance on the statements of Dr. Subhash Pathak (PW-7), Dr. Vasudeo (PW-1) and Dr. Ramesh (PW-2) and recorded finding that Rita committed suicide and discarded the evidence regarding dying declaration.

10. On careful scanning of statements of Dr. Vasudeo (PW-1) and Dr. Ramesh (PW-2), it reveals that Dr. Vasudeo is the son of landlord of appellant. It is admitted by Dr. Vasudeo that litigation in relation to eviction matter was fought upto the High Court. He also admitted that two other criminal cases were registered against him on the report of Triveni Bai, mother of appellant. In these circumstances, Vasudeo (PW-1) cannot be said to be an independent witness. Dr. Ramesh (PW-2) neighbour of appellant deposed that on listening hue and cry, he rushed towards the room where Rita was burning. A family member tried to extinguish the fire. Ramkumar, brother-in-law of Rita was saying *Bhabhi tumne yeh kya kar liya ?*

11. From the evidence of aforesaid two witnesses nothing could not deduced except the fact that Dr. Ramesh (PW-2) saw that Rita was burning and a family member tried to extinguish the fire. Dr. Subhash Pathak (PW-7) deposed that he inspected the place of incident on 27.8.1987, which is situated at Sawarkar Ward, Nai Basti, Katni. On his direction seizure was also made. List of seized articles was annexed with his report (Ex.P-10). No doubt Surendra Singh (PW-17) admitted that Dr. Subhash Pathak inspected the place of incident along with him but he specifically deposed that report (Ex.P-10/20) was not prepared before him. It means report was not prepared on the spot and in other words, it was prepared afterwards. It is well established principle of law that report prepared by the Investigating Officer is a

corroborative piece of evidence, that can be used to corroborate the statement of Officer, who prepared it but unfortunately, in the instant case Dr. Subhash Pathak (PW-7) deposed nothing in regard to factual position seen by him at the time of inspection. He simply stated that he inspected the place of incident, some material were seized on his direction and list of the same is annexed to (Ex. P-10). In these circumstance, in my opinion, the trial Court committed illegality in accepting report (Ex.P-10) as a substantive piece of evidence.

12. Dhanna Lal Bakawle (DW-1) deposed that on 29.8.1987 he recorded dying declaration of Rita, who stated that she burnt by stove at the time of preparing the food. In his cross examination, he specifically stated that at the time of recording of dying declaration, none of the family members of Rita were present. Dr. O.P.Shrivastava (PW-3) treated the deceased at the first instance, he deposed in his cross-examination Para-4 that Rita informed him that she burnt at the time of preparing the food due to flaring up of stove. When he asked her regarding smell of Kerosene, she stated that a Chimti was fallen on her at the time when someone was covering her by blankete. Though trial Court discarded this part of the evidence on the basis of other circumstances, but trial Court lost sight of the fact that Dr. O.P.Shrivastava is a prosecution witness and prosecution had not declared him hostile and has not challenged the aforesaid part of his testimony, thus, this part of the evidence is binding on the prosecution as held by the Apex Court in *Javed Masud and another Vs. State of Rajasthan* - AIR 2010 SC 979.

13. On careful scrutiny of statement of Dr. O.P.Shrivastava, it reveals that he wrote on Tehrir (Ex.P-5) that dying declaration of injured be recorded. Dying declaration of deceased is (Ex.P-6). Since Dhanna Lal Bakawle (DW-1), Nayab Tehsildar and Dr. O.P.Shrivastava, are the Government Servant and are independent witnesses, nothing could be brought out in their cross examination as to disbelieve them, thus I am of the view that the trial Court committed illegality in not placing the reliance on the testimony of aforesaid witnesses. In my opinion, from the evidence of aforesaid witnesses, the only inference which can be drawn is that deceased died accidentally due to burning and prosecution has failed to prove the fact that Rita committed suicide.

14. Now coming to the question whether deceased was subjected to cruelty or harassment by appellant in connection with demand of dowry; Smt. Sushila Tiwari (PW-9), mother of deceased deposed that when Rita came second time to her parental house, she told that her husband, mother in law and brother

in law asked her to tell her parents to transfer the land and house on the husband of Rita, other wise they would be killed. Kumad Tiwari (PW-10) deposed nothing regarding demand of dowry. Sheela (PW-12) sister in law of deceased also stated that when she was returning with Rita from Katni, then appellant told Rita to tell her father to transfer the land and house on his name otherwise he will be killed by him, in cross-examination. She further stated that appellant Ashok wanted a share in the property of father of deceased Rita. Suresh (PW-15), brother of deceased deposed nothing about demand of land, he only deposed about the omnibus statement for demand of dowry. Ashok Kumar (PW-14) deposed nothing about demand of dowry.

15. I have gone through the communications (Ex.D-4 to D-13) written to Ashok by deceased Rita, her brother in law and other family members, but in none of these letters fact of demand of dowry was found place. On careful scrutiny of the aforesaid evidence on record, it reveals that appellant occasionally expressed his desire to get the share in the property of father of deceased Rita. Except this fact, there is only omnibus statement regarding demand of dowry, in these circumstances fact of demand of dowry cannot be said to be proved.

16. As discussed above that Rita died accidental death, hence provision of section 306 cannot be invoked in this case.

17. Coming to the question of harassment of Rita within the meaning of Section 498-A of IPC committed by the appellant; Kumud (PW-10) and Sheela Tiwari (PW-12), sister in law of deceased stated that at the time of marriage of younger sister of Rita when Rita was at her parental house, appellant abused her on the point of preparation of tea and also assaulted her. She was saved by Kumud (PW-10). It also reveals from the evidence of Kumud (PW-10) that Rita told her regarding illicit relations of appellant with Anju and Shobha. When Rita tried to stop this relationship, appellant used to beat her. This fact finds further corroboration from the evidence of Meenaxi (PW-11), friend of deceased Rita. She deposed that Rita wrote a letter (Ex.P-12) to her and told her that her husband used to harass and beat her. On perusal of (Ex.P-12), it reveals that deceased was nervous due to misbehaviour and harassment of appellant. Aforesaid evidence also finds support from the evidence of Suresh Kumar, brother of deceased.

18. In these circumstances, it is proved on record that behaviour of appellant with deceased Rita was aggressive and appellant humiliated and assaulted her

in front of near relatives like her sister in laws. It is also proved on record that deceased suspected the appellant and tried to stop his illicit relationships with other ladies; then also she was beaten by the appellant, thus it is proved on record that deceased was subjected to cruelty by appellant within the meaning of Section 498-A of IPC.

19. Learned counsel for the appellant has alternatively submitted that appellant remained in jail for about 1 year and 10 days, ends of justice would be met if he is sentenced for the period already undergone and fine.

20. The incident took place in the year 1987, 24 years have lapsed by now, in the facts and circumstances of the case, in my opinion, the ends of justice would be met if appellant is sentenced for the period already undergone and fine of Rs. 5000/-.

21. In the result, the appeal is partly allowed. Conviction of the appellant recorded under section 304-B of IPC is liable to be set aside, same is hereby set aside. Appellant is acquitted to the charges under section 304-B of IPC, however, conviction of the appellant under section 498-A of IPC is hereby affirmed. Sentence recorded by the trial Court is reduced to the period already undergone i.e. 1 year and 10 days and fine of Rs. 5000/-, in default of payment of fine he has to undergo further S.I. for one month.

22. Appellant is on bail, his bail bond and surety bond stand discharged. He is directed to deposit the fine amount within four months from today before the concerned trial Court.

Appeal partly allowed.

**I.L.R. [2011] M. P., 2537
APPELLATE CRIMINAL**

Before Mr. Justice Rakesh Saxena & Mr. Justice M.A. Siddiqui
Cr.A.No. 2295/1998 (Jabalpur) decided on 22 July, 2011

RAMNARAYAN

Vs.

STATE OF M.P.

....Appellant

...Respondent

A. Prevention of Corruption Act (2 of 1947), Section 5(1)(d)/5(2), Prevention of Corruption Act (49 of 1988), Section 13(1)(d)/13(2), Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Error in framing of charge - Offence was committed on 15.1.1988 whereas

Act, 1988 came into force on 12.9.1988 - Charges were framed under Section 13(1)(d)/13(2) of Act, 1988 instead of 5(1)(d)/5(2) of Act, 1947 - Unless the convict is able to establish that the effect of omission of framing charge caused real prejudice to him, that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities - No prejudice is caused to appellant which could have rendered the conviction vitiated. (Para 10)

क. भ्रष्टाचार निवारण अधिनियम (1947 का 2), धारा 5(1)(डी)/5(2), भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी)/13(2), दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 - आरोप विरचित करने में त्रुटि - अपराध 15.1.1988 को कारित किया गया, जबकि अधिनियम, 1988 12.9.1988 से लागू हुआ - अधिनियम, 1947 की धारा 5(1)(डी)/5(2) की बजाए अधिनियम, 1988 की धारा 13(1)(डी)/13(2) के अंतर्गत आरोप विरचित किये गये - जब तक अपराधी यह स्थापित नहीं कर पाता कि आरोपों को विरचित करने के लोप के प्रभाव से उसे वास्तविक हानि कारित हुई है, यह कि उसे सूचित नहीं किया गया कि उसके विरुद्ध वास्तविक प्रकरण क्या है और यह कि वह उचित रूप से अपना बचाव नहीं कर सका, मात्र तकनीकीयों पर हस्तक्षेप अपेक्षित नहीं - अपीलार्थी को कोई हानि कारित नहीं हुई है जो दोषसिद्धि को दूषित कर देती।

B. *Prevention of Corruption Act (2 of 1947), Section 5(1)(d)/5(2), Burden of Proof* - Once it is held that money is found to have been passed to Public Servant, the burden is on Public Servant to establish that it was not by way of illegal gratification - If the initial burden is discharged by prosecution, it has to be presumed that he accepted the money as illegal gratification - However, where the accused offers an explanation for receipt of the alleged amount, the question would arise that whether such explanation can be said to have been established - Accused is not required to establish the defence by proving the same beyond reasonable doubt like to establish his defence by proving the same beyond reasonable doubt like prosecution, but can establish the same even by preponderance of probabilities. (Para 22)

ख. भ्रष्टाचार निवारण अधिनियम (1947 का 2), धारा 5(1)(डी)/5(2) - सबूत का भार - एक बार जब यह धारणा की जाती है कि रकम लोक सेवक को दी जाना पाया गया है, यह स्थापित करने का भार लोक सेवक पर होगा कि वह अवैध परितोषण के रूप में नहीं थी - यदि प्रारंभिक भार का निर्वाहन अभियोजन द्वारा किया गया है, यह धारणा करनी होगी कि उसने अवैध परितोषण के रूप में रकम स्वीकार की है - किन्तु जहां अभियुक्त अभिकथित रकम की प्राप्ति के लिए स्पष्टीकरण प्रस्तुत करता है, तब यह

प्रश्न उत्पन्न होगा कि क्या ऐसे स्पष्टीकरण का साबित हो जाना कहा जा सकता है — अभियुक्त से अभियोजन जैसी अपेक्षा नहीं कि वह युक्तियुक्त संदेह से परे साबित कर बचाव स्थापित करे, परन्तु अधिसंभाव्यताओं की प्रबलता द्वारा भी उसे स्थापित किया जा सकता है।

C. Prevention of Corruption Act (2 of 1947), Section 5(1)(d)/5(2) -Sentence - Offence is alleged to have been committed about 22 years back - Appellant is aged about 67 years of age - He has already lost his job - Sentence is reduced to 3 months R.I. (Para 24)

ग. भ्रष्टाचार निवारण अधिनियम (1947 का 2), धारा 5(1)(डी)/5(2) — दण्डादेश — अपराध करीब 22 वर्ष पूर्व घटित होना अभिकथित है — अपीलार्थी की आयु करीबन 67 वर्ष है — वह पहले ही अपनी नौकरी खो चुका है — दण्डादेश 3 माह के कठोर कारावास तक घटाया गया।

Cases referred:

AIR 1956 SC 116, AIR 1956 SC 575, (1969) 2 SCC 385, AIR 1970 SC 1636, (1989) 3 SCC 166, (1998) 6 SCC 554, (2003) 1 SCC 217, (2008) 14 SCC 94, (2009) 7 SCC 198, (2010) 10 SCC 130, (2010) 10 SCC 259, (2011) 2 SCC 83, (1995) 3 SCC 567, (2006) 12 SCC 277.

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

Aditya Adhikari, Spl. PP for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by **RAKESH SAKSENA, J.** :—Appellant has filed this appeal against the judgment dated 23.9.1998, passed by Special Judge, Lokayukta, Jabalpur, in Special Criminal Case No.7/1993, convicting the appellant 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 six months with fine of Rs.500/- and rigorous imprisonment one year with fine of Rs.500/-, on each count respectively.

2. According to prosecution, at the relevant time i.e. on 25.1.1988, appellant was posted as Reader in the Court of Naib Tahsildar, Badwara. A case under Section 107, 116 of the Indian Penal Code was pending against the complainant Namai (PW-1) in the Court of Tahsildar, Badwara. It is said that appellant demanded Rs.50/- from the complainant for dropping the said proceedings against him. He asked him to bring Rs.50/- on the next date of hearing i.e. on 25.1.1988. Being aggrieved, complainant went to the office of

Special Police Establishment, Jabalpur Division, and submitted a written complaint (Ex.P/1) to the Superintendent of Police (Lokayukta). A trap was arranged and in the presence of Dy. Superintendent of Police and other witnesses, appellant was caught in the Tahsil court taking illegal gratification of Rs.50/-. After further investigation and obtaining the requisite sanction from the Government, charge sheet was filed against the appellant in the court of Special Judge.

3. Appellant pleaded false implication. According to him, complainant gave him Rs.50/- currency note for obtaining change, but concocted a false story of giving bribe at the instance of Narayan Prasad and Rohini Prasad.

4. Learned Special Judge framed the charges under Section 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988, and upon trial and appreciation of evidence on record, held the appellant guilty and convicted and sentenced him as mentioned above.

5. It is important to note that the offence in question was committed by the appellant on 25.1.1988 and the Special Police had registered the offence under Section 161 of the Indian Penal Code and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 (for short 1947 Act). On the date of alleged offence Prevention of Corruption Act, 1988 was not in force, yet, the appellant was charged and convicted under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. Admittedly it came into force after 9th September 1988 when it received the assent of the President of India and thereafter published in the Gazette of India (Extraordinary) (Part-II) Sec. 1 dt. 12.9.1988. Therefore, the question, though not raised by appellant, is whether the charges framed against the appellant under Section 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short 1988 Act) and consequent trial are vitiated. At the same time, it is also required to be considered whether a person who committed the offence should merely on this ground go unpunished. Apparently the trial Court committed a mistake in framing the charges under Section 7, 13(1)(d) read with Section 13(2) of the 1988 Act, instead it ought to have framed charges under Section 161 of IPC and Section 5(1)(d) read with Section 5(2) of the 1947 Act.

6. A perusal and comparison of the penal provisions under previous law and present law is necessary. Section 7 of the '1988 Act' and Section 161 of the Indian Penal Code are as under:-

Section 7 of the 1988 Act	Section 161 of the IPC
7. Public servant taking gratification other than legal remuneration in respect of an official act:- Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, Corporation or Government company referred to in clause (c) of Section 2 or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.	161. Public Servant taking gratification other than legal remuneration in respect of official act:- Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, Corporation or Government Company referred to in Section 21 or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Thus, on a bare perusal of the aforesaid two provisions it is apparent that except the provisions pertaining to the quantum of punishment both the provisions are identical. The words 'with imprisonment of either description for a term which extends to three years or with fine or with both' of Section 161 IPC, are replaced by the words 'with imprisonment which shall not be less than six months but which may extend to five years and shall also be liable

to fine' in '1988 Act'. Thus, the maximum sentence for this offence has been raised from three years to five years and minimum sentence of six months has been made compulsory. It is relevant to refer to Article 20(1) of the Constitution of India, which provides as under:

“20(1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”

7. As far as Section 5(1)(d) read with Section 5(2) of the 1947 Act and Section 13(1)(d) read with Section 13(2) of the 1988 Act are concerned, the provisions of Section 5(1)(d) and Section 13(1)(d) are parimateria involving the same ingredients, though in 1988 Act Section 13(1)(d) has been dissected in three parts. It would be relevant to quote Section 13(1)(d) of the 1988 Act and Section 5(1)(d) of the 1947 Act as under:

Section 13(1)(d) of the 1988 Act	Section 5(1)(d) of the 1947 Act
Section 13. Criminal misconduct by a public servant:- (1) A public servant is said to commit the offence of criminal misconduct,- (d) If he, - (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or	Section 5. Criminal misconduct in discharge of official duty:-(1) A public servant is said to commit the offence of criminal misconduct- (d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person valuable thing or pecuniary advantage; or

However, there is substantial difference between the provisions of Section 13(2) of the 1988 Act and Section 5(2) of the 1947 Act, which reads as under:

Section 13(2) of the 1988 Act	Section 5(2) of the 1947 Act
Section 13 (2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.	Section 5 (2) Any public servant who commits criminal misconduct [****] shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine: Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

Under Section 13(2) of the new Act corresponding to Section 5(2) of the old Act the minimum imprisonment of one year prescribed in the old Act is retained and at the same time the discretion given to Special Judge to impose a sentence of imprisonment for less than one year for a special reason has been taken away by omitting the proviso to Section 5(2) of the old Act. Thus, except the provision pertaining to the punishment provided in Section 161 of the IPC, Section 5(2) of the old Act and Section 13(2) of the new Act, the basic ingredients constituting the offence are same. Therefore, the question would be whether the appellant was prejudiced due to omission of framing charge under Section 161 of IPC and Section 5(1)(d) read with Section 5(2) of the 1947 Act.

8. While examining the scope of error or omission in framing charge in case of *Willie (William) Slaney v. The State of M. P.* AIR 1956 SC 116, the Apex Court in paragraphs 20 and 21 held as under:-

“20. Now there is no doubt that a charge forms the foundation of a sessions trial and is a most important step in it. The accused must know and understand what he is being tried and must be told in clear and unambiguous terms: section 271(1): There can be no shirking that or slurring over it, and this must appear on the face of the record: It cannot be established by evidence taken after the trial. But there is, in our opinion, equally no doubt that the Code

expressly deals with this and expressly provides that no error, omission or irregularity in the charge or even total absence of a charge, shall vitiate a trial unless prejudice to the accused is shown. This is repeatedly reiterated in number of sections. The whole question, therefore, is whether the "charge" must be formally reduced to writing and expressed as a ritualistic formula in order to save the trial from the fundamental defect of an incurable illegality or whether the information that is the substance of the matter can be conveyed in other ways. The question is whether we are to grasp at the substance or play hide and seek among the shadow of procedure.

21. First of all, sections 221 to 223 of the Code, which undoubtedly envisage a formal written charge, set out what a charge must contain. A perusal of them reveals the reasons why a charge is required. It must set out the offence with which accused is charged and if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated "as to give the accused 'notice of the matter with which he is charged' ". The charge must also contain must also contain such particular of date, time, place and person "as are 'reasonably' sufficient to give the accused notice of the matter with which he is charged", and section 22 says-

"When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the matter in which the alleged offence was committed 'as will be sufficient for that purpose'".

Further, explaining and examining the effects of error and omission of framing charge, referred to the provisions of Section 225, 226, 227 and 535 of the old Cr.P.C. in *William Slaney's case* (supra), the Apex Court in paragraphs 23, 24, 25 and 26 held as under:

"23. The marginal note to section 225 is headed "Effect of errors". And the section states that-

"No' error in stating either the offence or the particulars retired to be stated in the charge, and 'no' omission to state the offence or those particulars, shall be regarded 'at any stage' of the case as

material, unless the accused was 'in fact' misled by such error or omission 'and' it has occasioned a failure of justice”.

Therefore, when there is a charge and there is either error or omission in it or both and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact (1) the accused has 'in fact' been misled by it 'and' (2) it has occasioned a failure of justice. That, in our opinion, is reasonable plain language.

24. Next, sections 226 and 227 show that errors in a charge, 'and even the total absence of a charge', do not vitiate a trial from the start so as to render it no trial at all as would the absence of sanction under section 197. This is evident because these errors and omissions can be remedied at any time during the course of the trial in the sessions Court (Section 226) or even at the very end of the trial (section 227), and when this is done the trial need not proceed 'de novo' but can go on from the stage at which the alteration was made provided neither side is prejudiced (section 228).

That is conclusive to show that no error or omission in the charge, and not even a total absence of charge, cuts at the root of the trial. The proceedings up to the stage of the alteration, which, as we have seen, can be at the very end of the trial, are not vitiated unless there is prejudice, they are good despite these imperfection. That is impossible when the error is so vital as to cut at the root of the trial. It follows that errors in the charge, and even a total absence of a charge, are not placed in the non-curable class.

25. Next, we have a case in which the error is not observed and corrected during the trial and the accused is convicted. In such a case, the High Court is empowered to direct a retrial, 'only' if, in its opinion the accused was “misled in his defence” (section 232). It is to be observed that this is so whether there was as total absence of a charge or merely an error in it. It is evident that a conviction cannot stand if the defect cuts at the root of the trial, therefore defects even of this nature are not regarded as fatal.

26. From there we proceed go section 535. The marginal note is “Effect of omission to prepare charge”, and the section says-

"No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby."

Here again the language is clear and wide and emphatic. The section summaries what was already indicated in sections 226, 227, 228 and 232."

Similar views were reiterated by the Apex Court in cases of *Jaswant Rai Manilal v. State of Bombay*-AIR 1956 SC 575, *Madanraj Bhandari v. State of Rajasthan*-(1969) 2 SCC 385, *Nani Gopal Mitra v. State of Bihar*-AIR 1970 SC 1636, *State of WB v. Laisal Haque*-(1989) 3 SCC 166, *State of AP v. Thakkidiram Reddy*-(1998) 6 SCC 554, *K. Prema S. Rao v. Yadla Srinivasa Rao*-(2003) 1 SCC 217, *Dinesh Seth v. State (NCT of Delhi)*-(2008) 14 SCC 94, *Sanichar Sahni v. State of Bihar*-(2009) 7 SCC 198, *Main Pal v. State of Haryana*-(2010) 10 SCC 130, *Abdul Sayeed v. State of M.P.* (2010)10 SCC 259 and *S. Ganesan v. Rama Raghuraman*-(2011) 2 SCC 83

9. It is further profitable to quote the proposition of Apex Court laid down in *M.W. Mohiuddin v. State of Maharashtra*-(1995) 3 SCC 567 which directly answers the question cropped up in the instant case:

"9. We may incidentally refer that the learned counsel also sought to contend that the trial of the accused initially commenced under Section 161 IPC read with Section 5(2) of the Prevention of Corruption Act, 1947 but the trial court ultimately convicted the accused under the provisions of the new Act of 1988. Therefore the trial is vitiated. We see no merit in this submission. Initially no doubt on 9-12-1983 the charges were framed under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 but when the trial actually commenced in the year 1990 the then Presiding Judge framed charges under Sections 13(d)(i), (ii) read with Section 13(2) and Section 7 of the Prevention of Corruption Act, 1988 and the trial proceeded. We do not find any objection having been taken in the trial court nor such contention was put forward in the appellate court. Even otherwise we see no prejudice has been caused to the accused since the gravamen of the charges under the relevant provisions of both the Acts in respect of these offences are

the same in substance and at any rate the appellant cannot raise such a contention for the first time in this Court when in fact no prejudice has been caused to him.”

10. Thus, it has been well settled that unless the convict is able to establish that the effect of omission of framing charge caused real prejudice to him, that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be decided on the touchstone of prejudice theory. There is no objection by the appellant and also there is no material on record to indicate in the present case that appellant had been misled by the aforesaid error and the omission in the charges or there was failure of justice. No prejudice appears to have been caused to appellant, which could have rendered the conviction of appellant vitiated. All the particulars about the facts and the ingredients of the offence including the date of commission of offence were clearly explained to appellant. Since the provisions of Section 161 IPC, Section 7 of '1988 Act' and the provisions of Section 5(1)(d) of the '1947 Act' and 13(1)(d) of the '1988 Act' were parimateria, no prejudice can be said to have been caused to appellant by omission of framing the correct charges. It is true under the provisions of Section 161 IPC and Section 5(2) of the 1947 Act the sentence of appellant could have been reduced than minimum as provided in 1988 Act, but that mistake is curable in view of the provisions under Section 464 and 465 of the Code of Criminal Procedure.

11. In view of the above legal position, we hold that the conviction of appellant was not vitiated on account of omission of framing the charge under Section 161 IPC and Section 5(1)(d) read with Section 5(2) of the 1947 Act and instead convicting the appellant under Section 7, 13(1)(d) read with Section 13(2) of the 1988 Act.

12. Now we advert to the facts of the case. Prosecution examined 8 witnesses to substantiate its case whereas appellant examined two witnesses viz. Sonelal Shrivastava (DW-1) and Kodupuri Goswami (DW-2) in his defence.

13. Learned counsel for the appellant submitted that the trial Court misappreciated the evidence on record. There were contradictions and discrepancies in the evidence of complainant Namai (PW-1) and other witnesses. Except the complainant no other shadow witness was produced in the court, who could have proved the conversation between the complainant

and the appellant at the time of trap. At one place complainant said that appellant demanded Rs.100/- whereas at other place in his statement he stated that a demand of Rs.50/- was made. There was also discrepancy in respect of the alleged motive for obtaining the bribe by the appellant. On the other hand, learned Special Public Prosecutor submitted that the evidence of complainant was fully corroborated by the evidence of other witnesses and also by the documentary evidence. Minor discrepancies found in the evidence of the complainant were natural and were because of his being a rustic villager. According to him, the impugned judgment of conviction passed against the appellant was fully justified and did not call for any interference.

14. We have heard the learned counsel for the parties and perused the evidence on record.

15. It is true that there appear some discrepancies in the evidence of complainant Namai in respect of the motive attributed to appellant for demand of illegal gratification, but, on examining his evidence critically, it appears that his evidence is natural and reliable. Written complaint (Ex.P/1) submitted by him reveals that a case under Section 107, 116 Cr.P.C. was pending in the court of Naib Tahsildar, Badwara. The clerk of that court viz. the appellant threatened him to dismiss his case, if he did not give him bribe of Rs.50/- He mentioned in the said complaint that if the proceedings pending against Deen Dayal and Ram Prasad were dropped, his life shall be at peril. He asked him to bring the aforesaid money on the date of the case i.e. on 25.1.1988. Learned counsel for the appellant pointed out that in the statement before the court, the complainant (PW-1), in his chief examination, disclosed that the appellant demanded money from him threatening that if the same was not paid, his case would be dropped, but, in the cross-examination, he deposed that the proceedings under Section 107, 116 Cr.P.C. were pending against him, therefore, he wanted these proceedings to be dropped. He never wanted that the case should go on for years. Thus, there appeared discrepancy, but, on perusal of the evidence of Naib Tahsildar (PW-3), it becomes apparent that there were two proceedings under Section 107, 116 Cr.P.C. viz. 10/1987 and 11/1987. The concerned order sheets of those cases were Ex. P/8 and Ex.P/9. There were two complaints Ex.P/10 and Ex.P/11. These proceedings were instituted by the police on the complaints made by the rival parties. On perusal of the order sheets of these two proceedings it is revealed that one proceeding was instituted by the complainant against Deen Dayal and Ram Prasad whereas in other proceeding he was the opposite party.

Complainant being a rustic villager, it could be presumed that he might not have understood the niceties of procedures of the above proceedings, therefore, at one place he stated that he wished the proceedings to be continued and at other place he stated that he wished the proceedings to be dropped against him. The evidence of complainant (PW-1), when appreciated in the light of the evidence of Naib Tahsildar Shri K.R. Dhurve (PW-3), it can be understood that in relation to these proceedings appellant, the reader of Naib Tahsildar, demanded bribe from him.

16. Complainant (PW-1) in his chief examination before the Court deposed that appellant demanded around Rs.100/- from him, but he told to him that he could pay only Rs.50/-. He went twice to the office of Lokayukta, Jabalpur. A day before the date fixed in the court, he handed over Rs.100/- to vigilance people, which they put in his pocket applying phenolphthalein powder and instructed him to hand over the said money to appellant on his demand and to give signal to the trap party after acceptance of the said money by him. In paragraph-8 of his statement, complainant, however, stated that alongwith the vigilance team when he went to the office of Naib Tahsildar and approached to appellant for giving a date, on the demand of appellant, he gave him Rs.50/- note, which appellant kept in the pocket of his pants. He then went out and gave signal as instructed. Lokayukta team reached there to whom the appellant handed over the said note of Rs.50/-. Inspector M.S. Patel (PW-5) and D.S.P. Hanumant Singh (PW-6) categorically stated that complainant Namai reached to their office on 24.1.1988 and made a complaint against the reader of Naib Tahsildar, Badwara that he was demanding Rs.50/- for dropping proceedings under Section 107,116. Since he did not want to give bribe, he approached to them. He also tendered a complaint (Ex.P/1) to them. DSP Hanumant Singh (PW-6) directed Inspector M.S. Patel to arrange for a trap. He requisitioned independent witness Brij Bhushan Vishwakarma (PW-2), Assistant Engineer, PHE, who read over the complaint (Ex.P/1) to complainant Namai and verified the truthfulness of the same. They obtained Rs.50/- currency note from the complainant and got it initialed by Brij Bhushan Vishwakarma (PW-2) and applied phenolphthalein powder to it. After demonstrating the procedure of trap, they went at the office of Naib Tehsildar, Badwara. Brij Bhushan Vishwakarma (PW-2) narrated the same story. He categorically stated that a Rs.50/- currency note was handed over by Hanumant Singh (PW-6) to him for marking his initial and thereafter all of them proceeded for Katni by Jeep. Necessary instructions about handing over the currency note

were given to complainant. All the aforesaid witnesses stated that when the said currency note was handed over to appellant by the complainant, they caught the appellant and recovered the said note. The fingers and the pocket of pants of appellant were dipped in sodium carbonate solution, which turned pink. Apart from it, the initial of Brij Bhushan Vishwakarma (PW-2) was also found on the said note.

17. From the evidence of aforesaid witnesses it is clearly established that the complainant (PW-1) gave Rs.50/- note to appellant and he accepted the same as illegal gratification for showing favour to him. As far as the discrepancy about the denomination of the note is concerned, though at some places complainant said that it was a Rs.100/- note, but, in para-34 of his statement, he clarified that he did not say in the vigilance office that appellant demanded Rs.100/- from him. He only disclosed that appellant demanded Rs.50/-. If in earlier part of his statement he mentioned that appellant demanded Rs.100/-, it was not correct. This fact finds corroboration from the contents of written complaint (Ex.P/1) submitted by him to Superintendent of Police (Lokayukta) wherein he clearly mentioned that appellant demanded Rs.50/- from him as bribe. Apart from it, from the evidence of trap witnesses viz. Brij Bhushan Vishwakarma (PW-2), M.S. Patel (PW-5) and DSP Hanumant Singh (PW-6) it is clearly established that the complainant disclosed to them that appellant demanded Rs.50/- only.

18. As far as the defence of appellant that complainant asked for change of Rs.50/- from him, therefore, he tendered Rs.50/- note to him is concerned, it does not appear satisfactory and reliable because complainant (PW-1) denied that he handed over Rs.50/- note to appellant for obtaining change. Similarly, Inspector M.S. Patel (PW-5) and DSP Hanumant Singh (PW-6) denied that appellant, at the time of trap, disclosed to them that he accepted the said currency note for giving change to complainant. For the first time, during the statement of Naib Tahsildar Shri K.R. Dhurve (PW-3) an elaborate suggestion was put that complainant asked for change of Rs.50/- from the appellant. Shri K.R. Dhurve (PW-3) deposed that at about 11.00 am on 25.1.1988 he was in his court room. His reader, the appellant, was in veranda. When a sub inspector informed to him that his reader was trapped, he went out in verandah and also signed memorandum. According to him, complainant came to his court and requested for a date in his case on the ground that a death had occurred in his relation. He asked his reader to give a date to him because somebody was ill in his family. On the same day complainant asked for change

of Rs.50/- from the appellant for which he instructed the appellant to give him the change. Appellant gave him Rs.40/- and a Petition Writer viz. Sonelal gave him Rs.10/- and appellant thus obtained Rs.50/- note from him. It appears that this witness Shri K.R. Dhurve had a soft corner for his clerk. The aforesaid suggestion was not put to other witnesses who were examined in the court earlier. It was not suggested to other witnesses that on the request of Naib Tahsildar appellant arranged the change of Rs.50/- and gave the same to complainant. Even otherwise, Shri K.R. Dhurve (PW-3), as stated by him, came to know about the trap only when it was informed to him by an inspector. He admitted that appellant was sitting in the verandah whereas he was sitting inside the court room. He did not inform the above fact to the members of the trap party at the time of occurrence. It is strange that Mr. Dhurve (PW-3) was so kind hearted that he asked the appellant to arrange the change of Rs.50/- for the complainant. It is doubtful that he asked appellant to give a date to the complainant in view of the fact that in one breath he stated that he adjourned the case as he came to know that some death had taken place in the relation of complainant and in other he stated that he asked appellant to adjourn the case as somebody was ill in his family. These facts indicate that the defence put by the appellant was not reliable and was an after thought. It is also significant to note that the defence put by appellant to Brij Bhushan Vishwakarma (PW-2) was that DSP Hanumant Singh (PW-6) forcibly thrust currency note in the pocket of the appellant. This suggestion was not even put to Hanumant Singh himself. In view of the above circumstances, we do not find the evidence of Sonelal Shrivastava (DW-1) and Kodupuri Goswami (DW-2), Clerk and Petition Writer of the Court of Naib Tahsildar Mr. K.R. Dhurve (PW-3), trustworthy.

19. We are unable to accept the submission made by the learned counsel for the appellant that complainant was in the habit of making police reports against the officers. On perusal of document (Ex.D/1) referred to by the learned counsel for the appellant, we find that it is a complaint purported to be made by the complainant to Lokayukta in respect of the conduct of Naib Tahsildar, Badwara, contending that in the trap case of R.N. Yadav, the appellant, he was harassing and intimidating him to resile from his evidence. It is true that complainant in his evidence admitted his signatures on the typed complaint, but he stated that his signatures were obtained on the blank paper by one Rohini Prasad. In our opinion, this document in no way helps appellant.

20. Thus, by the aforesaid evidence, in our opinion, it is established that

appellant demanded and obtained/accepted Rs.50/- from the complainant (PW-1) by way of illegal gratification for showing favour to him in 107,116 Cr.P.C. proceedings. Apart from the prosecution evidence, the fact of acceptance of tainted money by the appellant has not been disputed by the appellant himself, though, according to him, he accepted the same on the request of complainant for giving change of the said money.

21. In case of *B.Noha v. State of Kerala and another*-(2006) 12 SCC 277 the Apex Court held that when it is proved that there was voluntary and conscious acceptance of money by the accused, there is no further burden cast on the prosecution to prove by direct evidence the demand or motive. It has only to be deduced from the facts and circumstances obtained in the particular case. Similarly in *M.W. Mohiuddin v. State of Maharashtra*-(1995) 3 SCC 567 in the context of words 'obtains the pecuniary advantage' in Section 7 and 13(d) of the Prevention of Corruption Act, the Apex Court held that once the accused comes into possession of the tainted money, the only inference is that he accepted the same and thus 'obtained' the pecuniary advantage.

22. It is true that when the money is found to have been passed to public servant, the burden is on public servant to establish that it was not by way of illegal gratification. If this burden is not discharged, it has to be presumed that he accepted the money as illegal gratification. It is also well settled that in a case where accused offers an explanation for receipt of the alleged amount, the question that arises for consideration is whether that explanation can be said to have been established. It is also clear that the accused is not required to establish his defence by proving the same beyond a reasonable doubt like prosecution, but can establish the same even by preponderance of probability

23. Keeping the above settled legal propositions in our mind, when we examine the evidence on record to appreciate the explanation/defence put by the appellant in the case in hand, we find same to be wholly unconvincing and unsatisfactory.

24. In the above circumstances and for the aforesaid reasons, we find that the finding of conviction recorded by the trial Court is just and proper. Accordingly, the conviction of appellant on both the counts is affirmed. However, in view of the special reasons that appellant ought to have been charged under Section 161 of the Indian Penal Code and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947, the accusation against the appellant was that he accepted bribe of Rs.50/- only in

the year 1988, since then about 22 years have elapsed, the appellant has already lost his job, and the fact that appellant now is an old man of about 67 years of age, his sentence on both counts is reduced to rigorous imprisonment for a period of three months. Sentence of fine as awarded by the trial Court is affirmed. Sentences of imprisonment shall run concurrent.

25. Subject to modification in the sentence made hereinabove, this appeal is dismissed.

Appeal dismissed.

I.L.R. [2011] M. P., 2553

APPELLATE CRIMINAL

Before Mrs. Justice Vimla Jain

Cr.A. No. 560/1996 (Jabalpur) decided on 2 August, 2011

RAMBAHADUR SINGH -

...Appellant

Vs.

STATE OF M.P.

...Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) - Main cause of dispute among both the parties was entry of Ox in the field of the appellant/accused - No evidence to show that the appellant intentionally insulted or intimidated the son of complainant with intent to humiliate him because he belonged to 'Baiga' tribe - Ingredients u/s 3(1)(x) of the Act could not be proved - Appellant acquitted. (Paras 15 & 16)

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) - दोनों पक्षकारों के मध्य विवाद का मुख्य कारण, अपीलार्थी/अभियुक्त के खेत में बैल का प्रवेश था - यह दर्शाने के लिए कोई साक्ष्य नहीं कि अपीलार्थी ने शिकायतकर्ता के पुत्र को बैगा जनजाति का सदस्य होने के कारण, अपमानित करने के आशय के साथ उसे साशय अपमानित या अभित्रासित किया - अधिनियम की धारा 3(1)(x) के अंतर्गत घटकों को साबित नहीं किया जा सका है - अपीलार्थी दोषमुक्त।

S.K. Dixit, for the appellant.

V.P. Pandey, G.A. for the respondent/State.

J U D G M E N T

SMT. VIMLA JAIN, J. :-Appellant/accused Ram Bahadur Singh preferred this appeal under Section 374(2) of the Criminal Procedure Code being aggrieved by the judgment dated 12.3.1996 passed by Special Judge,

Shahdol (under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes Prevention of Atrocities) Act, 1989 (hereinafter which shall be referred to as 'Act') in Special Case No. 34/96 whereby appellant/accused has been convicted and sentenced under Section 3(1)(x) of the Act with rigorous imprisonment for six months.

2. Short facts of the case are that on 22.1.1995, complainant Bhole Baiga a resident of Village Tjihariya lodged a report against appellant/accused at Police Station Manpur, District Shahdol that his ox entered in the field of appellant/accused who kept his ox in his possession for about four days. On 19.1.1995 at about 5:00 pm, he came to know that his ox was in possession of appellant/accused. His son Shiv Prasad rushed towards the house of appellant/accused and asked to return his ox. The appellant/accused shouted on him by uttering filthy and abusive language and said that as he did not plough his field, he would not return his ox. The appellant/accused also threatened to shoot him if he makes complaint against him at police station. On a report made by complainant Bhole Baiga on 22.1.1995, the police took cognizance of the matter, seized the ox from the possession of appellant/accused by seizure memo (Ex/P6) and handed over the ox to complainant Bhole Baiga. A spot map (Ex/P5) was prepared.

3. On the basis Of the FIR, investigation was done and a charge-sheet was filed against the appellant under Section 3(1) (x) of the Act.

4. Appellant/accused was charged under Section 3(1)(x) of the Act. He denied the guilt and claimed to be tried, mainly contending that he has been falsely implicated, in the Special Court (SC/ST) for trial.

5. In order to bring home the charges against the appellant, the prosecution examined five witnesses and placed the documents Ex/P1 to Ex/P7 on record. The defence of the appellant is of false implication on the basis of false complaint which was made by complainant Bhole Baiga at Police Station Manpur, District Shahdol.

6. The learned Special Judge on the basis of evidence placed on record held that the appellant did commit the offence punishable under Section 3(1)(x) of the Act and convicted and sentenced him as mentioned above,

7. This appeal has been filed by the appellant assailing the said judgment of conviction and order of sentence.

8. Learned counsel for the appellant submitted that the Court below has erred in convicting the appellant because the prosecution has failed to prove required ingredients of the offence under Section 3(1)(x) of the Act.

9. Shri V.P. Pandey, learned Government Advocate has argued in support of the impugned judgment.

10. Now the question for consideration is that whether the trial Court has committed any illegality in convicting and sentencing the appellant under section 3(1)(x) of the Act.

11. Heard learned counsels for the parties and perused the record.

12. For the sake of convenience, Section 3(1)(x) of the Act, 1989 is extracted below:-

"3. Punishments for offences of atrocities-

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(x) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view:

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine."

13. Shiv Prasad (PW.4) stated that his ox entered in the field of accused Ram Bahadur Singh. He kept the ox in his possession. He asked to return his ox. But the appellant/accused did not return the ox and abused him in the following words:- "मादरचोद भोषड़ी वाले मैं बैल नहीं दूंगा" "ज्यादा करोगे तो गाड़ में गोली मार दूंगा । इसके अलावा आरोपी ने और कुछ नहीं कहा ।"

14. Raju (PW.3) stated that he went to the home of the accused with Shiv Prasad (PW.4). The accused Ram Bahadur Singh abused Shiv Prasad (PW.4). in the following words:- "मादरचोद बैल नहीं छोड़ेगे 500/- रुपये लेकर आओ । और कहा कि हमारे यहां जोतने नहीं आते हो हम बैल नहीं छोड़ेगे और गाड़ में गोली मार देंगे ऐसा भी बोला था और कहा था कि बैल नहीं देंगे ।"

But Bhola Baiga (PW.1) Stated in the trial Court that the accused abused in the following words:- "साले भोषड़ी वाले मादरचोद बैगा बैल लेने आया है और कहा कि गाड़ में गोली मार देंगे ।"

He was the first informant and filed the application (Ex/P1) which contains asd follows:—"मेरा लड़का शिवप्रसाद 19/1/1995 को बैल लेने गया तब राम बहादुर सिंह मादरचोद भोषड़ी वाले तुम लोग मेरा हल नहीं जोतते हो इसलिए मैं बैल नहीं दूंगा बोले कि साले बैगा जाति के हो ।" (Emphasis added by this Court). Thus Bhole Baiga improved and expanded his version in the application (Ex/P1) and in his statement and added the word 'Baiga'. By such improvement and expansion, he tried to attract the provisions of Section 3(1)(x) of the Act reproduced above.

15. On perusal of the said statements of the witnesses, it appears that the main cause of dispute among both the parties is entry of ox in the field of the appellant/accused. Shiv Prasad (PW.4) son of the complainant and Raju (PW.3) who went to the house of accused, which was place of occurrence, did not depose that the accused used the word "Baiga" during his abuse. Therefore, the statement and application (Ex/P1) of Bhole Baiga (PW.1) who was not on the spot, could not be corroborated by both the spot witnesses.

16. It is the duty of the prosecution to prove the ingredients of the offence under Section 3(1)(x) of the Act which is quoted above. In this case, there is no evidence to show that the appellant intentionally insulted or intimidated Shiv Prasad (PW.4) with intent to humiliate him because he belonged to 'Baiga' tribe. Thus, the ingredients under Section 3(1)(x) of the Act could not be proved by the prosecution.

17. For the reasons stated above, I am unable to uphold the conviction of appellant under Section 3(1)(x) of the Act and accordingly his conviction is set aside and he is acquitted from the said charge. Appellant is on bail and his bail bond is discharged.

Order accordingly.

I.L.R. [2011] M. P., 2556

APPELLATE CRIMINAL

Before Mr. Justice S.K. Seth

Cr.A. No. 164/1997 (Indore) decided on 9 August, 2011

DHULIBAI

... Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 315 - Act causing a newly born child to die - No one was examined as eye-witness either to the delivery

of child or alleged act of abandonment attributed to appellant - Opinion of doctor by itself is not sufficient to raise the presumption that the child was delivered by appellant - No evidence on record that the appellant was with child and she actually delivered the baby in question - Trial Court committed error in raising presumption to hold the appellant guilty of the offence - Appeal allowed. (Paras 7, 11, 12 & 13)

दण्ड संहिता (1860 का 45), धारा 315 - कृत्य जिसमें नवजात शिशु की मृत्यु हो गयी - ना तो शिशु के प्रसव के न ही परित्याग के अभिकथित कृत्य जिसे अपीलार्थी के कारण माना जा रहा है, के प्रत्यक्षदर्शी साक्षी के रूप में किसी का परीक्षण नहीं किया गया - चिकित्सक का अभिमत अपने आप में यह उपधारण करने के लिए पर्याप्त नहीं है कि शिशु का प्रसव अपीलार्थी द्वारा किया गया - अभिलेख पर कोई साक्ष्य नहीं कि अपीलार्थी शिशु के साथ थी और प्रसवगत शिशु को उसने वास्तविक रूप से जन्म दिया - अपीलार्थी को अपराध का दोषी होने की धारणा करने के लिए उपधारणा खड़ी करने में विचारण न्यायालय ने भूल की - अपील मंजूर।

A. Siddiqui, for the appellant.

R.S. Bais, Dy. G.A. for the respondent/State.

J U D G M E N T

S.K. SETH, J. :-Appellant is challenging her conviction under Section 315 of the IPC ordered by IInd, Additional Sessions Judge, Shajapur in S.T. No.160 of 1996 whereby she was sentenced to undergo three years' RI and to pay fine of Rs.200/- with default stipulation.

2. Facts leading to present appeal are as under. On 14.11.1995 Siddhnath Patidar, village Patel of Matana gave information on telephone to Police Station Moman-Barodiya that a newly born child was abandoned in the agriculture field of Durgashankar.

3. On the basis of said information FIR (EX.P.6) was registered. Police came to the village and recovered the newly born child vide Ex.P.7. It was suspected that appellant conceived and delivered a child, therefore, she was arrested and subjected to medical examination, which was conducted Dr.(Smt.) Uma Parmar (PW.3). The doctor opined that appellant had delivered a child within 24 hours of the examination. The child was examined by Dr. A.K. Parmar (PW.4), who found that newly born baby was hale and hearty female child born within 24 hours. The report of Dr. A.K. Parmar is Ex.P.3.

4. Taking other usual steps in investigation, Police filed the chargesheet against appellant to stand trial of the offence punishable under Section 315 of the IPC.

5. At trial appellant denied the charges. Learned trial Judge considering prosecution evidence specially the medical evidence held that appellant delivered child and after delivery the child was abandoned to die. Learned trial Judge raised a presumption under Section 114 of the Evidence Act and held the appellant guilty.

6. We have heard rival submissions at length. Perused the material available on record.

7. At the outset, we may mention that no one was examined as eye-witness either to the delivery of child or alleged act of abandonment attributed to appellant after birth of the child. The material prosecution witnesses either turned hostile or of no avail to prosecution as none had deposed in the Court that anybody saw appellant pregnant at any material time.

8. Perusal of Section 315 reveals, that it must contain following essential ingredients:-

i) That the act or omission of the accused must be such that there should be prevention for the child to be born alive; or

ii) It must be caused to die after its birth.

9. Thus, it is clear that if child is allowed to born alive without any such act or omission and killed thereafter then obviously Section 315 is not attracted. In order to bring home the charge under Section 315 of the IPC, the prosecution must prove:

a) that the woman concerned was pregnant;

b) before the child being born the accused did some act with intent to prevent child from being born alive or to cause it to die after its birth;

c) the child was born dead or die after birth;

d) that such death was caused because of the aforesaid act done by the accused;

e) that the act was not done in good faith for the purpose of saving the life of the mother.

10. None of the ingredients as pointed out herein above has been established by the prosecution. Merely the opinion of doctor (Ex.P.2) by itself is not

sufficient to raise the presumption that the child in question was delivered by appellant. Appellant has been involved in the so called offence merely on suspicion and it is well settled that the suspicion howsoever strong may be, cannot substitute the proof necessarily required to hold a person guilty for a criminal offence.

11. As pointed out hereinabove, there is no evidence on record that the appellant was with child and she actually delivered the baby in question. Even the village midwife-Janibai (PW.7) does not say a word that she found appellant pregnant and assisted appellant in the delivery.

12. Considering the facts established on record, we find that the trial Court committed error in raising presumption to hold the appellant guilty of the offence punishable under Section 315 of the IPC, in absence of any evidence to connect the newly born baby with appellant. Thus, we find that the conviction and sentence of appellant is wholly unsustainable in law.

13. As a result, the appeal is allowed, the conviction and sentence awarded to appellant is hereby set aside and she is acquitted of the charge levelled against her.

14. Appellant is on bail. Her bail bond stands discharged. Fine amount, if any, paid by her be refunded to her.

Appeal allowed.

I.L.R. [2011] M. P., 2559
APPELLATE CRIMINAL

Before Mr. Justice Brij Kishore Dube

Cr.A. No. 498/2003 (Gwalior) decided on 9 August, 2011

SHRIPATI @ SHRIPRASAD & anr.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3, Penal Code (45 of 1860), Section 306 - Abetment of suicide - Proof of - No evidence and material available on record to hold that just before the incident, appellants abetted deceased for committing suicide - Held - Trial Court completely mis-directed itself in holding that the appellants are guilty of the offence u/s 306 of IPC.

One year prior to the date of incident, deceased was beaten and harassed by the appellants in her in-laws house and her husband had left her at her parental house, thereafter appellant had come to his in-laws house to take back his wife, but Shantibai refused to send deceased with him - After one month appellants again came to take deceased then the Panchayat was assembled - In the Panchayat witnesses were present - On the assurance given by appellants in the Panchayat that in future deceased will not be harassed by them, then only deceased was sent with appellants. Ten to Twelve days after coming to her (deceased) matrimonial house, she died.

(Paras 13 & 14)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या का दुष्प्रेरण - का सन्त - अभिलेख पर यह धारण करने के लिए कोई साक्ष्य एवं सामग्री उपलब्ध नहीं कि घटना के ठीक पहले, अपीलार्थीगण ने मृतक को आत्महत्या कारित करने के लिए दुष्प्रेरित किया - अभिनिर्धारित - विचारण न्यायालय ने यह धारणा करने में पूर्णतः स्वयं की दिशामूल की कि अपीलार्थीगण आईपीसी की धारा 306 के अंतर्गत अपराध के दोषी हैं।

B. Evidence Act (1 of 1872), Section 113-A -Statutory presumption - Marriage took place more than seven years back - Statutory presumption u/s 113 of the Act was not applicable.

(Para 15)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 113-ए - कानूनी उपधारणा - विवाह सात से अधिक वर्ष पूर्व हुआ - अधिनियम की धारा 113 के अंतर्गत कानूनी उपधारणा लागू नहीं होती।

Cases referred :

AIR 2010 SC 327, (2007) 10 SCC 797.

V.K. Saxena, with Koushal Singh, for the appellants.

B.K. Sharma, PP for the respondent.

J U D G M E N T

BRIJ KISHORE DUBE, J. :-Feeling aggrieved by the judgment of conviction and order of sentence dated 30th August, 2003 passed in Sessions Trial No.119/97 (State of M.P. Vs. Parikshit Kushwaha and two others) by the learned Second Additional Sessions Judge (FTC), Datia, convicting the appellants under Section 306 of IPC and thereby sentencing each of them to suffer four years rigorous imprisonment with fine of Rs.1,000/-, in default, further imprisonment for three months, the appellants have preferred this appeal under Section 374 of the Code of Criminal Procedure, 1973.

2. The prosecution story, in short, may be narrated as under:-

(i) that, Keshkali (since deceased) was the daughter of Matadeen (PW.8) and Shanti Bai (PW.7). Her marriage was solemnized with the appellant No.2-Shyamlal within seven years prior to the date of incident in question. The matrimonial life of Keshkali was not happy as she had been persistently subjected to cruelty and harassment due to non-fulfillment of demand of dowry by her husband Shyamlal, devar Shripati and father-in-law Parikshit. At the relevant point of time, deceased Keshkali along with her husband, devar and father-in-law was residing in Village Targunwa;

(ii) that, on 6.10.1995 co-accused Parikshit went to the police station Unao and informed the police that his daughter-in-law Smt. Keshkali developed acute pain in her stomach and had died. On the basis of this information, merg N0.21/75 under section 174 of Cr.P.C. was registered and the police started investigation into the cause of death. After inquest, the dead body was sent to for postmortem examination. The autopsy was conducted by a team of Doctors comprising Dr.D.K.Sharma (PW.1), Dr. Sulbha Laghate and Dr. Ashok Gupta. They opined that the mode of death of Keshkali was Asphyxia. The cause of death can be given after receipt of viscera chemical examination report;

(iii) that, in the light of the findings of the merg enquiry, S.S. Jadon, the then S.H.O. registered a case (Ex.P.3) on 1.3.1997 under Sections 304-B of IPC and 3/4 of the Dowry Prohibition Act, against the appellant No.2 Shyamlal, his younger brother Shripathi (appellant No.1) and his father Parikshit (acquitted co-accused):

(iv) that, on completion of the investigation a charge-sheet was filed against the appellants and acquitted co-accused Parikshit before the committal Court, which on its turn committed the case to the Court of Sessions, from where it was received by the Trial Court for the trial.

3. The learned Trial Court on the basis of material placed on record framed

charge punishable under section 304-B of IPC and in alternative under Section 302 of IPC against all accused persons including the appellants. The acquitted co-accused and the appellants denied the charge and claimed to be tried. The defence of all the accused persons is of false implication. They pleaded that Keshkali fell sick, therefore, Dr. Rajesh Kumar (PW.14) was summoned for giving treatment to Keshkali however she died, then her father-in-law Parikshit went to the Police Station and informed the incident and the same defence they set forth in their statements recorded under Section 313 of Cr.P.C.

4. To bring home the charge, the prosecution has examined as many as 18 witnesses and placed Ex.P.1 to Ex.P.14 the documents on record. The accused have not examined any witness in their defence.

5. The learned Trial Judge on the basis of the evidence placed on record came to hold that the charge under Section 304-B and under Section 302 of IPC have not been proved against the appellants, an eventually, acquitted them from these charges. However, offence under Section 306 of IPC has been found to be proved against the appellants, as a result of which convicted them under section 306 of IPC and passed the sentence as mentioned hereinabove.

6. The learned Trial Judge on the basis of the same set of evidence came to hold that charge under Section 304-B and Section 302 of IPC had not been proved against the accused Parikshit, and eventually, acquitted him from the charge.

7. The State has not preferred any appeal against the acquittal of the appellants as well as accused Parikshit, in respect of charge mentioned hereinabove, hence, the findings of the learned Trial Court regarding their acquittal became final.

8. Legality and propriety of the impugned judgment of conviction has been challenged by the appellants on the ground of mis-appreciation of the evidence on record. Shri V.K. Saxena, learned Senior Counsel appearing for the appellants has submitted that the learned Trial Court held that the prosecution could not prove that the deceased was married to Shyamlal within seven years of her death. The learned Trial Court further held that the prosecution had failed to prove that the deceased was subjected to cruelty for or in connection with demand of dowry. Further the learned Trial Court

held that the prosecution has also failed to prove that Keshkaii was murdered, and hence, all the accused persons were acquitted from the charge under Sections 304-B and 302 of IPC. It is further submitted by the learned Senior Counsel that there was no cogent evidence to establish the ingredients of offence for which they have been convicted. The learned Trial Court erred in convicting the appellants, hence, this appeal may be allowed and the appellants may be acquitted from the charge.

9. In response, Shri B.K. Sharma, learned Public Prosecutor has argued in support of the impugned judgment and findings arrived at by the learned Trial Court and submitted that the conviction in question is well merited.

10. In order to appreciate the merits of the rival contentions in a proper perspective, it would be necessary to advert to the evidence available on record.

11. The learned Trial Judge after appreciating and marshalling the evidence in detail found that the marriage of the deceased Keshkali was solemnized with the appellant No.2-Shyamlal on 15.5.1987 whereas the deceased had died on 6.10.1995, therefore, it has not been proved that the deceased Keshkali had died within seven years of her marriage. The learned Trial Judge further found that it has also not been proved by the prosecution that the deceased was subjected to cruelty or harassment by her husband or any other relatives of her husband for or in connection with, any demand of dowry and, eventually, acquitted appellants under Section 304-B of IPC. The learned Trial Court further came to the conclusion that prosecution failed to prove that Keshkali was murdered by the appellants, hence, the appellants were acquitted from the charge under Section 302 of IPC for commission of murder of Keshkali.

12. The learned Trial Court in the instant case further came to the conclusion that there is no evidence and material available on record to hold that just before the incident, appellants abetted Keshkali for committing suicide, however, on the basis of evidence of Shanti Bai (PW.7), Matadeen (PW.8) and Ramraja Singh (PW.9) an inference was drawn that appellants abetted Keshkali for committing suicide.

13. According to Shanti Bai (PW.7), Matadeen (PW.8) and Ramraja Singh (PW.9) one year prior to the date of incident, Keshkali was beaten and harassed by the appellants in her in laws house and her husband Shyamlal

had left her at her parental house, thereafter appellant Shyamlal had came to his in-laws house to take back his wife Keshkali, but Shantibal refused to send Keshkali with him. After one month Gulab Singh and Shyamlal again came to take Keshkali then the Panchayat was assembled. In the Panchayat Ramraja, Hariram, Chhatrapal Singh, Ashok Parashar and others were present. On the assurance given by Shyamlal and Gulab Singh in the Panchayat that in future Keshkali will not be harassed by them, then only Keshkali was sent with appellant-Shyamlal. Ten to Twelve days after coming to her (Keshkali's) matrimonial house, she died. Therefore, on the basis of aforesaid evidence, the learned Trial Court has committed a grave mistake in arriving at a conclusion that appellants abetted Keshkali to commit suicide because of those alleged incidents took place much before the date of incident i.e. 6.10.1995.

14. The Hon'ble Apex Court in the case of *Gangula Mohan Reddy Vs. State of Andhra Pradesh*, AIR 2010 SC 327 explained the term "Abetment" as under:

"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 cases decided by this court is clear that in order to convict a person under section 306, I PC 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."

15. Moreover, the statutory presumption under Section 113-A of the Evidence Act was not applicable to the peculiar facts and circumstances of the present case as the marriage took place more than seven years back. In such a situation, the prosecution was required to establish a direct or indirect act of incitement attributed to the appellants [*Kishori Lal Vs. State of M.P.*, (2007) 10 SCC 797 relied on].

16. In my considered view, the learned Trial Court completely misdirected itself in holding that the appellants are guilty of the offence under Section 306

of IPC, by taking recourse to conjunctures and surmises and to explain the glaring infirmities in the prosecution evidence.

17. For the reasons stated hereinabove, this Court is unable to uphold the findings of the learned Trial Court convicting the appellants under section 306 of IPC.

18. Resultantly, this appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence passed by the learned Trial Court is set aside and the appellants are acquitted from the charge under Section 306 of IPC. The appellants are on bail and their bail bonds stand discharged. The amount of fine, if deposited be returned to the appellants.

Appeal allowed.

**I.L.R. [2011] M. P., 2565
APPELLATE CRIMINAL**

Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava
Cr.A. No. 613/2001 (Indore) decided on 17 August, 2011

RAMESH

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Sections 3 & 118 - Child Witness
- Evidence of witness aged 9-10 years is natural and there seems no elements of tutoring about the incident - He gives a clear picture of the incident, which is supported by other prosecution evidence - His statement is also supported by medical evidence - His statement is believable..
(Paras 21, 22 & 23)

क. साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 118 - बालक साक्षी - 9-10 वर्ष की आयु के गवाह की साक्ष्य स्वामाविक है और घटना के बारे में सिखाये जाने के कोई तत्व प्रकट नहीं होते - वह घटना का स्पष्ट चित्रण देता है, जो अन्य अभियोजन साक्ष्य द्वारा समर्थित है - उसका कथन चिकित्सीय साक्ष्य द्वारा भी समर्थित है - उसका कथन विश्वास योग्य है।

B. Evidence Act (1 of 1872), Section 3, Criminal Procedure Code, 1973 (2 of 1974), Section 161 - Discrepancy in police statement and Court statement - Witness (aged 9-10 years) the son of deceased (and one accused) could not give the correct statement of the incident to the police because at that time his maternal grand mother (Nani) was not in

his favour and threatened him that if he will tell this incident to any person, then she will send him to jail - Held - The witness can not be disbelieved on the ground that he did not tell the truth to the Investigating Officer and stated it after a lapse of time in the Court. (Para 21)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161 - पुलिस कथन और न्यायालयीन कथन में अन्तर - साक्षी (9-10 वर्ष की आयु का) मृतक का (तथा एक अभियुक्त) का पुत्र पुलिस को घटना का सही कथन नहीं दे सका क्योंकि उस समय उसकी नानी उसके पक्ष में नहीं थी और उसे धमकाया गया कि यदि उसने यह घटना किसी व्यक्ति को बतायी तो वह उसे जेल भेज देगी - अभिनिर्धारित - साक्षी पर अविश्वास इस आधार पर नहीं किया जा सकता कि उसने जांचकर्ता अधिकारी को सत्य बात नहीं बतायी और समय बीत जाने के पश्चात न्यायालय में बतायी।

C. Penal Code (45 of 1860), Section 302 - Murder - Accused/ appellants (A-1 & A-2) are the wife and her paramour - They allegedly murdered the deceased and threw the dead body in the well situated nearby - Blood stained Axe was recovered from the accused - Blood Stained cloths were recovered from the house - The room of deceased was found recently painted by cow-dung which was having blood stains - Accused/wife (A-1) avoided to search her husband/deceased - Son of deceased gave a full statement of the incident how his father was murdered by A-1 & A-2 and his evidence was found believable - No explanation by A-1 about the cause of death of husband and her silence for not searching or informing to anybody - Homicidal death was also supported by medical evidence and F.S.L. report - Held - Appellants (A-1 & A-2) were responsible for the murder of deceased - Appeals dismissed. (Para 28)

ग. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - अभियुक्त/अपीलार्थीगण (ए-1 व ए-2) पत्नी तथा उसका प्रेमी है - उन्होंने अभिकथित रूप से मृतक की हत्या की तथा पास में स्थित कुएँ में लाश फेंक दी - अभियुक्त से रक्त रंजित कुल्हाड़ी बरामद की गई - घर से रक्त के दाग लगे कपड़े बरामद किये गये - मृतक के कमरे को हाल ही में गोबर द्वारा लिपाई की गई होना पाया गया जिस पर रक्त के दाग थे - अभियुक्त/पत्नी (ए-1) ने अपने पति/मृतक को नहीं तलाशा - मृतक के पुत्र ने घटना का पूर्ण कथन दिया है कि कैसे ए-1 व ए-2 द्वारा उसके पिता की हत्या की गई और उसकी साक्ष्य विश्वसनीय पाई गयी - ए-1 द्वारा पति के मृत्यु के कारण के बारे में और न तलाशने के लिए या किसी को सूचित न करने के लिए उसके मौन के बारे में कोई स्पष्टीकरण नहीं - आपराधिक मानव वध चिकित्सीय साक्ष्य एवं एफ.एस.एल. रिपोर्ट द्वारा

भी समर्थित — अभिनिर्धारित — अपीलार्थीगण (ए-1 व ए-2) मृतक की हत्या के लिए जिम्मेदार थे — अपीलें खारिज।

Cases referred :

AIR 2010 SC 3071, 1995 CRLJ 3613, (2011) 4 SCC 786, 1993 J LJ 200, (1992) 3 SCC 106, (1992) 3 SCC 300.

R.K. Trivedi, for the appellant.

C.R. Karnik, G.A. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by I.S. SHRIVASTAVA, J. :—Both these appeals have been preferred by the appellants being aggrieved by the judgment dated 11.05.2001 passed by the Court of Shri V.P.S.Chouhan, A.S.J., Narsinghgarh, Dist. Rajgarh (Biora) in S.T. No. 123/99 by which the appellants Phool Kuwarbai and Ramesh have been convicted under S. 302 of the I.P.C. and sentenced to life imprisonment along with fine of Rs.2000/- and under S. 201 of the I.P.C. with R.I. for 3 years and fine of Rs.500/- each.

2. According to prosecution case Gowardhan informed at Police Station Kurawar on 3.9.99 that his Jamai Ajabsingh is missing since previous evening and on search he was not found. Hence he went to village Jhadkiya for search. His sister Phool Kuwarbai informed him that shoes of Ajabsingh are kept near well of Kamalsingh Teli. She informed that her husband Ajabsingh after eating food came out at about 1.00 p.m. and has not returned home. Thereafter Gowardhan went with Bapusingh to the well and in the torch light he saw dead body of Ajabsingh was floating in the well. Due to night they could not go to the police station. Hence on 3.9.99 he informed at police station on the basis of which Merg No. 32/99 was registered. During investigation it was found that the place of incident was house of Phool Kuwarbai where blood stains were found on the wall and in the earth and to hide them, relevant portion was painted by cow dung. His beddings - pillow, mat, mattress were also stained with blood. The dead body of Ajabsingh was recovered from the well. It was having an incised wound from right side of the neck to mouth. It was found that deceased was murdered in the house and thereafter his body was thrown into the well to destroy the evidence of murder. Hence FIR was registered against the unknown persons at Crime No. 143/99. During investigation it was found that Ajabsingh was the husband of Phool Kuwarbai and co-accused Ramesh was her paramour. Both murdered Ajabsingh and to

destroy the evidence, threw his dead body into the well and put his shoes near the well to show his drowning in the well. On the information of Ramesh, the used axe was recovered which was sent to FSL with other articles of beddings. They were found containing human blood. After investigation challan was filed. After trial the appellants were convicted and sentenced as mentioned above.

3. It has been argued by the appellants' counsel that they have been falsely implicated in the case. There was no evidence of murder to connect the appellants with the crime. The statements of witnesses were recorded with delay which was not explained. The statement of Lokendra PW.5 son of deceased, was not reliable because it was against his police statement recorded under S. 161 of the Cr.P.C. and his age was only 10 years at the time of incident. This was the case of drowning into the well and the case against appellants was not proved on the basis of evidence produced before the trial court. Hence appeal be allowed.

4. It has been argued by respondent's counsel that the case was proved on the basis of prosecution evidence produced before the trial court. The appellants failed to give plausible explanation about the death of Ajabsingh. Phool Kuwarbai did not inform to any person that her husband was missing and she herself did not try to search him while she was knowing the fact that shoes of Ajabsingh were placed near well. She did not go to the well. The dead body of Ajabsingh was floating in the well as seen by her brother Gowrdhan PW.4. Appellant Ramesh was the paramour of her sister Phool Kuwarbai and used to go to the house of Phool Kuwarbai. With her aid he killed Ajabsingh and on his information the axe was seized. From the FSL report, the axe and seized articles of beddings, were found to contain human blood. Therefore, appellants were rightly convicted for the murder of Ajabsingh. The appeal being devoid of merits, be dismissed accordingly.

5. Considered the arguments. Record of the trial Court perused.

6. From the statement of Dr.K.C. Dube, who conducted postmortem of Ajabsingh on 3.9.99 and gave P.M.report Ex.P.2. It revealed that time of death of Ajabsingh was between 2-3 days from the time of postmortem. He found one incised wound from right angle of mouth to left supra scapular region cutting to and fro right mandible skin, muscels carotid artery and vein of right side of neck, tongue oesophagus trachea and central vertebral column just above cervical protrabonee antemortem and incised wound 5 cm x 1 cm.x skin depth lies horizontally over surface of right shoulder joint. According

to his opinion the death of Ajabsingh was due to shock which was due to severe haemorrhage

7. According to Gowardhan PW.4, his father came to him from Jhadkiya to Pilukhedi at about 5.00 p.m. and told him that his brother-in-law (deceased) is missing. Thereafter he along with Bapusingh reached Jhadkiya from Pilukhedi at about 8.00 p.m. Phool Kuwarbai was at her house. When he asked her as to what happened then she told that shoes of Ajabsingh are near Kundi (well). Then he went with Bapusingh to the well situated near the house of Kamalsingh and saw that near the well nylon shoes of Ajabsingh were kept. In the light of torch he saw the dead body. It was about 9.00 p.m. At about 12.00 p.m. in the night he returned to Pilukhedi with Bapusingh. In the night he was not having means therefore, in the morning he lodged report at police station and thereafter police came with him at Jhadkiya where dead body was taken out from the well. It was dead body of Ajabsingh which was having injury on the neck and scapular region. Panchnama of dead body and spot map were prepared.

8. Kamalsingh PW.1 deposed that he went to Kurawar with Chowkidar Punia and returned at 6.00 p.m. After some time Punia told him that Jamai Saheb (deceased) is lying in the well go and see. Then he said to him to call Patel and other persons. It was night hence no one came there. Chowkidar Punia remained near the well for whole night. In the morning some one informed the police hence police came there. Thereafter brothers of Phool Kuwarbai took out the dead body from the well which was having injuries on the neck and below the ear, prepared the Panchnama and sent the dead body to Narsinghgarh. He further deposed that deceased was living with his wife and children in the house of Bhawarlal. After 2 -3 days of incident, police came and took him to the house of Bhawarlal where police saw beddings – pillow, mattress, quilt were stained with blood. Hence police seized them. He identified the articles A- Mat, B-pillow, C- quilt and D-another quilt (Godadi). The earth and wall where Jamai Saheb (deceased) used to sleep, was painted with cow dung. The seizure memo Ex.P.1 bears his signatures.

9. In the cross-examination this witness replied that Jamai Saheb (deceased) came to his village 5 – 6 months before. Earlier he was living with his father-in-law at village Jhadkiya. In this way from the statement of this witness it reveals that the dead body of deceased was recovered from the well and he was having an injury on his neck and below the ear. From the house of the deceased blood stained articles of beddings A to D were seized and the earthen wall was painted with cow dung.

10. Shri B.L.Sharma PW.7 A.S.I. deposed that in the investigation of Merg No. 32/99 he reached Mohalla Nayapura of Jhadkiya. He called the witnesses by notice Ex.P.4. The dead body of Ajabsingh was lying in the well. It was this witness who inspected the well. The well was 14' in depth in which water was filled upto 10' and 4' it was empty. Diameter of the well was 12'. It was having no boundary wall. 2 ft. away from the well a pair of shoes were kept. The part of neck of deceased was visible. He prepared Panchnama Ex.P.5 and spot map Ex.P.7. Thereafter with the help of witnesses he took out the dead body out of the well and found that the deceased was having a deep axe like wound from neck to face. They were three in numbers. The depth of the wound was about 4 – 5 fingers. The bone of face was cut and scapula was also injured. Thereafter he prepared Panchnama Ex.P.7. On investigation of the house of Ajabsingh he found that the place where Ajabsingh was residing, was painted with cow dung and blood stains were seen on the wall. He prepared map Ex.P.6 and sealed the house and shoes.

11. Shri Dhanpal Singh PW.8 Investigating Officer deposed that on the report of Gowardhan Singh, he registered Merg intimation report Ex.P.9 and thereafter sent B.L.Sharma, A.S.I on the spot. On 4.9.99 Sharma reported him about the incident. Thereafter he went to the village Jhadkiya and inspected the house of the deceased Ajabsingh. It was the witness who found that the wall of the room of Ajabsingh was recently painted by cow dung which was having blood stains. On minor inspection of the clothes mat, quilt and pillow he found blood stains. Thereafter he seized them and prepared seizure memo Ex.P.1. On suspicion he interrogated Ramesh Deshwali. On 13.9.99 he gave information about the recovery of axe. Hence he prepared memo Ex.P.3 and arrested him and prepared arrest memo Ex.P.4 and went to the house of accused Ramesh where he produced the axe which was seized by him and seizure memo Ex.P.11 was preped. The axe was blood stained. Thereafter through S.P. he sent seized blood stained clothes, axe and soil to FSL. FSL report is Ex.P.15. From the FSL report Ex.P.15, it reveals that blood was found on article 'A' -axe, 'B'-soil, 'D' -Chatai, 'E' -pillow and 'F' and 'G'- Godadi (quilts). From the report Ex.P.16 sent by the Serologist and Chemical Examiner to the Government of India, it was found that Iterm 22 Godadi(quilt) and Item 23 Godadi (quilt) (Article 'F' and 'G') were stained with human blood.

12. Therefore, from the evidence it was found that the dead body of deceased Ajabsingh was recovered from the well. He was missing for the last two days. Soil, walls and Articles 'A', 'B', 'D', 'E', 'F' and 'G' were blood stained.

13. The conduct of accused Phool Kuwarbai was suspicious in this case because her husband was missing for last two days but she did not try to search him and inform to any other person that her husband is missing. Her brother and father were in the same village but she did not inform them that her husband is missing.

14. From the statement of Gowardhan PW.4 it reveals that he lodged the report on 3.9.99. One day before his father informed him at about 5.00 p.m. that his brother-in-law (deceased) is missing. At about 8.00 p.m. he came to his sister Phool Kuwarbai. She informed him that shoes are kept near the well. Then he went there and saw the dead body in the well and shoes near the well. Next day he lodged the report. This shows that while Phool Kuwarbai was knowing the fact that shoes of the deceased are placed near the well then she did not go to the well to search her husband or enquire from the neighbours or inform her father, brother that her husband is missing. From the spot map Ex.P.6 it reveals that the house of the deceased where Phool Kuwarbai was living, the well is about 100 feet away hence it was not far. It was very natural when Phool Kuwarbai was knowing that the shoes of her husband are placed near the well, then naturally she could have suspicion and could have searched her husband in the well. From the statement of B.L.Sharma Ex.P.7 it reveals that well was only 4 feet empty. It means that water level was only 4 feet below the ground where dead body was floating. Hence it was visible to all if Phool Kuwarbai had gone to search her husband, then naturally she could have seen dead body of her husband. But she did not go there. This reveals her guilty state of mind. Willfully she was avoiding to search her husband and go to well while she was in the knowledge that shoes of deceased husband were kept near the well.

15. Lokendra PW.5 son of deceased, aged 10 years, deposed that Phool Kuwarbai is his mother and he knows the accused Ramesh present in the Court. On the date of incident at 11.00 p.m. he was sleeping in his house and hearing noise he awoke. He saw that his mother assaulted his father by one axe and accused Ramesh assaulted two times by the axe to his father. Thereafter both the accused persons threw his father into the well and kept shoes of his father near the well. Seeing this he ran away to the school but his mother went there and caught his both the hands and called Ramesh to come soon and to kill him. Thereafter he bit on the hands of his mother and getting rid off from his mother he ran away to the house of his maternal uncle. There he informed his maternal uncle Gowardhan. At that time he was residing with his mother

and father in the house of Ramesh. In the night his maternal uncle Gowardhan came to the well and with the aid of bamboo he saw his father in the well who was dead.

16. About the statement of this witness, it has been argued by the appellants' counsel that he is child witness and his deposition is in the contradiction with the police statement Ex.D.1. In the police statement he does not depose the above incident but he simply has deposed that he was at his house with his mother and father. His father brought small hen and wine to house which was cooked by him. After drink, his father quarrelled with his mother at the same time accused Ramesh came there. He pacified the quarel in between his mother and father and did not allow him and his mother to go to his house. They all lived in the house of Ramesh since last 4 – 5 months. Ramesh used to come to his house. Phool Kuwarbai and Ramesh after pacifying him, slept his father. After two days dead body of his father was found in the well situated near his house. Hence it has been argued that statement of Lokendra PW.5 is not admissible in evidence. Respondent's counsel has argued that in the circumstances of the case it is reliable.

17. Considered the arguments.

18. Lokendra PW.5 is 10 years' boy of deceased. He gave full statement of the incident that how his father was murdered by his mother and Ramesh. In his police statement Ex.D.1 he has revealed the fact tht accused Ramesh used to come to his house from earlier period and thereafter they came to live in his house since last 4 -5 months. On the date of incident when his father and mother quarrelled, Ramesh was there and he pacified the quarel in between his father and mother. In the Court statement he gave the correct history of the incident and in cross-examination he, in para 5, deposed that he did not tell this incident to the police because his maternal grand mother (Nani) was against it and she threatened him that if he tells this fact to the police, then she will send him to jail. But in the night he stated this fact to his maternal uncle Gowardhan. In cross-examination he has deposed that his father was used to drink and Ramesh used to bring wine and provide to his father.

19. The question arises whether the statement of Lokendra PW.5 is acceptable and reliable. So far as reliability of his statement is concerned, it has been held in the case of *State of U.P. Vs. Krishna Master and Ors.* - AIR 2010 SC 3071 that "*There is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate facts in his*

memory witnessed by by him long ago. It would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future."

20. In the case of *Pathan Fatima Vs. State of A.P.* -1995 Cri.L.J. 3613 it has been held that "*It may be indicated here that PW.13 was under the custody of the mother and from her evidence it transpires that she had to suffer great trauma on account of a licentious and mis-guided mother and despite all imploration, she could not persuade her mother to lead dignified life. She had to live with her mother and accused No.1 and it is not at all unlikely that at the initial stage she did not dare making any statement about the said murder but when she was cited as a witness, she wanted to make clean breast of the relevant facts and stated the truth. Her evidence gets corroboration from the depositions of other witnesses and also from the extra-judicial confession proved by PWs. 1,2,3 and 4. We, therefore, do not find any reason to discard the evidence of PW.13."*

21. Similar is the position in this case. Lokendra PW.5 son of deceased, could not give the correct statement of the incident because at that time his maternal grand mother (Nani) was not in his favour and threatened him that if he will tell this incident to any person, then she will send him to jail. At the time of incident, the child was about 9 -10 years old. Naturally he was in fear due to threat of his maternal grand mother. Hence he could not inform the police about the real incident. Secondly he went to his maternal uncle to inform the incident. There were maternal grand mother, maternal father and maternal uncle of the witness; naturally they were not in his favour that their daughter accused Phool Kuwarbai would involve in this case. Therefore, they would not have allowed the child to reveal the true story to police and Gowardhan PW.4 the maternal uncle of child who knew it did not tell to the police the real story. But now when child Lokendra PW.5 came to the Court he dared to state the true version of the prosecution story that how his father was killed which is supported by the medical evidence, statement of Dr.K.C.Dube and the P.M. report Ex.P.2. Therefore, the statement of Lokendra PW.5 gives the true story of the incident and he can not be disbelieved on the ground that he

did not tell the truth to the Investigating Officer and stated it after a lapse of time in the Court. His statement is true, natural and as has been discussed above in the case of *State of UP Vs. Krishna Master* (supra) that *child will never forget those events for the rest of his life*. The age of 9 – 10 years' is the age in which he can understand that what happened and to save him he ran away from the spot to the school and when his mother called his paramour to kill him he saved himself by biting on the hands of his mother and ran away to the house of his maternal uncle. Under the circumstances, statement of Lokendra PW.5 gives a clear picture of the incident which is supported by the other prosecution evidence.

22. In the case of *State of M.P. Vs. Ramesh and another* -(2011) 4 SCC 786 it has been held by the Apex Court that “*Court may rely upon evidence of child witness, in case her deposition inspires confidence of Court and there is no embellishment or improvement*”. It has been further held that “*only in case there is evidence on record to show that a child has been tutored, can court reject her statement partly or fully. An inference as to whether child has been tutored or not, can be drawn from contents of her deposition.*”

23. In this case statement of Lokendra PW.5 is supported by medical evidence. Though in the crossexamination the question has been asked that he has been tutored by his paternal aunt (Bua) but he has replied that it is wrong to say that he was tutored by his paternal aunt (Bua). Statement of child Lokendra PW.5 is very natural and there seems no elements of tutoring about the incident because he ran away from the house and informed his maternal uncle Gowardhan (PW.4) about the incident.

24. Under the circumstances of the case that the accused Phool Kuwarbai did not try to search her husband or ask any other person to search her husband or to inform to her relatives her brother, father which were living in the near place Jhadkiya and specially did not go to the see the well where shoes of her husband were kept, shows that the statement of Lokendra PW.5 is believable and gives true story of incident.

25. In case of *Phundi Vs. State of M.P.* - 1993 J.L.J. 200 it has been held that “*accused is supposed to give plausible explanation of cause of death, failure may be treated the circumstances against him.*”

26. In case of *Dineshilal Vs. State of Maharashtra* (1992) 3 SCC 106 it

has been held that "*when death caused while deceased is in the custody of the accused, accused is obliged to give a plausible explanation for the cause of death in his statement under S. 313 of the Cr.P.C.* In this case no plausible explanation has been given by the accused. Simply they have deposed that blind murder has been foisted on them.

27. In case of *State of U.P. Vs. Dr. Ravindra Prakash Mittal* – (1992) 3 SCC 300 it has been held that "*Presence of accused husband in the company of the deceased wife in the room on the previous night as well as presence of accused in the room next morning, proved motive of murder shown, false pleading of alibi taken by accused instead of giving any plausible explanation for the custodial death, traditional external visible features of strangulation and other internal injuries found, held chain of circumstances lead to the only conclusion of the commission of the offence by the accused.*" Therefore, this appeal being devoid of merits, is liable to be dismissed.

28. In this case the conduct of Phool Kuwarbai and her non-explanation about the cause of death of her husband and her silence for not searching her husband or informing to any other person that her husband is missing while she was knowing the fact that the shoes of her husband were placed near the well but she did not go to search her husband, shows that she was guilty of murder of her husband with the aid of her paramour Ramesh. The axe siezed from the house of Ramesh was found to be stained with human blood. Lokendra PW.5 son of appellant Phool Kuwarbai and deceased gave true version of the incident which is reliable and trustworthy. Therefore, these circumstances lead to the conclusion that appellants Phool Kuwarbai and Ramesh were responsible for the murder of Ajabsingh. Therefore, this appeal is devoid of merits and is liable to be dismissed.

29. Therefore, on the basis of above discussion both the appeals are dismissed accordingly. The appellants are on bail their bail bonds are cancelled. They are directed to surrender before the trial court immediately and to undergo sentence awarded by the trial court.

Appeal dismissed.

I.L.R. [2011] M. P., 2576

APPELLATE CRIMINAL

Before Mr. Justice T.K. Kaushal

Cr.A. No. 1743/2006 (Jabalpur) decided on 18 August, 2011

CHANDRA SHEKHAR PRASAD TIWARI

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8(c) & 20(b)(ii)(c) - Unauthorised possession of 162 Kg of Contraband Ganja - Contraband was seized from a locked pump house in presence of appellant - No witness stated specifically about the exclusive and conscious possession to that pump house - As per record, pump house belonged to one Jitendra who could not be interrogated by the Investigation Officer, though he tried to search him - Held - Exclusive and conscious possession of the pump house in which contraband was kept is not proved with sufficient evidence by prosecution. (Paras 1, 16 & 17)

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8(सी) व 20(बी)(ii)(सी) - 162 किग्रा. विनिषिद्ध गांजे का अनाधिकृत कब्जा - अपीलार्थी की उपस्थिति में तालाबंद पंप हाउस से विनिषिद्ध पदार्थ जब्त किया गया - किसी साक्षी ने विनिर्दिष्ट रूप से उस पंप हाउस के कब्जे के अनन्य एवं मानपूर्वक कब्जे के बारे में कथन नहीं दिये - अभिलेख के अनुसार, पंप हाउस जितेंद्र का था जिसकी अन्वेषण अधिकारी द्वारा पूछताछ नहीं की जा सकी यद्यपि उसने उसे खोजने का प्रयास किया - अभिनिर्धारित - पंप हाउस जिसमें विनिषिद्ध पदार्थ रखा गया था, उसका अनन्य एवं मानपूर्वक कब्जा अभियोजन द्वारा पर्याप्त साक्ष्य से साबित नहीं किया गया।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 52(A) - Non compliance of - To make case of the prosecution credible and free from dents and lacuna, it is desirable rather necessary to make sincere compliance of Section 52(A).

In back drop of insufficient evidence regarding exclusive and conscious possession of the pump house in which contraband was found, its non-production in the trial court makes the case of the prosecution doubtful to the extent that no conviction can be based on such evidence. (Para 21)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52(ए) - का. अनुपालन - अभियोजन के मामले को विश्वसनीय तथा दरारें एवं कमियों

से मुक्त करने के लिए, यह न केवल अपेक्षित है, अपितु आवश्यक है कि धारा 52(ए) का सच्चाई से अनुपालन किया जाये।

Case referred :

AIR 2009 SCC(SUPP) 852,

S.C. Datt with G.P. Patel, for the appellant.

Pushpraj Singh, PL for the respondent/State.

J U D G M E N T

T.K. KAUSHAL, J. :- This appeal has been preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (in short Code) against judgment dated 04/09/2006 passed Special Judge (NDPS) Rewa in Special Case no. 9/2006 convicting the appellant under Section 20(b)(ii) (c) of The Narcotic Drugs & Psychotropic Substances Act, 1985 (in short NDPS Act) for having unauthorized possession of 162 Kg of contraband Ganja in contravention of the provisions of Section 8(c) of the NDPS Act and sentenced to 10 years R.I. and with Rs.1 lakh fine, in default, imprisonment of 1 year R.I.

2. Facts, in short, are that on 30/01/2006 A.P. Singh, Sub Inspector (PW-6) on receiving information from reliable sources regarding illegal possession of contraband, having prepared Panchnama Ex.P-17, along with witnesses and police party proceeded towards the Village-Bhaluha, within the ambit of Police Station- Raipur Karchuliyan, District- Rewa, reached at pump house of the appellant, served a notice Ex.P-3 under Section 50 of the NDPS Act, on him giving the appellant option of search to be taken before Gazetted Officer or Magistrate. Prior to this, co-accused Rajnish Pandey could manage to run away and proceedings continued in presence of appellant only. Vide Ex.P-4, appellant offered his consent for search by the police party. Police party also gave search to the effect that they do not have any contraband with them and prepared Panchnama Ex.P-5. In presence of the punch witnesses, lock of the pump house was opened. In 11 gunny bags, covered by hard wooden bed (Takhata), contraband Ganja 1 quantal 62 kg was found. Panchnama Ex.P-9 was prepared. Seizure Memo Ex.P-10 was also prepared. Physical test of contraband was conducted on the basis of personal experience by appearance, smell, and fumes and Panchnama Ex.P-11 was prepared. Panchnama Ex.P-12 was prepared regarding weight measurement and samples. Spot Map Ex.P-13 was prepared. Vide Ex.P-14 Police arrested the appellant and appellant was taken to police station.

3. At police station-Police Station- Raipur Karchuliyan, District- Rewa, at crime no.26/2006 a case was registered under Section 20 (B) of NDPS Act against the appellant and one co-accused. In support of the possession and title of the pump house of the appellant, Naksha Trace Ex.P-14, Khasra Entries Ex.P-15 and the report Ex.P-16 were obtained from Patwari (PW-5). Contraband was brought to police station and was deposited in Malkhana vide Roznamcha entry Ex.P-27. Sample of contraband was sent to Forensic Science Laboratory, Sagar for examination. Vide F.S.L report Ex.P-21 seized contraband was found to be Cannabis Ganja.

4. Completing investigation, citing 8 witnesses, police submitted charge sheet under Section 20(B) of NDPS Act, against the appellant and another. Charge under Section 8(c) and Section 20(B) (ii) (c) of NDPS Act was framed on the appellant. Appellant abjured his guilt. To substantiate case of the prosecution, statements of Surendra Singh, Punch witness (PW-1), Babulal, Punch witness (PW-2), Rajkumar Pandey (PW-3), Brijendra Kumar Singh, Constable (PW-4), Yadendra Mani Tripathi, Patwari (PW-5), Aditya Pratap Singh, Sub Inspector (PW-6), Triveni Singh, Head Constable (PW-7), Rajkumar Mishra, Sub Inspector (PW-8), Loknath Dwivedi, Head Constable (PW-9), and Amrit Lal Gupta, Clerk, Office of Registrar (PW-10) were recorded. Defence of the appellant in the Trial Court was that of false implication. Ownership and possession of the pump house was that of one Jitendra Sharma. Police extended undue benefit to him and falsely implicated appellant in his place in the matter. To substantiate aforesaid defence, statements of Ram Khilawan Chaudhari (DW-1), Sitaram Kol (DW-2) and Upendra Kumar Dwivedi (DW-3) were recorded.

5. After appreciating aforesaid evidence, Trial Court found charge proved against appellant and convicted and sentenced him as above.

6. This appeal has been preferred against the judgment on the grounds that no independent punch witness supported the case of the prosecution. There is no reliable independent evidence to show the possession and ownership of contraband of the appellant rather it belonged to Jitendra Sharma, who was not even interrogated by the police. Non-compliance of the mandatory provisions of Sections 42, 50, 52, 55, and 57 of the NDPS Act caused great prejudice to the appellant. Conviction and sentence is bad in law. On the other hand, learned Panel Lawyer for the State, supported the findings of conviction and sentence and supported that offence has been proved against the appellant beyond reasonable doubt.

7. Learned Counsel for the appellant submitted that exclusive and conscious possession of the pump house has not been proved by the prosecution whereas discharging his burden sufficient evidence has been produced to show the possession of pump house to be of Jitendra Sharma.

8. Surendra Singh (PW-1) stated that while he reached on the spot he saw pump house opened. Police Inspector called appellant and asked about the possession of ganja then appellant had denied his possession. This witness has been declared hostile. He did not know to whom the ownership and possession of the pump house belong. He saw 11 gunny bags ganja in open field adjoining the pump house. Police collected it from the field itself.

9. Babulal (PW-2) was also declared hostile and has denied the entire proceedings.

10. Yadvendra Mani Tripathi, Patwari (PW-5) stated that he prepared Site Map Ex.P-13 showing pump house of appellant in it. In report Ex.P-16, submitted by him it is stated that aforesaid pump house was situated on Khasara no. 537 and Jitendra Kumar recorded as Bhoomiswami on it. This land was exchanged by appellant in the year 2002, and possession of this land was obtained by the appellant from Jitendra Sharma and pump house was constructed by the appellant. On elaborate cross examination, it is revealed that pump house was constructed on the land situated on adjoining survey no. 536 and 537. As per record land of pump house belongs to Jitendra.

11. Aditya Pratap Singh, Sub Inspector (PW-6) stated that as per revenue record pump house is constructed on the land of Jitendra. He did not interrogate as to in whose name electricity connection is obtained in the pump house. Jitendra was not interrogated by him in the matter, though he tried to search him.

12. Rajkumar Mishra, Sub Inspector (PW-8) conducted later part of the investigation and submitted charge sheet in the trial court, he did not take care to interrogate Jitendra Sharma in order to establish exclusive and conscious possession of the pump house. It is strange and hopeless that in such a small village in respect of seizure of such a huge quantity of contraband registered owner of the land of pump house was not traced and touched by any of the Investigating Officer. Rather they completed the proceeding against an easy target, the old man who could not escape from the spot.

13. Amrit Lal Gupta, Clerk, (PW-10) stated that vide Ex.P-29, on 25/09/2001,

exchange deed between Jitendra Kumar and appellant executed, but he did not know who was in actual possession of the land exchanged in the documents.

14. Ram Khilawan Chaudhari (DW-1) and Sitaram Kol (DW-2) both stated that they worked as labourer in construction of the pump house by Jitendra Sharma.

15. Upendra Kumar Dwivedi (DW-3) punch witnesses of exchange deed Ex.P-29 stated that he never participated in the execution of the deed. Pump house constructed in the land of Jitendra Sharma.

16. Trial Court placed entire reliance on exchange deed Ex.P-29 to hold the exclusive and conscious possession of the pump house of the appellant. Whereas, as discussed above, not a single witness stated specifically about the exclusive and conscious possession to that pump house. Even prosecution witnesses themselves like Yadvendra Mani Tripathi, Patwari (PW-5) and Aditya Pratap Singh, Sub Inspector (PW-6) have clearly stated the ownership of the land on which pump house was constructed to be of one Jitendra Sharma. In such a situation, investigation can be said to be transparent and reliable only when the proper interrogation would have been made with Jitendra Sharma also. If not as accused, at least, as witness he should have come before the investigation agency or before the Court. Knowing well right from the beginning that pump house constructed in the land whose ownership is with one Jitendra Sharma, there is no reason for Investigating Officer to not to call him as witness before him. Appellant was caught on the spot he was an old person could not manage to run away.

17. Exchange deed Ex.P-29 was ever acted upon by the parties to the documents is still doubtful. Appreciation of the evidence of the Trial Court in this respect seem to be not correct and balanced. For conducting the proceedings in respect of such a huge quantity of contraband, basic precaution and awareness is expected from the prosecution. It was not very difficult for the prosecution to collect some more reliable evidence in respect of exclusive and conscious possession of the pump house. Hence evidence in respect of exclusive and conscious possession of the pump house in which contraband was kept is not proved with sufficient evidence by prosecution.

18. Learned Counsel for the appellant placed reliance on AIR 2009 SC (Supp) 852 (*Noor Aga Vs. State of Punjab & anr*) and submitted that contraband was never produced before the Trial Court during the trial. It has caused great prejudice to the appellant.

19. In view of the evidence of Aditya Pratap Singh, Sub Inspector (PW-6) that two samples of 50 gms Cannabis from each gunny bag was taken and after taking weight on scale 11 gunny bags are also packed and sealed. Aforesaid contraband, was taken to the police station and was deposited in the Malkhana. Brijendra Kumar Singh, Constable (PW-4) stated that he took 22 packets of cannabis to F.S.L. Sagar. Aditya Pratap Singh (PW-6) stated F.S.L report Ex.P-21 was received and was produced in the trial court. Record of the Trial Court reveals that contraband or its samples was never produced in the Court. It's seizure and further handling of the contraband has been done in a very casual manner.

20. According to the provisions of Section 52(A) of the NDPS Act, in order to establish the reliability of the prosecution it is desirable and rather necessary to produce the contraband before the trial court. In case of bulk quantity even samples can be produced or even photographs of such bulk contraband should be produced before the trial court.

21. To make case of the prosecution credible and free from dents and lacuna, it becomes desirable rather necessary to make sincere compliance of Section 52(A) of the NDPS Act by the prosecution. Taking cumulative view of the evidence i.e non sincere effort of the prosecution agency regarding the collection of evidence of exclusive and conscious possession of the appellant of contraband, this lapse becomes fatal in the matter of such huge quantity of contraband, proof of quantity is equally important for the purpose of deciding the case. It is more a question of awareness and sincere effort regarding compliance of provisions of NDPS Act by the prosecution. In back drop of insufficient evidence regarding exclusive and conscious possession of the pump house in which contraband was found, it's non-production in the trial court makes the case of the prosecution doubtful to the extent that no conviction can be based on such evidence.

22. As discussed above, the way investigating was conducted, does not inspire confidence. For want of proof of exclusive and conscious possession of the contraband of the appellant and non-compliance of the provisions of Section 52(A) of NDPS Act, and non-production of the contraband in the trial court, appeal deserves to be allowed.

23. Conviction and sentence of the appellant is set aside. Appellant shall be released forthwith if not required in any other case.

Appeal allowed.

I.L.R. [2011] M. P., 2582

APPELLATE CRIMINAL

Before Mr. Justice T.K. Kaushal

Cr.A. No. 2301/1996 (Jabalpur) decided on 6 September, 2011

ROOP SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3 - Sole testimony of prosecutrix - Rape - Prosecutrix sustaining injuries as a result of beating by the appellant and not in order to oppose the act of rape - Her statement is also not believable on certain counts - Held - Evidence of prosecutrix in this case, is not worthy of credence and can not be made basis of conviction for offence.

Prosecutrix was subjected to forcible rape or not can not be ascertained merely on the basis of her statement of the prosecutrix in present case because (i) Prosecutrix had sufficient opportunities to show her opposition on the appellant but she failed to show, (ii) Want of corroboration by medical evidence in respect of commission of rape and dragging marks etc. on her body, (iii) Prosecutrix had a questioned matrimonial background, (iv) She disowned her previous statement regarding co-accused and trial Court extended benefit of doubt to him and acquitted him of all the charges, (v) Prosecutrix took undue interest in roping in the appellant for offences under SC/ST (Prevention of Atrocities) Act - She was rightly disbelieved by the trial Court and acquitted the appellant of the relevant charges.

(Para 17)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - अभियोक्ति की एकमात्र परिसाक्ष्य - बलात्संग - अभियोक्ति को अपीलार्थी द्वारा पीटे जाने के फलस्वरूप क्षतियां कारित हुई और न कि बलात्संग के कृत्य का विरोध करने के कारण - उसका कथन भी कतिपय तथ्यों पर विश्वसनीय नहीं है - अभिनिर्धारित - इस प्रकरण में अभियोक्ति की साक्ष्य विश्वास योग्य नहीं और उसे अपराध के लिए दोषसिद्धी का आधार नहीं बनाया जा सकता।

B. Penal Code (45 of 1860), Section 376 - Rape - FIR lodged after about 12 hours of the incident - Prosecutrix was subjected to forcible rape or not can not be ascertained merely on the basis of her statement - Conviction of the appellant u/s 376 of I.P.C. deserves to be set aside.

(Para 18)

ख. दण्ड संहिता (1860 का 45), धारा 376 - बलात्संग - घटना के करीब 12 घंटे बाद एफआईआर दर्ज की गई - अभियोक्ति के साथ बलपूर्वक बलात्संग किया गया अथवा नहीं, मात्र अभियोक्ति के कथन से सुनिश्चित नहीं किया जा सकता - आईपीसी की धारा 376 के अंतर्गत अपीलार्थी की दोषसिद्धि अपास्त किये जाने योग्य।

Case referred :

1990(1)VOL.1) MPWN 111.

Sankalp Kochar, for the appellant.

Puspraj Singh, PL for the respondent/State.

J U D G M E N T

T.K. KAUSHAL, J. :- This appeal has been preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'the Code') against judgment dated 11.12.1996, passed by Special Judge, Sagar in Special Case No.107/96, convicting the appellant under Sections 376 and 323 of I.P.C. and sentenced him to 3 years R.I. and with fine of Rs.500/- and 500/- respectively.

2. Facts, in short, are that on 31.5.1996 at about 10.00 am while prosecutrix, aged 25 years (PW-3) went to forest along with her niece Meena, aged 12 years (PW-4) for taking leafs was accosted and dragged by appellant and was subjected to rape. Meena (PW-4) rushed back to her house and told the incident to Lakhan Singh, husband of prosecutrix (PW-5). Later on, prosecutrix (PW-3) came back to the house and narrated the incident. At about 9.30 p.m. on the same day, prosecutrix (PW-3) along with her husband Lakhan (PW-5) proceeded to Police Station Banda, District-Sagar. According to prosecution, prosecutrix (PW-3) was assaulted by appellant and acquitted co-accused Lotan Singh, brother of appellant in relation. A report Ex.P/2 was lodged at Police Station Banda by prosecutrix (PW-3). A case at Crime No.175/96 was registered under Sections 376, 323, 34 of the I.P.C. against appellant and another. Prosecutrix was sent for her medical examination to P.H.C. Banda. She was examined by lady Doctor Diwakar (PW-6). Lady Doctor prepared vagina swab slide and collected the clothes of the prosecutrix and handed over to the Police. M.L.C. report Ex.P/7 was prepared. Appellant was arrested on 3.6.1996.

3. After completing investigation, citing 20 witnesses, Police Banda submitted charge sheet in Special Court. Trial Court framed charge under Sections 376 of I.P.C./3(2)(5) of SC/ST (Prevention of Atrocities) Act, 1989 and 323 of I.P.C./3(1)(10) of SC/ST (Prevention of Atrocities) Act, 1989. Appellant abjured guilt.

4. To substantiate the case of prosecution, statements of Dr. Subhash Jain (PW-1), P.N. Yadav S.I. (PW-2), Prosecutrix (PW-3), Meena (PW-4), Lakhan Singh (PW-5), Dr.(Smt.) S.S. Diwakar (PW-6), Munnalal Sen (PW-7), Santosh Singh (PW-8) and Mubarak Ali, Constable, S.I. (PW-9) were recorded.

5. Defence of the appellant in the trial court was that of false implication on account of dispute arose in respect of damage caused by the prosecutrix to hand pump of the brother of the appellant. To substantiate aforesaid defence, statement of Khet Singh (DW-1) was recorded.

6. Appreciating aforesaid evidence, trial Court acquitted the accused persons of the charge under Section 3(i)(x) and 3(ii)(v) of SC/ST (Prevention of Atrocities) Act, 1989 and further acquitted co-accused Lotan Singh of all the charges however convicted the appellant under Sections 376 and 323 of I.P.C. and sentenced as above.

7. This appeal has been preferred challenging the findings of the trial Court on the grounds that appreciation of evidence is not proper. Evidence of prosecution is suffering from material contradictions and omissions. Story forwarded by prosecutrix is absolutely unnatural and unreliable. Being a lady of easy virtue and being of party consenting to inter course, her statement cannot be relied upon. Trial Court committed serious error, by placing reliance on such statement of prosecutrix. For want of corroboration by medical evidence, entire story of prosecution becomes doubtful. On the other hand learned Panel Lawyer supported the findings of trial Court if conviction and sentence both.

8. Prosecutrix (PW-3) stated that she was forcibly caught by the appellant and was dragged. She tried her level best to got up and to run away but she could not do so. Prosecutrix (PW-3) stated in her chief examination that co-accused Lotan Singh did nothing with her and she lodged report against him in the stage of subconsciousness.

9. In para 6 of her statement, she admitted that she was earlier married to Bodhan Singh but he was suffering with mental disorder and was still living with her and now she got married with Lakhan Singh (PW-5).

10. In para 7 of her statement, she stated that she was dragged by the appellant up to about 70-80 fts. Her bangles were also broken. She sustained injury on her writ from the broken bangles. She stated that she was threatened by showing Axe but appellant committed inter course with her for about a period of half an hour and the axe was kept away by the appellant at that time.

11. In para 7 of her statement prosecutrix stated that Meena (PW-4) rushed back to her house and narrated the incident to her husband. While she reached back to her house Lakhan Singh (PW-5) asked her whether there was any such incident done by the appellant with her then she conceded the fact.

12. Learned counsel for the appellant placing reliance on 1990 (1) (Vol. 1) M.P.W.N 111 *Kanchedi Vs. State of M.P.*, submitted that in case of such a grown up lady, having antecedents not clean, regarding her matrimonial life, it is rather impossible for a supple person to apply force on her for committing rape. Statement of prosecutrix hence should not be believed in this case.

13. Meena (PW-4) also stated that sari of prosecutrix was removed by the appellant and both of them were laid down in a culvert. She ran away from the spot and narrated the incident to Lakhan (PW-5).

14. Dr.(Smt.) S.S. Diwakar (PW-6) stated that there had been no definite opinion about the rape or recent intercourse committed on the prosecutrix. In so far as injuries of the prosecutrix are concerned, Dr. Subhash Jain (PW-1) stated there had been four injuries on the person of prosecutrix as follows:-

(i) Complaining pain in left thigh but no visible injury was seen.

(ii) Contusion 5 ½ cm x 2 ½ cm on right thigh on dorsal side.

(ii) Multiple contusions 2 cm to 10-12 cm on the back.

(iv) Abrasion of 3 cm long on the chest.

15. Dr. Subhash Jain (PW-1) stated that he prepared M.L.C. report Ex. P/1 and aforesaid injuries could have been caused by lathi blows also.

16. Taking account of all the evidence, ocular and medical together, it reveals that prosecutrix sustained no injury on her person in order to oppose the act of rape, however she sustained injuries as a result of beating by appellant and acquitted co-accused that too at subsequent stage of the events.

17. F.I.R. Ex.P/2 was lodged by the prosecutrix after about 12 hours of the incident. Prosecutrix was subjected to forcible rape or not cannot be ascertained merely on the basis of statement of the prosecutrix in present case because (i) Prosecutrix had sufficient opportunities to show her opposition on the appellant but she failed to show, (ii) Want of corroboration by medical evidence in respect of commission of rape and dragging marks etc. on her

body, (iii) Prosecutrix had a questioned matrimonial background, (iv) She disowned her previous statement regarding co-accused and trial Court extended benefit of doubt to him and acquitted him of all the charges, (v) Prosecutrix took undue interest in roping in the appellant for offences under SC/ST (Prevention of Atrocities) Act. She was rightly disbelieved by the trial Court and acquitted the appellant of the relevant charges. Evidence of prosecutrix in this case, is not worthy of credence and cannot be made basis of conviction for offence under Section 376 of I.P.C.

18. In view of the aforesaid, conviction of the appellant under Section 376 of I.P.C. deserves to be and is hereby set aside. However, conviction and sentence under Section 323 of I.P.C. deserves to be maintained and requires no interference.

19. As discussed above, appeal is allowed in part. Conviction and Sentence of appellant under Section 376 of IPC is set aside. Conviction and sentence of the appellant under Section 323 of IPC is maintained.

Appeal partly allowed

I.L.R. [2011] M. P., 2586

CIVIL REVISION

Before Mr. Justice Abhay M. Naik

C.R. No. 120/2011 (Indore) decided on 24 August, 2011

GHANSHYAM

...Applicant

Vs.

SUBHASHCHANDRA

...Non-applicant

Accommodation Control Act, M.P. (41 of 1961), Section 23-J(ii) - Landlord - Retired employee of Municipal Corporation is a landlord. Law laid down by the Single Bench in the case of Mohandas (1994(1) MPLJR 259) stands impliedly overruled in view of the observation of Division Bench (1995 MPLJ 21). (Para 8)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23-जे(ii) - भू-स्वामी - नगरपालिका निगम का सेवानिवृत्त कर्मचारी भू-स्वामी है। खंड न्यायपीठ का प्रेक्षण (1995 एमपीएलजे 21) को दृष्टिगत रखते हुए एकल न्यायपीठ द्वारा मोहनदास (1994(1) एमपीएलजेआर 259) में अधिकथित विधि विवक्षित रूप से उलट जाती है।

Cases referred :

1994(1) MPLJR 259, 1995 MPLJ 21.

S.S. Garg, for the applicant.

Harish Joshi, for the non-applicant.

ORDER

ABHAY M. NAIK, J. :- This revision petition has been submitted by the tenant against the order of eviction passed by the Court of Rent Controlling Authority, Indore on 08.04.2011 in Eviction Case No. A-90 (7) 8 / 09-10.

2. Admitted facts of the case are that the revisionist is a tenant of respondent in the suit shop comprised in House No.33 situated in Morsali Gali, Ward No.9, Indore, on rent at the rate of Rs.530/- per month. Respondent has been retired from the services of Municipal Corporation, Indore on 30.06.2004 as Head Clerk. Eviction of tenant has been claimed by the respondent for the bona fide need of his major son, namely, Kamlesh to start the business of jewelery. Landlord/respondent submitted an application for eviction under Section 23-A (b) of the MP Accommodation Control Act, 1961 (hereinafter referred to as the Act) with the allegations that he and/or Kamlesh does not have any other alternative vacant nonresidential accommodation for the purpose of business in the city of Indore. The application for eviction was opposed on the ground that Kamlesh is running a cosmetic business with his wife in shop situated in Bakhtawar Ram Nagar, Indore. It is further stated that the landlord/respondent has got vacated various other premises from time to time and has re-let them.

3. Learned Rent Controlling Authority, after recording the evidence, has held that revisionist is a tenant of the landlord/respondent in the suit shop. He has further held that the landlord/respondent bona fide needs suit shop for his son Kamlesh's business. It has also been found that there is no other alternative non-residential suitable accommodation available with the landlord or Kamlesh. Accordingly, the application for eviction stood allowed by the impugned order dated 08.04.2011; hence, this revision.

4. Only point advanced before this Court is that the landlord/respondent is a retiree from the Municipal Corporation, Indore, and therefore, he does not fall within the category of landlords specified in Section 23-J of the Act. Reliance for this purpose has been placed on the decision of this Court in the case of *Mohan Das v. Deven Das* [1994 (1) MLJR 259].

5. Learned counsel appearing for the landlord/respondent has supported the impugned order.

6. At this juncture, I feel it appropriate to reproduce Section 23-J of the Act, which defines landlord for the purpose of Chapter III-A of the Act: -

"23-J. Definition of landlord for the purposes of Chapter III-

A. For the purposes of this Chapter 'landlord' means a landlord who is -

- (i) a retired servant of any Government including a retired member of Defence Services: or
- (ii) a retired servant of a company owned or controlled either by the Central or State Government; or
- (iii) a widow or a divorced wife; or
- (iv) physically handicapped person; or
- (v) a servant of any Government including a member of defence services who according to his service conditions, is not entitled to Government accommodation on his posting to a place where he owns a house or is entitled to such accommodation only on payment of penal rent on his posting to such a place."

7. Crucial question in this case is whether the 'landlord' falls in Clause (ii), which takes within its sweep a retired servant of a company owned or controlled either by the Central or State Government. The case of *Mohan Das* (supra) was decided by a learned Single Judge of this Court who has held in paragraph 8 that Municipal Corporation employee cannot be said to be government servant and that being so, such employee will not be covered within the definition of Section 23-J of the Act. Obviously, municipal employee cannot be treated as an employee of State Government or Central Government. Question before this Court is whether the landlord in the present case, being a retiree from Municipal Corporation, Indore may be treated as retired servant of a company owned or controlled by the State Government. For this purpose, this Court is required to examine the meaning which is provided to the expression 'company' in Section 23-J (ii) of the Act. This question came up for consideration before Division Bench of this Court in the case of *Ranjit Narayan Haksar v. Surendra Verma* [1995 MPLJ 21]. Learned Division Bench has observed: -

"11. The question for consideration is which is the meaning attributed to the expression 'company' in section 23J (ii) of the Act. A brief reference to the legislative history is instructive. M.P. Accommodation Control Act, 1961 as it originally stood did not contain any special provision for the benefit of any category of landlords. The Act was amended in 1964 introducing section 20A enabling an expeditious or special remedy to members of armed forces of the Union or member of the family of a deceased member of such forces. Section 20AA was introduced in 1981 extending the benefit to the retired Government employees and members of the family of deceased retired Government employees. Sections 20A and 20AA were deleted and Chapter III (a) was introduced without section 23-A (ii) in 1981 making the special benefit available to all categories of landlords. Section 23-J was incorporated in 1985 defining expression 'landlord' for the purpose of the chapter and thereby limiting the benefit only to such specified categories of landlords.

12. The statement of objects and reasons accompanying the amending Bill does not explain the reason for introducing clause (ii) of section 23-J of the Act. Therefore, we shall look at the scheme of the Act and the scheme underlying Chapter IIIA to find out the purpose of the amendment.

13. The general provisions relating to eviction viz. section 12 onwards of the Act serves to restrict the grounds of eviction which can be invoked by a landlord in a suit in a civil Court. The purpose of Chapter IIIA is to provide expeditious remedy to certain categories of landlords on whom restrictions are imposed by section 12 of the Act. This purpose is sought to be achieved by changing the forum and substituting a right of revision to High Court for the right of appeal and second appeal which is otherwise available. Section 23-J specifies certain categories of landlords, namely, a retired servant of any Government including a retired member of defence services, a retired servant of a company owned or controlled either by the Central or State Government, a widow or a divorced wife, physically handicapped person etcetera. It was thought that widows, divorced women and physically handicapped persons should not be driven to the necessity of going through the elaborate procedure

followed in civil Courts and that more expeditious remedy should be available to them. The same view was taken in regard to other categories viz. retired government servants, retired servants of Government owned or controlled company and certain categories of the Government employees. They were or continue to be public servants instruments through which the State acts for public benefit. In the generality of such servants, transfer is an incident of service and this factor may inhibit meritorious candidates entering such services. Meritorious candidates may own buildings or they may construct buildings while in service. If they are to face the prospect of not securing possession of their building at the time of retirement or their posting in places where the buildings are situated, they may render the employment unattractive. The Legislature therefore thought it necessary to give special treatment to landlords of buildings who belong to these special categories.

14. From such legislative perspective, there could not be any discrimination between retired employees of Government owned or controlled companies, or corporation. Of course we are not called upon to decide if section 23-J (ii) if understood as being applicable only to companies incorporated under the Companies Act, 1956 will violate Article 14 of the Constitution. Nevertheless in considering the legislative intent, regard must be had to the equality clause in the Constitution in case of an ambiguity. We sought the assistance of learned counsel in finding the possible reasons for treating retired employees of companies under the Indian Companies Act and statutory corporation differently. The only reason suggested at the bar is that the corporations are more in number and larger in size and have large number of employees and the legislature did not desire to extend the benefit of Chapter IIIA to such a large number of landlords to the detriment of the tenants. This reason is not sound in view of section 23- J (i) which includes the very large number of retired Government employees in the definition of landlord. There is nothing in the language or context of section 23-J (ii) indicating any intention to give a restricted meaning to the expression 'company'. The legislature did not refer to the Companies Act in section 23-J (ii) and did not specifically exclude statutory corporation. The expression 'company' has been used in its general

legal sense and takes in Government owned and controlled statutory Corporations. We hold that retired employee of a Government owned or controlled statutory corporation is a landlord as defined in section 23-J (ii) of the Act."

Shri S.S. Garg, learned counsel appearing for the revisionist contended that the case of *Ranjit* (supra) was in respect of landlord who had retired from the MP State Road Transport Corporation, whereas the case of *Mohan Das* (supra) is in respect of Municipal Employee. Therefore, matter may be referred to a larger bench.

8. This Court is not impressed with this contention because learned Division Bench has clearly concluded that retired employee of Government owned or controlled statutory Corporation is a landlord as defined in Section 23-J (ii) of the Act. Undoubtedly, Municipal Corporation is statutory Corporation on account of its constitution by virtue of Section 7 of the MP Municipal Corporation Act, 1956. Chapter XXXIV of the Act contains various provisions of the State Government for having control on it. Thus, it cannot be denied that the Municipal Corporation is statutory Corporation and is controlled by the State Government. This being so, it is held that retired employee of Municipal Corporation is a landlord as defined in Section 23-J (ii) of the Act and law laid down by the Single Bench in the case of *Mohan Das* (supra) stands impliedly overruled in view of the aforesaid observation of division bench.

9. In the result, I do not find any force in the civil revision, which is hereby dismissed with no order as to costs.

C. c. as per rules.

Revision dismissed.

I.L.R. [2011] M. P., 2591

CRIMINAL REVISION

Before Mr. Justice G.D. Saxena

Cr. Rev. No. 561/2011 (Gwalior) decided on 13 July, 2011

GOVIND

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Juvenile Justice (Care and Protection of Children) Act (56 of

2000), Sections 7 & 49, Juvenile Justice (Care and Protection of Children) Rules 2007, Rule 12 - Determination of age - Sessions Court, after the case is committed to it has the power to make an enquiry and determine the age of the accused if it considers it necessary in the interests of justice or a prayer is made in that behalf. (Para 10)

किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम (2000 का 56), धाराएँ 7 व 49, किशोर न्याय (बालकों की देख-रेख और संरक्षण) नियम 2007, नियम 12 - आयु का निर्धारण - सेशन न्यायालय, को उसे प्रकरण उपार्पित किये जाने के पश्चात जांच करने की और अभियुक्त की आयु निर्धारित करने की शक्ति है यदि वह ऐसा करना न्यायहित में आवश्यक समझता है अथवा इस संबंध में प्रार्थना की जाती है।

Case referred :

AIR 2006 SC 1933.

Rajmani Bansal, 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 is directed against an order dated 13th May 2011 in Criminal Revision No. 21/2011 passed by the Fourth Additional Sessions Judge (Fast Track) Guna, M.P. allowing thereby the revision filed by the State of Madhya Pradesh while setting aside the order passed in Criminal Case No.217/10 dated 23/11/10 of the Judicial Magistrate First Class, Guna and remanding the case to that Court for re-determine the age of the accused after following the procedure laid down in Rule 12(3) of the Juvenile Justice (Care and Protection) Act, 2007.

2. The facts necessary for the disposal of this petition are that a Crime No.217/10 was registered against the accused-petitioner Govind for commission of offence punishable under Sections 302, 452, 147, 148, 149, 323, 324 and 325 of I.P.C. by police station Dharnabda for causing death of one Hukum Singh and injuring persons namely, Geetabai, Ramjane, Bana Sahab Madurn on 22nd October, 2010 at around 9 in the night, in village Kanerachak and after investigation, the accused was taken into custody. During investigation, it was pleaded by the accused that he was a juvenile at the time of commission of offence. On submission by him an application under Section 12 of the said Act, he was sent for medical examination and after getting report about him of juvenile, his case was transmitted to the Juvenile Board vide order dated 23/11/10 for proceeding further in accordance with the provisions. It was this order,

which was challenged by the respondent-State in a revision before the Revisional court. The Revisional court without issuing notice and hearing the accused-petitioner (herein) set aside the finding of its subordinate court and remitted the case back for re-determination of his age. Hence, this revision before this court.

3. The learned Counsel for the petitioner contended that the said order is passed against the provisions of Section 398 of Cr.P.C., as no opportunity of hearing was given to the accused-petitioner before reaching at a conclusion. It is further argued that the learned revisional court did not even think it proper to make an enquiry as contemplated under Section 32 of the Act and straightway set aside the order of the trial court. Hence, the impugned order is patently illegal, arbitrary and deserves to be set aside.

4. On the other hand, the learned Panel Lawyer for the State supported the impugned order and contended that no such illegality has been committed as pointed out by the counsel for the petitioner and the revision deserves dismissal.

5. Needless to add here that the powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Sessions, when the proceeding comes before them in an appeal, revision or otherwise. As regards procedure to be followed by the Magistrate not empowered under the Act reads as is below:-

'7. Procedure to be followed by a Magistrate not empowered under the Act.- (1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile or the child, he shall without any delay record such opinion and forward the juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under Sub-section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it.

It would further be necessary to reproduce Section 49 of the said Act.

Section. 49 :- Presumption and determination of age:-(1) where it appears to a competent authority that person brought before it

under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be.

(2) No order of the competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not juvenile or the child, and the age recorded by the competent authority to- be the age of the person so brought before it shall for the purpose of this Act, be deemed to be the true age of that person.'

6. A plain reading of the aforesaid provisions makes it clear that insofar as a juvenile in conflict with law is concerned, the Juvenile Justice Board has exclusive power to deal with such a juvenile in respect of the proceedings under the said Act. Furthermore, by virtue of Section 7 if a Magistrate who is not empowered to exercise the powers of the Juvenile Justice Board, is of the opinion that a person brought before him is a juvenile then he is required to record such an opinion without delay and forward the juvenile and the record of the proceedings to the competent authority having jurisdiction under the Act. The meaning of this is clear that where any Magistrate who is not functioning as a Juvenile Justice Board feels that a person brought before him is a juvenile he has to record such an opinion and send such juvenile to be dealt with by the competent authority. Section 7(2) provides that after the juvenile has been sent to the competent authority, the latter shall hold the 'inquiry' as if the juvenile or the child had originally been brought before it. This 'inquiry' has reference to the inquiry to be conducted by the Board under Section 14 of the Act and does not have reference to the inquiry for determination of age of a person under Section 49 of the said Act.

7. Going by that principle, if during the trial of a case in a Criminal Court any question of juvenility of any accused is raised before the Court it becomes incumbent upon the court to make a preliminary enquiry in the matter and form an opinion as to whether the person concerned is a juvenile and if the opinion is affirmative in that event the case has to be referred to the Juvenile Court for being dealt with under the Juvenile Justice Act, in which case the Juvenile Court shall make due enquiry under Section 32(1) of the Juvenile

Justice Act about age of the person and record a finding whether the person concerned is a juvenile or not.

8. A reading of the aforesaid extracts makes it clear that it is well within the powers of the Sessions Court to embark upon an inquiry as to the age of a person instead of rejecting the order passed by the trial court.

9. At this juncture, it would be useful to refer the decision of the Apex court in the case of *In the case of Jitendra Ram alias Jitu Vs. State of Jharkhand* (AIR 2006 SC 1933), the Hon. Apex court held :-

"We are, however, not oblivious of the decision of this Court in *Bhola Bhagat v. State of Bihar* [(1997) 8 SCC 720], wherein an obligation has been cast on the court that where such a plea is raised having regard to the beneficial nature of the socially-oriented legislation, the same should be examined with great care. We are, however, of the opinion that the same would not mean that a person who is not entitled to the benefit of the said Act would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit. Each case has to be considered on the basis of the materials brought on records.

The provisions of a beneficial legislation should ordinarily be given effect to. However, we may notice that the appellant is literate. Presumably he attended some school. However, no certificate of his date of birth or any other proof as regard his date of birth is available on records. No other material apart from the estimate of the court has been brought to our notice. In the absence of any material on record, we cannot arrive at a definite conclusion that the appellant as on the date of commission of the offence was a child within the meaning of the said Act.

10. The enunciation of the aforesaid decision goes to indicate that even in the absence of an enquiry under the Act, the Sessions Court, after the case is committed to it has the power to make an enquiry and determine the age of the accused if it considers it necessary in the interests of justice or a prayer is made in that behalf. The opinion of the Sessions Court should support from a definite finding with regard to the age of the accused based upon an inquiry conducted by it, which is not a situation in the instant case.

11. As discussed above, the order in the present case was passed by the

revisional court in a manner inconsistent with the rules of natural justice and in violation of the statutory rules prescribing the mode of enquiry as contemplated under the Code as well as Act. It appears that the court was influenced by irrelevant considerations where no reasonable person could ever have arrived at. In other words, the conclusion on the very face of it is so wholly arbitrary and capricious. The proviso to Section 398 of Cr.P.C. is imperative and enjoins that an opportunity should be given to the accused to show cause why further inquiry should not be ordered and a disregard of the same is an illegality and in any case such an irregularity seriously prejudices an accused who is ordered to be proceeded against it.

12. In view of the above, the order passed by the Revisional court dated 13/5/11 is hereby set aside. The revision is allowed. The matter is remitted back to the revisional court, heading the Board, with a direction to redetermine the age of the accused-petitioner, as on the date of commission of the alleged offences, in accordance with law, enunciated above. In the event he is found to be juvenile within the meaning of the Act, he shall be dealt with accordingly. However, if he is not found to be so, he would face trial under the ordinary criminal law. The inquiry shall be completed expeditiously, preferably within a period of one month of receipt of a copy of this judgment.

Revision allowed.

I.L.R. [2011] M. P., 2596

CRIMINAL REVISION

Before Mr. Justice G.D. Saxena

Cr.Rev. No. 194/2010 (Gwalior) decided on 3 August, 2011

RAMPRASAD & anr.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 91, 161 & 208 - Summons to produce documents - FIR recorded and statements of some witnesses were recorded by A.S.I. - At subsequent stage of investigation supplementary statements (of these witnesses) were recorded by I.O. and have been filed (with charge-sheet) - Statements recorded at earlier stage were not submitted by the I.O. at the time of filing of charge sheet before the Court - Held - Investigation agency is duty bound to furnish the statements recorded after lodging FIR and

after launching investigation before the trial Court and is also bound to supply the copies of those statements recorded on earlier stage to the accused - Revision allowed. (Paras 10 & 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 91, 161 व 208 - दस्तावेजों को प्रस्तुत करने के लिए समंस. - एफ.आई.आर. अभिलिखित की गई और ए.एस.आई. द्वारा कुछ साक्षियों के बयान अभिलिखित किये गये - अन्वेषण के पश्चातवर्ती प्रक्रम पर (इन साक्षियों के) अनुपूरक बयान आई.ओ. द्वारा अभिलिखित किये गये और प्रस्तुत किये गये हैं (आरोप पत्र के साथ) - न्यायालय के समक्ष आरोप पत्र प्रस्तुत करते समय पूर्ववर्ती प्रक्रम पर अभिलिखित बयान आई.ओ. द्वारा पेश नहीं किये गये - अभिनिर्धारित - अन्वेषण एजेंसी एफ.आई.आर. दर्ज होने के पश्चात एवं अन्वेषण आरंभ होने के पश्चात अभिलिखित बयान विचारण न्यायालय के समक्ष प्रस्तुत करने के लिए कर्तव्यबद्ध है और पूर्ववर्ती प्रक्रम पर अभिलिखित उन बयानों की प्रतियां अभियुक्त को प्रदाय करने के लिए भी बाध्य है - पुनरीक्षण मंजूर।

Cases referred :

AIR 2000 SC 2335, 1998(2) MPLJ 629.

Ankur Maheshwari, for the applicants.

R.K. Shrivastava, PL for the non-applicant/State.

ORDER

G.D. SAXENA, J. :- This Revision petition under Section 397/401 of the Code of Criminal Procedure 1973 preferred by the petitioners/accused is directed against an order dated 15th December 2009 passed in Criminal Case No. 105/2008 by the Special Judge (Atrocities), Morena, dismissing thereby an application filed by the accused under Section 91 Cr.P.C. for providing the copies of the statements of prosecution witnesses recorded during investigation under Section 161 Cr.P.C. by the Investigating Officer of Police Station Sabalgarh district Morena in Crime No. 26/2008 for offence under Section 302 of I.P.C.

2. The facts, in short, are that complainant Vijay Singh lodged a report at P.S., to the effect that on 28th September 2009 at about 7 a.m. in the morning while he was returning back he was informed by the neighbours that by the side of garden of Munna Gusai, at Village Sabalgarh, dead-body of one namely, Nora @ Bhagawan Singh Khatik was found lying under suspicious circumstances. It is alleged that a just day before, on 27th September 2008, the deceased went to attend the marriage function of daughter of Sannu Kushawah. On the report lodged by the complainant which was registered on Marg Intimation report, inquiry was carried out. The post mortem was

conducted by Dr. S.K. Kakaur of Community Health Center, Sabalgarh. The viscera was preserved. After usual investigation, the charge-sheet was filed against the petitioners and other accused person.

3. The contention of the learned counsel appearing for the petitioners is that the statements of some of the prosecution witnesses, namely, Jeetu, Kammoda, Jamnabai, Kuldeep, Balle, Rajoli, Rakesh and Munna were recorded on 29th January 2008, just after two days of the incident by the Investigating Officer. Then after two months of the incident, before filing charge-sheet, again additional statements of these witnesses were recorded by the Investigating Officer. It is submitted by the learned counsel that the statements recorded on 29th January 2008 were not filed with the charge sheet nor copies thereof were supplied by the Investigating Officer. It is argued that the statements recorded on 29th January 2008 were essential for just and fair decision of the case and therefore they were to be filed before the trial Judge to substantiate the defence of the accused. Hence, it is submitted that the impugned order passed by the trial Judge is against law and principles of natural justice. It is requested that by allowing the revision petition, the trial court be directed that the statements of the prosecution witnesses dated 29th & 30th January 2008 be produced before the trial court and the copies of those statements as mentioned above be supplied to the petitioners.

4. The learned Panel Lawyer opposed the prayer of the accused/petitioners and submitted that no illegality or irregularity is committed while rejecting the application of the petitioners under Section 91 of Cr.P.C. by the trial court.

5. Heard the learned counsel for the parties and perused the case diary of Crime No. 218/2008 registered by Police Station Sabalgarh district Morena and the law applicable to the case.

6. In the case before this court, though it has been alleged in the said application by the petitioners/accused that the statements in question are necessary or desirable for the purpose of trial, the learned trial Judge at the time of examination of the said application, did not find sufficient materials on which an order under Section 91 could be made. Hence, the question that remains to be answered by this court is that whether the prosecution was obliged to submit the same alongwith the charge-sheet before the court and supply copies thereof to the petitioners-accused.

7. At this juncture, it would be useful to reproduce Section 91 Cr.P.C, which reads as is under:-

"91. Summons to produce document or other thing- (1) Whenever any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this code by or before such Court or such officer, such Court may issue a summons or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons or order."

8. If Section 91 Cr.P.C. is to be attracted, the Court has to be satisfied that the document is necessary or desirable for the purpose of investigation, inquiry, trial or any other thing and secondly it is also required under the above section that the document must be in possession of the other party. Any document or other thing as indicated in the aforesaid section can be directed to be produced on finding that the said document is necessary or desirable for the purpose of the case. The discretion conferred on the court is an absolute discretion, the only condition for the exercise of the discretion being that in the opinion of the court the production of the document should be necessary or desirable for the purposes of the enquiry, trial or other proceeding before the court. In determining that question, he has to exercise his discretion judicially, in the sense that he must satisfy himself that the document has bearing upon and is relevant to the case.

9. In the case of *Om Parkash Sharma Vs. Central Bureau of Investigation, Delhi* (AIR 2000 SC 2335), the Hon. Apex Court held :-

"While considering the application for summoning and production of documents, the question at the present stage of the proceedings before the Trial Court would be to address itself to find whether there is sufficient ground for proceeding to the next stage against the accused if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to even look into the materials so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time. It is trite law that the standard of proof normally adhered to at the final stage is not to be insisted upon at the stage where the consideration is to be confined to find out a prima facie case and decide whether it is necessary to proceed to the next stage of framing the charges and making the accused to

stand trial for the same. The Court concerned must be allowed a large latitude to the matter of exercise of discretion."

10. On perusal of the case diary, it appears that the FIR about the unnatural death perhaps murder by some unknown persons was recorded on the basis of Marg report on 28th September 2008. Thereafter, the statements of eye-witnesses Murarilal, Munna, Jeetu, Kammodi, Jamunabai, Kuldeep Singh, Dilip, Kamal Singh, Rajaram, were recorded by Assistant Sub Inspector of Police Station Sabalgarh, and at subsequent stage of investigation, on 6th March 2008 the supplementary statements were recorded by the Investigating Officer and have been filed. The statements recorded of the witnesses at earlier stage on 29th and 30th January, 2008 were not submitted by the I.O., at the time of filing charge-sheet before the concerning criminal court.

11. In the case of *Gartri Bais Vs. State of MP* [1998(2) MPLJ 629] this court held:-

"Public Prosecutors are prosecutors appointed for prosecuting the offenders or prosecuting them for safeguarding the interest of the public. If the accused makes a prayer for production of any document which is necessary for the purpose of finding out the truth in a trial being conducted by them, they should not withhold such documents merely because the investigating agency does not like it to be produced in the court on the ground that it may help the defence. Duty of the Public prosecutor is to safeguard the interest of the public in prosecution or connected with the prosecution and that includes the accused also. None can be punished without following the due process of law. When in trial, the court is searching the truth all that is relevant and necessary for that purpose should not be withheld. The person moving such an application has to satisfy the court that such order is necessary to be issued in the interest of justice. Such applications can be moved at any stage of the trial. But preferably such applications should be moved before framing of the charge, by prosecution or the defence so as to see that no prejudice is caused to the adversary and no inconvenience is caused to the court."

12. Further, on bare looking to the provisions of Section 208 Cr.P.C., it appears that it is the duty of the Magistrate in cases in which the offence is triable exclusively by the court of Sessions, without delay furnish to the accused free of cost, a copy

of all statements recorded under Section 161 Cr.P.C. The investigation agency is further duty bound to furnish the statements recorded after lodging FIR and after launching investigation before the trial court and is also bound to supply the copies of those statements recorded on earlier stage to the accused.

13. Considering the above facts and circumstances of the case, in the opinion of this court, the learned trial Judge has passed the order ignoring the relevant provisions of law and if the said order is allowed to stand, it would cause great prejudice to the accused-petitioners. Same being not sustainable in law, is hereby dismissed.

14. Ex consequenti, the revision is allowed setting aside the order passed by the trial court dated 15th December 2009. The trial court shall direct the Investigating Agency to submit all statements of the witnesses recorded so far under Section 161 Cr.P.C. within a period of fifteen days from the date of receipt of certified copy of this order after supplying copies thereof to the petitioners-accused.

Revision allowed.

I.L.R. [2011] M. P., 2601

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr.Rev. No. 1270/2011 (Jabalpur) decided on 25 August, 2011

KANHAIYALAL & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 227, Penal Code (45 of 1860), Section 307 - Framing of charge - Unless the prima facie evidence showing the ingredients of first part of Section 300 of IPC are not found from the charge sheet, the charge of the Section 307 could not be framed - Revision allowed. (Paras 9 & 15)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227, दण्ड संहिता (1860 का 45), धारा 307 - आरोप विरचित करना - जब तक कि आरोप पत्र से आई.पी.सी. की धारा 300 के प्रथम भाग के अवयव दर्शाने वाली प्रथम दृष्ट्या साक्ष्य नहीं पायी जाती, धारा 307 के आरोप विरचित नहीं किये जा सकते - पुनरीक्षण मंजूर।

Abhay Gupta, for the applicants.

Alok Tapikar, PL for the respondent/State.

ORDER

U.C. MAHESHWARI, J. :-The applicants – accused have directed this revision being aggrieved by the order dated 13.6.2011 passed by Ist Upper Additional Sessions Judge, Hoshangabad in Sessions Trial No. 109/11 framing the charges against them for the offence under Sections 147, 148, 307/149 and 353 of IPC.

2. The facts giving rise to this revision in short are that on dated 12.12.2010 at 17.15 o'clock the Police Party comprising of various Police Officials including the victims namely Shankar Meena, Harishankar, Roop Singh, Jugal Kishore and Gautam Kashyap caught hold the applicants while they were carrying out the gambling activities at some open place in village Temla Hill of district Hoshangabad. At the same time the applicants lashed with the implements by using the criminal force created obstruction in discharging the public duties of such Police Officials and in continuation of the same, in furtherance of their common object started their beating also. Resultantly the abovenamed Police Constables sustained various injuries on their persons. Therefore, the applicants were arrested and brought to Police Station where Crime No. 455/10 was registered against them for the offence under Sections 147, 148, 149, 353, 183, 307 of IPC. On sending, the above mentioned victims to the hospital after medical examination, their MLC reports were prepared. Some of them were also advised for x-ray. On completion of the investigation, the applicants were charge sheeted for the aforesaid offence alongwith additional Section of 333 of IPC and Section 13 of Gambling Act.

3. On committing the case to the Sessions Court, considering the papers of the charge sheet on framing the charges of the offences, stated in para 1 against the applicants, they abjured the same and thereafter being dis-satisfied with such order the applicants have come forward to this Court with this revision.

4. Shri Abhay Gupta, learned counsel for the applicants after taking me through the FIR, MLC reports and medical papers of the victims alongwith other papers of the charge sheet placed on the record, said that even on taking the face value of such evidence collected by the investigating agency, it could not be deemed that any of the applicants has committed the alleged act with an intention to cause death of any of the Police Officials. In continuation he said that keeping in view this aspect of the case, if the MLC reports of the victims are perused and examined, then looking to the nature of injuries stated in such MLC reports, as various injuries were described simple in nature and

for some of the injuries for which the victim Shankarlal and Hari Prasad were referred for x-ray, no opinion regarding nature of such injuries was mentioned. It is also apparent from the list of the document mentioned in the Police Report filed under Section 173 of Cr.P.C. that no such x-ray report, showing that any of the aforesaid victims sustained any fracture, has been produced on record. So in the lack of x-ray report, it could not be deemed that the injuries referred for x-ray were grievous in nature. The same should be treated to be simple in nature. He also argued that the allegation of Section 307 of IPC has been levelled in the charge sheet on the basis of some injuries of Shankarlal and Harishankar mentioned in their MLC reports but because of aforesaid reasons, the same could not be treated to be grievous in nature or sufficient to cause death in the ordinary course of the nature and accordingly in the light of the medical evidence placed with the charge sheet the charge of Section 307 of IPC could not be framed against any of the applicants. He also argued that the interrogatory statements of the victims and other witnesses are also not sufficient to frame such charges of Section 307 of IPC. According to him in the available circumstances only the charge of Section 332 of IPC could have been framed and prayed to set aside the charge of Section 307 of IPC by admitting and allowing this revision.

5. On the other hand learned PL Shri Alok Tapikar by justifying the impugned order said that the same being based on proper appreciation of charge sheet is in accordance with the prescribed procedure. Thus, the same does not require any interference at this stage and prayed for dismissal of this revision.

6. Keeping in view the arguments, advanced by the counsel, I have carefully gone through the entire charge sheet alongwith impugned order and the charges framed by the trial court.

7. It is apparent fact that the alleged incident took place when the Police Party was discharging its public duty to take the applicants in custody in connection of the offence of Gambling Act. At that time as alleged the applicants by using criminal force created obstructions in discharging their duties as public servants. In continuation of the same, in furtherance of their common object they also beaten the Police Officials and caused them injuries. But after going through the averments of FIR in its face value, it could not be deemed or assumed that there was any intention of the applicants to cause death of any of the Police Officials. Initially without awaiting for the MLC

reports of any of the victims, the case was registered along with other Sections under Section 307 of IPC also. On medical examination of the above mentioned victims namely Shankarlal, Harishankar, Roop Singh, Jugal Kishore and Gautam Kashyap except some of the injuries of Shankar Meena and Harishankar other injuries of the victims were opined simple in nature by the Doctor in the concerning MLC reports. For ready reference the injuries of the victims stated in their MLC reports are reproduced below:-

(a) Shanker Meena:-

1. Lacerated wound 4 cm x 2 cm x bone deep on left occipital region of scalp.
2. Contusion 4 cm x 2 cm right elbow on back.
3. Contusion 3 cm x 2 cm left side of chin.

(b) Roop Singh:-

- (1) Contusion 6 cm x 3.1 cm, left side of calf region.
- (2) Abrasion and swelling, left knee joint, movement painful.

(c) Jugal Kishore :-

- (1) Contusion 12 cm x 4.5 cm, right gluteal region.
- (2) Contusion 9 cm x 4.5 cm, right gluteal region.
- (3) Contusion 7 cm x 4.5 cm, posterior lateral aspect of right leg.

(d) Gautam Kashyap :-

- (1) Contusion 1 cm x 4.5 cm, posterior aspect of left leg.
- (2) Contusion 7 cm x 4.5 cm, posterior aspect
- (3) Contusion 7 cm x 3.5 cm, posterior aspect of left leg.

(e) Harishankar:-

- (1) Swelling over right thumb.
- (2) Contusion 7 cm x 3.5 cm oblique, left calf region.

8. The injury no. 1 of Shankarlal and also of Harishankar, as described in

the aforesaid MLC reports (a) and (d) were referred for x-rays but it is apparent from the list of documents shown in the Police Report filed under Section 173 of Cr.P.C that no such x-ray reports have been placed by the prosecution on record. So it could not be deemed that in any of such injuries the fracture was found or the same were grievous in nature, or was sufficient to cause death of a person in ordinary course of the nature. So on taking into consideration the face value of the FIR and the MLC report alongwith the interrogatory statements of the victims, it could not be said that the present case was a case of Section 307 of IPC and such charge could also be framed against the applicants. As such the ingredients of Section 307 of IPC are not established even for framing the charges.

9. I am of the considered view that unless the prima facie evidence showing the ingredients of first part of Section 300 of IPC are not found from the charge sheet, then the charge of Section 307 of IPC could not be framed against the accused like the applicants. Such earlier part of Section 300 of IPC is read as under:-

Section 300:-

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

Secondly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

Thirdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

Fourthly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

10. In view of the aforesaid provision on examining the case at hand, then as per aforesaid discussion, even on taking into consideration the face value of the charge sheet even then the applicants could not be held guilty for the

offence of Section 307 of IPC, as any of the ingredients of such offence is not made out against any of the applicants. In such premises also the charge of Section 307 of IPC could not be sustained to hold the trial.

11. In view of the aforesaid discussion charge framed against the applicants for the offence under Section 307/149 of IPC being apparently perverse and contrary to law, is not sustainable under the law, hence the same is hereby set aside.

12. Setting aside the aforesaid charge of Section 307/149 of IPC does not mean that at the place of such charge no other charge could be framed. In view of the aforesaid matrix of the charge sheet and looking to the nature of the injuries sustained by the victims, the offence punishable under Section 332/149 of IPC is prima facie made out against the applicants-accused. So while setting aside the charge of Section 307/149 of IPC, the trial court is directed to frame the charge of Section 332/149 of IPC against the all the applicants – accused.

13. In view of the aforesaid discussion by allowing this revision in part, the charge of Section 307/149 of IPC framed against the applicants is hereby set aside, as stated above and instead of it, the trial court is directed to frame the charge of Section 332/149 of IPC against all the applicants. Till this extent the impugned order is modified while remaining part and other findings of the same are hereby affirmed.

14. After aforesaid modification in the charge, the trial court shall be at liberty to send the matter to the Court having the territorial jurisdiction to hold the trial. In view of disposal of revision IA No. 14502/11, an application for stay does not require any consideration, hence the same is dismissed.

15. The revision is allowed in part as indicated above.

Revision partly allowed.

I.L.R. [2011] M. P., 2607

CRIMINAL REVISION

Before Mr. Justice N.K. Gupta

Cr.Rev.No. 177/2001(Jabalpur) decided on 9 September, 2011

MOHD. BAITULLA

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Prevention of Food Adulteration Act (37 of 1954), Section 13(2)
- Delay in prosecution - Complaint filed after 7 months and 18 days -
Accused/applicant though present in Court did not file application u/s
13(2) of the Act for re-examination of the sample by Central Food
Laboratory - Held - Delay caused in filing of complaint clearly deprives
the accused of his valuable right - He could not be convicted for the
offence of adulteration - Appeal allowed. (Paras 16 & 17)

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2) - अभियोजन में विलम्ब - 7 महीने और 18 दिनों के पश्चात् शिकायत प्रस्तुत की गई - यद्यपि अभियुक्त/आवेदक न्यायालय में उपस्थित था किन्तु उसने केन्द्रीय खाद्य प्रयोगशाला द्वारा नमूने का पुनः परीक्षण किये जाने हेतु अधिनियम की धारा 13(2) के अंतर्गत आवेदन प्रस्तुत नहीं किया - अभिनिर्धारित - शिकायत प्रस्तुत करने में कारित विलम्ब अभियुक्त को अपने मूल्यवान अधिकार से स्पष्टतः वंचित करता है - उसे अपमिश्रण के अपराध के लिए दोषसिद्ध नहीं किया जा सकता - अपील मंजूर।

Cases referred :

1995 MPLJ 287, 2000(1) MPHT 547, 2005(2) FAC 245, 1977 MPLJ 169, AIR 1951 NAG. 191.

Malti Dadaria, for the applicant.

G.S. Thakur, PL for the non-applicant/State.

ORDER

N.K. GUPTA, J. :-The applicant was convicted for commission of offence punishable under Section 7(1) read with Section 16(1)(A)(1) of the Prevention of Food Adulteration Act, 1954 (for brevity "Act, 1954") and sentenced for six months' simple imprisonment with fine of Rs.1000/-, in default of payment of fine, additional SI for two months, by the Chief Judicial Magistrate, Shahdol vide judgment dated 16.7.1998 in Criminal Case No.893/1996. In Criminal Appeal No.119/1998, the Additional Sessions Judge, Shahdol vide judgment dated 12.2.2001 dismissed the appeal of the applicant. Being aggrieved with

the judgments of both the Courts below, this criminal revision is preferred by the applicant.

2. Prosecution case, in short, is that on 23.11.1995 at bypass road Shahdol, Food Inspector J.P.Verma (PW-2) was inspecting the milk carried by some of the milk vendors. The applicant Mohd. Baitulla was found transporting three cans of milk. On enquiry the applicant informed that it was a mixed milk of cow and buffalo. A notice Ex.P-7 was given to the applicant in form No.6 and 750 ml. milk was purchased. Sample was made homogeneous and thereafter 750 ml. milk was distributed in three dried plastic bottles. 20 drops of formalin were added to each part of the sample and was sealed properly. Thereafter slip issued by the Local Health Authority was pasted on the samples and samples were sealed in a proper manner. Food Inspector Shri Verma had prepared a document Ex.P-9, Panchanama of the entire proceedings. Ultimately, the sample was sent for analysis to the Public Analyst and it was found in the report of the Public Analyst that fat contents in the sample were found to be 3.5% whereas solid not fat contents were found to be 8%, therefore the Public Analyst found the sample to be adulterated. After getting a due sanction from the Local Health Authority, a complaint was filed before the trial Court.

3. The applicant-accused abjured his guilt before the trial Court. He did not take any specific plea in the matter, but he has stated that he was not dealing in milk and no sample was taken from him. However, no defence evidence has been adduced.

4. The Chief Judicial Magistrate, Shahdol after considering the evidence adduced by the prosecution convicted and sentenced the applicant in aforesaid manner. In appeal no relief could be granted to the applicant.

5. I have heard the learned counsel for the parties.

6. Learned counsel for the applicant has challenged the judgments of the Courts below mainly on three counts. Firstly, the applicant had not sold any milk to the Food Inspector, and therefore he was unnecessarily convicted for the alleged offence. Secondly, while taking the sample, the entire milk of that can was not stirred properly, and therefore the sample taken from the can was not a representative sample of entire milk. Under such circumstances, the applicant could not be convicted for adulteration. Learned counsel for the applicant has placed reliance on the orders of this Court in the case of "*Ujjain*

Municipal Corporation Vs. Ramchandra Moolchand Sahu", (1995 MPLJ 287) and in the case of "*Mehboob Khan Vs. State of MP*" [2000(1) MPHT 547]. Thirdly, it is argued that the alleged sample was taken on 23.11.1995, whereas a notice Ex.P-1 under Section 13 of the Act, 1954 was given on 17.7.1996 i.e. after more than 7 months, and therefore the applicant could not apply for examination of the sample from the Central Food Laboratory. Learned counsel for the applicant has placed reliance on the order of this Court in the case of "*Ram Singh Vs. State of MP*", [2005(2) FAC 245], in which it is held that the prosecution launched after 7 months and 20 days of taking sample and it is a settled provision that after 6 months preservative mixed with milk loses its strength, and therefore sample does not remain fit for analysis. Hence, the applicant was deprived of his right under Section 13(2) of the Act to get sample examined from CFL, therefore conviction must be set aside.

7. On the other hand, learned counsel for the State has supported the impugned judgments of the Courts below. He submits that the conviction and sentence directed by the Courts below are based on sound reasonings and no illegality or perversity is visible in the impugned judgments.

8. After perusal of the entire evidence led by the prosecution, the first contention raised by learned counsel for the applicant cannot be accepted. The applicant has signed the various memos including Ex.P-7 that was form No.6 under Rule 12 of the Prevention of Food Adulteration Rules, receipt Ex.P-8 and Panchanama Ex.P-9. Again some notices were sent to him, but he did not raise such objection before the Local Health Authority or to any other authority to the fact that no sample was taken from the applicant. No such suggestion was given to the Food Inspector J.P. Verma in his cross examination. It is also argued by the learned counsel for the applicant that no independent witness was examined, and therefore the evidence of the Food Inspector cannot be relied upon. Looking at the entire procedure and various documents including the evidence of complainant J.P. Verma, it cannot be said that there was any enmity between the Food Inspector and the present applicant, and therefore the sole testimony of the Food Inspector cannot be disbelieved without any reason. It is true that independent witnesses were not examined, but it is nowhere alleged that the Food Inspector did not take independent witnesses at the time of taking the sample. In such circumstances, if witnesses are not examined or they turned hostile, then the sole testimony of the Food Inspector can be assessed. Therefore, if the testimony of the Food

Inspector is believable, then it cannot be said that the Food Inspector has prepared a false case against the applicant. Under such circumstances, it is apparent that the sample was taken from the applicant himself.

9. Learned counsel for the applicant further submitted that it is nowhere mentioned in the memo Ex.P-9 that the bottles were empty and the milk contained in the can was properly stirred before taking the sample. The contention raised by learned counsel for the applicant cannot be accepted. It is very well mentioned in the memo Ex.P-9 that samples were taken in dried odorless bottles. Since it was a sample of liquid, therefore it was sufficient to make sure that bottles were dried and also that they were empty. If some liquid was already present in the bottles, then it could not be a dried bottle. Misrepresentation of language cannot be done in such a manner. It would be made clear at this stage that fat content in the samples were found to be 3.5% and solid not fat content were found to be 8%. According to the Para A.11.01.11 of the Appendix B of the Act, 1954, it would be clear that for mixed milk percentage of fat and solid not fat should be 4.5 and 8.5 respectively, and therefore the sample in question was found adulterated with the water, hence percentage of fat as well as solid not fat content was lesser than the required standard. Since the bottle is mentioned to be dried in Ex.P-9, it should be presumed that there was no water content in the bottle prior to filling of that sample.

10. It is also argued by learned counsel for the applicant that the milk in the can was not properly stirred prior to taking the sample but such factual position is not proved by the defence in the present case. In the case of *Ujjain Municipal Corporation* (supra) and *Mehboob Khan* (supra) it is held by this Court that if the liquid is not made homogeneous prior to taking the sample, then the sample taken from the liquid is not a representative sample of the liquid, and therefore non-compliance of Rule 9(A) of the Rules, 1955 will be fatal to the prosecution. But such decision will be helpful to the applicant, if it is proved that milk was not stirred properly before taking the sample. Though it is nowhere mentioned in the Panchanama Ex.P-9 to the fact that the milk was stirred in the can before taking the sample, the Food Inspector J.P. Verma has stated in his statement that he made milk homogeneous before taking the sample and thereafter the applicant gave the sample by a measure of 500 ml milk. One complete measure and half measure of milk was given in a container, therefore looking at the procedure mentioned by the Food Inspector, it cannot be said that the milk was not made homogeneous prior to taking sample. If the

milk is not made homogeneous prior to taking the sample, then there should be a disbalanced result received from the Public Analyst or Central Food Laboratory. If it is found that percentage of solid fat is less and percentage of solid not fat is higher than the expected concentration or vice versa, then only it can be said that due to disbalanced result it appears that the sample was not made homogeneous.

11. In the present case, the percentage of fat and solid not fat is lesser than the required standard, therefore by the report of the Public Analyst, it cannot be said that percentage of fat and solid not fat was not properly balanced. Similarly, no application under Section 13(2) of the Act, 1954 was moved by the applicant, and therefore no report of the Central Food Laboratory was obtained in the case. Hence, there is no possibility of comparison of the analysis by two different laboratories. In such circumstances, factual position in the case is not such, that the ratio laid down in the case of *Ujjain Municipal Corporation* (supra) and *Mehboob Khan* (supra) may be applied. Under such circumstances, the applicant cannot get any advantage of non-compliance of Rule 9(B) of the Rules, 1955, because non-compliance of that rule was not proved by the applicant.

12. Learned counsel for the applicant has submitted that the sample was taken on 23.11.1995, whereas a notice under Section 13(2) of the Act, 1954 was given on 17.7.1996 i.e. 7 months and 26 days after taking the sample. However, it appears that the complaint was filed before the Chief Judicial Magistrate, Shahdol on 11.7.1996, and on that date the applicant was present in the Court, and therefore delay must be counted from the date of taking of sample to the date on which the complaint was filed. In such circumstances, it appears that the complaint was filed after 7 months and 18 days of taking the sample.

13. As per the provisions of Section 13(2) of the Act, 1954, the applicant had the right to move an application under Section 13(2) of the Act for re-examination of the sample on receiving the notice. Since he was present at the time of filing of the complaint and he received the copy of complaint and papers including the report of the Public Analyst, therefore it was for him to move an application under Section 13(2) of the Act soon after filing of the complaint.

14. Learned counsel for the State has submitted that if the applicant had applied for analysis of the second part of the sample by the Central Food

Laboratory and if sample was found deteriorated, then it could be said that the right of the applicant under Section 13(2) of the Act was violated, but since he did not apply at all, it cannot be said that his right was violated. In this context the order passed by this Court in the case of "*Shiv Dayal Saligram Tiwari Vs. State of Madhya Pradesh*", (1977 MPLJ 169) may be referred, in which the passage from the book 'Milk Production and Control' by Harvey and Hill was quoted. The judgment passed by this Court in the case of "*Dattappa Vs. Buldana Municipality*", (AIR 1951 Nag. 191) was also quoted and Encyclopedia of Britanica (1970 Edition), Volume IX at Page 456 was also referred and it was observed as under:-

"So considering the various authorities cited above, it can be said that a sample of milk, even after adding preservative, can remain fit for analysis at the most for a period of six months, if kept under refrigeration. The period given in the Encyclopedia of Britanica is of course under the conditions prevailing in cold countries but our climate is much warmer. In fact, temperature is normally above 70 F. throughout the year, the summer temperature being very much higher. There are also not such facilities available here for preservation of the samples as in those advanced countries."

15. Again in the order passed by this Court in the case of *Ram Singh* (supra) the judgment passed in the case of *Shiv Dayal Saligram Tiwari* (supra) has been referred and it was held that "it is not in dispute that right to examine the remaining sample from Central Food Laboratory was a valuable right of the applicant and this could not be destroyed by the prosecution and it is a settled position of law that after 6 months the preservative mixed with the milk has lost its strength and the sample does not remain fit for analysis. Under such circumstances, it is not necessary to apply for analysis of that sample under Section 13(2) of the Act, 1954.

16. In the present case if the factual situation is examined, then it would be clear that the complaint was initiated after more than 7 months. It is true that no hard and fast limitation can be fixed for consideration of deterioration of the sample. Formalin loses its effect due to heat, and therefore it is not necessary that on exact completion of six months, formalin may lose its effect. One-two weeks may be considered as a period of margin. But in the present case the complaint was filed before the concerned Magistrate after 7 months and 18 days, therefore that margin period was also over. It is also clear from

the record that the applicant did not move any application under Section 13(2) of the Act. Learned counsel for the State has stated that since the applicant has not applied for re-examination of the sample, then he cannot get the benefit of the said provisions. However, such contention cannot be accepted. It appears to be a hyper technical approach. For the sake of argument if such an application was moved, then the right could not be said to be exhausted by the applicant because the sample would have deteriorated due to lapse of time period of more than six months.

17. By the aforesaid view, it would be clear that when it was apparent to the Court that the prosecution was launched after a great delay, and therefore it would be a hyper technical approach to seek for an application under Section 13(2) of the Act for re-analysis of the sample from the Central Food Laboratory whereas result of such examination is apparent because the sample must have deteriorated due to expiry of preservative. Such hyper technical approach is not required at all. The right given under Section 13(2) of the Act is a valuable right, which cannot be denied to any of the accused, and therefore if a complaint was filed after six months, then delay caused in filing of that complaint clearly deprives the accused from his valuable right as per the provisions of Section 13(2) of the Act. Under such circumstances, when the applicant was deprived of his right under Section 13(2) of the Act, 1954, then he could not be convicted for the offence of adulteration.

18. Therefore, in the light of aforesaid orders passed by this Court in the case of *Shiv Dayal Saligram Tiwari* (supra) and *Ram Singh* (supra), this Court has no option except to acquit the applicant, because his valuable right under Section 13(2) of the Act to get the sample examined from Central Food Laboratory was withheld. In such circumstances, both the Courts below have committed an error in convicting the applicant for the offence of adulteration. The Courts below did not consider this aspect of the case, and therefore apparent perversity is visible in their judgments. Therefore, the judgments are not sustainable in the eye of law.

19. Consequently, the present revision petition succeeds and is allowed. The judgments of both the Courts below are hereby set aside. The conviction and sentence for commission of offence under Section 7(1) read with Section 16(1)(A)(1) of the Act, 1954 are hereby set aside and the applicant is acquitted from the aforesaid charges. If any fine amount was deposited by the applicant before the trial Court, then he shall be entitled to get the same back.

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20. At present the applicant is on bail, his bail bonds shall stand discharged,
because the presence of the applicant is not at all required now in the present
case.

Petition allowed.

I.L.R. [2011] M. P., 2614

INCOME TAX APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma

I.T.A. No. 173/2008 (Indore) decided on 29 July, 2011

MANSUKHLAL

...Appellant

Vs.

COMMISSIONER OF INCOME TAX & anr.

...Respondents

Income Tax Act (43 of 1961), Section 249(4) - Payment of admitted Tax - Appellant did not make payment of admitted tax and submitted that in the search and the seizure conducted by the revenue, the Hundies of the assessee (appellant) were seized and on realization, the revenue has recovered more than the amount of admitted tax, required to have been paid to make the appeal maintainable - Held - Amount more than the admitted tax has been recovered by the revenue out of the seized Hundies - The defect in the appeal before the CIT(A) due to non-compliance of payment of admitted tax which is a directory requirement can be treated to have been removed. (Para 6)

आयकर अधिनियम (1961 का 43), धारा 249(4) - स्वीकार किये गये कर का भुगतान - अपीलार्थी ने स्वीकार किये गये कर का भुगतान नहीं किया और निवेदित किया कि राजस्व द्वारा की गई छानबीन और जब्ती में निर्धारिती/करदाता(अपीलार्थी) की हुंडियां जब्त की गई और वसूली पर, स्वीकार किये गये कर की राशी से अधिक की बरामदगी राजस्व द्वारा की गई, अपील को पोषणीय बनाने के लिए जिसका भुगतान किया जाना अपेक्षित था - अभिनिर्धारित - राजस्व द्वारा जब्तशुदा हुंडियों में से स्वीकार किये गये कर से अधिक की राशी बरामद की गई - स्वीकार किये गये कर जो निर्देशिनी अपेक्षा है के भुगतान के अपालन के कारण से सीआईटी(ए) के समक्ष प्रस्तुत अपील में त्रुटि को हटा दिया जाना माना जा सकता है।

P.M. Choudhary, for the appellant.

Veena Mandlik, for the respondents.

ORDER

The Order of the Court was delivered by
SHANTANU KEMKAR, J. :- THIS appeal by the assessee under Section 260 A

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of the Income Tax Act, 1961 [for short "the Act"] is directed against the order dated 21.11.2006 passed by the Income Tax Appellate Tribunal, Indore Bench [for short "the ITAT"] in IT (SS) A No.39/Ind/05 for the block period 01.04.1996 to 26.06.2002 by which the assessee's appeal against the order dated 30.12.2004 passed by the CIT (A) has been dismissed.

2. The CIT (A) vide order dated 30.12.2004 dismissed the assessee's appeal for non compliance of the requirement of payment of admitted tax as provided under Section 249 (4) of the Act. The said order on being challenged before the ITAT, the ITAT also dismissed the assessee's appeal upholding the order passed by the CIT (A) dismissing the appeal holding it to be not maintainable in view of non payment of admitted tax. Rectification application submitted by the assessee before the ITAT was also rejected vide order dated 25.07.2008 passed in Misc. Appeal No.59/Ind/98.

3. Feeling aggrieved by the aforesaid orders passed by the CIT (A) and the ITAT, the assessee has filed this appeal.

4. Shri P.M.Choudhary, learned counsel for the appellant argued that in the search and the seizure conducted by the revenue, the Hundis of the assessee were seized. On account of the seizure of Hundis it became impossible for the assessee to have realized the amount of Hundis and to have paid the admitted tax for making the appeal competent. He, however, submitted that by now the revenue has realized the amount of seized Hundis and on such realization the revenue has recovered more amount than the amount of admitted tax which was required to have been paid by the assessee so as to make the appeal before the CIT (A), maintainable. In the circumstances he prayed that the said recovery from the Hundis may be ordered to be adjusted towards the payment of admitted tax treating it to be compliance of the requirement of Section 249 (4) of the Act and the CIT (A) be directed to decide the assessee's appeal on merits.

5. Ms. Veena Mandlik, learned counsel appearing for the revenue did not dispute that till date the amount realized by the revenue from the aforesaid Hundis seized from the assessee is more than the amount of the admitted tax which was required to be paid by the assessee to make his appeal competent before the CIT (A).

6. Having considered the aforesaid subsequent event and undisputed position that by now the amount more than the admitted tax has been recovered

2616 C. of In. Tax, Jbp. Vs. M/s Khem. Motilal Jain (DB) I.L.R.[2011] M.P.,
by the revenue out of the seized Hundies, we are of the considered opinion
that the defect in the appeal before the CIT (A) due to non-compliance of
payment of admitted tax which is a directory requirement can be treated to
have been removed. As a result we direct the revenue to treat the said realization
of the amount towards payment of admitted tax and to treat the appeal before
the CIT (A) to be competent for the purposes of Section 249 (4) of the Act.

7. We accordingly set-aside the impugned orders passed by the CIT (A)
and the ITAT and remit the matter to CIT (A) by restoring the appeal before
the CIT (A) with direction to the CIT (A) to decide the assessee's appeal on
merits, in accordance with law, uninfluenced by the earlier orders passed by it
and by the ITAT as expeditiously as possible.

8. The appeal stands allowed to the extent indicated above.

Appeal allowed.

**I.L.R. [2011] M. P., 2616
INCOME TAX REFERENCE**

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain

I.T.R. No. 42/1998 (Jabalpur) decided on 23 August, 2011

COMMISSIONER OF INCOME TAX, JABALPUR ...Applicant
Vs.

M/S KHEMCHAND MOTILAL JAIN ...Non-applicant

Income Tax Act (43 of 1961), Section 37(1) - Allowable deduction
- Director of the Company, when he was on business tour, was kidnapped
and for his release the ransom amount of Rs. 5,50,000/- was paid (by
the Company) - Held - The amount paid as ransom money to the
kidnappers was an allowable deduction. (Para 17)

आयकर अधिनियम (1961 का 43), धारा 37(1) - मंजूर करने योग्य कटौती -
कंपनी का निदेशक जब व्यावसायिक दौरे पर था, व्यपहत किया गया और उसकी मुक्ति
के लिए रु. 5,50,000/- की रकम की फिरोती अदा की गई (कंपनी द्वारा) -
अभिनिर्धारित - व्यपहरणकर्ताओं को फिरोती की रकम के रुप में अदा की गई राशी
मंजूर करने योग्य कटौती थी।

Cases referred :

118 ITR 261, 157 ITR 212, 118 ITR 379.

Sanjay Lal, for the applicant.

A.K. Shrivastava, for the non-applicant.

G.N. Purohit, as an amicus curiae.

ORDER

The Order of the Court was delivered by **KRISHN KUMAR LAHOTI, J.** :—This is a reference by the Income Tax Appellate Tribunal, Jabalpur in R.A.No.20(Jab)1995 by which the Tribunal has referred following question for the answer of this Court.

“Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the amount of Rs.5,50,000/- paid as ransom money to the kidnappers of one of the Directors was an allowable deduction under Section 37(1) of the Income-tax Act, 1961?”

2 Facts of the case are that the assessee is a private limited company. The main income of the company was from manufacturing and sale of bidis. Sukhnandan Jain was a whole time Director of the assessee company. He was looking after the purchase, sales and manufacturing of bidis.

3. On 5.8.1987 Sukhnandan Jain had gone to Sagar for purchase of tendu leaves. On the same day, he was kidnapped for ransom by a dacoit gang headed by Raju Bhatnagar. Immediately complaint and FIR were lodged with Sagar Police. The assessee awaited the action of the police. The police were unsuccessful to recover Sukhnandan Jain from the clutches of dacoit. Ultimately a sum of Rs.5,50,000 was paid by way of ransom for the release of Sukhnandan Jain on 27.8.1987. On 28.7.1987 itself Sukhnandan Jain was released by the dacoits.

4. The assessee claimed this amount of Rs.5,50,000 under the head of 'General Expenses' and claimed deduction thereof. The Assessing Officer disallowed the claim of the assessee on the ground that the ransom money paid to the kidnappers was not an expenditure incidental to business. On appeal, the C.I.T.(A) allowed the claim of the assessee. The department preferred second appeal before the I.T.A.T. The I.T.A.T confirmed the finding of the C.I.T.(A) and dismissed the appeal of the Department. Thereafter the Department moved an application before the Income Tax Appellate Tribunal, Jabalpur for referring the matter under Section 256(1) of the Income tax Act to this Court which was allowed by the Tribunal and present reference has been made on 8th January, 1998.

2618 C. of In. Tax, Jbp. Vs. M/s Khem. Motilal Jain (DB) I.L.R.[2011] M.P.,

5. The learned counsel appearing for the Revenue submitted that amount of ransom could not have been claimed by way of expenditure as the Explanation of sub-section (1) of Section 37 of the Income-tax Act, 1961 prohibits such expenditure. It is submitted that the payment of any amount which is prohibited by law is not a business expenditure and it cannot be allowed as an expenditure.

Stating aforesaid, it was submitted by Shri Lal, appearing for the Department, that this reference may be answered in favour of Revenue.

6. Shri J.N.Purohoti, the learned Senior Advocate, appearing as amicus curiae, and Shri A.K.Shrivastava supported the orders passed by the CITA and ITAT and submitted that payment of ransom is an expenditure. If the aforesaid amount was paid to the dacoits to get Sukhnandan Jain released, who was on business tour, working as Director of the Company, the aforesaid amount was rightly claimed as an expenditure of business. It is insisted that at the relevant time, Sukhnandan Jain was on a business tour and for this purpose, he was staying at a Govt. Rest House at Sagar from where he was kidnapped.

Reliance is placed to the Apex Court judgment in *Sassoon J. David and Co.P.Ltd. vs. Commissioner of Income-Tax, Bombay* 118 ITR 261 and 157 ITR 212 Calcutta High Court in the case of *Commissioner of Income-Tax West Bengal, Calcutta vs. Karam Chand Thapar and brothers (P) Ltd.* It is submitted that the reference may be decided in favour of the assessee. They have also placed reliance to the Full Bench Judgement of this Court in *Addl. Commissioner of Income-Tax vs. Kuber Singh Bhagwandas* 118 ITR 379.

7. To appreciate the rival contentions of the parties, it would be appropriate if the findings recorded by the Income Tax Appellate Tribunal in order dated 19th September, 1990 and the Commissioner of Incometax (Appeal) in order dated 23rd Feb. 1995 are referred.

8. The Commissioner of Incometax (Appeals) in paras 13, 14 and 15 of the order considered this question. The CIT(A) in para 18 had considered the contentions and recorded his finding in para 19. We quote paras 13, 14, 15 and 19 of the order which reads as under:

“ 13. Ground nos.8,9 and 10 relate to a disallowance of a claim for deduction of Rs.5,50,000/- On page 2 of the assessment order, the Ld. Assessing officer has observed that under the head “ general

charges" the assessee debited Rs.5,92,274/- While scrutinizing the details of these expenditure, the Ld. Assessing officer found that a sum of Rs.5,50,000/- was spent through a voucher no.1190 dated 24th August, 1987. This amount was ransom money paid to the kidnaper of Shri Sukhnandan Jain, a Director of the company. In the assessment proceedings, assessee submitted that Shri Sukhnandan Jain was kidnapped on 5th August, 1987 by one Raju Bhatnagar and members of his gang from Sagar Rest House. Total ransom money of Rs.30 lacs was originally demanded by the kidnapper. It was, however, reduced to the sum of Rs.5,50,000/- after a protracted negotiation and discussion. The assessee claimed the deduction of this amount under Section 37 of the Incometax Act. It was urged that the expenditure was for commercial expediency. The Ld. Counsel of the appellant, at the time of assessment proceedings, relied on the decisions of the Hon'ble Madras High Court and Hon'ble Gujarat High Court, reported in 138 I.T.R. 779 and 104 ITR 711 to impress that ordinary principles of commercial expediency could not be ignored by the Ld. Assessing officer. The assessee also contended before the Ld. Assessing officer that Shri Sukhnandan Jain was an effective and efficient Director of the company. Therefore, the sum of Rs.5,50,000/- was paid to the kidnapper to get the Director released. These contentions did not find favour with the Ld. Assessing officer. He was of the opinion that the expenditure was of personal nature. Accordingly, he disallowed the amount of Rs.5,50,000/-

14. At the time of hearing of the appeal, the Ld. counsel, Shri B.C.Jain and Shri Jeewan Lal Jain, Director stated the background of the issue. The Ld. Counsel stated that Shri Sukhnandan Jain joined the appellant company on 1st April, 1983 as a Quality Control Inspector. He was appointed on a monthly salary in the scale of 1000-10-1500 per month. He is a commerce graduate and was of 24 years age. Shri Sukhnandan Jain learned the technique to ascertain the required qualities of tendu leaves of different varieties used for manufacture of bidis. The company was highly satisfied with his performance. This led to his appointment as a Director (Works) in 1986. Ld. Counsel stated that a contract was executed between Shri Sukhnandan Jain and the assessee company on 21st August

1986 setting out terms and conditions of his employment. According to the Ld counsel, Shri Sukhandan Jain happens to be a shareholder of the company also. The Ld counsel further submitted that Shri Sukhandan Jain was one of the two Directors, who were below 30 years in age. The other Directors were of middle ages. By sheer dint of labour he contributed to a great extent to the performance of the appellant company. The Ld counsel went on to submit that Shri Sukhandan Jain was incharge of quality control, which required that he personally selects and orders for purchase of different varieties of tendu leaves.

15. The Ld counsel and the Director submitted that Shri Bihari Lal, the man who asked Shri Sukhandan Jain for the meeting at M.P. Tourism Establishment at Sagar was a supplier of tendu leaves to the Company. In his capacity of supplier of tendu leaves, he was personally known to Shri Sukhandan Jain. According to the Ld counsel, during the accounting year, relevant for the assesment years 1987-88, Shri Bihari Lal supplied the company tendu leaves worth Rs. 8.25 lakhs approximate. At that material point of time, Bihari Lal was acquainted with different source of tendu leaves traders. According to the Ld counsel when Bihari Lal fixed up an appointment for meeting, Shri Sukhandan Jain was duty bound to meet him in the interest of the business of the appellant company. As regards the observation of the Ld assessing officer that the tourism establishment was not a place of business, the Ld counsel averred that for the purpose of conduct of business, the appellant company or its directors need not always be sitting in their offices. If the business need required a director to meet somebody at a particular place, anywhere in the country or outside the country, it is for the company or its directors to decide whether to go to that place or not. Coming to the observations of the Ld. Assessing officer that the kidnap took place at night, which was beyond business hours, the Ld counsel stated that there is no fixed time for conduct of business.

19. I have carefully considered the assessment order as well as the elaborate and lengthy submission of the Ld counsel and the director. I am of the opinion that the Ld assessing officer did not properly appreciate the facts of the case. First, it has to be admitted

that Shri Sukhnandan Jain was conducting business of the company in the capacity of a Director. He had experience and drive which led to his appointment as Director, He was one of the young Directors. There can be no question of time for conducting business talks or business activity nor can there be any set pattern that the business negotiations and talks have to be carried out from the offices only. Shri Biharilal was the supplier to the assessee company as it was natural for Shri Sukhnandan Jain to meet Shri Biharilal for business talks, which was meant for the purpose of procurement of required quantity and quality of tendu leaves. Shri Sukhnandan Jain was in the employment of the company by virtue of an agreement. I have the benefit of going through the agreement. It is enforceable in any Court of law under the Indian Contract Act. Clause 12 of the agreement clearly stipulates that any bona fide expenditure incurred for the purpose of business of the company would be borne by the company itself. The kidnapping of Shri Sukhnandan Jain, payment of ransom money, his release thereafter, existence of Raj Bhatjanagr and his gang are all contemporaneous history available, in different news magazines as well as public records. Therefore, these are to be accepted as having evidentiary value. The finding of the Ld assessing officer that the expenditure was personal is unfounded. As already pointed out, by virtue of the contractual obligation, Shri Sukhnandan Jain was always in a position to claim the reimbursement of the ransom money. The company for its smooth business, decided through the resolution of the Board of Directors to deal in the matter. Identity of the recipient of the ransom money is established. In short, company only discharged the contractual obligation to the Director. Shri Sukhnandan Jain in terms of the agreement and it decided to discharge the liability because the company thought it fit. The principle of commercial expediency urged that the trader or businessman is the best to decide the commercial expediency. It is now a settled law that unless a particular expenditure, incurred for business and commercial expediency, specifically barred by any specific provision of Income Tax Act, such expenditure has to be allowed. The only point is that the assessee has to establish that the expenditure was incurred for the purpose of business. In this particular case, the assessee has been able to establish that dictum. Accordingly, I am of the opinion that the amount of Rs.5,50,000

was spent for the commercial necessity of the company and that it is an allowable expenditure under section 37 of the Income tax Act. As a result, the disallowance of Rs.5,50,000 is deleted, Grounds nos.8,9 and 10 are thus allowed in full.”

9. The Tribunal has also considered this aspect in para 6 of the order and for ready reference we quote it thus:-

6. “We have heard the parties. We are of the opinion that the order of the CIT(Appeals) deserves to be confirmed. From the facts brought out above, it is clear that Shri Sukhnandan Jain in his capacity as a Director of the Company and incharge of purchases and quality control had to move to the forest areas and other areas of Bundelkhand which were and are infested by dacoits and kidnappers. The company assigned the particular work of purchase and quality control to Shri Sukhnandan Jain knowing it fully well that he would be facing problems of this nature. From the materials brought out in the paper book of the assessee it has come out that the kidnappers very well knew that Shri Shri Sukhnandan Jain belonged to a business family dealing in bidi and bidi leaves and was moving out quite often in the course of such business. It is also notable that Shri Bihari Lal, the man who is allowed to have contacted Shri Sukhnandan on telephone on 5.8.87 was a well-known business associates of the assessee. If the assessee company had not made this payment to the kidnappers it would have resulted in the loss of life of Shri Sukhnandan Jain and thereby resulting in deprivation of the company services of an experienced executive. Even as per terms of the contract between Shri Sukhnandan Jain and the assessee company Shri Sukhnandan Jain could have claimed this expenditure as reimbursement, had the payment been made by the family members for and on behalf of Sukhnandan Jain only. While section 28 of the I.T. Act imposes a charge on the profits and gains of the business it does not provide how these profits are to be computed. There are sections in the Income-Tax Act which emerge various items which are admissible as deductions but they are not exhaustive of all allowances which could be made in ascertaining the profits of a business taxable under the Act. The profits and gains which are liable to be taxed under the Act are what are understood under ordinary commercial principles.”

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10. From the perusal of the aforesaid facts, it is apparent that Sukhanandan Jain was conducting business tour for the company and was staying at Govt. Guest House, Sagar. Sukhanandan Jain visited Sagar to meet one Bihari Lal for the procurement of quality tendu leaves. During his business tour, he was kidnapped. For a period of nearabout 20 days after lodging a report to the police, the respondent waited the efforts of the police, but ultimately on 27th August, 1987 when all the efforts of the police were unsuccessful, then the respondent had made to make payment of ransom amount of Rs.5,50,000 to the kidnappers and ultimately on 28.8.1987, Sukhnandan Jain was released from the clutches of the dacoits. Both the authorities have found that it was a business expenditure and allowed the claim.

11. The contention of the petitioner is that under Explanation of sub-section (1) of Section 37, such expenditure could not have been allowed. We find it appropriate to refer Section 37(1) and Explanation to it for ready reference which reads as under:

The Explanation provides that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business. To ascertain whether any expenditure incurred by the assessee for any purpose which is an offence or prohibited by law is to be seen.

Kidnapping for ransom is an offence under Section 364 A of the I.P.C which reads as under:

364 A. Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-Governmental organisation or any other person) to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life and shall also be liable to fine."

The aforesaid section provides that kidnapping a person for ransom is an offence and any person doing so or compelling to pay, is liable for the punishment as provided in the Section, but nowhere it is provided that to save

2624 C. of In. Tax, Jbp. Vs. M/s Khem. Motilal Jain (DB) I.L.R.[2011] M.P., a life of the person if a ransom is paid, it will amount to an offence. No provision is brought to our notice that payment of ransom is prohibited by any law. In absence of it, the Explanation of sub-section (1) Section 37 will not be applicable in the present case.

12. In the case of *Dr. T.A. Qureshi*, the assessee was a medical practitioner, claiming deduction of the value of the seized articles. The Income tax Department denied the deduction. On an appeal, the appellate Tribunal held that the assessee is entitled to claim the benefit of loss. On an appeal, the High Court held that the Explanation of Section 37 of the Act was fully satisfied that possession of heroine was an offence. Indeed it was a disgrace for the doctor community where one doctor was found indulging in such kind of activities against humanity.

13. In *Sassoon J. Davi and Co. P. Ltd* (supra), the Apex Court considering Section 10(2)(xv) of the Incometax Act which was applicable at the relevant time, that the expression "wholly and exclusively" does not mean "necessarily". Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of his or its business. Such expenditure may be incurred voluntarily and without any necessity. It is incurred for promoting the business and to earn profits, the assessee can claim deduction under section 10(2)(iv) of the Act even though there was no compelling necessity to incur such expenditure.

14. The Full Bench of this Court in the case of *Additional Commissioner of Incometax vs. Kuber Singh Bhagwandas* held that to decide whether a payment of money or incurring of expenditure is for the purpose of the business and an allowable expenditure, the test applied is of commercial expediency and principles of ordinary commercial trading. If the payment or expenditure is incurred to facilitate the carrying on of the business of the assessee and is supported by commercial expediency, it does not matter that the payment is voluntary or that it also enures to the benefit of a third party.

15. In *Karam Chand Thapar* (supra), the Division Bench of the Calcutta High Court considering the question of death of Chairman while he was on business tour held that the expenditure incurred to have his body flown back by Airways is incidental to business and an allowable deduction under Section 37(1) of the Income Tax.

16. In the present case, Sukhnandan Jain was on business tour and was

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staying at Govt. Rest House, Sagar from where he was kidnapped. As he was on business tour, to get him released, if the aforesaid amount was paid to the dacoits as ransom money and because of this, Sukhnandan Jain was released, the petitioner claimed it a business expenditure and the authorities namely, Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal have allowed the aforesaid expenditure as business expenditure, no fault is found.

17. Sukhnandan Jain remained in custody for a period of nearabout 20 days. The police were also informed and after waiting 20 days for the police action, If the respondents to save his life paid the aforesaid amount, then the aforesaid amount cannot be treated as an action which prohibited under the law. No provision could be brought to our notice that payment of ransom is an offence. In absence of which, the contention of the petitioner that it is prohibited under explanation of Section 37 (1) of the Incometax Act has no substance. The entire tour of Sukhnandan Jain was for purchase of tendu leaves of quality and for this purpose, he was on business tour and during his business tour, he was kidnapped and for his release the aforesaid amount was paid.

18. In these circumstances, we affirm the reasonings of Commissioner of Incometax and the Income Tax Appellate Tribunal allowing the aforesaid expenditure as business expenditure.

In view of the aforesaid, this reference is answered in favour of the assessee and against the Department.

Order accordingly.

I.L.R. [2011] M. P., 2625

TAX REFERENCE

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vinla Jain

T.R. No. 1/2011 (Jabalpur) decided on 16 August, 2011

KISHAN AUTOMOBILE (M/S)

...Applicant

Vs.

COMMISSIONER OF INCOME TAX

...Non-applicant

Income Tax Act (43 of 1961), Section 43-B - Deduction - Petitioner firm made a provision of Rs. 51,918/- for the payment of sales tax liability pertaining to period of February-March 1984 - The amount of

2626 Kishan Auto. M/s Vs. Commr. of Income Tax (DB) I.L.R.[2011] M.P., tax was paid on 31.05.1984 before the last date of filing of Income Tax return i.e. 30.06.1984 - Petitioner claimed aforesaid deduction in the assessment year 1984-85 - The assessing officer by interpreting section 43B held that without actual payment, no provision can be made for payment of sales tax and no deduction in that regard could have been allowed unless actually paid within the accounting year - Held - Tribunal was not justified in sustaining the addition of Rs. 51,918/- on account of sales tax liability, which was actually paid by the assessee within the statutory period and before the due date of filing of return for the aforesaid year. (Paras 5 & 8)

आयकर अधिनियम (1961 का 43), धारा 43बी - कटौती - फरवरी-मार्च 1984 के अवधि के संबंध में विक्रय कर के दायित्व के भुगतान हेतु याची फर्म ने 51,918/- रुपये का प्रबंध किया - आय कर रिटर्न भरने की अंतिम तिथि अर्थात् 30.06.1984 से पूर्व 31.05.1984 को कर की रकम का भुगतान किया गया - याची ने उपरोक्त कटौती के निर्धारण वर्ष 1984-85 की होने का दावा किया - धारा 43बी के निर्वचन द्वारा निर्धारण अधिकारी ने धारण किया कि वास्तविक भुगतान किये बिना, विक्रय कर के भुगतान हेतु कोई प्रावधान नहीं किया जा सकता और जब तक कि लेखा वर्ष के भीतर वास्तविक भुगतान नहीं किया जाता, उसके संबंध में कोई कटौती को मंजूरी नहीं दी जा सकती - अभिनिर्धारित- अधिकरण द्वारा विक्रय कर के दायित्व के रूप में रु. 51,918/- के जोड़े जाने को कायम रखना न्यायोचित नहीं, जिसका करदाता द्वारा कानूनी अवधि के भीतर और उपरोक्त वर्ष के रिटर्न भरने की सम्यक् तिथि से पहले वास्तविक भुगतान कर दिया गया था।

Cases referred :

(1997) VOL. 224 ITR 677, (2000) 162 CTR (SC) 308.

Ajay Mishra, for the applicant.

Sanjay Lal, for the non-applicant.

ORDER

The Order of the Court was delivered by KRISHN KUMAR LAHOTI, J. :- This is a reference by the Income Tax Appellate Tribunal, Jabalpur Bench, Jabalpur in R.A.No.13/Jab/1992, by which following question has been referred for the opinion of this Court :-

“Whether on the facts and in the circumstances of the case and in the light of the provisions of Sec.43-B of the Income Tax Act, 1961, as existed, originally and after amendment, the Tribunal was justified in sustaining the addition of Rs.51,918/- on account of sales tax liability?”

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2. Learned counsel appearing for petitioner submitted that to give effect to the provisions as contained in section 43B, first proviso was inserted w.e.f. 1989, but it was curative in nature and has to be given retrospective effect. Section 43B(a) of the Income Tax Act, 1961 was inserted to meet out various difficulties. He has placed reliance to the Apex Court judgment in *Allied Motors (P) Ltd. Vs. Commissioner of Income Tax* [(1997) Vol 224 ITR 677] and *Whirlpool of India Ltd. Vs. Commissioner of Income Tax* [(2000) 162 CTR (SC) 308] and submitted that this reference may be answered in favour of the assessee.

3. Shri Sanjay Lal, learned counsel appearing for Department opposed the contention and submitted that the aforesaid proviso has been inserted by Finance Act, 1988 w.e.f. 1.4.1989, so it is prospective in nature and until and unless a specific provision is made that it is retrospective, it is to be treated prospective.

4. To appreciate rival contention of the parties, the relevant facts of the present case deserves to be stated, which are :-

5. The present case relates to the assessment year 1984-85, accounting year ending on 31.3.1984. The petitioner firm in that accounting year made a provision of Rs.51,918/- for the payment of sales tax liability pertaining to period of February-March 1984. This tax, an amount of Rs.51,123/-, was paid on 31.5.1984. In the relevant year the last date of filing of Income Tax return was 30.6.1984. The petitioner herein claimed aforesaid deduction in the assessment year 1984-85. The assessing officer by interpreting section 43B held that without actual payment, no provision can be made for payment of sales tax and no deduction in that regard could have been allowed unless actually paid within the accounting year. The assessing officer had made addition in income of Rs.51,918/-. Against such an order, the assessee preferred an appeal before the CIT(A) and also before the Income Tax Appellate Tribunal, but remained unsuccessful. Thereafter an application was filed by the assessee under section 256(1) of the Act for referring the aforesaid question for the opinion of this Court and now this matter is before us for our opinion.

6. The controversy involved in this case is squarely covered by the judgment of Apex Court in *Allied Motors (P) Ltd.* (supra). A similar question was before the Apex Court. The Apex Court held that section 43B of the Act was inserted w.e.f.1.4.1984 to discourage tax payers, who did not discharge their statutory liability of payment of excise duty, employer's contribution towards provident fund etc., for long period of time, but had claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by

2628 Kishan Auto. M/s Vs. Commr. of Income Tax (DB) I.L.R.[2011] M.P., them in the relevant previous year. After insertion of section 43B of the Act, even if the assessee had regularly adopted the mercantile system of accounting, the amount of tax payable by the assessee could be deducted only in the year in which the sum was actually paid and not in the year in which the assessee incurred the liability to pay that tax. However, an assessee who had collected sales tax in the last quarter of the accounting year and deposited it in the treasury within the statutory period falling in the next accounting year, was not entitled to claim any deduction for it. This was not intended by section 43B. To avoid this kind of unexpected outcome of section 43B, the first proviso was added in section 43B by the Finance Act of 1988. The proviso makes it clear that the section will not apply in relation to any sum which is actually paid by the assessee in the next accounting year, if it is paid on or before the due date for furnishing the return of income in respect of the previous year, in which the liability to pay such sum was incurred and the evidence of such payment is furnished by the assessee along with the return. The Apex Court considered this question on page no.682 and 683 of the report, held that the view of Delhi High Court by which it was held that the proviso was prospective in nature was not approved, while the view of other High Courts namely, Calcutta, Gujarat, Karnataka, Orissa, Gauhati, Rajasthan, Andhra Pradesh, Patna and Kerala that the proviso must be given prospective effect was approved by the Apex Court. It was therefore held that the aforesaid proviso was inserted to give effect to the provisions as contained in section 43B of the Act and was retrospective in nature.

7. The same view has been reiterated by the Apex Court in *Whirlpool of India Ltd.* (supra).

8. In view of the settled position of law by the Apex Court, the question referred to this Court is answered thus :-

“In the light of proviso of section 43B of the Income Tax Act, 1961, as existed originally and after amendment and insertion of proviso, the Tribunal was not justified in sustaining the addition of Rs.51,918/- on account of sales tax liability, which was actually paid by the assessee within the statutory period and before the due date of filing of return for the aforesaid year.”

9. Office to communicate our answer to the Tribunal.

Order accordingly.

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MISCELLANEOUS CRIMINAL CASE

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

M.Cr.C. No. 3187/2008 (Jabalpur) decided on 11 May, 2011

ASHOK KUMAR JAIN & ors.

...Applicants

Vs.

CENTRAL BUREAU OF INVESTIGATION & ors.

...Non-applicants

A. Prevention of Corruption Act (49 of 1988), Section 17 - Authorization - Dy.S.P. holding the charge of S.P. authorized himself under Section 17 of Act, 1988 - Each one of the officers designated in clauses (a) to (c) is competent to investigate the offence under Section 13(1)(e) even without order of authorization by S.P. as contemplated in second proviso - Order under second proviso would be necessary only in a case where investigation into the offence is sought to be conducted by an officer of a lower rank though authorized by State Govt. under first proviso - View taken in Umesh Kumar's case is erroneous and overruled. (Paras 28 & 29)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 17 - प्राधिकार देना - डिप्टी एस.पी. ने एस.पी. का भार धारण करते हुए, अधिनियम 1988 की धारा 17 के अंतर्गत स्वयं को प्राधिकृत किया - खंड (ए) से (सी) तक में नामनिर्दिष्ट प्रत्येक अधिकारी, एस.पी. द्वारा प्राधिकार के आदेश के बिना भी जैसा कि दूसरे परंतुक में अनुध्यात है, धारा 13(1)(ई) के अंतर्गत अपराध का अन्वेषण करने के लिए सक्षम है - दूसरे परंतुक के अंतर्गत आदेश केवल उस मामले में आवश्यक है जहां अपराध का अन्वेषण निम्न श्रेणी के अधिकारी द्वारा किया जाना चाहा गया है यद्यपि राज्य सरकार द्वारा प्रथम परंतुक के अंतर्गत प्राधिकृत किया गया है - उमेश कुमार के मामले में लिया गया दृष्टिकोण गलत है और उलट दिया गया।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Investigating Officer - Investigation conducted by same police officer who had lodged the F.I.R. - It is not barred - Such investigation could be assailed only on the ground of bias or real likelihood of bias on the part of Investigating Officer. (Para 31)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) - अन्वेषण अधिकारी - अन्वेषण उसी पुलिस अधिकारी द्वारा किया गया जिसने एफ.आई.आर. दर्ज की थी - यह विवक्षित नहीं है - ऐसे अन्वेषण का विरोध केवल अन्वेषण अधिकारी की ओर से पक्षपात या पक्षपात की वास्तविक संभावना के आधार पर किया जा सकता है।

C. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Defective Investigation - Effect - Order taking cognizance not challenged at the earliest possible opportunity - Even if it is assumed that the investigation in any manner was defective, the order taking cognizance and consequent proceedings can not be quashed as no failure of justice had occasioned thereby. (Para 32)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) - त्रुटिपूर्ण अन्वेषण - प्रभाव - संज्ञान लेने के आदेश को यथासंभव सर्वप्रथम अवसर पर चुनौती नहीं दी गई - यदि यह धारणा भी की जाए कि अन्वेषण किसी प्रकार त्रुटिपूर्ण था, संज्ञान लेने का आदेश और परिणामिक कार्यवाहियां अभिखंडित नहीं की जा सकती क्योंकि इससे न्याय की विफलता कारित नहीं हुई है।

D. Penal Code (45 of 1860), Section 120B - Conspiracy - Criminal conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence - Offence can be proved largely from the inferences drawn from acts or illegal omission committed by conspirators in pursuance of a common design. (Para 37)

घ. दण्ड संहिता (1860 का 45), धारा 120बी - षडयंत्र - आपराधिक षडयंत्र प्रायः गुप्त रूप से रचा जाता है और प्रत्यक्ष साक्ष्य देना असंभव है - अपराध को षडयंत्रकारियों द्वारा समान उद्देश्य के अग्रसरण में कारित की गई अवैध लोप या कृत्यों से निकाले गये निष्कर्षों से मुख्य रूप से साबित किया जा सकता है।

E. Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Framing of Charge - Judge is required to record reasons only if he decides to discharge the accused - Mere strong suspicion leading to presumption as to possibility as against certainty about commission of crime makes out a case for framing of charge. (Para 38)

ड. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 - आरोप विरचित करना - न्यायाधीश को केवल तभी कारण अभिलिखित करना अपेक्षित है यदि वह अभियुक्त को आरोपमुक्त करने का निश्चय करता है - अपराध के कारित होने के संबंध में निश्चितता के विरुद्ध संभावना की अवधारणा की ओर ले जाने वाला प्रबल संदेह मात्र, आरोप विरचित करने का मामला बनाता है।

Cases referred:

(2006) 7 SCC 172, AIR 1955 SC 196, AIR 1959 SC 707, 2002 CR.L.J. 845, 2007 CR.L.J. (NOC) 425, 2002 CR.L.J. 4368, 2000 CR.L.J. 1760 (Overruled), 2001 CR.L.J. 2695, 1973 MPLJ 411, AIR 1964 MP 114, AIR 1992 SC 604, AIR 2004 SC 2684, AIR 1964 SC 221, (2000) 5 SCC 88, AIR 1964 SC

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28, AIR 1980 SC 439, AIR 1962 SC 1821, AIR 2000 SC 2245, (2005) 1
SCC 568.

Ajay Mishra with Mukesh Sahu, for the applicants.

Vikram Singh, for the non-applicant No.1/CBI.

O R D E R

The Order of the Court was delivered by
R.C. MISHRA, J. :—These petitions are interrelated, as arisen from the same
proceedings pending as Special Case No.8/06 before Special Judge [under
the Prevention of Corruption Act, 1988 (hereinafter referred to as the '1988
Act'), for CBI cases], Bhopal.

2. MCrcC No.3187/2008 is a petition, under Section 482 of the Code of
Criminal Procedure (for short 'the Code'), for having the order-dated
22.09.2007, rejecting the objection as to competence of M.V. Surti, the Deputy
Superintendent of Police (CBI), Bhopal to investigate into the matter as well
as the petitioners' prayer for taking into consideration the documents furnished
by them at the stage of framing of charge nullified and also for quashing the
charge-sheet as against the petitioner namely Ashok Kumar, son of Sheel
Chand Jain [for brevity 'Ashok(S)'], his wife Sunita Jain and brother Rajeev
Jain.

3. The revision registered as Criminal Revision No.554/2007 is directed
against a common order-dated 17.02.2007 passed by the Special Judge,
rejecting the applications, under Section 91 of the Code, moved by the
revisionists as well as by co-accused Nanulal Ahirwar and R.C. Parashar.

4. The revision numbered as Criminal Revision No.836/2008 has been
preferred against the order-dated 18.03.2008 whereby charges of the offences
punishable under Section 13(1)(e) read with S.13(2) read with 201 of the
IPC and 120B read with 201, 465 and 471 of the IPC were framed against
the revisionist namely Ashok Kumar Jain, son of Babulal Jain [hereinafter
referred to as 'Ashok(B)'], an Income-Tax Practitioner.

5. The subject-matter of Criminal Revision No.1098/2008 is the order-
dated 15.02.2008 whereby not only the application filed by Ashok(S), Sunita,
Rajeev and R.C. Parashar for recalling the order-dated 22.09.2007 was
rejected but it was also concluded that a prima facie case was made out
against Ashok(S) to justify framing of charges of the offences punishable
under Sections 120-B read with 465 and 471 of the IPC and Section 13(1)(e)

2632 Ashok K. Jain Vs. Cent. Bureau of Investn. (DB) I.L.R.[2011] M.P., read with 13(2) of the Act whereas the other accused were liable to be charged with the offences punishable under Sections 120-B read with 465, 471 and 201 of the IPC and Section 109 read with 13(1)(e) read with 13(2) of the Act.

6. Background facts may be summed up thus -

(1) During the check period from 01.04.1999 to 20.05.2004, Ashok(S) had remained posted as Branch Manager of Vidisha Branch and the Bhopal City Branch Office IV of the United India Insurance Company Limited.

(2) On 20.05.2004, upon complaint made by one Mohd. Sajid, a trap was arranged by M.V. Surti, the Deputy Superintendent of Police (CBI) to apprehend Ashok(S) red-handed while accepting bribe of Rs.20,000/-. The trap proceedings were organized. He also conducted search in Ashok(S)'s residence i.e. MIG-4 located in New BDA Complex, Bhopal and recorded the details of the properties seized in a list (Annexure 'P-1').

(3) On 02.05.2005, M.V. Surti registered yet another case against Ashok(S) in respect of offence punishable under Section 13(1)(e) read with 13(2) of the Act on the ground that during the check period, he had acquired properties and pecuniary resources in his name and also in the name of his family members disproportionate to his known sources of income to the extent of Rs.11,43,071/-. Investigation further revealed that explanations furnished by Ashok(S) with regard to various sources of income were found to be false or unacceptable. To illustrate, -

(a) The plea that an amount of Rs.2,86,000/- was received by Sunita Jain as an advance towards consideration under a sale agreement from Umed Singh Raghuwanshi, the proposed purchaser of a plot located in Behlot Road, Ganjbasoda, was unacceptable due to the following reasons -

(i) He had not given prior intimation to the insurance company, as required under the Conduct Rules, either regarding sale of the plot or as to receipt of an amount of Rs.2,86,000/- as advance.

(ii) Non-judicial stamp of Rs.50/-, whereon the sale agreement purported to have been executed on 07.04.2004, was not sold by the stamp vendor Rajkumar Sen on that day.

(iii) Rajkumar Sen, in order to prove sale of the stamp on the aforesaid date to Umed Singh Raghuwanshi, had made false entries in the corresponding register suggesting that on that day, he had sold two stamps (a) one in the denomination of Rs.10/- to Obaidulla Khan, Manager of M/s Bhopal Carrier Service and Zaheer Uddin, the proprietor of the firm and (b) another in the denomination of Rs.50/- to Umed Singh Raghuwanshi whereas on verification, it was found that only one stamp in the denomination of Rs.50/- was sold by him to Obaidulla Khan and Zaheer Uddin.

(iv) Umed Singh Raghuwanshi claimed to be an agriculturist by profession but it was found that he was not filing income-tax returns despite being engaged in the business of sale of tractors also. As such, the amount of Rs.2,86,000/- was not declared by him to the income-tax department. Further, being a financially sound person, he could have easily arranged Rs.1,25,000/- for payment to Smt. Sunita as the balance amount of consideration. Moreover, he had not lodged any FIR or filed a Civil Suit for recovery of the amount of Rs.2,86,000/- said to have been paid by him to Sunita as advance.

(v) The ante-dated sale-agreement purported to have been executed on 07.04.2004 was attested by Pradeep Chaturvedi and S.S. Aslam and was notarized by R.C. Parashar.

(4) Claim of Rs.2,03,000/- as salary drawn by Sunita Jain while being in the employment of Rajeev Jain, an agent of the Insurance Company, was also found to be false and the income tax returns submitted by Rajeev Jain were found to be fictitious for the following reasons -

(i) By virtue of rider placed by Rule 14(1) of the General Insurance (Conduct, Discipline & Appeal) Rules, 1975, Rajeev Jain could not act as an insurance agent.

(ii) In the initial records, Ashok(S) had declared that his wife Smt. Sunita Jain was unemployed.

(iii) In the Bank accounts opened during the period from 1999-2004, Smt. Sunita Jain had declared herself to be a house wife and left the column pertaining to occupation blank.

(iv) There was no evidence to substantiate that Smt. Sunita Jain was employed by Rajeev Jain.

(v) During the check period, only an amount of Rs.88,000/- was deposited by Rajeev Jain and there was no record as to payment of an amount of Rs.2,03,000/- as salary amount to Sunita Jain.

(vi) As Sunita did not file any income tax return, the amount of Rs.2,03,000/- remained undeclared.

(vii) Rajeev Jain was residing at Vidisha whereas Sunita was living with her husband at Bhopal since April, 2000. Thus, the assertion that Rajeev had employed Sunita was inherently improbable.

(5) Income tax returns submitted by Rajeev Jain were found to be false whereas the enclosures were found to be annexed subsequently. Further, rough drafts of the false documents which were allegedly substituted for the originals enclosure with the help of Nanulal Ahirwar posted as Daftari and the record keeper in the Income-Tax Office at Vidisha, were found to have been authored by Ashok(B).

7. In the light of these facts, Sunita, Rajeev, Ashok(B) and Nanulal (who had not challenged the order framing charges against him) were arraigned as accused and further investigation revealed involvement of other persons namely Umed Singh Raghuwanshi, Raj Kumar Sen, Ramesh Chandra Parashar, Pradeep Chaturvedi, Sayed Sajid Aslam, the revisionist in Criminal Revision No.1098/2008 in the offences. Ultimate outcome of the investigation indicated that Ashok(S) was not able to satisfactorily account for the disproportionate

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assets to the extent of Rs.6,73,602/-. Accordingly, charge-sheet was filed
against him, his wife Sunita, brother Rajeev and seven other accused named
above before the Special Court.

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8. According to the petitioners namely Ashok(S), Sunita and Rajeev, - in
view of the restriction imposed by second proviso to Section 17 of the Act,
M.V. Surti, being the Deputy Superintendent of Police (for short 'DSP'), was
not authorized even to register the case under Section 13(1)(e). However, he
not only recorded the FIR but also conducted investigation without the order
of the police officer not below the rank of Superintendent of Police, as
contemplated in the proviso. In such a situation, an application was moved on
26.03.2007 for their discharge on the ground of incompetence of the
Investigating Officer. No reply was filed on behalf of the CBI despite availing
of several opportunities. Ultimately, learned trial Judge rejected their
application vide order-dated 22.9.2007. Since the order was passed even
without affording them an opportunity of being heard, they submitted an
application on 08.07.2008 for recalling the order but this application was also
dismissed for the reasons assigned in the order-dated 15.02.2008.

9. Learned Senior Counsel appearing on behalf of the petitioners except
Ashok(B) has strenuously contended that continuance of the prosecution
founded on unauthorized and illegal investigation, is an abuse of the process
of the Court in view of the following facts -

- (i) M.V. Surti, the DSP, who recorded the FIR, had authorised
himself to conduct the investigation despite the express bar contained
in the second proviso.
- (ii) The trial Court had taken cognizance of the offences ignoring
the fact that the charge sheet was not based on a legal and valid
investigation.

This apart, legality and propriety of the order-dated 22.09.2007, have
been challenged on the ground that it contained a wrong fact as to hearing of
the arguments despite the fact that a number of adjournments were sought
and granted on the ground of non-availability of Shri Meena, Public Prosecutor
In-charge of the case, whose son was reportedly indisposed.

In response, learned Standing Counsel for the CBI has submitted that

2636 Ashok K. Jain Vs. Cent. Bureau of Investn. (DB) I.L.R.[2011] M.P., on 02.02.2005, M.V. Surti had validly registered the case as In-charge Superintendent of Police, CBI Bhopal. Attention has also been invited to the contents of fax message suggesting that on that day, Superintendent of Police, CBI Bhubaneswar was looking after overall supervision of the working of the officials of CBI posted at Bhopal.

10. Learned Senior Counsel still contended that no document authorizing M.V. Surti to investigate the case was placed on record either along with the charge sheet or with the replies to the applications dated 05.05.2007 and 23.06.2007. Reference has also been made to the guidelines contained in Rule 7.11 of the CBI Crime Manual-2005, which defines powers of Deputy Superintendent of Police in the following terms -

The Superintendent of Police will investigate/enquire into the cases which are allotted to him. In Branches where there is no Additional SP, one of the Deputy Superintendents of Police will assist the Superintendent of Police in supervision of the work relating to administration, establishment/accounts. In this respect he will perform such functions and duties as are allotted to him by the Superintendent of Police. He may be designated Dy. SP (Hqrs) and will hold charge of the Branch in the absence of the SP from the Headquarters.

11. With reference to the argument that M.V. Surti was authorized by way of an oral order, learned Senior Counsel referred to the decision of the Apex Court in *State Inspector of Police v. Surya Sankaram Karri* (2006) 7 SCC 172 wherein it was held that issuance of oral direction for investigation is not contemplated under the Act.

12. In the light of the rival contentions, the following questions arise for consideration in the petition (MCrC No.3187/2008) under Section 482 of the Code -

"Whether in the official capacity of DSP, M.V. Surti was not competent either to register the offence under Section 13(1)(e) read with 13(2) of the Act or to investigate the same in absence of an authorization by the competent authority ?

If so, what would be the effect on the consequent proceedings" ?

13. Before proceeding further, it would be necessary to advert to the

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provisions of Section 17 of the 1988 Act, which is couched in the following
terms :-

17. Persons authorised to investigate - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank -

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police.

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank,

shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:

Provided further that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.
(Emphasis supplied)

14. A bare perusal of the FIR recorded on 2.2.2005 would reveal that the scribe M.V. Surti, while writing his designation as S.P. (presumably in-charge) had entrusted the investigation to himself in the capacity of DSP.

15. Learned Senior Counsel has strenuously contended that the entire proceedings before the Special Judge were illegal and void ab initio, inasmuch

2638 Ashok K. Jain Vs. Cent. Bureau of Investn. (DB) I.L.R.[2011] M.P., as the investigation forming basis thereof had been conducted without obtaining the necessary order of the Superintendent of Police, under the second proviso to S.17 of the 1988 Act. According to him, since the illegality in the course of investigation was brought to the notice of the trial Court at the stage of the charge only, it ought to have directed fresh investigation by an officer authorized by the Superintendent of Police. To buttress the contention, he has placed reliance on the following observations made by the Apex Court in *H.N. Rishbud v. State of Delhi* AIR 1955 SC 196, with reference to Section 5(4) and proviso to Section 3 of the Prevention of Corruption Act, 1947 (which correspond to the first proviso to Section 17 (supra) and Section 5-A, which corresponds to the main part of Section 17 -

"We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby. ... It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for ... When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under section 537, Cr. P. C. of making out that such an error has in fact occasioned a failure of justice.

Reference has also been made to the decision of Supreme Court in *State of M.P. v. Mubarak Ali* AIR 1959 SC 707, upholding this Court's order directing re-investigation to rectify the defects and cure the illegality of the investigation in view of the fact that the objection was taken before commencement of the trial. Learned Senior Counsel has cited the following decisions of other High Courts to the same effect -

(i) *State of Karnataka v. B. Narayan Reddy* 2002 Cr.L.J. 845

(ii) *Mukteshwar Prasad Singh v. State of Jharkhand* 2007 Cr.L.J (NOC) 425

He has also relied upon a single Bench decision of this Court in *State of M.P. v. Dr. Devendra Singh* 2002 CriLJ 4368, wherein the order of the trial Judge quashing the part of investigation conducted by the unauthorized police officers with liberty to re-investigate in accordance with law was set aside and the trial Court was directed to proceed with the trial excluding the statements of three witnesses recorded by such officers.

16. To fortify the argument that, in absence of authorization by the S.P., M.V. Surti was not entitled to register or investigate into the offence under Section 13(1)(e) of the Act, our attention is invited to the following precedents -

(i) *Umesh Kumar Choubey v. State of M.P.* 2000 Cr.L.J. 1760

(ii) *H. S. Gotla v. State of Karnataka* 2001 Cr.L.J. 2695

(iii) *Girija Shankar Shukla v. SDO Harda* 1973 MPLJ 411

17. In the last mentioned case, a Full Bench of this Court had to resolve the conflict of opinions expressed by two Division Benches regarding the meaning of the expression "holding current charge of the duties". After referring to the various decisions of the English and Indian Courts, it proceeded to approve the view taken by a Division Bench in *Ramratan v. State of M.P.* AIR 1964 M.P. 114 to the following effect -

"A person appointed permanently or to officiate on a post holds that rank whereas a person who is placed only "in current charge of duties of a post" does not hold that rank. Accordingly, those functions or powers of the post, which depend on the rank, cannot be discharged by a person who is placed only in current charge of the duties of that post".

18. In the case of *H.S. Gotla*, the DSP had registered the case as In-charge Superintendent of Police at the relevant point of time and exercising his power as in-charge Superintendent of Police permitted himself by an order of sanction for investigation into the matter. While holding that rank of the Deputy Superintendent of Police had remained unchanged, learned single Judge

2640 Ashok K. Jain Vs. Cent. Bureau of Investn. (DB) I.L.R.[2011] M.P., proceeded to quash registration of the case as well as continuation of investigation for want of order of an Officer not below the rank of Superintendent of Police to conduct the investigation, as contemplated in the second proviso to Section 17 of the 1988 Act. However, liberty was granted to the State to initiate fresh proceedings by following the due procedure of law.

19. In *Umesh Kumar's case*, objection as to incompetence of a DSP to investigate the offence under S.13(1)(e) without any order of the S.P. was taken at an early stage of the trial. A single Bench of this Court, placing primal reliance on certain observations made by the Supreme Court in *State of Haryana v. Bhajanlal*, AIR 1992 SC 604, rejected the argument that the defect stood cured by application of S.P. before the JMFC for issuing warrant of search to be conducted by the DSP, as it was of the opinion that there could not be a deemed order under second proviso to S.17. However, following the guideline laid down in *H.N. Rishbud's case* (above), the learned Judge, while declining to quash the FIRs, discharged the petitioners with the observation that the investigating authority would be at liberty to proceed afresh in accordance with law, if they so desire.

20. For a proper appreciation of the rival contentions, it is necessary to refer briefly to the legislative history leading to creation of the offence punishable under Section 13(1)(e) of the 1988 Act and the enactment of Section 17 thereof. As pointed out already, Section 17 corresponds to Section 5-A(1) of 1947 Act with necessary modifications in view of the fact that the entire Chapter IX of the Indian Penal Code that comprised the offences by or relating to public servants was omitted by the 1988 Act.

21. Section 3 of the 1947 Act ran as follows -

3. Offence under Section 165-A of the Penal Code to be cognizable offence.-An offence punishable under Section 161 or Section 165 or Section 165-A of the Indian Penal Code shall be deemed to be a cognizable offence for the purposes of the Code of Criminal Procedure, 1898, notwithstanding anything to the contrary contained therein:

[Provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of the Magistrate of the first class or make any arrest therefor without a warrant.] (Emphasis supplied)

Section 5(4) of the 1947 Act read as under -

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a Police Officer below the rank of Deputy Superintendent of Police shall not investigate any offence punishable under sub-Section (2) without the order of a Magistrate of the First Class or make any arrest therefor without a warrant".

22. By virtue of the provisions of the Prevention of Corruption (Second Amendment) Act, 1952, -

- (a) the proviso to Section 3 was omitted and it was further amended by adding the words "or Section 165-A" after the portion "Section 165".
- (b) sub-section (4) of Section 5 of the 1947 Act was replaced.
- (c) Section 5-A, which was worded in the following form was introduced -

5-A. Investigation into cases under this Act.-

Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police-officer below the rank,-

- (a) in the presidency-towns of Madras and Calcutta, of an Assistant Commissioner of Police,*
- (b) in the presidency-town of Bombay, of a Superintendent of Police, and*
- (c) elsewhere, of a Deputy Superintendent of Police, shall investigate any offence punishable under Section 161, Section 165 or Section 165-A of the Indian Penal Code or under sub-section (2) of Section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:*

Provided that a police-officer of the Delhi Special Police Establishment, not below the rank of an

Inspector of Police, who is specially authorised by the Inspector-General of Police of that Establishment may, if he has reasons to believe that, on account of the delay involved in obtaining the order of a Magistrate of the first class, any valuable evidence relating to such offence is likely to be destroyed or concealed, investigate the offence without such order; but in every case where he makes such investigation, the police-officer shall, as soon as may be, send a report of the same to a Magistrate of the first class together with the circumstances in which the investigation was made.

23. Against this backdrop, the Apex Court in *H. N. Rishbud's case* (supra) explained the nature, scope and object of a provision like Section 5(4) as well as the underlying policy in the following terms -

"It is in the light of this scheme of the Code that the scope of a provision like Section 5(4) of the Act has to be judged. When such a statutory provision enjoins that the investigation shall be made by a police officer of not less than a certain rank, unless specifically empowered by a Magistrate in that behalf, notwithstanding anything to the contrary in the Code of Criminal Procedure, it is clearly implicit therein that the investigation (in the absence of such permission) should be conducted by the officer of the appropriate rank. ...

When the Legislature has enacted in emphatic terms such a provision it is clear that it had a definite policy behind it. ...

The underlying policy, in making these offences by public servants non-cognizable appears to be that public servants who have to discharge their functions - often enough in difficult circumstances - should not be exposed to the harassment of investigation against them on information levelled, possibly by persons affected by their official acts, unless a Magistrate is satisfied that an investigation is called for, and on such satisfaction authorises the same. This is meant to ensure the diligent discharge of their official functions by public servants, without fear or favour. When, therefore the Legislature thought

fit to remove the protection from the public servants, in so far as it relates to the investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank. Having regard therefore to the peremptory language of sub-section (4) of Section 5 of the Act as well as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory..

We are, therefore, clear in our opinion that Section 5(4) and proviso to Section 3 of the Act and the corresponding Section 5-A of Act 59 of 1952 are mandatory and not directory and that the investigation conducted in violation thereof bears the stamp of illegality."

By Anti-Corruption Laws (Amendment) Act, 1964, clause (e) in Section 5 of the 1947 Act was added and Section 5-A was substituted by a new Section, comprising two sub-sections. Section 17 of the 1988 Act (as reproduced above) corresponds to the first sub-Section with necessary modifications.

24. The legislative intent in incorporating Section 17 in the 1988 Act was to ensure that the investigation of any offence under the Act should be done ordinarily by officers of the rank of Deputy Superintendent of Police or above. However, under the first proviso, an officer below the rank of Deputy Superintendent but not that of an Inspector of Police, if authorized by the State Government in this behalf, would also be legally competent to investigate the offences subject to condition as contained in the second proviso which says that an offence referred to in clause (e) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

25. It is a settled rule of construction that the language of the proviso, even if general, is normally to be construed in relation to the subject matter covered by the section to which the proviso is appended. In other words, normally a proviso does not travel beyond the provision to which it is a proviso. In this view of the matter, the second proviso is applicable to power of an officer authorized by the State Government, under the first proviso, and not to the

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general power conferred on designated officers including a Deputy
Superintendent of Police to investigate any offence under the Act.

26. In *Bhajanlal's case* (supra), the Supreme Court had the occasion to interpret analogously worded provisions of Section 5A(1) of 1947 Act. It was observed (in paragraph 124 of the Judgment) that a conjoint reading of the main provision, 5A(1) and the two provisos thereto, shows that the investigation by the designated police officers is the rule and the investigation by an officer of a lower rank is an exception. However, to understand the true meaning of the observation, it is necessary to look into the factual context and read the foregoing paragraphs of the judgment, as extracted below -

" 121. Section 5A of the Act as it originally stood, was inserted by the (Second Amendment) Act 58 of 1952 based on the recommendations of the Committee of Members of Parliament under the chairmanship of Dr. Bakshi Tek Chand. The said section as it stands now was substituted by Act 40 of 1964, the main object of which is to protect the public servant against harassment and victimisation. (See *The State of M. P. v. Mubarak Ali* (AIR 1959 SC 707) (albeit). In *A. C. Sharma v. Delhi Administration* (1973) 3 SCR 477: (AIR 1973 SC 913), Dua, J. said that the scheme of this provision is for effectively achieving the object of successful investigation into the serious offences mentioned in Section 5 of the Act without unreasonably exposing the public servant concerned to frivolous and vexatious proceedings. A Constitutional Bench of this Court in *A. R. Antulay v. R. S. Nayak* (1984) 2 SCR 914 at page 941 : (AIR 1984 SC 718 at p. 732) has observed that "Section 5A is a safeguard against investigation of offences by public servants, by petty or lower rank police officer. "

122. *According to Section 5A, notwithstanding anything contained in the Code, no police officer below the rank specified in clauses (a) to (d) of Section 5A (1), shall investigate any offence punishable under Sections 161, 165 or 165A of the IPC or under Section 5 of the Act without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be or make arrest therefor without a warrant. There are two provisos to that section. As per the first proviso, if a police officer not below the rank of an Inspector of Police is*

authorised by the State Government, either by general or special order, he may investigate any such offence without the order of a Magistrate or make arrest therefor without a warrant. According to the second proviso, an offence referred to in clause (e) of sub-section (1) of Section 5 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police.

123. It means that a police officer not below the rank of an Inspector of Police authorised by the State Government in terms of the first proviso can take up the investigation of an offence referred to in clause (e) of Section 5 (1) only on a separate and independent order of a police officer not below the rank of a Superintendent of Police. To say in other words, a strict compliance of the second proviso is an additional legal requirement to that of the first proviso for conferring a valid authority on a police officer not below the rank of an Inspector of Police to investigate an offence falling under clause (c) of Section 5(1) of the Act. This is clearly spelt out from the expression "further provided" occurring in the second proviso."

(Emphasis supplied).

27. A bare reading of the order passed by learned Single Judge in *Umesh Kumar's case* would reveal that the view that, in absence of authorization by the Superintendent of Police, investigation conducted by DSP into an offence under Section 13(1)(e) would be without jurisdiction, was based only on the observations made by the Supreme Court in paragraph 123 of the judgment rendered in *Bhajanlal's case* (quoted already) with regard to the Police officers inferior in rank to that of a DSP. However, it was nowhere observed in the judgment that the second proviso governs the entire section and not the first proviso alone. On the contrary, it was clearly indicated in paragraph 134 of the judgment that the second proviso prescribes an additional safeguard in case the investigation is entrusted to an officer other than that of a designated rank. Relevant observations may be reproduced as under -

"It is, therefore, clear in the light of the above principle of law that the Superintendent of Police or any police officer of above rank while granting permission to a non-designated police officer in exercise of his power under the second proviso to

Section 5A(1), should satisfy himself that there are good and sufficient reasons to entrust the investigation with such police officer of a lower rank and record his reasons for doing so; because the very object of the legislature in enacting Section 5A is to see that the investigation of offences punishable under Section 161, 165 or 165A of Indian Penal Code as well as those under Section 5 of the Act should be done ordinarily by the officers designated in clauses (a) to (d) of Sec. 5A(1). The exception should be for adequate reasons which should be disclosed on the face of the order."

28. Taking into consideration the legislative history, object and basic scheme of the provisions of Section 17 of the 1988 Act and above all, the aforesaid observations in *Bhajanlal's case*, we are of the considered opinion that each one of the officers designated in clauses (a) to (c) thereof is competent to investigate the offence under Section 13(1)(e) even without order of authorisation by Superintendent of Police as contemplated in the second proviso. The question posed in Para 12 (above) is, therefore, answered in the negative. As an obvious corollary, an order under the second proviso would be necessary only in a case where investigation into the offence is sought to be conducted by an officer of a lower rank, though authorized by the State Government under the first proviso.

29. In view of the opinion formed by us, the view taken by learned Single Judge in *Umesh Kumar's case* (2000 CRI.L.J. 1760) on interpretation of the second proviso to Section 17 of the 1988 Act is legally erroneous and is hereby overruled.

30. Reverting to the facts of the present case, it may easily be concluded that, in any case, M.V. Surti, being the DSP, had the authority to register the offence under Section 13(1)(e) as the second proviso to Section 17 is only applicable to investigation that commences with lodgment of information relating to the commission of a cognizable offence.

31. The objection that the prosecution based on outcome of the investigation conducted by M.V. Surti, the officer who had recorded the FIR as the complainant was not sustainable in law, is also misconceived. The Apex Court in *State v. V. Jayapaul* AIR 2004 SC 2684 has clearly laid down that where the investigation was done by the same police officer who lodged FIR, the same cannot be held barred by law and such investigation could be assailed

I.L.R.[2011]M.P., Ashok K. Jain Vs. Cent. Bureau of Investn. (DB) 2647 only on the ground of bias or real likelihood of bias on the part of the Investigating Officer. In that case, Inspector of Police, Vigilance and Anti-Corruption had received information about commission of the offence in question and had scribed the FIR. The Supreme Court, while reiterating the view taken in *State of U.P. v. Bhagwant Kishore Joshi* AIR 1964 SC 221, proceeded to observe as under-

"There is nothing in the provisions of the Criminal Procedure Code which precluded the appellant from taking up the investigation. The fact that the said police officer prepared the FIR on the basis of the information received by him and registered the suspected crime does not disqualify him from taking up the investigation of the cognisable offence. A suo motu move on the part of the police officer to investigate a cognisable offence impelled by the information received from some sources is not outside the purview of the provisions contained in Sections 154 to 157 of the Code or any other provisions of the Code."

This apart, the Apex Court in *State of M.P. v. Ram Singh*, (2000) 5 SCC 88, had the occasion to consider effect of investigation by an unauthorized police officer upon the consequent criminal proceedings by making reference to the decisions in the cases of *H.N. Rishbud* and *Bhajanlal*. In that case, upon the information that Ram Singh, an Excise Sub-Inspector had acquired properties disproportionate to his known sources of income, a raid was conducted by the Deputy Superintendent of Police (SPE) Lokayukt Office, Gwalior and the initial investigation was also conducted by another Deputy Superintendent of Police but thereafter, one Inspector of the SPE was authorised by the Superintendent of Police to conduct further investigation. However, a single Bench of this Court, while exercising inherent powers under Section 482 of the Code, quashed the investigation and the consequent proceedings on the ground that the order of the Superintendent of Police clothing the Inspector with the requisite legal authority to investigate within the meaning of the second proviso did not reflect application of mind. Observing that the facts of the case were somewhat different and distinguishable from those of *Bhajanlal's case*, the Supreme Court proceeded to allow the State appeal and in the judgment, also quoted the following observations made by the three Judge Bench of the Supreme Court in *H.N. Rishbud's case* (supra) with approval -

"A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 Cr.P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings." The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., Sections 193 and 195 to 199.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under Clause (a) or (b) of Section 190(1) (whether it is the one or the other we need not pause to consider) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial."

That an illegality committed in the course of investigation does not affect competence and jurisdiction of the Court for trial is well settled as appears from the cases of Prabhu vs. Emperor AIR 1944 PC 73 and Lumbhardar Zutshi vs. The King AIR 1950 PC 26.

32. It is relevant to note that the petitioners had not challenged the order-taking cognizance at the earliest possible opportunity. In this view of the matter, even if it is assumed that the investigation was, in any manner, defective, the order taking cognizance and the consequent proceedings cannot be quashed as no failure of justice had occasioned thereby. For this, reference may be made to the decision of the Apex Court in *Munna Lal v. State of U.P.* AIR 1964 SC 28 wherein the view taken in *Mubarak Ali's case* (above) was distinguished.

33. For these reasons, none of the contentions raised on behalf of the petitioners in MCrC No.3187/2008 against validity of order taking cognizance or the consequent proceedings deserves acceptance. Further, the inherent powers, under Section 482 of the Code, are to be exercised ex debito justitiae to prevent abuse of the process of Court but not to stifle a legitimate prosecution, when the issue involved, whether factual or legal, can not be decided without sufficient material. Accordingly, no interference is called for with the order-dated 22.09.2007 or the subsequent proceedings.

CRIMINAL REVISION NO.836/2008

34. As pointed out already, in this revision, the order framing charges is the subject matter of the challenge. According to the revisionist namely Ashok(B), he was only engaged by Rajeev Jain as a tax consultant to file income tax returns but he has been unnecessarily roped in the case upon the allegations that he had given the rough drafts of the enclosures submitted by Rajeev Jain along with income tax returns.

35. Shri Vijay Nayak, learned counsel appearing on behalf of Ashok(B), has urged that no offence was made out against him for the following reasons :-

- (i) No evidence is available on record to establish that the rough notes in question were prepared by the petitioner.
- (ii) There is no iota of evidence to suggest that he had acted as a co-conspirator.
- (iii) Nothing on record suggests that he had used the forged documents as genuine.

36. However, a bare reading of the relevant extracts of the charge-sheet would reveal that Ashok(B) was arraigned as an accused because -

- (i) It was found that the enclosures to the income tax returns submitted by Rajeev Jain were prepared at his instance by Narendra Kumar Jain, the Accountant.
- (ii) The enclosures were, in fact, substituted subsequent to the search of residence of Ashok(S) with a view to explaining the disproportionate income as the income earned by his brother Rajeev Jain.
- (iii) It was further noticed that Ashok(B) had made alterations in

the enclosures at the time when the income tax returns were in the custody of Nannulal Ahirwar, the Daftari of Income Tax Office at Vidisha, who had taken out the original returns from the Record Room and had made them available to Rajeev Jain for substitution of the enclosures.

37. As indicated already, Ashok(S) is charged with the offence of criminal conspiracy which is always hatched in secrecy and it is impossible to adduce direct evidence of the same. The offence can be only proved largely from the inferences drawn from acts or illegal omission committed by the conspirators in pursuance of a common design (See. *Shivanarayan Laxminarayan Joshi v. State of Maharashtra* AIR 1980 SC 439. Moreover, it is not necessary that each member of a conspiracy must know all the details of the conspiracy (*R. K. Dalmia v. Delhi Administration* AIR 1962 SC 1821 relied on). Besides this, framing of charge and to establish the charge of conspiracy cannot possibly be placed at par (*Hardeo Singh v. State of Bihar* AIR 2000 SC 2245 referred to).

38. The trial Judge is required to record reasons only if he decides to discharge the accused (See. *Kanti Bhadra Shah v. State of W.B.* (2000) 1 SCC 722). It is also well established that even a strong suspicion leading to presumption as to possibility as against certainty about commission of crime makes out a case for framing of charge. Moreover, at this stage, the Court need not undertake an elaborate enquiry in sifting and weighing the material and should not enter upon a process of evaluating the evidence by deciding its worth or credibility. Nor is it necessary to delve deep into various aspects. All that the Court has to consider is whether the evidentiary material on record if generally accepted, would reasonably connect the accused with the crime. Accordingly, the order framing charges against Ashok(B) deserves to be affirmed as well merited.

CRIMINAL REVISION NO.1098/2008

39. In view of the above discussion pertaining to the petition under Section 482 of the Code, the order-dated 15.02.2008 rejecting prayer for recalling the order-dated 22.09.2007 does not call for any interference under the revisional jurisdiction. Moreover, learned trial Judge also did not commit any error of jurisdiction in reaching the conclusion that the revisionists deserved to be charged with the offences punishable under Sections 120-B read with 465, 471 and 201 of the IPC and Section 109 read with 13(1)(e) read with 13(2) of the Act.

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.