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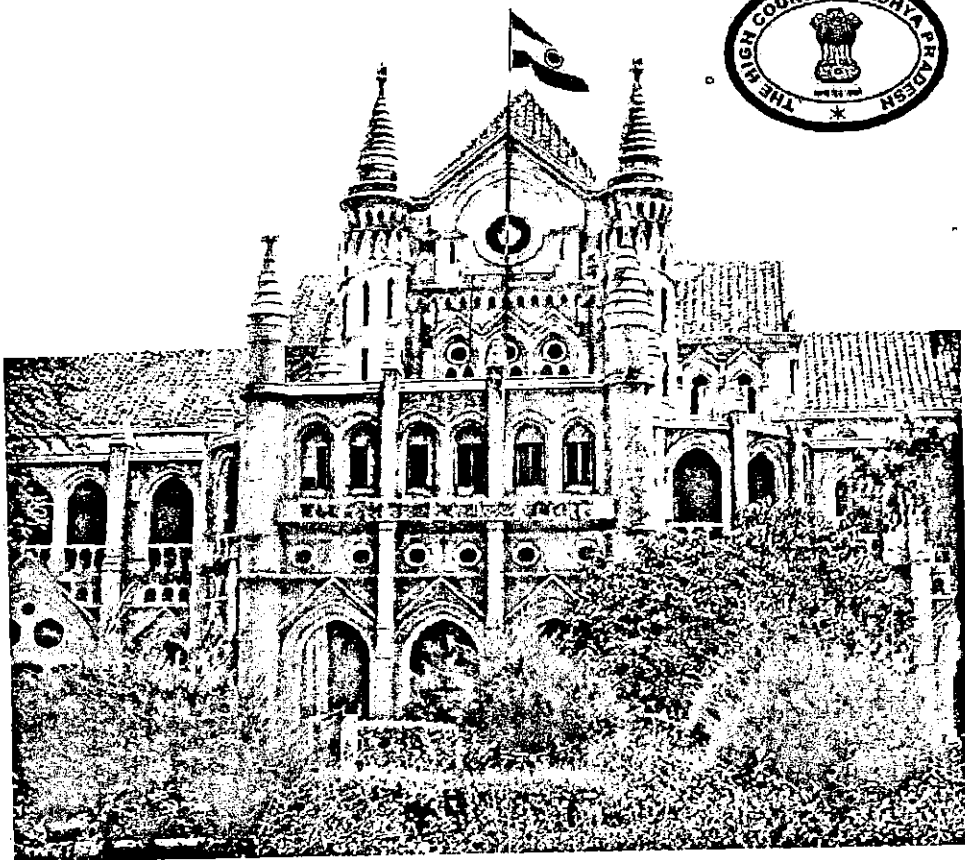
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CONTAINING

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Short Note (SC)

*(42)

Before Mr. Justice A.K. Patnaik & Mr. Justice Swatanter Kumar

Criminal Appeal No. 301/2008 decided on 15 March, 2012

BHAJJU @ KARAN SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 32 – Dying Declaration

– If Dying declaration is recorded in accordance with law, is reliable and gives a cogent and possible explanation of the occurrence of events
– Dying Declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in conviction of accused
– Admissibility of dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that the conscientious and virtuous man under oath.

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – यदि मृत्युकालिक कथन विधिनुसार अभिलिखित किया गया है विश्वसनीय है और घटनाओं के घटित होने का प्रबल एवं साध्य स्पष्टीकरण देता है – मृत्युकालिक कथन पर न्यायालय द्वारा निश्चित रूप से विश्वास किया जा सकता है और अभियुक्त को दोषसिद्ध करने के लिये एकमात्र साक्ष्य का रूप ले सकता है – मृत्युकालिक कथन की ग्राह्यता इस सिद्धांत पर आधारित है कि सन्निकट मृत्यु का बोध मनुष्य के मन में वैसी ही भावना उत्पन्न करता है जैसा कि शपथबद्ध, शुद्धमति एवं सदाचारी व्यक्ति के मन में उत्पन्न होती है।

B. Evidence Act (1 of 1872), Section 154 – Hostile Witness –

Evidence of hostile witness can also be relied upon by the prosecution to the extent to which supports the prosecution version of incident.

ख. साक्ष्य अधिनियम (1872 का 1), धारा 154 – पक्षदोही साक्षी – पक्षदोही साक्षी की साक्ष्य पर अभियोजन भी उस सीमा तक विश्वास कर सकता है जहां तक वह घटना की अभियोजन कहानी का समर्थन करता है।

The judgment of the Court was delivered by : SWATANTER KUMAR, J.

Cases referred :

(2006) 9 SCC 240, (2008) 2 SCC 516, (2000) 1 SCC 310, (2001) 6 SCC 118, (2002) 1 SCC 577, (2009) 11 SCC 647, (2005) 9 SCC 113, (1976) 3 SCC 104, (1999) 8 SCC 624, (2010) 8 SCC 536, (2010) 6 SCC 1, (2007) 13 SCC 525.

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Short Note (DB)

*(43)

Before Mr. Justice Shantanu Kemkar & Mr. Justice P. Shrivastava
Review Petition No. 15/2011 (Indore) decided on 22 September, 2011

MOHD. SHAFI

...Petitioner

Vs.

ABDUL WAHID (DECEASED) THROUGH LRs.

...Respondents

A. Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Review – Scope – Review is maintainable if it is necessitated on account of some mistake or any other sufficient reason and words Sufficient reasons are wide enough to include misconception of fact or law by a Court or even an Advocate.

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1. – पुनर्विलोकन – विषयक्षेत्र – पुनर्विलोकन पोषणीय है, यदि वह किसी मूल या अन्य किसी पर्याप्त कारण से आवश्यक हो जाता है और शब्द 'पर्याप्त कारण' व्यापक है जिसमें न्यायालय द्वारा या यहां तक कि किसी अधिवक्ता द्वारा भी तथ्य या विधि का भ्रम शामिल है।

B. Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Concession by Advocate – Decree of eviction was passed on concessional statement made by Counsel for respondent therein/ applicant that he admits the grounds of eviction – Counsel filing affidavit denying the fact of making such concession – Respondents did not file any affidavit to controvert the affidavit of the Counsel for applicant – Further when the applicant was claiming title over the land in dispute from the very beginning of the case, there was no occasion for him to make such concession.

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – वकील द्वारा रियायत – प्रत्यर्थी/आवेदक के अधिवक्ता द्वारा दिये गये रियायत का कथन कि वह बेदखली के आधारों को स्वीकार करता है, के आधार पर बेदखली की डिक्री पारित की गई, – अधिवक्ता द्वारा शपथपत्र प्रस्तुत कर उक्त रियायत के तथ्य से इंकार किया गया – प्रत्यर्थीगण ने आवेदक के अधिवक्ता द्वारा प्रस्तुत किये गये शपथ पत्र को विवादित करने हेतु कोई शपथ पत्र प्रस्तुत नहीं किया – इसके अतिरिक्त जब आवेदक विवादित भूमि पर अपना दावा, प्रकरण के प्रारंभ से कर रहा था तो उसके लिये उक्त रियायत करने का कोई अवसर नहीं था।

C. Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Concession – Concession on the point of law is not binding and it is open to withdraw it by filing a review application – If the Counsel has

NOTES OF CASES SECTION

made any concession without going through the record, the Court should take care to verify the record before accepting the concession made by Counsel.

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – रियायत – विधि के बिन्दू पर रियायत बाध्यकारी नहीं है और इसे पुनर्विलोकन आवेदन प्रस्तुत करके वापिस लेने के लिये स्वतंत्र है – यदि अधिवक्ता द्वारा अभिलेख को बिना पढ़े कोई रियायत की जाती है तो न्यायालय को अधिवक्ता द्वारा की गई रियायत को स्वीकार करने से पहले अभिलेख का परीक्षण करना चाहिए।

D. *Civil Procedure Code (5 of 1908) Order 47 Rule 1 – Review – Maintainability* – Applicant already submitted undertaking before the Executing Court – By giving such undertaking the statutory remedy of appeal, revision or review is not scuttled or foreclosed.

घ. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – पुनर्विलोकन – पोषणीयता – आवेदक द्वारा पहले ही निष्पादक न्यायालय के समक्ष वचन प्रस्तुत किया गया – उक्त वचन देने से अपील, पुनरीक्षण या पुनर्विलोकन का कानूनी उपचार संकुचित या पुरोबधित नहीं हो जाता।

The order of the Court was delivered by : SHANTANU KEMKAR, J.

Cases referred :

(2005) 4 SCC 741, (2000) 6 SCC 224, (1998) 2 SCC 523, (1995) 5 SCC 751, (1991) 4 SCC 195, (1996) 10 SCC 574, (2009) 13 SCC 131, (1998) 6 SCC 507, 1995 (Supp) 2 SCC 539.

A.K. Chitale with S. Kochatta, for the petitioner.

A.K. Sethi with H. Joshi, for the respondents.

Short Note

*(44)

Before Mr. Justice Sujoy Paul

W.P. No. 6378/2011 (Gwalior) decided on 21 March, 2012

RAJENDRA SINGH SALUJA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Caste Certificate – Verification – Vigilance Report* – Caste Verification Committee can examine the correctness and genuineness of the report – Committee is not required to blindly follow the Vigilance Report.

क. जाति प्रमाण पत्र – सत्यापन – सतर्कता रिपोर्ट – जाति सत्यापन

NOTES OF CASES SECTION

समिति रिपोर्ट की शुद्धता एवं सत्यता का परीक्षण कर सकती है – सतर्कता रिपोर्ट का बिना सोचे समझे अनुसरण करना समिति से अपेक्षित नहीं।

B. Caste Verification Committee – Constitution thereof – Allegation that a member who was required to be nominated by Chairman and who should be an expert in the field of SC was not there – Held – State produced communication dated 4.11.1999 showing that Director of S.T. research Institute was nominated a Member – No material produced to establish that said member is not competent to be so nominated – Decision dated 4.11.1999 also not challenged – Constitution of Committee upheld.

ख. जाति सत्यापन समिति – का गठन – अभिकथन कि सदस्य जिसे अध्यक्ष द्वारा नामित करना अपेक्षित था और जिसे एससी के क्षेत्र में विशेषज्ञ होना चाहिए था वहाँ नहीं था – अभिनिर्धारित – राज्य ने प्रेषण दिनांक 4.11.1999 प्रस्तुत किया यह दर्शाते हुए कि एसटी अनुसंधान संस्थान के निदेशक को सदस्य नामित किया गया था – यह स्थापित करने के लिये कोई सामग्री प्रस्तुत नहीं की गई कि उक्त सदस्य इस प्रकार नामित किये जाने के लिये सक्षम नहीं है – निर्णय दिनांक 4.11.1999 को भी चुनौती नहीं दी गई – समिति के गठन की पुष्टि की गई।

C. Caste Verification Committee – Findings – Committee rejected the Vigilance Report which was based on oral evidence and based its finding basically on documentary evidence like School Admission Register, Transfer Certificate, Application submitted by father of petitioner for grant of APL/BPL Ration Card – All documents show that petitioner and his father always expressed their caste as Punjabi/Sikh/Hindu and never claimed them as S.C.

ग. जाति सत्यापन समिति – निष्कर्ष – समिति ने सतर्कता रिपोर्ट अस्वीकार की जो मौखिक साक्ष्य पर आधारित थी और मुख्यतः अपना निष्कर्ष दस्तावेजी साक्ष्य जैसे शाला प्रवेश पंजी, अंतरण प्रमाण पत्र, याची के पिता द्वारा एपीएल/बीपीएल राशन कार्ड प्रदान किये जाने हेतु प्रस्तुत आवेदन पर आधारित किया – सभी दस्तावेज दर्शाते हैं कि याची तथा उसके पिता ने सदैव अपनी जाति पंजाबी/सिख/हिन्दू के रूप में अभिव्यक्त की और कभी भी एससी होने का दावा नहीं किया।

D. Evidence Act (1 of 1872), Section 90 – School Admission Register – Record more than 30 years old – Has more probative and evidenciary value in comparison to oral statement.

घ. साक्ष्य अधिनियम (1872 का 1), धारा 90 – शाला प्रवेश पंजी – अभिलेख 30 वर्ष से अधिक पुराना – इसका मौखिक कथन की तुलना में अधिक प्रमाणित एवं साक्ष्यक मूल्य है।

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E. Caste Certificate – Issuance of – Petitioner before submitting application for grant of Caste Certificate always projected himself as *General, Hindu, Sikh or Punjabi* - Petitioner or his father never faced deprivation, discrimination, atrocities or difficulties which are faced by a S.C. Candidate – Very purpose of grant of SC certificate is available to those who had a difficult start and upbringing in their lives because of belonging to SC community – Petitioner never faced those deprivation – Not entitled for benefits

ड. जाति प्रमाण पत्र – जारी किया जाना – याची ने जाति प्रमाण पत्र प्रदान किये जाने हेतु आवेदन प्रस्तुत करने से पूर्व हमेशा स्वयं को सामान्य, हिन्दू, सिख या पंजाबी प्रक्षेपित किया – याची या उसके पिता ने कभी भी वंचित किये जाने, भेदभाव, अत्याचार या कठिनाईयों का सामना नहीं किया जिनका सामना एससी अभ्यर्थी द्वारा किया जाता है – एससी प्रमाण पत्र प्रदान किये जाने का प्रयोजन उन्हीं को उपलब्ध है जिन्हें शुरुआत और प्रारंभिक शिक्षा में एससी समुदाय का होने के कारण कठिनाई आती है – याची ने इन वंचनाओं का कभी सामना नहीं किया – लाभों का हकदार नहीं।

Cases referred :

(1994) 6 SCC 241, 2002(2) JLJ 391, 2005(4) MPLJ 417, 2012 (1) MPLJ 359, (2012) 1 SCC 113, 2010(1) JLJ 14, (2010) 9 SCC 496, 2007 (5) MPLJ 539, 2012 (1) MPLJ 359, (2004) 2 SCC 105, (2005) 8 SCC 283, (2005) 7 SCC 690, (2007) 14 SCC 481, (2007) 10 SCC 590, (2008) 2 SCC 186, (2006) 3 SCC 257, (1996) 3 SCC 545.

K.N. Gupta with Pawan Dwivedi, for the petitioner.

Nidhi Patankar, G.A. for the respondents No. 1 & 2.

Anil Mishra & Rajnish Sharma, for the respondent No.3.

Short Note

*(45)

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 718/2002 (Jabalpur) decided on 8 December, 2011

RAM KRISHAN & ors.

...Applicants

Vs.

PRABHU BAIGA & ors.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 222, Penal Code (45 of 1860), Sections 307, 326 – Framing of Charge – If any injury falls under any category of the either part of Section 300 of IPC, charge under Section 307 can be framed – In MLC report and X ray

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report fracture in Occipital region found – The occipital region is vital part of the body, any fracture sustained in such part is sufficient to cause death in ordinary course of the nature – If victim survives then charge of Section 307 of IPC ought to have been framed – Trial Court directed to frame charge under Section 307 of IPC.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 222, दण्ड संहिता (1860 का 45), धाराएँ 307, 326 – आरोप विरचित किये जाना – यदि कोई चोट भा.द.सं. की धारा 300 के किसी प्रवर्ग के अंतर्गत आती है तो धारा 307 के अंतर्गत आरोप विरचित किया जा सकता है – एम.एल.सी. रिपोर्ट और एक्स रे रिपोर्ट में ऑक्सीपिटल भाग (खोपड़ी का पिछला हिस्सा) में अस्थि भंग पाया गया – ऑक्सीपिटल भाग शरीर का महत्वपूर्ण भाग है, उक्त अंग में किसी अस्थि भंग का होना, प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिये पर्याप्त है – यदि पीड़ित जीवित है, तो भा.द.सं. की धारा 307 के अंतर्गत आरोप विरचित किया जाना चाहिए था – विचारण न्यायालय को भा.द.सं. की धारा 307 के अंतर्गत आरोप विरचित करने के लिये निदेशित किया गया।

Suyash Tripathi, for the applicants.

Sanjiv Saxena, for the non-applicants No. 1 to 7.

Alok Tapikar, P.L. for the non-applicant No. 8/State.

Short Note (DB)

*(46)

Before Mr. Justice A.K. Shrivastava & Mrs. Justice S.R. Waghmare

Cr. A. No.478/2001 (Indore) decided on 3 January, 2012

RAM MOHAN AGRAWAL(DEAD) THROUGH LRS. ...Appellants
Vs.

STATE OF M.P. ...Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Illegal Gratification – Members of the raiding party were standing on the ground floor whereas the complainant had gone to the office of the appellant which is situated on the first floor – Complainant was not accompanied by any member of raiding party – Complainant had sufficient time to come in contact with treated currency notes – If the complainant shakes his hands with the appellant, certainly the particles of phenolphthalein powder will fall on the hands of appellant.

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – अवैध परितोषण – छापामार दल के सदस्य भू-तल पर खड़े थे जबकि शिकायतकर्ता

NOTES OF CASES SECTION.

अपीलार्थी के कार्यालय में गया था जो प्रथम मंजिल पर स्थित है — छापामार दल का कोई सदस्य शिकायतकर्ता के साथ नहीं था — शिकायतकर्ता के पास उपचारित करेंसी नोट के सम्पर्क में आने के लिए पर्याप्त समय था — यदि शिकायतकर्ता अपीलार्थी से अपना हाथ मिलाता है तो निश्चित रूप से फिनॉल्फ्थेलीन पाउडर के कण अपीलार्थी के हाथों में गिरेंगे।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Surveillance or Shadow Witness – Presence of Surveillance or Shadow witness is very much essential to prove what actually transpired at the time of transaction of bribe.

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – निगरानी या छाया साक्षी – निगरानी या छाया साक्षी की उपस्थिति यह साबित करने के लिए अत्यंत आवश्यक है कि रिश्वत के संव्यवहार के समय वास्तविक रूप से क्या घटित हुआ।

C. Evidence Act (1 of 1872), Section 3 – Defence Witness – Status – Status of defence witness is at par with that of prosecution witnesses and their testimony should not be thrown out merely on the basis that they have been examined by defence.

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 – बचाव साक्षी – स्थिति – बचाव साक्षी की स्थिति अभियोजन साक्षियों के समान्तर है और उनकी परिसाक्ष्य को मात्र इस आधार पर ठुकराया नहीं जाना चाहिए कि उनका परीक्षण बचाव पक्ष द्वारा किया गया।

D. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Defence – Probable – Appellant took a defence that the complainant entered inside his office in his absence and put the currency notes in the pocket of his coat which was hanging on his chair – The fact that members of raiding party asked the complainant about the money instead of appellant further corroborates the defence – Appellant had also examined office peon in his defence – Defence taken by appellant was probable – Prosecution failed to prove the guilt of the appellant – Appeal allowed.

घ. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – बचाव – संभाव्य – अपीलार्थी ने बचाव लिया कि शिकायतकर्ता ने उसके कार्यालय के भीतर उसकी अनुपस्थिति में प्रवेश किया और करेंसी नोटों को उसकी कुर्सी पर टंगे उसके कोट की जेब में रख दिया – तथ्य कि छापामार दल के सदस्यों द्वारा रुपयों के बारे में अपीलार्थी की बजाये शिकायतकर्ता को पूछा जाना बचाव की पुष्टि करता है – अपीलार्थी ने अपने बचाव में कार्यालयीन भृत्य का भी परीक्षण किया – अपीलार्थी द्वारा लिया गया बचाव संभाव्य था – अभियोजन अपीलार्थी की दोषिता

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सिद्ध करने में विफल रहा – अपील मंजूर।

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

Cases referred :

AIR 2000 SC 3377, AIR 2002 SC 486, (2006) 13 SCC 210, AIR 1970 SC 450, AIR 1974 SC 218, AIR 1979 SC 1191, (2006) 2 SCC 250, (2006) 1 SCC 401, (2005) 6 SC 211, (2010) 4 SCC 450.

Jai Singh with Raghuvver Singh for the appellants.

L.N. Soni, P.P. with Anand Soni, for the respondent/State.

Short Note (SC)

*(47)

Before Mr. Justice Dalveer Bhandari, Mr. Justice T.S. Thakur & Mr. Justice Dipak Misra

Criminal Appeal No. 223/2008 decided on 17 February, 2012

RATTIRAM & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Interpretation of Statutes – Per incuriam – Decisions given in ignorance or forgetfulness of some inconsistent statutory provision of some authority binding on the court concerned—If a decision has been given per incuriam, the court can ignore it.

क. कानूनों का निर्बचन – अनवधानता से – संबंधित न्यायालय पर बाध्यकारी किसी उद्धरण के किसी असंगत कानूनी उपबंध की अनभिज्ञता अथवा विस्मृति में दिये गये निर्णय – यदि निर्णय अनवधानता से दिया गया है, न्यायालय उसकी उपेक्षा कर सकता है।

B. Words and Phrases – Fair Trial – Includes fair and proper opportunities allowed by law to the accused to prove innocence – Adducing evidence in support of defence is a valuable right and denial of that right means denial of fair trial – Denial of fair trial is crucifixion of human rights.

ख. शब्द और वाक्यांश – निष्पक्ष विचारण – में अभियुक्त को निर्दोषिता साबित करने के लिये विधि द्वारा मान्य निष्पक्ष और उचित अवसर सम्मिलित है – बचाव के समर्थन में साक्ष्य प्रस्तुत करना एक मूल्यवान अधिकार है और उस अधिकार से वंचित करने का अर्थ है निष्पक्ष विचारण से वंचित करना – निष्पक्ष विचारण से वंचित करना, मानवाधिकारों को सूली पर चढ़ाना है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 194,

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Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) – Cognizance of offence by Court of Session – Charge sheet filed directly before Special Court – Objection relating to non-compliance of Section 193 of Code, which eventually resulted in directly entertaining and taking cognizance by Special Judge under Act, 1989 does not vitiate the trial and conviction can not be set aside and there can not be a direction of retrial in as much as no failure of justice or no prejudice caused to the accused.

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 194, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) – सत्र न्यायालय द्वारा अपराध का संज्ञान – आरोप पत्र सीधे विशेष न्यायालय के समक्ष प्रस्तुत – संहिता की धारा 193 के अनुपालन के संबंध में आक्षेप, अंततः जिसके परिणामस्वरूप अधिनियम 1989 के अंतर्गत विशेष न्यायाधीश द्वारा सीधे ग्रहण किये जाने और संज्ञान लिये जाने से विचारण को दूषित नहीं करता और दोषसिद्धि अपास्त नहीं की जा सकती तथा पुनः विचारण के लिये निदेशित नहीं किया जा सकता जब तक कि न्यायहानि न हो या अभियुक्त को प्रतिकूल प्रभाव कारित न हो।

The judgment of the Court was delivered by : **DIPAK MISRA, J.**

Cases referred :

AIR 2004 SC 1890, (2004) 1 SCC 214, AIR 2001 SC 3372, AIR 2000 SC 740, 2003 (1) MPJR 158, (1984) 2 SCC 500, (1994) 3 SCC 440, (2004) 4 SCC 231, (1989) 2 SCC 754, AIR 1995 SC 1480, AIR 1977 SC 308, AIR 1980 SC 541, AIR 1985 SC 339, (2003) SC (L&S) 827, (1990) 3 SCC 682, (1991) 4 SCC 139, (1944) 1 KB 718, AIR 2011 SC 312, (2007) 2 SCC 258, (2010) 6 SCC 1, AIR 1957 SC 623, 1956 CrLJ 291, (2001) 2 SCC 577, (1977) 1 All ET 813, AIR 2004 SC 5117, (1999) 8 SCC 501, AIR 1971 SC 508, (1980) 1 SCC 81, AIR 2007 SC 56, AIR 1998 SC 3281, AIR 2009 SC 1535, AIR 2005 SC 2119.

Short Note

***(48)**

Before Mr. Justice K.K. Trivedi

W.P. No. 10226/2008 (Jabalpur) decided on 7 February, 2012

ROYALE HIGHWAY SERVICES (M/S)

...Petitioner

Vs.

HINDUSTAN PETROLEUM CORPN. LTD. & ors.

...Respondents

Constitution – Article 226 – Termination of Dealership of retail

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outlet – Sample drawn from outlet, petitioner failed RON Test – **HELD** – Only because there was a failure to successfully pass the RON Test, the dealership of the petitioner should not have been terminated – Petitioner should have been offered an opportunity to improve – Writ Petition Allowed.

संविधान – अनुच्छेद 226 – खुदरा दुकान की डीलरशिप को समाप्त किया जाना – दुकान से नमूना लिया गया, याची आर.ओ.एन. जांच में विफल रहा – अभिनिर्धारित – केवल इसलिए कि याची ने आर.ओ.एन. जांच को सफलतापूर्वक पास नहीं किया याची की डीलरशिप को समाप्त नहीं किया जाना चाहिए था – याची को सुधार का एक अवसर देना चाहिए था – रिट याचिका मंजूर।

Cases referred :

AIR 2003 SC 2120, (2010) 3 SCC 321, C.A. NO. 11200/2011, W.P. 14039/2009, (2010) 10 SCC 539.

Manikant Sharma, for the petitioner.

Anoop Nair, for the respondents.

Short Note

***(49)**

Before Mr. Justice Sanjay Yadav

W.P. No. 5004/2005 (Jabalpur) decided on 20 December, 2011

SANDHIPIKA SHARMA & ors.

...Petitioners

Vs.

M.P. HOUSING BOARD & ors.

...Respondents

Constitution – Article 226 – Escalation of price of house – Petitioner booked a MIG house with M.P. Housing Board under self financing scheme – Payments are made as per schedule – Increase in plinth area, cost enhanced (first time) – Again due to construction of retention wall cost enhanced (second time) – Again further enhancement – **Held** – Price escalation in present case does not suffer from arbitrary action – No material brought on record to doubt the assessment in respect of cost enhancement – **Petition dismissed.**

संविधान – अनुच्छेद 226 – मकान की कीमत में बढ़ोत्तरी – याची ने म. प्र. हाऊसिंग बोर्ड का एम.आई.जी. मकान स्ववित्तीय योजना के अंतर्गत बुक किया – परिशिष्ट के अनुसार भुगतान किया गया – कुर्सी क्षेत्रफल बढ़ा, कीमत बढ़ाई गई (प्रथम बार) – पुनः रोकथाम दीवार के निर्माण के कारण कीमत बढ़ाई गई (द्वितीय बार) – पुनः अतिरिक्त बढ़ोत्तरी – अभिनिर्धारित – वर्तमान प्रकरण में कीमत की

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बढ़ोत्तरी मनमानी कार्यवाही से ग्रसित नहीं — अमिलेख पर कोई सामग्री नहीं लायी गयी जो बढ़ी हुई कीमतों के निर्धारण पर संदेह उत्पन्न करती हो — याचिका खारिज।

Cases referred :

(1989) 2 SCC 116, (1985) 3 SCC 1, AIR 1980 SC 738, AIR 1980 SC 848, AIR 2004 SC 400, (2005) 10 SCC 796, (2011) 6 SCC 714.

Rajneesh Gupta, for the petitioners.

S.K. Rao with S.K. Chaturvedi, for the respondents.

Short Note

*(50)

Before Mr. Justice J.K. Maheshwari

W.P. No. 2212/2010 (Gwalior) decided on 10 February, 2012

VIRENDRA KUMAR MAHESHWARI(DR.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Constitution — Article 226 — Alternative Remedy —

Notices issued about 1-1/2 years back and interim order granted — Reply, rejoinder and various applications filed — Alternative remedy would not operate as a bar where the writ petition seeks enforcement of any of fundamental rights, where there is violation of principles of natural justice or where the order is wholly without jurisdiction or the vires of an Act is challenged.

क. संविधान — अनुच्छेद 226—वैकल्पिक उपचार—नोटिस करीब 1-1/2 वर्ष पूर्व जारी किये गये और अंतरिम आदेश प्रदान किया गया — उत्तर, प्रतिउत्तर एवं विभिन्न आवेदन पेश किये गये—विकल्प उपचार विबंध के रूप में प्रवर्तित नहीं होगा जब रिट याचिका किसी मूलभूत अधिकार को प्रभावी करना चाहती हो, जब नैसर्गिक न्याय के सिद्धांतों का अतिक्रमण हुआ हो या जब आदेश पूर्णतः अधिकारिता विहीन है या किसी अधिनियम की शक्तिमत्ता को चुनौती दी गई है।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 133 & 138 — Public Nuisance — Procedure as per Section 138 of Cr.P.C. is required to be followed even for passing preliminary order — A show cause notice was issued to petitioner mentioning the grounds for closure of Nursing Home — However, no evidence was recorded by the Magistrate to prove the allegations so leveled against the petitioner

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affording opportunity of cross examination on prosecution witnesses and to lead evidence in defence – Preliminary as well as final order were passed without following the procedure laid down in Section 138 of Cr.P.C. – Petition allowed.

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 133 व 138 – लोक न्यूसेंस – प्रारंभिक आदेश पारित किये जाने के लिये भी द.प्र.सं. की धारा 138 के अनुसार प्रक्रिया का अनुपालन करना अपेक्षित है – याची को नर्सिंग होम को बंद करने के आधारों को उल्लिखित करते हुए एक कारण बताओ नोटिस जारी किया गया – किन्तु याची के विरुद्ध लगाये गये आरोप साबित करने के लिये एवं अभियोजन साक्षियों को प्रतिपरीक्षण का अवसर देने तथा बचाव साक्ष्य प्रस्तुत करने के लिये मजिस्ट्रेट द्वारा कोई साक्ष्य अभिलिखित नहीं की गई – प्रारंभिक तथा अंतिम आदेश द.प्र.सं. की धारा 138 में दी गई प्रक्रिया का पालन किये बिना पारित किये गये – याचिका मंजूर।

C. *Criminal Procedure Code, 1973 (2 of 1974), Section 133* – While exercising power so contemplated under Section 133 of Cr.P.C., the District Magistrate is bound to record a finding that the act so alleged falls within the purview of public nuisance caused by performing the business and its removal is necessary.

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 133 – द.प्र.सं. की धारा 133 के अंतर्गत अनुध्यात शक्ति का प्रयोग करते समय जिला मजिस्ट्रेट यह निष्कर्ष अभिलिखित करने के लिए बाध्य है कि व्यवसाय संचालन के कारण से अभिकथित कृत्य लोक न्यूसेंस की परिधि में आता है और उसे हटाया जाना आवश्यक है।

Cases referred :

(1996) 7 SCC 71, (1979) 2 SCC 267, (2004) 1 MPLJ 7, (1998) 8 SCC 1.

K.N. Gupta with Rajendra Singh Dhakad, for the petitioner.

Nidhi Patankar, G.A. for the respondents No.1 & 2.

Prashant Sharma, for the respondent No.3.

I.L.R. [2012] M.P., 837

FULL BENCH

Before Mr. Sushil Harkauli, Acting Chief Justice,

Mr. Justice Ajit Singh & Mr. Justice Alok Aradhe

W.P. No. 3710/2000 (Jabalpur) decided on 11 January, 2012.

UNION OF INDIA

...Petitioner

Vs.

REGISTRAR GENERAL, HIGH COURT OF

MADHYA PRADESH, JABALPUR & anr.

...Respondents

A. Interpretation of Statutes – Legislature is deemed not to waste its words or to anything in vain – Court can not enlarge the scope of statutory provisions or intention when the language of provision is plain and unambiguous – Real intention must be gathered. (Para 6)

क. कानूनों का निर्वचन – विधान मंडल से अपेक्षित है कि वह अपनी किसी भी बात को बेकार नहीं होने देगा – न्यायालय कानूनी उपबंध या आशय की व्याप्ति नहीं बढ़ा सकता जब उपबंध की भाषा असंदिग्ध एवं सीधी है – वास्तविक आशय को समझना चाहिए।

B. High Court Superintendence Rules (M.P.), 1998 – Entry 9 & 10 of Schedule, Constitution–Article 227 (2)(b)–Only Court word has been used in Article 227(2)(b)–Thus Article 227(2)(b) does not empower the High Court to make rules with regard to Tribunals–Rules 1998, so far it relates to Administrative Tribunal are ultra vires. (Para 7)

ख. उच्च न्यायालय अधीक्षण नियम (म.प्र.), 1998 – अनुसूची की प्रविष्टि 9 व 10, संविधान – अनुच्छेद 227(2)(बी) – अनुच्छेद 227 (2)(बी) में केवल न्यायालय शब्द का प्रयोग किया गया है – इस प्रकार अनुच्छेद 227(2)(बी) उच्च न्यायालयों को अधिकरणों के संबंध में नियम बनाने की शक्ति प्रदान नहीं करता – नियम 1998 जहां तक प्रशासनिक अधिकरण का संबंध है अधिकारातीत है।

Cases referred :

AIR 1997 SC 1125, (2001) 1 SCC 516, (2001) 6 SCC 607, (2003) 2 SCC 577, (2004) 12 SCC 488.

R.L. Gupta, Assistant Solicitor General with *O.P.Namdeo* for the petitioner

Ashish Shroti, for the respondent No.1.

Kumares Pathak, Dy. A.G. for the respondent No.2

ORDER

The order of the court was delivered by :
ALOK ARADHE, J.:- A Division Bench of this Court vide order dated 08.4.2002 found that the issue involved in the instant writ petition is of grave importance and immense signification and, therefore, deserves consideration by the Larger Bench. In view of the aforesaid order the matter has been placed for consideration by this Bench. The petitioner has challenged the vires of Schedule appended to M.P. High Court Superintendence of Tribunals Rules, 1998 in so far as it pertains to Entry 9 and 10 of the Schedule. In order to appreciate the petitioner's challenge, few facts need mention which are stated infra.

2. In exercise of powers under Article 323-A of the Constitution of India the Parliament has enacted Administrative Tribunals Act, 1985. Under the aforesaid Act, the Central Administrative Tribunal and the Madhya Pradesh State Administrative Tribunal were established. In exercise of powers conferred by Clause (2) of Article 227 of the Constitution of India the High Court of Madhya Pradesh has framed the Rules, namely, Madhya Pradesh High Court Superintendence of Tribunals Rules, 1998 (for short 'the Rules'). The Rules were made with the object to supervise the functioning of the Tribunals. In the schedule appended to the said Rules, M.P. State Administrative Tribunal and the Central Administrative Tribunals have been mentioned at Sr. Nos. 9 & 10. Thus, the aforesaid Rules apply to the aforesaid Tribunals as well.

3. Learned counsel for the petitioner submitted that Supreme Court in the case of *L. Chandra Kumar vs. Union of India*, AIR 1997 SC 1125 in paragraphs 96 and 99 has categorically held that the High Court has the power of judicial review but does not have the supervisory jurisdiction. It is further submitted that High Court cannot frame Rules which would empower it to exercise powers of administrative superintendence over the Tribunals in question.

4. On the other hand, Mr. Ashish Shrotri, leaned counsel appearing for the respondents submitted that expression "superintendence" used under Article 227 does not make any compartmentalization between the judicial supervision and administrative supervision. It is further submitted that if the Tribunal is situated within the territorial jurisdiction in which High Court functions it has to be within the sphere of Superintendence of High Court. It is also submitted that expressions "judicial superintendence" should be given

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broader meaning and should be held to include the power of supervision.

5. We have considered the submissions made on both sides. The Supreme Court in the cases of *T.Sudhakar Prasad vs. Govt. of A.P. and others*, (2001) 1 SCC 516 and *Dhyan Investments & Trading Co.Ltd. vs. Central Bureau of Investigation and others*, (2001) 6 SCC 607 has held that power of superintendence exercised by the High Court under Article 227 of the Constitution of India is judicial superintendence and not administrative superintendence.

6. It is well settled rule of statutory interpretation that legislature is deemed not to waste it's words or to anything in vain. [See: Principles of Statutory Interpretation justice G.P.Singh 12th edition Page 75]. In *Nasiruddin and others vs. Sitaram Agrawal*, (2003) 2 SCC 577 it has been held that court cannot enlarge the scope of statutory provisions or intention when the language of the provision is plain and unambiguous and the real intention of legislation must be gathered from language used. Similar view has been taken in *Maniklal Majumdar and others vs. Gouranga Chandra Dey and others*, (2004) 12 SCC 488.

7. In the backdrop of aforesaid well settled principles with regard to statutory interpretation, the provisions of Article 227(2) of the Constitution of India may be examined under which the rules have been framed. The relevant extract of clauses (1) and (2) of Article 227 read as under:

“(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provisions, the High Court may-

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and”

From careful scrutiny of words in clauses (1) and 2(b) of Article 227 it is apparent that though in clause (1) of Article 227 words ‘courts and Tribunals’ have been used but in clause 2(b) only the word ‘court’ has been used. Thus, it is a case of deliberate and conscious omission of the word

‘Tribunal’ in clause 2(b) of Article 227 of the Constitution of India which confers rule making power on the High Court, which in turn leads to irresistible conclusion that Article 227(2)(b) does not empower the High Court to frame rules with regard to Tribunals.

7. For the aforementioned reasons, the M.P. High Court Superintendence Rules, 1998 in so far as they relate to Administrative Tribunals in question are declared ultra vires the Article 227(2)(b) of the Constitution of India.

8. In the result, the writ petition succeeds and is hereby allowed.

Petition allowed.

**I.L.R. [2012] M.P., 840
ARBITRATION APPEAL**

Before Mr. Justice J.K. Maheshwari

Arbitration Appeal No. 38/2009 (Jabalpur) decided on 22 Sept. 2011

BANCO CONSTRUCTION CO.(M/S)

...Appellant

Vs.

UNION OF INDIA

...Respondent

A. *Arbitration and Conciliation Act (26 of 1996), Sections 34 & 36 – Enforcement of award – During pendency of the proceedings under Section 34, no discretion is left with the Court to proceed on an application under Section 36 of the Act, if any, filed for enforcement of the award.*

After passing the arbitral award two applications were filed under Section 34 of the Act , one is by the respondent on the issue of not granting the interest and other is by the appellant assailing the merits of the award – Execution proceedings were filed during the pendency of the application under Section 34 of the Act filed by the appellant and after its transmission to Bhopal which remained pending.

Implication of the language of Section 36 of the Act indicates the automatic suspension of the arbitral award if the application has been filed within the period of limitation – Such award becomes unexecutable on filing the application under Section 34 of the Act by any of the parties or on taking cognizance by Court.

(Para 8)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 34 व 36 – अवार्ड का प्रवर्तन – धारा 34 के अंतर्गत कार्यवाहियों के लंबित रहने के दौरान न्यायालय के पास अवार्ड के प्रवर्तन हेतु प्रस्तुत किये गये अधिनियम की धारा 36 के अंतर्गत किसी आवेदन पर कार्यवाही करने का विवेकाधिकार नहीं बचता।

B. Arbitration and Conciliation Act (26 of 1996), Section 34, Civil Procedure Code (5 of 1908), Section 11 – Res judicata – Principle of res judicata attracts only when the matter directly and substantially in issue in the former suit between the same parties which has been heard and finally decided by such Court.

In the facts of this case, the issues raised by the appellant to set aside the arbitral award are different than the issue raised by the respondent in his application, however, the trial Court committed an error in rejecting the application of appellant applying the principle of res judicata. (Para 11)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34, सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – पूर्व न्याय का सिद्धांत केवल तब आकर्षित होता है जब पक्षकारों के मध्य पूर्ववर्ती वाद में प्रत्यक्ष एवं सारतः विवाद्य मामला जिसे ऐसे न्यायालय द्वारा सुना गया और अंतिमतः निर्णित किया गया है।

Case referred :

(2004) 1 SCC 540.

Arvind Dudawat, for the appellant.

Anand Singh, for the respondent.

ORDER

J.K. MAHESHWARI, J. :-Assailing the order dated 11.9.2009 passed by VI Additional District Judge, Bhopal in Execution Case (Arbitration) bearing No.561/05, the appellant has preferred this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'). By the said order request to suspend the execution proceedings till decision on the application of appellant under Section 34 of the Act has been rejected, and the said application has also been dismissed for the reason it is barred by res judicata.

2. The facts leading to this case are that an arbitral award was passed on 11.1.2002. Two applications under Section 34 of the Act to set aside the said award were filed within the prescribed period of limitation, one is by the appellant in the Court of VI Additional District Judge, Gwalior on 27.3.2002,

and another is by the respondent in the Court of V Additional District Judge, Bhopal for awarding the interest. The application filed by the appellant has been 2 transmitted as per order dated 2.4.2004 passed by the Gwalior Bench in M.C.C. No.99/2004 to Bhopal. In the meantime appellant opposed the application of respondent and filed the reply. The Court while deciding the said application first observed that the ground so raised in reply by the appellant in additional pleas may be adjudicated while considering the application filed by him, but in later part of the order some observations were made reiterating the findings as recorded in arbitral award. On filing application for execution of award by respondent under Section 36 of the Act, objection has been filed by appellant inter alia contending that the award is unexecutable without deciding the application of Section 34 of the Act. But the objection so filed and the application, both have been rejected, by the order impugned and it is held that on account of rejection of application under Section 34 of the Act of the respondent, principle of res judicata to consider the application of appellant shall be applicable, however merit of their contention cannot be gone into.

3. Shri Arvind Dudawat, learned counsel appearing on behalf of the appellant referring Section 36 of the Act, contends that when an application to set aside the arbitral award has been filed prior to expiry of the period of limitation i.e. 90 days, the enforcement of the arbitral award until decision on the said application remain suspended, however trial Court committed an error in passing the order impugned in execution case. It is urged that the Apex Court in the case of *National Aluminium Co. Ltd. Vs. Pressteel & Fabrications (P) Ltd and another*, (2004) 1 SCC 540, has laid down the said principle of law. It is submitted by him that the application under Section 34 of the Act filed by the respondent for setting aside the arbitral award was only on the issue of not awarding the interest, while in the application of appellant various points were raised on merit inter alia challenging the award, however the order rejecting the application of respondent would not operate as res judicata to decide the application filed by appellant, therefore the finding as recorded in the order impugned is unsustainable in law. Learned Judge committed an error by considering the application for setting aside the arbitral award along with the execution proceedings filed by the respondent. In fact, the application for setting aside the arbitral award ought to have been considered separately thereafter only the execution proceedings may be continued. In view of the foregoing, prayer is made to set aside the impugned order and to direct the Trial Court to decide the application under Section 34 of the Act filed by appellant prior to enforcement of award.

4. On the other hand Shri Anand Singh, learned counsel representing Union of India, contends that while deciding the application filed by the respondent under Section 34 of the Act vide order dated 26.11.2002, the similar objection has been decided, however the said order shall operate as res judicata in view of Section 11 of the Code of Civil Procedure and the application filed by the appellant under Section 34 of the Act is liable to be dismissed. It is contended by him that Trial Court has rightly rejected the application filed by appellant applying the principle of res judicata. It is further submitted that if the application filed by the appellant for setting aside the arbitral award was not entertainable, however consideration of such application along with the execution proceedings filed by respondent is merely an irregularity to which interference by this Court is not warranted. In view of the foregoing, it is urged that the order passed by the Trial Court is in accordance to law and the appeal filed by the appellant may be dismissed.

5. After having heard learned counsel appearing for the parties and on perusal of the facts which are no more in dispute, the arbitral award was passed on 11.1.2002. The application filed under Section 34 by the appellant on 27.3.2002 in the Court of VI Additional District Judge Gwalior has been transferred to Bhopal as per order dated 2.4.2004 passed in M.C.C. No.99/2004 by the Gwalior Bench of this Court. In the meantime respondent has filed the application under Section 34 of the Act, on 28.2.2002 raising issue of not awarding the interest. The reply has been filed by the appellant supporting the award on the issue of not granting the interest, raising some additional pleas also. The Trial Court on 26.11.2002 decided the said application, and observed that the objections as raised by the appellant by way of additional plea may be decided while adjudicating application filed by him, and in the operative para finding has been recorded reiterating the findings as recorded in award. In such circumstances, the question arises for consideration whether such finding will have implication of principles of res judicata as per Section 11 of the Code of Civil Procedure in the facts of the present case and if it is not then the Trial Court was justified in rejecting the application and the objection regarding enforceability of the award by the order impugned.

6. To deal with the said issue, and the rival submission of the parties the relevant provisions of the Arbitration and Conciliation Act, 1996 is required to be taken note of. In Chapter VII of the Act the recourse against arbitral award is specified. On filing application by any of the party under Section 34, raising grounds specified in section (2)(a)(i) to (v) the arbitral award may be set aside, simultaneously on the grounds specified under sub-section (2) (b)

(i) to (ii) of Section 34 of the Act the Court itself is having power to set aside the award. Thereafter Chapter VIII of the Act deals with finality and enforcement of arbitral award. As per Section 35 of the Act, the arbitral award shall be final and binding on the parties, and Section 36 deals with the enforcement. In the present case, in the proceedings for enforcement of the award, the application filed by the appellant under Section 34 of the Act and the objection to suspend such proceeding has been decided, however provisions of Section 36 is relevant in the facts of the present case which is reproduced as under :-

“36. Enforcement.- Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court. “

7. In the case of *National Aluminium Co. Ltd.* (*supra*) the Apex Court while dealing the issue of pendency of application under Section 34 of the Act, and enforcement of the award as per Section 36 of the Act and on pressing the issue to find out some interim measure curtailing delay in arbitral proceedings to enforce the award during the pendency of such application exercising power under Article 142 of the Constitution, observed in para 10 as under:-

“But then we noticed from the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provisions, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant.”

8. Bare reading of Section 36 of the Act makes it clear that after passing an arbitral award, if an application under Section 34 of the Act for setting aside the arbitral award has been filed prior to expiry of the period of limitation

as specified under sub-section (3) of Section 34 of the Act, it is required to be adjudicated and after passing the order on such application, the award shall be enforced in the manner as if it were a decree of the civil court. Thus the implication of the language of Section 36 of the Act indicates the automatic suspension of the arbitral award if the application has been filed within the period of limitation. It is clear that such award becomes unexecutable on filing the application under Section 34 of the Act by any of the parties or on taking cognizance by court. In view of the foregoing, during pendency of the proceedings under Section 34 of the Act no discretion left with the Court to proceed on an application under Section 36 of the Act, if any, filed for enforcement of the award.

9. In the present case, after passing the arbitral award two applications were filed under Section 34 of the Act, one is by the respondent on the issue of not granting the interest and other is by the appellant assailing the merits of the award. The application filed by the respondent was rejected on 26.11.2002 thereafter the application filed by the appellant has been transmitted by the High Court from Gwalior to Bhopal as per order dated 02.04.2004 passed in M.C.C. No. 99/2004. The execution case bears No. 561/2005 however it appears that the execution proceedings were filed during the pendency of the application under Section 34 of the Act filed by the appellant and after its transmission to Bhopal which remained pending. As per language Section 36 of the Act, it is apparent that if an application under Section 34 of the Act is filed within the period of limitation, enforcement of the arbitral award cannot be continued because it remains unexecutable till decision on the said application. Thus, it was the bounden duty of the Court to first decide the application under Section 34 of the Act filed by the appellant, thereafter only the execution proceedings initiated by the respondent can be proceeded with. In the present case the Trial Court has not taken the said recourse of the law on the contrary on filing an application by the appellant to suspend the execution proceedings, it is rejected and the application for setting aside the arbitral award has also been rejected in the execution proceedings. The said recourse can not be held justifiable, and as per procedure known to law.

10. It is further seen that the Trial Court by the order impugned passed in the execution case rejected the application for setting aside the arbitral award filed by the appellant for the reason that such an application is barred by res judicata. The principle of res judicata attracts only when the matter directly and substantially in issue in the former suit between the same parties which has been heard and finally decided by such Court. In this case the parties are

the same and after passing the award, application filed by the respondent under Section 34 of the Act has been decided affirming the award on an issue of not granting interest, while in the application of the appellant merit of the award has been assailed on various grounds other than the issue of interest. Thus, the fact in issue in the application filed by the appellant is different and has not been heard and finally decided by the Court. It is not out of place to mention that the Court while deciding the application of respondent in the order observed that the objections raised by the appellant shall be considered while deciding his application. In the said facts, principle of res judicata is having no application in the present case.

11. It is to be observed that Section 34 of the Act empowers any of the party to take recourse, against arbitral award by applying to court on the ground as specified under Section 34(2) (a) (i) to (v) and the Court may itself set aside the award as per grounds specified in Section 34 (2)(b) (i) & (ii) of the Act. In the facts of this case, the issues raised by the appellant to set aside the arbitral award are different than the issue raised by the respondent in his application, however, the trial Court committed an error in rejecting the application of appellant applying the principle of res judicata. Till decision on the such application the arbitral award becomes unexecutable by legal fiction, and the effect thereof is that the arbitral award shall remain suspended till adjudication of the application for setting aside such award. Thus the application for setting aside the arbitral award is required to be decided first, then only the execution proceedings can be proceeded with. The Trial Court with utmost haste has rejected the application of the appellant under Section 34 of the Act in the execution case, and also rejected the objection to not to enforce the award, applying the procedure not recognized by law. In view of the foregoing discussions, the order impugned is hereby set aside.

12. Consequently, this appeal succeeds and is hereby allowed. The order impugned dated 11.9.2009 passed by VI Additional District Judge, Bhopal in Execution Case (Arbitration) No.561/05 is set aside. The Trial Court is directed to decide the application under Section 34 of the Act filed by appellant on merit, till then arbitral award shall be unexecutable, as per scheme of the Act. It is seen that the proceeding under Sections 34 of the Act is pending since last more than 9 years, however it is directed that the Trial Court shall proceed to decide such application now within a period of six months from the date of production of the certified copy of this order. In the facts and circumstances of the case, parties are directed to bear their own costs.

Appeal allowed.

I.L.R. [2012] M.P., 847

WRIT APPEAL

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain

W.A. No. 547/2009 (Jabalpur) decided on 12 December, 2011

STATE OF M.P. & anr.

...Appellants

Vs.

SMT. MUNNIBAI & ors.

...Respondents

Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1), Urban Land (Ceiling and Regulation) Act (33 of 1976), Urban Land (Ceiling and Regulation) Repeal Act (15 of 1999), General Clauses Act (10 of 1897), Section 6(e) – Order of Additional Commissioner was just and proper as respondent was in possession and notice under Section 10(5) was not properly served – Possession of land was not taken over by the State Government – Single Bench considered all relevant questions and all aspects also inspected original record – No infirmity in the order in writ – Writ appeal dismissed. (Paras 2, 5, 7 & 13)

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1), नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), नगर भूमि (अधिकतम सीमा और विनियमन) निरसन अधिनियम (1999 का 15), साधारण खण्ड अधिनियम (1897 का 10), धारा 6(ई) – अपर आयुक्त का आदेश न्याय संगत व उचित था क्योंकि प्रत्यर्थी कब्जा धारक था और धारा 10(5) के अंतर्गत नोटिस उचित रूप से तामील नहीं किया गया – भूमि का कब्जा राज्य सरकार द्वारा नहीं लिया गया – एकल न्यायपीठ ने सभी सुसंगत प्रश्न तथा पहलु विचार में लिये – मूल अभिलेख की भी जांच की – रिट में पारित आदेश में कोई कमी नहीं – रिट अपील खारिज।

Sanjay Dwivedi, G.A. for the appellants.

Sanjay K. Agrawal, for the respondents.

J U D G M E N T

The Judgment of the Court was delivered by :
VIMLA JAIN, J. :- Assailing the propriety and validity of the order dated 24.3.2008 passed by the learned Single Judge in Writ Petition No.17560/2007, the present intra-court appeal has been filed by the appellants under Section 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyayapeeth ko Appeal) Adhiniyam, 2005.

2. Short facts of the case are that:

2.1 The appellants by invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution filed Writ Petition No.17560/2007 and challenged the order dated 14.12.2005 passed by Additional Commissioner, Jabalpur Division Jabalpur in Case No. 675-A-90-B-90/04-05. The petition was dismissed on 24.3.2008 by the learned Single Judge.

2.2 Earlier the respondents by filing Writ Petition No.4049/1999 had called in question the order dated 29.4.1983 and consequential proceedings dated 27.7.83 and 3.9.83 passed by the competent authority of Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the 'Act'). An appeal was filed before the Commissioner and the order dated 12.1.99 was passed by the Commissioner, Jabalpur dismissing the appeal as barred by limitation. The Writ Petition No.4049/1999, filed against the order of the Commissioner, was disposed of on 17.1.2002 directing that the petitioners should put forth their grievances before the competent authority.

2.3 In compliance of the order passed in the writ petition, the Additional Collector, Jabalpur, after extending proper opportunity of hearing and on the report regarding possession, held by his order dated 25.4.2005 that the possession of the land in Khasra Nos.737, 738, 760 and 762 of Village Purwa was taken in accordance with the provisions of Act of 1976 and rejected the claim of the respondents.

2.4 Being aggrieved by the order dated 25.4.2005, the respondents filed an appeal which was decided by order dated 14.12.2005 by the Additional Commissioner, Jabalpur by setting aside the order of Additional Collector and holding therein that the notice issued for the purpose of taking possession of the land was not duly served.

2.5 The State Government filed a Writ Petition No. 17560/2007 in the High Court against the order of Additional Commissioner. The learned Single Judge while dismissing the writ petition came to the conclusion that the order of Additional Commissioner was just and proper as the respondents were in possession and the notice under Section 10(5) of the Act, 1996 was not properly served on the respondents and the findings arrived at by the Additional Collector were based on total misreading of evidence and material available on record.

2.6 Being aggrieved by this order passed in Writ Petition No.17560/2007,

the State/appellant preferred the present writ appeal.

3. The learned Government Advocate appearing for the appellant submitted that the appeal preferred by the respondents before the Additional Commissioner was not proper as Additional Commissioner had no jurisdiction to entertain the appeal since the provisions of the Urban Land (Ceiling and Regulation) Act, 1976 were repealed. It was further submitted that the aforesaid aspect was not properly appreciated by the learned Singal Judge.

4. On the other hand, learned counsel for the respondents submitted that since the writ petition was preferred before this Court in the year 1999 and was pending for adjudication, at the time of commencement of Urban Land (Ceiling and Regulation) Repeal Act, 1999, therefore, in view of Section 6(e) of the General Clauses Act, the appeal preferred by the respondents before the Additional Commissioner was rightly entertained and was maintainable.

5. We have considered the aforesaid submissions of learned counsels for the parties.

6. We would like to place on record that the Urban Land (Ceiling and Regulation) Repeal Act, 1999 came into force in the State of Madhya Pradesh with effect from 10/04/2000. On such date, the writ petition No.4049/1999 was pending in the high Court and possession of the disputed land was with the respondents.

7. The Single Bench perused the original record of both the revenue courts and found that possession of the land in question was with the respondents as reported by the Tehsildar, vide his inspection report dated 24/09/2003 and without looking to this report, the additional Collector, exercising the powers as competent authority, rejected the application. The Additional Commissioner, considering this report, quashed the order of the Additional Collector, exercising powers under Section 44 of the M.P.Land Revenue Code. The Single Bench found that the possession of the land was not taken over by the State Government, therefore the Additional Commissioner had not committed any error in allowing the appeal.

8. To examine, evaluate and appreciate each and every finding made by the Single Bench, it shall be worthwhile to quote the relevant findings of the judgment.

The Single Bench on the point of possession passed the order which reads thus:

“The petitioners did not seek restoration of possession nor did they move any application to the competent authority under the Act of 1976, the application filed by the respondents was for correction of the revenue records under the M.P. Land Revenue Code and when the application was received by the Additional Collector, the Additional Collector directed the Tehsildar Nazul, Jabalpur to conduct an enquiry into the question of possession and submit a report. Direction was issued in this regard to the Tehsildar, Nazul, who in pursuance to the same conducted an enquiry and has submitted his report. A perusal of the report of the Tehsildar indicates that in his report dated 24.9.03, he has indicated that after spot inspection it is found by him that in part of the area house constructed by the respondents are available and crops sown by the respondents are available in the field. Part of the field is lying vacant. Finding recorded by the Tehsildar in this report dated 24.9.2003 indicates that possession is not taken over from the respondents. In spite of this report, the Additional Collector merely placed reliance on the notice issued under Section 10(5) and the order sheet showing taking over of ex-parte possession and recorded a finding that notice is issued and possession is taken over. However, in spite of mentioning the fact with regard to receipt of the report of the Tehsildar Nazul, Jabalpur, this authority did not consider the said report and holding possession to be by way of encroachment passed the impugned order rejecting the application of the petitioner.”

9. The Single Bench considering the order passed by the Additional Commissioner, held, that:-

“The Additional Commissioner taking note of the report of the Tehsildar Nazul found that this report dated 24.9.2003 clearly indicates that possession is not taken over and at the time of inspection by the Tehsildar Nazul, it is the respondents who were in possession thereafter on going through the original records pertaining to action taken by issuing notice and

proceeding under Section 10 (3), 10(5) and 10(6), finding recorded is that notices are not properly issued and possession is not taken over, accordingly Additional Commissioner had interfered with the matter and quashed the order of the Additional Collector. It is clear from the records that the Additional Commissioner in the present case exercised powers of an appellate authority under Section 44 of the M.P. Land Revenue Code and did not exercising the powers under Section 33, rightly so because the Act of 1976 was repealed and the Additional Commissioner had no power under Section 33 of the said Act.”

10. The Single Bench on the point of notices issued by Naib Tehsildar and his jurisdiction recorded that :-

“The original records indicated that in the present case the notice under Section 10(3) and 10(5) is not issued by the competent authority. On the contrary the entire proceedings are conducted by Naib Tehsildar who is not the competent authority. The original order sheet pertaining to issuance of process under Section 10(5) is dated 29.2.1992. This order under Section 10(5) is issued by Naib Tehsildar, Jabalpur. In this order purported to be under Section 10(5), Naib Tehsildar has directed for taking over possession. Naib Tehsildar is not the competent authority and, therefore, it cannot be said that process initiated on 29.2.92 by Naib Tehsildar is in accordance to law. When the matter was remanded back by this Court for enquiry and when the proceedings are again held before the Additional Collector, Additional Collector had directed Tehsildar Nazul, Jabalpur to conduct an enquiry, Tehsildar Nazul has conducted an enquiry and he has submitted a report to the Additional Collector on 24.9.2003. In this report also the Tehsildar has indicated that possession is not taken over, in part of the land house of the respondents are situated and crops of ‘Dhan’ grown by them are standing in the field. These factors clearly indicate that even after vesting of land with the State Government, possession is not taken over by the State Government or by any person authorised by the State Government in this behalf; that being so, in view of the

provisions of Section 3 and 4 of the Repeal Act, the Additional Commissioner has not committed any error in interfering with the matter. The Additional Collector while rejecting the claims of the respondents has placed much reliance on the improper and illegal proceedings held by the Naib Tehsildar and has recorded a finding that possession is illegally taken over after issuing notice under Section 10(5) by resorting to ex-parte proceedings under Section 10(6). The finding is totally perverse, these proceedings are said to be held in the year 1992 (Annexure P/10), notice issued under Section 10(5) is of the year 1992 that also on the basis of an illegal order passed by the Naib Tehsildar. However, on spot inspection conducted in the year 2003 and when report is submitted, the Tehsildar Nazul, Jabalpur has recorded a finding that in the year 2003. i.e. 11 years after possession is said to have been taken over under Section 10(5) and 10(6) in an ex-parte manner, respondents are found to be in possession, their house available and crops standing, that being so, the finding of the Additional Collector is wholly perverse and unsustainable and in interfering with the same Additional Commissioner has not committed any error warranting interference."

11. The Single Bench has found the order of Additional Collector as illegal on following grounds: -

"The order dated 25.4.2005 (Annexure P/9) is issued by the Additional Collector, the competent authority is based on total misreading of the evidence and material available on record and the finding recorded by him that possession is taken over on 3.3.92, is an incorrect finding. This finding is recorded not on the basis of factual aspect of the matter as indicated by the Tehsildar Nazul in his report dated 24.9.2003, but is only based on the improper proceedings recorded in the file, that being so, if the order impugned passed by the Additional Collector is evaluated, it is found that the same is unsustainable and the records clearly indicate that it is the respondents who are in possession when the Repeal Act came into force, even though orders were passed vesting the land in the State Government, but possession in accordance to law was not taken when the

Repeal Act was enforced in the State of Madhya Pradesh on 10.4.2000 and, therefore, the entire proceedings abated and respondents were entitled to retain their possession and the State Government dis-entitled to claim restoration of possession.”

12. We find that the Single Bench considered all the relevant questions which are summarized referred above with reasoned judgment thoroughly and minutely. The Single Bench also called the relevant revenue case of Additional Collector and fully examined interlocutory orders passed and proceedings recorded in the order-sheets, notices issued to the parties and service of such notices issued by the Naib Tehsildar. The jurisdiction of Naib Tehsildar to issue notices and process of possession taken by him. The spot inspection made by Tehsildar Nazul and report of such spot inspection. The relevant legal provisions of the M.P. Land Revenue Code, 1956 and the Urban Land (Ceiling and Regulation) Act, 1976.

13. We find that the learned Single Judge has considered all the aspects of the matter and inspected the original record of the Additional Collector. We do not find any infirmity in the order and merit in the appeal and any reason to interfere with the order dated 24/3/2008 passed in writ petition by the Single Bench. This appeal is found without merit and is accordingly dismissed. No order as to costs.

Appeal dismissed.

I.L.R. [2012] M.P., 853

REVIEW PETITION

Before Mr. Justice Shantanu Kemkar &

Mr. Justice Prakash Shrivastava

R.P. No. 392/2010 (Indore) decided on 26 September, 2011

JODHRAJ

...Petitioner

Vs.

**SHRI BHUTESHWAR MAHADEV MANDIR TRUST,
MANDSAUR**

...Respondent

Precedent – Contrary View – If the learned Single Judge was of the view that the judgment passed in a previous case was not correct, it was desirable for him as per the well accepted practice and in view of the law laid down by the judgments to have referred the matter to

854 Jodhraj Vs. Shri Bhut. Mandir Tr. Mandsaur (DB) I.L.R.[2012]M.P.
**Hon'ble the Chief Justice for constitution of Larger Bench instead of
observing against a view taken in the previous case, which was having
binding precedent.** (Para 13)

पूर्व निर्णय – विरोधी दृष्टिकोण – यदि विद्वान एकल न्यायाधीश इस मत के थे कि पूर्ववर्ती प्रकरण में पारित निर्णय सही नहीं था तब उसे भलिमांति स्वीकृत प्रथा एवं निर्णयों द्वारा प्रतिपादित विधि की दृष्टि से वृहद न्यायपीठ का गठन करने हेतु माननीय मुख्य न्यायमूर्ति को मामला निर्दिष्ट किया जाना चाहिए था बजाए पूर्ववर्ती प्रकरण में लिये गये दृष्टिकोण जो बाध्यकारी पूर्व निर्णय था, के विरुद्ध समुक्ति किए जाने के बजाये।

Cases referred :

1997 MPACJ 255, 2003(1) MPLJ 513, 2004(2) MPLJ 492, (2011) 2 SCC 94, (1997) 8 SCC 715.

G.M. Chaphekar with D.S. Kale, for the petitioner.

A.S. Garg with G.S. Yadav, for the respondent.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. :- By filing this review petition under Order 47 Rule 1 read with Section 151 of the Code of Civil Procedure, the petitioner is seeking review of the order dated 28.10.2010 passed by the learned single Judge of this Court in Second Appeal No.619/2008. In view of the fact that the learned Judge who has passed the said order has demitted the Office, the matter is placed before the Division Bench, in terms of Rule 13 (1) (b) (ii) (1) of Chapter 4 of the High Court of MP Rules, 2008.

2. Briefly stated, the petitioner claims to be a tenant in the suit shop let out to him by the respondent a public trust registered under the Public Trust Act, 1951. After terminating the tenancy of the petitioner, a suit for eviction was filed by the respondent/trust, which was registered as Civil Suit No.151-A/2000.

3. In the said suit, the respondent/trust claimed exemption from application of the provisions the MP Accommodation Control Act, 1961 (for short, the Act), in view of the notification dated 07.09.1989 issued by the State Government in exercise of its powers under Section 3 (2) of the Act. In view of the exemption, the respondent sought eviction merely on the basis of termination of tenancy of the petitioner.

4. The trial Court decreed the suit vide judgment and decree dated

28.11.2007. Civil Regular Appeal No.2-A/2008 filed by the petitioner against the said judgment and decree also suffered dismissal vide judgment and decree dated 05.07.2008 passed by the 2nd Additional District Judge, Mandsaur. Feeling aggrieved by the dismissal of the appeal, the petitioner filed Second Appeal No.619/2008. The said second appeal was dismissed by the learned single Judge vide order dated 28.10.2010, of which review is sought.

5. Shri G.M. Chaphekar, learned senior counsel appearing for the petitioner argued that the learned single Judge, while dismissing the petitioners appeal, has taken a contrary view than the view, which has been taken by another single Judge of this Court in the case of *Boolchand v. Ataeram Sindhi Dharmashala Trust and others* 1997 MPACJ 255. He submitted that the learned single Judge in the case of *Boolchand* (supra) has very categorically held that the State Government cannot exempt the registered institutions from operation of Section 3 (2) of the Act, if the whole income derived from them is not being utilized for such institutions. He contended that this judgment of coordinate bench has been disregarded by the learned single Judge by observing, thus: -

“After taking into consideration the factual and legal position, which emerges from the notification dated September 7, 1989, I find that the judgment relied upon by the learned counsel for the appellant has no relevance to the controversy in question. As a matter of fact, the only question, when an exemption is claimed by the public trust has been so registered under the provisions of MP Public Trust Act, 1951, for an educational, religious and charitable purpose. The application of the income of the trust is totally irrelevant, once the registration of the trust is proved.”

(emphasis supplied)

6. He further contended that the observations of the learned single Judge that “The application of the income of the trust is totally irrelevant, once the registration of the trust is proved.” is contrary to the earlier view taken by this Court in the case of *Boolchand* (supra). He argued that instead of taking a contrary view against a binding precedent, the learned single Judge should have referred the matter to Hon’ble the Chief Justice for referring it to a Larger Bench. According to him, by the impugned judgment, learned single Judge has overreached the earlier single bench judgment of this Court, and therefore, the jurisdiction of review needs to be exercised. In support of his

contention, learned senior counsel for the petitioner has placed reliance on the judgment of this Court in the case of *Jahalpur Bus Operators Association & others v. State of MP and others*. 2003 (1) MPLJ 513 and another Full Bench decision of this Court in the case of *Commissioner of Sales Tax v. Hukumchand Mills* 2004 (2) MPLJ 492 and the judgment of the Supreme Court in the case of *Safiya Bee v. Mohd. Vajahath Hussain @ Fasi* (2011) 2 Supreme Court Cases 94. He submitted that overlooking the point of law already settled by a judicial pronouncement, would inevitably suffer from an error apparent on the face of record, for which no elaborate arguments or reasoning would be required to point out such an error and it would be a good ground for review.

7. In reply to the aforesaid submissions, Shri A.S. Garg, learned senior counsel placed reliance on the judgment passed by the Supreme Court in the case of *Parsion Devi and others v. Sumitri Devi and others* (1997) 8 Supreme Court Cases 715. He submitted that merely if an erroneous view, if at all, is taken, this itself would not be a ground to invoke the jurisdiction of review.

8. Having considered the submissions of the learned senior counsel for the parties, in our considered view, the observations as referred to above, by the learned single Judge runs contrary to the earlier view taken by single Bench of this Court in the case of *Boolchand (supra)*.

9. In the case of *Jabalpur Bus Operators Association (supra)* a Special Bench of Five Judges of this Court while considering the question of precedent has observed that a Single Bench of High Court is bound by the decision of another Single Bench. In case he does not agree with the view of the other Single Bench, he should refer the matter to the Larger Bench.

10. The Supreme Court in the case of *Safiya Bee (supra)* in paragraph 27 has held thus:

“27. However, even assuming that the decision in WP No.35561 of 1998 did not operate as *res judicata*, we are constrained to observe that even if the learned Judges who decided WP No.304 of 2011 did not agree with the view taken by a coordinate Bench of equal strength in the earlier WP No.35561 of 1998 regarding the interpretation of Section 2 (c) of the Act and its application to be petition schedule property, judicial discipline and practice required them to refer the issue to a larger Bench. The learned Judges were not right

in overruling the statement of the law by a coordinate Bench of equal strength. It is an accepted rule or principle that the statement of law by a Bench is considered binding on a Bench of same or lesser number of Judges. In case of doubt or disagreement about decision of earlier Bench, well-accepted and desirable practice is that later Bench refer case to a larger Bench".

11. Full Bench of this Court in the case of *Commissioner of Sales Tax vs. Hukumchand Mills* (supra) considering the question about failure to take notice of the decision of the Supreme Court observed that overlooking a point of law already settled by a judicial pronouncement of the Supreme Court, if a contrary view is taken by the High Court, it results in non-application of law and the decision would inevitably suffer from an error apparent on the face of record, for which no elaborate arguments or reasoning would be required to point out such an error and it would be a good ground for review.

12. Applying the principle of judicial discipline laid down by the Supreme Court in the case of *Safiya Bee* (supra) and keeping in view the observations of the Full Bench in the case of *Commissioner of Sales Tax vs. Hukumchand Mills* (supra) and in the case of *Jabalpur Bus Operators Association* (supra) in our considered view, the failure to take notice of a binding precedent by a coordinate Bench of the High Court would also be an error apparent on the face of record, warranting invocation of jurisdiction of review. It is not merely an erroneous view as argued by learned senior counsel for the respondent by placing reliance on the judgment of Supreme Court in *Parsion Devi & others* (supra) but it is a case of failure to take notice of the earlier view which was a binding precedent.

13. In our considered view, if the learned single Judge was of the view that the judgment passed in the case of *Boolchand* (supra), was not correct, it was desirable for him as per the well accepted practice and in view of the law laid down by the judgments referred to above to have referred the matter to Hon'ble the Chief Justice for constitution of Larger Bench instead of observing against a view taken in *Boolchand* (supra) which was having binding precedent that "the application of the income of the trust is totally irrelevant, once the registration of the trust is proved". Thus having not referred the matter for constitution of Larger Bench, in our considered view, the order passed by the learned Single Judge is liable to be reviewed.

14. Accordingly, we allow this review petition and recall the order dated 28.10.2010 passed in SA No.619/2008. The second appeal is ordered to be restored to its original number. It be listed before the appropriate bench.

Petition allowed.

I.L.R. [2012] M.P., 858

WRIT PETITION

Before Mr. Justice Shantanu Kemkar &

Mr. Justice Prakash Shrivastava

W.P. No. 1192/2004 (Indore) decided on 25 November, 2011

ANAND CONSTRUCTION (M/S)

....Petitioner

Vs.

DIVISIONAL DY. COMMISSIONER, COMMERCIAL

TAX, INDORE & ors.

...Respondents

Vanijyik Kar Adhiniyam (M.P.), 1994 (5 of 1995), Section 62-Revision – Duty of Revisional Authority– Original certificates specifying the materials in question as raw material and incidental goods were issued to the petitioner after following the due procedure prescribed under the Act – Subsequently, when the authorities intended to take a different view, then it was necessary for them to pass an order considering all the relevant aspects of the matter and give reasons for reaching to the conclusion as to why the petitioner is not a manufacturer – Impugned orders passed by the respondents can not be sustained and are hereby set aside with liberty to the respondents to pass fresh, reasoned and speaking order after giving proper opportunity of hearing.(Paras 7 & 8)

वाणिज्यिक कर अधिनियम (म.प्र.), 1994 (1995 का 5), धारा 62 – पुनरीक्षण – पुनरीक्षण प्राधिकारी का कर्तव्य – प्रश्नगत सामग्री को कच्चा माल व अनुषांगिक माल विनिर्दिष्ट करते हुए अधिनियम के अंतर्गत विहित प्रक्रिया का सम्यक अनुपालन करने के पश्चात याची को मूल प्रमाण पत्र जारी किये गये – तत्पश्चात्, जब प्राधिकारीगण ने भिन्न दृष्टिकोण अपनाना चाहा तब उनके लिये और भी आवश्यक था कि मामले के सभी सुसंगत पहलुओं को विचार में लेकर आदेश पारित करे और निष्कर्ष पर पहुंचने के कारण दें कि क्यों याची उत्पादक नहीं है – प्रत्यर्थीगण द्वारा पारित किया गया आक्षेपित आदेश कायम नहीं रखा जा सकता और एतद् द्वारा अपास्त किया जाता है, प्रत्यर्थीगण को स्वतंत्रता के साथ कि सुनवाई का उचित अवसर देने के पश्चात नया, सकारण एवं अर्थपूर्ण आदेश पारित करें।

P.M. Jain, for the petitioner.

Mini Ravindran, Dy. G.A. for the respondents.

ORDER

The Order of the Court was delivered by :
PRAKASH SHRIVASTAVA, J. :- This order will govern the disposal of W.P. No. 1192/2004 and W.P.No. 1193/2004.

2. These writ petitions have been filed against the common order dated 09.03.2004 passed by the Divisional Dy. Commissioner Commercial Tax Division No. 1, Indore affirming the order of the Commercial Tax Officer dated 21.02.2003 deleting certain raw materials from the Registration Certificate of the petitioner issued under the M.P. Vanijya Kar Adhiniyam, 1994 (For short, 'the State Act') and the Central Sales Tax Act, 1956 (for short 'Central Sales Tax Act'). The Writ Petition No.1192/2004 is in respect of the deletion of raw material from the Registration Certificate issued under the Central Sales Tax Act and Writ Petition No.1193/2004 is in respect of the deletion of raw material from the Registration Certificate issued under the State Act.

3. In brief, the petitioner is a contractor involved in the business of taking Government/Semi Government and private contracts for construction of roads. The petitioner was issued the Registration Certificates under the Central Sales Tax Act and the State Act. In these Registration Certificates, tools, oils, grease and furnace oil were entered as raw material and incidental goods. The petitioner was issued the show cause notices dated 31.03.2002 for deletion of these raw materials and incidental goods from the Registration Certificates issued under the State and Central Acts. The petitioner, thereafter, filed reply to the show cause notice and respondent No.2 Commercial Tax Officer, Circle 1, Indore had passed the orders dated 21.02.2003 deleting these raw materials and incidental goods from the Registration Certificates of the petitioner. The petitioner had preferred the revision before the Respondent No.1 which has been dismissed by the impugned common order dated 09.03.2004.

4. Learned counsel appearing for the petitioner submitted that the respondents have committed an error in deleting the raw material and incidental goods from the Registration Certificates of the petitioner without appreciating that the petitioner is a manufacturer involved in the process of manufacturing and that the grounds on which these raw materials and incidental goods have been deleted, are unsustainable.

5. Learned counsel for the respondents supporting the orders, submitted that no error has been committed by the authorities in deleting these items from the Registration Certificates since the petitioner is not a manufacturer

and under the relevant rules, he is not entitled for inclusion of these materials in the Registration Certificates.

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

7. The impugned orders dated 21.02.2003 passed by respondent No. 2 under the State and Central Acts are cryptic orders where the respondent No. 2 has recorded the finding that the petitioner is not covered under the category of manufacturer without assigning any reason and even without considering the activities of the petitioner and the provisions of the Act and Rules. Same is the position in respect of the revisional order. The revisional authority has referred to Rule 13, but has not examined the activity of the petitioner in the light of the various provisions of the Act.

Section 2 (r) of the State Act defines raw material, 2(o) defines manufacture and 2(k) defines goods. Section 22 of the Act deals with registration of the dealer. Similarly section 7 of the Central Sales Tax Act deals with registration of the dealer and after the amendment, the works contract has been defined under section 2(ja) of the Act which includes manufacture also. It is worth noting that the original certificates specifying the materials in question as raw material and incidental goods, were issued to the petitioner after following the due procedure prescribed under the Act and subsequently when the authorities intended to take a different view, then it was all the more necessary for them to pass an order considering all the relevant aspects of the matter and give reasons for reaching to the conclusion as to why the petitioner is not a manufacturer, by examining the nature of activity of the petitioner in the light of the relevant provisions of the Act and the Rules which they have failed to do in the present case.

8. For the reasons stated herein-above, the impugned orders passed by the respondents cannot be sustained and are hereby set aside with liberty to the respondents to pass fresh, reasoned and sneaking order after giving proper opportunity of hearing to the petitioner.

9. The writ petitions are disposed of accordingly.

10. Let the original order be retained in the record of W.P. No. 1192/2004 and a copy thereof be placed in the record of W.P.No. 1193/2004.

Petition disposed of.

I.L.R. [2012] M.P., 861

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 16827/2010 (Jabalpur) decided on 1 December, 2011

BEENA PANDEY

...Petitioner

Vs.

MAMTA DEVI & ors.

...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122, Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995 – Rule 7 – Deposit of Security – Security amount deposited with Tahsildar instead of Specified officer(S.D.O.) due to non-availability of regular Establishment/ court of S.D.O. – Deposit of security is mandatory and not the mode in which it is deposited – Election petition was rightly held to be filed as per rules – Writ petition dismissed. (Para 14)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122, पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995, – नियम 7 – प्रतिभूति जमा करना – अनुविभागीय अधिकारी की नियमित कोर्ट/स्थापना की अनुपलब्धता के कारण प्रतिभूति की रकम अनुविभागीय अधिकारी की बजाये तहसीलदार के पास जमा की गई – प्रतिभूति को जमा करना आज्ञापक है और न कि जमा करने की पद्धति – निर्वाचन याचिका को नियमानुसार प्रस्तुत किये जाने की उचित रूप से धारणा की गई – रिट याचिका खारिज।

Cases referred :

M.P. 1985 JIJ 644, 1999(I) JIJ 200, 2004(2) JIJ 263, AIR 1983 SC 558, AIR 2002 SC 3105.

Rishi Pandey, for the petitioner.

Piyush Dharmadhikari, for the respondent/State.

ORDER

SANJAY YADAV, J.:- Heard.

1. Petitioner was elected as Sarpanch, Gram Panchayat, Pahadiya, 365, Janpad Panchayat, Raipur Karchulian District Rewa on 18.1.2010.
2. Respondent no.1 filed an election petition as 122 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam 1993.

3. Petitioner raised objection as to maintainability of election petition and for dismissal of election petition for non compliance of Rule 7 of M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules 1995 (hereafter referred as Rules 1995).'

4. Rule 7 of the Rules 1995 stipulates:

"7. Deposit of security.-At the time of presentation of an election petition, the petitioner shall deposit with the specified officer a sum of Rs. Five Hundred as security. Where the election of more than one candidate is called in question, a separate deposit of an equivalent amount shall be required in respect of each such returned candidates."

5. The effect of non compliance of Rule 7 is depicted in Rule 8 of Rules 1995 which provides:

"8 Procedure on receiving petition.- If the provisions of rule 3 or rule 4 or rule 7 have not been complied with, the petition, shall be dismissed by the specified officer:

Provided that the petition shall not be dismissed under this rule without giving the petitioner an opportunity of being heard."

6. Objection raised by the petitioner was overruled by the specified officer vici his order dated 5/5/2010, holding that as per arrangement and non availability of the regular establishment of Sub Division Office at a Tahsil place, i.e. Raipur Karchulian, the amount towards security are required to be deposited in the office of Tehsildar Raipur Karchulian who issues receipt vide MPTC 6.

7. Placing reliance on the decision in *Babulal V. State of M.P.* 1985 JLJ 644, *Uday Singh Vs. Himmat Singh* : 1999 (1) JLJ 200, *Sarla Tripathi (Smt.) Vs. Kaushilya Devi and others*: 2004 (2) JLJ 263; as also the affidavit filed by Collector Rewa, which is in pursuant to order dated 24/3/2011 to substantiate the submissions that provisions of Rule 7, i.e. deposit of security amount, is mandatory and requires strict compliance.

8. The Affidavit by Collector Rewa relied upon by the petitioner is in pursuance to the direction by this Court on 24/3/2011 whereby the Collector was called upon to indicate as to how cash deposits are made with regard to proceedings initiated in the Court of Sub Divisional Officer, Tehsil Raipur Karchulian District Rewa.

9. Collector, Rewa in his affidavit dated 10/5/2011 has stated that the cash deposit can be made in the office of Sub Divisional Officer, who is required to issue MPTC-6 receipt in accepting cash deposits. it is further stated that 'any person who is required to make the deposits under the provisions of Madhya Pradesh Panchayats (Elections Petition Corrupt Practices and Disqualification for Membership) Rules 1995 is required to deposits the same with the SDO and not with the Tahsildar as has been the case in the present matter in as much as vide receipt dated 24/2/2010 Tahsildar Raipur Karchuliyar had issued a receipt for Rs. 500/-".

10. In view of provisions of Rule 7 and 8 of the Rules 1995, the decisions relied upon by the petitioner and the Affidavit filed by the Collector Rewa, there cannot be a cavil regarding the mandate contained in Rule 7 that at the time of presentation from of an election petition, the petitioner shall deposit with the specified officer a sum of Rs. 500/- as security.

11. Thus in case of non deposit of security amount alongwith election petition with specified officer, the election petition would be liable to be dismissed u/R 8 of Rules 1995.

12. But in a case as the present one, where the deposit is made before filing the election petition with the authority as per the arrangement made by the specified officer, whether in such circumstances can it be said that there is a non-compliance of Rule 7 of Rules 1995

13. What is mandatory under Rule 7 of Rules 1995 is the deposit of security at the time of presentation of election petition and not the mode in which it is deposited. Collector in his affidavit seems to have mixed up two aspect in the affidavit filed by him.

14. In the case at hand, there is no dispute that at the time of presentation of election petition on 24/2/2010 the same was accompanied with a receipt MPTC-6 dated 24/2/2010, though issued by Tehsildar, Tehsil Raipur Karchulian, but as certified by the specified officer vide his letter dated 12/1/2011 which was in pursuance to the query raised under Right to Information Act 2005 (Annexure R/4), the said mode was evolved by the Sub-Divisional Officer, may be for the reasons, as spelt out in the return that there is no regular establishment/court of Sub-divisional Officer, but of Tehsildar. Therefore, mode of deposit being not mandatory, the election petition is rightly been held to be filed as per rule. In this context reference can be had of decision of the Supreme Court which is in respect of Section 117 of the

Representation of people Act 1951 also supports the view of substantial compliance of Rule 7 of Rules 1995.

15. In *M. Karunanidhi V. H.V. Handa and Ors.*: AIR 1983 SC 558 it is held:

"19. The submissions advanced by learned counsel for the appellant cannot be accepted as they proceed on the assumption that no distinction can be drawn between the requirement as to the making of a deposit in the High Court under sub-sec.(1) of sec.117 and the manner of making such deposit. There was considerable emphasis laid by learned counsel that sub-sec (1) of Sec. 117 cannot be dissected in to two parts one part being treated as mandatory. and the other as directory. The contention is wholly misconceived and indeed runs counter to several decisions of this Court. It is always important to bear the distinction between the mandatory and directory provisions of a statute Sub Sec (1) of S. 117 is in two parts. The first part of sub section (1) of Sec.117 provides that at the time of presenting an election petition, the petitioner shall deposit in the High Court sum of Rs.2000/- as security for the costs of the petitioner, and the second is that such deposit shall be made in the High Court in accordance with the rules of the High Court. The requirement regarding the making of a security deposit of Rs.2000/- in the High Court is mandatory, the noncompliance of which must entail dismissal in limine of the election petition under sub sect (1) of Sec 86 of the Act. But the requirement of its deposit in the High Court in accordance with the rules of the High Court is clearly directory. As Maxwell on the interpretation of Statutes, 12 Edn at p.314 puts it : "An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." The rule of construction is well settled and we need not burden the judgment with many citations.

20. It is well established that an enactment in form mandatory might in substance be directory and that the use of the word "shall" does not conclude the matter. The general rule of interpretation is well known and it is but an aid for ascertaining

the true intention of the Legislature which is determining factor and that must ultimately depend on the context.

16. In *M Y Ghorpade Vs Shivaji Rao M Poal* : AIR 2002 SC 3105 it was held

9. One of the question that arose was whether the expression 'in favour of the Election Commission', contained in Section 117, as it stood then, were mandatory in character or not, and this Court held that the first part of Section 117 though mandatory, but not the later part. It is not necessary to multiply authorities on the point, but suffice it to say, that the sum of Rs.2,000/- must be deposited while filing an Election Petition and that is undoubtedly mandatory, but through whom the amount will be deposited etc. cannot be held to be mandatory. That being the position, and in the case in hand the evidence of the Election Petitioner as well as the evidence of Respondent No. 5 unequivocally pointing out that it is the Election Petitioner who deposited the amount of Rs.2,000/-, we see no infirmity with the conclusion of the High Court that there has been compliance of Section 117 of the Act and consequently the Election Petition has been rightly held to be maintainable and could not have been dismissed under Section 86 on the ground of non-compliance of Section 117 of the Act".

17. In view whereof there being substantial compliance of the provision of Rule 7 of Rules 1995, there is no substance in the challenge put forth. Petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2012] M.P., 865

WRIT PETITION

Before Mr. Justice.S. Kemkar & Mr. Justice Prakash Shrivastava

W.P. No. 2726/2011 (Indore) decided on 9 December, 2011

HARI NARAYAN SHARMA

Vs.

STATE OF M.P.

...Petitioner

...Respondent

Work Charged and Contingency Paid Employees Pension Rules M.P. 1979 – Rule 6 – Pension – Petitioner appointed as Gangman in

the Public Works Department in March 1957 and retired on 31.12.1997 – Petitioner can not be made to suffer on account of inaction or delayed action on the part of the respondents – The case of the petitioner is covered by the earlier Division Bench judgment of this Court in the matter of *State of M.P. Vs. Mohd. Sadiq* (2010(4) MPLJ 367) and he is also entitled to the same benefit as has been extended in that case – Petitioner is entitled for the pension. (Paras 2, 3, 10, 11 & 12)

कार्य भारित तथा आकस्मिकता निधि कर्मचारी पेंशन नियम म.प्र. 1979 – नियम 6 – पेंशन – याची मार्च 1957, को लोक निर्माण विभाग में गैंगमेन के रूप में नियुक्त था और 31.12.1997 को सेवानिवृत्त हुआ – प्रत्यर्थागण की ओर से निष्क्रियता या विलंबित कार्यवाही के कारण याची को पीड़ित नहीं किया जा सकता – याची का प्रकरण इस न्यायालय द्वारा म.प्र. राज्य वि. मो. सादिक (2010 (4) एमपीएलजे 367) के मामले में पारित खंड न्यायपीठ के निर्णय द्वारा शासित होता है और वह उस मामले में जैसा लाभ दिया गया है वैसे ही लाभ का भी हकदार है – याची पेंशन का हकदार।

Case referred :

2010(4) MPLJ 367,

V.K. Patwari, for the petitioner.

M. Ravindran, Dy. G.A. for the respondent.

O R D E R

The Order of the Court was delivered by :
S. KEMKAR, J.:- This is a letter petition in which this Court vide order dated 08.04.2011 had appointed Shri V.K. Patwari Advocate to assist the petitioner.

2. The case of the petitioner is that he was appointed as Gangman in the Public Works Department in March 1957 and had retired on 31.12.1997 after serving the department for more than 40 years but he has not been granted the pensionary benefits whereas his juniors have been extended the said benefit. He has stated that he is a poor, handicapped, old and ailing retired employee with no support.

3. A reply has been filed by the respondents stating that the petitioner had retired on 31.12.1997 whereas in terms of the Circular (Annexure R/1) dated 01.12.1997, the Gangmen have been regularized with effect from 01.01.1998, but, the petitioner could not be regularized as he had retired in the mean while. The petitioner has not completed minimum qualifying service,

therefore, in terms of Rule 6 of the Madhya Pradesh (Work Charge and Contingency Paid employees) Pension Rules, 1979, he is not eligible for the grant of pension and accordingly he has been paid the gratuity amount as permissible in law.

4. Learned counsel appearing for the petitioner submitted that the case of the petitioner is squarely covered by the judgment of this Court in the matter of *State of M.P. and others Vs. Mohammad Sadiq* reported in 2010 (4) MPLJ Page 367 wherein in similar circumstances, the relief has been granted. He has further submitted that the petitioner cannot be denied the said benefit since the similarly situated employee in the matter of *Mohammad Sadiq* (supra) has been granted the relief.

5. Learned counsel for the respondents has submitted that the petitioner is not entitled to the pensionary benefit since he has not completed the minimum ten years of regular service in the Work Charge Establishment.

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

7. The respondents in their reply have not disputed the fact that the petitioner was employed as Gang Man in the Public Works Department since the year 1957. This fact is also not in dispute that the petitioner had retired from service on reaching the age of superannuation on 31.12.1997. Thus, undisputedly the petitioner has served the respondents for more than 40 years.

8. It is also worth noting that the circular dated 01.12.1997, in respect of regularization of gangman, was issued when the petitioner was working as gangman, but he was not given the benefit of the said circular without any justifiable reason. In terms of this circular the petitioner is to be treated as a regular Gangman w.e.f. 01.01.1996.

9. In the matter of *Mohammad Sadiq* (supra), the concerned employee was appointed as daily wager in the year 1960 and was regularized on 01.01.1996 and had retired on 31.12.2002 and he was denied the benefit of pension on the same ground raising the plea that he had not completed the minimum period of qualifying service of ten years. This Court, after taking note of the provisions of the Pension Rules, 1979, held thus:-

"10. On taking into consideration Rule 2(c) of the Pension Rules of 1979 it is luminously clear that a person can be said to be a permanent employee who has completed 15 years, of

service or more on or after 1st January, 1974 as contingency paid or a work charged employee. Since undisputedly the petitioner was appointed as daily wager in the year 1960, hence in the year 1975 he has completed 15 years of his service. No doubt he was regularized vide Annexure R/2 on 1.1.1996, but before he was regularized he already qualified the qualifying service for the grant of pension. It is not at all in dispute that the qualifying service of 10 years as envisaged in the proviso to definition clause of 'permanent employee' stated in Rule 2(c) of the Pension Rules of 1979, has been reduced to six years vide notification dated 30th January, 1996. But, according to us, the writ petitioner already qualified the qualifying service for obtaining the pension, and hence, according to us, the respondent has been rightly granted relief by the learned Writ Court.

11. Indeed, this aspect of the matter has already been taken note of in paras 4,5 and 6 by the Division Bench of this Court in *Shrikrishan* (supra) which has also been quoted by the learned Writ Court. We do not find any merit in the contentions of the learned Additional Advocate General for appellants/State that the Pension Rules of 1976 would be applicable upon the contingency paid or work charged employee. If we go through the application of these Pension Rules of 1976 as envisaged in Rule 2 of the said Rules, we find that these Rules are not applicable to certain employees, who have been categorized (ii)(a) to (g). According to clause (a) these Rules would not be applicable for the persons in a work charged establishment, and therefore, since the Pension Rules of 1976 are expressly made inapplicable to those employees. According to us, learned Writ Court has rightly allowed the writ petition of the writ petitioner. The Full Bench of this Court in *Vishnu Mutiya* (supra) para 14 has also taken note of that the pension of Gangman would govern by the Pension Rules of 1979. Needless to say the respondent has been retired from the post of Gangman."

10. In the above matter, the employee concerned was appointed on the same post subsequent to the petitioner and he has been granted the pensionary

benefit therefore, the present petitioner cannot be made to suffer on account of inaction or delayed action on the part of the respondents.

11. We find that the case of the petitioner is covered by the earlier Division Bench judgment of this Court in the matter of *Mohd. Sadiq* (supra) and he is also entitled to the same benefit as has been extended in that case.

12. Accordingly we allow this letter petition on the same terms by holding that the petitioner is entitled for the pension and direct the respondents to extend the necessary benefits to the petitioner as has been extended in the matter of *Mohd. Sadiq* (supra) within 8 weeks from the date of receipt of a copy of this order.

No costs.

Petition allowed.

I.L.R. [2012] M.P., 869

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No. 1178/2006(S) (Jabalpur) decided on 4 January, 2012

BHAGWANDEEN CHOUDHARY

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Fundamental Rules – 54 (7), 54-A – No Work No Pay – Punishment of termination was set aside as excessive and minor penalty was imposed by SAT – Provisions of FR 54-A(3) will not be applicable but the period has to be regularized as per Rule 54-A (2) – Entire period cannot be treated on the principle of no work no pay – Although Petitioner is not entitled for full pay and allowance but his claim has to be settled in accordance with Rule 54(7) which is made applicable by virtue of provisions of Rule 54-A(2). (Paras 12 &13)

मूलभूत नियम – 54(7), 54-ए – काम नहीं तो वेतन नहीं – सेवा समाप्ति की शास्ति को अत्यधिक मानते हुए अपास्त किया गया और सेट द्वारा लघु शास्ति अधिरोपित की गई – मूल नियम 54ए(3) के उपबंध लागू नहीं होंगे परन्तु नियम 54ए(2) के अनुसार अवधि को नियमित किया जाना चाहिये – संपूर्ण अवधि को काम नहीं तो वेतन नहीं के सिद्धांत पर होना नहीं माना जा सकता – यद्यपि याची पूर्ण वेतन एवं भत्ते का हकदार नहीं किन्तु उसके दावे का निपटारा नियम 54(7) के अनुसार किया जाना चाहिए जो नियम 54ए(2) के उपबंधों के प्रभाव से लागू किया जाता है।

R.C. Tiwari, for the petitioner.

Rajesh Tiwari, G.A. for the respondent.

ORDER

RAJENDRA MENON, J. :- Challenging the order passed by the respondents as contained in Annexure P/6 dated 25.2.2005 and refusing payment of back wages to the petitioner for various periods, petitioner has filed this writ petition.

2- Facts that have come on record indicate that petitioner was holding the post of Forester in Khairatpur Depot, Garhi Production Range, District Raisen. It is alleged against the petitioner that on 20.3.1980, he is said to have misbehaved with his superior officer, for which a charge-sheet was issued to the petitioner and after departmental enquiry, his services were terminated. It was the case of the petitioner that he did not misbehave with the superior officer, instead it was the superior officer one Mr. S.N. Sharma, who instigated the petitioner and, therefore, imposition of penalty of termination was said to be unsustainable. When the appeal and representation against the termination was rejected, petitioner filed a petition before this Court and on formation of State Administrative Tribunal the matter was transferred to SAT, was registered as T.A.No.874/1988 and by an order passed on 23.11.1998 vide Annexure P/1, a Bench of the Tribunal found that the punishment of termination from service was not proper. It was held that interest of justice would be met if termination is quashed and instead a penalty of withholding of two increments without cumulative effect is awarded to the petitioner. Accordingly, the disciplinary authority was directed to impose the said penalty.

3- With regard to regularization of the intervening period and with regard to payment of backwages no direction was issued by the Tribunal instead in paragraph 16 the following orders were passed:

“16. In view of the said situation, it cannot be said that the petitioner was also not responsible for the said incident. Enquiry Officer also has given a finding that the petitioner as well as Shri Sharma were equally responsible for the said incident. Therefore, regarding backwages, it is ordered that the disciplinary authority shall take a decision regard the said aspect of payment of backwages in accordance with the provisions contained in Rule 54 and 54-A of Fundamental Rules of the State of Madhya Pradesh.”

4- In accordance to the aforesaid directions, claim of the petitioner was decided by the competent authority. It was the case of the petitioner that the decision was not taken properly, he was not heard and, therefore, the petitioner again filed a writ petition before this Court being W.P.No.14863/2003 and on 23.6.2004 vide order – Annexure P/4, the said writ petition was disposed of directing the respondents to decide the claim of the petitioner for regularization of the intervening period in accordance to the directions issued by the Tribunal in paragraph 16, within a period of three months. Claim of the petitioner having been decided by the impugned order-dated 25.2.2006 – Annexure P/6, petitioner has now filed this writ petition.

5- Shri R.C. Tiwari, learned counsel for the petitioner, argues that for the alleged misconduct, petitioner has been imposed with three punishments – (1) confirmation of the period of suspension of petitioner by paying him only subsistence allowance; (2) penalty of stoppage of two increments without cumulative effect; and, (3) non-payment of salary for the period from 9.11.1984 to 28.12.1998, on the principle of ‘no work no wage’. Inviting my attention to the provisions of Fundamental Rules 54 and 54-A and the stipulations contained in Fundamental Rule 54(A-3), Shri R.C. Tiwari, learned counsel for the petitioner, argued that for the intervening period the petitioner is entitled to full pay and allowances. Accordingly, it is the case of the petitioner that full pay and allowances for the period from 9.11.1984 i.e... the date of termination, till the date of reinstatement i.e... 28.12.1998, after imposing minor penalty of stoppage of two increments without cumulative effect, be paid to the petitioner.

6- Even though in the writ petition, in the grounds canvassed, it is stated that the claim of the petitioner should have been settled in accordance to the requirement of sub-rule (7) of Rule 54, during the course of hearing of the writ petition, it was argued by learned counsel for the petitioner that in view of the provisions of Rule 54(A-3), the petitioner is entitled to full salary and allowances as the impugned action amounts to imposing three penalty for one act of misconduct.

7- Respondents have refuted the aforesaid and it is pointed out by them that for the purpose of imposing the penalty the contention of the petitioner that he has been visited with three penalties is not correct. It is the case of the respondents that the petitioner has been punished with only one punishment of stoppage of two increments without cumulative effect. The confirmation of the period of suspension and denial of backwages on the principle of ‘no

work no wage' is in accordance to the requirement of FR 54 and 54-A, it amounts to regularization of the intervening period as per the statutory rule and, therefore, it is not punishment. According to the respondents, the claim of the petitioner does not warrant any consideration.

8- Having heard learned counsel for the parties and on a perusal of the records, it is clear that when the petitioner challenged his initial termination and when a Division Bench of the Tribunal on 23.11.1998, interfered into the matter of imposing the extreme penalty of termination, no direction was given for payment of salary for the intervening period. Instead, as is evident from the directions issued in paragraph 16 above, the direction was only to regularize the period in accordance to FR 54 and FR 54-A. That being so, it would be appropriate to take note of the provisions of Rule 54 and 54-A of the Fundamental Rules. Both these Rules pertain to payment of pay and allowances to an employee on his reinstatement when the termination, removal or dismissal is set aside either by the appellate or reviewing authority or by a Court of law.

9- As far as FR-54 is concerned, it pertains to regularization of the period after reinstatement with regard to pay and allowances when the government servant - who is dismissed, removed or compulsorily retired, is reinstated as a result of his appeal, review being allowed. In such cases, the period intervening has to be regularized as per sub-rule (2) or sub-rule (4) to (7) of the aforesaid Rule.

10- Similarly, when the dismissal, removal or compulsory retirement is set aside by a Court of law then the matter is to be decided as per FR 54-A. FR 54-A, therefore, is more relevant for the present case and is reproduced hereinafter:

“FR 54-A (1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a court of law and such Government servant is reinstated without holding any further inquiry, the period of absence from duty shall be regularized and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3) subject to the directions, if any, of the court.

(2) (i) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the court solely on the ground of non-compliance with the requirements of clause (2) of Article 311 of the

Constitution, and where he is not exonerated on merits, the Government servant shall, subject to the provisions of sub rule (7) of rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled to had he not been dismissed, removed or compulsorily retired, or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection, within such period which, in no case shall exceed sixty days from the date on which the notice has been served as may be specified in the notice:

Provided that any payment under this sub-rule to a Government servant shall be restricted to a period of three years immediately preceding the date on which the judgment of the court was passed, or the date of retirement on superannuation of such Government servant, as the case may be.

- (ii) The period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of judgment of the court shall be regularized in accordance with the provisions contained in sub-rule (5) of rule 54.
- (3) If the dismissal, removal or compulsory retirement of a Government Servant is set aside by the court on the merits of the case, the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purposes and he shall be paid the full pay and allowances for the period, to which he would have been entitled, had he not been dismissed, removed or

compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement as the case may be.

(4) The payment of allowances under sub-rule (2) or sub-rule (3) shall be subject to all other conditions under which such allowances are admissible.

(5) Any payment made under this rule to a Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of dismissal, removal or compulsory retirement and the date of reinstatement. Where the emoluments admissible under this rule are equal to or less than those earned during the employment elsewhere, nothing shall be paid to the Government servant.”

11- If the aforesaid provision is taken note of, it would be seen that when the dismissal, removal or compulsory retirement of a government servant is set aside by a Court of law and when the government servant is reinstated without holding any further inquiry, the period has to be regularized in accordance to the provisions of sub-rule (2) and (3). As far as sub-rule (2) is concerned, it pertains to a case where the dismissal, removal or compulsory retirement is set aside by the Court due to non-compliance with the requirement of Clause (2) of Article 311 and where the employee concerned is not exonerated on merits. Sub-rule (3) pertains to regularization of the period when the employee is exonerated on all counts and is directed to be reinstated. It is, therefore, clear that both sub-rule (2) and sub-rule (3), of FR 54-A, deal with two different eventualities. Whereas sub-rule (2) pertains to the government servant's dismissal, removal etc being set aside on the ground of non-compliance with the requirement of Article 311 and where he is not exonerated on merits, sub-rule (3) deals with cases where the entire action of dismissal, removal are set aside on merits.

12- In the present case, if the order passed by the State Administrative Tribunal on 23.11.1998 is taken note of, it would be seen that the petitioner is not exonerated on merits of all the charges levelled against him. Instead, it is a case where he is directed to be reinstated after setting aside the order of punishment holding him guilty of the charges and an alternate punishment of stoppage of increment is inflicted, therefore, the provisions of sub-rule (3) of FR 54-A will not be applicable, but the period has to be regularized as per

sub-rule (2) of Rule 54-A. A perusal of the aforesaid Rule, which is reproduced hereinabove would show that when the employee is not exonerated on merits, the government servant is entitled to pay and allowances subject to the provisions of sub-rule (7) of Rule 54, which he would have been entitled to had he not been dismissed, removed or compulsorily retired. Sub-rule (7) of Rule 54 speaks about payment of amount which shall not be less than the subsistence allowance and other allowances admissible under Rule 53. That apart, the mandate of sub-rule (2) of Rule 54-A is that the matter has to be settled after notice to the government servant about the quantum proposed and considering the representation. The proposal for quantum of payment to be made for the intervening period has to be strictly in accordance made in accordance with the requirement of sub-rule (7) of Rule 54.

13- In the present case, without taking note of the requirement of sub-rule (2) of Rule 54-A and the mandate of sub-rule (7) of Rule 54, the entire period is treated on the principle of 'no work no wage', this cannot be done. Even though the State Government may be right in denying full pay and allowance, which would be applicable only if the case falls under sub-rule (3) of Rule 54-A, but as the petitioner is not exonerated on merits and is visited with an alternate minor penalty, his claim has to be settled in accordance to the requirement of sub-rule (7) of Rule 54, which is made applicable to him by virtue of the provisions of sub-rule (2) of Rule 54-A. That is why in the body of the petition and in the grounds raised the petitioner has come out with a case that his claim has not been settled in accordance to Rule 54(7), to that extent petitioner has a grievance, which has to be considered.

14- Keeping in view the aforesaid, this petition is allowed in part. Even though the claim of the petitioner for payment of full salary and allowance for the period from 9.11.1984 to 23.12.1998 is rejected, respondents are directed to settle the claim of the petitioner in accordance to the requirement of FR 54-A(2) and the mandate of Rule 54(7). Necessary orders in accordance to these Rules be passed within a period of three month and after determining the amount payable in accordance to Rule 54(7), the amount be paid to the petitioner within a period of three months.

15- With the aforesaid observations, the petition stands allowed and disposed of.

Petition allowed

I.L.R. [2012] M.P., 876

WRIT PETITION

Before Mr. Justice Rajendra Menon & Mr. Justice Alok Aradhe

W.P. No. 2701/2005(S) (Jabalpur) decided on 12 January, 2012

SHANKAR PRASAD GUPTA

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

Civil Services (Pension) Rules, 1976 (M.P.) – Rule 42(1)(b) – Fundamental Rule – Rule 56(2-A) – Compulsory Retirement – Overall service performance of the petitioner rated as ‘average worker’ and finally, when a complaint is received against him with regard to his integrity, the impugned action is taken – Petitioner is also rated as an ‘average worker’, – Adverse communications to petitioner throughout his service record – Petitioner was reverted on one occasion and on two occasions his promotions were deferred because of certain adverse material against him – Finally, there was complaint with regard to integrity – Held – It is a case where a Judicial Officer, holding the post of ADJ, is compulsorily retired on the basis of his entire service record and in the absence of any malafide or arbitrariness being established from the material available on record, no interference is warranted.

(Paras 14)

सिविल सेवा (पेंशन) नियम 1976 (म.प्र.) – नियम 42(1)(बी) – मूलभूत नियम – नियम 56(2ए) – अनिवार्य सेवानिवृत्ति – कुल मिलाकर याची की सेवा संपादन का आंकलन ‘औसत कर्मचारी’ के रूप में किया गया और अंततः जब उसके विरुद्ध उसकी सत्यनिष्ठा के संबंध में शिकायत प्राप्त की गई, तब आक्षेपित कार्यवाही की गई – याची का मूल्यांकन भी ‘औसत कर्मचारी’ के रूप में किया गया – याची की आद्योपांत सेवा पुस्तिका में प्रतिकूल संप्रेक्षण – एक अवसर पर याची को पदावनत किया गया था और दो अवसरों पर उसकी पदोन्नतियां उसके विरुद्ध कतिपय प्रतिकूल सामग्री के कारण आस्थगित की गई थी – अंततः सत्यनिष्ठा के संबंध में कोई शिकायत नहीं थी – अभिनिर्धारित – यह एक ऐसा प्रकरण है जहां एक न्यायिक अधिकारी जो एडीजे का पद धारण करता था, उसे उसके संपूर्ण सेवा अभिलेख के आधार पर अनिवार्य सेवानिवृत्त किया गया और अभिलेख पर उपलब्ध सामग्री से किसी असदभाव या मनमानेपन की अनुपस्थिति में, किसी हस्तक्षेप की आवश्यकता नहीं।

Cases referred :

(2001) 3 SCC 314, (2010) 10 SCC 693,

N.K. Salunke, for the petitioner.

Rajesh Tiwari, G.A. & *Sanjeev Kumar Singh*, P.L. for the State.

Shobha Menon with *Surabhi Ahirkar* for the respondent No.2.

ORDER

The Order of the Court was delivered by :
RAJENDRA MENON, J.: Challenging the order-dated 20.4.2005–Annexure P/1, by which petitioner has been compulsorily retired under the provisions of Rule 42(1)(b) of the MP Civil Services (Pension) Rules, 1976 read with the provisions of Fundamental Rule 56(2-A), petitioner has filed this writ petition.

2- Petitioner was appointed as a Civil Judge Class II on 16.10.1985. He was promoted as Civil Judge Class I on 26.7.1992 and thereafter as Chief Judicial Magistrate (hereinafter referred to as “CJM”) on 6.6.1997. Subsequently, in the year 1999, he was reverted from the post of CJM to the post of ACJM. In the meanwhile, certain adverse entries were communicated to him for the year 1997-98 vide communication Annexure R/7 dated 30.6.1998. His representation against the aforesaid communication was rejected vide Annexure R/8 on 23.1.1999. Thereafter, in the next year 1998-99 also, he was given an advisory remark and his grading was rated as ‘average’, as is evident from Annexure R/9 dated 13.4.1999. Subsequently, his representation against this was also rejected vide Annexure R/10, on 13.10.1999. However, on 16.1.2002, he was again promoted as CJM. While working as CJM again for the year 2001, certain advisory remarks were communicated to him vide Annexure R/12. However, on 9.5.2003 he was promoted to the post of Additional District Judge (HJS) and was posted in Nowgaon, District Chhatarpur, in the newly opened Court. A complaint was received against the petitioner with regard to a pilgrimage undertaken by the petitioner between 4.6.2004 to 13.6.2004, while being posted as ADJ. It was indicated in the complaint that petitioner accompanied by one Shri Anil Saxena, Advocate, Government Pleader of District Gohad, District Bhind and another Advocate Shri K.C. Upadhyaya undertook the pilgrimage in a Tempo Trax Vehicle alongwith his family members and the expenses for the same was mainly borne by the Advocates. It was pointed out that after coming back the petitioner had passed certain orders in criminal cases to the advantage

of these Advocates and, therefore, the complaint was looked into and on the basis of a report submitted by the District Judge (Vigilance), a prima facie case being made out, a charge-sheet was issued to the petitioner. In this regard, the note-sheet of the District Judge (Vigilance) is Annexure R/15 dated 6.1.2005; approval of the Hon'ble Chief Justice is Annexure R/15 dated 8.1.2005; the report of the Administrative Committee No.1 proposing to initiate Departmental Inquiry is Annexure R/16 dated 7.3.2005. While the Departmental Inquiry was pending, advisory remarks were again communicated to the petitioner for the year ending 2004 on 8.4.2005 vide Annexure P/3 and P/4.

3- In the meanwhile, as the petitioner had completed 20 years of service, his case came up for scrutiny with regard to his continuation in service after completing 20 years as required under Rule 42 (1)(B) of the MP Civil Services (Pension) Rules, 1965 and while scrutinizing the case of the petitioner, it was found that the over all performance of the petitioner was not 'good', he was only an 'average' worker and taking note of the totality of the circumstances the Administrative Committee No.1 recommended for compulsory retirement of the petitioner. The recommendations of the Administrative Committee was accepted by the Full Court in its meeting held on 16.4.2005 vide Annexure R/ 22, and based on the same the State Government has passed the impugned order – Annexure P/1.

4- Shri N.K. Salunke, learned counsel for the petitioner, placing reliance on the judgment rendered by the Supreme Court in the case of *State of Gujarat Vs. Umedbhai M. Patel*, reported in (2001) 3 SCC 314, submitted that promotion was granted to the petitioner on the post of ADJ just two years prior to his compulsory retirement and the fact that a charge-sheet was issued to him and without conducting an inquiry into the charge-sheet the impugned action was taken, and emphasizing that the entire action against the petitioner is taken only to punish him for the allegations levelled in the charge-sheet, which was issued to him, this was a short-cut method adopted by the respondents to somehow remove the petitioner from service without conducting a Departmental Inquiry. Accordingly, it is argued that when a charge-sheet was issued to the petitioner and when there were serious allegations against the petitioner, an inquiry should have been conducted and the action to compulsorily retire the petitioner on the aforesaid allegation is nothing but an act of punishment without conducting Departmental Inquiry. That apart, it was emphasized by him that when the petitioner was promoted as ADJ in 2003

i.e... on 9.5.2003, after considering his over-all service record, then his compulsory retirement within a period of two years thereafter is illegal as the petitioner cannot be treated as dead wood on 13.4.2005. Accordingly, emphasizing that the entire action is contrary to the principles governing compulsory retirement, learned counsel for the petitioner seeks for interference into the matter.

5- Refuting the aforesaid Smt. Shobha Menon, learned Senior Advocate appearing for respondent No.2, took us through the entire service record of the petitioner and argued that the petitioner was an 'average' worker and throughout his career adverse entries were communicated to him. The adverse entries communicated were with regard to his working and the manner in which the cases were disposed by him, certain complaints with regard to integrity of the petitioner and considering the over-all situation, it is stated that the High Court took a decision to compulsorily retire the petitioner after evaluating his entire service record. Learned Senior Advocate then emphasized that in the case of a judicial officer even if there is an isolated adverse entry in the career with regard to his integrity, the same is sufficient to take action for compulsorily retiring him in public interest. It is stated that in the absence of any malafide or arbitrariness being brought to the notice of this Court, in the light of the law laid down in the case of *Pyare Mohan Lal Vs. State of Jharkhand and others*, (2010) 10 SCC 693, the action taken on the basis of an isolated case of doubtful integrity is upheld by the Supreme Court. It is stated in the present case that there was serious doubt with regard to integrity of the petitioner and thereafter the decision to compulsorily retire him was taken after considering the over-all service performance of the petitioner, which included the fact with regard to reversion of the petitioner on one occasion from the post of CJM to the post of ACJM; and, his case for promotion initially to the post of CJM and subsequently to the post of ADJ being deferred on two occasions, it is a case where the over-all service performance of the employee is treated to be 'average' and the High Court took a decision in the interest of administration and in doing so, it is stated that no error is committed.

6- Learned Senior Advocate further submitted that merely because a charge-sheet was issued to the petitioner and the Departmental Inquiry was pending, that by itself is not a ground for holding that the petitioner is being punished. It is emphasized that compulsory retirement under Rule 42 of the Pension Rules read with Fundamental Rule 56 is not punishment and, therefore, the arguments advanced by learned counsel for the petitioner is not tenable.

Accordingly, it is the case of the respondents that in the facts and circumstances of the case, no interference is called for.

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

8- On a perusal of the records, it is clear that the over-all service performance of the petitioner has been rated as 'average'. After his appointment in the year 1985, even though he was promoted on the post of CJM on 6.6.1997, but considering the fact that his services were not satisfactory he was reverted in the year 1999 from the post of CJM to the post of ACJM; an adverse remark was communicated to him for the year ending 30.6.1998 i.e... immediately after he was confirmed on completion of probation; and, an adverse entry is Annexure R/1 and it pertains to his work and supervising the work of his staff members. Thereafter, for the year ending March 1994, the District Judge after evaluating his judgments and the manner of his working came to the conclusion that his judgments and decision are not supported by logical conclusion and it was indicated that he should concentrate more on the judicial work. If the documents filed by the respondents' alongwith the return and various communications available on record are perused, it would be seen that petitioner had been an 'average' worker. He has received below average gradings for the year 1998, average gradings for the year 1999 and subsequently also he is generally rated average in most of the gradings issued to him alongwith various adverse entries as are indicated in the record. The adverse entries pertains to his work and remarks with regard to improvements to be done, slow rate of disposal so also the manner in which bail applications and application under section 482 CrPC are decided by him. Finally, even though he was promoted to the post of ADJ, a complaint with regard to his integrity was received and on the same a preliminary inquiry was conducted, the same was found to be correct and a Departmental Inquiry was initiated.

9- If the entire service record of the petitioner is scrutinized, it would be seen that in the year 1987, an adverse entry was indicated to him vide Annexure R/1, on 14.1.1988, pertaining to inspection of work and irregularity committed in supervising the work of the Staff. For the period 1989-90, petitioner was again graded as 'Average' i.e.... 'D'. Even though he received good gradings for the next three years between 1990-93, but an adverse remark was indicated to him vide Annexure R/2, for the year 1993-94, wherein it was indicated that his judgments and conclusions are not supported by sound logic and he was cautioned to be more careful, concentrate and provide guidance to the staff. Again, for the year 1993, the representation against this was also rejected

vide Annexure R/3. For the year 1994 again certain allegations were levelled against the petitioner and the same were communicated to him by way of adverse remarks i.e... Annexure R/4. This pertains to action taken in the matter of deciding certain criminal cases, there were allegations of extraordinary delay by the petitioner and it was found that the petitioner was not conducting the procedure properly. Thereafter, in the year 1995 also, complaints were received against the petitioner from one Shri Sunder Prasad of Bhandar, District Gwalior when the petitioner was posted as Civil Judge Class II, at Gwalior and the petitioner was cautioned to be careful in view of the said complaint, which related to maintenance of relations with certain litigants and the facts which were found with regard to his activities in discharge of his judicial duty. Petitioner was directed to be cautious again for the year ending 1995, adverse remarks were communicated to the petitioner and his grading was 'average'. For the year ending 1997-98, he was graded 'below average' and the same was indicated to him vide Annexure R/7 on 30.6.98 and his representation was rejected vide Annexure R/8 by the High Court on 23.1.1999. Again, in the year 1998-99, he was graded as 'D' (Average) and his representation rejected vide Annexure R/10 on 13.10.1999. For the years 1999-2000, he was again graded as 'D'. For the year 2000-2001 also, he was communicated adverse CR vide Annexure R/12. For the year 2004 also, adverse communications were made to him vide Annexure R/13, advisory was issued and his grading was 'Average'. The entire service profile of the petitioner shows that it was not so extraordinary that he could be termed as a 'Good Judicial Officer'. In the adverse entry made by the Portfolio Judge for the year ending 31.12.2004, it was indicated that his integrity is doubtful and there are question-marks with regard to his character and reputation.

10- Be it as it may be, it is a case where the over-all service performance of the petitioner is rated as 'average' and finally, when a complaint is received against him with regard to his integrity, the impugned action is taken. The question is as to whether the action of the High Court in compulsorily retiring the petitioner without conducting an inquiry under such circumstances is justified or not?

11- It is not a case where the petitioner is punished by way of compulsory retirement for an isolated instance of travelling to Badrinath between 4.6.2004 to 13.6.2004. While the question with regard to this incident was pending the petitioner completed 20 years of service and as required under the statutory provisions i.e... Rule 42(1) of the MP Civil Services (Pension) Rules, his

case had to be placed and considered for confirmation for retaining him in service after 20 years. When the said exercise was undertaken and when his over-all service record was evaluated, it was found that right from the beginning he was an 'average worker', his disposal was not upto the mark, the quality of judgments were not as 'good' as it should been, and his over-all performance has been rated as 'average'. Added to that, there were certain complaints with regard to his integrity and finally in the year 2004 a serious complaint was received against him and there were material to show in the preliminary inquiry that there was some substance in this complaint. Taking note of all these circumstances, if a decision is taken to compulsorily retire the petitioner, we are of the considered view that the same would not amount to an act of punishment nor can it be termed as illegal or unjustified in any manner whatsoever.

12- As far as reliance placed by the petitioner with regard to the principle laid down in *Umedbhai M. Patel* (supra) is concerned, the same cannot be made applicable for the simple reason that for an adverse entry in the matter of a judicial officer that also with regard to his integrity, considerations have to be different and the same is laid down by the Supreme Court in the case of *Pyare Mohan Lal* (supra).

13- If the principle laid down by the Supreme Court in the aforesaid case is followed, it would be seen that in the said case also the judicial officer was an 'average worker' and as there was one isolated entry with regard to his integrity, the same formed the basis for his compulsory retirement and the action of the High Court was upheld by the Supreme Court and the following observations were made by the Supreme Court, in this regard in paragraph 29, as under:

“The law requires the Authority to consider the “entire service record” of the employee while assessing whether he can be given compulsory retirement irrespective of the fact that the adverse entries had not been communicated to him and the officer had been promoted earlier in spite of those adverse entries. More so, a single adverse entry regarding the integrity of an officer even in remote past is sufficient to award compulsory retirement. The case of a Judicial Officer is required to be examined, treating him to be different from other wings of the society, as he is serving the State in a different capacity.

The case of a Judicial Officer is considered by a Committee of Judges of the High Court duly constituted by Hon'ble the Chief Justice and then the report of the Committee is placed before the Full Court. A decision is taken by the Full Court after due deliberation on the matter. Therefore, there is hardly any chance to make the allegations of non- application of mind or malafide."

(Emphasis supplied)

14- If the case of the petitioner is evaluated in the backdrop of this principle, it would be seen that apart from the fact that petitioner is also rated as an 'average worker', there are adverse communications to him throughout his service record, he has been reverted on one occasion and on two occasions his promotions were deferred because of certain adverse material against him. Finally, there was complaint with regard to integrity and taking note of all these factors, if the High Court took a decision to compulsorily retire the petitioner, we see no error in the same warranting interference. It is a case where a judicial officer, holding the post of ADJ, is compulsorily retired on the basis of his entire service record and in the absence of any malafide or arbitrariness being established from the material available on record, it is not a fit case where interference is warranted in these proceedings.

15- Accordingly, finding no ground to interfere into the matter on the grounds raised, the petition is dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 883

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 7372/2010 (Jabalpur) decided on 7 February, 2012

RAJESH ASNANI & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

Municipal Corporation Act, M.P. (23 of 1956), Section 299-A – Power can be utilized under this section when construction is made in violation of act a rule or in public interest, but after due opportunity of hearing construction not found illegal – On the basis of sanction granted

petitioners permitted to make construction – Petition allowed.(Para 11)

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 299-ए – इस धारा के अंतर्गत शक्ति का उपयोग तब किया जा सकता है जब निर्माण अधिनियम, नियम या लोक हित के उल्लंघन में किया गया परन्तु सुनवाई के उचित अवसर के पश्चात निर्माण अवैध नहीं पाया गया – प्रदत्त मंजूरी के आधार पर याचिका को निर्माण की अनुज्ञा दी गई – याचिका मंजूर।

Shashank Shekhar, for the petitioners.

Samdarshi Tiwari, G.A. for the respondents No. 1, 2 & 3.

ORDER

K.K. TRIVEDI, J. :- The grievance of petitioners in this petition under Article 226 of the Constitution of India is that on being sent a proposal by the Commissioner of respondent no.4, the respondent no.1 has exercised the powers allegedly conferred under section 299-A of the M.P.Municipal Corporation Act, 1956 (hereinafter referred to as 'Act' for short) and has remitted back the matter to the Municipal Corporation with certain directions.

2. It is contended that such an order issued on 29.4.2010 Annexure P-19 is per se illegal as it is based on such circumstances, which were not made out or available on record. It is the contention of the petitioners that because of the prejudice and malafide action of the Commissioner of Municipal Corporation a proposal was made for cancellation of sanction granted to the petitioner to construct a building and without considering the reply submitted by the petitioner such an order has been passed. It is therefore prayed by the petitioners that the order impugned may be quashed and petitioners be permitted to carry out the construction, in accordance to the sanction granted.

3. The facts giving rise to this petition are that the petitioners after obtaining the sanction intended to make a construction on the plot purchased by them. The building permission sanction was granted by the Municipal Corporation, respondent no.4 vide order dated 8.4.2002. The action was initiated against the petitioners by stating that the construction was being made in a illegal colony, therefore the construction be stopped immediately. The petitioners were required to produce the relevant documents. The entire facts were explained and thereafter the building permission was again granted to the petitioners on 30.4.2008 vide Annexure P-9. This was done only after getting the entire enquiry conducted and after obtaining the reports. However all of a sudden another letter was issued to the petitioners on 7.8.2009 directing them

to stop the construction of their building. It was said that the construction is being done on an area which is reserved for widening of the road. Since the area was reserved for such purpose, illegal colony was being constructed, the building permission granted to the petitioners was therefore liable to be stayed. Again the facts were brought to the notice of the authorities, but instead of considering those facts as were placed on record of the Corporation, the matter was referred vide memo dated 7.1.2010 to the State Government by the Commissioner of Corporation. Pursuance to this, the matter was taken up in hearing by the State Government. Notice was also delivered to the petitioners and a detailed reply was submitted by the petitioners before the respondent no.1. All relevant documents were also submitted. However nothing was seen and the order impugned was passed.

4. It is the contention of the petitioners that not only the sanction map, the earlier permission of building granted by the Corporation, but also the photographs and a particular order passed by the Lokayukt was produced before the respondent no.1. It was also pointed out that the road was being made for BRTS scheme and the road was not going through the land purchased by the petitioners. Infact the construction of the petitioners was away from the road and there were other commercial buildings constructed on the same line. For the purpose of proving such fact the petitioners have annexed the photographs of the shops constructed on the same line of the building, where the building was being constructed by the petitioners. It is thus contended that from these documentary evidence it was made clear that there was no breach of any Municipal laws, rules or bye-laws, while granting sanction to construct building to the petitioners and as such power under section 299-A of the Act was not to be invoked. However ignoring this the order impugned was passed, not in accordance with the provisions of section 299-A of the Act. Therefore the petitioner was required to approach this Court. With the writ petition several documents have been filed.

5. This Court has issued notice to the respondents and in response to the notice the respondent nos.1, 2 & 3 have filed their return. The entire note sheet has been placed on record by the respondents indicating that opportunity of hearing was extended in full to the petitioners. The reports were obtained and it was found that grant of permission to the petitioner to construct was against the norms prescribed under the Municipal laws and regulations. It was found that certain officials of the Corporation have taken action in granting such permission to the petitioners in violation of aforesaid laws, therefore

while remitting back the matter to the Corporation, the respondent/ State has passed the order for taking suitable action against the respondent/authorities, who were involved in granting such permission to the petitioners.

6. The respondent no.4 has filed a separate return and has contended that the action was properly taken. There were reports received and it was found that the grant of sanction to construct the building to the petitioners was not proper. Since such a power to cancel the building permission after commencement of construction is not vested in the Corporation, it was left with no option to refer the matter to the State Government for taking an action under section 299-A of the Act. The petitioners were accorded full opportunity of defence and thereafter the order was passed by the State.

7. Refuting the allegations made in the return the petitioners have filed rejoinder and have reiterated the facts as stated in the writ petition. It is contended by the petitioner that from the documentary evidence as well as the photographs annexed with the writ petition and rejoinder, it was clear that the construction of the road was already done. The land was not needed for the construction of the road. The plot of the petitioner was away from the road and sufficient land was available even for widening of the road, if needed in future. There was no other irregularity committed in granting the sanction, inasmuch as, the other persons were allowed to make construction. Even commercial buildings were constructed with the sanction of the Corporation in the very same area and in the line of the building of petitioner. By filing an interlocutory application, I.A.No.1657/2011, the order of the Lokayukt has been brought on record as Annexure P-26, in which it is specifically directed by the Lokayukt that the case registered in respect of illegal colony has been closed and the Commissioner, Municipal Corporation was directed to see that the construction of the building is done in accordance to the revised sanction granted on 30.4.2008. Thus, it is contended that when there is nothing available against the petitioners, no irregularity was found even by the investigating agency, no finding could have been given by the respondent no.1 that the sanction to construct granted to the petitioner was in any way violative of any Municipal laws, rules or regulations or bye-laws. It is thus prayed that the petitioners are entitled to the reliefs claimed in writ petition.

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

9. The provisions of section 299-A of the Act are inserted in the Act in

the year 1998 by way of amendment only, because though in the provision of section 299 of the Act powers of Commissioner to direct modification of sanctioned plan of a building before its completion is provided, but that power is restricted to be exercised only before the commencement of the work. The provision of section 299 contemplates that the Commissioner may before any work has been commenced in pursuance of any permission granted by it under section 293 of Act, revoke such permission and may give fresh permission in lieu thereof on such conditions, in accordance with this Act and the rules. Thus if the provisions of section 299 of the Act are examined, the said powers could be exercised before the commencement of construction. Undisputedly on grant of sanction to construct by revised order dated 30.4.2008 Annexure P-9, the petitioner had already initiated construction and that is why it was held by the Commissioner, Municipal Corporation that it will not be possible for the Commissioner, Municipal Corporation to pass any order in respect of grant of sanction to construct the building to the petitioner. Because of this reason it appears that the matter was referred by the Commissioner, Municipal Corporation to the State Government for exercising the powers under section 299-A of the Act. For the purpose of proper appreciation of action taken by the respondent/State, it would be better to look into the provision of section 299-A of the Act, which reads thus :-

"299-A Power of State Government to cancel or revise permission for construction of a building - If it is found that any permission for construction of a building has been given in violation of any provision of this Act or Rules or bye-laws made thereunder or in the opinion of the State Government it is necessary in the Public interest that the permission granted by the Municipal Corporation deserves to be cancelled or revised the State Government shall have power to cancel or revise such permission and on such cancellation or revision, as the case may be, any construction contrary to the order regarding cancellation or revision shall be deemed to be without permission and shall be dealt with in accordance with the provisions of this Act and the rules made thereunder:

Provided that no such order shall be passed unless the aggrieved party has been given an opportunity of being heard."

A plain and simple reading of this provision makes it clear that if it is found that any permission for construction of a building has been given in

violation of any provision of this Act or Rules or bye-laws made thereunder or in the opinion of the State Government in the public interest it is so required, then the permission granted by the Municipal Corporation can be cancelled or revised by the State Government. There is no condition prescribed that the said power cannot be exercised after the commencement of construction pursuant to the sanction granted. Thus it was required to be seen by the State Government that if sanction was per se illegal or was violative of any provision of the Act, the same was to be revoked or revised. There is nothing else provided in the Act.

10. If the order impugned is examined in view of the provision of section 299-A of the Act, things were considered by the State Government, but no finding was recorded as to how it was found that such a sanction was not in accordance to the provisions of the Act or the same was violative of any rules or bye-laws. In paragraph 3 of the order impugned only the contention or the facts as have been mentioned by the Commissioner, Municipal Corporation have been recorded. What are the findings on the basis of such, what has been stated by the petitioners and whether such a contention of petitioners is just and acceptable or not, no finding is recorded in this respect. In paragraph 4 a conclusion has been drawn in respect of recommendation made by the Commissioner, Municipal Corporation that some error have been found in the sanction order to construct the building granted by the Municipal Corporation and thereafter the matter is remitted back to the Municipal Corporation. This is not the power available to the State Government under the provisions of section 299-A of the Act. The State Government is required to either cancel or revise the plan already sanctioned by the Municipal Corporation. If such an order is passed cancelling or revising the permission to construct and if any construction is done, the same is to be treated as violative of sanction of construction and the action is to be taken as per the provisions of the Act. The direction as has been given by the respondent/State in this order contains action against those officers who were responsible to grant building construction permission to the petitioners. The other direction was to make recovery of the loss caused to the Corporation from those officers and then third direction was to place the matter before the MIC or the Corporation in its meeting for passing a resolution in this respect. These are not the power conferred on the State Government under the provision of section 299-A of the Act. The only part in the order impugned granting some solace to the petitioners is to direct payment of compensation to the petitioners for the loss caused to them. This all is not provided under the Act and therefore the order cannot be sustained

in the eye of law.

11. Another aspect is that, as has been put forth by the petitioners by placing various photographs on record alongwith the writ petition, and also with rejoinder that there are several constructions made on the same road in the same site and on the same line of the building by various persons. The road has already been constructed and it has become operational. It is seen from the photographs that certain lands are even just after the road, just touching the boundary of the road and even no place is left for making pavement. The photographs relates to the building of petitioner reflect that there is a Bank building constructed just by the side of the building of petitioner and its frontage is more extended to the road rather than the building of petitioner. A hospital is also constructed just by the side of building of the petitioner adjoining the building of the Bank. Sufficient land is available in front of the building of the petitioner for the purpose of construction of pavement. Thus to say that there was no clear frontage available even for making pavement or the widening of the road in front of the building of petitioner because of the grant of such building sanction order is not acceptable. The documents produced by the petitioner indicates that FAR in the area where the building of petitioner is constructed, indicate same ratio for other building also and all such buildings are constructed for the commercial purpose. This fact is evident from an information made available by the officers of the Municipal Corporation, Bhopal placed on record along with the rejoinder of the petitioner as Annexure P-28. The order of Lokayukt office itself indicates that the petitioners were to be granted permission to construct the building as per the sanction granted by the Municipal Corporation. Such authorities after making investigation have reached to such a finding that the construction of the building in the area was not illegal. All these facts were available before the State authority, but none of them have been referred or taken into consideration by the said authority. These documents were already annexed with the reply of the petitioner, which was filed before the respondent no.1, as is clearly indicated in the reply document Annexure P-17. In rebuttal, nothing has been indicated in the return. Not a single word is said. Para wise reply has not been filed. Those allegations made against the respondents have not been denied specifically. In view of this as per the law, such allegations are to be treated as proved. Further it is clear from the perusal of the impugned order and the findings recorded by the authority of the respondent no.1 that none of such documents of the petitioners were seen, examined or taken into consideration while the order impugned was passed. In view of this, it cannot be said that the power was rightly

exercised by the respondent no.1 in passing the order impugned.

12. In view of the findings reached hereinabove, the order of respondent no.1 cannot be given a stamp of approval by this Court. Accordingly, this writ petition is allowed. The order dated 29.4.2010 Annexure P-19 is hereby quashed. The petitioners be allowed to make construction in accordance with the sanction granted by the Municipal Corporation. There shall be no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 890

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 12148/2008 (Jabalpur) decided on 9 February, 2012

MAHARANI LAXMI BAI MAHILA BAHU

UDDSHIYA SAHKARI SAMITI

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Food Stuffs Public Distribution Scheme (M.P.), 1991 – Clause 13, Public Distribution System (Control Order) (M.P.), 2009, – Fair price shop allotted to petitioner under Scheme, 1991 – The same was cancelled without following the procedure laid down in clause 13(5) as no enquiry was conducted and no report was called from Dy. Registrar/ Asst. Registrar Co-operative Society – In view of saving clause in scheme 2009, the shop would have continued even when the new scheme come into force – Order cancelling allotment quashed – Petition allowed.

(Paras 1,2,10,11)

खाद्य पदार्थ लोक वितरण प्रणाली (म.प्र.), 1991 – खण्ड 13, लोक वितरण प्रणाली (नियंत्रण आदेश) (म.प्र.), 2009 – स्कीम, 1991 के अंतर्गत याची को उचित मूल्य की दुकान आवंटित की गई – खण्ड 13(5) में निर्धारित की गई प्रक्रिया का अनुपालन किये बिना उसे निरस्त किया गया क्योंकि कोई जांच नहीं की गई और डिप्टी रजिस्ट्रार/असिस्टेंट रजिस्ट्रार सहकारी समिति से कोई रिपोर्ट नहीं बुलायी गई – स्कीम 2009 में दिये गये व्यावृत्ती खण्ड को दृष्टिगत रखते हुए दुकान जारी रहती तब भी जब नई स्कीम प्रभावशील हो गई – आवंटन निरस्ती का आदेश अभिखंडित – याचिका मंजूर।

Amrit Ruprah, for the petitioner.

R.P. Tiwari, G.A. for the respondents.

ORDER

K.K. TRIVEDI, J.:- The petitioner, a Co-operative Society, has approached this Court against the order by which the Sub Divisional Officer, Nowgong, District Chhatarpur, has cancelled the allotment for fair price shop of the petitioner in Village Tatam and the said work has been entrusted to the respondent No.8 Samiti. It is contended that said order has been passed without properly appreciating the reply submitted by the petitioner or without granting an opportunity of hearing in appropriate manner to the petitioner. It is contended that appeal was preferred, but the same has been dismissed, therefore, the petitioner is required to approach this Court by way of filing the present writ petition.

2 : The facts giving rise to filing of this writ petition in brief are that the petitioner was granted a allotment to run the fair price shop in the aforesaid village under the M.P. Food Supplies (Distribution Control) Order, 1960 (hereinafter referred to as the Order for short) and the Scheme made thereunder known as M.P. Food Stuff Public Distribution Scheme, 1991 (hereinafter referred to as the Scheme of 1991 for short). It is contended that a group of women was constituted for the purposes of forming the Petitioner-Society and upon their application after the registration, the fair price shop was allotted to the Petitioner-Society on 10.12.2004. Some sort of inspection of the shop of the petitioner was done and a show cause notice was issued to the petitioner, indicating tentative decision of cancelling the fair price shop of the petitioner by the Sub Divisional Officer Nowgong. In response to the show cause notice, a detailed reply was given by the petitioner. The previous order sheets, exposing the mind of the Sub Divisional Officer, is placed on record as Annx.P/11, the show cause notice is placed on record as Annx.P/12 and the reply to the show cause notice is placed on record as Annx.P/13.

3 : It is contended that though reply was submitted by the petitioner, the same was neither looked into nor the facts as stated by the petitioner were verified. No opportunity of hearing was extended to the petitioner and the order was passed on 8.2.2008 against it cancelling the allotment of fair price shop to the petitioner. Certain extraneous facts were taken into consideration while passing the order, of which no opportunity of hearing was granted to the petitioner. Since the order was vitiated with malafide intention, the petitioner approached the appellate authority i.e. the Collector and filed an appeal taking numerous grounds. The petitioner has approached this Court also by way of filing a writ petition against the order of the Sub Divisional

Officer, but the same was withdrawn. Since the appeal of the petitioner was not being heard, another writ petition being W.P.No.3866/2006 was filed, which was disposed of by this Court vide order dated 21.4.2006 directing the Collector to decide the appeal of the petitioner. However, again without considering the facts and grounds as have been raised in the appeal, by the order dated 30.6.2006, the appeal of the petitioner was dismissed. Therefore, the writ petition is required to be filed.

4 : It is the contention of the learned counsel for the petitioner that in terms of the provisions of the Scheme, which was in vogue at the relevant time, detail hearing was required to be done. Since the order cancelling the allotment of fair price shop in favour of the petitioner under the Order was to cast a stigma, a detailed procedure was laid down under the Scheme for holding an enquiry in that respect. It is the contention that such an enquiry was not conducted in appropriate manner and the order was passed and this fact was specifically mentioned in the memo of appeal, but was not considered by the appellate authority, therefore, the orders impugned are bad in law and are liable to be quashed.

5 : The respondents in response to the notice of this writ petition have filed a return. Unfortunately, the respondents have not carefully gone through the writ petition and filed a cryptic return. The respondents have said that since a new Scheme has been formulated during pendency of this petition, known as M.P. Public Distribution System (Control Order) 2009, the fair price shop is not to be restored in favour of the petitioner as it has been decided by the State Government that after coming into force of the Scheme of 2009, the fair price shops are to be granted only to the Primary Agriculture Co-operative Society or Minor Forest Co-operative Society. Since the Petitioner-Society is not a Primary Agriculture Co-operative Society or Minor Forest Co-operative Society, it is not entitled to claim restoration of fair price shop to it. However, the respondents have not justified their action of cancelling the allotment of fair price shop of the petitioner in appropriate manner and have raised the plea in their reply that since the petitioner has admitted its guilt relating to shortcomings and irregularities, the Sub Divisional Officer was right in cancelling the allotment of the petitioner.

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

7 : First of all, the action is required to be examined whether the same was in accordance to the Scheme in vogue at the relevant time or not ? The

Scheme of 1991, specifically laid down the manner of making inspection of shop. The penalties are specified in paragraph 13 of the Scheme and it is specifically directed that in case of fair price shop situated in the rural area, the Sub Divisional Officer is the competent authority to take decision. It is provided that the Sub Divisional Officer will issue a show cause notice to the Society concerned and after hearing the Society pass an order. Paragraph 13(5) of the Scheme specifically provides that an enquiry with respect to the complaint made against any fair price shop dealer is to be conducted as per the provisions prescribed in the said paragraph. In case of a Co-operative Society, the officer indicated in paragraph 9(2) of the Scheme will report the matter to the Deputy Registrar/Assistant Registrar of Co-operative Societies to take an action against the said Society if it is found in the enquiry that complaint made against the said Society is true. The Deputy Registrar/Assistant Registrar is required to submit a report within 15 days for cancellation of fair price shop. If in the light of this, the order dated 8.2.2008 is examined, nothing has been indicated whether on a complaint made against the petitioner, any enquiry was conducted in the manner indicated in paragraph 13(5) of the Scheme and whether any report was obtained from the Deputy Registrar/Assistant Registrar Co-operative Societies in that respect. The return is totally silent on this. The order passed in the note sheet nowhere indicates that the procedure as laid down was followed. Even the order passed by the appellate authority nowhere indicates that except issuance of the show cause notice any other thing was done or not. The Collector recorded the finding that the petitioner has admitted in its reply the guilt and, therefore, as prayed for grant of pardon, which could not be granted and thus, it is held that the misconduct of the petitioner is proved and, therefore, there is no force in the appeal as the order was rightly passed by the Sub Divisional Officer. Again the Collector has not examined whether such a procedure laid down under the Scheme was followed or not.

8 : Learned counsel for the petitioner has taken this Court to the show cause notice (Annx.P/12) and its reply (Annx.P/13) and has contended that in paragraph 4, nothing was said that the entire guilt was accepted. It is pointed out that the charges levelled were denied. It is seen that charge No.4 was that in the distribution register of kerosene, it was found that one person was supplied the kerosene on three different ration cards and the acknowledgement of the receipt was not found in the register. The reply to this allegation made by the petitioner in its show cause notice is that since the

consumer of the kerosene are the village people and sometime one person come to the shop for taking delivery of the supply of kerosene on three or four cards, such supply is made. The reason explained by the villagers is that other persons are busy in their agriculture work and are not in a position to come to the shop themselves, therefore, one person takes the delivery for three or four persons of the same area. In the last, it is stated by the petitioner that if the signatures were not taken on the register of supply, because of the rush in the shop, in future, the same will not be repeated. How could it be treated as admission of the entire guilt of the petitioner or the admission of all the charges made against the petitioner. Further, there was a procedure laid down to conduct an enquiry on two stages one by the authorised officer as prescribed in paragraph 9(1) of the Scheme and another, by the officials of the Co-operative Department, in case of a Co-operative Society as per paragraph 13(5) of the Scheme. Nothing could be inferred from the order impugned or from the appellate order passed by the Collector that such an enquiry was conducted in such a manner and that the petitioner was given an opportunity to cross-examine those persons who have conducted the abovesaid enquiry. How and from where the findings could be recorded by the competent authority, the Sub Divisional Officer, that the petitioner has in fact committed such violation of the terms and conditions of order granting fair price shop to it. Thus, it is apparent that such an enquiry was illusionary and not in terms of the Scheme which has the force of law.

9 : Now the stand taken by the respondent-State that after coming into force of the new Scheme 2009, the petitioner cannot continue to hold the permission or the allotment order to run the shop is required to be examined. The Scheme of 2009 has a specific provisions made in paragraph 15, where it is specifically said that all act done under the old Scheme which stand repealed after coming into force of the new Scheme are saved. The provisions of Repeal and Saving are to be interpreted and to be taken into consideration in all respect. Had the allotment of the petitioner to run the fair price shop been not cancelled, it would have remained operative even when the new Scheme came into force. As per the saving Clause, the allotment of the petitioner was not to be terminated at all only because of coming into force of the new Scheme. Of course for any misconduct committed after coming into force of the new Scheme, action was required to be taken under the new Scheme and the allotment could have been cancelled, as if it is granted under the new Scheme, but merely because of this reason, it cannot be said that no relief can be granted to the petitioner. Such an assertion of the respondent-State cannot

be accepted.

10: For the reasons stated hereinabove and the findings recorded, it is to be held that the respondents while passing the impugned order dated 8.2.2008 have not complied with the provisions of the Scheme which was in vogue at the relevant time and, therefore, such an order cannot be given a stamp of approval by this Court. Similarly, since the appellate authority has also not looked into these aspects, the appellate order is also bad in law. Resultantly, the writ petition succeeds and is allowed. The order dated 8.2.2008 passed in Case No.1078/B-121/2007-2008 by the Sub Divisional Officer (Revenue) Nowgong, District Chhatarpur, Annx.P/1/B is hereby quashed. Consequently, the order dated 30.6.2008 passed by the Collector Chhatarpur Annx.P/1/C also stands quashed. The allotment of fair price shop to the petitioner at Tatam, Tahsil Nowgong, District Chhatarpur, be restored in favour of the petitioner. However, it will be open to the respondent No.6 to initiate proceedings fresh against the petitioner with respect to the reports received, strictly in accordance to the terms and provisions of the Scheme of 1991 and to take a final decision in that respect, if required.

11: In the result, the writ petition stands allowed to the extent indicated hereinabove, but with no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 895

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 1800/2011 (Jabalpur) decided on 9 February, 2012

MAYA CHOUDHARY(SMT.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 40 & 92 – Petitioner has been removed from the post of Sarpanch – HELD – Legislature was not indicating that the two enquiries be clubbed together which are to be conducted under section 40 and 92 of the Act – Authority could have initiated show cause notice to the petitioner for misconduct – Application under section 92 was required to be rejected, but for any reason the order section 40 of the Act could not have been passed–Without following the procedure of

enquiry prescribed order passed—Writ Petition Allowed. (Paras 1,2,9,11)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएँ 40 व 92 — याची को सरपंच के पद से हटाया गया — अभिनिर्धारित — विधायिका यह नहीं दर्शा रही थी कि अधिनियम 40 व 92 के अंतर्गत संचालित की जाने वाली दो जांच को एक साथ सम्मिलित किया जाये — प्राधिकारी याची के अवचार के लिये कारण बताओ नोटिस जारी कर सकता था — धारा 92 के अंतर्गत आवेदन को नामंजूर किया जाना अपेक्षित था परंतु किसी कारण अधिनियम की धारा 40 के अंतर्गत आदेश पारित नहीं किया जा सकता था — जांच के लिये विहित प्रक्रिया का पालन किये बिना आदेश पारित किया गया — रिट याचिका मंजूर।

V.K. Shukla, for the petitioner.

Yogesh Dhande, Dy. G.A. for the respondents No. 1,2 & 3.

None for the respondents No. 4 to 6, though served.

K.N. Bundela, for the intervenor.

O R D E R

K.K. TRIVEDI, J.:- By this petition the petitioner has called in question the order dated 27.10.2010 Annexure P-I, passed by the Sub Divisional Officer, Revenue Tehsil Nagod, District Satna and order dated 10.01.2011 passed by the Collector, Satna. By earlier order the petitioner has been removed from the post of Sarpanch, in exercise of power under Section 40 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993, (hereinafter referred to as 'Act'). By later order the appeal preferred by the petitioner against the said order has been dismissed. The contention of the petitioner is that she was elected as a Sarpanch of Gram Panchayat Umari (Brajnandan), Tehsil Nagod, District Satna on 11.02.2010. However, since she was not being delivered the charge of the post by the Ex-Sarpanch she made a complaint before the Chief Executive Officer, Janpad Panchayat Nagod, District Satna as also before the Sub Divisional Officer, Revenue Nagod, District Satna on 17.02.2010. It is the contention that on the applications made by the petitioner since no action was taken, ultimately she filed an application under Section 92 of the Act on 24.02.2010 before the Sub Divisional Officer (Revenue) Nagod. The proceedings were initiated on the basis of making of such an application by the petitioner, notices were issued to the non-applicants by the Sub Divisional Officer and their replies were received. It is the contention of the learned counsel for the petitioner that since such complaint was made, the authorities have started acting against the petitioner malafidely and issued show cause notice to the petitioner calling her explanation as to why the petitioner should

not be removed from the post of Sarpanch. She made an application and also filed a revision before the Collector against the said show cause notice. Since nothing was done in that matter, revision was not decided, the petitioner made the application before the Sub Divisional Officer again for taking action against the Secretary of Gram Panchayat. It is the contention of the learned counsel for the petitioner that some order was issued by the Zila Panchayat with reference to one memo issued by the Commissioner, Rewa to make appropriate arrangement of a substitute of the Panchayat Secretary. It is contended that because of these reasons, the order was passed on 27.10.2010 against the petitioner and she has been removed from the post. Since the removal order was issued by the Sub Divisional Officer, the same was called in question by filing an appeal before the Collector, Satna but the same has been dismissed therefore, this writ petition has been filed. It is contended that the action was improperly initiated against the petitioner though the complaint was made by the petitioner against the then Secretary of the Gram Panchayat, who was not co-operating with the petitioner to take over the charge of the post. It is contended that such an order being passed on malafide action of the authorities is liable to be quashed.

2. The respondents in response to the notice of writ petition have filed their return and have contended that action was rightly taken against the petitioner as she was not discharging her duties as Sarpanch in the Gram Panchayat. It is contended that after making an enquiry the Chief Executive Officer has given a report that the petitioner was not complying with the directions of the authorities of taking over the charge or opening the joint account for the purposes of distribution of pension to the disabled and elderly persons. These being the reasons, it was said that the petitioner was not entitled to continue on the post of Sarpanch. It is further contended that the show cause notice was issued to the petitioner as provided under Section 40 of the Act and thereafter the order was passed after extending opportunity of hearing to the petitioner. Thus it is contended that the petition is misconceived and merits dismissal.

3. The intervenor has a very limited role in the present petition and since the intervenor was authorized to function as adhoc Sarpanch till the elections are held, the prayer is made to grant permission to oppose the petition.

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

5. The order passed by the Sub Divisional Officer is in a proceedings

said to be initiated under Section 92 of the Act by making an application by the petitioner herself. The provisions of Section 92 of the Act are quoted hereinbelow for the purposes of convenience:

"92. Power to recover records articles and money.- (1) Where the prescribed authority is of the opinion that any person has unauthorizedly kept in his custody any record or article or money belonging to the Panchayat [or Gram Nirman Samiti and Gram Vikas Samiti] [or committee of Gram Sabha], he may, by a written order, require that the record or article or money be delivered or paid forthwith to the Panchayat [or Gram Nirman Samiti and Gram Vikas Samiti] [or committee of Gram Sabha], in the presence of such officer as may be appointed by the prescribed authority in this behalf.

(2) If any person fails or refuses to deliver the record or article or pay the money as directed under sub section (1) the prescribed authority may cause him to be apprehended and may send him with a warrant in such form as may be prescribed, to be confined in a Civil Jail for a period not longer than thirty days.

(3) The prescribed authority may-

(a) for recovering any such money direct that such money be recovered as an arear (sic arrears) of land revenue; and

(b) for recovering any such record or articles issue a search warrant and exercise all such powers with respect thereto as may lawfully be exercised by a Magistrate under the provisions of Chapter VII of the Code of Criminal Procedure, 1973 (No. 2 of 1974).

(4) No action under sub-section (1) or (2) or (3) shall be taken unless a reasonable opportunity has been given to the person concerned to show cause why such action should not be taken against him.

(5) A person against whom an action is taken under this section shall be disqualified to be member of any Panchayat [or Gram Nirman Samiti and Gram Vikas Samiti] [or

Committee of Gram Sabhaj for a period of [six] years commencing from the initiation of such action."

In the said proceedings the reply was filed by the non-applicants and they made allegations that the petitioner was not performing her duties, was not complying with the order of the competent authority for opening the joint account. In that very same proceedings the show cause was issued to the petitioner as provided under Section 40 of the Act and final order was passed in the very same proceedings.

6. The proceedings as were required to be initiated under Section 40 of the Act are totally different, wherein an enquiry is required to be conducted in different manner. For the purposes of convenience and understanding the difference in two provisions of the Act, Section 40 of the Act is quoted below:-

"40. Removal of office bearers of Panchayat. -(1) The State Government or the prescribed authority may after such enquiry as it may deem fit to make at any time, remove an office bearer-

- (a) if he has been guilty of misconduct in the discharge of his duties; or
- (b) if his continuance in office is undesirable in the interest of the public:

Provided that no person shall be removed unless he has been given an opportunity to show cause why he should not be removed from his office.

Explanation.-For the purpose of this sub-Section "Misconduct" shall include-

- (a) any action adversely affecting-
 - (i) the sovereignty, unity and integrity of India; or
 - (ii) the harmony and the spirit of common brotherhood amongst all the people of State transcending religious, linguistic, regional, caste or sectional diversities; or
 - (iii) the dignity of women ; or
- (b) gross negligence in the discharge of the duties under the Act.

[(c) the use of position or influence directly or indirectly to secure employment for any relative in the Panchayat or any action for extending any pecuniary benefits to any relative, such as given out any type of lease, getting any work done through them in the Panchayat by an office bearer of Panchayat.

Explanation.- For the purpose of this clause the expression 'relative' shall mean father, mother, brother, sister, husband, wife, son, daughter, mother-in-law, father-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law:]

[Provided further that the final order in the inquiry shall be passed within 90 days from the date of issue of show cause notice to the concerned office bearer and where the pending case is not decided within 90 days, the prescribed authority shall inform all facts to his next senior officer in writing and request extension of time for disposal of the enquiry but such extension of time shall not be more than 30 days,]

(2) A person who has been removed under sub-section (1) shall forthwith cease to be a member of any other Panchayat of which he is a member, such person shall also be disqualified for a period of six years to be elected [x x x] under this Act."

A bare perusal of the two provisions aforesaid will make it clear that an enquiry which was to be conducted under Section 40 of the Act is totally different. The show cause notice required to be issued under the said proceedings is to reflect the charges on the basis of which the proceedings are started under Section 40 of the Act as it has been categorically provided that the office bearer of a Panchayat can be removed at any time:-

'(a) if he has been guilty of misconduct in the discharge of his duties; or

(b) if his continuance in office is undesirable in the interest of the public."

7. The show cause issued in this case to the petitioner, simply says that proceedings are initiated under Section 40 of the Act. If any preliminary enquiry is conducted with respect to alleged misconduct, this fact is also required to be mentioned in the show cause notice so that person concern may defend

himself/herself properly. Such a person is also required to extend an opportunity of putting documentary and oral evidence also in rebuttal of such a preliminary enquiry report if the same is demanded. This will also be necessary because the order of removal of an elected office bearer is also a penal provision contained in Section 40 of the Act, and an elected office bearer of Panchayat elected by people is not to be branded unceremoniously. Only after completing the proceeding in this manner for the purposes of reaching to definite findings, whether any misconduct or other contingency mentioned in the provisions of Section 40 of the Act is made out or not, the order can be passed by the prescribed authority. If it is not done, the proceedings under Section 40 of the Act would be vitiated.

8. The proceedings under Section 92 of the Act are quite different than that of Section 40 of the Act. Under Section 92 of the Act the persons in whose possession the documents are required to be recovered are, is to be asked to deliver the said documents and on failure of the compliance of the said order the consequence are given under Sub- section (2), (3), (4), and (5) of Section 92 of the Act. No detail enquiry in that respect is required nor any recording of evidence is needed. In view of this, there is a total difference in the manner of conducting enquiries under the aforesaid two provisions.

9. From the aforesaid, it is also clear that the legislature was not indicating that the two enquiries be clubbed together which are to be conducted under Section 40 and 92 of the Act. By notification the State Government has authorized only one authority to act as prescribed authority under the aforesaid two Sections, but it will not mean that the said authority can take an action of removal of a Sarpanch of the Gram Panchayat in the proceedings which are initiated under Section 92 of the Act. If the continuance of the petitioner as office bearer of the Panchayat was not desirable in view of the report received by him, the prescribed authority could have initiated the proceedings separately by issuing the show cause notice to the petitioner calling her explanation indicating such a misconduct and after completing the enquiry as provided under Section 40 of the Act, could have passed an order. The application made by the petitioner under Section 92 of the Act was required to be rejected/dismissed, but for any reason the order under Section 40 of the Act could not have been passed in that proceedings, that too without following the procedure of enquiry prescribed under Section 40 of the Act. Since such impugned order has been passed in a proceedings initiated on the complaint made by the petitioner under Section 92 of the Act and the power under Section 40 of the

Act have been exercised by the Sub Divisional Officer, the order impugned cannot be sustained nor can be given a stamp of approval by this Court.

10. Consequently, the writ petition succeeds and is hereby allowed. The order dated 27.10.2010, Annexure (P-I) is hereby quashed. The petitioner be permitted to take over the charge as Sarpanch of the Gram Panchayat concerned immediately. However, it will be open to the respondents authorities to initiate the proceedings under Section 40 of the Act against the petitioner by giving her a Show cause notice afresh and after completing the required enquiry, to pass a fresh order in the said proceedings as per the law.

11. With the aforesaid, the writ petition is allowed to the extent indicated hereinabove. There shall be no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 902

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P.No. 2897/2007(S) (Jabalpur) decided on 14 February, 2012

DAL CHAND AHIRWAR

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 – Rule 2(d), 14 – Disciplinary Authority – Petitioner working as Sub-Inspector – DIG is the disciplinary authority – Issuance of charge sheet and appointment of Enquiry officer by Superintendent of Police who is subordinate to disciplinary authority is without authority – Proceeding initiated by unauthorized person would be illegal and entire subsequent action taken also vitiated. (Para 9)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – नियम 2(डी). 14 – अनुशासनिक प्राधिकारी – याची उप निरीक्षक के रूप में कार्यरत – डी. आई.जी. अनुशासनिक प्राधिकारी है – पुलिस अधीक्षक जो अनुशासनिक प्राधिकारी के अधीनस्थ है उसके द्वारा आरोप पत्र जारी किया जाना एवं जांचकर्ता अधिकारी की नियुक्ति बिना प्राधिकार के है – अप्राधिकृत व्यक्ति द्वारा आरंभ की गई कार्यवाही अवैध है एवं की गई संपूर्ण पश्चातवर्ती कार्यवाही भी दूषित है।

Adarsh Muni Trivedi with S.K. Mishra, for the petitioner.

Rajesh Tiwari, G.A. for the respondents.

O R D E R

RAJENDRA MENON, J.:- Challenging the order Annexure P/14 dated 11.12.2003 passed by the Director General of Police rejecting the appeal filed by the petitioner and the order dated 7.6.2003 Annexure P/12 passed by the Inspector General of Police, imposing penalty of compulsory retirement, petitioner has filed this writ petition.

2. At the relevant time when the impugned action was taken, petitioner was posted as Sub Inspector in Police Station, Kindrai, District Seoni. A complaint was received in the office of Superintendent of Police to the effect from one Swarooplal that his father has died in the village about six months back and for forwarding his claim for grant of pension under a particular scheme, the petitioner has demanded a sum of Rs.1000/-.

3. Record indicates that a show cause notice Annexure P/1 was issued to the petitioner. Petitioner's reply to the same Annexure P/2 being found to be not satisfactory, a preliminary enquiry was ordered which was conducted by the S.D.O.P. Police, Seoni and based on the report submitted by the said authority, a charge sheet Annexure P/3 was issued to the petitioner by the Superintendent of Police, Seoni on 21.11.2002. Petitioner denied the allegations leveled in the charge sheet, gave a detailed reply, however, finding the same to be unsatisfactory, the Additional Superintendent of Police was appointed as Enquiry Officer. Enquiry Officer conducted enquiry, five witnesses were examined and on the basis of evidence that came in the Enquiry, the Enquiry Officer recorded a finding, forwarded to the petitioner vide Annexure P/10 holding the petitioner is guilty of charges leveled against him. Petitioner's reply to the show cause notice being found to be not satisfactory, impugned order Annexure P/12 has been passed by the Inspector General of Police, Jabalpur Range and appeal and mercy appeal having been rejected, petitioner is before this Court.

4. During the course of hearing Shri Adarsh Muni Trivedi, learned Senior Counsel raised various contentions. The contentions put forth by him pertains to the conduct of the SDOP in conducting preliminary enquiry in an illegal manner, so also with regard to non supply of certain documents which were relevant and were with regard to illegal manner of conducting preliminary enquiry. Learned Senior Counsel pointed out various discrepancies in the enquiry, perversity in the findings of Enquiry Officer and also raised grounds with regard to non issuance of show cause notice before imposing the

punishment by the Competent Authority, act of the Appellate Authority in not deciding the appeal in accordance with law. However, a question of legal ground raised by Shri A. M. Trivedi, learned Senior Counsel was to the effect that the charge sheet was issued to the petitioner by the Superintendent of Police. The Superintendent of Police himself received the reply to the charge sheet and on being dis-satisfied with the reply appointed the Additional Superintendent of Police as Enquiry Officer, got the enquiry conducted and after receipt of enquiry report forwarded the entire matter to the Inspector General of Police for taking action. Taking me through the provisions of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966, the definition of 'disciplinary authority' as contained in Clause Rule 2(d), the punishment envisaged under the rule as contained in Rule 10, the authority competent to impose the punishment as detailed in Rule 12, the provisions of Rule 13 with regard to initiation of departmental proceedings and the procedure for imposing penalty as contained in Rule 14, 15 and 16, submitted that as per the Schedule to the Discipline and Appeal Rules with regard to an employee holding the post of Sub Inspector, the Appointing Authority and the Disciplinary Authority is the Deputy Inspector General of Police and accordingly, it is argued by him that initiation of departmental enquiry by the Superintendent of Police who is not the disciplinary authority vitiates the entire proceedings. Accordingly, Shri A. M. Trivedi, learned Senior Counsel submits that if the initiation of the enquiry itself is by an unauthorized person then the final punishment imposed are also stands vitiated. Accordingly, on these counts Shri A. M. Trivedi, learned Senior Counsel prays for interference into the matter.

5. Shri Rajesh Tiwari, learned counsel appearing for the respondents refuted the aforesaid contentions and with regard to the legal objection submitted that as the final punishment order is passed by the competent authority, namely the Inspector General of Police, there is no illegality in the matter and therefore, the contentions of Shri A. M. Trivedi, learned Senior counsel needs to be rejected.

6. Having heard learned counsel for the parties at length and after due consideration of submissions made, I am of the considered view that before entering into the controversy on merit, the legal objection raised by Shri A. M. Trivedi, learned Senior Counsel, with regard to power and jurisdiction of Superintendent of Police to initiate departmental enquiry should be gone into.

7. It is not in dispute that before initiating the proceedings against the

petitioner, a show cause notice Annexure P/1 was issued by the Superintendent of Police and it was the Superintendent of Police who issued the charge sheet to the petitioner for initiating the disciplinary proceeding under Rule 14 of the Discipline and Appeal Rules vide Annexure P/3 dated 21.11.2002 and thereafter appointed the Enquiry Officer to conduct an enquiry. In the Discipline and Appeal Rules of 1966 a "disciplinary authority" is defined in sub rule (d) of Rule 2 to mean a authority competent under the rules to impose on the government servant any of the penalties specified in Rule 10. In the schedule to this rule with regard to a Sub Inspector of Police the appointing authority is indicated to be the Deputy Inspector General of Police and the authority competent to impose penalty is also shown to be the Deputy Inspector General of Police. That being so, the disciplinary authority with regard to the petitioner who is holding the post of Sub Inspector would be the Deputy Inspector General of Police in accordance to these rules. Under Rule 10 various punishments have been indicated and compulsory retirement is a major punishment envisaged under this rule. The procedure for imposing major punishment or rather any punishment under the rule is contemplated under Rule 14 and 15 and the authority competent entitled to initiate or institute these proceedings is indicated in Rule 13. Rule 13 of the Discipline and Appeal Rules consisted of two parts. Sub rule (1) of this rule indicates that the Governor or any other authority empowered by the Governor by general or special order may institute the departmental proceedings against a government servant or such authority may direct the disciplinary authority to institute the departmental proceedings against a government servant and impose any of the penalty specified in Rule 10. Thereafter in sub rule 2 to 13 it is stipulated that the disciplinary authority who is competent under these rules to impose any of the penalty, may institute the departmental proceedings against the government servant. Admittedly, in this case the departmental proceeding is not initiated by the disciplinary authority in accordance to sub rule 2 of rule 1 but it is by an authority subordinate to the disciplinary authority i.e. the Superintendent of Police. The Superintendent of Police could initiate the departmental proceeding if the Governor exercising the powers under Rule 13(1) had empowered by general or special orders the Superintendent of Police to initiate departmental proceedings under this rule. Neither in the return nor during the course of hearing of this petition till date any such general or special order issued by the Governor authorizing the Superintendent of Police to institute or initiate a departmental enquiry is brought to the notice of this Court. Therefore, it has to be assumed that the Superintendent of Police is

not authorized by the Governor through a general or special order issued under Rule 13(1) to institute disciplinary proceeding, it is also an admitted position that the same is not instituted by disciplinary authority as required under Rule 13(2). The proceeding initiated by an unauthorized person would be illegal and the entire subsequent action taken also vitiated, as it is contrary to procedure prescribed under the law.

8. When the statute prescribe a process to be followed for taking disciplinary action and when the process so prescribed under the statutes contemplates as to how and in what manner the disciplinary proceeding is to be initiated, mandate of rule has to be followed in its totality and if the disciplinary proceeding is initiated contrary to the aforesaid statutory rules, the entire initiation of disciplinary proceeding stands vitiated. This itself is sufficient to hold the subsequent action to be illegal.

9. When a law prescribes a procedure to be followed, then everything has to be done in accordance to the procedure prescribed under the law and anything contrary thereto being in contravention to the law stands vitiated being in nullity and therefore, cannot be given effect to. Under such circumstances this is a case where the initiation of departmental enquiry against the petitioner itself is found to be illegal being contrary to the statutory provisions and on that count this petition is liable to be allowed.

10. In view of aforesaid finding recorded by this Court now, it is not necessary for this Court to go into various other questions raised by Shri A. M. Trivedi, learned Senior Counsel during the course of hearing. Finding the initiation of departmental enquiry against the petitioner which culminated in imposing of punishment to be initiated by an unauthorized person, contrary to the statutory rules, this petition is allowed.

11. Orders impugned dated 7.6.2003 and the order dated 11.12.2003 passed by the appellate authority are quashed. As the petitioner has already attained the age of superannuation, respondents are directed to treat the petitioner to have remained in service till the age of superannuation and treating him to have retired on attaining the age of superannuation, consequential benefits be paid to him. All arrears be paid to him after deducting post retiral benefits already granted to him.

12. Petition stands allowed and disposed of with the aforesaid.

c.c. as per rules.

Petition allowed.

I.L.R. [2012] M.P., 907

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 1206/2012 (Gwalior) decided on 21 February, 2012

KULDEEP SHARMA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Advocate Act (25 of 1961), Section 30, Forest Act (16 of 1927), Sections 19 & 72 – Powers of Authorities – Right to represent through an Advocate in confiscation proceedings – Not permissible.

(Para 9)

क. अधिवक्ता अधिनियम (1961 का 25), धारा 30, वन अधिनियम (1927 का 16), धाराएँ 19 व 72 – प्राधिकारियों की शक्तियाँ – जब्ती कार्यवाही में अधिवक्ता के जरिये प्रतिनिधित्व करने का अधिकारी – अनुज्ञेय नहीं।

B. Forest Act (16 of 1927), Section 52, Advocate Act (25 of 1961), Section 30 – Confiscation Proceedings – Act, 1927 is a complete Code in itself – No evidence is recorded, therefore, Section 30 of Act, 1961 has no application – Advocate can not appear in confiscation proceedings.

(Para 10)

ख. वन अधिनियम (1927 का 16), धारा 52, अधिवक्ता अधिनियम (1961 का 25), धारा 30 – जब्ती कार्यवाहियाँ – अधिनियम 1927 अपने आप में संपूर्ण संहिता है – कोई साक्ष्य अभिलिखित नहीं की गई, इसलिए, अधिनियम 1961 की धारा 30 लागू नहीं होती – अधिवक्ता जब्ती कार्यवाहियों में उपस्थित नहीं हो सकता।

C. Forest Act (16 of 1927), Section 19 – Right to appear – Limited right of engaging pleader is before Forest Settlement Officer, Appellate Authority and the Court – Authorized Officers under Section 52 is not an Authorized Settlement Officer – Advocate can not appear in confiscation proceedings.

(Para 12)

ग. वन अधिनियम (1927 का 16), धारा 19 – उपस्थित होने का अधिकार – वन समझौता अधिकारी, अपीलीय प्राधिकारी और न्यायालय के समक्ष प्लीडर/अधिवक्ता नियुक्त करने के अधिकार सीमित हैं – प्राधिकृत अधिकारी धारा 52 के अंतर्गत प्राधिकृत समझौता अधिकारी नहीं – अधिवक्ता जब्ती कार्यवाहियों में उपस्थित नहीं हो सकता।

Cases referred :

(1994) 6 SCC 205, (2004) 4 SCC 159, M.Cr.C. No. 213/12, W.P. No. 16012/92.

A.K. Saxena, for the petitioner.

Sangita Pachori, G.A. for the respondents/State.

O R D E R

SUJOY PAUL, J.:- Singular question involved in the present writ petition is whether an accused is entitled to engage an advocate in seizure/confiscation proceedings before the Authorised Officer under the Indian Forest Act, 1927?

(2) The petitioner's request for engaging an advocate in confiscation proceedings is turned down by communicating the order dated 12th January, 2012 (Annexure P/1) which is assailed in the present petition. The petitioner submits that as per section 30 of the Advocates Act, 1961 read with sections 19 and 72 of the Indian Forest Act, 1927 (for brevity "1927 Act") the petitioner is entitled to engage an advocate even in confiscation proceedings.

(3) Per contra, Ms Sangita Pachori, learned Government Advocate supported the impugned order and submits that the petitioner is not entitled to engage an advocate in confiscation proceedings.

(4) I have heard learned counsel for the parties at length.

(5) Section 30 of the Advocates Act, 1961 (hereinafter, referred to as "1961 Act"), gives right to the advocates to practise throughout the territories to which 1961 Act extends, these are -

(i) in all courts including the Supreme Court;

(ii) before any tribunal or person legally authorised to take evidence; and

(iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

(6) The petitioner by placing reliance on section 19 of the 1927 Act submits that a pleader/advocate can appear before the Authorised Officer. Shri Saxena submits that section 30 (ii) of 1961 Act provides that an advocate can appear in proceedings before any person who is legally authorised to take evidence.

Shri Saxena then relied on section 72 of 1927 Act which reads thus -

“72. State Government may invest Forest officers with certain powers. (1) The State Government may invest any Forest officer with all or of the following powers, that is to say:-

(a) power to enter upon any land and to survey, demarcate and make a map of the same;

(b) the powers of a civil court to compel the attendance of witnesses and the production of documents and material objects;

(c) power to issue a search warrant under the Code of Criminal Procedure, 1898 (5 of 1898); and

(d) power to hold an enquiry into forest offences, and, in the course of such inquiry, to receive and record evidence.

(2) Any evidence recorded under clause (d) of sub-section (1) admissible in any subsequent trial before a Magistrate, provided that it has been taken in the presence of the accused person.”

(7) Learned counsel for the petitioner submits that a conjoint reading of section 30 of 1961 Act and section 72 of 1927 Act makes it crystal clear that the petitioner can appear before the Authorised Officer through his counsel. Section 2 (2) contend the definition of “ Forest Officer” which reads thus -

“ 'Forest-officer' means any person whom the State Government or any office empowered by the State Government in this behalf, may appoint to carry out all or any of the purposes of this Act or to do anything required by this Act or any rule made thereunder to be done by a Forest-officer.”

In the considered opinion of this Court, confiscation proceedings are governed by section 52 (Madhya Pradesh amendment in 1927 Act). A minute and microscopic reading of this section shows that if there is reason to believe for the Forest Officer that forest offence has been committed, he may seize the vehicle, material, ropes, chains etc. which are used in the alleged forest offence. Sub-section (4) of section 52 aforesaid prescribes that the Authorised Officer is required to send an intimation in the form prescribed about the

proceedings of confiscation to the Magistrate and issue a parallel notice in writing to the accused whose property is seized and then afford an opportunity to the accused person to submit a representation within a reasonable time.

(8) The words 'reason to believe' are considered by the Apex Court in various judgments including *N.Nagendra Rao and Co. vs. State of A.P.* (1994) 6 SCC 205. It is held in para 5 as under -

“The expression 'reason to believe' means that even though formation of opinion may be subjective but it must be based on material on record.”

(9) A reading of section 52 aforesaid shows that it does not contain any provision and procedure for recording evidence for the purpose of confiscation of the vehicle or property etc. The Apex Court in *State of West Bengal vs. Sujeet Kumar Rana* (2004) 4 SCC 159 held that the West Bengal amendment in 1927 Act is a complete code in itself. This Court had an occasion to consider the West Bengal amendment in juxtaposition to similar amendment in section 52 by the State of Madhya Pradesh in a recent judgment of this Court in the case of *Ramniwas vs. Game Range, Chambal Sanctuary*, (MCRC No.213/12 decided on 3rd February, 2012 at Gwalior). This Court opined that the amendment by the State of West Bengal is analogous/ *pari materia* qua the amendment made by the State of Madhya Pradesh. In *Sujeet Kumar Rana's case* (*supra*), the Apex Court has held that the aforesaid amendment is a complete code in itself by giving sufficient safeguards both substantive and procedural against any arbitrary exercise of power.

(10) In this view of the matter, it is clear that section 52 is a special provision dealing with the seizure of the property under 1927 Act. Section 72 of 1927 Act is a general provision. General powers given in section 72 aforesaid are unless attracted and applicable in the confiscation proceedings, it cannot be said that the Authorised Officer will record evidence. In other words, the powers under section 72 of 1927 Act are general powers which may be attracted in other provisions, but so far as confiscation proceedings are concerned, the same are governed by section 52 which is a complete code in itself. In absence of any such provision to record evidence in section 52, section 72 of 1927 Act and section 30 of 1961 Act cannot be pressed into service. In the considered opinion of this Court, section 30 (ii) of 1961 Act has no application and appearance of advocates is rightly prohibited by the Authorised Officer. Since the Authorised Officer is not legally authorised to take evidence in section 52 proceedings under 1927 Act, the question of

appearance of advocates by claiming right from section 30 (ii) of 1961 Act does not arise.

(11) The Kerala High Court in Writ Petition No.16012/92, decided on January 8th, 1993 held that in confiscation proceedings, there is no question of any examination-in-chief and consequently there is no question of any cross examination of the officials involved in seizure etc. Thus, it is clear that in confiscation proceedings, no evidence is recorded.

(12) So far as reliance on section 19 of 1927 Act is concerned, a careful reading of section 19 shows that it gives right to a person who has made a claim under the Forest Act regarding something. Such claim can be made before the Forest Settlement Officer, Appellate Officer or in the court in the course of any enquiry or appeal under this Act. In the opinion of this Court, the Authorised Officer is not a the Forest Settlement Officer and the petitioner has not submitted any claim before the said Authority, and therefore, section 19 of 1927 Act has no application in the instant case. Admittedly, the impugned order is not passed by the Appellate Officer or court in the course of any enquiry. Thus, in the absence of showing any enabling provision, I am unable to hold that the Authorised Officer has committed any error of law in passing the order dated 12th January, 2012 impugned in the instant petition as Annexure P/1.

(13) In view of the above, the present petition is dismissed but with no order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 911

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 21249/2011 (Jabalpur) decided on 22 February, 2012

PUSHPAARORA

...Petitioner

Vs.

DR. SMT. ANITAARORA & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17 – Amendment of Complaint – Factors required to be borne in mind by the Court while dealing with application for amendment – Law discussed. (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – वादपत्र में

संशोधन – न्यायालय द्वारा संशोधन के आवेदन का निपटारा करते समय विचार में लेने के लिये आवश्यक कारक – विधि विवेचित।

Cases referred :

(2008) 3 SCC 717, AIR 1957 SC 363, AIR 1983 SC 319, (2000) 1 SC 712, (2005) 6 SCC 344, (2008) 5 SCC 117, (2008) 14 SCC 364, (2008) 14 SCC 632, (2009) 10 SCC 84.

A.P. Shroti, for the petitioner.

Sanjay Agrawal, for the respondents.

ORDER

ALOK ARADHE, J.:- With the consent of parties, the matter is heard finally.

In this writ petition under Article 227 of the Constitution of India the petitioner has challenged the validity of the order dated 10.11.2011 by which the application filed by the petitioner for amendment of the plaint has been rejected. In order to appreciate the petitioner's challenge to the impugned order, few facts need mention, which are state infra.

2. The petitioner has filed a suit seeking relief of partition. The claim in the suit is based on the ground that the petitioner is the mother of deceased Rajeev Arora and a category-I heir. In paragraph 1 of the plaint, it has been stated that defendants No.1 & 2 i.e. the respondents are widow and son respectively of Late Rajeev Arora. Similarly, in paragraph 9 of the plaint it is stated that the petitioner as well as respondents No.1 & 2 are entitled to one-third share each in the property of Late Rajeev Arora. Accordingly, the relief of partition of the property has been sought. The respondents on receipt of summons of the suit have filed written statement in which the claim of the plaintiff that she is entitled to one-third share in the suit property has been admitted. The respondents filed written statement before the trial Court on 04.11.2011. However, on that very day, the plaintiff filed an application for amendment of the plaint in which it was, inter alia, pleaded that the respondent No.1 had settled her claim with the son of the petitioner and had separated from him. It was further submitted that respondent No.1 had stopped using the surname "Arora". Accordingly, by the proposed amendment a plea was sought to be incorporated that respondent No.1 is not entitled to any share in the property of Late Rajeev Arora. The respondents filed reply to the aforesaid application for amendment. The trial Court, however, vide impugned order

dated 10.11.2011 rejected the application for amendment filed by the plaintiff on the ground that the application is not supported by documentary evidence. Accordingly, the application for amendment was rejected. In the aforesaid background the petitioner has approached this Court.

3. Learned counsel for the petitioner submitted that the application for amendment was made at the pre-trial stage. It was further submitted that while deciding the application for amendment the merits of the amendment cannot be considered by the trial Court. It was also submitted that the trial Court grossly erred in rejecting the application for amendment filed by the petitioner. In support of his submission, learned counsel for the petitioner has placed reliance on the decision of the Supreme Court reported in (2008) 3 SCC 717 [*Usha Devi vs. Rijwan Ahamad and others*].

4. On the other hand, learned counsel for the respondents submitted that the amendment of the plaint was filed with malafide intention with a view to protract the trial. It was further submitted that marriage of the respondent No.1 with Late Rajeev Arora was never dissolved and, therefore, the respondent No.1 is the legally married wife of deceased Rajeev Arora and is entitled to one-third share in the suit property. It was further submitted that if the Court finds that the application for amendment is malafide, same may be rejected. The order passed by the trial Court is just and legal and does not call for any interference.

5. I have considered the submissions made on both sides. The Order 6 Rule 17 of the Code of Civil Procedure deals with amendment of pleadings. The application for amendment can be made at any stage of the proceedings by the parties to the suit. The application for amendment can be made before the trial is commenced or after the trial is commenced. The law relating to grant of amendment of pleading is well defined a catena of decisions of Supreme Court. In *Pirgonda Hongonda Patil vs. Kalgonda Shidgonda Patil*, AIR 1957, SC 363 it has been held by the Supreme Court that all amendments ought to have been allowed which satisfy two conditions, namely, of not working injustice to the other side and of being necessary for the purpose of determining the real questions in controversy between the parties. In *Savithri Amma vs. Aratha Karthy*, AIR 1983 SC 319 it has been held that test for allowing the amendment is to find out whether the proposed amendment works in serious injustice to the other side. Similarly, in *B.K. Narayana Pillai vs. Parameswaran Pillai*, (2000) 1 SCC 712 it has been held that though it is

true that amendment cannot be claimed as a matter of right, however, it is equally true that Courts while deciding the prayer for amendment should not adopt hyper technical approach. The liberal approach should be the general rule particularly in cases where the other side can be compensated with costs. It has further been held that amendments in the pleadings to avoid uncalled for multiplicity of litigation should be allowed. It has also been held that a party cannot be allowed by way of amendment to set up a new case or a new cause of action particularly when a suit or new case or cause of action is barred. However, the power of the Court to deal with the prayer for amendment if the trial is commenced is has been circumscribed by an amendment in the Code of Civil Procedure (Amendment) Act. The proviso to Order 6 Rule 17 of the Code provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, party could not have raised the matter before the commencement of trial.

6. The amended provisions of the Code of Civil Procedure have been considered by the Supreme Court in *Salem Advocate Bar Association, T.N. vs. Union of India*, (2005) 6 SCC 344. The Supreme Court in *Chander Kanta Bansal vs. Rajinder Singh Anand*, (2008) 5 SCC 117 has held that the delayed amendment which appears to be afterthought should not be allowed. However, in deserving cases the Court can allow even a belated application for amendment, if other side can be compensated in terms of the cost. In *Usha Devi* (supra) it has been held that merits of amendment is not the relevant criteria while deciding the application for amendment. In *Rajkumar Gurawara (Dead) through LRs. Vs. S.K.Sarwagi and Company Pvt. Ltd. and another*, (2008) 14 SCC 364 it has been held that just and proper amendment can be introduced at any stage for the purpose of determining the real controversy involved in the suit. In *South Konkan Distilleries and another vs. Prabhakar Gajanan Naik and others*, (2008) 14 SCC 632 it has been held that if the application for amendment is within limitation or there is an arguable case with regard to the question of limitation, the same should be allowed. However, time barred amendment should not be allowed. In *Rajkumar Gurawara* (supra) (2008) 14 SCC 364 the Supreme Court while drawing distinction between the pre trial and post trial amendment has further held that greater degree of prejudice is caused by amendments which are sought after commencement of the trial. It has further been held that prejudice likely to be caused depends upon the procedural stage at which the amendment is sought.

It has been reiterated that it is a settled law that the grant of application for amendment shall be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; and (iii) when allowing amendment application defeats the law of limitation. The basic principles with regard to dealing with the application for amendment have been stated by the Supreme Court in *Revajeevu Builders and Developers vs. Narayanaswamy and Sons and others*, (2009) 10 SCC 84. In view of the well settled position dealing with the prayer for amendment of the pleadings the following important factors are required to be borne in mind by the Court dealing the application for amendment:-

(i) Whether the amendment is necessary for proper and complete adjudication of the controversy involved in the suit.

(ii) Whether the application has been made bonafide or with malafide intention to protract the proceedings.

(iii) Whether the proposed amendment, if allowed, would cause any prejudice to either side which cannot be compensated in terms of money.

(iv) Whether by the proposed amendment a party is setting up a new case or cause of action which changes the nature and character of the case.

(v) The application for amendment should not be rejected merely on the ground that delay alone, if the other side can be compensated in terms of cost.

(vi) The amendment which is barred by limitation should not be allowed.

(vii) In case of post trial amendment, the Court has to come to the conclusion that inspite of due diligence party could not have raised the matter before the commencement of the trial.

7. I may hasten to add here that the aforesaid factors are only illustrative and no exhaustive. The trial Court while passing the impugned order has failed to take into account the basic principles which are to be kept in mind while deciding the application for amendment.

8. For the aforementioned reasons, the impugned order cannot be sustained in the eye of law. The same is hereby quashed. The trial Court is directed to decide the application preferred by the petitioner afresh by a

speaking order by taking into account the well settled legal principles governing grant of amendment.

Accordingly, the writ petition is disposed of.

C.C. as per rules.

Petition disposed of.

I.L.R. [2012] M.P., 916

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 4495/2011 (Gwalior) decided on 28 February, 2012

KAILASH NARAYAN DUBEY

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Pujari – Discontinuance of – Gram Panchayat –*
Unanimous decision to discontinue a Pujari after satisfying itself –
Temples were initially maintained by the grant given by erstwhile State
but after independence the powers were given to Gram Panchayat –
Gram Panchayat is best judge to decide the suitability of Pujari for the
purpose of his continuance. (Para 13)

क. पुजारी – को हटाया जाना – ग्राम पंचायत – स्वयं संतुष्ट होने के पश्चात पुजारी को हटाने का सर्वसम्मति से निर्णय लिया गया – मंदिरों को पहले मृतपूर्व राज्य द्वारा प्रदत्त अनुदान से संचारित किया जाता था परंतु स्वतंत्रता प्राप्त करने के पश्चात ग्राम पंचायत को शक्तियां दी गयीं – पुजारी के बने रहने के प्रयोजन हेतु उसकी उपयुक्तता का निर्धारण करने के लिये ग्राम पंचायत सर्वोत्तम निर्णायक है।

B. *Pujari – Discontinuance of –* There is no Constitutional or statutory provision to determine service condition etc. of Pujari – Neither there is any contract of service – Petitioner has no vested legal or constitutional right to continue. (Para 16)

ख. पुजारी – को हटाया जाना – पुजारी की सेवा शर्तों इत्यादि का निर्धारण करने के लिये कोई संवैधानिक अथवा कानूनी उपबंध नहीं हैं – न ही सेवा का कोई अनुबंध है – याची को बने रहने का कोई विधिक या संवैधानिक अधिकार निहित नहीं है।

C. *Pujari – Discontinuance of – Reasons –* Gram Panchayat satisfied itself by assigning either serious reasons for discontinuance

of Pujari – No fault can be found in said decision, even if Petitioner's sons were acquitted in an offence under Section 376 of I.P.C. – The prosecutrix turned hostile, who was wife of the real brother of petitioner, no interference is called for. (Para 23)

ग. पुजारी – को हटाया जाना – कारण – ग्राम पंचायत ने पुजारी को हटाने के गंभीर कारणों की स्वयं संतुष्टि की – उक्त निर्णय में कोई दोष नहीं पाया जा सकता – तब भी जब याची के पुत्रों को भा.द.सं. की धारा 376 के अंतर्गत अपराध में दोषमुक्त किया गया – अभियोक्ति पक्षदोही हो गई जो याची के सगे भाई की पत्नी थी, हस्तक्षेप की कोई आवश्यकता नहीं।

D. *Pujari – Misconduct – Conduct of Pujari can not be compared with a public servant – His conduct should be like a saint – Religious history traced which shows that Pujari enjoys a very high position in the mind of people in Indian Society which can not be equated with Civil Post holder – His conduct should be, therefore, in consonance with the said decision.* (Para 17)

घ. पुजारी – अवचार – पुजारी के आचरण की तुलना लोक सेवक के साथ नहीं की जा सकती – उसका आचरण संत जैसा होना चाहिये – धार्मिक इतिहास खोजा जो दर्शाता है कि पुजारी भारतीय समाज में लोगों के मन में अति उच्च स्थान रखता है जिसे सिविल पद धारक के साथ समिकृत नहीं किया जा सकता – इसलिये उसका आचरण उक्त निर्णय के अनुरूप होना चाहिये।

E. *Pujari – Duties – Income and Expenditure – As Pujari is custodian of a public temple, therefore, he is bound to disclose it to Gram Panchayat and State Officials – Conduct of petitioner deprecated for not disclosing the account – Petitioner directed to submit entire record of his income expenditure and financial status within a period of 7 days – Petition dismissed.* (Para 26)

ड. पुजारी – कर्तव्य – आय और व्यय – चूंकि पुजारी सार्वजनिक मंदिर का परिरक्षक है इसलिए, ग्राम पंचायत और शासन के अधिकारियों को प्रकट करने के लिये बाध्य है – याची के आचरण का तिरस्कार किया गया क्योंकि उसने लेखा प्रकट नहीं किया – याची को अपनी आय व्यय का संपूर्ण अभिलेख और वित्तीय स्थिति 7 दिनों के भीतर प्रस्तुत करने के लिये निदेशित किया गया – याचिका खारिज।

Cases referred :

AIR 2005 Raj 250, 2010 AIR SCW 5935, (2011) 2 SC 429, 2012 (I) MPHT 37, AIR 1984 SC 38, (2003) 4 SCC 712, 1971 1 WLR 1581.

N.K. Gupta, for the petitioner.

Nidhi Patankar, G.A. for the respondents No. 1 & 2/State.

V.K. Bharadwaj with *Raja Sharma*, for the respondent No/3.

O R D E R

SUJOY PAUL, J. - The petitioner, Pujari of Shri Ram janki Temple of village Rahi, Tahsil Bhitwar, District Gwalior preferred this petition under Article 226 of the Constitution against the resolution passed by Gram Panchayat (Annexure P/3, whereby it was unanimously decided to discontinue him as Pujari. On the strength of said resolution of Gram Panchayat, after giving show cause notice to the petitioner, the Sub-Divisional Officer passed the order dated 27.8.2010 (Annexure P/2). The petitioner filed an appeal against the order dated 27.8.2010 (Annexure P/2) before the Collector. The said authority by order dated 21.2.2011 (Annexure P/9) quashed the order of Sub-Divisional Officer dated 27.8.2010 on the ground that the matter was fixed by the Sub-Divisional Officer on 6.8.2010. On the said date no further date was fixed but on 19.8.2010 the Sub-Divisional Officer fixed the matter for orders on 27.8.2010 and passed the order which cannot be said to be in accordance with law. It is further held that the allegations made against the petitioner were required to be proved by the respondents and in absence of recording evidence by the Sub-Divisional Officer, the charges cannot be said to be proved. The appeal was allowed by the Collector with a direction that the petitioner shall provide the entire account statement (Income & Expenditure) to the authorities and the same shall be audited. The Collector directed a limited enquiry for the purpose of deciding the income and expenditure of Pujari. The petitioner assailed the order dated 2.12.2011 to the extent he was directed by the Collector to produce the income-expenditure statement to assess his income. The respondent-Panchayat preferred a revision which was registered as Case No. 22/10-11/Revision. The petitioner's appeal and respondent's revision were analogously heard and decided by common order. The Commissioner agreed with the resolution of Gram Panchayat and affirmed the orders passed by the Sub-Divisional Officer and quashed the order passed by the Collector.

2. The main grievance of the petitioner is that he has a right to continue as Pujari and this right is infringed and taken away without following the principles of natural justice. Shri N.K. Gupta, learned counsel for the petitioner would submit that without giving a charge sheet and without providing adequate

opportunity of hearing he has been discontinued. Learned counsel vehemently attacked the finding in resolution (Annexure P/3) that the petitioner is earning Rs.5.00 lacs per year. He submits that there is no basis for such a finding. Learned counsel further submits that he was not permitted to examine the witnesses whose statements were recorded behind his back. He further submits that his sons who were accused in an offence under section 376 I PC were acquitted and, therefore, this cannot be a reason for his discontinuance. By placing reliance on Annexure P/10 dated 27.1.2011 Shri Gupta submits that appeal lies from the order of Collector to the Commissioner and the respondents have preferred a revision and not an appeal and, therefore, the same could not have been entertained. By placing reliance on 1999 RN 392 (*State of MP and others vs. Mandir Shri Khande Rao*), Shri Gupta submits that this Court directed the State to frame Rules and Regulations governing the conditions of service and other rights of Pujari but the respondents have not done anything. Hence, in absence of any procedure laid down, the petitioner could not have been discontinued in the manner the respondents have done.

3. Per Contra, Shri V.K.Bharadwaj, learned senior counsel assisted by Shri Raja Sharma, would submit that the petitioner is not a "person aggrieved". To elaborate, Shri Bharadwaj submits that a litigant can be said to be a "person aggrieved" only when his any legal, constitutional, vested or statutory right is infringed or taken away. The petitioner has no legal right to continue as Pujari and, therefore, he is not a "person aggrieved". Learned senior counsel relied on AIR 2005 RAJASTHAN 250 (*Union of India v. Trustees of Major Maharaj Harisingh Benefit of Defence Services Personnel Charitable Trust and others*); 2010 AIR SCW 5935 (*Zonal Manager, Central Bank of India vs. M/s. Devi Ispat Ltd. & ors.*); (2011) 2 SCC 429 (*State of Rajasthan and others vs. Daya Lal and others*); and, 2012 (1) M.P.H.T. 37 (*Sarvesh Patel vs. State of MP and others*) in this regard. AIR 1984 SC 38 (*Mohd. Yunus v. Mohd. Mustaqim and others*) is pressed into service to show that this Court should not entertain a writ petition in absence of necessary ingredients warranting interference.

4. Smt. Nidhi Patankar, learned Government Advocate supported the orders, Annexures P/1, P/2 and P/3. Learned State counsel submits that a great confidence and faith is reposed by Gram Panchayat in Pujari. The conduct of Pujari should be above board and without there being any iota of doubt regarding his conduct, performance and duty etc. She submits that the petitioner's sons were accused in an offence of rape and in such circumstances

the Gram Panchayat has taken a right decision after having satisfied itself. The said unanimous decision is not liable to be interfered with by this Court.

5. I have bestowed my anxious consideration to the rival contentions of the parties.

6. A bare perusal of Annexure P/3 shows that the unanimous decision of Gram Panchayat to discontinue the petitioner is for the following reasons.

(i) Yearly earning of the temple (having 45 bighas land) is Rs.5.00 lacs which is being used by Pujari for his own benefits;

(ii) No function/festival is being organised by the Pujari in the temple;

(iii) The temple is in a ruined condition;

(iv) The idols are in a broken condition;

(v) There is no time schedule for "Puja Aarti";

(vi) The space of temple is being used by the Pujari for his own purpose to keep paddy, agricultural equipments, tractor etc.;

(vii) The women of the village do not visit the temple because of the character of the petitioner's sons who were accused in an offence u/s. 376 of IPC.

7. The Sub-Divisional Officer upon receiving the resolution (Annexure P/3) issued a show cause notice to the petitioner. In the show cause notice (Annexure P/6) the Sub-Divisional Officer directed the petitioner to provide the entire income-expenditure statement and permitted the petitioner to even engage an Advocate. In turn, the petitioner submitted his reply (Annexure P/7) and admitted that from the date of his engagement he is keeping the income-expenditure account. It is relevant to mention here that Shri N.K. Gupta, learned counsel for the petitioner while arguing this matter has vehemently stated that in the appointment order or elsewhere it is not mentioned that the petitioner is required to maintain a statement of income and expenditure. He submits that the petitioner is under no obligation either to maintain the said account or produce the same before the Gram Panchayat or the State officials.

The petitioner did not produce the said accounts statement and,

therefore, the Sub-Divisional Officer passed its order (Annexure P/2) and has given a specific finding that the petitioner has not produced the income-expenditure account, details of bank accounts and other documents for his perusal.

8. Pausing here for a moment, it will be relevant to note that in the petitioner's statement which is Annexure R/4, the petitioner stated that he earns Rs.1,26,000/- per year from the temple. Other witnesses have stated that petitioner is earning about Rs.5 .00 lacs per year. The petitioner had chosen not to produce his statement of account despite specific direction by the Sub-Divisional Officer. The Collector allowed his appeal and again directed the petitioner to produce the income-expenditure account before the authorities. In turn, the authorities were directed to examine his income-expenditure account and make an audit of it. The petitioner was not satisfied by this direction. He challenged this order to the extent he was directed to submit income-expenditure account.

9. In the opinion of this Court, the position of Pujari is very important in our society. He is custodian of a temple. The earning from a land attached to the temple is also received by him. Pujari has no right interest or title on the temple or on the land attached to it. The said property is a public property. Thus, he has a duty towards the public and money and income received by him is a public income. Thus, accountability of Pujari needs to be fixed. In other words, the income and expenditure of the temple should be maintained in a proper manner and the same is required to be examined by the competent authorities and by the Gram Panchayat under which he is working. Admittedly, the petitioner has maintained the said record as stated by him in the reply to show cause (Annexure P/7) but did not produce the same before the authorities. The Collector's direction to produce the same was also challenged by the petitioner by filing an appeal. Thus, in the considered opinion of this Court, the petitioner lacks bonafide. If the petitioner was maintaining the accounts, there should not be any hesitation for him to produce the same before the Gram Panchayat or the State Officials as the case may be.

10. Shri N.K.Gupta submits that the Collector's order was just and proper whereby the Sub-Divisional Order's order was set aside. However, a bare perusal of this order shows that the Collector presumed that the resolution of Gram Panchayat (Annexure P/3) contains charges against the petitioner. Thus, on this presumption, the Collector held that the petitioner has not been given

any opportunity to put forth his case and in absence of evidence being recorded by the Sub-Divisional Officer, the decision cannot be upheld. In the considered opinion of this Court, the said finding of Collector is clearly erroneous. A plain reading of Annexure P/3 shows that the said resolution is a decision taken by the Gram Panchayat. It is not like a charge sheet or statement of allegations against the petitioner. On the contrary, the Panchayat took an unanimous decision to discontinue the petitioner as Pujari and for that reasons were assigned. It is also clear that for the satisfaction of Gram Panchayat, certain statements including the statement of petitioner were recorded. Thus, the resolution (Annexure P/3), by no stretch of imagination, can be said to be a charge. On the contrary, it is an unanimous decision of entire Gram Panchayat to discontinue the petitioner for the reasons stated in the decision. Thereafter also the petitioner was given an opportunity to put forth his defence by the Sub-Divisional Officer. The petitioner although denied the allegation but did not produce the relevant record of account statement before the said authority. Needless to mention that the petitioner is the custodian of the entire record of the temple. He alone is aware of the income and expenditure of the temple. Thus, when he was noticed, it was obligatory for him to produce the record for scrutiny. This conduct of the petitioner is liable to be deprecated. The conduct of the petitioner should be in consonance with the holy position he was enjoying as Pujari.

11. On the basis of aforesaid analysis, it is clear that Gram Panchayat on its satisfaction came to hold that it is not desirable to continue the petitioner. The activities of Pujari are under the direct vigil of the villagers and Gram Panchayat. The Gram Panchayat was the best judge to form an opinion about the Pujari.

12. In this view of the matter, the basic question is whether the petitioner has a right to continue and whether his legal vested or constitutional right is infringed or taken away? Another question is whether the impugned orders are legal and justified?

13. Admittedly, the service conditions of Pujari are not framed by the State Government. In pre-independence era i.e., in the regime of State the law was known as "रियासत ग्वालियर की परस्तिशगाहों, और मजहबी औकाफ की इम्दाद और निग्रानी का कानून, सम्वत् 1971" (hereinafter referred to as the 'Kanoon'). Initially the places of worship including temples, Masjids and Churches which were public property were regulated by aforesaid Kanoon.

Subsequently powers to regulate and govern those places of worship were given to the Gram Panchayat by the State Government. However, it will be profitable to trace the history in this regard. The basic object of framing the Kanoon in the said era was to ensure that the places of worship are kept in a proper manner for which those temples/Masjids/Churches, as the case may be, were established. It is relevant to quote a portion of aim and object of the Kanoon as under:-

“चूंकि करीन मस्लिहत है, कि परस्तिशगाहें, जो रियासत ग्वालियर में अवाम के लिए कायम की गई है या आयन्दा कायम की जायें, ऐसी हालत में रहें कि जिससे उनके कायम करने वालों का असली मुद्दा पूरा हो, और वह बिला इबादत न पड़ी रहे, और उस जायदाद व सरमाये का जो ऐसी परस्तिगाहों की इम्दाद और गौर व परदाख्त की गरज से वक्फ किया गया हो, या आयन्दा किया जाये, कायम करने वालों की असली मन्शा के मुताबिक इन्तजाम रख जावे, और उस पर मुनासिब निग्रानी रहे,”

Even in this Kanoon, the 'public temple' is defined in the definition clause (ग) which reads as under:-

“(ग) “ पब्लिक मन्दिर, मसजिद, गिर्जा,” से मुराद ऐसा मन्दिर मसजिद, व गिर्जा है, जो अवाम के इस्तेमाल के लिए बनाया गया हो,”

Section 6 (स) of the Kanoon reads as under:-

“(6) (स) अगर उसकी कायमी के लिए कोई मन्कूला या गैर मन्कूला जायदाद वक्फ करना मकसूद हो तो उसकी तशरीह यानी अगर जायदाद गैर मन्कूला वक्फ करना मकसूद हो तो उसकी मालियत और सालाना आमदनी बतलानी चाहिए । और अगर मन्कूला जायदाद हो तो उसकी कीमत या तादाद.”

(Emphasis Supplied)

14. A bare perusal of Section 6(स) aforesaid shows that the caretaker/ Pujari of the place of worship was under a legal obligation to disclose his annual income & expenditure. Thus, even during State time it was ensured that such temples are organized in a proper manner and there is a transparency in handling and dealing with the financial matters. Thus, the vehement and repeated argument of Shri N. K. Gupta that Pujari is under no obligation to maintain the account and disclose it is without any basis.

15. In post independence era also, whether or not it is defined, Pujari is custodian of temple, which is meant/established for the public and, therefore, such Pujari is bound to maintain the financial record and disclose it to the

concerned authorities. The argument of petitioner that he will not disclose the account status is unbecoming of a Pujari.

16. The herculean effort of Shri N. K. Gupta, learned counsel for the petitioner is to equate the Pujari with a civil post holder. Civil post holders are given certain protections in the matter of disciplinary action against them in the Constitution and in Statutory Rules framed for that purpose by the Government. For example, Article 311 gives a constitutional protection to the civil post holders and the principles of natural justice for them have taken a statutory shape when translated into conduct and discipline rules like M.P. Civil Services (Classification, Control and Appeal) Rules, 1966. In various departments, different kinds of statutory rules with different nomenclature are made which regulate the disciplinary action against civil post holders. However, in absence of any such express constitutional provisions or rules with regard to Pujari, in the considered opinion of this Court, the petitioner cannot equate himself with civil post holders/Government servants. Thus, neither the constitutional protection aforesaid is applicable to the petitioner nor any statutory rule is in vogue which gives any kind of procedural protection to the petitioner.

17. The petitioner is appointed for a holy purpose. In Indian Society the Pujari enjoys a very high position in the mind of people. The said position is because of the nature of work which is being entrusted to him by religion and in cases of public temple by the State or its agencies. The Pujari cannot enjoy the trust and that position unless his conduct is fair, transparent and in consonance with the religious values and traditions of the society. The Pujari must have a saintly conduct. In absence thereof the people may lose faith, trust and respect for him. If the custodian of a public temple reduces it to a money making machine for himself or converts the temple for his own welfare, the very purpose of his appointment is defeated. 'Dharma' of Pujari is to ensure purity, transparency and holiness in his entire conduct and in maintaining the temple. "Kautilya" said as under in this regard:-

विप्रो वृक्षस्तस्य मूलं च सन्ध्या

वेदाः शाखा धर्मकर्माणि पत्रम् ।

तस्मान्मूलं यत्नतो रक्षणीयं

छिन्ने मूले नैव शाखा न पत्रम् ।।३।।"

ब्राम्हण एक वृक्ष के समान हैं और संध्या अर्थात् प्रभु की उपसना और अराधना उस ब्राम्हण रूपी वृक्ष की जड़ है, वेद उस वृक्ष की शाखाएं हैं । धर्म -कर्म

उसके पत्ते हैं, इसलिए यत्नपूर्वक उस जड़ की रक्षा करनी चाहिए क्योंकि जड़ के नष्ट हो जाने पर न शाखाएं रहेंगी और न पत्ते।

18. It is profitable to quote Saint Kabir as under

साधू कहावन कठिन है, आंगेकी सुधि नाहि।

सूली उपर खेलना, गिरै तो ठोरहिं काहि ।।15।।

साधू कहावन कठिन है, ज्यो खांडे की धार।

डगमगाय तौर गिरि परै, निश्चल उत्तरै पार ।।16।।

साधू कहावन कठिन है, ज्यों लम्बी पेड़ खजूर।

चढ़ै तो चाखै प्रेम रस, गिरै तो चकनाचूर ।।17।।

जौन भाव उत्तर रहै, भीतर बसावे सोय।

भीतर और न बसावई, ऊपर और न होय ।।18।।

जौन चाल संसार की, तौन साधू की नाहि।

दुस्म चाल करनी करै, साधु कहो मति ताहि ।।19।।

साधु चाल जो चालई, साधु कहावै सोय।

बिन साधन जो सुधि नहीं, साधु कहां ते होय ।।20।।

साधू सोई जानिये, चलै साधु की चाल।

परमारथ राता रहै, बोलै। बोले वचन रसाल ।।21।।

तन में शीतल शब्द है, बोलै वचन रसाल।

कहै कबीर तो साधुकौ, गंजि सकै ना काल ।।22।।

19. In 'Mahabharata' (Shanti Parva) it is mentioned that Raja should not excuse a Pujari, whose conduct is improper, rather should punish him for not acting in consonance with "dharma". If despite providing a source of livelihood Pujari's conduct remains improper, such Pujari shall be expelled from "Rajya". The relevant portion reads as under:-

यिकर्मस्थाश्च नोपेक्ष्या विप्रा राज्ञा कथंचन।

नियम्याः संविभज्याश्च धर्मानुग्रहकारणत् ।।11।।

राजा कर्मभ्रष्ट ब्राम्हण को किसी तरह क्षमा न करें, बल्कि धर्मपर अनुग्रह करने के लिए उसे दण्ड देकर धर्मात्मा ब्राम्हणों की श्रेणी से अलग कर दे। जीविका मिल जाने पर भी यदि वह

चोरी करना न छोड़े तो उसे कुटुम्बसहित राज्य से बाहर निकाल देना चाहिए ।

20. In view of these examples, it is clear like noon day that position of Pujari in Indian Society cannot be equated with a public employment. The kind of and degree of confidence and trust reposed on him, in turn, expects a holy conduct from Pujari. In other words, it can be said by using the old adage that the ceaser's wife should be above suspicion and this principle is equally true to a Pujari in Indian Society and set up.

21. It will not be out of place to remember a classical passage by Judge Learned Hand, which reads as under:-

"I often wonder whether we do not rest our hopes too much upon our Constitution, upon laws and upon false hopes. Liberty lies in the hearts of men and women; do much to help it. While it lies there it needs no constitution, no law, no court to save it."

Justice H.R.Khanna in his famous book "*Neither Roses Nor Thorns*" has written that said passage holds equally true of purity in public life and administration (page 59).

22. In aforesaid backdrop it is clear that the Gram Panchayat took an unanimous decision that petitioner should be removed/discontinued. For that they satisfied themselves and then only passed an unanimous resolution. There is neither a written contract of service defining terms and conditions of such employment with petitioner and the State nor there are any statutory recruitment rules or constitutional protection available to the petitioner. Gram Panchayat is consisting of elected representatives of the villagers. When such elected representatives have taken an unanimous decision, in the considered opinion of this Court, it will be treated to be a general public opinion against the petitioner. Considering the seriousness of reasons mentioned in the resolution (Annexure P/3), in the opinion of this Court, the Gram Panchayat has not committed any error of law in discontinuing the petitioner. Another objection of Shri N.K.Gupta regarding maintainability of revision also deserves to be and is accordingly rejected because as per settled legal position mere wrong quoting of provision will not denude the authority to exercise jurisdiction, so long as same is traceable elsewhere in the provision. (See, (2003) 4 SCC 712 (*High Court of Gujarat and another vs. Gujarat Kishan Mazdoor Panchayat and others*)).

23. Although Shri N.K. Gupta vehemently submitted that petitioner's sons were ultimately acquitted by the criminal court, it cannot be lost sight that they were accused in a heinous offence under section 376 IPC. A bare perusal of the judgment (Annexure P/8) in Case No. 121/2003 shows that the complaint regarding offence of section 376 IPC was registered by Madhu Sharma (prosecutrix), who is a family member/relative of the petitioner. The prosecutrix is none else but the wife of real younger brother of petitioner. Despite the fact that she turned hostile before the criminal court, the kind of allegations were made, it causes loss of faith, trust and confidence of the people on Pujari and his family, who are residing in the temple premises.

24. Apart from this, the reasons assigned in Annexure P/3 shows that temple is not kept in proper condition, the 'daily Puja' is also not performed as per any fixed time and the premises of the temple is being used by the petitioner for his own benefit. If the Gram Panchayat is satisfied and has taken an unanimous decision, no fault can be found in such decision. More so, when the petitioner was given an opportunity by Annexure P/6 to submit his accounts and he did not deliberately submit the same. This kind of engagement is not governed by any constitutional provision or statutory rules or any contract. Lord Reid in *Malloch v. Abardeen Corpn.* (1971 1 WLR at 1581) held as under:-

"At Common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then servant's only remedy is damages for breach of contract."

25. On the basis of aforesaid discussion and analysis, the petitioner has no legal vested or constitutional right to continue as Pujari. Hence, none of those rights are infringed or violated.

26. The petitioner, who is custodian of the entire income-expenditure record has not submitted the same before the Sub-Divisional Officer. The said authority in page 3 of its order has directed the Revenue Officer/Naib Tahsildar to assess the income of the petitioner and then proceed further to recover the amount. In the opinion of this Court, there is no flaw in the said order. Thus, the petitioner is directed to submit the entire record regarding his income-expenditure and financial status before the Sub-Divisional Officer

within seven days from the date of receipt of certified copy of this order. The said authority shall peruse the said record and then decide the question of recovery(if any). The decision of discontinuing the petitioner by Annexures P/3, P/2 and P/1 are affirmed. The respondents are directed to implement the said decision forthwith. In nutshell, no case is made out by the petitioner for exercising discretionary jurisdiction by this Court under Article 226 of Constitution.

27. Petition is dismissed. No costs.

Petition dismissed.

I.L.R. [2012] M.P., 928

WRIT PETITION

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

W.P. No.3957/2010 (Jabalpur) decided on 1 March, 2012

MOHD. FAREED & anr.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

Krishi Upaj Mandi (Allotment of Land and Structures) (M.P.) Rules, 2009 – Rule 3(7) – Preference to old allottees – Object of sub-rule is to protect the existence of genuine licensee traders by giving due preference and also to prevent favoritism or nepotism to traders in the allotment of lands to them – Rule 3(7) of Rules, is neither arbitrary nor contrary to decision of Supreme Court in Labharam case – Petition dismissed.
(Para 12)

कृषि उपज मंडी (भूमि और संरचना का आवंटन) (म.प्र.) नियम, 2009 – नियम 3(7) – पुराने आवंटितों को प्राथमिकता – उप नियम का उद्देश्य वास्तविक अनुज्ञप्ति धारक व्यापारियों के अस्तित्व को सम्यक् प्राथमिकता देकर संरक्षण देना है और व्यापारियों को भूमि के आवंटन में पक्षपात एवं भाई-भतीजावाद रोकना भी है – नियमों का नियम 3(7) न तो मनमाना है और न ही लभाराम के मामले में उच्चतम न्यायालय के निर्णय के विपरीत है – याचिका खारिज।

Case referred :

(1998) 5 SCC 207.

Vivek Ranjan Pandey, for the petitioners.

Naman Nagrath, Addl. A.G. for the respondents No. 1 & 2.

Atulanand Awasthy with *R.P. Singh*, for the respondent No.3.

Piyush Bhatnagar, for the respondent No.4.

ORDER

The Order of the Court was delivered by :
AJIT SINGH, J. :- This order shall also dispose of Writ Petition Nos.6322, 6355, 4880, 4890, 10244, 3887 and 612, all of 2010. All these petitions were heard together because they relate to a common issue.

2. There is an old fruit and vegetable market known as “Nav Bahar Sabji Mandi” since last 20/25 years in the city of Bhopal. The Sabji Mandi is, in fact, situated in the heart of city. With the passage of time, the population of the city has increased manifold. This has resulted into huge congestion and lack of space for fruit and vegetable traders in the Sabji Mandi. The State Government therefore, taking note of the difficulties of such traders, by notification dated 9.11.2000 issued under section 3 of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (in short, “the Adhiniyam”) for the first time established a new market yard for fruit and vegetable traders having 56 acres of land at a place called Karond in Bhopal. On 22.12.2006 the Krishi Upaj Mandi, Bhopal (in short, “the Mandi Bhopal”) also for the first time prescribed the rates for different fruits and vegetables. Thereafter, on 27.2.2007 a list of allotment of land and structures, by way of auction, was issued. But the auction, which was scheduled for 6th, 7th and 8th of September 2007, for some reason could not be held.

3. In the year 2007 the land and structures of the market committee, constituted under section 11 of the Adhiniyam, were required to be allotted in accordance with the provisions of the Madhya Pradesh Krishi Upaj Mandi (Allotment of Land and Structures of Marketing Committee/Board) Rules, 2007. The State Government however, in exercise of powers conferred by section 79 of the Adhiniyam, by notification dated 25.5.2009 repealed the Rules of 2007 and framed new Madhya Pradesh Krishi Upaj Mandi (Allotment of Land and Structures) Rules, 2009 (in short, “the Rules”). Rule 3 of the Rules enumerates the general principles of allotment of land and structures of marketing committee. Its sub-rule (1) states that no land or structure of a market committee shall be allotted except the manner as provided in these rules. According to sub-rule (2) the land or structure shall be allotted only for a purpose which is conducive to marketing of agricultural produce or desirable for the convenience of agriculturists or for a purpose ancillary thereto. Sub-rule (3) states that allotment of land or structures shall be made on ‘licence’ generally for a period of 30 years and not on lease while sub-rule (4) provides that no person shall be allotted more than one plot or structure. According to

sub-rule (5) allotment of land or structure for a shop-cum-godown or a godown shall be made only to a person who holds a licence, as the case may be, as a trader/processor or warehouseman under the Adhiniyam. Sub-rule (6) very clearly states that the system of auction or invitation of offers in sealed covers/envelops shall be followed for allotment of land or structure meaning thereby that the allotment of land or structure can be made only by auction or by invitation of offers in sealed covers/envelopes. Sub-rule (7) is in two parts (a) and (b). The first part 7(a) states that in the event of transfer of market yard to a new market yard, traders, who possess licence under the Adhiniyam, who are allottees of land or structure in the old premises and are continuously trading for five years, prior to the date of auction, shall be given preference for allotment of plot or structure in the first auction and in the event of subsequent auction, all licensee traders shall be allowed to participate. The second part 7(b) provides that in the event of establishment of market yard for the first time after notification or establishment of a section of yard for the purpose of marketing of any specified produce, preference will be given for allotment of plot or structure in the auction to such traders who are licensee under the Adhiniyam and who have been engaged in the previous years for trading of that specified produce.

4. On 5.1.2010 and 18.1.2010 auction for allotment of lands at the newly established market yard Karond was held in which 2771 fruit and vegetable traders, who were licensees, participated and out of them 2027 were allotted the lands. Thus, now 744 such traders have been left without allotment. The offset price of the land in the auction was fixed at Rs.251/- per square feet and the offers received were from Rs.280/- to Rs.1820/- per square ft.

5. The petitioners, who are fruit and vegetable traders in the Nav Bahar Sabji Mandi, were opposed to the auctioning of lands at the market yard Karond from the very beginning. Some of them, therefore, did not participate in the auction proceedings. And some who participated could not succeed in the allotment of lands in their favour. Aggrieved, they have filed the present petitions challenging the validity of the entire auction proceedings held on 5.1.2010 and 18.1.2010 and also the vires of sub-rule (7) of Rule 3 of the Rules.

6. It is argued on behalf of the petitioners that as they have been operating from Nav Bahar Sabji Mandi, they have preferential right over allotment of lands in the newly established market yard and therefore the auctioning of such lands, by merely allowing them to compete with the outsiders in open

· auction, is illegal, arbitrary and unreasonable. According to the petitioners the auctioning of lands, by keeping the auction open to all licensees without giving preference to the traders from Nav Bahar Sabji Mandi who were being shifted to the market yard Karond, is improper. The petitioners have also argued that action of the State Government and of the Mandi Bhopal amounts to depriving them to carry on their trade which is violative of their right guaranteed under Article 19 of the Constitution of India. The petitioners have further submitted that since, despite of being old traders, they have not been given preferential treatment, there is violation of Article 14 also. The petitioners, in support of their submission, have placed reliance on the decision of the Supreme Court in *Labha Ram And Sons v. State of Punjab* (1998) 5 SCC 207 wherein it is held that Government has inherent obligation to provide sufficient accommodation to all the existing licensed dealers having regard to the handicaps they suffer due to creation of new marketing complex and that the obligation is not discharged by merely allowing them to compete with the outsiders in open auction. According to the petitioners, sub-rule (7)(a) and (b) of Rule 3 of the Rules is, therefore, ultra vires the Constitution.

7. The State Government, in reply, has defended the validity of sub-rule (7)(a) and (b) of the Rules and also the allotment of lands by auction to the fruit and vegetable traders having licence at the newly established market yard. The State Government in the return has denied that petitioners will be deprived of their source of livelihood in the event of lands not being allotted to them at the newly established market yard because they can still carry on their present business as petty traders in the same Nav Bahar Sabji Mandi in view of section 6 (iii) of the Adhiniyam. According to the State Government, in the newly established market yard, allottees of land are entitled for doing marketing of bulk agriculture produce from where the petty traders can purchase agriculture produce and thereafter sell the same at other places and therefore the petitioners, who are petty traders, are entitled to carry on their business as before. Interestingly, the State Government has also relied upon the decision of *Labha Ram And Sons* (supra).

8. The Mandi Bhopal has adopted the submissions of the State Government and defended its action of allotment of lands by auction. Pursuant to the direction of the High Court, Secretary of the Mandi Bhopal also filed an affidavit on 9.7.2010 stating therein that the committee has taken a decision to develop 12.30 acre of land of the newly established market yard and allot the same to the remaining 744 licence traders by auction. The Secretary has

further stated that for the licensee traders, who could not participate in the auction proceedings due to their weak financial condition and the traders who are below poverty line, the Mandi Bhopal has already constructed three platforms having sheds and 12 similar platforms were under construction which will be allotted to them by auction. The Municipal Corporation, Bhopal, has also adopted the submissions of the State Government.

9. The vires of sub-rule (7) of Rule 3 of the Rules, which has been challenged, reads as under:

“3. General principles of allotment.-

(1) xxxxxx

(2) xxxxxx

(3) xxxxxx

(4) xxxxxx

(5) xxxxxx

(6) xxxxxx

(7) (a) In the event of transfer of market yard to a new market yard, traders, who possess licence under Section 32 of the Act, who are allottees of land or structure in the old premises and are continuously trading for five years, prior to the date of auction, shall be given *preference* for allotment of plot or structure in the first auction. However, all licensee traders shall be allowed to participate in the subsequent auction.

(7)(b) In the event of establishment of market yard for the first time after notification or establishment of a Section of yard for the purpose of marketing of any specified produce, *preference* will be given for allotment of plot or structure in the auction to such traders who are licensee under Section 32 of the Act and who have been engaged in the previous years for trading of that specified produce.”

10. The legislative competence of the State Legislature to make the Rules is not denied by the petitioners. We shall, therefore, examine whether the above quoted sub-rule (7) is so arbitrary that it cannot be said to be in conformity with Article 14 of the Constitution or that it is violative of Article

19 of the Constitution or it is contrary to the decision of the Supreme Court in the case of *Labha Ram* (Supra).

11. In the case of *Labha Ram* the State Government had declared a new Mandi where it allotted plots by auction without providing any concession for the existing traders despite they being badly affected by the establishment of new market. The Supreme Court, without disturbing the power of the State Government to sell plots by auction, remanded the matter with a direction to provide preference to the existing traders in the matter of allotment. The Supreme Court, while so directing, also took care by not suggesting that the Government should give preference to such traders by providing free allotment of plots or to fix a rate below the reserved price and left it open to the Government to fix reasonable rate above the reserved price.

12. We have already seen above that for the allotment of land under the Rules, only system of auction or invitation for offers in sealed covers is followed and in both sub-rule (7)(a) and sub-rule (7)(b) of Rule 3 of the Rules care has been taken to give preference in the auction of land to genuine old allottees or traders, as the case may be. Sub-rule (7)(a) of Rule 3 of the Rules deals with a situation when there is a transfer of market yard to a new market yard. In such an event, the sub-rule clearly provides that the traders who possess licence under the Adhiniyam, who are allottees of land or structure in the old premises and are continuously trading for five years prior to the date of auction, shall be given preference for allotment of land in the first auction but all licensee traders shall be allowed to participate in the subsequent auction. Subrule (7)(b) deals with a different situation i.e. when there is a establishment of market yard for the first time after notification or establishment of a section of yard for the purpose of marketing of any specified produce. This sub-rule also clearly provides that preference will be given for allotment of land or structure in the auction to such traders who are licensee under the Adhiniyam and who have been engaged in the previous years for trading of that specified produce. The object of the sub-rule is to protect the existence of genuine licensee traders by giving due preference and also to prevent favoritism or nepotism to traders in the allotment of lands to them. The sub-rule is, therefore, neither arbitrary nor contrary to the decision of the Supreme Court in *Labha Ram* case.

13. In the present case, market yard at Karond for fruit and vegetable trade has been established for the first time. Allotment of lands at the newly established market yard to the fruit and vegetable traders by giving preference

in the auction to the traders of the same trade has already been made. The petitioners have not alleged favoritism or nepotism in such allotment to the traders. The petitioners were admittedly carrying the trade of fruit and vegetable in the market area which has not been notified under the Adhiniyam. They have also not denied the contention of the State Government as well as of the Mandi Bhopal that they can continue to sell fruit and vegetable as petty traders from the same Nav Bahar Sabji Mandi. Thus, it cannot be held that their right under Article 19 of the Constitution has been violated.

14. For these reasons, we also find the allotment of lands by auction at the newly established market yard Karond to the fruit and vegetable traders, who have been engaged in the previous years of trading of that specified produce, is legal and proper.

15. In the result, the petitions fail and are dismissed. However, no order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 934

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 1055/2004 (Gwalior) decided on 1 March, 2012

VISHWANATH LAHARIA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 – Doctrine of Relation Back – Punishment imposed by Disciplinary Authority is substituted/modified by Appellate Authority – Substituted punishment will relate back to the date of original punishment.

(Para 6 to 8)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – रिलेशन बैक का सिद्धांत – अनुशासनिक प्राधिकारी द्वारा अधिरोपित शास्ति, अपीलीय प्राधिकारी द्वारा प्रतिस्थापित/उपांतरित – प्रतिस्थापित शास्ति, मूल शास्ति के दिनांक के साथ पूर्व संबंधित होगी।

Cases referred :

(2011) 5 SCC 142, (1997) 6 SCC 159.

D.S. Raghuvanshi, for the petitioner.

Praveen Newaskar, Dy. G.A. for the respondents/State.

ORDER

SUJOY PAUL, J. -In this petition filed under Article 226 of the Constitution petitioner has assailed the action of the respondents in not promoting him on the post of Assistant Director from 28.02.2004 when other similarly situated persons were promoted vide Annexure P/4. Brief facts necessary for adjudication of this matter are as follow:-

(i) Petitioner was served with a charge sheet on 17.03.1986. By the punishment order dated 22.08.1988 (Annexure P/1) petitioner was inflicted with various punishments, which are as under:-

- (i) Stoppage of two increments with cumulative effect.
- (ii) Debarred from promotion for six years.
- (iii) Recovery of Rs.2600/-
- (iv) Recover of Rs.220/-
- (v) Claim for travelling allowance was rejected.

2. The petitioner preferred an appeal before the appellate authority and that appeal was not decided. He then preferred O.A No.02/2002 and it was disposed of by directing the appellate authority to decide the appeal within a period of three months. In turn, the appellate authority passed an order dated 24.10.2002 (Annexure P/3) whereby punishment imposed by the disciplinary authority was modified as under:-

- (i) For charge No.1 stoppage of two annual increments with cumulative effect.
- (ii) Recovery of Rs.2820/-and
- (iii) Rejected the claim of travelling allowance.

3. Shri Raghuvanshi submits that modification of the punishment will take effect from the date of original punishment order i.e 22.08. 1988, however, his case has not been considered by the DPC for next promotion when it took place pursuant to which promotion order Annexure P/4 was passed whereby his statutory, fundamental right of promotion is infringed and is taken away.

4. In turn, Shri Newaskar, learned Deputy Government Advocate submits that the punishment is to be counted from the date of passing of the appellate order i.e 24.10.2002 and not to be counted from the date of original punishment order and when DPC met i.e 31.01.2004, petitioner was undergoing aforesaid punishment imposed by the appellate authority. In such circumstances, petitioner is not entitled for any relief.

5. I have considered the rival contention of the parties and perused the record.

6. The singular question to be decided in this matter is what would be the effect of the appellate order on the date when DPC met i.e 31.01.2004. As per M.P. C.S (CCA) Rules 1966, the appellate authority is empowered to set aside, modify, reduce or enhance the punishment order. For the purpose of enhancing punishment order, appellate authority is obliged to hear the delinquent employee before taking any adverse action. The appellate authority is also empowered to annul, modify or cancel the punishment order passed by the disciplinary authority. The appellate order in this case shows that the appellate authority after due application of mind has substituted the punishment, which was imposed by the disciplinary authority. Thus, modification so imposed by the appellate authority will relate back to the date of imposition of original punishment order dated 22.08.1988. This view is recently taken by the Supreme Court in the case of *Chairman-Cum-Managing Director, Coal India Limited and Others Vs. Ananta Saha and Others* reported in (2011) 5 SCC 142.

7. In (1997) (6) 5CC 159 (*Punjab Dairy Development Corporation Ltd. And Another Vs. Kala Singh And Others*) the Supreme Court by the following the Constitutional Bench Judgement has held as under:-

"Following the judgement of the Constitution Bench, we hold that on the Labour Court's recording a finding that the domestic enquiry was defective and giving opportunity to adduce the evidence by the management and the workman and recording of the finding that the dismissal by the management was valid, it would relate back to the date of the original dismissal and not form the date of the judgment of the Labour Court."

8. Considering the above legal position, in the opinion of this Court, the

doctrine of relation back would apply in the present case and the substituted punishment imposed by the appellate order has to be counted from the date of the imposition of original punishment order. If it is counted from the original punishment order i.e 22.08.1988 the petitioner's punishment came to an end much before the date of DPC i.e 31.01.2004. Thus, on the date when the DPC met, petitioner was neither facing any disciplinary proceedings nor undergone punishment. No other ground is pressed by the learned Government Advocate to support their stand.

9. On the basis of the aforesaid factual back drop it is clear that petitioner's right of consideration is taken away and infringed by the respondents. Accordingly, it is directed to convene a review DPC and consider the case of the petitioner on the date of original DPC. If on such consideration petitioner is found entitled, he be promoted to the post of Assistant Director with all consequential benefits. The aforesaid exercise be completed within a period of four months.

With the aforesaid, petition is allowed.

No order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 937

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 4070/2006 (Jabalpur) decided on 19 March, 2012

MUKESH TIWARI

Vs.

STATE OF M.P. & ors.

...Petitioner

...Respondents

A. *Executive Instructions* – Statutory Rules can not be supplanted by Executive Instructions. (Para 10)

क. कार्यपालिक अनुदेश – कानूनी नियमों को कार्यपालिक अनुदेशों द्वारा प्रतिस्थापित नहीं किया जा सकता।

B. *Civil Services (Medical Attendance) Rules, M.P. 1958, Rule 4 – Medical Reimbursement – Capping* – Circular dated 15/20-3-2001 puts a capping on maximum amount to be disbursed towards medical reimbursement – Circular is contrary to Rule 4 and will not be

applicable as the same leads to supplanting of Rule 4 – Petitioner entitled for reimbursement of entire medical expenses.(Paras 11 & 12)

ख. सिविल सेवा (चिकित्सीय परिचर्या) नियम, म.प्र. 1958, नियम 4 – चिकित्सीय प्रतिपूर्ति – सीमा बांधना – परिपत्र दिनांक 15/20-3-2001 चिकित्सीय प्रतिपूर्ति की ओर वितरित होने वाली अधिकतम रकम की सीमा बांधता है – परिपत्र नियम 4 के विपरीत है और लागू नहीं होगा क्योंकि वह नियम 4 को प्रतिस्थापित करता है – याची संपूर्ण चिकित्सीय खर्चों की प्रतिपूर्ति के लिए हकदार।

Cases referred :

AIR 1975 SC 1116, 1980 (Supp) SC 524, (2004) 6 SCC 85.

A.P. Shroti, for the petitioner.

L. Joglekar, P.L. for the respondent/State.

ORDER

SANJAY YADAV, J. - Heard.

1. Being aggrieved by partial reimbursement of Medical expenses meted out by the petitioner for Coronary Artery By-Pass Surgery underwent at Escorts Hearts Hospital, New Delhi, present petition is filed seeking direction to respondents to make good the difference of amount paid and the amount reimbursed.

2. The petitioner an employee of School Education Department, Government of M. P. was detected of Coronary heart disease in May 2004. He was treated at Government MGM College, Indore, whereupon he was referred to Escorts Heart Hospital, New Delhi for Coronary Angiography and further treatment. The petitioner on the basis of referral certificate applied for permission from the Director, Public Instruction for treatment at Escorts Heart Hospital, New Delhi. The permission was duly accorded. Petitioner after preliminary treatment underwent surgery and was relieved on 8.6.2004. Petitioner had to incur Rs.2,19,473/- for the entire treatment. Thereafter, he applied for reimbursement of the said amount. The respondents instead of entire amount of Rs.2,19,473/-reimbursed only Rs.1,15,000/- on the anvil that it was the maximum amount which is reimbursable as per circular issued by the Medical Education Department No.F.18-58/2000/55/vish/1 dated 15/20-3-2001 for an open heart surgery.

3. The facts being not controverted, nor the entitlement of the petitioner for medical reimbursement having undergone surgery at Escorts Heart Hospital,

New Delhi, the question which arises for consideration is whether the petitioner is entitled for the reimbursement of entire amount spend to meet out the expenses of surgery or are the respondents justified in limiting the same as per circular dated 15/20-3-2001.

4. Medical attendance and treatment of Government servant is regulated by the Rules framed by Governor in exercise of powers conferred by proviso to Article 309 of the Constitution of India, viz., Madhya Pradesh Civil Services (Medical Attendance) Rules 1958 (hereinafter to be referred as Rules of 1958). Since it is not disputed, that the petitioner underwent treatment in the Hospital as per sanction by the Competent Authority. It is Rule 4 which is relevant in the context as to the entitlement of Government servant of medical reimbursement. Rule 4 stipulates-

"4(1)- A Government servant shall be entitled to treatment in a hospital free of charge. If any amount is paid by a Government servant on account of such treatment accommodation in hospital, diet or on any other account it shall be reimbursed to him in the manner and to the extent provided in these Rules.

(2)- The Medical Officer- in-charge of the Hospital may place the patients in any ward he consider appropriate.

5. The Rule as apparent entitles the Government Servant for the reimbursement of any amount paid by him on account of such treatment subject to the extent provided in the Rules of 1958. Rule 6 stipulates that a Government servant shall pay in the first instance bills, if any, preferred by the hospital authorities on account of medical attendance, treatment, room rent or diet or on any other account and may, thereafter, prefer claim for reimbursement in accordance with the Rules of 1958. Furthermore, Rule 7 makes a provision regarding expenditure incurred or purchase of drugs prescribed by the authorized attendant in full. Provisions appended with Rule 7 stipulates that-

"(1) If a Government servant submits medical reimbursement bills in respect of treatment of himself or any member of his family as an out-door patient exceeding Rs.250/- (Rupees two hundred fifty) per month for four times in a year or continuously for three months, the Controlling Authority shall seek second opinion of the Chief Medical And Health Officer and only on receipt of a favourable recommendation, shall pass

the medical reimbursement bill. In case of treatment by any Indian System of Medicines or Homeopathy second opinion of the Divisional Officer Ayurveda or District Ayurveda, Officer in-charge as the case may be, shall be, obtained instead of the Chief Medical and Health Officer.

(2) If, in a year, bills for medical reimbursement exceeding Rs. 3000/- (rupees three thousand) are received from a Government servant the controlling authority shall get, all such bills exceeding the said limit examined by the Medical Board consisting of the Divisional Joint Director of Health Services, Chief Medical Officer and Health Officer, Specialist of the Disease concerned Divisional Officer Ayurveda or District Ayurveda Officer incharge of the District, as the case may be and such bills shall be passed by the controlling authority only on the recommendations of the Board.

(3) If the Bills for medical reimbursement presented by a Government servant in a year exceed Rs. 5,000/- (rupees five thousand) then all such bills exceeding the above said limit shall be got scrutinized by a Board consisting of the Director Medical Services, Director of Medical Education, Director of Indian Systems of Medicine and Homeopathy and the controlling authority shall pass such bills in accordance with the recommendation of the said Board only.

6. These proviso however, are not applicable in respect of reimbursement bills relating to: (a) In-door patients; and (b) Patients suffering from such disease in respect of which the Chief Medical and Health Officer concerned has issued a certificate in the prescribed proforma to the effect that the treatment for the disease is required or likely to continue for a prolonged period.

7. Be that as it may. Except what is provided under Rule 7, no capping in respect of the reimbursement of expenses for treatment availed by a Government Servant in the hospital has been shown to be in the Rules. Except that by way of instructions circulated vide F 18-58/2000/55/vishi/1 dated 15/20-3-2001 by the Medical Education Department, providing the capping of medical reimbursement in case of Angiography of Rs.10,500/-, for Open Heart Surgery Rs. 1,15,000/- and for Kidney transplant Rs. 1,92,000/-. Clause 2 of said instruction stipulates that expenses above the aforesaid amount' shall

be borne by the Government servant.

8. The question is whether when Rules framed under Article 309 of the Constitution of India does not provide for a capping whether the operation of Rule 4 can be circumvented by way of executive instructions.

9. Trite it is that Rule made under the proviso of Article 309 of the Constitution of India are legislative in character [please see *Rajkumar v. Union of India and ors.*: AIR 1975 SC 1116 and *B. S. Yadav v. State of Haryana*: 1980 (Sup) SCC 524].

10. Equally settled it is that the statutory Rules cannot be supplanted by the executive instruction. In this context reference can be had of the decision in *T. N. Housing board v. N. Balasubramaniun* (2004) 6 SCC 85; wherein it was observed by their Lordships in-

"6. It is one thing to say that there exists no provision in the Regulations which would attract the rules specified, in Regulation 28(a) or the instructions and rulings thereunder, but it is another thing to say that the instructions if implemented cannot be given effect to having regard to the consequences provided for in the extent Regulations, still the same would be applicable. We have noticed hereinbefore that for Junior Engineers and Draftsmen eligibility criteria have been laid down. It is not in dispute that the said eligibility criteria are mandatory in nature and the validity thereof had not been questioned. If a Draftsman is to be promoted to the post of Assistant Executive Engineer, he must complete 15 years of service in the said capacity, whereas the Junior Engineer may have to complete only 10 years in the said post. Once the eligibility criteria are considered to be a pre-requisite for giving effect to the statutory Regulations, the purported executive instructions would not be applicable. Once it is held that relying on the basis of the executive instructions in terms of Regulation 28(a), the Draftsmen who have been getting higher salary are given preference over the diploma-holder junior Engineers, the eligibility criteria contained in the statutory Regulations would become otiose; the logical corollary thereof would be that the executive instructions would prevail over the statutory Regulations. Such a consequence would lead to an absurdity

and in that view of the matter it must be held that the executive instructions cannot be given effect to."

(emphasis supplied)

11. Therefore in the considered opinion of this court executive instruction dated 15/20-3-2001 which put a capping on a maximum amount which has to be disbursed towards medical reimbursement was contrary to Rule 4 (1) and (2) of the Rules of 1958 will not be applicable as the same leads to supplanting of Rule 4 of Rules 1958, if followed the operation of rules is restricted.

12. In view of above, petition is allowed. Respondents are directed to disburse the entire amount towards medical reimbursement as was claimed by the petitioner who underwent Coronary Artery By-Pass Surgery after adjusting the amount already paid.

13. Let the same be paid within a period of three months from the date of communication of this order.

The petition is allowed to the extent above.

Petition allowed.

I.L.R. [2012] M.P., 942

APPELLATE CIVIL

Before Mr. Justice J.K. Maheshwari

F.A. No. 788/2005 (Jabalpur) decided on 23 August, 2011

AGRAWAL MEDICAL AGENCIES (M/S)

...Appellant

Vs.

GOVIND PRASAD

...Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a), Evidence Act (1 of 1872), Section 114, General Clauses Act (10 of 1897), Section 27 – Demand Notice – Service – Notice was returned back with the note of postman that despite information defendant has not received the notice – Defendant has not disputed the address, as given in the notice – Held – The service of the notice sent on the correct address by registered post may be presumed to be effective service of the said notice – Trial Court erred in law in refusing the decree of eviction on account of non-service of demand notice.

(Para 10)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए), साक्ष्य अधिनियम (1872 का 1), धारा 114, साधारण खण्ड अधिनियम (1897 का 10), धारा 27 – मांग नोटिस – तामीली – नोटिस पोस्टमेन के इस टीप के साथ वापिस किया गया कि सूचना के बावजूद प्रतिवादी ने नोटिस स्वीकार नहीं किया – प्रतिवादी ने नोटिस में दिये गये पते को विवादित नहीं किया – अभिनिर्धारित – सही पते पर रजिस्टर्ड डाक द्वारा भेजी गये नोटिस की तामीली को उक्त नोटिस की प्रभावी तामीली होने की उपधारणा की जा सकती है – विचारण न्यायालय ने मांग नोटिस की ना-तामीली के कारण बेदखली की डिक्री से इंकार में विधि की मूल की।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a)–Arrears of Rent – As per lease deed the tenant had to pay 10% increased rent every after two years, w.e.f. 1st April, 1994 onwards – The period of the lease was for five years – No further renewal of the lease deed but the defendant continued in the shop as tenant as per said lease deed – Held – Term of the lease deed shall not cease its effect until changed or renewed.

The term and condition of the said lease shall operate till occupation of the shop by the tenant – The non renewal of the lease deed would not culminate the terms upon which the defendant was inducted as a tenant and occupying the premises – Once tenant enjoys the shop it can only be in the terms in which he was inducted – Mere non renewal of lease after the said period would not give up the right of landlord to enhance 10% rent after every two years as agreed by defendant. (Para 9)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) – किराया का बकाया – पट्टा विलेख के अनुसार किरायेदार को 1 अप्रैल, 1994 के बाद से प्रभावी रूप से प्रत्येक दो वर्ष पश्चात 10 प्रतिशत बढ़ाये गये भाड़े का भुगतान करना होगा – पट्टे की कालावधि 5 वर्षों के लिए थी – आगे पट्टा विलेख का नवीनीकरण नहीं परंतु उक्त पट्टा विलेख के अनुसार दुकान में प्रतिवादी की किरायेदारी जारी रही – अभिनिर्धारित – पट्टा विलेख की समयावधि अपना प्रभाव समाप्त नहीं करेगी जब तक कि वह बदली या नवीनीकृत न की जाये।

Cases referred :

(1992) 1 SCC 647, (1996) 7 SCC 523, (2007) 6 SCC 555, 2009 (1) MPHT 17(CG), (2004) SCC 380, ILR (2011) M.P. 1243, AIR 2011 SC 1940, 2006(1) MPLJ 445.

Dileep Pandey, for the appellant/plaintiff.

Vishal Dhagat, for the respondent/defendant.

J U D G M E N T

J.K. MAHESHWARI, J.:- Being aggrieved by the judgment and decree dated 21st April, 2005 passed by the 11th Additional District Judge, Bhopal in Civil Suit No.25-A/2002 decreeing the suit in part only for arrears of rent, the plaintiff has filed this appeal under Section 96 of the Code of Civil Procedure seeking decree of eviction and arrears @ 10% increase after every two year.

2. Plaintiff's case in brief is that plaintiff-appellant M/s. Agrawal Medical Agencies is a registered partnership firm, wherein Ashish Agrawal, Ramesh Agrawal, Shyamlal Ji Agrawal and Smt. Indira Bai Agrawal are the partners. The defendant is the tenant of M/s. Agrawal Medical Agencies of the Shop No.27, Jumerati, Bhopal according to the lease deed executed on 12.4.1993 at the rate of Rs.2500/- per month. As per the terms of lease deed after every consecutive two years rent may be enhanced @ 10%. It is further said that w.e.f. 1.4.1999 rent at the rate of Rs.3327/- is due against defendant which has not been paid up-to 31.8.2000, total thereof comes to Rs.26567.50. Even after notice of demand, rent was not paid, however Rs.19137/- fell further due till the date of filing the suit. Thus decree of eviction and arrears of rent by increased rate along with mesne profits was prayed for.

3. The defendant by filing his written statement denied the existence of the registered partnership firm. It is said that the firm is not a registered one and the suit has been filed by the person who is authorised by the unregistered firm which is not maintainable. The lease deed executed was only for the five years thereafter it has been non-operational against defendant. It is also said, on account of the loss in business and poor financial status defendant was assured by Mr.Ramesh Agrawal, one of the partner to firm, that the rent shall not be enhanced from Rs.3025/-, however the defendant is the tenant by the said rate from 1999, and the rent by the said rate has been deposited on 22.4.2000, however he is not in arrears thus the decree of eviction may be refused. It is also stated that advance rent of three months deposited by the defendant is with the plaintiff which has not been adjusted. The notice for payment of rent has not been served, therefore, the suit asking decree of eviction can not be decreed.

4. During course of hearing, not disputed facts are that the defendant is the tenant of Shop No. 27, Jumerati, Bhopal, as per the lease deed Ex.P-2. There is landlord-tenant relationship between them to the said shop w.e.f.

12.4.1993, and the period leased is for five years. The tenancy starts from 1st day of every English month and tenant has to pay the monthly rent of Rs.2,500/- and every after two year increase of rent shall be @ 10% till expiry of the period of lease i.e. five year.

5. On the pleading the trial Court has framed as many as 6 issues. Issue No.1 relates to service of the notice and payment of the rent within two months from the date of its service. While deciding Issue No. 2 the trial Court held that in terms of the lease deed Ex.P-2 tenancy was at the rate of Rs.2,500/- per month and after every two years 10% enhancement was agreed. The lease deed was not renewed and the period came to an end in 1998, On the said date rent was @ Rs.3,025/-. Due to non-renewal of lease, the plaintiff is not entitled to get 10% enhanced rate of rent after expiry of the period of five years w.e.f. 1st April, 1998. Issue No. 3 regarding assurance given by Ramesh Agrawal of not enhancing rate of rent from Rs.3025/- was not found prove in view of the pleadings in written statement and the evidence brought on record. Issue No. 4 relates to non-payment of arrears of rent from 31.8.2000 which is decided in favour of plaintiffs. The issue No.5 regarding service of notice of demand to pay rent from the date of the service and the effect of non-service. While deciding Issue Nos. 1,4 and 5 trial Court held that as per Rule 15 of M.P. Accommodation Control Rules, 1966 (in short the "Rules of 1966") service of the demand notice has not been made effective over the person and in absence of acknowledgment due, decree of eviction has been refused. It has further been held that the plaintiff is unable to prove that the rent to the tune of Rs.26,567.50 was due while the finding of non-payment of the remaining rent has been recorded, but because notice was not found serve, therefore, the decree of eviction has been denied granting the decree of arrears of rent only.

6. Shri Dileep Pandey, learned counsel appearing on behalf of the appellant-plaintiff contends that the notice Ex.P-3 for recovery of arrears of rent was sent by registered post as per receipt Ex.P-4 on the address 27, Jawahar Chowk, Jumerati, Bhopal. On 4.9.2000 the defendant was not found on the said address and on the next day i.e. 5.9.2000 it was informed to the postman that receiver is out of station, however, the intimation was given, On 11.9.2000 summons were returned to the Court with the report that even on intimation notice has not been received. In the said fact as per Section 114 (f) of the Evidence Act as well as Section 27 of the General Clauses Act presumption of service of the notice must be drawn against the defendant,

however, the trial Court committed an error to record the finding of not having service of the notice on the person in light of Rule 15 of Rules of 1966. In support of the said contention reliance has been placed on the judgments of *Jagdish Singh v. Natthu Singh*, (1992) 1 SCC 647, *State of M.P. v. Hiralal and others*, (1996) 7 SCC 523, *C.C. Alavi Haji v. Palapetty Muhammed and another*, (2007) 6 SCC 555 and *Thakumal (since deceased) through L.Rs. Mamtabai and others v. Chakradhar Rao Bhosle*, 2009 (1) M.P.H.T. 17 (CG). In view of law laid down in the said cases it is urged that the finding recorded by the trial Court is erroneous, however, the decree of eviction may be granted looking to the finding of non-payment of the arrears of rent recorded by the trial Court. Reliance has been placed on the judgment of the Apex Court in the case of *Jamnalal and others Vs. Radheshyam*, (2004) SCC 380 to submit that the arrears of rent and the future rent are two ingredients of Section 13(1) of the M.P. Accommodation Control Act, 1961 (in short 'the Act'). Further relying upon the judgment of this Court in the case of *Sabir Mohd. v. Maganlal*, I.L.R. (2011) M.P. 1243 it is submitted that after determination of provisional rent vide order dated 2.7.2003 the tenant has not deposited the arrears within the time of one month as required under section 13 (1) of the Act, therefore the decree of eviction under Section 12(1) (a) of the Act may be directed.

7. It is further contended that on the basis of lease deed (Ex.P12) tenancy is undisputed as per Clause 2 (g) of the lease deed, after every two years 10% rent is required to be enhanced, Such condition has not been changed, the trial Court has committed an error in not granting the decree as per the increased rate of rent and the finding as recorded to pay rent at the rate of Rs.3,025/- on account of the expiry of the period of lease is completely erroneous particularly when the terms of the lease deed are admitted and the defendant is continuously occupying the shop without any change of terms and conditions of the tenancy. In support of such contention reliance has been placed on the judgment of the Apex Court in the case of *Mohammad Ahmad & Anr. v. Atma Ram Chauhan and others*, AIR 2011 SC 1940 wherein the Apex Court laid down the principles for enhancement of the rent as per terms and conditions of the agreement or at least by 10%, after every three years, which shall be payable to the landlord. In the said judgment it has further been observed that if the prevalent market rent assessed and fixed between the parties is paid by the tenant then he may be allowed to enjoy or occupy the shop at least for a period of five years.

8. Per contra Shri Vishal Dhagat, learned counsel appearing on behalf of the respondent-defendant contends that the defendant has raised dispute regarding rate of rent, however, until and unless dispute under section 13 (2) of the Act is decided, decree for eviction under section 12(1)(a) of the Act cannot be directed. In the present case dispute under section 13 (2) of the Act is decided on 2.7.2003 fixing the provisional rent at the rate of Rs.3,025/- per month. Thereafter future rent has been paid by him regularly without any fault. It is fairly said that the arrears have been paid with some delay to which the application seeking condonation of the delay was filed. As the trial Court has not decided such application, therefore, by allowing such application delay, if any, in depositing the arrears may be condoned upholding the judgment and decree passed by the trial Court and the decree of eviction may be refused. In support of his submission reliance has been placed on the judgment of this Court in the case of *Ramgopal Kanhaiyalal v. Firm M/s. Dinanath Gyasilal*, 2006 (1) MPLJ 445 whereby this Court has held that time-barred rent is not required to be deposited and due to non-depositing of such rent decree under section 12 (1) (a) of the Act cannot be directed. In the said case it has been further held that if the notice has not been served by a person so authorised by the plaintiff and the suit is not instituted within the period of effectivity of the notice, decree of eviction cannot be directed.

9. After having heard learned counsel appearing on behalf of the parties and on perusal of the record, the tenancy of the defendant as per lease deed Ex.P-2 of the shop No.27, Jumerati, Bhopal is not in dispute. The said lease deed has been executed on 12th day of April, 1993. As per Clause. 2 (c) of the lease deed the defendant is required to pay monthly rent at the rate of Rs.2,500/- on or before 5th day of each English calendar month obtaining receipt. As per Clause 2 (g) the tenant shall pay 10% increased rent every after two years, and such increase shall be effective from 1st April, 1994 onwards. The period of the lease was for five years. Admittedly no further renewal of the lease deed is in between the parties but the defendant is continuing in the shop as tenant as per said lease deed, however, the term of the lease deed shall not cease its effect until changed or renewed, the term and condition of the said lease shall operate till occupation of the shop by the tenant. The non renewal of the lease deed would not culminate the terms upon which the defendant was inducted as a tenant and occupying the premises. Once tenant enjoys the shop it can only be in the terms in which he was inducted. Mere non renewal of lease after the said period would not give up

the right of landlord to enhance 10% rent after every two years as agreed by defendant. The guidance may be taken from the judgment of the Apex Court in the case of *Mohammad Ahmad* (supra) whereby the Apex Court has clarified that the tenant must enhance the rent according to the terms of the agreement or at least by 10 per cent, after every three years and enhanced rent should then be made payable to the landlord. In the present case as per terms of the agreement, the said enhancement would be applicable w.e.f. 1st April, 1994. In view of the foregoing discussion, the finding recorded by the trial Court that the rent only at the rate of Rs.3,025/- is recoverable on account of expiry of the period of the lease deed, is unsustainable in law.

10. It is seen from the record that on an application filed by the tenant under section 13 (2) of the Act, the provisional rent @ Rs.3025/- per month was fixed by the trial Court vide order dated 2.7.2003. Thus the dispute under section 13 (2) of the Act has been resolved by the trial Court. As per section 13 (1) of the Act after resolving the dispute, arrears of rent ought to be paid or deposited within one month and to pay rent regularly on or before 15th day of every month. The trial Court recorded a finding of non-payment of arrears of rent but the decree under section 12 (1) (a) of the Act has been refused because the notice of demand Ex.P-3 was not served on the defendant. In this respect record of the trial Court has been perused whereby notice for payment of the rent at the rate of Rs.3,327-50 w.e.f. April, 1999 onwards was sent vide Ex.P-3, by registered post on 2.9.2000 Ex.P-4. The said registered notice was sent on the address 27, Jawahar Chowk, Jumerati, Bhopal. The defendant has not disputed the said address and during trial various affidavits have been filed by him disclosing the same address. On 4.9.2000 defendant was not found on spot on 5.9.2000 it was reported that defendant is out of station, however intimation was given by Postman. On 11.9.2000 the notice was returned back with the note that despite information defendant has not received the notice. In this respect Section 114 of the Evidence Act, 1872 Illustration (f) is required to be quoted which is reproduced as under :-

"114. Court may presume existence of certain facts. - The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Illustrations

The court may presume--

(f) that the common course of business has been followed in particular case:

thereby it is apparent that the court in the common course of business may presume the existence of any fact which it thinks likely to have happened. The said presumption may be drawn looking to the common course of natural events, human conduct and course of business in relation to the facts of the particular case. As per Section 27 of the General Clauses Act which reads as under :-

"27. Meaning of service by post.- Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the express 'serve' or either of the express 'give' or 'sent' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

thus it is clear, the service of the notice sent on the correct address by registered post may be presumed to be effective service of the said notice. The Apex Court in the case of *Jagdish Singh (supra)*, *State of M.P. Vs. Hiralal (supra)* and *C.C. Alavi Haji (supra)* has held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. In the context of the said legal position looking to the fact of the present case despite intimation the defendant was not found available, however, by the said endorsement summons were returned to Court. In the present case the defendant has not disputed the address as given in the notice, more so he himself filed affidavits endorsing the said address. Rule 15 of the Rules of 1966 specifies the service of notice either by delivering it to the person or by forwarding it to the person by registered post with acknowledgment due. The present case relates to subsequent mode wherein by forwarding the notice to the person it has been

sent by registered post. After despatch how the service be presumed it has not been specified in the said Rules of 1966. How the service of notice sent by registered post be accepted has been specified in section 27 of the General Clauses Act and the presumption as enumerated under section 114 Illustration (f) of the Evidence Act. Thus the finding of not having service of demand notice on person, recorded by the trial Court in reference to Rule 15 of the Rules of 1966 is based on the misinterpretation and liable to be set aside. In the opinion of this Court looking to the facts of this case notice of demand of rent sent by the landlord was duly served on the tenant. Thus trial Court erred in law in refusing the decree of eviction on account of non-service of demand notice Ex.P-3. It is seen that the trial Court in paragraph 13 of the impugned judgment recorded the finding of non-payment of the arrears of rent, however, as per the judgment of the Apex Court *Jamnial and others* (supra) plaintiff is also entitled for decree under section 12 (1) (a) of the Act.

11. In addition to the same, on perusal of the record and looking to the statement of depositing rent filed by the defendant before the trial Court on 13.4.2005 it is clear that even after fixing provisional rent on 2.7.2003 future rent was deposited regularly but the arrears has not been deposited. As per said statement by receipt No.7 of Book No.9798 a sum of Rs.39,325/- was deposited on 2.1.2004. Similarly as per receipt No.60 of Book No.9865 Rs.33,025/- was deposited on 3.3.2004. As per requirement of Section 13 (1) of the Act amount of the arrears is required to be paid within one month from the date of service of the summon of Court. After fixing of provisional rent vide order dated 2.7.2003, the defendant became aware of the rate of rent and arrears, which has not been paid within due period as discussed above. As per record without depositing the arrears the defendant has filed an application before the trial Court on 7.9.2003 which was not pressed on 21.6.2004 and on the said date another application (I.A. No.1/2004) was filed and that remained undecided by the trial Court. Simultaneously, application under Section 13 (6) of the Act was filed by the plaintiff on account of non-depositing the arrears of rent which also remained undecided, but the trial Court after appreciation of the evidence granted decree of arrears of rent and not of the eviction. It is to be observed that the appellant has not filed any application before this Court seeking condonation of delay. In view of the foregoing it is apparent that even after fixing the provisional rent, the arrears thereof has not been deposited within the time twice and no plausible explanation showing bona fide is available on record. However, in the opinion

of this Court prayer seeking condonation of delay to pay the arrears of rent cannot be accepted. Thus in the facts of this case, plaintiff is entitled for a decree of eviction due to non-payment of arrears of rent under Section 12(1)(a) of the Act.

12. In the facts and circumstances of the case and in view of the discussion made herein above, the increase in rent @ 10% in terms of the agreement with effect from 1.4.1994 after every two consecutive years is required to be paid till vacation of the suit shop by the tenant. It is to be observed that the plaintiff is entitled for the legally recoverable arrears of rent as per the provisional rent fixed uptill passing the impugned judgment and decree. The plaintiff is held to be entitled for the increased rate of rent @ 10% after passing the impugned judgment and decree till vacation of the suit shop.

13. In view of the foregoing, the appeal filed by the appellant/plaintiff succeeds and is hereby allowed. The finding recorded in the impugned judgment and decree refusing the decree of eviction is hereby set aside and the plaintiff is held entitled for decree of eviction under Section 12(1)(a) of the Act. It is to be further held that the arrears of rent as per the provisional rent fixed by the Trial Court is payable by the defendant till passing the impugned judgment and decree and thereafter the plaintiff is further held entitled to recover the increased rate of rent @10% after every two consecutive years till vacation of the suit shop. The decree be drawn accordingly.

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

Appeal allowed.

I.L.R. [2012] M.P., 951

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 99/1999 (Indore) decided on 24 November, 2011

RAJESH

...Appellant

Vs.

KESHAR SINGH & ors.

...Respondents

A. *Hindu Law – Nature of property – Property in dispute originally belonged to father of the respondent No.1 which was subsequently partitioned between brothers after his death – Property*

falling to the share of respondent No. 1 would be self acquired property for all others except his male issue – Share allotted to respondent No.1 would still be a coparcenary property between him and the appellant though it may be his self acquired property for the others. (Para 12)

क. हिन्दू विधि – सम्पत्ति का स्वरूप – विवादित सम्पत्ति मूलतः प्रत्यर्थी क्रं. 1 के पिता की थी जिसका बाद में उसकी मृत्यु के पश्चात माईयों में बंटवारा किया गया – प्रत्यर्थी क्रं. 1 के हिस्से में आने वाली सम्पत्ति स्वयं अर्जित सम्पत्ति होगी सभी अन्य व्यक्तियों के लिए उसके पुत्र को छोड़कर – प्रत्यर्थी क्रं.1 को आवंटित हिस्सा अब भी उसके तथा अपीलार्थी के मध्य सहदायिकी सम्पत्ति होगी यद्यपि अन्य के लिये वह उसकी स्वयं अर्जित सम्पत्ति हो सकती है।

B. Hindu Succession Act (30 of 1956), Section 6 (Amended) – Share of Daughters – Daughter of a coparcener is also entitled for the same share which a son of coparcener is having in a coparcenary property – Section 16 of Hindu Marriage Act provides that children born out of void or voidable marriage shall be the legitimate children – Although the second marriage of respondent No.1 is void but the children out of such void marriage will be entitled for their share – Appellant entitled for 1/6th share in the property. (Para 13 and 14)

ख. हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 6 (संशोधित) – पुत्रियों का हिस्सा – सहदायिक सम्पत्ति में सहदायिक की पुत्री का भी उतने ही हिस्से का हक है जितना सहदायिक के पुत्र का है – हिन्दू विवाह अधिनियम की धारा 16 उपबंधित करती है कि शून्य या शून्यकरणीय विवाह से जन्मी संताने धर्मज संताने होगी – यद्यपि प्रत्यर्थी क्रं. 1 का द्वितीय विवाह शून्य है परन्तु ऐसे शून्य विवाह से जन्मी संताने अपने हिस्से के लिये हकदार होगी – अपीलार्थी सम्पत्ति में 1/6 भाग का हकदार।

J.B. Mehta, for the appellant.

None for the respondents No.1 & 2.

Pramod Mitha, G.A. for the respondent No.3/State.

J U D G M E N T

A.K. SHRIVASTAVA, J.:- This is plaintiff's second appeal against the judgment of reversal passed by learned First Appellate Court dismissing the suit.

2. The facts necessary for disposal of this appeal lie in narrow compass. Suffice it to say that plaintiff Rajesh filed a suit arraying his father Keshar

Singh and step-brother Babu as defendants no.1 and 2. Since the suit property is agricultural land, the State of M.P. has been arrayed as defendant no.3 in view of Order 1 Rule 3(B) CPC (State Amendment). The suit is for declaration of his share, partition and delivery of separate possession. According to plaintiff, the suit property which is agricultural land is ancestral property and because he is having 1/3rd share in the suit property, it be so declared and accordingly partition be effected by delivering possession of 1/3rd share to him.

3. The defendants no. 1 and 2 filed written statement and denied the plaint averments. According to the defendants, the suit property is not the property of HUF. Further it has been denied that plaintiff is the son of Keshar Singh. It has also been pleaded in the special plea that plaintiff's mother Sampat Bai is not the wife of Keshar Singh. In the written statement, it has been pleaded that defendant is having one son and two daughters born from the wedlock of Kanchan Bai and apart from these three children, Keshar Singh is not having any other son or daughter.

4. Learned Trial Court framed necessary issues and after recording evidence of the parties came to hold that Sampat Bai and Keshar Singh (defendant no.1) are the mother and father of plaintiff and Sampat Bai is the first wife of Keshar Singh. The learned Trial Court further came to hold that Mamta and Pankti are the daughters of Keshar Singh from second wife Kanchan Bai. The second defendant Babu alias Sanjay is also the son of Keshar Singh but from Kanchan Bai and both the wives of Keshar Singh are alive. The learned Trial Court hence found that plaintiff is having 1/5th share in the suit property and accordingly decreed the suit of plaintiff declaring him to be owner of 1/5th share and further passed a decree that he is entitled for separate possession.

5. The first and second defendants filed first appeal before learned First Appellate Court which has been allowed by the impugned judgment and the suit of plaintiff has been dismissed.

6. In this manner, this second appeal has been filed by appellant/plaintiff, which was admitted on 24.06.1999 on the following substantial question of law :-

"Whether the reasons given by the first appellate Court for dislodging the finding recorded by the trial Court are correct, proper and legal?"

7. The contention of Shri Mehta, learned counsel for the appellant is that learned First Appellate Court, contrary to law has come to the conclusion that suit property is solely owned by Keshar Singh and therefore during his life time, no partition can be effected. Learned counsel submits that suit property is ancestral property and therefore, the present suit for partition which has been filed by the plaintiff is maintainable and he is entitled to have 1/5th share and separate possession as directed by learned Trial Court. Hence, it has been prayed that by allowing this appeal, the impugned judgment and decree passed by learned First Appellate Court be set aside and that of learned Trial Court be restored.

8. Despite respondents no.1 and 2 were served, none has put appearance on their behalf.

9. Shri Pramod Meetha, learned government Advocate appears for respondent no.3 who is a formal respondent.

10. Having heard learned counsel for the appellant and after perusal of the record, I am of the view that this appeal deserves to be allowed in part.

Regarding Substantial Question of Law framed:-

11. On going through the findings recorded by learned First Appellate Court, this Court finds that in para 8 of the impugned judgment, it has been categorically held by learned First Appellate Court that the suit property was of Dariyao Singh who was the father of Keshar Singh (first defendant) and his brother Rameshwar. Learned First Appellate Court further came to hold that after the death of Dariyao Singh, a partition took place between Keshar Singh and Rameshwar and the suit property fell in the share of plaintiffs father Keshar Singh and accordingly it was mutated in the revenue record solely in his name. Hence, according to learned First Appellate Court, after partition, the suit property which fell in the share of plaintiffs father amounts to his self acquired property and therefore during the life time of plaintiffs father Keshar Singh (first defendant), the present suit for partition is not maintainable.

12. According to me, the approach of learned First Appellate Court is wholly unwarranted under the law and the impugned judgment is illegal. True, after the death of Dariyao Singh, a partition took place between Keshar Singh and his brother Rameshwar in which the suit property fell in the share of Keshar Singh. But, it will be his self acquired property for all others except his male issue. According to me, the share allotted to a coparcener after partition would

still be a coparcenary property between him and his male issue though it may be his self acquired property for the others. In this regard Article 221 (4) of Mulla's Hindu Law, 21st Edition, page 337 may be seen. Hence, the disputed property which was acquired by Keshar Singh in partition, still it will be a coparcenary property between him and his male issue. It is proved that plaintiff is the son of Keshar Singh.

13. The question now would arise what share appellant/plaintiff is entitled to. The finding of fact of learned two Courts below is that Sampat Bai who is the mother of plaintiff is the first legally wedded wife of defendant no.1 Keshar Singh and during the subsistence of first marriage, a second marriage has been solemnized by said Keshar Singh with Kanchan Bai from whom a male child namely Babu alias Sanjay (defendant no.2/ respondent no.2) and two daughters namely Mamta and Pankti were born. During the pendency of this appeal, Section 6 of Hindu Succession Act, 1956 has been amended by Hindu Succession (Amendment) Act, 2005 with effect from 09.09.2005. Under the amended Section 6 of the said Act, the devolution of interest in coparcenary property is altogether different because under this provision, daughter of a coparcener is also entitled for the same share which a son of coparcener is having in a coparcenary property. Although a proviso has been enacted by the Legislature that nothing contained in sub-section (1) of Section 6 of the said Act shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20.12.2004. Since this proviso is not coming in the way to this case, therefore, the two daughters of Keshar Singh (defendant no.1) namely Mamta and Pankti are also entitled for the same share in the coparcenary property. These daughters are born from the wedlock of Keshar Singh and Kanchan Bai. Under Section 16 of the Hindu Marriage Act, 1955, the children born from the void or voidable marriage shall be the legitimate children and thus second defendant Babu and the daughters of Keshar Singh namely Mamta and Pankti being the children of first defendant Keshar Singh from second wife Kanchan Bai shall be his legitimate children. Although the second marriage of first defendant Keshar Singh is void because during the subsistence of his first marriage, he solemnized second marriage with Kanchan Bai. In that regard, Sections 5 (i) and 11 of Hindu Marriage Act, 1955 may be seen. The first legally wedded wife of defendant Keshar Singh namely Sampat Bai who is the mother of plaintiff is still alive.

14. On scanning the entire gamut, the picture which is formed is that the

suit property is the coparcenary property of first defendant Keshar Singh in which plaintiff Rajesh, his mother Samspat Bai (first wife of Keshar Singh), defendant no.1 Keshar Singh himself, second defendant Babu alias Sanjay and two daughters namely Mamta and Pankti born from the second wife Kanchan Bai are entitled for equal share. Thus, in this manner, the plaintiff is having 1/6th share in the entire suit property.

15. The impugned judgment of learned First Appellate Court runs contrary to this well settled principle of law, hence it cannot be allowed to remain stand. Accordingly, it is hereby held that the suit property is coparcenary property of plaintiff and he is entitled to 1/6th share.

16. The substantial question of law is thus answered that the impugned judgment of learned First Appellate Court and its approach runs contrary to law and is based on mis-interpretation of law hence the same is not legal.

17. Resultantly, this appeal succeeds and is hereby allowed to the extent indicated herein above. The impugned judgment and decree passed by learned First Appellate Court is hereby set aside and the suit of plaintiff is decreed to the extent that he is entitled to 1/6th share in the suit property and is further entitled to have separate delivery of possession to that extent. Let a decree be drawn up accordingly.

18. Looking to the facts and circumstances of the case, parties are hereby directed to bear their own costs.

Appeal allowed.

I.L.R. [2012] M.P., 956

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 21/1999 (Indore) decided on 25 November, 2011

DITYA (DELETED) THROUGH L.Rs. & ors.

...Appellants

Vs.

KIDI & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Section 11 – Resjudicata – Between Parties under whom they or any of them claim litigating under same title - Appellants challenged the judgment on the ground that they were not party in the suit which was filed by the

respondent No.1 for declaration of title against their predecessor – Principles of Resjudicata is based on the principle that no man should be vexed twice over the same cause— As appellants are claiming through their predecessor, the judgment passed in former suit would operate as resjudicata. (Paras 10 & 11)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – पक्षकारों के मध्य जिनके अधीन वे या उनमें से कोई उसी स्वत्व/हक के अंतर्गत मुकदमा करते हुए दावा करते हैं – अपीलार्थीगण ने इस आधार पर निर्णय को चुनौती दी कि वे प्रत्यर्थी क्र. 1 द्वारा उनके पूर्वज के विरुद्ध हक की घोषणा के लिये प्रस्तुत किये गये वाद में पक्षकार नहीं थे – पूर्व न्याय के सिद्धांत इस सिद्धांत पर आधारित हैं कि किसी व्यक्ति को उसी वाद के लिये दोबारा तंग नहीं किया जाना चाहिये – चूंकि अपीलार्थीगण अपने पूर्वज के द्वारा दावा कर रहे हैं, पूर्ववर्ती वाद में पारित निर्णय पूर्व न्याय के रूप में प्रवर्तित होगा।

B. Civil Procedure Code (5 of 1908), Section 11 – Resjudicata — Erroneous or wrong Judgment – Court which decided the former suit was competent and having jurisdiction to decide the same – Erroneous or wrong judgment can always be challenged in superior court— Even a wrong judgment or judgment which is contrary to law is binding upon the party unless and until it is set aside in the appeal. (Para 12)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – त्रुटिपूर्ण या गलत निर्णय – न्यायालय जिसने पूर्ववर्ती वाद निर्णित किया वह सक्षम था और उसके पास उसे निर्णित करने की अधिकारिता थी – त्रुटिपूर्ण या गलत निर्णय को प्रवर न्यायालय में सदैव चुनौती दी जा सकती है – गलत निर्णय या विधि के विपरीत निर्णय भी पक्षकारों पर बाध्यकारी है जब तक कि उसे अपील में अपास्त नहीं किया जाता।

Cases referred :

AIR-1966 SC 1061, 1973 J.L.J 489.

S.N. Joshi, for the appellants.

M.L. Agrawal with Ravi Shukla for the respondents.

J U D G M E N T

A.K. SHRIVASTAVA, J. :- This appeal has been filed by the plaintiffs against the judgment of reversal.

2. A suit for declaration of Bhumiswami right, restoration of possession and cancellation of decree passed in Civil Suit No.16-A 1981 (Kidi vs. Bucha) dated 25.9.1982 by Civil Judge, Class-II, Jobat (hereinafter referred to as "the former suit") was filed by the plaintiffs long back on 4.9.1986 (more than 25 years ago) on the averments that they are the heirs of Bucha who was owning the disputed land, the description whereof has been mentioned in the plaint and which is the subject matter of the suit. According to the plaintiffs, Kidi (defendant No.2) filed a former suit against their predecessor Bucha arraying him as defendant in that suit on the averments that she is the owner of the suit property. In the aforesaid suit, the plaintiffs were not the parties and therefore, the decision passed in former suit is not binding upon them. As soon as they came to know about the passing of the aforesaid judgment they have filed the present suit. The plaintiffs have further pleaded that suit property was owned by Bucha in which second defendant Kidi was not having any right, title and interest and therefore, by decreeing the suit, the decree passed in former suit be set aside and by declaring the plaintiffs to be the Bhumiswami of the suit property, the possession be also restored to them.

3. The second defendant Kidi filed written-statement while other defendants filed their separate written-statement. However, in both the written-statements the averments made in the plaint were. denied and, inter-alia, a plea of res judicata was also raised. The defendants prayed that the suit be dismissed.

4. Learned Trial Court framed necessary issues and after recording the evidence of the parties decreed the suit of plaintiffs. However, in appeal filed by the defendants the judgment and decree passed by learned Trial Court was set aside and suit of plaintiffs was dismissed by the impugned judgment and decree.

5. In this manner this second appeal has been filed by the appellants (plaintiffs) in this Court which was admitted by this Court on 26.11.1999 on the following substantial question of law:

"Whether the courts below erred in not considering while deciding the dispute that the appellant and the respondent belong to Bheel Society and the daughter has her legal right or not for her share in father's property considering the legal weight of the evidence on record ?"

6. Vehemently it has been put forth by Shri S.N. Joshi, learned counsel

for the appellants that since the plaintiffs were not the parties in the earlier suit which was filed by second defendant Kidi against the predecessor of plaintiffs and further the said judgment was decreed in ex parte, therefore, when the plaintiffs came to know about the passing of the former judgment immediately the present suit has been filed by them. Learned counsel further submits that because the plaintiffs are the member of Scheduled Tribe community, therefore, provisions of the Hindu Succession Act, 1956 are not applicable on them and hence, Kidi (defendant No.2) who is the daughter of Bheema is not having any right, title and interest in the disputed property which was owned by her father Bheema and indeed, the plaintiffs' predecessor Bucha being the son of Bheema became the absolute owner of the suit property after the death of Bheema, and therefore, the judgment and decree passed in the former suit is ex facie erroneous and not in accordance with law. On these premised submissions it has been put forth by learned counsel that by allowing this appeal the impugned judgment be set aside and that of learned Trial Court be restored.

7. On the other hand, Shri M.L. Agrawal, learned senior counsel for the respondents/defendants argued in support of the impugned judgment and submitted that earlier Kidi, who has been arrayed as second defendant in the present suit, filed the former suit against plaintiffs' predecessor Bucha and in that suit Bucha filed written-statement, but, later on he did not appear, resultantly, an ex parte decree was passed against him and therefore, the present appellants/plaintiffs who are the heirs of Bucha and are claiming title through Bucha are bound by the decision passed in the former suit. Learned senior counsel submits that present suit is hit by the dictum of res judicata as envisaged under Section 11 CPC. Learned senior counsel further submits that if the decision passed in the former suit was not in accordance with law and was erroneous, even then also it will amount to resjudicata in this later suit and in this context he has placed heavy reliance on the decision of Supreme Court *State of West Bengal v. Hemant Kumar Bhattacharjee and others*, AIR 1966 SC 1061.

8. Having heard learned counsel for the parties I am of the view that this appeal deserves to be dismissed.

Regarding Substantial Question of Law framed:

9. Plaintiff No.4, Reslo is the widow of Bucha while plaintiffs 1 to 3 are

the sons of Bucha. Undisputedly, Kidi, second defendant of the present suit, had filed a former suit against her brother Bucha for declaration of the Bhumiswami right and restoration of possession in respect to the same suit property which is the subject matter of the present suit. The plaint of the former suit is Ex.D-2 and the written-statement filed by Bucha in that suit is Ex.D-5. Later on, Bucha did not appear in that suit and eventually the suit was decreed ex parte against him vide judgment delivered on 25.9.1982. Certified copy of the judgment of former suit is Ex.D-3 while the decree passed in that suit is Ex.D-4. The document dated 7.11.1987, Ex.D-6 is the certified copy of the execution proceedings arose from the ex parte judgment passed in the former suit and on bare perusal of the said proceedings this Court finds that the possession of the suit property was delivered to Kidi Bai (defendant No.2). Ex.D-7 is the Panchnama of the delivery of possession. Undisputedly, the suit property in the present suit is same.

10. I do not find any merit in the contention of the learned counsel for the appellants that because plaintiffs were not the party in the earlier suit and they were not aware of the passing of the judgment of former suit and therefore, the said judgment is not binding upon them. The said contention is in complete derogation to Section 11 CPC wherein the legislature has specifically enacted the law that no Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. According to me, the legislature has deliberately used the words "or between parties under whom they or any of them" in Section 11 CPC so that a person cannot be vexed twice for the same cause of action. If these words would not have been enacted in Section 11 CPC, after passing of a judgment in a civil suit, any of the heir of the party against whom a judgment has been passed may later on institute a second suit and in that situation the litigation would never attain finality. Therefore, it is being said that the principle of resjudicata is based upon public policy.

11. It be seen that Section 11 CPC is based partly on the maxim of Roman jurisprudence, "*Memo debet bis vexari pro una et eadem causa*", which would mean that no man should be vexed twice over the same cause. Hence, I am of the view that because the plaintiffs are claiming through their predecessor

Bucha, the judgment passed in former suit (Ex.D-3) would operate as *res judicata*.

12. I shall now deal with the second submission put forth by learned counsel for the appellants. Learned counsel vehemently submitted that the judgment passed in the former suit was wrong and was in complete derogation to Section 2(2) of the Hindu Succession Act. Several contentions have been put forth by learned counsel for the appellants in this regard, but, those contentions cannot be accepted for the simple reason that even if the judgment passed in the former suit was erroneous or wrong it cannot be a ground to file a fresh suit or the *res judicata* would not apply. In this context, rightly the decision of Supreme Court *Hemant Kumar (supra)* has been placed reliance by learned senior counsel for the respondents. I may further add that undisputedly the learned Court which decided the former suit was competent and having jurisdiction to decide the same. The Court may have wisdom to decide rightly or wrongly and even contrary to law, but, the said erroneous judgment or even a judgment which is contrary to the law can always be challenged in appeal before the superior Court. However, a fresh suit cannot be filed. A landmark decision in this regard of Single Bench of this Court in the case of *State of M.P. v. Mulamchand*, 1973 J.L.J. 489, may be taken note of which governs the field of this case and the submissions placed reliance by learned counsel for the appellants. According to me, even a wrong decision or the judgment which is contrary to the law is binding upon the party unless and until it is set aside in the appeal or the other remedy provided under the law. Thus, the second contention put forth by learned counsel for the appellants cannot be accepted.

13. The substantial question of law is thus answered that learned First Appellate Court did not err in not considering while deciding the dispute that the appellants and respondents belong to Bheel Society and daughter has her legal right or not for her share in father's property considering the legal weight and evidence on record, because the judgment passed in the former suit operates as *res judicata* on this point.

14. Resultantly, this appeal fails and is hereby dismissed with costs. Counsel fee according to the schedule, if pre-certified.

Appeal dismissed.

I.L.R. [2012] M.P., 962

APPELLATE CIVIL

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

F.A. No. 451/2003 (Indore) decided on 5 December, 2011

PRAKASHRAO

...Appellant

Vs.

SMT. JYOTI

...Respondent

A. Hindu Marriage Act (25 of 1955), Section 13(1)(a) – Cruelty – At some occasions some disputes taken place between the respondent and her husband or in laws on small household issues relating to day to day work – Such disputes are not unusual in the joint families – No inference of cruelty can be drawn on that basis. (Para 14)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ए) – क्रूरता – किसी अवसर पर प्रत्यर्थी तथा उसके पति या ससुराल वालों के बीच दैनिक कार्य से संबंधित घरेलू मामलों पर विवाद हुए – संयुक्त परिवारों में ऐसे विवाद होना असामान्य नहीं – इस आधार पर क्रूरता का निष्कर्ष नहीं निकाला जा सकता।

B. Hindu Marriage Act (25 of 1955), Section 13(1)(a) – Cruelty – complaint by the respondent under Section 498-A of the IPC – No case of the appellant that in pursuance to the said complaint, the appellant or his family members were arrested or kept in custody – Family members of the respondent themselves took initiative to compromise the matter and on the basis of the said compromise the criminal case came to an end – Making of the complaint would not amount to cruelty. (Para 16)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ए) – क्रूरता – प्रत्यर्थी द्वारा भा.द.सं. की धारा 498-ए के अंतर्गत शिकायत – अपीलार्थी का यह मामला नहीं कि उक्त शिकायत के अनुसरण में, अपीलार्थी या उसके परिवार के सदस्यों को गिरफ्तार किया गया या अभिरक्षा में रखा गया – प्रत्यर्थी के परिवार के सदस्यों ने स्वयं मामले में समझौते की पहल की और उक्त समझौते के आधार पर आपराधिक प्रकरण समाप्त हुआ – शिकायत करना क्रूरता की कोटि में नहीं आयेगा।

C. Hindu Marriage Act (25 of 1955), Section 13 – Divorce – Irretrievable breakdown of marriage – Respondent wanted to live with the appellant as wife – The reluctance is only on the part of the appellant husband – The irretrievable breakdown of marriage is not established. (Para 19)

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 – विवाह विच्छेद – विवाह की असाध्य विफलता – प्रत्यर्थी अपीलार्थी के साथ पत्नी के रूप में रहना चाहती थी – अनिच्छा केवल अपीलार्थी पति की ओर से है – विवाह का असाध्य रूप से विफल होना स्थापित नहीं होता।

Cases referred :

2007(4) MPLJ 123, 2009(1) MPWN 16, 2006(3) MPLJ 1, 2006(2) MPLJ, 2005(1) MPLJ 14, AIR 2001 SC 1709, 2003(2) MPLJ 489.

V.P. Saraf, for the appellant.

Sachin Subnis, for the respondent.

J U D G M E N T

The Order of the Court was delivered by :
PRAKASH SHRIVASTAVA, J.:- This first Appeal under Section 28 of the Hindu Marriage Act is at the instance of the husband challenging the judgement and decree 19th August, 2003 passed by the Court of Additional District Judge, Shujalpur, dismissing the case No. 2/2002.

2. The appellant had filed the application seeking divorce under Section 13 (1) (ia) of the Hindu Marriage Act, Pleading that his marriage with the respondent was solemnised on 21/2/2000. After 5-6 months of the marriage, the respondent had started creating disputes. She used to abuse and insult the parents of the appellant the appellant and. falsely tell her relatives that her in-laws were demanding dowry and torturing her. She had made a false report under Section 498-A of the IPC which had ended into compromise. One day she had started fighting on the old issues and had thrown *belan* on the appellant and had said that she would commit suicide and send her in-laws to jail. On these pleadings, a prayer for grant of decree of divorce on the ground of cruelty was made.

3. The respondent by filing the written statement had denied the allegations by stating that she had always tried to keep her husband and his family members happy, but they used to mistreat her for not bringing the adequate dowry and Rs.10,000/-, colour TV and cooler demanded by them. She further pleaded that since she was beaten by the appellant and his mother and the dowry was demanded, therefore, she had made a complaint to the police made a complaint to the police under section 498-A of the IPC which had ended into compromise in the presence of respectable members of the family. She had denied the allegation of insulting and mistreating her in-laws or abusing the appellant

and throwing Belan on him. She had also denied the allegation of extending threat to commit suicide and had categorically stated that she wanted to live with the appellant and perform her duty as wife.

4. The trial Court, by the impugned judgment dated 19/8/2003 has dismissed the application for divorce on reaching to the conclusion that the appellant had failed to establish the cruelty on the part of the respondent. The said finding has been arrived at by the trial Court after considering the evidence brought on record by the parties.

5. Learned counsel appearing for the appellant submitted that from the evidence on record, the cruelty on the part of the respondent wife is established. Therefore, the appellant is entitled for the decree of divorce under Section 13(1)(ia) of the Act. He further submitted that it is a case of irretrievable breakdown of marriage, thereafter in terms of the various judgment of the Supreme Court, the appellant is entitled to the decree on this ground also. In support of his submissions he has relied upon several judgments of this Court as well as the Supreme Court.

6. Learned counsel for the respondent has supported the judgment of the trial Court by submitting that from the evidence on record, the ground of cruelty is not established. He has also submitted that it is not a case of irretrievable breakdown of marriage and no decree on this ground can be granted in the facts of the present case. In support of his submissions he has also relied upon several judgments of this Court as well as the Supreme Court.

7. We have heard the learned counsel for parties and perused the record.

8. The issues which arises for consideration in this appeal are as under:-

- (1) Whether the appellant has successfully established the ground of cruelty entitling him for decree of divorce under Section 13(1)(ia) of the Act?
- (2) Whether ii. is a case of irretrievable breakdown of marriage?

Both the issues are interconnected, therefore, they are decided together.

9. The appellant in or Jer to prove the ground of cruelty had examined himself as PW.1. He has stated that the respondent used to abuse and humiliate his parents whereas the statement of PW.2 Kusum Deshmukh, mother of PW.1, shows that respondent used to treat her father-in-law like her father. The

incidents narrated by PW.1 in his statement are the usual frictions which take place in the matrimonial, life between husband and wife. The incidents of not bringing the drinking water for the guests, refusing to do the work of all the persons etc. are the small issues which would not constitute cruelty and even otherwise they are not supported by any independent evidence. The appellant has stated that the respondent used to abuse his sister and mother but the sister of the appellant has not been examined to prove it and PW. 2 Smt. Kusum Deshmukh, mother of the appellant has not supported it. He has stated about the incident of beating by respondent with Belan but the same is not only unsupported statement, but also seems improbable keeping in view the other evidence on record. The appellant himself has stated that after the incident he had met his parents but had not informed then about this incident which makes the version of the appellant doubtful.

10. PW.2 Smt. Kusum Deshmukh, the mother of the appellant has stated that the respondent used to tell lie in respect of the wiping of the floor of the house and used to cook extra food etc, but she has categorically stated that no hot talks ever took place between her and the respondent. Her statement only indicates that there were some differences and disputes on the small household issues which are normal and natural in any family. Her statement also indicates that the respondent used to treat the parents of the appellant with respect.

11. PW. 3 Praveen Onkarrao Deshmukh is the brother of the appellant but his statement is mainly a hearsay statement based upon the information received from other persons. The incident of putting less salt in breakfast cannot be termed as an act of cruelty.

12. PW.4 Mukesh Deshmukh is a friend of the appellant who has categorically stated that in his presence no dispute between the respondent and her in-laws had taken place and even otherwise he is not a reliable witness as he had given the affidavit in-chief as per the instructions of the appellant and his family members.

13. As against this, the respondent had examined herself -stating that her father-in-law is a simple and religious person and his behaviour towards her was good and that she had never insulted her father- in-law. Her statement indicates that the behaviour of the appellant and his mother towards the respondent was not proper, yet the respondent wants to live with the appellant since she is from a poor family and in the society to which she belongs, second marriage is not permissible. Statement of DW.3 Manoj Deshmukh, brother of

the respondent also indicates that the behaviour of the appellant and his family members towards the respondent was not good and that the respondent is from a poor family.

14. The above analysis indicates the witnesses of the appellant have failed to disclose the specific incidents which would amount to cruelty on the part of the respondent. From their statements it appears that at some occasions some disputes had taken place between the respondent and her husband or in-laws on small household issues relating to day today work, but such disputes are not unusual in the joint families and no inference of cruelty can be drawn on that basis.

15. It has further been argued before this Court that cruelty is also established from the fact that the respondent had lodged a false criminal case under Section 498-A of the IPC, resulting in harassment to the appellant and his family members.

16. The statement of the respondent shows that she had to file the case under Section 498-A of the IPC since the appellant and his family members were demanding dowry and were harassing her. It is not the case of the appellant that in pursuance to the said complaint, the appellant or his family members were arrested or kept in custody. The evidence on record also indicates that the family members of the respondent themselves had taken the initiative to compromise the matter and on the basis of the said compromise the criminal case had come to an end. Therefore, in such circumstances making of complaint by the respondent under Section 498-A of the IPC would not amount to cruelty.

17. Learned counsel for the appellant has placed reliance upon the judgment of this Court in the matter of *Anuradha Prafull Vaidh Vs. Prafull Vaidh* reported in 2007(4)MPLJ 123, but the said judgment is distinguishable on its own facts since in that case on the complaint under Section 498-A of the IPC the family members of the husband were sent to jail and parents were required to suffer incarceration for more than two years and their conviction was set aside by the Sessions Court giving benefit of doubt and there was reasonable apprehension in the mind of the husband that living together with the spouse was not possible, but the fact situation in the present case is different. Similarly the benefit of the judgment in the matter of *Vandana Gupta (Smt.) Vs. Ramesh Gupta* reported in 2009(1)MPWN 16 cannot be granted to the appellant since in that case the false allegation of demand of dowry,

misbehaviour with the parents of the husband, calling the husband impotent, threatening the husband to involve in criminal case were established, therefore, the Court held that the same would amount to cruelty, but in the case no such allegations have been proved which would amount to cruelty on the part of the respondent.

18. Learned counsel for appellant has also placed reliance upon the judgment of the Supreme Court in the matter of *Naveen Mohli Vs. Neelu Kohli* reported in 2006(3) MPLJ 1, wherein it has been held that the cruelty allegations largely depend upon the type of the life the parties are accustomed or their economic or social conditions or their cultural and human values and each case has to be decided on its own merit. We have already examined the entire circumstances of the case in the preceding paragraphs and have found that the appellant has failed to establish the cruelty on the part of the wife, therefore, this judgment is of no help.

19. The appellant has also advanced the plea of irretrievable breakdown of marriage but the facts of the present case are different. The marriage was solemnised only in 2000 and thereafter the parties had lived together peacefully for some time. The evidence indicates that the respondent is not living separately voluntarily, but the appellant is not allowing her to live with him. The respondent has taken a categorical stand before the trial Court as well as before this Court that she wanted to live with the appellant as wife. The reluctance is only on the part of the appellant husband. Thus, the irretrievable breakdown of marriage is not established.

20. Learned counsel for appellant has placed reliance upon the judgment of the Supreme Court in the matter of *Durga Prasanna Tripathy Vs Arundhati Tripathy* reported in 2006(2)MPLJ wherein complete irretrievable breakdown of marriage has been held since the parties had separated for last 14 years and there was no possibility of their resuming normal matrimonial life but in the present case since the wife is willing to live with the appellant and the allegation against wife are not of serious nature, therefore, the possibility of re-union of the parties cannot be ruled out.

21. The ground for irretrievable breakdown of marriage cannot be upheld also for the reason that the Supreme Court in the matter of *Shyam Sunder Kohli Vs. Sushma Kohli @ Satya Devi* reported in 2005 (1) MPLJ 14 has held that the Court only in extreme circumstances may use the ground of irretrievable breakdown of marriage for dissolving marriage. In the matter of

Chetan Dass Vs. Kamla Devi reported in AIR 2001 SC 1709 the Supreme Court has taken the view that the husband who commits wrong cannot be given an advantage of his own wrong and cannot be granted divorce on the ground of desertion on the part of his wife who is still prepared to live with him. In the matter of *Murarilal S/o Late Harprasad Vs Saraswati d/o Late Khuman W/o Murarilal* reported in 2003(2)MPLJ 489 this Court has taken the view that the husband having failed to prove cruelty on the part of the wife is not entitled to decree of divorce invoking the concept of irretrievable break down of marriage.

22. In view of the aforesaid analysis, we are of the considered opinion that the appellant has failed to establish the ground of cruelty as required under Section 13(1)(ia) of the Act and in the facts of the present case, irretrievable breakdown of marriage is also not proved. Thus, the trial Court has not committed any error in dismissing the suit for divorce filed by the appellant.

23. Accordingly, the appeal has no merit and the same is dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 968

APPELLATE CIVIL

Before Mr. Justice S.N. Aggarwal

S.A. No. 76/2002 (Gwalior) decided on 2 February, 2012

PHERANIYA & anr.

...Appellants

Vs.

MAUJILAL & ors.

...Respondents

Specific Relief Act (47 of 1963) – Suit for declaration – Suit for declaration of right in joint family property is maintainable without a separate prayer for consequential relief of possession – Bar of Section 34 of Act, 1963 not attracted. (Paras 4 & 5)

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47) – घोषणा के लिए वाद – संयुक्त कुटुम्ब सम्पत्ति में अधिकार की घोषणा के लिये वाद, कब्जे के परिणामिक अनुतोष हेतु पृथक प्रार्थना के बिना पोषणीय है – अधिनियम 1963 की धारा 34 का विबंध आकर्षित नहीं होता।

R.K. Upadhyaya & Sarvesh Sharma, for the appellants.

Prakhar Dhengula, for the respondents No. 2 & 3.

J U D G M E N T

S.N. AGGARWAL, J.:- This second appeal is by the defendants who have lost in both the courts below. They have preferred this appeal aggrieved by the impugned judgment of the two courts below declaring respondents No.2 and 3 owner of one fourth undivided share each in the suit property comprising of total area of 9.615 hectares forming part of several survey numbers in village Ghousa, Tahsil Kurwai, District Vidisha. The Courts below vide the impugned judgment and decree have also directed the revenue authorities to delete the names of the appellants from the khasra entries and in its place substitute the names of respondents No.2 and 3 as owner in respect of half undivided share in the suit property.

2. This appeal was admitted for final hearing by this Court vide its order dated 29th October, 2005 on the following substantial question of law:

“Whether the mere suit for declaration filed by the respondent plaintiff is maintainable without consequential relief in view of section 34 of the Specific Relief Act ?”

3. Briefly stated the facts of the case giving rise to this second appeal are that the respondents No.2 and 3 along with their late mother Kasturi Bai had filed a civil suit for declaration and mandatory injunction against the appellants as also against respondents No.4, 5 and 6. The declaration that was prayed by the respondents No. 2 and 3 in their suit against the appellants was that they be declared owner of one fourth undivided share each in respect of half undivided share in the suit property left by their late father Nirpatia at the time of his death in 1978. It was alleged by respondents No. 2 and 3 in their suit that the appellants have wrongly got the entire suit property mutated in their names with the revenue authorities and, therefore, a declaration was sought by them that they both are entitled to one fourth undivided share each in the suit property and a consequential prayer was made for direction to the revenue authorities to delete the names of the appellants and substitute their names to the extent of their share in the suit property. The suit as filed by respondents No. 2 and 3 against the appellants has been decreed by both the courts below in their favour. The appellants in their written statement had taken a preliminary objection to the maintainability of the suit on the ground that the suit as framed was not maintainable without making a prayer for consequential relief of possession. Issue No.6 was framed by the trial court on this objection to the maintainability of the suit taken by the appellants in their written statement.

This issue regarding maintainability of the suit was decided by the trial court as also by the first appellate court in favour of respondents No.2 and 3 as it was found that respondents No. 2 and 3 being the co-owner of the joint family property left by their late father were deemed to be in possession of the suit property and, therefore, they were not required to make a separate prayer for consequential relief of possession in the suit. This second appeal has been admitted for final hearing only on one substantial question of law as to whether the suit filed by respondents No.2 and 3 against the appellants was maintainable in the absence of prayer for consequential relief of possession in view of the provisions contained in section 34 of the Specific Relief Act, 1963 (for brevity, the "Act").

4. It is not disputed by Shri Upadhyaya, learned counsel appearing on behalf of the appellants that the suit property admeasuring 9.615 hectares forming part of several survey numbers in village Ghousa, Tahsil Kurwai, District Vidisha was jointly owned by the late father of respondents 2 and 3 as also by the late father of the appellants. The appellants are the first cousin of respondents No.2 and 3. It is also not disputed by the learned counsel appearing on behalf of the appellants that partition of the suit property had not taken place during the life time of late fathers of the parties to the suit. The character of the suit property admittedly was a joint family property. The need for respondents No. 2 and 3 to file a suit for declaration against the appellants arose because the appellants had wrongly got their half undivided share in the suit property mutated in their name and started claiming themselves to be the exclusive owner of the entire suit property. The plea of respondents No. 2 and 3 in their suit was that they had never relinquished their right in the suit property and, according to them, mutation of their share in the suit property by the appellants was wholly inappropriate and wrong. Section 34 of the Act entitles a person to seek declaration of status or right in the suit property. For the sake of convenience, section 34 of the Act is extracted below:

"34. Discretion of court as to declaration of status or right.-

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Provided that no court shall make any such declaration

where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so.

Explanation. - A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee."

5. The relief of declaration that may be granted by the court under section 34 is of discretionary in nature. However, the discretion that has to be exercised is a judicial discretion and has to be based on well settled principles. For granting a declaration as prayed for by the plaintiffs in the suit, the plaintiff must have a personal interest or right as distinguished from a mere chance or vague expectancy to get a share or interest in the suit property. The discretionary relief that can be granted under section 34 of the Act is based upon principles contained in legal maxim '*ex debito justitiae*'. However, there is a rider in the nature of proviso appended to section 34 of the Act and that provides that no court shall make a declaration contemplated by section 34 where the plaintiff omits to seek further relief than a mere declaration. The bar to the grant of relief contained in the proviso to section 34 would not apply to the facts of the present case because the respondents No. 2 and 3 who were the plaintiffs before the trial court admittedly had one fourth undivided share each in the suit property on the date of filing of the suit. As it was not disputed by the appellants that partition of the suit property had not taken place during the life time of their late fathers or even thereafter till filing of the suit, respondents No. 2 and 3 as also the appellants are deemed to be in constructive possession of the suit property and, therefore, the respondents No. 2 and 3 were not required to seek a separate relief of possession. Here, at this stage, it would be relevant to notice the provisions contained in Order VII Rule 7 C.P.C. which provides as under:

"7. Relief to be specifically stated.- Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

6. A bare perusal of the above statutory provisions contained in Order VII Rule 7 C.P.C. would show that it is within the realm of the plaintiffs to

formulate appropriate reliefs for them which may be necessary in a given factual matrix and they were not required to have necessarily prayed for relief of possession when they were satisfied by the declaration to be given by the court in their favour that they were the owner of one fourth undivided share each in the suit property. The decree of declaration granted by the courts below in favour of respondents No.2 and 3 to the effect that they had one fourth undivided share each in the suit property is based not only on admission of the appellants but also there is ample evidence on record of the trial court to support the said conclusion which cannot be faulted with in the present appeal. Both the courts below were absolutely right in their conclusion that respondents No. 2 and 3 were not required to claim separate relief of possession while seeking a declaration regarding their right in the suit property. They were in deemed possession of their share on the date of the suit.. This Court is of the considered view that it was the choice of respondents No. 2 and 3 being the plaintiffs in the suit to have simply made a prayer for declaration with consequential relief of mandatory injunction in the form of direction to the revenue authorities to delete the names of the appellants from khasra entires and to substitute their names to the extent of their shares in the suit property.

7. In view of the foregoing, the substantial question of law that was framed by this Court at the time of admission of the present appeal is thus answered against the appellants and in favour of respondents No. 1 and 2. This appeal is devoid of any merit and is, therefore, dismissed with costs throughout.

Appeal dismissed.

I.L.R. [2012] M.P., 972

APPELLATE CIVIL

Before Mr. Justice R.C. Mishra

M.A. No. 1751/2003 (Jabalpur) decided on 1 March, 2012

SULOCHANI (SMT.)

...Appellant

Vs.

SMT. JIWARANIYA & ors.

...Respondents

Coal Bearing Areas (Acquisition and Development) Act (20 of 1957), Section 14(8), 20, Civil Procedure Code (5 of 1908), Order 7 Rule 11 – Powers of Tribunal – All Powers of Civil Court under C.P.C. are not exercisable by Tribunal – Tribunal does not possess power under Order 7 Rule 11 C.P.C. – Tribunal can not reject the claim at threshold

on any of the grounds mentioned therein or dismiss a case for default of appearance of a party. (Para 3)

कोयला धारक क्षेत्र (अर्जन और विकास) अधिनियम (1957 का 20), धारा 14(8), 20, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 - अधिकरण की शक्तियां - सि.प्र.सं. के अंतर्गत सिविल न्यायालय की सभी शक्तियां अधिकरण द्वारा प्रयोज्य नहीं - अधिकरण के पास सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत शक्ति नहीं है - अधिकरण दावे को उसमें उल्लिखित किसी आधार पर आरंभ में ही अस्वीकार नहीं कर सकता या पक्षकार की अनुपस्थिति के व्यतिक्रम के लिए प्रकरण को खारिज नहीं किया जा सकता।

Case referred :

1981 MPLJ 46.

K.P. Mishra with Amresh Mishra, for the appellant.

Rajesh Dubey, for the Lrs. of respondent No.1 & respondents No.2 &3.

Anoop Nair & K. Rohan for the respondent No.4.

O R D E R

R.C. MISHRA, J. :- This appeal, under Section 20 of Coal Bearing Areas (Acquisition and Development) Act, 1957 (hereinafter referred to as the 'Act'), has been preferred against the order-dated 14.7.03 passed by the Tribunal (constituted under Section 14 of the Act) at Sidhi in Case No.1/ 2000, rejecting the claim petition preferred by the appellant for the following reasons -

- (i) The petition was barred by limitation.
- (ii) Even otherwise, the petition was not maintainable in absence of reference as to the quantum of compensation or the persons to whom it is payable.

2. By virtue of sub-section (8) of Section 14 of the Act, the Tribunal, in the proceedings before it, for determining compensation, has all the powers which a civil court has while trying a suit under the Code of Civil Procedure, for the purposes of -

- (i) summoning and enforcing the attendance of any person and examining him on oath;

- (ii) requiring the discovery and production of any document;
- (iii) reception of evidence on affidavits;
- (iv) requisitioning any public record from any court or office; and
- (v) issuing commissions for examination of witnesses.

3. Thus, all the powers of a Civil Court under the Code of Civil Procedure are not exercisable by the Tribunal. Obviously, the Tribunal does not possess the power, under Order 7 Rule 11 of the Code of Civil Procedure, to reject the claim at the threshold on any of the grounds mentioned therein or to dismiss a case for default of appearance of a party. (*Sheo Shankar Jaiswal v. Govt. of India* 1981 MPLJ 46 referred to).

4. Moreover, any provision prescribing limitation for filing claim petition would be inapplicable in view of the fact that no amount of compensation has been disbursed to the appellant.

5. For these reasons, the appeal is allowed and the impugned order is hereby set aside. The matter is remanded to the Tribunal for deciding the claim petition on merits, in accordance with law.

Appeal allowed.

I.L.R. [2012] M.P., 974

APPELLATE CIVIL

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain

F.A. No. 405/2011 (Jabalpur) decided on 6 March, 2012

OM PRAKASH TIWARY & ors.

...Appellants

Vs.

SMT. NEETU TIWARY

...Respondent

A. *Family Courts Act (66 of 1984), Sections 7, 8 & 24 – Suit for return of Stridhan – Suit for return of Stridhan without there being any relief as envisaged under Section 9,10 or 13 of Hindu Marriage Act is maintainable.* (Para 6)

क. कुटुम्ब न्यायालय अधिनियम (1984 का 66), धाराएँ 7, 8 व 24 –

स्त्रीधन वापसी हेतु वाद – स्त्रीधन वापसी हेतु वाद, बिना किसी अनुतोष के जैसा कि हिन्दू विवाह अधिनियम की धारा 9, 10 या 13 के अंतर्गत अनुज्ञात है, पोषणीय है।

B. Family Courts Act (66 of 1984), Sections 7, & 24 – Suit for return of Stridhan – Maintainability of suit against relatives of husband – Suit for return of stridhan filed against husband and in laws – Family Court has jurisdiction to consider the suit of the respondent in respect of return of stridhan and was not required to file two separate suits, i.e, one against her husband before Family Court and another before Ordinary Civil Court against her in-laws. (Para 11)

ख. कुटुम्ब न्यायालय अधिनियम (1984 का 66), धाराएँ 7 व 24 – स्त्रीधन वापसी हेतु वाद – पति के रिश्तेदारों के विरुद्ध वाद की पोषणीयता – पति एवं ससुरालवालों के विरुद्ध स्त्रीधन वापसी हेतु वाद – कुटुम्ब न्यायालय स्त्रीधन वापसी के संबंध में प्रत्यर्थी के दावे पर विचार करने की अधिकारिता प्राप्त है और दो पृथक वाद प्रस्तुत की जाना अपेक्षित नहीं था अर्थात् एक अपने पति के विरुद्ध कुटुम्ब न्यायालय के समक्ष और दूसरा अपने ससुरालवालों के विरुद्ध साधारण सिविल न्यायालय के समक्ष।

Cases referred :

AIR 2006 KERALA 187, AIR 1982 P&H 372, AIR 2003 SC 2525, AIR 2001 AP 169.

P.N.Pathak, for the appellants.

Suyash Tripathi, for the respondent.

ORDER

The Order of the Court was delivered by : **KRISHN KUMAR LAHOTI, J. :-** This appeal is directed against an order dt.2.5.2011 passed by the Family Court, Shadol in Civil Suit No.1 B/11 by which the Family Court rejected an application filed by the appellants under Order 7 Rule 11 C.P.C. for dismissal of the suit filed by the respondent against the appellant.

2- The contentions of the appellant before this Court are summarized as under:

(i) That, the suit u/s 7(i)(c) of the Family Courts Act, alone for refund of Stridhan could not have been filed as there was no relief prayed in the suit in respect of main relief as are envisaged

u/s 9, 10 and 13 of the Hindu Marriage Act, 1955. It was submitted that the return of the Stridhan could not have been granted by the Family Court. Suit between the husband and wife was not in respect of any relief as provided u/s 9, 10 and 13 of the Hindu Marriage Act, 1955. In support of this contention he had referred to section 27 of the Hindu Marriage Act, 1955.

(2) The suit filed against the appellants herein except appellant No.1 was not maintainable before the Family Court as the appellants No.2 to 7 do not fall within the category of "parties to a marriage". Placing reliance to the judgment of a Division Bench of Kerala High Court in AIR 2006 KERALA 187 (*Suprabha v. Sivaraman K.K. & anr*) and a Full Bench judgment of Punjab & Haryana High Court in AIR 1982 PUNJAB & HARYANA 372 (*Vinod Kumar Sethi and others Vs. State of Punjab* and another it was submitted by Sun Pathak that this appeal be allowed, the impugned order be set aside and suit filed by the respondent may be dismissed by allowing an application filed by the appellants under Order 7 Rule 11 C.P.C.

3- Shri Suyash Tripathi, learned counsel appearing for the plaintiff/respondent submitted that the suit was maintainable u/s 7(1) Explanation (c) of the Family Courts Act, 1984 as it was a suit in respect of property of the respondent and for this purpose no reliefs as are envisaged u/s 9, 10 and 13 of the Hindu Marriage Act, 1955 were required to be sought from the Family Court. It was also submitted that when the suit was filed against the husband and his family members for return of Stridhan, the Family court was having jurisdiction to hear and decide the suit in accordance with law. He has placed reliance to a judgment of the Apex Court in AIR 2003 SC 2525 (*K.A. Abdul Jaleel v. T.A. Shahida*), and para 7 of the judgment of the Keral High Court in *Suprabha V. Sivaraman K.K. & anr*, and submitted that this appeal may be dismissed.

4- To appreciate the rival contentions of the parties, it would be appropriate to state factual position of the case. Respondent Smt. Neetu Tiwary filed a suit before the Family Court Shahdol for return of Stridhan against the appellants. Appellant No.1 Om Prakash Tiwary is the husband of Smt. Neetu Tiwary while the appellant No.2 is the father-in-law and appellant No.5 is the mother-inlaw. Ramesh Tiwary and Ramayan Tiwary are brother of Om Prakash Tiwary, while Smt. Sunita Tiwary and Smt. Arti Tiwary are wives of Ramesh

Tiwary and Ramayan Tiwary respectively. The allegations in the plaint are that certain properties of which details are given in the plaint are her Stridhan which are in possession of the appellants and a decree be passed against the appellants for refund of the Stridhan or to pay Rs.11,09,241/- in lieu thereof. The suit was contested by the appellants by filing written statement. They had also filed an application under Order 7 Rule 11 C.P.C. to the effect that the suit was not maintainable in the Family Court as no reliefs, as are envisaged in sections 9, 10 and 13 of the Hindu Marriage Act, 1955 were claimed and until unless such reliefs are claimed, the property could not have been refunded to the plaintiff u/s 27 of the Hindu Marriage Act, 1955. It was submitted that claiming of main relief as are envisaged u/s 9, 10 and 13 of the Hindu Marriage Act, 1955 are sine quo non for filing of such suit and. until unless such suit is filed the plaintiff was not entitled to claim refund of the Stridhan.

5- To appreciate this contention the relevant provisions deserve to be examined. Section 9 of the Hindu Marriage Act, 1955 provides for a decree of restitution of conjugal rights, section 10 provides for a decree of judicial separation and section 13 provides for a decree of divorce. Sections 11 and 12 of the Hindu Marriage Act, 1955, define void and voidable marriages. Section 27 of the Hindu Marriage Act, 1955 provides disposal of property of the parties by the Court dealing with the petition u/s 9, 10 and 13 of the Hindu Marriage Act, 1955. The Court has power to make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife Meaning thereby that a court hearing a matter u/s 9, 10 and 13 has power to pass an order in respect of the property belonging to the parties to a marriage by way of disposal of the property at the time of decision of the suit.

Section 7(1)(a) and Explanation(c) of the Family Courts Act 1984 provides as under:

“7. Jurisdiction.-(1) Subject to the other provisions of this Act, a Family Court shall -

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b)

Explanation. - The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely

- (a)
- (b)
- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;”

Section 8 and 20 of the Family Courts Act deserves to be referred which read a under:

“8. Exclusion of jurisdiction and pending proceedings.- Where a Family Court has been established for any area,

(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established.

Shall stand transferred to such Family Court on the date on which it is established.”

“20. Act to have overriding effect.- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

6- Section 7(1) provides that the Family Court shall have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect to suits and proceedings of the nature referred to in the explanation. The Explanation provides that a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them shall be tried by the Family Court. Though a court dealing with petition u/s 9, 10 and 13 of the Hindu Marriage Act, 1955 have power u/s 27 to deal with such property, but, for refund of Stridhan an independent civil suit could have been filed by the respondent before the ordinary court of jurisdiction and jurisdiction could have been as per the valuation of the property, meaning thereby as per the valuation put by the respondent for refund of the property amounting to Rs.11,09,241/- a District Court was having jurisdiction to entertain the suit of the respondent. It is not disputed before us that for refund of Stridhan, the respondent was entitled to file a suit before the ordinary civil court. When an ordinary civil court could have examined the claim of the respondent then in the light of the provisions as contained in section 8 read with section 7 we have to examine whether the Family Court has exclusive jurisdiction or respondent could have filed the suit before the ordinary court of civil jurisdiction. Section 8(a) specifically provides that no district court or any subordinate court referred to in sub-section (1) of section 7 shall, in relation to such area, where a Family Court has been established, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section and the Family Court shall have the exclusive jurisdiction in the matter. Meaning thereby that section 8 of the Family Court emphasizes the nature of the suit which have been explained in sub-section (1) to section 7. When we read Explanation (c) it is apparent that the Explanation provides in respect of a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them. Meaning thereby that either of the parties to a marriage can file a suit or

proceeding before the Family Court; in respect of property of the parties. As per this Explanation, if the nature of the suit is in respect of the property of the parties to the marriage then under sub-section(a) to section 8 the Family Court was having jurisdiction to consider such suit. So, for the suit filed by the respondent, under sub-section(1)(a) of section 8, the Family Court was having exclusive jurisdiction, in respect of the area for which the Court was established.

7- Now we have to consider next contention of appellants that whether the suit could have been filed between the parties to a marriage alone or not. For this purpose when we examine the contents of the plaint, we find that it was suit filed by the respondent against all the appellants claiming that her Stridhan properties are with the appellants, meaning thereby that the court has to consider whether the properties are in possession of the appellants or either of them and in case Family Court arrives at a finding that the appellant No.1 or any of other appellants or all the appellants are in possession of the properties of the respondent then the Family Court could have passed a decree against all or any of them. For an example, if the plaintiff claims properties against her husband and from in-laws, then whether she is required to file two suits; one against her husband and another against her in-laws, meaning thereby that she has to split cause of action in this regard and for filing of suit against her husband she has to go before the Family Court u/s 7 and 8 of the Family Courts Act, 1984 and against her in-laws she is required to file suit before the ordinary court of civil jurisdiction. It will be contrary to the provisions as contained in Order 1 Rule 3 and Order 2 Rule 2 C.P.C. The aforesaid provisions specifically provides that the plaintiff cannot split cause of action and has to include the whole of the claim in one suit, meaning thereby the mandate of Order 2 Rule 2 read with Order 1 Rule 3 shall come into play in splitting the suit, the plaintiff is bound to file one suit against her husband and against her in-laws in such a situation when the suit is filed for recovery of Stridhan.

Now we have to examine whether it is to be filed before the Family Court or before the ordinary civil Court. Section 7 and 8 specifically provide that the Family Courts shall have exclusive jurisdiction in respect of the suit of the nature under sub-section (1) to section 7. In this provision, the emphasis is of the nature of suit and not the parties. When the suit is filed with respect of properties of the parties, who are parties to a marriage, the exclusive jurisdiction will be of family Court. Meaning thereby that the Family court shall have jurisdiction in respect of the property of the parties or of either of

them. The suit filed by the respondents was definitely maintainable before the Family Court.

8- The Apex Court in *K.A.Abdul Jaleel v. T.A. Shahida* considered this aspect, and held that. words “suit or proceeding between the parties to a marriage” cannot be read as “parties to subsisting marriage”. Suit, relating to property of spouse/spouses where divorce does not take place the Apex Court held that the statement of Objects Reasons, clearly go to show that the jurisdiction of the Family Court extends, inter alia, in relation to properties of spouses of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other : irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise. The jurisdiction of a Court created specifically for resolution of disputes of certain kinds should be construed liberally. The words “a suit or proceeding between the parties to a marriage” cannot therefore be read as parties to a subsisting marriage. The restricted meaning if ascribed to Expln. (c) appended to S.7 of the Act would frustrate the object wherefor the Family Court were set up. The dispute over properties between parties to a marriage cannot be confined to the parties to a subsisting marriage.

9- In *Suprabha v. Sivaraman K.K. & anr (supra)* a Division Bench of Kerala High Court considering the provision as contained in section 7 Explanation (c) held that the suit or proceeding must be between husband and wife with respect to property of parties or either of them and does not mean include all those who are interested in welfare of couple or those who take part to marriage ceremony. The Kerala High Court was considering the case when either husband or wife is not alive and suit is filed against parents of either of them, and in that perspective it was held that it cannot be said it is a suit or proceeding between parties to marriage, while the factual position in the present case is entirely different. It is a suit between the plaintiff Smt. Neetu Tiwary and against her husband Om Prakash Tiwary along with his family members.

10- In AIR 2001 ANDHRA PRADESH 169 (*P.Srihari v.Kum. P. Sukunda and another*), a Division Bench of Andhra Pradesh High Court was considering the disputes between the brothers, sisters, mother, father in respect of property and considering the aforesaid, it was held that such a suit was not maintainable before the Family Court while the present case is on different footing.

11- In view of the law laid down by the Apex Court and by interpreting

the provisions as contained u/s 7 and 8, there is no iota of doubt that the Family Court was having jurisdiction to consider the suit of the respondent in respect of return of Stridhan, and she was not required to file two separate suits, one against her husband in family Court and against in-laws before the ordinary civil Court. When a suit is filed against the husband and other family members for return of Stridhan then the claim could not have been split up by the plaintiff and all the persons against whom the plaintiff is claiming the return of Stridhan could have been sued in one suit and the Family Court was having jurisdiction to decide the suit even against the in-laws of the plaintiff, meaning thereby the suit which has been filed for return of Stridhan against the husband and his family members is maintainable before the Family Court.

12- So far as the judgment of Punjab & Haryana High Court, relied by the appellants in *Vinod Kumar Seth and ors. v. State of Punjab (supra)* is concerned, in the aforesaid case, the Full Bench was considering a case u/s 406 of the I.P.C. and held that what constitute Stridhan is to be decided by the Family Court. At this juncture, we are not considering the case on merits, but is deciding the objections raised by the defendants in respect of jurisdiction of the Family Court. Whether the property claimed by the respondent falls within the purview of Stridhan or the respondent is entitled for the aforesaid property, these questions are yet to be decided by the Family Court after hearing both the parties and in this regard it would not be appropriate for this Court to decide the aforesaid facts because these can be decided only after recording of evidence of the parties.

13- In view of the aforesaid, this appeal is found without merits and is dismissed with costs. Counsel fee Rs. 2, 000/-

Appeal dismissed.

I.L.R. [2012] M.P., 982

APPELLATE CIVIL

Before Mr. Justice R.C. Mishra

M.A. No. 3808/2011 (Jabalpur) decided on 6 March, 2012

JAGDISH SINGH ALIAS JAGDISH PRATAP SINGH ...Appellant

Vs.

MOHANLAL AGRAWAL & ors.

...Respondents

***Civil Procedure Code (5 of 1908), Order 39 Rule 1 and 2 –
Temporary Injunction – Plaintiff and Defendants claiming title over***

the disputed property on the basis of Wills in their favour – Circumstances surrounding execution of each one of the Wills are sufficient to raise a reasonable suspicion as to its genuineness – Facts of case clearly establishes existence of a substantial question to be investigated and consequent necessity to preserve status quo – Order of temporary injunction restraining appellant from alienating the property rightly granted – Appeal dismissed. (Paras 7 to 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – वादी एवं प्रतिवादी उनके पक्ष में वसीयतों के आधार पर विवादित सम्पत्ति पर हक का दावा कर रहे हैं – प्रत्येक वसीयत के निष्पादन से घिरी परिस्थितियाँ उनकी सत्यता के बारे में युक्तियुक्त संदेह उत्पन्न करने के लिये पर्याप्त हैं – प्रकरण के तथ्य, जांच योग्य सारवान प्रश्न का अस्तित्व और यथापूर्ण स्थिति बनाए रखने की परिणामिक आवश्यकता को स्पष्ट रूप से स्थापित करते हैं – अपीलार्थी को सम्पत्ति अन्य संक्रामित करने से अवरुद्ध करते हुए अस्थायी व्यादेश का आदेश उचित रूप से प्रदान किया गया – अपील खारिज।

Case referred :

AIR 2010 SC 3221.

Atul Anand Awasthy, for the appellant.

Sanjay K. Agrawal, for the respondent No.1.

Rajendra Singh, for the respondents No. 2, 3 & 4.

Rahul Jain, G.A. for the respondent No.5/State.

Alok Hoonga, for the interveners.

ORDER

R.C. MISHRA, J. - This appeal, under Order XLIII Rule 1(r) of the Code of Civil Procedure (for short 'the Code'), has been preferred against the order-dated 29/8/2011 passed by Second Additional District Judge, Rewa in Civil Suit No.11-A/08, whereby the appellant was restrained from getting any sale-deed concerning the suit lands registered and also from transferring or alienating the lands in any manner. Admittedly, the lands belonged to Smt. Aruna Kumari Singh, who died intestate on 3.2.2006.

2. The suit has been filed by respondent no.1 impleading the appellant and the other respondents as defendants, for declaration of title in respect of the lands and permanent injunction. It is based on a Will said to have been executed by Smt. Aruna Kumari in favour of the plaintiff on 6.1.2006. An application, under Order XXXIX Rule 1 and 2 read with Section 151 of the

Code, was also moved for grant of temporary injunction restraining defendant no.1, who is claiming title on the basis of another Will purported to have been executed by Smt. Aruna Kumari Singh only on 22/1/2006, from alienating or transferring the suit lands in favour of any one as well as from interfering with his possession on the lands.

3. While opposing the prayer, the appellant has asserted that the Will executed in his favour is genuine as he is related to Smt. Aruna Kumari as nephew of her husband whereas the respondent no.1 belongs to an altogether different caste. Reference has also been made to the fact that his name has already been recorded as Bhumiswami of the suit lands in the corresponding revenue records. According to him, being an old and sick person, he has executed a sale-deed on 10.8.2011 in pursuance of an agreement dated 1.8.2011 in favour of Neeraj Gupta, Mayank Kesharwani, Durgesh Pandey, Neeraj Pradhan, Gyanendra Shukla and Avin Sharma and has also handed over possession to them but, registration of the sale-deed has been deferred on a technical ground.

4. Learned counsel for the appellant has strenuously contended that the trial Court has committed serious error of jurisdiction in passing the impugned order as, on the facts as highlighted above, the rights of the plaintiff were sufficiently protected by the doctrine of *lis pendens* embodied in Section 52 of the Transfer of Property Act. He is further of the view that no specific additional ground for issuance of the temporary injunction is made out.

5. Learned counsel for the interveners has also endorsed the arguments raised by learned counsel for the appellant.

6. However, learned counsel for respondent no.1 has submitted that he has been able to make out a *prima facie* case and would suffer an irreparable loss, in case the appellant is permitted to alienate the lands.

7. Circumstances surrounding execution of each one of the Wills are sufficient to raise a reasonable suspicion as to its genuineness. Moreover, the appellant's conduct in transferring the entire lands within a short period of the death of Smt. Aruna Kumari, can also not be termed as natural and probable.

8. As rightly pointed out by learned Government Advocate, if none of the Wills is found to be valid, the State would take the lands by escheat.

9. To sum up, facts of the case clearly establish existence of a substantial question to be investigated and the consequent necessity to preserve *status*

quo. Accordingly, the positive findings on the points of *prima facie* case, balance of convenience and irreparable loss do not suffer from any apparent error or perversity. Further, it is well settled that interference with discretion exercised by the trial Court in granting temporary injunction should not be made only because a different opinion is possible (See. *Skyline Education Institute (Pvt.) Ltd. v. S. L. Vaswani* AIR 2010 SC 3221).

10. In the result, the appeal stands dismissed and the temporary injunction granted by the trial Court is hereby maintained. However, learned trial Judge is directed to expedite the trial of the suit.

Appeal dismissed.

I.L.R. [2012] M.P., 985

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 138/1995 (Jabalpur) decided on 15 March, 2012

ASHOK KUMAR

...Appellant

Vs.

KRISHNA CHAND & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Section 100 – Question of Fact – Courts should be slow in reversing the finding of fact – Finding of fact even if erroneous would not be disturbed unless the finding is shown to be perverse and based on surmises and conjectures. (Para 6)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – तथ्य का प्रश्न – तथ्य के निष्कर्ष को पलटने में न्यायालयों को सावधानी बरतनी चाहिए – तथ्य का निष्कर्ष यदि त्रुटिपूर्ण भी है तो उसे छेड़ना नहीं चाहिए जब तक कि निष्कर्ष को विकृत और संदेहों एवं अटकलों पर आधारित होना दर्शाया नहीं जाता।

B. Adverse Possession – Party pleading adverse possession has to plead the actual possession but has also to plead the period and date from which he claims the possession – It has to prove that possession was continuous, exclusive and undisturbed to the knowledge that he is the real owner of the land – Also required to demonstrate hostile title and has to communicate his hostility to the real owner. (Para 7)

ख. प्रतिकूल कब्जा – प्रतिकूल कब्जे का अभिवाक् करने वाले पक्षकार को वास्तविक कब्जे का अभिवाक् करना होता है किन्तु उसे अवधि और दिनांक का भी अभिवाक् करना होता है जबसे वह कब्जा होने का दावा करता है – उसे साबित करना होगा कि कब्जा उसकी जानकारी में अविरत, अनन्य और शांतिपूर्ण था कि वह

भूमि का वास्तविक स्वामी है - उसे प्रतिकूल हक भी दर्शाना आवश्यक है और अपनी प्रतिकूलता वास्तविक स्वामी को संसूचित करनी होगी।

Cases referred :

1930 PC 57(1), AIR 1980 SC 1109, (2002) 1 SCC 134, (2001) 4 SCC 262, (2006) 11 SCC 587, AIR 2000 SC 1485, AIR 1971 SC 996, 1992 MPJ 563, (2007) 1 SCC 546, (2004) 5 SCC 140, (2004) 5 SCC 762, (2009) 5 SCC 264, (2000) 7 SCC 409, (1999) 3 SCC 722, (2008) 3 SCC 120, (2007) 12 SCC 774, (2001) 7 SCC 189, (2010) 11 SCC 483, (2007) 3 SCC 569, AIR 1995 SC 895, (1994) 6 SCC 591.

R.P. Agrawal with *Kapil Jain*, for the appellant.

R.K. Verma, for the respondent No.1.

J U D G M E N T

ALOK ARADHE, J. - This appeal is preferred by the defendant No.1 who has suffered a decree of possession from both the Courts. This Court vide order dated 24.2.1995 while admitting the appeal had formulated the following substantial question of law:-

"Whether the plea of adverse possession raised by the appellant was rejected on erroneous assumption that there is no denial of title in the earlier suit between the parties?"

2. Facts giving rise to filing of the appeal, briefly stated, are that the father of the plaintiff, namely, Late Hukumchand was the owner of the house and the site comprised in Plot Nos.21/1, 21/2 and 19/2. As per the case set forth in the plaint, father of the plaintiff, inducted one Sitaram who is father of the defendants, as tenant some time in 1949-50 in respect of the house situate on Plot No.21/2 on a monthly rent of Rs.10/-. In 1968, the plaintiff filed a suit against the father of the defendants, namely, Civil Suit No.19-A/1968 for eviction on the ground of arrears of rent. A written statement (Exhibit-P-30) was filed by the father of the defendants. In the aforesaid civil suit in paragraph 2(a) of the plaint it was pleaded that for more than 20 years the defendants are the adversely exercising their possession over the house in question. It was further pleaded that they have repudiated the title of plaintiff's father-Late Hukumchand as landlord of the house. The trial Court vide judgment and decree dated 06.8.1970 (Exhibit-P-5), *inter alia*, held that relationship of landlord and tenant between the parties to the suit is not established. It was further held that notice terminating the tenancy under section 106 of the Transfer of Property Act was not valid. Accordingly, the suit was

dismissed. Being aggrieved by the aforesaid judgment and decree, an appeal was preferred by the plaintiff. During the pendency of the appeal, the father of the defendants expired. However, the present defendants were not brought on record. Accordingly, the appeal was dismissed as abated vide order dated 14.9.1979 (Exhibit-P-6). Thereafter, on or about 27.10.1980 the plaintiff filed the instant suit seeking the relief of possession which was based on title. The defendants filed written statement in which, inter alia, it was pleaded that defendants have acquired title by adverse possession.

3. The trial Court vide judgment and decree dated 31.3.1987 decreed the suit filed by the plaintiff. The aforesaid decree was affirmed in appeal by the lower appellate Court vide judgment and decree dated 30.1.1995. Being aggrieved by the aforesaid decree, the defendant No.1 preferred the instant appeal. The instant appeal was decided vide judgment dated 09.5.2006 by this Court by which the matter was remanded to the appellate court to re-decide the appeal by taking into consideration the averments made in exhibit-P-30 i.e. the written statement filed by the father of defendants, namely, Late Sitaram in previous suit. The aforesaid judgment was challenged by the plaintiff before the Supreme Court. The Supreme Court vide order dated 11.5.2009 set aside the judgment passed by this Court and remanded the matter to this Court to decide the matter afresh on merits.

4. Learned senior counsel for the appellant submitted that the father of the defendants, namely, Sitaram in the written statement (Exhibit-P-30) which was filed in the previous suit had denied the title of the father of the plaintiff as well as the relationship of landlord and tenant. It was further submitted that the plaintiff himself in paragraph 9 of the plaint had stated that sometime in the year 1949-50 the father of the plaintiff inducted one Sitaram in possession of the suit house as tenant. Thus, the father of the defendants was in possession of the suit house since 1949-50. While inviting the attention of this Court to paragraph 18 of the plaint it was pointed out by learned senior counsel that plaintiff himself has stated in that father of the defendants had denied the title of the plaintiff's father. There is no evidence on record to show that the defendants are the tenants of the plaintiff. However, the courts below have travelled beyond the pleadings of the parties and have recorded the findings. In support of his submissions, learned senior counsel has placed reliance on the decisions of Privy Council reported in *Siddik Mahomed Shah vs. Mt. Saran and others*, 1930 PC 57 (1) and of Supreme Court reported in and *Nirod Baran Banerjee vs. Dy. Commissioner of Hazaribagh*, AIR 1980 SC 1109.

5. On the other hand, learned counsel for respondent No.1 submitted that previous civil 'suit instituted by the father of the plaintiff' was dismissed on technical ground. Thereafter, the plaintiff filed the instant suit which is based on title. The defendants have failed to show as to how they were inducted in the premises in question. It was further submitted that in paragraph 2(a) of the written statement (Exhibit-P-30) filed by the father of the defendant in the previous suit, the status of the father of the plaintiff as landlord was denied. It was further argued that there is no pleading with regard to adverse possession in the written statement. The defendants have failed to disclose the point of time when their possession became adverse to the interest of the plaintiff. Mere long possession is not sufficient to confer title by adverse possession. It was also submitted that both the courts below on meticulous appreciation of evidence on record have recorded a concurrent finding of fact that defendant did not acquire any title by adverse possession. The aforesaid finding is based on evidence available on record and can neither be said to be perverse nor based on no evidence. In support of his submissions, learned counsel has placed reliance on the decisions of Supreme Court reported in *Veerayee Ammal vs. Seeni Ammal*, (2002) 1 SCC 134; *Kulwant Kaur and others vs. Gurdial Singh Mann (Dead) by L.Rs. and others*, (2001) 4 SCC 262, *Sugani (Mst.) vs. Rameshwar Das and another*, (2006) 11 SCC 587, *Roop Singh (Dead) through LRs. vs. Ram Singh (Dead) through LRs.*, AIR 2000 SC 1485, *State Bank of Travancore vs. Arvindan Kunju Panicker and others*, AIR 1971 SC 996 and of this Court reported in *General Mines and Quarries Ltd. vs. Kartar Singh Prem Singh and others*, 1992 MPLJ 563.

6. I have considered the submissions made by learned counsel for the parties and perused the record. The jurisdiction of this Court to interfere with the findings of facts under section 100 of CPC is limited to the case where the finding is either perverse or based on no evidence. This Court cannot interfere with the concurrent finding of fact until or unless the same is perverse or contrary to material on record. [See: *Sugani (mst.) (supra)*, *Gurdev Kaur V. Kaki*, (2007) 1 SCC 546, *Praksah Kumar V State of Gujrat*, (2004) 5 SCC 140, *Thiagarajan and Others v. Sri Venugopalaswamy B. Koil and Others*, (2004) 5 SCC 762 and *Narayanan Rajendran and another v. Lekshmy Sarojini and Others*, (2009) 5 SCC 264] It is equally well settled that this Court in exercise of power under Section 100 of the Code of Civil Procedure cannot reappreciate evidence. [See: *Thimmaiah and Others v. Nin gamma and Another*, (2000) 7 SCC 409] It is equally well settled that where on appreciation of evidence, even if two views are possible, this Court

in exercise of powers under Section 100 of the Code of Civil Procedure would not interfere. [See: *Kondiba Dagadu Kadam v. Savitribai Sopan Guzar and others*, (1999) 3 SCC 722 and *Veerayee Ammal (supra)*]. It has further been held by the Supreme Court that interference with a question of fact is not permissible. [See: *Basayya I Mathad v. Rudrayya S Mathad and Others*, (2008) 3 SCC 120] In *S.Appadurai Nadar & another v. A. Chokalinga Nadar and another*, (2007) 12 SCC 774 it has been held by the Supreme Court that in exercise of power under Section 100 the Courts should be slow in reversing the finding of fact. The finding of fact even if erroneous would not be disturbed in second appeal unless the finding is shown to be perverse and based on surmises and conjectures. [See: *Kulwant Kaur (supra)*, *Hafazat Hussain v. Abdul Majeed and others*, (2001) 7 SCC 189 and *Bharath Matha v. R. Vijay Rengandathan*, (2010) 11 SCC 483].

7. In a case where the plaintiff takes a plea of acquisition of title by adverse possession, has not only to plead the actual possession but has also to plead the period and date from which he claims the possession. The plaintiff has further to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge that he is the real owner of the land. He is required to demonstrate a hostile title and has to communicate his hostility to the real owner. [See: *Krishnamurthy S. Settur (Dead) by LRs. vs. O.V.Narasimha Setty and others*, (2007) 3 SCC 59].

8. A person who basis his title by adverse possession must show by clear and unequivocal evidence i.e. the possession was hostile to the real owner and amounted to denial to the property claimed. [See: *Annasaheb Bapu Saheb Path vs. Baiwant @ Balasaheb Babusaheb Patil (dead) by L.Rs. and heirs*, AIR 1995 SC 895]. It is equally well settled that party pleading adverse possession must state with sufficient clarity as to when he is in adverse possession, nature of his possession and the plea of adverse possession is not a pure question of law, but a mixed question of fact and law. [See: *Dr.Mahesh Chand Sharma vs. Rajkumari Sharma and others*, AIR 1995 SC 869]. The plea that permissive possession became adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner, Mere possession for how-so-ever length of time does not result in converting permissive possession into adverse possession. [See: *Thakur Kishan Singh (Dead) vs. Arvind Kumar*, (1994) 6 SCC 591].

9. In the backdrop of aforesaid well settled legal position the facts of the case may be adverted to. The defendants' witness No.1 Babulal has stated in

his examination-in-chief that he is not aware as to in which capacity the plaintiff's father was in possession of the suit premises. Similarly, the defendant No.1 has stated that his father was in possession of the suit premises since 1948. In paragraph 6 of his cross-examination it has further been admitted that in the year 1948 he was aged about 14 years and was not aware about the negotiations which his father had with regard to the suit house. The defendants in the written statement have failed to prove the manner in which they came in possession of suit house and as to when possession of defendants became adverse to the interest of the plaintiff.

10. The trial Court after appreciation of the evidence on record has held that the defendants have failed to prove that they have acquired the title by adverse possession. The lower appellate Court vide judgment and decree dated 30.1.1995 had held that in the earlier civil suit the defendants had denied the fact that his father was the owner of the suit house for want of knowledge. It has further been held by lower appellate Court that from the statements of defendant witness No.1 and defendant witness No.2 it is not clear as to when the possession of the defendants became adverse to the interest of the plaintiff. It has also been held by the lower appellate Court that it is not a case of the defendants that they forcibly took possession of the suit house. It was further held that mere long possession does not amount to adverse possession. From oral and documentary evidence on record, by no stretch of imagination, findings recorded by the trial Court as well as lower appellate Court with regard to acquisition of title by adverse possession, can be either said to be perverse or based on no evidence. The Supreme Court had held that plea of acquisition of title by adverse possession is a mixed question of law and fact; The aforesaid finding of fact is based on appreciation of evidence on record which is concurrent in nature. The plea of adverse possession raised by the appellant has not rejected merely on the ground that there is no denial of title in the earlier suit. From perusal of the judgment and decree of the trial Court as well as lower appellate Court it is apparent that courts below have not rejected the plea of adverse possession raised by the appellant merely on the ground that there is no denial of title on the earlier suit between the parties. Accordingly, the substantial question of law is' answered in the negative and against the appellant.

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

Appeal dismissed.

I.L.R. [2012] M.P., 991

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 703/1995 (Jabalpur) decided on 29 March, 2012

MANOHAR

...Appellant

Vs.

CENTRAL BANK OF INDIA & anr.

...Respondents

Transfer of Property Act (4 of 1882), Section 116 – Renewal of Lease – Lease deed not containing any clause of renewal – Appellant accepted the rent after determination of the lease – The lease is renewed.

After determination of the lease, the rent has been deposited in the account of the plaintiff – The plaintiff has failed to state in specific terms that he has not withdrawn any amount which was deposited after determination of the lease in his account. (Paras 7 & 8)

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 116 – लीज का नवीनीकरण – पट्टा विलेख में कोई नवीनीकरण खंड अंतर्विष्ट नहीं – पट्टा निर्धारण पश्चात अपीलार्थी ने भाड़ा स्वीकार किया – पट्टा नवीनीकृत हो जाता है।

पट्टा निर्धारण पश्चात, वादी के खाते में भाड़ा जमा किया गया है – वादी विनिर्दिष्ट शब्दों में यह कथन करने में विफल रहा कि उसने पट्टा निर्धारण पश्चात अपने खाते में जमा की गई किसी भी रकम को नहीं निकाला।

Cases referred :

2010(2) MPLJ 436, 2005(II) MPJR 263.

K.N. Agrawal with Dinesh Agrawal, for the appellant.

H.C. Kohli, for the respondents.

J U D G M E N T

ALOK ARADHE, J. - This appeal has been filed by the plaintiff. This Court vide order dated 15.4.1996 while admitting the appeal had formulated the following substantial question of law:-

"A. Whether in absence of any express agreement to make a new tenancy could it be held by the Court below that a new tenancy was created by mere acceptance of rent ?"

B. Whether the lower appellate Court was right in reversing

the finding recorded by the trial Court that it was not proved that acceptance of rent by withdrawing the amount deposited by the bank was in respect of arrears of rent after the tenancy was terminated ?"

2. Facts giving rise to filing of the appeal briefly stated are that the plaintiff filed a suit for possession on the ground that plaintiff is the owner of double storied building, which was let out to defendant on a monthly rent of Rs.725/-. The suit house was leased out vide registered lease deed dated 11.8.1981 for a period of five years (Ex.P/2). The lease deed did not contain any clause for renewal. By notice dated 8.7.1985 (Ex.P/1), the lease was determined w.e.f. 31.12.1985. Thereafter, on 11.1.1988, the plaintiff filed a suit for possession. The defendant filed the written statement in which inter-alia it was pleaded that after termination of the tenancy, the rent was deposited in the account of the plaintiff which was withdrawn by him and, therefore, the lease stood renewed.

3. The trial Court vide judgment and decree dated 4.1.1995 inter alia held that by mere deposit of rent, the lease is not renewed. It was further held that no particulars of the payment of rent were mentioned by the defendant and there is no specific pleading with regard to deposit of the amount of rent as well as the period for which the rent has been deposited. It was found by the trial Court that though of 31.3.1986, 28.4.1986 and 8.8.1986, a sum of Rs.7000/-, Rs.7420/- and Rs.9100/- was withdrawn by the plaintiff yet by mere withdrawal of the amount of rent, the lease is not renewed. The trial Court also held that the lease of the defendant in respect of the accommodation question has been determined. Accordingly, the suit of the plaintiff was decreed. The defendant challenged the validity of the aforesaid decree in an appeal. The appellate Court vide judgment and decree dated 3.5.1995 allowed the appeal preferred by the defendant and dismissed the suit filed by the plaintiff. The lower appellate Court held that since the Plaintiff had withdrawn the amount of rent which was deposited after determination of the lease, therefore, the lease has been renewed and the plaintiff is not entitled to decree for possession.

4. Learned counsel for the appellants submitted that the appellate Court grossly erred in reversing the well reasoned judgment and decree of the trial Court. It was further submitted that the lower appellate Court grossly erred in holding that new tenancy came into existence by merely acceptance of rent by the plaintiff. It was also urged that the lower appellate Court grossly erred in reversing the finding recorded by the trial Court when it was not proved that

acceptance of rent by the plaintiff was for a period after the tenancy was terminated. In support of his submissions, learned counsel for the appellant has placed reliance in *Balwant Rai Agrawal Vs. Bharat Petroleum Corporation*, 2010(2) M.P.L.J. 436 and a decision of Supreme Court in *Shanti Prasad Devi and another Vs. Shankar Mahto and others*, 2005(11) MPJR 263.

5. On the other hand, learned counsel for the respondent-Bank submitted that the lower appellate Court on the basis of material available on record has recorded a finding that after termination of the tenancy, the rent was deposited by the Bank which was withdrawn by the plaintiff and, therefore, it has rightly been held by the appellate Court that appellant is not entitled to decree for possession.

6. I have considered the submission made by learned counsel for the parties and have perused the records. Section 116 of the Transfer of Property Act, 1882 provides that- "if a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106".

7. It is pertinent to mention here that in the lease deed (Ex.P/1), there is no clause of renewal. Thus, the mode of renewal of lease has not been prescribed in the lease deed. In paragraph 11 of the statement, the plaintiff who has been examined as plaintiff witness No.1 has admitted that after the termination of the lease, the rent has been deposited in his account and copy of his statement of account is Ex.D/1. It has further been admitted by the plaintiff that he has withdrawn an amount of Rs.7,000/-, 7,420/- and Rs.9,100/- respectively on, 31.3.1986, 28.4.1986 and 8.8.1986. In paragraph 13 of the statement, plaintiff has further admitted that after 1986, he has not withdrawn the amount from his account. The statement of account Ex.D/1 clearly shows that after determination of the lease, the rent has been deposited in the account of the plaintiff. Thus, in view of admission made by the plaintiff in his statement, it was for the plaintiff to prove that he did not withdraw any amount which was deposited after the determination of the lease. The plaintiff has failed to state in specific terms that he has not withdrawn any amount which was deposited after determination of the lease in his account. The plaintiff

who has obtained LL.B. Degree, after determination of lease ought to have given written instructions to the Bank not to deposit the amount of rent in his account, as has been admitted by him in para 11 of his statement. Thus, the finding recorded by the lower appellate Court that the plaintiff has withdrawn the amount of rent which has been deposited after determination of the rent cannot be said to be perverse or based on no evidence.

8. If the lease deed contains the renewal clause, the renewal of the lease has to be sought in the manner provided under the clause. In such a case, the lessee cannot claim that merely because the lessor has accepted the rent, "he is holding over". However, in the instant case, it is pertinent to mention here, that the lease deed does not contain any clause of renewal. Therefore, the decision relied upon by learned counsel for the appellant in the case of *Shanti Prasad Devi and another*, supra, is of no assistance to the appellant. Similarly, the ratio laid down by this Court in *Balwant Rai Agrawal*, supra, that renewal of lease cannot be automatic, is of no assistance to the appellant, as the same is distinguishable on facts and Section 116 of Transfer of Property Act has not been noticed. The appellant has accepted the rent after determination of the lease, therefore, under Section 116 of the Transfer of Property Act, the lease is renewed. Accordingly, the first substantial question of law is answered. For the reasons which have already been assigned in the preceding paragraphs, the second substantial question of law is answered in the affirmative and against the appellant.

9. In the result, the appeal fails and is hereby dismissed. However, there shall be no order as to costs.

Appeal dismissed.

I.L.R. [2012] M.P., 994
APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

Cr. A. No. 1701/1996 (Jabalpur) decided on 1 October, 2011

SUKKU ALIAS SUKHRAT

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 304, 304A – Culprable Homicide or causing death by negligent act – Appellant a tattooist by profession, undertook to cure deceased by making tattoos on his temples

and occiput – In the process, deceased sustained internal injuries and was rendered unconscious – His son took him to Civil Hospital where he was declared as brought dead – Held – Appellant had no intention to cause death or knowledge that the injuries caused by him would be sufficient in the ordinary course of nature to cause death – Tattooing on the vital parts viz. temples as well as occiput gave a proximate cause of the death – Appellant ought to have been held guilty of causing death by professional negligence, punishable under Section 304A of the Act – Conviction under Section 304 Part II altered to Section 304A – Appeal partly allowed. (Para 2)

दण्ड संहिता (1860 का 45), धाराएँ 304, 304ए – अपराधिक मानव वध या उपेक्षापूर्ण कार्य से मृत्यु – अपीलार्थी पेशे से एक टैटू बनाने वाला, मृतक के माथे पर तथा मस्तिष्क के पिछले भाग पर टैटू बनाकर उसके उपचार का वचन दिया – प्रक्रिया में मृतक को अंदरूनी क्षतियां पहुंची और वह बेहोश हो गया – उसका पुत्र उसे सिविल अस्पताल ले गया जहां उसे मृत लाया जाना घोषित किया गया – अभिनिर्धारित – अपीलार्थी का मृत्यु कारित करने का कोई आशय नहीं था या ज्ञान था कि उसके द्वारा कारित क्षतियां प्रकृति के सामान्य क्रम में मृत्यु कारित करने के लिये पर्याप्त होंगी – माथा तथा मस्तिष्क के पिछले हिस्से नामक कोमल अंग पर टैटू करना मृत्यु का नजदीकी कारण बना – अपीलार्थी को उपेक्षापूर्ण व्यवसाय द्वारा मृत्यु कारित करने का दोषी माना जाना चाहिए था जो अधिनियम की धारा 304ए के अंतर्गत दण्डनीय है – धारा 304 भाग II के अंतर्गत की दोषसिद्धि धारा 304ए में संपरिवर्तित की गई – अपील अंशतः मंजूर।

Case referred :

(1891) 18 Cal 484(FB).

Satish Chaturvedi, for the appellant.

R.K. Kesarwani, P.L. for the respondent/State.

J U D G M E N T

R.C. MISHRA, J.:- This appeal has been preferred against the judgment-dated 28/6/96 passed by Sessions Judge, Tikamgarh in S.T. No.19/95, whereby the appellant was convicted under Section 304 Part II of the IPC and sentenced to undergo R.I. for 5 years and to pay a fine of Rs.500/- and in default, to suffer R.I. for 6 months.

2. At the relevant point of time, Dhanka (since deceased) was a resident of Village Laxmanpura. He used to have recurrent attacks of headache. The appellant, a resident of Durhatora and a tattooist by profession, undertook to

cure Dhanka by making tattoos on his temples and occiput. In the process, Dhanka sustained internal injuries and was rendered unconscious. His son Jagdish (PW3) took him to Civil Hospital at Tikamgarh. Declaring him as brought dead, Dr. A.K. Jain, by way of memo (Ex.P/6), informed the Police accordingly. After due investigation, the appellant was charge-sheeted for the offence under Section 304 of the IPC.

3. The appellant pleaded false implication due to animosity. In the cross-examination of Jagdish (PW3), it was also suggested that Dhanka had died of food poisoning after eating a rotten fish.

4. Jagdish (PW3) testified that his father Dhanka used to have frequent attacks of headache. According to him, it was in his absence that the appellant, despite being forbidden by him to do so, inscribed tattoos on occipital and temporal regions of his father's skull by means of a machine. He further deposed that on his return home, he found his father lying unconscious and the appellant explained that the tattoo marks were created at the insistence of Dhanka. 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 drew support from the medical evidence. Dr. B. Kathel (PW4) proved existence of the following injuries on Dhanka's body -

- (i) Two black linear abrasions of 4 cm length (gap of 1 cm in between) on left side of forehead, 1.5 inches above & 2 inches lateral to outer border of left eyebrow.
- (ii) Two black linear abrasions of 6 cm length (gap of 1.5 cm) on occipital region, 1 inch below occipital tuberosity.

According to him, mode of the death was syncope but it was not possible to give any definite opinion as to its cause.

5. Co-villagers Nathua (PW1) and Kishori (PW2), though declared hostile by the prosecution, clearly stated that the appellant is a professional tattooist.

6. In the light of the overwhelming evidence on record, learned trial Judge did not commit any illegality in holding that aforesaid injuries were authored by the appellant only.

7. This brings me to the question as to what was the offence committed by the appellant ?

8. Learned trial Judge was of the view that the act committed by the appellant attracted Exception 5 to Section 300 of the IPC that reads as under-

Exception 5.- Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Obviously, the exception refers to cases where a man consents to submit to the doing of a particular act either knowing that it will certainly cause death or that death will be the likely result. Yet, tattooing is not such an act. As further explained by Pigot, J. in *Nayamuddin's case (1891) 18 Cal 484 (FB)* -

“the person killed with a full knowledge of the facts, determined to suffer death, or take the risk of death, and that this determination continued upto and existed at the moment of his death”.

The view taken by learned trial Judge, therefore, cannot be sustained. But, even though, the appellant had no intention to cause Dhanka's death or knowledge that the injuries caused by him would be sufficient in the ordinary course of nature to cause his death, tattooing on the vital parts viz. temples as well as occiput gave a proximate cause of the death. Accordingly, he ought to have been held guilty of causing Dhanka's death by professional negligence, punishable under Section 304A of the IPC.

9. Coming to the question of sentence, it may be observed that a considerable period of more than 16 years has already elapsed after the incident in question. Meanwhile, the appellant has already suffered imprisonment for 1 year and 11 months whereas maximum sentence prescribed for the offence under Section 304A of the IPC is imprisonment for a term of 2 years, or with fine, or with both. In these circumstances, interests of justice would be met if the term of sentence of imprisonment is reduced to the period already undergone by the appellant.

10. In the result, the appeal is allowed in part. The conviction under Section 304 Part II is altered to one under Section 304A of the IPC and the term of

custodial sentence is reduced from 5 years to the period already undergone by the appellant. However, the sentence of fine is maintained.

11. The appellant is directed to appear before the trial Court on or before 30.11.2011 for depositing the fine amount or for being committed to custody to suffer the default sentence.

Appeal partly allowed.

I.L.R. [2012] M.P., 998

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mrs. Justice S.R. Waghmare

Cr. A. No. 1456/2011 (Indore) decided on 9 January, 2012.

JUJHAR SINGH

...Appellant

Vs:

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 – Death Sentence – Rarest of Rare Case – Appellant and three deceased had consumed liquor and chicken – They were intervened by security guard – Thereafter appellant caused death of three deceased by causing injury by means of hammer – Held – It cannot be said that appellant has become hazardous to the Society and therefore, merely because he has committed murder of three persons would not mean that extreme penalty of death is to be awarded – Plurality of murder can not be a determining factor in order to pass extreme penalty – Appellant having no criminal history – Death sentence not confirmed – Appellant awarded life imprisonment. (Para 25)

दण्ड संहिता (1860 का 45), धारा 302 – मृत्युदण्ड – विरल से विरलतम मामला – अपीलार्थी और तीनो मृतकों ने मदिरा पान किया एवं मांस खाया – सुरक्षाकर्मी द्वारा उनका बीच-बचाव किया गया – उसके बाद अपीलार्थी ने तीनों मृतकों की हथौड़े से चोट कारित करके मृत्यु कारित की – अभिनिर्धारित – यह नहीं कहा जा सकता कि अपीलार्थी समाज के लिये घातक हो गया है और इसलिए, मात्र इस कारण कि उसने तीन व्यक्तियों की हत्या कारित की है इसका अर्थ यह नहीं होगा कि मृत्युदण्ड का परम दण्ड दिया जाए – हत्या की अनेकता परम दण्ड पारित करने के लिए निश्चायक कारक नहीं हो सकती – अपीलार्थी का आपराधिक इतिहास नहीं – मृत्यु दण्डादेश की पुष्टि नहीं की गई – अपीलार्थी को आजीवन कारावास प्रदान किया गया।

Cases referred :

(1980) 2 SCC 684, (1983) 3 SCC 470.

M.A. Bohra & R.S. Soni, for the appellant.

S.D. Bohra, P.P. for the respondent/State.

J U D G M E N T

The Judgment of the court was delivered by :
A.K. SHRIVASTAVA, J.:- The judgment passed in this appeal shall also govern the disposal of connected Criminal Reference No.1/2011 sent by learned Sessions Judge, Indore for confirmation of death sentence imposed by him to the accused/appellant Jujhar Singh under Section 354(3) Cr.P.C.

2. The case of the prosecution, in brief, is that on 1.11.2010 at 9.50 A.M., Narayan Singh Parihar (PW-4) lodged first information report in respect to the occurrence in the police station that during the midnight of 31st October and 1st November, 2010 quarrel took place between the appellant and the deceased persons who are three in number, namely, Bhagat Singh, Durjan Singh and Maqsood Ansari in which the appellant by using the hammer as weapon dealt blows on the deceased persons. It is stated that soon before the incident all these four persons were consuming liquor and were eating the chicken.

3. At the relevant point of time, the author of the FIR, Narayan Singh Parihar was serving on the post of Security Guard at Ansal Township (under construction) where the incident had taken place. On receiving the information from Shiv Kumar regarding the quarrel among the accused and the deceased persons he rushed to the spot and found that all the four persons are in drunken state. It is said that this witness firstly pacified and thereafter scolded on them. This witness thereafter left the spot and went back to the place of his duty. In the morning of 1.11.2010 when he was on duty at the gate of the Ansal Chambers which was under construction, witnesses Shiv Kumar, Subhash and Khemchand came and informed about the murder of deceased persons, namely, Bhagat Singh, Durjan Singh and Maqsood Ansari. He was told that all these three deceased persons are lying dead on the floor of room No.25 of the building under construction and the accused Jujhar Singh had already fled from the place of occurrence. Besides this, these witnesses also informed him about the brawl which had taken place between the deceased persons and the accused on previous night, as a result of which the accused Jujhar Singh

committed the murder of three deceased persons by giving blows of hammer.

4. On the basis of the FIR lodged by complainant Narayan Singh Parihar a case was registered under Section 302 IPC against the appellant. The investigating agency arrived at the spot; prepared the spot map; summoned the eyewitnesses and recorded their statements; prepared the inquest report of the deceased persons; the snap shots of the dead body were also taken; the blood sample lying on the first floor of room No.25 of the Ansal Township were also taken and the dead bodies were sent for the postmortem etc.

5. After the investigation was over, a charge-sheet was submitted in the committal Court which committed the case to the Court of Session where the appellant/accused was tried.

6. The learned Trial Judge on the basis of the allegations made in the charge-sheet framed charge punishable under Section 302 IPC (three counts) which appellant had denied and requested for the Trial.

7. In order to prove the charges, the prosecution examined as many as eight witnesses and placed Ex.P-1 to P-32, the documents on record.

8. The defence of the appellant is of false implication and that of alibi and same defence he set forth in his statement recorded under Section 313 Cr.P.C. However, in support of his defence, he did not choose to examine any witness.

9. The learned Trial Judge on the basis of evidence placed on record came to hold that charge under Section 302 IPC (three counts) against the appellant has been proved and eventually holding the instant case to be the rarest of the rare case passed the death sentence and fine of Rs.10,000/-; in default further R.I. of 2 years has been imposed and case has been sent to this Court for confirmation of the death sentence.

10. The contention of learned counsel for the appellant is that the case of the prosecution is not at all proved and the eyewitnesses, namely, Kripal (PW-1), Khemchand (PW-2) and Shivkumar (PW-3) are not at all reliable. By inviting our attention to their cross-examination it has been submitted that all the three witnesses have not seen the incident and therefore, learned Trial Court has seriously erred in convicting the appellant by imposing the extreme penalty of death. Hence, it has been prayed that by allowing this appeal the impugned judgment be set aside and appellant be acquitted from all the charges.

11. An alternative submission has also been put forth by learned counsel

that because the incident had occurred all of a sudden when the deceased persons and appellant were drinking the liquor together and were enjoying the chicken and there was no previous enmity between them, at the most the case would rest under the ambit and scope of Section 304 Part-I IPC.

12. A further alternative submission has been put forth by learned counsel for the appellant that if this Court comes to the conclusion that the appellant has murdered three persons, since the case is not coming within the ambit and scope of rarest of rare case, therefore, the conviction of appellant be altered by passing suitable sentence.

13. On the other hand, Shri S.D. Bohra, learned Public Prosecutor argued in support of the impugned judgment and submitted that if the evidence of the eyewitnesses is considered in true perspective, since at the time of incident only four persons (three deceased and appellant) were present and looking to the testimony of the eyewitnesses, learned Trial Court has rightly come to the conclusion that the deceased persons have died on account of hammer injuries given by the appellant. Learned Public Prosecutor submits that cogent reasons are assigned by learned Trial Court by passing the extreme penalty of death since the present case falls within the sphere of rarest of rare case, therefore, by extending the stamp of approval by this Court the death sentence referred by learned Sessions Judge be confirmed under Section 366 Cr.P.C.

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

15. In the present, the prosecution has examined three persons as eyewitnesses, they are Kripal (PW-1), Khemchand (PW-2) and Shivkumar (PW-3). The other important witness is Narayan Singh Parihar (PW-4) who is the author of the FIR (Ex.P-8). Dr. Prashant Rajput (PW-8) is the Autopsy Surgeon and the postmortem reports Ex.P-33, P-34 and Ex.P-35 are of deceased Bhagat Singh, Maqsood Ansari and Durjan Singh respectively.

16. In order to see whether the prosecution is able to prove its case beyond reasonable doubt, we shall examine the evidence of aforesaid witnesses and also the other witnesses examined by the prosecution as well as of the documents which are proved and placed on record.

17. Shivkumar is an eyewitness to the incident who has been examined by the prosecution as PW-3. He has also corroborated the statement of Kripal (PW-1) and Khemchand (PW-2). In his examination-in-chief, PW-3 is saying

that on hearing the shriek coming out from one room where the incident had taken place, this witness and other witnesses rushed to the place of occurrence and found that appellant was giving hammer blows to the deceased persons and on seeing him appellant rushed towards him and also tried to give the hammer blow to him as a result of which he ran away and hid himself. This witness is also saying that earlier to the incident at 10 p.m. the deceased persons and the appellant were drinking the liquor and were eating the chicken. Thereafter, they were quarreling with each other but on being intervened by the security guard they stopped quarreling at that time. In para-13 of the cross-examination specifically this witness is deposing that by his own eyes he saw appellant causing injuries by hammer to all the deceased persons and when he entered inside the room, at that juncture the appellant was in process of giving blows by hammer to the deceased persons, though he has put his inability that how many hammer blows were dealt by the appellant to each deceased.

18. The other eyewitness to the incident is Kripal (PW-1). Categorically he has stated in his examination-in-chief that he is well acquainted with the appellant who is present in the Court. According to this witness, he along with other witnesses were sitting at 10 p.m. in the township building which was under construction. The deceased persons Bhagat Singh and Durjan Singh and the appellant were consuming the liquor in a room of the building under construction and were also eating the chicken. At that juncture all the three persons started quarreling with each other. On hearing hue and cry the security guard who is being known by the name Parihar arrived there and pacified them. According to this witness, on the point of liquor and chicken the quarrel took place. Further it has been stated by this witness that when the quarrel was going on, Supervisor Subhash was also called and thereafter this witness along with Subhash (supervisor), Khemchand and Shivkumar arrived at the place of occurrence where three deceased persons and appellant were sitting and were quarreling with each other. According to this witness, he saw appellant giving the blows of hammer on the deceased persons and on seeing these witnesses, appellant scolded on them that they should flee from the place of occurrence otherwise they shall also be treated in the similar manner, as a result of which this witness and other witnesses came back on account of fear and the appellant by carrying hammer in his hand, fled from the place of occurrence. Later on, this witness is saying that appellant Jujhar Singh threw the hammer out of the building.

19. In cross-examination, a suggestion put to this witness has been emphatically denied by him that he has been tutored by the police. In cross-examination (para-8) this witness has said that he did not intervene on account of fear. Further in cross-examination he has admitted that he did not see the appellant causing injuries and further says that he saw him running away from the spot and at that juncture he threw the hammer on the road. He has also stated that he saw the appellant at a distance of 5 feet. According to us, it has come in the testimony of this witness that in the room where the incident had taken place only four persons (three deceased persons and present appellant) were there and therefore, soon after the incident if this witness has seen the appellant running away by throwing the hammer on the road it cannot be held that this witness is concealing the reality and his testimony cannot be relied upon. The totality of the entire statement of this witness is that when this witness after hearing the shriek of the deceased persons came to the place of occurrence he saw appellant running away from there by throwing the hammer on the road. At that juncture, all the three deceased persons were lying on the floor.

20. The last eyewitness to the incident is Khemchand (PW-2) and he has corroborated the statement of Kripal (PW-1). In examination-in-chief (para-2) he has categorically stated that on hearing the shriek coming out from room No.25, this witness, Kripal, Shivkumar and Subhash (supervisor); all of them went to see what has happened in the said room where they saw appellant was causing injuries by hammer on the deceased persons. This witness has also proved the inquest reports of the deceased persons; Ex.P-1, P-2 and Ex.P-3 and has admitted his signature on it and stated that in his presence the inquest reports were prepared by the investigating agency. True in para-10 of his cross-examination he has stated that he has not seen appellant causing injuries by hammer to the deceased persons but if his cross-examination (para-10) is considered in true perspective it cannot be said that the appellant is an innocent and has not committed the offence. In this para, this witness has categorically stated that on hearing the shriek of the deceased persons, he rushed to the place of occurrence where he saw that the appellant was coming out from the room where the incident had taken place by carrying a hammer. Further he has stated that on seeing him, appellant rushed to give the hammer blow to this witness, as a result of which he ran away and rescued himself. We have already held herein-above that in the room where the incident had taken place during the odd hours in the night, three deceased persons and

appellant were present and none else and therefore, because deceased persons were having injuries and they were screaming and this witness has categorically stated that he saw the appellant coming out from the room where the incident had taken place by holding a hammer and he also tried to wield hammer on this witness, we are of the view that it was only the appellant who caused injury to the deceased persons, as a result of which they had died.

21. Thus, we are of the considered view that even if Kripal (PW-1) and Khemchand (PW-2) have not seen that appellant giving blows of hammer to the deceased persons, but, when these two witnesses arrived at the spot, appellant was inside the room of occurrence and was running away by having hammer in his hand and therefore, we are not having any doubt in our mind in holding that the evidence of Kripal (PW-1) and Khemchand (PW-2) is relevant piece of evidence. It has also come in the testimony of these three witnesses that before the actual incident took place at 2 a.m., at 10 p.m. the appellant and three deceased persons in drunken state were quarreling with each other and they were pacified by the supervisor Subhash. Thus, we are not having any scintilla of doubt in our mind in holding that the deceased appellant had brutally dealt hammer blows on the deceased persons as a result of which they died.

22. The evidence of above said three witnesses has also been medically corroborated as Dr. Prashant Rajput (PW-8) who has found the following injuries on the person of deceased, namely, Bhagat Singh, Durjan Singh and Maqsood Ansari.

Injuries found by the doctor (PW-8) on the person of deceased Bhagat Singh:-

- (i) Lacerated wound present about 3.5 cm above right eyebrow lateral margin right obliquely placed 3.0 x 1 cm;
- (ii) Contused lacerated wound present about 4 cm above right mastoid left oblique 2.5 x 0.5 cm size;
- (iii) Contused lacerated wound size 2 x 0.5 cm about 2 cm to right of injury No.2 left obliquely;
- (iv) Contused lacerated wound present about 2 cm above tip of injury No.3 and 2 cm to right of injury 2.5 cm x

0.5 cm length somewhat in inverted "C";

- (v) Contused lacerated wound in Inverted "C" shape present past behind mid part right mastoid bone size 3.5 x 1 cm size;
- (vi) Right ear showing lacerated wound of size 3.5 cm starting from upper mid present;
- (vii) A vertical abrasion size 1.5 x 0.5 cm present at lower tip of injury No.1;
- (viii) Contused lacerated wound size 1.5 x 0.5 cm vertically 2 cm to right of right eyebrow tip lateral part;
- (ix) Abrasion about 0.5 cm below right lateral tip of right eyebrow size 1 x 0.5 cm vertical;
- (x) Abrasion present over right clavicle region 3 x 2 cm. Viscera preserved for chemical analysis;
- (xi) Head; Scalp ecchymosed internally on bilateral frontal, right temporal region fracture arising from lower posterior bone. Right temporal region giving fragment which is extended uptill lower part of left frontal eminence. Total length 28 cm meninges tense. Subdural hemorrhage present all over brain with clots. Sub-arachnoid hemorrhage present over bilateral frontal, right temporal region. Hemorrhage present over cerebellum, anterior and right cranial fossa.

Injuries found by the doctor (PW-8) on the person of deceased Durjan Singh:-

- I. Contused lacerated wound in a slight to "C" shape about 4 cm above lateral part of right eyebrow 1 cm x 0.5 cm;
- II. Contused lacerated wound size 5.5 x 1.5 cm about 8 cm from tip of right pinna in a 'U' shape;
- III. Contused lacerated wound size 2.5 x 1 cm vertically about 3.5 cm below posterior tip of injury No.2;

- IV. Contused lacerated wound size 3.5 x 1.2 cm interially joint behind posterior part of right mastoid bone;
- V. Contused lacerated wound in a slight "C" shape present 8 cm right posterior lower part of mastoid bone size 2.5 x 0.5 cm.;
- VI. Contused lacerated wound size 1x0.5 cm between injury No.3 and 5 left oblique;
- VII Contused lacerated wound 1x0.5 cm vertically about 6 cm below mid part of injury No.2;
- VIII Contused lacerated wound size 1 x 0.5 cm sagittaly placed about 1.5 cm posterior to tip of injury No.3;
- IX Contused lacerated wound size 1x0.5 cm sagittaly placed about 1.5 cm posterior to tip of injury No.2 (posterior part);
- X Contused lacerated wound size 3 x 1.5 cm about 5 cm behind (posterior to tip of injury No.2) posterior part slight "C" shape sagittaly;
- XI. Head; Scalp ecchymosis internally over right frontal, right mid tempero lateral occipital region. Multiple radiating fracture evident with (depressed fracture) over right anterior temporal size 10x6 cm oval horizontally. Brain matter lacerated over depressed part. Subdural hemorrhage present all over brain with clots. Sub-arachnoid hemorrhage present over right clavicle and middle clavicle fossa.

Injuries found by the doctor (PW-8) on the person of deceased Maqsood Ansari:-

- (i) Contusion present 0.5 x 0.5 cm mid lower part of lip;
- (ii) Lacerated wound size 1.5 x 0.5 cm traversaly placed upper anterior part of nose;
- (iii) Abrasion 1.5 x 2 cm over anterior mid part of right cheek;

- (iv) Contused lacerated wound 3x 0.5 cm size left oblique over right lateral part of left eyebrow;
- (v) Contused lacerated wound 3.5 x 0.5 cm right oblique over left lateral part of left eyebrow;
- (vi) Contused lacerated wound 4 x 0.5 cm size over left frontal about 6 cm above left eyebrow lateral part (left lateral);
- (vii) Lacerated wound size 1.5 x 0.5 cm initial right lower part of pinna;
- (viii) Lacerated wound 1.5 x 0.5 cm mid part posterior behind right ear vertical;
- (ix) Lacerated contused wound transversely placed over upper part right ear medially size 1 x 0.5 cm;
- (x) Lacerated wound contused size 5x0.5 cm left obliquely placed underneath fracture left angle of middle vertically placed;
- (xi) Contused lacerated wound 1 x 0.5 cm size vertically placed at upper border of injury No.10;
- (xii) Contused lacerated wound 1.5 cm left side of injury No.10 left upper part vertically;
- (xiii) Contusion 2.5 x 1 cm size over mid lateral part of left cheek;
- (xiv) Contused lacerated wound 1 cm x 0.3 cm initial over lower part of left pinna;
- (xv) Contusion present 1 x 0.5 cm upper part size 1x0.5 cm over upper anterior part of left pinna;
- (xvi) Contused lacerated wound size 1.3x0.5 cm just behind upper part of left pinna about 6 cm above left mastoid;
- (xvii) Lacerated wound size 3.5 x 0.5 cm about 8 cm above tip of right pinna mid part of right frontal vertically;
- (xviii) Head: Subdural hemorrhage present bilateral frontal.

Right mid tempero joint vertical region with clot meninges tense. Subdural hemorrhage present bilateral frontal region. Hemorrhage present anterior clavicle fossa.

According to the doctor, all the injuries on the body of the deceased persons were caused by hard and blunt object and were sufficient to cause death in ordinary course of nature.

23. Thus, according to us, the prosecution has been able to prove the case beyond reasonable doubt that on account of giving hammer blows on the person of the deceased, who are three in number, by the appellant they had died. Thus, we are of the considered view that the appellant has committed the offence of culpable homicide amounting to murder and rightly he has been convicted under Section 302 IPC.

24. We are not impressed by the alternative submission put forth by learned counsel for the appellant that because the incident had occurred all of a sudden and there was no previous enmity the case would rest under Section 304 Part-I IPC. It be seen that repeated blows of hammer that too on the vital part of the body i.e. head were dealt by the appellant on each deceased person and therefore, it was a cold blooded murder and we are not having any doubt in our mind that the appellant has committed the offence under Section 302 IPC.

25. The question now would rest whether the learned Sessions Court has rightly proposed to pass the death sentence. Law in this regard is very settled that unless and until the case comes within the purview of rarest of the rare case the extreme penalty of death should not be passed. In this regard, the Constitution Bench of Supreme Court *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 may be seen where the principles have been laid down that what are the circumstances on the basis of which the extreme penalty of death is to be passed. Similarly, three Bench decision of Supreme Court *Machhi Singh and others v. State of Punjab*, (1983) 3 SCC 470 may be seen. According to us, looking to the evidence placed on record it cannot be said that appellant has become hazardous to the society and therefore, merely because he has committed murder of three persons would not mean that the extreme penalty of death is to be awarded to him. The plurality of the murder, according to us, cannot be a determining factor in order to pass the extreme penalty of death.

26. The learned Sessions Judge in para-46 of the impugned judgment has found that there is no criminal history of the appellant. The death penalty has been imposed because the deceased persons have come from Uttar Pradesh and Bihar to earn their livelihood and therefore, the case of appellant comes within the purview of the rarest of the rare case. According to us, merely on this ground the extreme penalty of capital punishment cannot be passed and therefore, we are not inclined to confirm the death sentence imposed by learned Trial Court.

27. Resultantly, this appeal succeeds in part. The conviction of appellant under Section 302 IPC (three counts) is hereby affirmed. However, the sentence of death is altered to life imprisonment (three counts) and the fine as imposed by learned Trial Court with a defaulting clause. Needless to say, all the sentences shall run concurrently.

28. Accordingly, Criminal Reference No.1/2011 is hereby also disposed of. Let a copy of this judgment be also kept in the record of Criminal Reference No.1/2011.

Appeal partly succeeds.

I.L.R. [2012] M.P., 1009

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mrs. Justice S.R. Waghmare

Cr. A. No. 731/2007 (Indore) decided on 11 January, 2012

SHIVRAM

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 – Murder – Appellant gave solitary knife blow on the left side of neck below the ear resulting in cutting of muscles of neck, carotid artery and trachea – Injury was caused due to old enmity – Held – Enmity is established and particularly looking to the nature of the injury on the neck it can be gathered that the appellant dealt the blow in order to commit murder as he brought the knife with him – Appeal dismissed. (Para 16)

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी ने गर्दन की बाईं तरफ कान के नीचे चाकू से एक वार किया जिससे गर्दन की मांसपेशियाँ, कैरोटिड धमनी एवं श्वासनली कट गई – पुरानी रंजिश के कारण क्षतियाँ कारित की गई थी – अभिनिर्धारित – रंजिश स्थापित की गई है और विशेष रूप से गर्दन

की चोट की प्रकृति को देखते हुए यह अनुमान किया जा सकता है कि अपीलार्थी ने हत्या कारित करने के उद्देश्य से हमला किया क्योंकि वह अपने साथ चाकू लाया था - अपील खारिज।

Cases referred :

AIR 1997 SC 2186, AIR 2004 SC 1264, 1998 (1) MPWN 65.

Pradeep Gupta, for the appellant.

B.L. Yadav, P.P. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
A.K. SHRIVASTAVA, J. : - Feeling aggrieved by the judgment of conviction and order of sentence dated 21.3.07 passed by the 4th Additional Sessions Judge (Fast Track), Khargon, in Sessions Trial No.163/06 convicting the appellant under Section 302 IPC and thereby sentencing him to suffer life imprisonment with fine of Rs.500/-; in default of payment of fine further RI of one month, this appeal has been preferred by the appellant under Section 374 (2) of the Cr.P.C.

2. In brief, the case of the prosecution as narrated in para-3 of the impugned judgment is that at 9 PM of 15.10.06 on the road of village Romchichli on account of old enmity the appellant dealt knife blow nearby the neck region of the deceased which resulted into his death. The incident has been witnessed by Pathan and Jamsingh.

3. First Information Report was lodged by Pathan on the basis of which a case was registered under Section 302 IPC against the appellant.

4. After completion of the investigation the charge-sheet was filed before the committal court which committed the case to the Court of Session from where it was received by the Special Court for trial.

5. The learned Trial Judge on the basis of the allegations made in the charge sheet, convicted and sentenced the appellant as mentioned in the para-1 of this judgment. Needless to say that this accused person abjured his guilt.

6. The defence of the appellant is of false implication which he also set forth in his statements recorded under Section 313 Cr.P.C. but he did not choose to examine any witness in support of his defence.

7. The learned Trial Judge on the basis of the evidence placed on record

found that present appellant has committed offence under Section 302 IPC and eventually convicted him and passed the sentence which is mentioned in the impugned judgment.

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

9. The contention of Shri Gupta, learned Counsel for the appellant is that the testimony of the two eyewitnesses namely Pathan (P.W.1) and Jamsingh (P.W.2) are not at all reliable because on account of darkness they were not able to see and hence, their testimonies should be disbelieved. And alternative submission has also been put forth by learned Counsel is that if this Court comes to the conclusion that on account of giving a blow of knife by the appellant the deceased has died, since a single blow has been dealt and on account of certain quarrel which was started from the side of the deceased, at the most case would rest under Section 304 Part I of the IPC and if that would be the position, since the appellant is behind the bars more than 5 years this would be suitable punishment for the offence which has been committed.

10. On the other hand, Shri Yadav, learned Public Prosecutor has argued in support of impugned judgment.

11. Having heard learned Counsel for the parties, we are of the considered view that this appeal deserves to be dismissed.

12. In the present case the prosecution has examined two persons as eyewitnesses they are Pathan (P.W.1) and Jamsingh (P.W.2). Thus according to us we are required to scan the testimony of these two witnesses that whether they are reliable or not. It is borne out from testimony of these two witnesses that there was previous enmity between the deceased and the appellant. It has been categorically stated by Pathan (P.W.1) that on account of old enmity because the appellant had solemnised the marriage with the sister of the deceased, hence to ally the revenge the appellant dealt the knife blow on the deceased resulting into his death. This witness has categorically stated that the knife blow was given as a result of which he has died. This witness was cross-examined at length but despite there being a roving cross-examination over him he was embedded in his version. The suggestion was made to this witness that on account of darkness he was not able to see that who has caused the injury, but he has stated that because the incident had taken when

he was nearby the deceased and he saw appellant causing injury by knife to the deceased. This witness is also the author of the FIR Ex.P/1 and has also proved the FIR.

13. The statement of this witness is supported by the testimony of another witness Jamsingh P.W.2 who has also categorically stated that he has seen the incident when he was far away at the distance between 50-100 ft. True both the witnesses have stated that altercation was started by the deceased himself with the appellant. But, according to us it is borne out from the testimony of both the witnesses that on account of previous enmity the appellant has dealt blow behind the left ear of the deceased resulting into the death. The testimony of eyewitnesses is corroborated by the evidence of autopsy surgeon Dr. Anil Kumar Kandua (P.W.7) and the postmortem report Ex.P/12 of the deceased in which the doctor has found following injuries on the person of the deceased:-

- i. Incised penetrating wound by sharp edged object -2 cm x 1 cm x 10 cm deep on the left side of the neck below the ear. The muscles of the neck, carotid artery were chopped and the trachea was also chopped.

According to the autopsy surgeon the injury sustained to the deceased was sufficient to cause the death.

14. We do not find any merit in the contention of the learned Counsel for the appellant that on account of darkness the witnesses were unable to identify the incident. It be seen that in the evidence of eyewitnesses it has come that from very beginning the appellant, deceased and these two witnesses were going together however after travelling for a certain distance the appellant and the deceased had gone little ahead from them and therefore when there was no other person except the appellant, it cannot be said that any other person except appellant had caused injury on the deceased particularly when it has been proved from the statement of these two eyewitnesses that there is enmity between the appellant and the deceased since the sister of the deceased got married to the appellant. Apart from this in AIR 1997 SC 2186 (*Kalika Tiwari and others v.State of Bihar*) the Apex Court has observed is under:-

“The visibility capacity of urban people who are acclimated to fluorescent lights or incandescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country-made lamps. Their visibility is conditioned to such lights

and hence it would be quite possible for them to identify men and matters in such light.”

15. We do not find any merit in the contention of the learned Counsel for the appellant that because the witnesses are saying that injury caused behind the ear but the doctor has found it to be on the neck therefore the case of prosecution is not proved. If the testimony of the autopsy surgeon and the post mortem of the deceased is considered in true perspective it would reveal that the size of the injury was 10” deep and it started from the left side of the ear and the last point of the injury was up to the trachea cutting of the carotid artery and the trachea completely and therefore if the eyewitnesses have stated that the appellant has dealt the knife blow nearby the ear of the deceased their testimony cannot be disbelieved. The Supreme Court in *State of Rajasthan vs. Dhool Singh* [AIR 2004 SC 1264] had come across with the similar situation and this case was of single blow which was dealt by sharp edged weapon on the vital part of the body i.e. the neck. The Supreme Court in the said decision held that although this act though solitary in number had severed sternocleidomastoid muscle, external jugular vein, internal jugular vein and common carotid artery completely leading to almost instantaneous death. In these facts and circumstances of the case the Supreme Court held that the injury not only exhibits the intention of the attacker in causing the death of the victim but also the knowledge of the attacker as to the likely consequence of such attack which could be none other than causing the death of the victim. By reversing the decision of the Rajasthan High Court converting the conviction from Section 302 to 304 Part II IPC, the Supreme Court held that the accused had committed the offence under Section 302 IPC. If the ratio decidendi of the decision of *Dhool Singh (supra)* is considered on the touchstone and anvil of the present factual scenario, although there is solitary injury but, looking to its nature since the major vessels carotid artery as well as trachea of the deceased were completely chopped, we have no scintilla of doubt in our mind that appellant has committed an offence under Section 302 IPC.

16. The decision of the Supreme Court *Ramesh Laxman Pardeshi v. State of Maharashtra* [1988 Vol.I M.P.W.N. 65] placed reliance by learned Counsel for appellant is not applicable since in that case it was held that on account of hot exchange and the altercation which took place between the deceased and appellant therefore the conviction was altered to Section 304 Part-I of the IPC. True in that case the incident had occurred at the spur of

the moment and in that situation the Supreme Court held that the offence under Section 304 Part-I of the IPC has committed. However, in the present case the enmity has established and particularly looking to the nature of the injury on the neck, we can gather that the appellant dealt the blow in order to commit the murder, because he brought the knife with him otherwise there was no occasion for him to bring the knife when he was going along with the deceased and the witnesses. Therefore the decision of the *Ramesh Laxman Pardeshi Vs. State of Maharashtra (supra)* placed reliance by the learned Counsel for appellant is also not applicable in the present case.

17. Resultantly this appeal fails and is dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1014

APPELLATE CRIMINAL

Before Mr. Justice M.C. Garg

Cr. A. No. 506/2004 (Gwalior) decided on 3 February, 2012

MUKESH

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 304 Part II or 324 – Culpable Homicide not amounting to murder or simple injury – Prosecution filed charge sheet under Section 302 – Appellant alleged to have caused injury on the head from blunt side of Farsa – Other unknown co-accused persons neither arrested nor identified – Deceased died because of rupture of liver which is attributable to other accused person – Injury caused by appellant not responsible for death of deceased – Co-accused persons have not been brought to books at all – Appellant can be convicted only for offence under Section 324 of I.P.C. – Sentenced to imprisonment already undergone – Appeal partly allowed. (Para 12)

दण्ड संहिता (1860 का 45), धारा 304 भाग II या 324 – हत्या की कोटि में न आने वाला आपराधिक मानव वध या साधारण चोट – अभियोजन ने धारा 302 के अंतर्गत आरोप पत्र प्रस्तुत किया – अपीलार्थी ने अभिकथित रूप से फरसे की मोथरी तरफ से सिर पर चोट कारित की – अन्य अज्ञात सह अभियुक्त गण को न तो गिरफ्तार किया गया और न ही पहचान की गई – मृतक की यकृत फट जाने के कारण मृत्यु हो गई जिसके लिये अन्य अभियुक्त जिम्मेदार थे – अपीलार्थी द्वारा कारित की गई चोट मृतक की मृत्यु के लिये जिम्मेदार नहीं – सह अभियुक्त गण को दण्डित नहीं किया गया है – अपीलार्थी को केवल भा.द.सं. की धारा 324 के

अंतर्गत अपराध के लिये दोषसिद्ध किया जा सकता है - भुगताए जा चुके कारावास से दंडित किया गया - अपील अंशतः मंजूर।

S.K. Tiwari, for the appellant.

Mukund Bhardwaj, G.A. for the respondent/State.

J U D G M E N T

M.C. GARG, J.:- This appeal arises out of the judgment dated 20.8.04 delivered by IInd, Addl. Sessions Judge, Guna in Sessions Trial No. 316 of 02, whereby, the appellant has been convicted for commission of offence under sec. 304 Part II of IPC and sentenced to undergo RI for six years besides payment of fine of Rs.11,000/-. In default of payment of fine, the appellant has been directed to further undergo RI for two years.

2. Briefly stating the prosecution case was that one Sumer (deceased) had lodged a report at Police Station, Jamner on 17.10.02 to the effect that at about 7.00 pm, while he was on his own field, Mukesh Dhakad came along with two associates alarming filthy abuses. The appellant has also been alleged to have inflicted a Farsa blow on the head of the deceased from the blunt side. His two associates, who are unknown and have not been arrested by prosecution (infact not even identified) are alleged to have also beaten the deceased with Lathi. As a result of injuries suffered on his back and right leg besides other injuries on his head, the deceased succumbed to his injuries. It is also alleged that at that time, his brother Jai Narayan (PW 5) also came on the spot. After seeing him, the appellant and two other persons ran away. A report was lodged by the deceased himself at the Police Station. On that basis, first information report bearing no. 288 of 02 was registered against the appellant under sec. 341, 294, 323, 506B and 307/34 of IPC.

3. During investigation, Sec.302 of IPC was also added as the deceased succumbed to his injuries. After investigation, the challan was filed before the court of Judicial Magistrate First Class and later on the same was committed to the court of Sessions for trial vide order dated 20.12.02.

4. After concluding the trial , learned Addl. Sessions Judge besides relying upon the statement of deceased form part of first information report; statement of Jainarayan PW5, Ramsingh PW 4; Ramdayal PW 6; were also relied upon.

5. The testimony of all these witnesses were challenged by the appellant on the ground that they were relations of the deceased. A previous enmity

regarding the matter pending against the father Imratlal in Raghogarh court, wherein, deceased Sumer was also brought on record. As such the defence (sic. defence) was that, it was a case of previous enmity and because of that reason, the appellant was falsely implicated in the alleged offence.

6. On the basis of evidence which came on record and the medical evidence in the form of statement made by Dr. J.B. Singh PW.1, the court came to the conclusion that though it was not a case of commission of culpable homicide which make out a case under sec. 302 IPC. The Trial court held that it was a case of sec. 304 Part II of IPC. The opinion of the Doctor stands mentioned in para 25 of the judgment which reproduced hereunder -

25— इसके उपरान्त अब विचारणीय बिन्दु "अ" के सम्बन्ध में विचार किया जावेगा। इस संबंध में डॉ. जे.बी.सिंह (अ.सा.1) का कथन बहुत महत्वपूर्ण है। जिन्होंने सुमेरसिंह का मेडीकल परीक्षण करने पर निम्नलिखित चोटें पाई थीं। (1) फटा हुआ घाव जिस पर खून का थक्का जमा हुआ था जो सिर में खड़ी अवस्था में था जिसका आकार $\frac{1}{2}$ इंच गुणित $\frac{1}{2}$ इंच x $\frac{1}{2}$ इंच।

(2) नील का निशान जो पीठ में दाहिनी तरफ था— जिसका आकार 3x1 इंच।

(3) नील का निशान जो दाहिनी तरफ पीठ में था जिसका आकार 4x1 इंच।

(4) नील का निशान दाहिनी तरफ पीठ में था तथा चोट नं.2 के एक इंच नीचे था जिसका आकार 3x1 इंच।

(5) नील का निशान जो दाहिनी पिडली में आड़ी अवस्था में था जिसका आकार 2x1 इंच था।

उनकी राय में उक्त सभी चोटें सख्त एवं भोथरे हथियार द्वारा पहुंचाई गई थीं। उनकी रिपोर्ट प्रदर्श पी.1 है। चोट क्र. 1 लगायत 4 की प्रकृति को जानने के लिये उन्होंने आहत को जिला चिकित्सालय गुना भेजा था। किन्तु जिला चिकित्सालय गुना जाने के पूर्व ही सुमेरसिंह की मृत्यु हो जाने के कारण उन्होंने दिनांक 18.10.02 को मृतक सुमेर का शव परीक्षण करने पर उसके शरीर पर पूर्ववत् 1 लगायत 5 चोटें पाई थीं। और आन्तरिक परीक्षण करने पर लीवर को छोड़कर बाकी सभी अंग स्वस्थ अवस्था में पाये थे एवं लीवर फटा हुआ था उनकी राय में सुमेर की मृत्यु फटे हुए लीवर से अधिक मात्रा में खून बहाने के कारण शॉक से हुई उनकी शव परीक्षण रिपोर्ट प्रदर्श पी.2 है।

7. It is also relevant to take note of para 26 to 28 of the judgment which are reproduced hereunder.

26— लीवर फटने पर कोई स्पष्ट कारण अभिलिखित पर सामने नहीं आया है आहत के शरीर पर आई चोटों की प्रकृति को गंभीरता पूर्व विचार करने पर

ऐसी कोई स्पष्ट चोट दृष्टिगत नहीं होती है जिससे कि लीवर फट सके एवं मुख्य रूप से आरोपी मुकेश द्वारा जो सिर में चोट पहुंचाई जाना पाया गया है उसको तो मृत्यु के कारण से नहीं जोड़ा जा सकता है।

27— इस सम्बन्ध में बचाव पक्ष की ओर से मोदी के मेडीकल ज्युरिसप्रूडेन्स का सहारा लेते हुए कहा है कि एकडोमिनल मसल्स के अचानक संकुचन के कारण लीवर फट सकता है। जिसे आरोपी के किसी कृत्य से नहीं जोड़ा जा सकता है। बचाव पक्ष की ओर से प्रस्तुत उक्त मोदी के मेडिकल ज्युरिसप्रूडेन्स एवं टाक्सीकॉलोजी 22वां एडिशन के पृष्ठ क्रमांक 442 के परिशीलन से यह भी स्पष्ट होता है कि कभी कभी लीवर किसी प्रहार, किक, दुर्घटना में कुचलने और गिरने से भी एबडोमिनल मसल्स के अचानक संकुचन के कारण लीवर रपरिचड हो सकता है और लीवर इनलार्ज्ड वे फेटी होने की अवस्था में आसानी से फट सकता है। लीवर के फटने से यदि पोर्टल वेन या वीना के वाको क्षति होने पर आहत की शॉक व हेमरेज के कारण तत्काल मृत्यु हो।

8. The Trial Court considering the nature of injuries as opined by the Doctor and could be inferred from the testimony of the witnesses including the first information report, which goes to show that as far as appellant is concerned, he inflicted only one injury from blunt side of Pharsa, the Trial Court came to the conclusion that it was not a case of sec. 302 IPC, but was a case of sec. 304 Part II. The relevant observation made in para 32 of the judgment which also reproduced for the sake of reference.

32— अभियोजन द्वारा प्रस्तुत मेडीको लीगल रिपोर्ट या डॉक्टर के कथन से यह नहीं कहा गया कि मृतक को आई चोटें प्रकृति के सामान्य अनुक्रम में पर्याप्त थी यह सिद्ध करने के लिये कि चोटें प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिए पर्याप्त थी, भी कोई साक्ष्य नहीं दिया गया, इसलिए युक्तियुक्त एकमात्र निष्कर्ष यही निकाला जा सकता है कि आरोपी पक्ष द्वारा सुमेर की जिस प्रकार से मारपीट की गई वह इस ज्ञान के साथ थी कि इस कार्य से मृत्यु होना ही संभावित है। किन्तु मृत्यु कारित करना या ऐसी शारीरिक चोट पहुंचाना जिससे मृत्यु संभावित है, के आशय के बिना किया गया। ऐसी स्थिति में उक्त कार्य धारा 300 भा.द.सं.वि. के चार खंडों में वर्णित आशय या ज्ञान से किया गया प्रमाणित नहीं होती है। अतः प्रस्तुत मामला धारा 299 भा.दं.वि. के अधीन वाला मामला होकर अपराध धारा 304 भाग दो भा.दं.वि. के अन्तर्गत दण्डनीय अपराध की श्रेणी में आवेगा। और इस संबंध में बचाव पक्ष की ओर से प्रस्तुत समस्त दलीलें व केस लॉ जो पूर्णतः भिन्न परिस्थितियों के धारा 302 भा.दं.वि. के मामलों से संबंधित हैं, रंच मात्र भी प्रयोज्य नहीं होते हैं।

9. Taking all these facts in consideration, but without considering the plea of the appellant to release him on probation, the Trial Court convicted

and sentenced him as mentioned in para 1 of the judgment. It is this judgment which has been assailed by the appellant.

10. Learned appellant's counsel submits that the appellant has already undergone the custodial sentence for number of months, inasmuch as, after passing of the impugned judgment, he remained in judicial custody since 20.8.04. He was released on bail vide order dated 4.10.04. Learned counsel also submits that appellant is not a previous convict. The appellant has inflicted only one injury on the deceased which was simple in nature and was not inflicted with an intention to cause death of the deceased. Learned counsel, therefore, prayed that in this case appellant deserves to be granted the benefit of the provisions of Probation of Offenders Act.

11. On the other hand, learned Govt. Advocate submits that in this case, considering the nature of injury inflicted on the body of the deceased by the appellant and his associates, the appellant does not deserve to be released on probation.

12. Considering all the facts of this case and the cause of death of the deceased and role assigned to the appellant which involves infliction of only a single injury from the blunt side of Pharsa which injury is not responsible for death of the deceased who died on account rupture of liver which is attributable to other accused persons, who have not been identified and brought to the books even till date. The offence for which the appellant can be convicted only for offence under sec. 324 of the Penal Code wherein the sentence which can be imposed upon the accused can be imprisonment of either description for a term which may extend to three years, or with fine, or with both.

13. In view of aforesaid discussions, the appeal is partly allowed. The finding of conviction is altered to sec. 324 of the Penal Code and the appellant is sentenced to the period already undergone, subject to the payment of Rs. 25,000/- as compensation which shall be disbursed to the legal representatives of the deceased. The amount shall be deposited before the Trial Court within one month hereof. In the event the amount is not deposited then the sentence is reduced to the period of three years, the appellant shall surrender before the trial court and shall suffer the custodial sentence of three years.. The Trial Court shall take appropriate steps in this regard.

CC as per rules.

Appeal partly allowed.

**I.L.R. [2012] M.P., 1019
APPELLATE CRIMINAL**

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

Cr. A. No. 671/2007 (Jabalpur) decided on 14 February, 2012

PAWAN SHUKLA

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 or 304 Part II – Murder or Culpable Homicide not amounting to murder – Daughter of the deceased drove out a cow of the accused from her field and accused manhandled her – Deceased came and indulged in grappling with accused who had a gun – Accused and his father also received injuries – Deceased died because of gun shot fired by appellant – Circumstances show that appellant had no intention to commit murder of deceased – In a sudden altercation, appellant fired a single shot – Appellant liable to be convicted under Section 304 Part II of I.P.C. – Appeal partly allowed.

(Para 14)

दण्ड संहिता (1860 का 45), धारा 302 या 304 भाग II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक की पुत्री ने अपने खेत से अभियुक्त की गाय को मगाया तो अभियुक्त ने उसके साथ दुर्व्यवहार किया – मृतक आया और अभियुक्त के साथ जिसके पास बंदूक थी हाथापाई करने लगा – अभियुक्त और उसके पिता को भी चोटें आयीं – अपीलार्थी द्वारा चलाई गई बंदूक की गोली के कारण मृतक की मौत हो गई – परिस्थितियां दर्शाती हैं कि अपीलार्थी का आशय मृतक की हत्या कारित करना नहीं था – अचानक कहा सुनी में अपीलार्थी ने एकमात्र गोली दागी – अपीलार्थी भा.द.सं. की धारा 304 के भाग II के अंतर्गत दोषसिद्ध किये जाने योग्य – अपील अंशतः मंजूर।

Cases referred :

AIR 2006 SC 1920, (2009) 11 SCC 472.

Sharad Verma, for the appellant.*Nirmala Nayak*, G.A. for the respondent.**J U D G M E N T**

The Judgment of the Court was delivered by :
RAKESH SAKSENA, J. :- Appellant/accused has filed this appeal against the judgment dated 26.12.2006, passed by I Additional Sessions Judge,

Chhatarpur (M.P.) in Sessions Trial No.133/2003, convicting him under Section 302 of the Indian Penal Code and Sentencing him to imprisonment for life with fine of Rs.1,000/-. In default of payment of fine, further rigorous imprisonment for six months.

2. In short, the prosecution case is that Ram Prasad, the deceased, had taken a field of accused Pawan Shukla on Batai. This field was situated in village Bhuiya Purwa in district Chhatarpur. At the time of occurrence, gram crop in the field was being reaped. On 23.3.2003, Ram Prasad, Bachcha, Usha, Sumitra, Ganga Sagar, Ram Kishore and Pancha were busy in reaping the crop. The field of accused was also adjoining. Accused and his father Lallu Shukla were present on their field. At about 2.00 pm, when a cow of accused started grazing in the field of Ram Prasad, his daughter Sumitra drove her out towards the field of accused. Accused reached there with his rifle and remonstrated with Sumitra and manhandled her by catching her hair. On hearing cries of Sumitra, Ram Prasad and other persons reached there and tried to save her. It is alleged that accused assaulted them with butt of his gun. When Ram Prasad grappled with accused, accused fired his rifle at him, which hit him in his abdomen. As a result of gun shot injury, Ram Prasad fell down and died. Accused ran away. Ganga Sagar (PW-4), the son of deceased, and other persons carried the body of Ram Prasad to Police Station, Prakash Bamhori and lodged first information report (Ex.P/1) on the same day at 4.50 pm.

3. Investigating Officer Arvind Singh (PW-16) reached at the spot, conducted inquest proceedings and prepared inquest memo (Ex.P/12) in presence of Lalu Kushwaha (PW-10) and Tulli (PW-15). He seized the blood stained earth and broken butt of gun from the spot and prepared seizure memo (Ex.P/2). He also drew the spot map (Ex.P/11). Dead body of deceased Ram Prasad was sent to Primary Health Centre, Laundi for postmortem examination.

4. On 24.3.2003, Dr. S.S. Chaurasiya (PW-8) conducted postmortem examination of the body of Ram Prasad and found a gun shot injury in his abdomen. In his opinion, deceased died due to excessive haemorrhage from the said injury. Dr. Chaurasiya gave his postmortem examination report Ex.P/9.

5. On 30.3.2003, accused was arrested and on his information a rifle was seized from the verandah of his house. Seized articles were sent to Forensic Science Laboratory for examination. After investigation, charge sheet was

filed and the case was committed for trial to the court of session.

6. During trial, accused abjured his guilt and pleaded false implication. According to his statement under Section 313 Cr.P.C., Pancha and some other labourers used to steal away the reaped crops from his field. When his father viz. Lallu Shukla made a complaint to family members of deceased, they pretended that the crop was grazed by cow. On the day of occurrence, when Sumitra drove the cow towards his stock of the reaped crop, his father admonished Sumitra. Being annoyed, deceased and his son Ganga Sagar bent upon assaulting his father with spear. When he tried to save him, Bachcha (PW-1) assaulted him with Lathi. He warded off the blow with his gun, as a result of which his gun broke down and he heard a sound of fire. According to him, a false case was concocted against him.

7. Prosecution, to substantiate its case, examined 16 witnesses. Bachcha Kushwaha (PW-1), Usha (PW-2), Sumitra (PW-3), Ganga Sagar (PW-4), Ram Kishore (PW-11) and Pancha (PW-13) were examined as eyewitnesses of the occurrence. Out of aforesaid witnesses, Ganga Sagar, Ram Kishore and Pancha did not support the prosecution case. Dr. S.S. Chaurasiya (PW-8) was examined to prove the injury found on the body of deceased. In defence, accused also examined Dr.S.Prajapati (DW-1) and Loknath Rajput (DW-2). Trial court, after appreciation of evidence and upon trial, concluded that accused fired gun shot at deceased as a result of which he died and convicted and sentenced him as mentioned above.

8. Aggrieved by his conviction, accused/appellant has filed this appeal.

9. Shri Sharad Verma, learned counsel for the accused/appellant, did not agitate much that deceased received gun shot injury at the hands of accused. He, however, submitted that the circumstances in which the gun is said to have been fired by accused, he could not have been held liable for the charge under Section 302 of the Indian Penal Code. He submitted that from the evidence of eyewitnesses it was apparent that the incident occurred suddenly after an altercation between accused and Sumitra, when deceased grappled with him. He further submitted that it was also on record that the father of accused suffered injury at the hands of members of the complainant party in the same incident. Therefore, at the most, accused could have been held liable for the offence under Section 304-II of the Indian Penal Code. On the other hand, Smt. Nirmala Nayak, learned Government Advocate, submitted that it was established beyond doubt that accused fired gun shot in the abdomen of

deceased. When the gun was fired on the deceased from a close range, it stood established that the intention of the accused was to commit murder of the deceased. She justified the impugned judgment of conviction of accused under Section 302 of the Indian Penal Code.

10. It has not been disputed that deceased died of gun shot injury and that his death was homicidal in nature. The first information report of the occurrence was lodged by Ganga Sagar (PW-4) stating that accused fired gun shot at deceased. Bachcha (PW-1), Usha (PW-2) and Sumitra (PW-3) also made similar statements before the court. Investigating Officer Arvind Singh (PW-16) reached the spot and conducted inquest proceedings in presence of Lalu Kushwaha (PW-10) and Tulli (PW-15). They found that deceased Ram Prasad died due to gun shot injury. Inquest memorandum (Ex.P/12) was prepared by Arvind Singh (PW-16). The postmortem examination of the body of deceased was done by Dr.S.S.Chaurasiya (PW-8). Dr. Chaurasiya found following injury on the body of deceased:

“(1) A firearm wound of entrance on abdomen below the umbilicus more on right side. 2.5 x 2.5 cm circular. Greasy black margin blackening and tattooing present in 6 x 6 cm radius. Gun powder blackish also present in 10 cm radius. Intestine protruding out from from the wound.

Wound of exit present just above the iliac crest on right side. Ragged irregular everted margins 3 x 3 cm. Blood trickling from the wound of exit.

In the opinion of doctor, the deceased died due to shock by severe haemorrhage due to firearm wound.

Thus, from the above evidence, it is clearly established that the deceased died due to gun shot injury and that his death was homicidal in nature.

11. Now the question before us is whether appellant caused firearm injury to deceased? Bachcha (PW-1), the son of deceased, stated that his father had taken 1½ Beegha of agricultural land on Batai from accused Pawan Shukla. On 23.3.2003, he, Ram Prasad, Ganga Sagar and Sumitra were reaping and stocking crops. While his sister Sumitra was working in the field, at about 3.00 pm, a cow of accused started grazing the reaped crops. Sumitra drove out that cow. Accused, who had a gun, reached there, abused and manhandled Sumitra. Hearing her cries, he, Ram Prasad, Ganga Sagar and Usha reached

there. Accused assaulted Ganga Sagar and Usha with the butt of gun and fired gun shot at Ram Prasad. Bullet hit Ram Prasad in his abdomen and he fell down dead. In cross-examination, this witness admitted that Lallu Shukla, the father of accused, was also grazing cows at nearby place. He, however, denied that witness Ganga Sagar assaulted Lallu Shukla with a spear on his hand. He admitted that Lallu had gone to police station, but he did not know whether he lodged any report or not. Though he denied that deceased grappled with accused, but he was confronted with his police statement (Ex.D/1) wherein he mentioned that his father grappled with accused. Certain other contradictions were pointed out by the learned counsel for the appellant in the statement of this witness, but they were not material by nature. The evidence of Bachcha (PW-1) finds support from the evidence of Usha (PW-2) and Sumitra (PW-3), who also reiterated the same story and categorically stated that when they were reaping crops, after an altercation between Sumitra and deceased on one side and accused on the other, accused fired gun shot, which hit deceased in his abdomen. The presence of these witnesses is natural. Though they are close relatives of deceased, but, looking to their consistency and simplicity, they appear to be truthful witnesses. Ganga Sagar (PW-4), another son of deceased, was though declared hostile, but, in cross-examination by the prosecutor, he repeated the same story saying that after an altercation and scuffle between deceased and the accused, accused fired his rifle at his father Ram Prasad, which resulted in his death. When this witness was subjected to cross-examination by accused, he admitted that there occurred a quarrel over a dispute about grazing of the crops by the cow. He even admitted that Lallu, the father of accused, had suffered an injury by spear and further that accused had also suffered injuries by Lathi. Evidence of this witness finds corroboration from the first information report (Ex.P/1) lodged by him immediately after the occurrence. The evidence of aforesaid eyewitnesses stands further corroborated from the medical evidence of Dr. S.S.Chaurasiya (PW-8), who found gun shot injury in the abdomen of deceased.

12. After a critical analysis of the evidence of aforesaid prosecution witnesses, we find it established that appellant fired gun shot at Ram Prasad, the deceased, as a result of which he died at the spot.

13. Learned counsel for the accused/appellant contended that even if the evidence, as adduced by the prosecution, is accepted, the circumstances which emerge out indicate that accused had no intention to commit murder of deceased. The incident was sudden and it occurred just on the spur of moment

without any premeditation when a sudden altercation took place between Sumitra and the accused, when she drove out the cow of accused. He also referred to the evidence of Dr.S.Prajapati (DW-1), who stated that on 30.3.2003 he examined the injuries of appellant and his father Lallu Shukla, when they were brought by police constable. He found injuries of abrasion and pain on the body of accused and a penetrating and a contusion injury on the right arm of Lallu. These injuries were simple in nature and were caused within 7-8 days before the examination by him. Their injury reports are Ex.D/6-A and Ex.D/7.

14. We find substance in the submission made by the learned counsel for the appellant. It has been admitted by the prosecution witnesses that the incident occurred suddenly when Sumitra (PW-3) drove out a cow of the accused from her field and accused manhandled her. It is apparent that deceased came suddenly and indulged in grappling with accused, who had a gun. Though it has not been admitted by Bachcha (PW-1), Usha (PW02) and Sumitra (PW-3) that anyone from the side of deceased assaulted accused or his father, but it was indicated by Ganga Sagar (PW-4) that accused and Lallu were assaulted. It was also evident from the evidence of Investigating Officer Arvind Singh (PW-16) that when he went at the spot, he found there a broken butt of gun, which he seized vide memorandum (Ex.P/2). The evidence of Dr.S.Prajapati (DW-1) supports version of defence that accused and his father suffered some injuries at the time of incident. It is also to be noted that there was no enmity between the two parties since before. The field, which was being cultivated by the deceased and his family members, belonged to accused and it was he who had given them the said field for that purpose on Batai. These facts unmistakably indicate that there could have been no intention on the part of appellant to commit murder of the deceased. In the above circumstances, the probability that in a sudden altercation and quarrel accused fired a single gun shot at deceased, as a result of which he died could not be ruled out. In the similar circumstances, the Apex Court in cases of *Surendra Singh @ Bittu v. State of Uttaranchal*-AIR 2006 SC 1920 and *Pappu @ Hari Om v. State of Madhya Pradesh*-(2009) 11 SC 472 held that the case of accused persons fell under Fourth Exception to Section 300 of the Indian Penal Code and they were liable to be convicted under Section 304- II of the Indian Penal Code and not under Section 302 of the Indian Penal Code and their conviction was modified to under Section 304-II of the Indian Penal Code.

15. For the reasons aforesaid, we find that the conviction of appellant

under Section 302 of the Indian Penal Code was not justified, as such, we modify his conviction to under Section 304-II of the Indian Penal Code and sentence him to rigorous imprisonment for seven years and also direct him to pay a fine of Rs.2000/-. In default of payment of fine, he shall undergo further rigorous imprisonment for six months.

16. Appeal partly allowed.

Appeal partly allowed.

**I.L.R. [2012] M.P., 1025
APPELLATE CRIMINAL**

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

Cr. A. No. 38/2002 (Jabalpur) decided on 23 February, 2012

MEENA BAI

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 302 – Circumstantial Evidence – Appellant was seen for the last time in the company of deceased child – Body of child was found in the box – Appellant also admitted her guilt in her statement under Section 313 of Cr.P.C. – Trial Court did not commit any error in convicting the appellant – Appeal dismissed. (Paras 8 to 13)

क. दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – अपीलार्थी को अंतिम बार मृतक बालक के सानिध्य में देखा गया था – बालक का शव बक्से में पाया गया था – अपीलार्थी ने द.प्र.सं. की धारा 313 के अंतर्गत कथन में भी अपनी दोषिता स्वीकार की – विचारण न्यायालय ने अपीलार्थी को दोषसिद्ध करने में कोई भूल कारित नहीं की – अपील खारिज।

B. Penal Code (45 of 1860), Section 84 – Act of person of unsound mind – Burden is on the accused to prove that she was insane at the time of commission of offence – The manner in which offence was committed shows that at the time of incident the appellant was not insane and she was knowing the consequence of her act – No question arises for extending the benefit of Section 84 of I.P.C. (Para 19)

ख. दण्ड संहिता (1860 का 45), धारा 84 – विकृतचित्त व्यक्ति का कृत्य – यह साबित करने का भार अभियुक्त पर है कि अपराध घटित होने के समय वह विकृत थी – जिस प्रकार से अपराध कारित किया गया है यह दर्शाता है कि

घटना के समय अपीलार्थी विकृत नहीं थी और उसे उसके कृत्य के परिणाम का ज्ञान था - मा.द.सं. की धारा 84 का लाभ विस्तारित करने का कोई प्रश्न नहीं होता।

Cases referred :

AIR 1964 SC 1563, AIR 1972 SC 2443, AIR 1961 SC 998, AIR 1984 SC 1622.

Madan Singh, for the appellant.

Amit Pandey, P.L. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
M.A. SIDDIQUI, J.:- Appellant has filed this appeal from jail against the judgment dated 20.12.2001 passed by First Additional Sessions Judge, Jabalpur in Sessions Trial No.712/99, convicting the appellant u/s 302 of IPC and sentencing her to rigorous imprisonment for life with fine of Rs. 100/-. In default of payment of fine, further rigorous imprisonment for 3½ months.

(2) It is admitted fact of the case that appellant Meena Bai admitted her guilt in her examination u/s 313 Cr.P.C. before the trial Court.

(3) In brief, the prosecution case is that appellant was married to Mulayam Singh Raghuvanshi, who had deserted her and she came to reside with her step grand-mother (maternal) Bhangnabai. Since before the incident Bhangnabai was residing with her son, daughter-in-law and their daughter Ragani aged about 2 years (since dead). On 18.9.1999 at about 7.30 a.m. Bhangnabai went to take water from outside the house, leaving her daughter-in-law Smt Jogwati, who was suffering from serious illness T.B., Ku. Ragni and accused Meena Bai. Smt Jogwati was sleeping in another room and accused Meena Bai and Ku. Ragni were lying in another room. At about 10.30 a.m. Bhangnabai came back. She found accused Meena Bai and Ku. Ragni missing from room. She asked about them from Smt Jogwati daughter-in-law. Smt Jogwati answered that she had no knowledge about accused Meena Bai and Ku. Ragni. Then Bhangnabai and other members of the family made search of Ku. Ragni and accused Meena Bai in their locality but in vain. They were not traced. As there was raining Bhangnabai got wet, so, in order to change her clothes she opened the box of clothes. In that box Ku. Ragni was found lying. She was taken to the clinic of Doctor Ghanshyam where she was found dead. The matter was reported to Police Station Gorakhpur, on which the police registered a margin intimation Ex.P/3 and inquest

of the dead body was prepared vide Ex.P/4 and body was sent for post mortem. In postmortem, it was found that Ku. Ragani was done to death by strangulation. At that time the accused Meena Bai fled away. P.S. Gorakhpur registered Crime vide Ex.P/7. During investigation, the appellant was arrested and after investigation, charge sheet against her was filed in the Court. The case was then committed for trial, and Sessions Trial No.712/99 was registered.

(4) Learned Additional Sessions Judge framed the charge u/s 302 of IPC against the accused/appellant. She abjured her guilt and pleaded for trial. It is pertinent to note that when questions u/s 313 Cr.P.C. were asked by the trial Court from the accused Meena bai, after recording the evidence of prosecution witnesses on 5.12.2001, she not only admitted her guilt but stated that she was residing with Bhangan Bai for about six months. She also admitted that Ku. Ragni was strangled by her with the help of a rope and her body was kept in box and she ran away towards Itarsi side. She confessed that Ragni's father Ajju and uncle were always teasing her that Mulayam Singh had kept her as wife. Mulayam committed murder of her four years' daughter Neeloo and also raped her. She further stated that Mulayam Singh did it on the instigation of Ragani's father and uncle. In order to take revenge, she strangled Ragni with the help of a rope and her body was kept in box.

(5) To substantiate its case the prosecution examined 9 witnesses in Court. Learned A.S.J. relying mainly on the evidence of witnesses namely Bhangan Bai @ Reva Bai (PW1), Imarti Bai (PW 2), Jugawati Bai (PW 3), Mahesh Prasad Rajak (PW 4), Saleem Khan (PW 5), Rajkumar (PW 6) H.L. Yadav (PW 7) Assistant Sub Inspector, Dr. Mukesh Shrivastava and constable Radheshyam Dubey (PW 9) together with admission of appellant held the appellant guilty of commission of offence u/s 302 of IPC and sentenced her as mentioned above.

(6) Aggrieved by the impugned judgment of conviction and sentence appellant filed this appeal from jail.

(7) we have heard learned counsel for the parties at length and perused the impugned judgment and evidence on record carefully.

(8) Bhangan Bai @ Reva Bai (PW 1) stated that accused Meena bai was her step daughter (maternal). She was married in village Baretha district Narsinghpur. She was residing with her. As she was angered with her in-laws she came to reside with her. Ku. Ragni was daughter of her son and Jogwati Bai she was about 2 years of age. In the morning at about 7.30 to 8.00 a.m.

she went to take water. In a room Ragni and Meena, the accused were lying on bed. Her daughter-in-law Jogwati bai was lying in another room as she was suffering from T.B. When she was going outside she asked Jogwati that on awakening Ragni she will be given milk. When she came back she saw that both Ragni and accused Meena were not in the room. Both were missing. She asked from Jogwati who said that she had no knowledge about them then Ragni and Meena were searched in the houses of the locality but both were missing. At that time there was raining and her clothes had got wet so in order to change clothes when she opened box of clothes she saw a foot of Ragni and further said that Ragni was lying in the box. At that time Ramkumar, Mahesh, Jogwati Bai, Imarti Bai also came there who were also informed about that fact and body of Ragni was taken to Doctor who declared her to be dead. Mahesh reported the matter to police. Imarti Bai (P W2) and Jogwati Bai (PW 3) supported the version of Bhangani Bai @ Reva Bai (PW 1) saying that in the room only Meena and Ragni were there and Ragni was found dead in box of clothes. Mahesh Prasad Rajak (PW 4) also corroborated the version of prosecution witnesses saying that there was noise in the locality that Meena had run away with Ragni so he went to house of Ragni's grand-mother and he also made search upto 10.30 a.m when he came back to his house. After taking bath when he was doing prayer he heard that Ragni was found. She was taken to Doctor as she was found in box of clothes. Dr. Declared her to be dead. He informed to police and police prepared inquest vide Ex.P/4. Saleem Khan (PW 5) incharge of PS Gorakhpur stated that police registered crime no.529/1999 u/s 302 and 201 of IPC. He investigated the matter and recorded the statements of witnesses in investigation. He prepared the spot map Ex.P/5 on 22.10.99. On 24.10.99 he arrested Meena Bai vide arrest memo Ex P/6 and submitted charge sheet in the Court.

(9) Ramkumar (PW 6) supported the version of prosecution saying that Bhangani Bai told him that accused Meena Bai had taken Ragni. They were searching them for about 2 hrs. There was raining so their clothes were wet. In order to change clothes when Bhangani Bai opened box of clothes body of Ragni was found lying in box of clothes and Meena bai was found missing,

(10) H.L.Yadav (PW 7) Assistant Sub Inspector Gorakhpur says that when he was posted S.I. Gorakhpur then he registered marg No.79/99 on the report of Mahesh for death of Ku Ragni daughter of Ajay Raghuvanshi aged about 4 years and he sent body for post mortem through constable Rajesh Kumar. On receiving P.M. Report he registered crime No.529/99 u/s 302 and 201 of

IPC on 22.10.1999 and handed over the case to incharge police station for investigation FIR is Ex.P/7.

(11) Dr. Mukesh Shrivastava (PW 8) stated that on 18.9.99 when he was posted at Medical College Jabalpur as Medical Officer, Rajesh Kumar Constable brought body of Ku. Ragni daughter of Ajay Raghuvanshi aged about 2 years for post mortem. He found that she was a female child up to 2 years of age. Rigor mortis was established all over her body. Peripheral cyanosis (blues) in lips and nails was present. Liner abrasions vertically placed length 1 cm x 2½ cm over both side of neck were present. Petechial hemorrhage was present over face and conjunctiva. He found that trachea was congested and compressed. Both lungs were filled with blood and they were congested. Both chambers of heart were filled with dark color blood. Death was ante-mortem. PM report is Ex.P/8 nature of death was homicidal. Radheshyam Dubey (pw 9) constable stated that he delivered a copy of FIR to Additional Chief Judicial Magistrate to the Court of CJM, Jabalpur on 25.10.99 at srl. no.1769 vide Ex.P/9, P-9C and P/10 and P/10C.

(12) Trial Court after recording the prosecution evidence prepared the questions in order to seek explanation u/s 313 Cr.P.C. Accused/appellant Meena Bai instead of refusing, accepted the guilt. She stated that she was very much present with Ragni. She caused her death by strangulation and she put the body in box of clothes. She did it to take revenge from father of Ragni. According to her, Ragni's father instigated Mulayam Singh who kept appellant to rape and murder her daughter Neeloo, aged about four years. Her daughter was murdered on the instigation of Ajay father of Ragni.

(13) Trial Court after appreciating the evidence of prosecution witnesses together with the fact that appellant accused admitted her guilt, came to the conclusion that not only prosecution evidence established her guilt but admission of appellant/accused Meena bai supplied extra link to the chain of circumstances of prosecution story and held her guilty for committing murder of Ragni and punished her accordingly.

(14) Learned counsel for the appellant submitted that the appellant was insane, she was treated during trial and according to Section 84 of the IPC, no offence had been committed. Section 84 of IPC is reproduced as under:

"84. Act of a person of unsound mind. -Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing

the nature of the act, or that he is doing what is either wrong or contrary to law."

(15) Learned counsel for the appellant has placed reliance on the decision of the Apex Court in case of *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat* (AIR 1964 SC 1563) where in it has been held that:

"When a plea of legal insanity is set up, the Court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, as incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of S.84 of the Penal Code can only be established from the circumstances which proceeded, attended and followed the crime.

(16) He further placed reliance on the decision of the Apex Court in case of *Sheralli Wali Mohammed v. State of Maharashtra* (AIR 1972 SC 2443) wherein it has been held that:

"In order to see whether the accused was insane at the time of the commission of the offence, the state of his mind before and after the commission of the offence is relevant. The law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime."

(17) Learned counsel for the appellant has also placed reliance on the decision of the Apex Court in case of *State of Madhya Pradesh v. Ahmadulla* (AIR 1961 SC 998) where in it has been held that:

"The burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by S.84 lies on the accused who claims the benefit of this exemption. The crucial point of time at which the unsoundness of mind as defined in S.84 has to be established is when the act was committed."

He further placed reliance on the case of *Sharad Birdhichand Sarda*

v. State of Maharashtra (AIR 1984 SC 1622) and argued that all the circumstances should be proved in chain and no link should be left; onus on prosecution to prove that chain is complete- Infirmary or lacuna in prosecution cannot be cured by false defence or plea and he further argued that learned trial Court has punished the appellant on her admission u/s 313 Cr.P.C.

(18) On perusal of the above cited case law, it is very much clear that the burden to prove insanity was on the appellant. Learned counsel for the appellant took us to the order sheets of the trial Court to show that the appellant was treated in mental hospital Gwalior during trial from 25.1.2000 to 25.5.2001, so it may be presumed that she was insane.

(19) Per contra, learned Panel Lawyer representing the respondent /State argued that from the bare reading of the report which was sent by Mental Hospital Gwalior, it is very much clear that the appellant became sane and as per above authorities, though not with the same rigour as required from prosecution, it was obligatory upon the appellant to prove that when the act was done she was insane. The circumstances of the case are that the appellant was abandoned and deserted by her husband so she came to live with maternal grand-mother. She was residing there. There was no instance for insanity. She committed murder and she kept the body of deceased in hidden place i.e. box of clothes. She silently flew away. At the time of examination u/s 313 Cr.P.C. in trial Court when questions were asked to her, she admitted her guilt and she narrated whole story. She also narrated the motive from which it was clear that at the time of incident the appellant was not insane and she was knowing the consequence of her act., hence no question arose for extending or giving benefit to her of Section 84 IPC.

(20). Learned trial Court has very well appreciated and marshaled the prosecution evidence and held her guilty finding that prosecution had proved the case beyond reasonable doubt by completing full chain, more over appellant Meena Bai had also accepted her guilt .when examined u/s 313 Cr.P.C. to provide an extra link of the crime.

(21). From the above discussion we find that the trial Court committed no mistake in holding appellant guilty. This appeal being devoid of merit, hence is dismissed.

Appeal dismissed.

Appeal dismissed.

**I.L.R. [2012] M.P., 1032
APPELLATE CRIMINAL**

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

Cr. A. No. 2599/2008 (Jabalpur) decided on 1 March, 2012

DHANSAMPAT & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 302, 304 Part II – Murder or Culpable Homicide not amounting to murder – Panchayat was convened and allegations of playing witchcraft was leveled against deceased and other two ladies – Appellants started beating the ladies by fists and blows – Deceased died due to the injuries sustained by her – Held – Deceased was old and frail women suffering from pneumonia – Appellants knew that assault on her by fists and blows was likely to result in her death – Appellants guilty of committing offence under Section 304 Part II of I.P.C. – Sentenced to 5 years R.I. and fine of Rs. 1,000– Appeal partly allowed (Para 15)

दण्ड संहिता (1860 का 45), धाराएँ 302, 304, भाग II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – पंचायत बुलाई गई और मृतिका तथा अन्य दो महिलाओं के विरुद्ध जादू टोना करने के आरोप लगाये गये – अपीलार्थीगण ने महिलाओं के साथ मुष्टि और घूसों से मारपीट शुरू की – मृतिका को आयी चोटों के कारण उसकी मृत्यु हो गई – अग्निनिर्धारित – मृतिका वृद्ध एवं कमजोर महिला थी जो निमोनिया से ग्रस्त थी – अपीलार्थीगण जानते थे कि उस पर मुष्टि और घूसों से हमला करने के परिणामस्वरूप उसकी मृत्यु संभावित थी – अपीलार्थीगण भा.द.सं. की धारा 304 भाग II के अंतर्गत अपराध कारित करने के दोषी – 5 वर्ष के सश्रम कारावास तथा रुपये 1,000/- के अर्थदंड से दण्डादिष्ट किया गया – अपील अंशतः मंजूर।

S.C. Datt with Siddharth Datt, for the appellants.

Amit Pandey, P.L. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
RAKESH SAKSENA; J. :- Appellants have filed this appeal against the judgment dated 29.11.2008 passed by Additional Sessions Judge in Sessions Trial No. 113/2008, convicting them under Sections 302/149 and 147 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs.500/-

and rigorous imprisonment for one year, on each count respectively.

2. In short, the prosecution case is that on 1.7.2008, in village Kukariya Raiyat, at about 7-8 A.M., Kotwar Anup Das informed to residents of village to attend a meeting in 'Badi' of Laman Singh. All the residents of village including women and children assembled there at about 10-11 A.M. and meeting started. Complainant Dhan Singh, his brother Moolchand and mother Bajrahin Bai were also present there. In the meeting, accused Dhansampat Singh told to people that Bajrahin Bai, Hansi Bai, Mangli Bai and Ahiran Bai were witches and they were harassing the inhabitants of village of their witchcraft due to which people were falling ill. He asked to aforesaid women to tell as to disclose their goddess. People present in the meeting got excited and asked them that there should be no mis-happening in the village and they should refrain from devouring people. In the meantime, number of people including appellants started beating Hansi Bai, Mangli Bai, Ahiran Bai and Bajrahin Bai with fists and kicks. Some how Hansi Bai, Mangli Bai and Ahiran Bai escaped and ran away, but appellants bent upon beating Bajrahin Bai with intent to kill her. As a result of assault, Bajrahin Bai suffered injuries on her face, eyes and other parts of the body. Some persons intervened and tried to pacify assailants. Dhan Singh rescued Bajrahin Bai and took her home. At about 5 O' clock in the evening, however, Bajrahin Bai succumbed to her injuries.

3. Dhan Singh went to police station Bajag and lodged the report Ex. P/1, at 11.30 P.M.. Police registered an offence under Sections 147 and 302/149 of the Indian Penal Code against the accused persons and reached the spot. Investigating Officer Bhagat Singh (PW14) in the presence of Dhan Singh (PW1) and Moolchand (PW2) conducted inquest proceedings and recorded memorandum Ex. P/4. He sent the body of Bajrahin Bai for postmortem examination to Community Health Centre, Bajag. Dr. P.C.Verma (PW13) conducted postmortem examination and found four injuries caused by hard and blunt object on the body. There was no fracture of any bone. In his opinion, death of deceased was caused due to shock hemorrhage and pneumonia as the deceased was old, weak and emaciated woman.

4. After requisite investigation, charge sheet was filed and the case was committed for trial.

5. On charges being framed, appellants abjured their guilt and pleaded false implication. According to them, deceased and her family members

practiced black magic, therefore, they were denounced. Deceased had died of illness, but false allegation of assault was made against them. It was also suggested in cross examination of some of the witnesses that the son of deceased killed her and levelled false accusation against the appellants.

6. Prosecution, to prove its case examined 14 witnesses, however, relying on the evidence of eye witnesses viz. Dhansingh (PW1), Moolchand (PW2), Mangli Bai (PW4), Hansi Bai (PW5), Ahiran Bai (PW6) and on the medical evidence of Dr. P.C. Verma (PW13) held the appellants guilty of the charges, convicted and sentenced them as mentioned above.

7. Learned counsel for the appellants did not assail the finding recorded by the Court below that appellants, in a mob, assaulted deceased as a result of which, she died. However, he submitted that in the facts and circumstances of the case, conviction of appellants under Section 302/149 of the Indian Penal Code was not justified. Since, the incident occurred suddenly in a mob when allegations were being made against the deceased and other women that they practiced witchcraft which engulfed number of residents of village and that no weapon was used in the assault, Court below committed error in holding that appellants intended to commit murder of deceased. He submitted that deceased was an old and ill lady; she was suffering with pneumonia, therefore, merely by trivial assault, she died. Appellants could have been held liable under Section 323 of the Indian Penal Code or at the most under Section 304-II of the Indian Penal Code. Appellants were already in custody since 2.7.2008. On the other hand, learned counsel for the State submitted that it was clearly established by the prosecution evidence that appellants assaulted an old and frail woman of about 62 years of age, who was suffering with pneumonia. In such circumstances, learned Court below was justified to convict the appellants under Section 302/149 of the Indian Penal Code.

8. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

9. It has not been disputed that Bajrahin Bai died on 1.7.2008. Dhan Singh (PW1), Moolchand (PW2), Mangli Bai (PW4), Hansi Bai (PW5) and Ahiran Bai (PW6) categorically stated that accused/appellants assaulted deceased with fists and kicks, as a result of which, she suffered injuries and died. Report Ex. P/1 of the said incident, after the death of deceased was lodged by Dhan Singh (PW1) at Police Station Bajag. Sub Inspector Bhagat Singh (PW14) recorded the said F.I.R. and also a merg report Ex. P/2 and

sent the body of deceased for postmortem examination to Community Health Centre, Bajag. He also recorded inquest memorandum Ex. P/4 in front of witnesses indicating that deceased died due to beating. Dr. P.C. Verma (PW13), who performed the postmortem examination found following injuries on the body of deceased:-

- (i) Both eyes black,
- (ii) contusion/abrasion on forehead area, swelling present,
- (iii) contusion on left side of lower chest 3"x3" bluish in colour &
- (iv) contusion on right side of lower chest 3"x3" bluish in colour.

On internal examination, doctor found that the deceased was an old, weak and emaciated woman. Bones of her skull were intact. Both the lungs had sign of pneumonitis. Inflammatory cough was present in thoracic cavity which was blood tinged. In his opinion, death was caused due to shock, hemorrhage and pneumonia. Multiple contusions present on the body were caused by hard and blunt object. Patient was old, weak, and emaciated.

10. From the above evidence, it is stood clearly established that deceased died due to injuries found on her body.

11. The next question before us is whether appellants assaulted deceased due to which she died.

12. From the evidence of complainant Dhan Singh (PW1), it seems that on the day of occurrence at about 1.30 P.M., accused persons called a meeting in the village. In the meeting, head of the village viz. Mansingh, Tihari, Hari Singh, Bhagat Singh, Karan Singh, Sunder Singh and some women were present. When he enquired from 'Mukhiya' about the purpose for calling meeting, he informed that it was in respect of the witch-craft in the village. Deceased, Hansi Bai, Managli Bai and Ahiran Bai were said to be witches. People in the meeting told that if they did not renounce their powers, they would be punished. Though, some elders tried to intervene, but accused persons did not yield to their request and started assaulting Hansi Bai, Mangli Bai and his mother Bajrahin Bai. Accused persons to whom he knew, assaulted his mother with fists due to which she suffered injuries. Hansi Bai and Mangli Bai ran away and saved themselves. He stated that he lifted and carried his

mother to his house, but in the evening at 5.00-5.30 P.M., she died. He then went to police station and lodged the report Ex. P/1. Though, this witness was cross examined at length, but nothing material could be elicited out to render his evidence unreliable. The evidence of Dhan Singh stood supported by Moolchand, Mangli Bai, Hansi Bai and Ahiran Bai, who reiterated the same story. Mangli Bai (PW4) and Hansi Bai (PW5) were also assaulted in the incident and were sent for medical examination through requisitions Ex. P/18 and Ex. P/19. They were examined by Dr. P.C. Verma (PW13), but their injuries could not be proved in the Court since, Dr. Verma did not depose in respect of them in the Court. He confined his statement only in respect of injuries of deceased. Presence of these witnesses at the spot has not been challenged by appellants. Evidence of these witnesses finds further supported from the medical evidence of Dr. P.C. Verma (PW13), who found four injuries on the body of deceased. According to Dr. Verma, injuries of deceased were caused by some hard and blunt object.

13. On appraisal of the evidence of aforesaid eye witnesses, we find it established that it were appellants, who assaulted deceased by fists due to which she suffered injuries and died. The finding recorded by the Court below in this regard is, therefore, affirmed.

14. The next question for consideration before us is whether appellants were rightly convicted under Section 302/149 of the Indian Penal Code.

15. On perusal of the evidence of Dhan Singh (PW1), Moolchand (PW2), Mangli Bai (PW4), Hansi Bai (PW5) and Ahiran Bai (PW6), it is revealed that since a long time number of untimely deaths occurred in the village, people of the village suspected that deceased, Mangli Bai, Hansi Bai and Ahiran Bai practiced black magic or witchcraft and were responsible for the unfortunate deaths. When the meeting was called, under excitement, appellants and some other persons indulged in beating all the aforesaid women. However, others, except the deceased ran away and got saved. When accusation was made against the deceased and other women, it was protested by Ahiran Bai and Hansi Bai, but suddenly in commotion accused persons started beating them. Admittedly, accused persons had no weapons. They assaulted all the aforesaid women. It was admitted by Dhan Singh that different accused assaulted different person separately. Learned counsel for the appellants argued that in such circumstances, it could not be presumed that appellants intended to commit murder of deceased, therefore, the conviction of appellants under

Section 302/149 of the Indian Penal Code was not justified. We find substance in the submissions of learned counsel for the appellants. It is apparent that the incident occurred suddenly in a mob. Appellants did not use any weapon, they merely assaulted deceased with fists. Only four injuries were found on the body of deceased. There was no fracture or any kind of grievous hurt on the body of deceased. Dr. P.C. Verma pointed out that the deceased was an old and frail woman and was also suffering with pneumonia. From his evidence, it appears that even by assault by fists and kicks she could have died. Under these circumstances, in our opinion, learned Court below committed error in holding that the intention of the appellants was to cause death of deceased, therefore, the conviction of appellants under Section 302/149 of the Indian Penal Code was not justified. However, from the evidence of Dr. Verma, it has since been established that deceased was a thin, frail and emaciated old woman it could be inferred that appellants knew that the assault on her by fists and kicks was likely to result in her death, therefore, in our opinion, it would be appropriate to hold the appellants guilty of the offence under Section 304-II of the Indian Penal Code.

16. In view of the above discussion, conviction of appellants under Section 302/149 of the Indian Penal Code is modified to one under Section 304-II/149 of the Indian Penal Code. They are sentenced to rigorous imprisonment for five years. They are also directed to deposit fine of Rs. 1,000/- in the trial Court. In default of payment of fine, they shall undergo further rigorous imprisonment for a period of six months each. Conviction and sentence under Section 147 of the Indian Penal Code is affirmed.

17. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2012] M.P., 1037

CIVIL REVISION

Before Mr. Justice R.C. Mishra

C.R. No. 214/2010 (Jabalpur) decided on 27 January, 2012

CHANDRALATA GUPTA

...Applicant

Vs.

UMESH KUMAR SINHAL

...Non-applicant

Civil Procedure Code (5 of 1908), Order 47 Rule 1 – Review – Rent Controlling Authority reviewed its order holding that the partition

deed is insufficiently stamped – There is a distinction between erroneous decision and an error apparent on record – Erroneous decision can be corrected by higher forum and latter can only be corrected by exercise of review jurisdiction – Even if the earlier order passed by RCA was erroneous, setting at naught the same would be beyond the scope of review jurisdiction – Revision allowed (Para 7)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – पुनर्विलोकन – भाड़ा नियंत्रण अधिकारी ने यह धारणा करते हुए आदेश पुनर्विलोकित किया कि बंटवारे का विलेख अपर्याप्त रूप से स्टाम्पित है – त्रुटिपूर्ण निर्णय और अभिलेख पर प्रत्यक्ष त्रुटि के मध्य अंतर है – त्रुटिपूर्ण निर्णय को उच्चतर मंच द्वारा सुधारा जा सकता है और दूसरे को केवल पुनर्विलोकन अधिकारिता के प्रयोग द्वारा सुधारा जा सकता है – यदि आरसीए द्वारा पारित किया गया पूर्वतर आदेश त्रुटिपूर्ण भी था तब भी उसे शून्य करना, पुनर्विलोकन के क्षेत्राधिकार के परे होगा – पुनरीक्षण मंजूर।

Cases referred :

(2001) 1 MPHT 321, 1983 MPWN 5, (1997) 8 SCC 715, AIR 1983 MP 144, AIR 1946 PC 51, AIR 1922 PC 112, AIR 1954 SC 526.

Amalpushp Shrotri, for the applicant.

R. P. Agrawal with Praveen Dave, for the non-applicant

O R D E R

R.C. MISHRA, J. - This revision, under Section 23-E of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as the 'Act'), has been preferred against the order-dated 12.04.2010 passed by Rent Controlling Authority, Bhopal in Case No.52/RCA/2006, reviewing the earlier order-dated 15.02.2010 on the ground that it suffered from patent error of law.

2. The proceeding, under Chapter III-A of the Act, for eviction of the respondent was initiated upon application moved by the petitioner, a widow, under Section 23-A(b) of the Act.

3. The respondent raised an objection, by way of an application under Section 35 of the Indian Stamp Act, 1899 (for short the 'Stamp Act') read with Section 151 of Code of Civil Procedure (for brevity 'CPC'), to the effect that being an insufficiently stamped instrument of partition, as defined under Section 2(15) of the Stamp Act, the Family Settlement Deed, sought to be tendered in evidence by the petitioner as document of title was admissible only after payment of requisite duty and penalty. In reply, the petitioner, while

asserting that subject matter of the deed was an ancestral property, termed the contention as misconceived. After hearing the arguments, the RCA, vide order-dated 15.02.2010, proceeded to reject the objection for the following reasons -

(i) In the light of the guideline laid down by this Court in *Anand Singhal v. Smt. Ramkotari* 2001 (1) MPHT 321, the deed, being a memorandum of partition, did not require registration..

(ii) As per the decision of this Court in *Laxmi Kumar Baori v. Gyasira* 1983 M.P.W.N. 5, the deed, even if assumed to be compulsorily registerable, was admissible for any collateral purpose.

Thereafter, by the order in question, the respondent's application for review was allowed on the ground that by virtue of Section 2(15)(iii) of the Stamp Act {as substituted by M.P. Act (8 of 1975)}, stamp duty @ 4% on the value of respective share of the petitioner was payable on the deed.

4. Legality and propriety of the impugned order have been challenged primarily on the ground that it is passed in excess of jurisdiction. Placing reliance on the decision of the Supreme Court in *Parsion Devi v. Sumitri Devi* (1997) 8 SCC-715, learned counsel for the petitioner has submitted that scope of jurisdiction under Order 47 Rule 1 of CPC is circumscribed by the definitive limits fixed by the language used therein and, therefore, review jurisdiction can not be used as appellate jurisdiction.

5. Per contra, learned Senior Counsel appearing on behalf of the respondent has supported the order of review. According to him, no interference under the revisional jurisdiction is called for in view of the following settled principles of law on the subject -

(i) The amended definition of instrument of partition was attracted as the document was executed after coming into force of M.P. Act of 8. of 1975 (*Rao Mahendrasingh v. Sub Registrar* AIR 1983 MP 144).

(ii) Deed of partition, which constituted an instrument of partition requiring stamp, cannot be admitted for any purpose including a collateral purpose (*Ram Rattan v. Parma Nand* AIR 1946 PC 51).

6. Chapter III A of the Act, which was inserted by M.P. Amending Act 27 of 1983 to provide a special machinery for eviction of tenant on the ground of bona fide requirement of landlord falling under the special category covered by Section 23-J, is a complete code for the purpose. On a conjoint reading of Section 23-D(2) of the Act and 17(1) of the Provincial Small Cause Courts Act, 1887, it is evident that the RCA, while holding an enquiry under the Chapter, has to follow the practice and procedure of the Court of Small Causes as prescribed in the CPC. Under Order 47 Rule 1 of CPC, the Court may allow a review on three specified grounds, namely -

- (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made,
- (ii) mistake or error apparent on the face of the record, and
- (iii) for any other sufficient reason.

7. As explained by the Judicial Committee of the Privy Council in *Chhajju Ram v Neki* AIR 1922 PC 112 and approved by the Supreme Court in *Moran Mar Bassellos Catholics v. Most Rev. Mar Poulouse Athanasius*, AIR 1954 SC 526, the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". Further, there is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction [*Parsion Devi's case* (supra) referred to].

8. Thus, even if it is assumed, for the sake of argument, that order-dated 15.02.2010 was erroneous in law; setting at naught the same would be beyond the scope of review jurisdiction.

9. Consequently, the revision stands allowed and the impugned order of review is hereby set aside. However, nothing contained herein shall be construed as any expression of opinion on the merits of the objection and it shall still be open to the respondent to challenge the legality and propriety of the order-dated 15.02.2010 in accordance with law.

Revision allowed.

I.L.R. [2012] M.P., 1041**CIVIL REVISION****Before Mr. Justice R. C. Mishra**

C.R. No.16/2012 (Jabalpur) decided on 8 February, 2012

SADHANA TRIPATHI(SMT.) & anr.

...Applicants

Vs.

BANARSI DEVI

...Non-applicant

Civil Procedure Code (5 of 1908), Order 39 Rule 2 A – Court granting Injunction – Court granting injunction means the Court which is trying the suit in which the injunction is granted and which has the jurisdiction to grant an injunction. (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 2ए- व्यादेश प्रदान करने वाला न्यायालय – व्यादेश प्रदान करने वाले न्यायालय का अर्थ है वह न्यायालय जहां वाद विचारित किया गया है एवं जिसने व्यादेश प्रदान किया और व्यादेश प्रदान करने की जिसकी अधिकारिता है।

Cases referred :

1987 MPWN 237, 1969 MPLJ Note 30, AIR 1936 Patna 23, 2003(1) MPLJ 513, AIR 1973 M.P. 303.

P.C. Paliwal, for the applicants.

Amitabh Gupta, for the non-applicant.

ORDER**R.C. MISHRA J. - Argument Heard.**

This revision is directed against the order-dated 5.12.2011 passed by First Civil Judge, Class-I, Katni in MJ.C. No.02/2012 - an application under Order 39 Rule 2-A of the Code of Civil Procedure (for short 'CPC'), whereby plea of jurisdiction raised by the petitioners by way of an application under Order 7 Rule 11 read with Section 151 of the CPC, was rejected.

2. The respondent filed a suit for permanent injunction restraining the petitioners from encroaching upon the suit house together with an application under Order 39 Rule 1 and 2 of the CPC for temporary injunction. The application was dismissed vide order dated 26.6.2010 passed by Second Civil Judge, Class-II, Katni in Civil Suit No.69A/10. The respondent preferred an appeal under Order 43 Rule 1. of CPC. The appeal was allowed vide

order dated 17.3.2011 passed by III Addl. District Judge (FTC), Katni in Miscellaneous Civil Appeal No.24/10 and, accordingly, the petitioners were restrained from interfering with the possession of the respondent on the suit house.

3. A bare perusal of the application under Order 7 Rule 11 read with Section 151 of the Code would reveal that objection to jurisdiction was based on the fact that the injunction order, said to have been disobeyed, was passed by the appellate Court and it was overruled by learned Civil Judge for the reason that "the Court granting injunction" means the Court, which was hearing the suit or the Court to which it has been transferred for trial.

4. While placing implicit reliance on the decision of a single Bench of this Court in *Allanoor v. Ramgopal* 1987 MPWN 237, learned counsel for the petitioners has contended that the impugned order deserves to be set aside as one without jurisdiction because the alleged breach of injunction granted in appeal was punishable by the appellate Court only. However, in that case, the earlier decision to the contrary as rendered in *Balu V. Nandram* 1969 MPLJ Note 30, though concerning the provision of Order 39 Rule 2(3) of the un-amended Code, does not find reference. The provision of Order 39 Rule 2(3) [supra] was omitted and a new Rule i.e. Order 39 Rule 2-A was inserted by Act 104 of 1976 w.e.f. 1.2.1977 in accordance with the suggestion given by Macpherson, 3. while speaking for the Bench of Patna High Court in *Jang Bahadur Singh v. Chhabila Koiri* AIR 1936 Patna 23 but, fact of the matter is that the power to punish disobedience of injunction continued to remain with the Court ordering injunction. For a ready reference, the provisions may be reproduced thus -

Rule 2(3)	Rule 2-A. Consequence of disobedience or breach of injunction
<i>In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to detained in the civil prison for a term not exceeding six months, unless in the meantime the Court</i>	<i>(1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, of the Court granting the injunction or making the order, or any Court to which the suit or proceeding</i>

<i>directs his release.</i>	<i>is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release</i> (2)
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5. In other words, both the provisions are substantially similar and, therefore, as explained by the Full Bench of this Court in *Jabalpur Bus Operators Association v. State of M.P.* 2003 (1) MPLJ 513, the earlier decision given by a Bench of equal strength in *Balu's case* (above), interpreting the expression "Court granting injunction" still holds the field as the binding precedent.

6. Moreover, the only decision viz. *Shashank v. Naraindas* AIR 1973 M.P. 303 distinguished in *Allanoor's case*, also relates to interpretation of the words "Court granting an injunction". Explaining the effect of Sections 36, 37 and 150 of the CPC in *Shashank's case*, the then Chief Justice, even without making reference to the view taken in *Balu's case* (ibid), virtually re-affirmed the same after considering judgments of the various High Courts on the question as to whether the Court to which the suit is transferred is competent to entertain an application under Order 39, Rule 2(3). It was observed -

"Words "Court granting an injunction" can only be understood to mean the Court which is trying the suit in which the injunction is granted and which has the jurisdiction to grant an injunction"

7. To sum up, the decision in the case of *Allanoor* (supra) was rendered not only by failing to take note of an earlier decision on the point but also in ignorance of relevant analogous statutory provisions as contained in Sections 36 and 37 of the CPC. It is, therefore, required to be ignored as per incuium. Further, in view of well-settled position of law on the point, the decision need not be referred to a Division Bench.

8. Needless to say that the order under challenge does not suffer from any palpable error of jurisdiction.

In the result, the revision stands dismissed.

Revision dismissed.

I.L.R. [2012] M.P., 1044

CIVIL REVISION

Before Mr. Justice R.C. Mishra

C.R. No. 80/2012 (Jabalpur) decided on 7 March, 2012

ALOK BADAL

...Applicant

Vs.

STATE BANK OF INDORE & ors.

...Non-applicants

Civil Procedure Code (5 of 1908), Order 21 Rules 84 & 85 – Purchase Money – Rules 84 & 85 leave no discretion of power to Court to extend time or to condone any delay in depositing the purchase money – Fact that the decree holder has pleaded no objection to the prayer for extension of time to deposit the remaining amount of purchase money also does not assume any significance. (Paras 3 & 4)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 84 व 85 – क्रय धन – नियम 84 व 85, न्यायालय को क्रय धन जमा करने में समय बढ़ाने या किसी विलम्ब के लिए माफी देने की शक्ति का विवेकाधिकार नहीं देते – तथ्य कि डिक्री धारक ने क्रय धन की बकाया रकम जमा करने के लिए समय सीमा बढ़ाने की प्रार्थना को आक्षेपित नहीं करने का अभिवाक् किया है यह भी कोई महत्व नहीं रखता।

Case referred :

AIR 1954 SC 349.

Abhijeet A. Awasthi, for the applicant.

ORDER

R.C. MISHRA, J. - Heard on admission.

1. This revision is directed against the order dated 25.1.2012 passed by IX ADJ, Bhopal in Execution Case No.288/07-08 setting aside the auction-sale proceedings for non-deposit of purchase money within the period of 15 days from the sale of the property as prescribed under Rule 85 of Order XXI of Code of Civil Procedure.

2. The legal consequences of default of payment of purchase money have been enumerated in Rule 86 of Order XXI of the Code. Accordingly, after defraying expenses of the auction sale, the property has to be re-sold. The provisions of Rules 84 and 85 of Order XXI are mandatory and upon non-compliance with these provisions, there is no sale at all (*Manilal Mohanlal Shah and others vs. Sardar Sayed Ahmed Sayed Mahmud and another* AIR 1954 SC 349 referred to). As explained further, even the inherent powers of the Court cannot be invoked to circumvent these mandatory provisions of the Code.

3. As an obvious corollary, contention that the time to deposit the remaining 75% of the purchase money could be extended under Section 148 of the Code as the application for extension of time (Annexure A/5) moved before expiry of the prescribed period of 15 days is apparently misconceived as rules 84 and 85 leave no discretion of power to Court to extend time statutorily fixed by these Rules or to condone any delay in depositing the purchase money.

4. Moreover, a fact that the decree holder has pleaded no objection to the prayer for extension of time to deposit the remaining amount of purchase money also does not assume any significance.

5. Thus, viewed from any angle, the order does not call for any interference under the revisional jurisdiction.

The revision, therefore, stands dismissed in limine.

Revision dismissed.

I.L.R. [2012] M.P., 1045

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 1984/2008 (Jabalpur) decided on 11 October, 2011

RAMESH DAS TYAGI

...Applicant

Vs.

BABULAL & ors.

...Non-Applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 145 – Dispute as to immovable property – Parties have already gone before the Civil Court to resolve their dispute and they are in a position to get the appropriate order from the Civil Court like interim injunction or

some other order – Proceedings initiated under Section 145 of Cr.P.C. could not be permitted to be continued and same deserves to be dropped with a direction to the parties to approach the Civil Court with appropriate proceeding. (Paras 5 & 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 145 – अवल सम्पत्ति का विवाद – पक्षकार पहले ही अपने विवाद को सुलझाने के लिए सिविल न्यायालय के समक्ष गये हैं और वे सिविल न्यायालय से उचित आदेश पाने की स्थिति में है जैसे कि अंतरिम व्यादेश या कोई अन्य आदेश – द.प्र.सं. की धारा 145 के अंतर्गत आरंभ की गई कार्यवाहियों को जारी रखने की अनुमति नहीं दी जा सकती तथा उसे समाप्त करना होगा पक्षकारों को इस निदेश के साथ कि उचित कार्यवाही हेतु सिविल न्यायालय के समक्ष जायें।

Case referred :

AIR 1985 SC 472.

Atulanand Awasthy, for the applicant.

Satyam Agrawal, for the non-applicant No1 & .

O R D E R

U.C. MAHESHWARI, J. - The applicant Shri Remeshdas Tyagi, who was one of the member of party No.2 before the Court of Sub-Divisional Magistrate, has filed this revision being aggrieved by the order dated 15.10.2008 passed by Additional Sessions Judge, Nasrullaganj, District Sehore in Criminal Revision No. 50/2008 whereby allowing the Revision filed by the respondent No. 1 & 2, the order dated 25.3.2008 passed by Sub Divisional Magistrate, Budhni District Sehore in Criminal Case No.3/1996 holding the possession of the present applicants over the disputed land before two months from 19.4.1996 the date of initiation of Istgasa with a direction to the receiver to handover the possession of such land to the present applicant has been set aside and by holding the aforesaid property of some trust the possession of the applicant was held under the authority of such trust.

2. In the course of the argument on perusing the impugned order passed by the revisional Court as well as the Court of Sub Divisional Magistrate, I have found that the present respondent No.2 Ramdhani Das Tyagi has filed some Civil Suit No.63-A/O1 against Ramanand Asharm, Public Trust through it's Chairman namely Chandramadas for declaration and perpetual injunction in the Court of District Judge, Bhopal, the same was dismissed vide Judgment and Decree dated 14.12.2002. Against such dismissal applicant Rameshdas

Tyagi has filed a First Appeal before this Court as submitted by the counsel of the parties present before the court. The same is still pending.

3. Subsequent to dismissal of aforesaid Civil Suit said Ramanand Asharm Public Trust through its President Chandramadas and other trustees has filed a Civil Suit against the present applicants for declaration and perpetual injunction in the Court of Additional District Judge, Sehore, the same is still pending and in pendency of such suit on filing an application under Order 39 Rule 1 and 2 of CPC for issuing ad-interim injunction in pendente lite of such suit, on consideration by allowing the same some interim injunction was issued in favour of the aforesaid trust. On which the present applicant had filed Misc. Appeal No.4608/10, before this Court. The same is still pending in this court for adjudication.

4. In the aforesaid subsequent Civil Suit filed on behalf of the Trust the respondent No.1 and 2 being trustees of such trust are also impleaded as plaintiffs/ respondents in suit and Misc. Appeal respectively. Accordingly, the civil litigation, the title suit, with respect of same disputed property is still pending between the parties present in this revision before the appropriate forum i. e. in the trial Court as well as before this Court.

5. In the aforesaid premises, the parties have already gone before the Civil Court to resolve their dispute and they are in a position to get the appropriate order from the civil court like interim injunction or some other order. Therefore, in view of law laid down by the Apex Court in the matter of "*Ram Sumer Puri Mahant Vs. State of U. P.* and others reported in AIR 1985 S.C. 472, the present proceedings initiated under Section 145 of Cr. P. C. could not be permitted to be continued and same deserves to be dropped with a direction to the parties to approach the Civil Court with appropriate proceeding. In the aforesaid cited case it is held as under:

"2.....When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, initiation of a parallel criminal proceeding under S. 145 of the Code, would not be justified. The parallel proceedings should not be permitted to continue and in the event of a decree of the civil Court, the criminal Court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil Court and parties are in a position to approach the civil Court for interim orders

such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation".

6. In view of aforesaid without going to examine the merits or demerits of impugned criminal proceedings the entire impugned proceedings initiated under Section 145 of Cr. P. C. is hereby dropped and parties are extended a liberty to approach the Civil Court in the pending litigation or by separate litigation permissible under the law for obtaining appropriate relief either for perpetual injunction or appointment of receiver or any other relief permissible under the law.

7. The revision is hereby disposed of with the aforesaid liberty, with a further direction that the parties shall now govern by the order of the Civil Court which would be passed either in their pending litigation or in any other proceeding permissible under the law.

8. Revision is disposed of with the aforesaid liberty, direction and observation.

Revision disposed of.

I.L.R. [2012] M.P., 1048

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 1490/2011 (Jabalpur) decided on 9 December, 2011

ROOP SINGH & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 222, Penal Code (45 of 1860), Section 307 – Complainant after taking meal was taking rest in Police Station – Applicants with Katarna, Ballam, Sticks, due to earlier enimities in furtherance of common object started violence – Held – Unless any injury falls under any category of either part of Section 300 of IPC, no charge under Section 307 can be framed – In MLC and X ray report no injury was found to be sufficient to cause death in ordinary course of nature – Offence under Section 307 not

made out – Section 332, IPC minor offence hence offence under Section 333/149 made out – Revision allowed in part. (Para 1,2,9,11,12, & 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 222, दण्ड संहिता (1860 का 45), धारा 307 – आवेदक भोजन करने के पश्चात पुलिस स्टेशन में विश्राम कर रहा था – आवेदकगण ने पूर्व शत्रुता के कारण कतरना, बल्लम, डंडों से सामान्य उद्देश्य के अनुक्रम में हिंसा की – अमिनिर्धारित – जब तक भा.द.सं. की धारा 300 के किसी वर्ग के अंतर्गत चोट नहीं आती धारा 307 के अंतर्गत आरोप विरचित नहीं किये जा सकते – एम.एल.सी. और एक्स रे रिपोर्ट में कोई चोट नहीं पाई गई जो प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिये पर्याप्त हो – धारा 307 के अंतर्गत अपराध निर्मित नहीं होता – भा.द.सं. की धारा 332 के अंतर्गत छोटे अपराध आते हैं, इसलिए धारा 333/149 के अंतर्गत अपराध निर्मित होता है – पुनरीक्षण अंशतः मंजूर।

R.S. Patel, for the applicants.

Yogesh Dhande, Dy. G.A. for the respondent/State.

ORDER

U.C. MAHESHWARI, J. - The applicants/accused have preferred this revision being aggrieved by the order dated 5.8.2011 passed by Special Judge (Constituted under Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act (in short 'the Act') Sagar, in Sessions Trial No. 84/11, framing the charges against each of them for the offence of Sections 147, 148, 186/149, 353/149, 307/149, 333/149, 332/149 and 294 of I.P.C. and also of Section 3(2) (v) of the Act.

2. The facts giving rise to this revision in short are that on dated 14.3.2011, at about 10.30 in the night Amar Singh, Head Constable posted at Police out post Athawan of Police Station Varaytha lodged a First Information Report at Police Station Varaytha contending that he along with Constable Arvind Yadav and Anand Pratap after taking their meals was taking rest in the police out Post, at about 10.20 P.M. the applicants accompanied with other 15 to 20 persons lashed with Katarna, the sharp edged weapons, Ballam, (Spear) a sharp edged pointed weapons and sticks due to earlier enmities on account of some old report, by entering in the police out-Post in furtherance of their common object, started violence. On asking them the reason in this regard on which, the applicant no.1 Jhallu Raja gave a blow of Katarna on him with intention to cause his death consequently, he sustained the injury on his head with bleedings. He shouted for help on which, the abovementioned Arvind

and Anand Pratap, taking rest, came to rescue him, then said Constable Arvind, was subjected to blow of Katarna by the applicants no.2 Makhan Singh resultantly, he also sustained the hurt on his head with bleeding. Simultaneously, the Constable Anand Pratap was subjected to blow of lathi by co-accused Bade Lodhi resultantly, he sustained the injury in his leg. As per further averments, by the abovementioned acts, the applicants accompanied the other co-accused have created the obstruction in discharging their duties as police officials. It was also stated that the complainant-Amar Singh, was also humiliated and harassed by the applicants along with the co-accused on account of his caste covered under the Act. In view of the aforesaid factual matrix, the crime of the offence of Section 452, 334, 332, 294, 307, 147, 148, 149, 353 and 332 of I.P.C. and Section 3(2) (v) of the Act was registered against the applicants and other co-accused. After lodging the report, the victims were sent to the hospital where on medical examination their MLC reports were prepared. The victim Amar Singh and Arvind, were advised to carry out the X-ray of some injuries. On carrying out the same, no fracture was found on the person of Arvind while, the fracture in the 1st metacarpal of the right hand of Amar Singh, was revealed. After holding the investigation, the applicants along with other co-accused were charge-sheeted for their prosecution under the aforesaid Sections. After committing the case to the Sessions Court on framing the charges of the Sections mentioned in the first para of this order, the applicants abjured the guilt and being dissatisfied with such order, has come to this Court with this revision.

3. Applicants' counsel Shri R.S. Patel, after taking me through the certified copy of the charge-sheet placed on the record along with the impugned order and the framed charges argued that on taking into consideration the face value of the entire charge-sheet as accepted in its entirety, the charge of Section 307 or 307 read with Section 149 of I.P.C. are not made out and prayed for setting aside such charge framed by the trial Court. In continuation, he said that after framing the charge of Section 333/149 and 332/149 of I.P.C., the charges framed under Sections 186/149 and 353/149 of I.P.C. are not sustainable as the offence made punishable under Sections 186 and 353 of I.P.C. being minor offence of Section 333 and 332 of I.P.C, the charge of such Sections are included in Sections 333 and 332 of I.P.C. Therefore, the charges framed separately under such Sections i.e. 186/149 and 353/149 of I.P.C. deserves to be set aside. So far other charges are concerned, he fairly conceded that in view of the evidence available in the charge-sheet, the same

does not require any interference under the revisional jurisdiction of this Court and prayed to allow this revision accordingly.

4. On the other hand, Shri Yogesh Dhande, learned Dy. Govt. Advocate by justifying the impugned order as well as the charges framed by the trial Court against the applicants said that the same being in consonance with the papers of the charge-sheet, does not require any interference either for setting aside the charge of Section 307/149 of I.P.C. or deleting the charges framed under Sections 186/149 and 353/149 of I.P.C. Besides this, he also argued that looking to the nature of the offence and the manner in which it was committed by the applicants with the victims in furtherance of their common object by means of Katarna, sticks and Ballam (sphere), thus mere on the basis of nature of the injuries stated in their MLC reports and X-ray reports, it could not be said that the applicants have not committed the offence of Section 307 of I.P.C. According to him, taking into consideration the entire scenario, this was a fit case for framing the charge of Section 307/149 of I.P.C. against the applicants and in such premises, the trial Court has not committed any error and prayed for dismissal of this revision.

5. Having heard the counsel at length keeping in view of their arguments advanced, I have carefully gone through the certified copy of the charge-sheet placed on the record along with the impugned order and the framed charges.

6. It is settled proposition of law that the accused like applicants may be tried and convicted for such offending act which actually they have committed and not for that act, which in the available circumstances they could have committed, but did not commit. So, keeping in view such proposition in the available circumstances, this Court has to answer the question, whether the trial Court has rightly framed the charge of Section 307/149, 353/149 and 186/149 of I.P.C. against the applicants or such approach of the trial Court requires interference for setting aside the same.

7. It appears from the aforesaid factual matrix of the case as stated in para 2 of this order that at the time of alleged incident the complainant-Amar Singh as well as the other two victims Constables namely, Arvind and Anand Pratap after taking their meals were taking the rest in the Police out Post as such they were not actually discharging any public duty as police officials, but the victims being police official of the same Police out-Post, were taking the rest inside of the same Police out-Post and at that time, if any person like the

applicants accompanied with other co-accused entered in the Police Station with the alleged weapons and created some violence, then the victims being police official were bound to resist such act of the applicants in discharging their official duty and pursuant to it on resisting the same they were subjected to aforesaid beating by the applicants and sustained the injuries. Thus, in such premises, it should be deemed that the applicants accompanied with others created the obstructions in discharging the public duty of the victims as police officials and also caused them the injuries as stated by the doctor in their MLC and X-ray reports. So, in such premises, I have found sufficient prima facie evidence in the charge-sheet against the applicants for committing the offence of Sections 186, 353, 332 and 333 of I.P.C. but, I am also of the view that Sections 333 and 332 of I.P.C. being major Sections of punishment of same cognate of Section 186 and 353 of I.P.C. and after recording the evidence in trial on establishing the ingredients of Sections 186 and 353 of I.P.C., then the accused like applicants by virtue of Section 222 of Cr.P.C., could be convicted for the minor offence made punishable under Sections 353 and 186 of I.P.C. Under the charges framed for the Offence of Section 332/149 and 333/149 of I.P.C. In such premises, the charge of Sections 186/149 and 353/149 of I.P.C. being not required separately deserves to be set aside. Accordingly, the same are hereby set aside.

8. Before proceeding further to decide the sustainability of the charge framed under Section 307/149, 333/149 and 332/149 of I.P.C, I deem fit to reproduce the injuries sustained by the victims as found by the doctor in their respective MLC and X-ray reports. The same are as under:-

A. As per MLC report of Amar Singh-complainant, he sustained the following injuries:-

- (i) 1. Lacerated wound on the posterior part of right parietal region of skull 4x2x2 cms in size coagulated blood and on around the wound+
2. Swelling on the dorsal aspect of right hand including right wrist joint. Tenderness+ Restriction of movements.
3. Abrasion (Red brown) on the antero medial aspect of upper part of left leg 4x2 cm.
4. Bruise (Red blue) on the antero medial aspect of lower part of left leg 5x2 cm.

5. Abrasion on the left shoulder region 5x3 cm.
6. Bruise (Red+blue) just below the left scapular region 6x3 cm.
7. Bruise (Red-blue) on the posterior aspect of upper part of Right upper arm 6x2 cm.

As per X-ray report given by the radiologist, he sustained the fracture of 1st metacarpal of his right hand.

Except the aforesaid injury of fracture, all other injuries were stated by the doctor to be simple in nature. The alleged fracture by virtue of Section 320 of I.P.C. shall be treated to be grievous in nature.

B. As per MLC report of Arvind, Constable, he sustained the following injuries:

- (i)
 1. Incised wound on the posterior part of right parietal region of skull 4x2x2 cm in size
 2. Abrasion (Red-brown) on the left shoulder region 7x5 cm.
 3. Bruise (Red-blue) on the right shoulder region 6x4 cm.
 4. Bruise (Red-blue) on the anterior aspect of right knee joint 5x3 cm.
 5. Abrasion on the right side of back at the level of T11 vertebra 4x2 cm.
 6. Bruise (Red-blue) on the left flank of abdomen 6x3 cm.
 7. Bruise on the dorsal aspect of lower part of left forearm 5x3 cm.

(ii) It is noted that no X-ray report of any injury of this victim has been placed with the charge-sheet, thus in such premises, the injury sustained by this victim shall be treated to be simple in nature as stated by the doctor.

C. As per MLC report of Anand Pratap, he sustained the following injuries:

- (i)
 1. Contusion 6 cm x 2 cm. Right and left buttock hard and blunt. Simple.

(ii) One contusion only.

9. In view of the aforesaid M.L.C. and X-ray reports, any of the injuries sustained by the victim Amar Singh, could not be treated to be sufficient to cause death of a person in the ordinary course of the nature and I am of the considered view that unless any of the alleged injury of the victims falls under any of the category of the earlier part of Section 300 of I.P.C., defines culpable homicide amounting to murder, the charge of Section 307 of I.P.C. could not be framed and in such premises, on examining the case looking the nature of the alleged injuries as stated above, the charge of Section 307/149 of I.P.C. framed by the trial Court is not sustainable. Pursuant to it, the same is hereby set aside.

10. It is apparent from the aforesaid discussions that victim Amar Singh-complainant except one grievous injury the fracture of 1st metacarpal of right hand had sustained all other injuries simple in nature by the alleged incident act of applicants along with the other co-accused in furtherance of their common object. Thus, looking to the nature of injuries of this victim, I do not found any error or perversity in the order of the trial Court in framing the charge of Section 333/149 of I.P.C. against the applicant. So such charge is hereby affirmed.

11. So far as the charge of Section 332/149 of I.P.C. is concerned, looking to the nature of the injuries sustained by the victims Constables Arvind and Anand Pratap, which are described to be simple in nature, in their MLC reports, the trial Court has not committed any error in framing such charge of Section 332/149 of I.P.C. So, the same does not require any interference under the revisional jurisdiction of this Court.

12. It is made clear that the offence of Section 332 of I.P.C. being minor offence of Section 333 of I.P.C., no separate charge of Section 332 of I.P.C. with respect of some other injuries of Amar Singh-complainant, which is stated by the doctor to be simple in nature, is required because, on appreciation of evidence on arising the occasion by virtue of Section 222 of Cr.P.C., the applicants may be convicted for the injuries either simple or grievous or both under the charge of Section 333 of I.P.C. Accordingly, the charge of Section 333/149 of I.P.C. framed against the applicants are hereby affirmed.

13. So far as the other charges framed by the trial Court against the applicants are concerned, I have not found any perversity either in the

impugned order or in the framed charges requiring any interference under the revisional jurisdiction of this Court. So such charges are hereby affirmed.

14. Under the aforesaid premises, by affirming the charges framed by the trial Court under Sections 147, 148, 333/149, 332/149 (two counts) and 294 of I.P.C. and Section 3(2) (v) of the Act, this revision is allowed in part and the charges framed against the applicants for the offence under Sections 307/149, 186/149 and Section 353/149 of I.P.C. are hereby set aside. It is made clear that the findings of setting aside the charge of Sections 186/149 and 353/149 of I.P.C. shall not be deemed that the applicants are entitled for extending the acquittal under such Sections or under Sections 333/149 and 332/149 of I.P.C. as such, the trial Court shall be at liberty to adjudicate the matter independently, on appreciation of the evidence also keeping in view the provision of Section 222 of Cr.P.C. Till this extent, the impugned order and the charges framed by the trial Court are hereby modified while the other findings of the same are hereby affirmed.

15. Revision is allowed in part as indicated above.

Revision partly allowed.

I.L.R. [2012] M.P., 1055

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 1999/2011 (Jabalpur) decided on 12 December, 2011

GULAB & anr.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 227, Penal Code (45 of 1860), Section 307 or 325 – Attempt to murder or Grievous hurt – The complainant's husband gave money to applicant for providing hut – As no hut was given therefore the complainant and her husband were beaten as they were demanding their money back – Held – Doctor has opined that nature of injuries are simple – No injury sufficient to cause death in ordinary course of nature found – No charge under Section 307 can be framed – Trial Court directed to frame charge under Sections 325, 323 of I.P.C. (Paras 1,2, 6,7, 8, 9 & 10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227, दण्ड संहिता (1860)

का 45), धारा 307 या 325 - हत्या या घोर उपहति पहुंचाने का प्रयत्न करना - शिकायतकर्ता के पति ने आवेदक को झोपड़ी प्रदान करने के लिये पैसे दिये - चूंकि कोई झोपड़ी प्रदाय नहीं की गयी, इसलिये शिकायतकर्ता और उसके पति को पीटा गया क्योंकि वे अपने पैसे वापिस मांग रहे थे - अभिनिर्धारित - चिकित्सक की राय में चोटें साधारण प्रकृति की हैं - प्रकृति के सामान्य अनुक्रम में मृत्यु कारित करने के लिये कोई चोट नहीं पाई गई - धारा 307 के अंतर्गत कोई अपराध विरचित नहीं किया जा सकता - विचारण न्यायालय को भा.द.सं. की धारा 325, 323 के अंतर्गत आरोप विरचित करने के लिये निर्देशित किया गया।

R.P. Prajapati, for the applicants.

Nirmala Nayak, G.A. for the non-applicant.

ORDER

U.C. MAHESHWARI, J. - The applicants/accused have preferred this revision under section 397 read with 401 of the Cr.P.C being aggrieved by Order dated 17.10.11 passed by the IInd ASJ, Damoh in S.T.No.263/11 framing charges against each of them for the offence of section 307/34, 325, 323 and 506-II of the IPC.

2. The facts giving rise to this revision in short are that the on dated 18.4.2011 victim Smt Kavita Bai wife of Kanai Ahirwal lodged the FIR at police outpost Sagarnaka, P.S Sagar Dehat contending that her husband gave Rs.1000/- to applicant No.1 Gulab Sarpanch of the village under an assurance that he will provide him a 'Kuteer' (hut). But after receiving such sum, no such Kutter was given to them and, on demanding the said money back from applicant No.1, he tried to beat her husband and today in the morning again such atmosphere was created by applicant No.2 Harchandra. Thereafter when she along with her husband was returning to her residence, on the way out of the village, applicant No.2 Harchandra lashed with Farsa and applicant No.1 Gulab lashed with sticks anticipated them and started their beating by means of Farsa and stick, resultantly, they sustained the injuries on different parts of their person. The names of witnesses is also stated in the FIR. On such information, the offence under section 307, 341 and 34 of the IPC was registered as Crime No. 0/11. On sending such FIR to the main police station, the original Crime No.165/11 was registered. After holding the investigation, the applicants were charge sheeted for the aforesaid offence. On evaluation of the charge sheet, the charge of sections 307, 325/34, 323 and 506-II against the applicant No.1 while the charge of section 307/34, 325, 323 and 506-II of the IPC were framed. They abjured the guilt and thereafter they have come to

this court with this revision for setting aside the same and discharging the applicants.

3. Shri Prajapati, learned appearing counsel after taking me through the copy of the charge sheet along with the impugned order and framed charges said that even on taking into consideration the face value of the charge sheet including the nature of the injuries sustained by the victims and the other medical evidence as accepted in its entirety, the charge of section 307 or 307 read with section 34 of the IPC is not made out against any of the applicants. It is also noted that he has not assailed the charges framed by the trial court for the offence under section 325, 323 and 506-II of the IPC and prayed to discharge the applicants from such charge of section 307 and 307/34 of the IPC respectively by allowing this revision.

4. On the other hand, responding the aforesaid argument, Smt Nirmala Nayak, GA by justifying the impugned order said that the charges framed by the trial court being in consonance with the papers of the charge sheet, does not require any interference at this stage either for discharging the applicants or to replace any of charge of other sections of the IPC. However, she fairly stated that in the MLC report as well as the x-ray report whatsoever injuries and fracture are stated, no one could be treated to be sufficient to cause death of the human being in the ordinary course of the nature and prayed to decide this revision accordingly.

5. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the copy of the charge sheet along with the impugned order and the framed charges.

6. Before proceeding further, I would like to reproduce the injuries of the victims stated by the doctor in their respectively MLC report as well as in the x-ray report of victim Kanai. The same are as under :-

(A) As per MLC report the victim Kanai sustained the following injuries :-

(i) Lacerated wound 4x0.5 cm bone deep over right parietal region. Oozing of blood present. Margins irregular. Inflammation at border present.

(ii) Lacerated wound 1x0.5 cm bone deep over left parietal region. Margin irregular, oozing present.

(iii) Swelling present left wrist and forearm. Movement of elbow and wrist lock.

All injuries caused by hard and blunt object.

Advised x-ray of skull and left forearm.

Under the aforesaid advise of the doctor, on carrying-out the x-ray of skull and left forearm of this victim, the following report was given by the radiologist :-

"x-ray skull - No bony injury.

X-ray forearm-left-fracture of ulna bone."

(B) As per MLC report victim Smt Kavita sustained following injuries

(i) Contusion 8x2 cm over right thigh posterior aspect reddish colour.

(ii) Contusion 6x2 cm over left thigh posterior aspect reddish colour.

(iii) Diffuse swelling left forearm over posterior aspect.

(iv) Contusion 6x2 cm left side back reddish colour. Advise x-ray of right forearm.

Injury No.1st,2nd and 4th simple in nature. All caused by hard and blunt object. Duration within six hours.

As per opinion of the doctor with respect of the injuries No. 1, 2 and 4 sustained by Smt Kavita Bai, the same were simple in nature while no x-ray report of injury No.3 was placed with the charge sheet, in such premises such injury also appear to be simple in nature. In the MLC report of Kanai, no opinion regarding nature of the injuries was given by the doctor. Subsequent to it, on carrying-out the x-ray, again the opinion regarding injuries was requisitioned from Dr. H. Singh. According to his opinion dated 30.6.2011, injury No.1 and 2 was stated to be simple in nature while injury No.3 was stated to be grievous in nature. In such premises such injury could not be

treated to be sufficient to cause death in the ordinary course of the nature.

7. After going through the FIR as well as the interrogatory statements of the witnesses, I have not found prima facie factual matrix showing that the alleged injuries were caused by any of the applicants to any of the victim with intention to cause their death. So, in such factual matrix as well as in view of the aforesaid medical evidence in which no injury has been stated by the doctor to be sufficient to cause death in the ordinary course of the nature, on taking into consideration the face value of the charge sheet as accepted in its entirety even then there is no evidence in the charge sheet to frame the charge of section 307 or 307/34 of the IPC. So in such premises, the impugned order till the extent of framing the charge of section 307/34 IPC, being perverse, deserves to be and is hereby set aside.

8. So far the charge of section 325, 323 and 341 of the IPC, on the basis of the injuries sustained by victim Kanai and Kavita are concerned, in view of the above mentioned circumstances and the injuries sustained by the concerning victims, such charges have rightly been framed against the applicants. At this stage, in the available circumstances of the case, I would like to observe and direct the trial court to frame the charge of section 34 of the IPC along with aforesaid sections of 325, 323 and 341 of the IPC because as per charge sheet such alleged acts were committed by the applicants in furtherance of their common intention. So far the charge of section 506-II of the IPC is concerned, in the available circumstances, the same does not require any interference at this stage.

9. In the aforesaid premises, by affirming the charges framed by the trial court for the offence of section 325, 323, 341 and 506-II of the IPC with a further direction to frame the additional charge of section 34 of the IPC along with these sections, this revision is allowed in part and the charges framed against the applicants for the offence of sections 307 and 307/34 of the IPC are hereby set aside. It is also observed that the trial court shall be at liberty to consider the papers of the charge sheet for framing the charge of section 341 of the IPC. Till this extent, the impugned order is modified while the other findings of the same are hereby affirmed.

10. Revision is allowed in part as indicated above.

Revision partly allowed.

I.L.R. [2012] M.P., 1060

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 593/2008 (Jabalpur) decided on 12 December, 2011

DWARKA SONI

...Applicant

Vs.

STATE OF M.P. & anr.

...Non-applicants

Negotiable Instruments Act (26 of 1881), Section 138 – Signature – Courts below hold that there is no over writing and difference of signature – Held – Defence that there was difference in the signature of the applicant between the cheque and specimen signature in the record of his Banker or the cheque was missed or stolen are being after thought are not helping to the applicant – Revision dismissed. (Paras 1,2,5,6, 7 & 8)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – हस्ताक्षर – अधीनस्थ न्यायालय ने निर्धारित किया कि हस्ताक्षर में कोई ओवर राइटिंग या भिन्नता नहीं—अभिनिर्धारित—चेक पर आवेदक के हस्ताक्षर और बैंकर के अभिलेख के नमूना हस्ताक्षर में भिन्नता थी या चेक गुम गया था या चोरी हो गया था, यह बचाव विचारोपरांत है, जो आवेदक को कोई सहायता नहीं देती—पुनरीक्षण खारिज।

Sanjay Sanyal, for the applicant.

Nirmala Nayak, G.A. for the non-applicant/State.

Ajit Singh Jatav, for the non-applicant No.2.

ORDER

U.C. MAHESHWARI, J. - The applicant/ accused has preferred this revision being aggrieved by the judgment dated 24.1.2008 passed by 13th Additional Session Judge, Jabalpur in Cr. Appeal No. 557/07, affirming the judgment dated 17.11.2007 passed by Special Judicial Magistrate 1st Class, Jabalpur in Criminal (Complaint) Case No.27358/06, filed by the respondent No.2, convicting the applicant under Section 138 of Negotiable Instruments Act (In short "the Act") with fine of Rs.1,45,000/- in default of depositing the fine amount for three months simple imprisonment with a direction that out of the fine amount Rs.1,35,000/- be given as compensation to the respondent No.2.

2. The facts giving rise to this revision in short are that respondent No.2 herein filed a private complaint against the applicant in the trial Court

contending that the applicant being his good friend was in need of some money for education and employment of his son in some foreign country in this regard on making demand by the applicant from him he gave a loan of Rs.2,00,000/- from him. Besides this Rs.1,00,000/- was also taken by the applicant from him on the death of his wife to carry out her last rite. In consideration of such sum applicant gave him three different cheques of his account to repay the same. Out of them one cheque bearing No.052001 dated 30.12.2004 for Rs.1,00,000/- was deposited by the respondent No.2 with his Banker on 10.1.2005 for its collection, the same was returned by the Banker as dishonored with a memo having the endorsement of insufficient fund in the account of the applicant. Thereafter in spite of service of demand notice on the applicant neither the consideration of such cheque nor any reply of the same was given by the applicant, on which within the prescribed period provided under the Act the impugned complaint was filed, in which by adopting the procedure prescribed under Section 200 and 202 of Cr. P. C. the cognizance of the aforesaid offence of Section 138 of the Act was taken by the trial Court against the applicant, on his appearance the trial was held. On appreciation of evidence the applicant was convicted and sentenced as stated above. On filing the appeal the same was dismissed, on which the applicant has come to this Court with this revision.

3. Shri Sanjay Sanyal, learned appearing counsel of the applicant after taking me through the record of the Courts below including the impugned judgment argued that the alleged transaction being a loan transaction the remedy to recover the sum of disputed cheque by way of Civil suit was available to the respondent No.2 and therefore the Courts below did not have jurisdiction to entertain the impugned complaint to convict the applicant. In continuation he said that the over writing part of the disputed cheque and apparent difference of the applicant signature on the disputed cheque with his specimen signature kept in the record of his banker was also not considered by the Courts below with proper approach. It is also argued that disputed cheque along with some others was missed from the custody of the applicant for which he also lodged the FIR and the same was produced and proved. In such premises also the Courts below ought to have held that the alleged cheque was never issued by the applicant with his signature for any valid consideration. In this connection he also argued that the applicant is always used to sign the cheque in English and not in Hindi language but such aspect was neither considered by the Courts below with proper approach nor sufficient

opportunity to prove such fact was given to him by the trial Court, and prayed for allowing this revision.

4. On the other hand Shri Ajit Singh Jatav, learned counsel of the respondent No.2 by justifying the findings of the impugned judgment holding conviction against the applicant said, the same being based on proper appreciation of evidence and in conformity with law does not require any interference at this stage for extending the benefit of acquittal to the applicant and prayed for dismissal of this revision.

5. Having heard the counsel keeping in view their argument, I have carefully gone through the record of the Courts below along with the impugned judgment.

6. It is apparent from the memo issued by the banker having the endorsement the impugned cheque was dishonored because of insufficient fund in the account and not because of difference of applicant's signature on the same. The Courts below on appreciation taking into consideration such factual aspect had overruled such objection of the applicant. Besides this the findings of the Courts below holding there is no overwriting and difference of the signature of the applicant on the cheque being based on appreciation of available evidence does not require any interference under the revisional jurisdiction of this court, hence all the arguments of the applicant's counsel in this regard are hereby rejected.

7. So far other argument advanced by the applicant's counsel that the impugned transaction being loan transaction the remedy of civil suit to recover such sum was available to respondent No.2 is concerned, such argument has also not appealed me because apparently the impugned transaction being transaction of cheque is squarely covered with the alleged provision of the Negotiable Instruments Act. In such premises in the available factual matrix of the case the respondent No.2 could not have been restrained to prosecute the impugned complaint against the applicant by any of the Courts below. Therefore, on the ground that the impugned transaction was a civil transaction, it could not be held that the criminal Court did not have jurisdiction to entertain the impugned private complaint of the respondent No.2 against the applicant. So such argument of the applicant's counsel is also failed.

8. Apart the above, I would like to mention here that after dishonoring the cheque on account of insufficient fund in the account of the applicant,

inspite service of demand notice of respondent No.2 on the applicant neither the consideration was paid nor any explanation in this regard by way of reply was given to the respondent No.2. Such circumstances are also sufficient to draw the inference that aforesaid defence as argued by the applicant's counsel that there was difference in the signature of the applicant between the cheque and specimen signature in the record of his Banker or the cheque was missed or stolen are being after thought are not helping to the applicant.

9. In the aforesaid premises, I have not found any perversity, infirmity, illegality or anything against the propriety of law in appreciation of evidence and also in considering the existing legal position in the impugned judgment by the Courts below for holding conviction and imposing the punishment against the applicant under the above mentioned offence. Hence, this revision being devoid of any merits deserves to be and is hereby dismissed at the stage of motion hearing.

Revision dismissed.

I.L.R. [2012] M.P., 1063

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 1989/2011 (Jabalpur) decided on 13 December, 2011

HYDER KHAN & anr.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Sections 107, 306 – Abetment to commit suicide – Deceased under fear as extortion money Rs. 6,000/- was demanded by applicants – Deceased consumed poisonous substance – Held – Applicants by carrying out the extortion activities created fear on the deceased to implicate him in murder case, so deceased was abetted and instigated to commit suicide – Acts of applicants are covered under “first and second ingredients of the section 107 I.P.C” – Revision dismissed.

(Paras 2, 11 & 12)

दण्ड संहिता (1860 का 45), धाराएँ 107, 306 – आत्महत्या कारित करने का दुष्प्रेरण – मृतक भयग्रस्त था क्योंकि आवेदकगण द्वारा उद्धापन के तौर पर रुपये 6,000/- की मांग की गई थी – मृतक ने विषैले पदार्थ का प्राशन किया – अभिनिर्धारित – आवेदकगण ने उद्धापित कार्यो द्वारा मृतक को भयभीत किया कि उसे हत्या के प्रकरण में फंसा देंगे, इस प्रकार मृतक को आत्महत्या कारित करने

के लिये दुष्प्रेरित किया एवं उकसाया – आवेदकगण के कृत्य मा.द.सं. की धारा 107 के प्रथम व द्वितीय घटक के अंतर्गत आते हैं – पुनरीक्षण खारिज।

M.K. Tripathi, for the applicants.

ORDER

U.C. MAHESHWARI, J. - This revision is directed by the applicants - accused under Section 397/401 of Cr. P. C. being aggrieved by the order dated 11.10.2010, passed by the Sessions Judge, Burhanpur in S.T. No. 06/2011 framing charge against each of them for the offence of Section 306/34 of IPC.

2. The facts giving rise to this revision in short are that on dated 22.9.2010 on receiving the information in writing from Dr. D.K. Patidar posted at Nehru Chikitsashalaya, Burhanpur regarding unnatural death of one Praveen Kunbi, son of Shri Gopal Kunbi, aged 23 years an inquest report bearing no. 29/2010 was registered at Police Station Lalbagh, Burhanpur. In the course of its enquiry after preparing the Panchanama of the dead body, the autopsy of the same was carried out. In further enquiry on interrogation of witnesses Chameli Bai Kunbi, Gopal Kunbi, Churaman Kunbi, Rupali Kunbi, Jitendra Mahajan, Dinesh Dhande, Yogesh Mahajan, Prakash Mahajan and Rahul Mahajan, it was revealed that the deceased Praveen in his life time was under fear and extortion of the applicants as they were demanding Rs.6000/- from him with criminal intimidation that on non giving such sum, they will implicate the deceased in the murder case of Shabnam, D/o Iqbal Khan. Accordingly the applicants harassed and abetted Praveen Kunbi for committing the suicide. Pursuant to such extortion and instigation said Praveen by consuming poisonous substance committed suicide, on which crime no. 278/10 was registered against the applicants at the same Police Station for the offence of Section 306/34 of IPC and after holding investigation on establishing the case of Section 306/34 of IPC against the applicants, they were charge sheeted for the same.

3. After committing the case to the Sessions Court, on evaluation of the charge sheet a charge of Section 306/34 of IPC was framed against both the applicants. They abjured the guilt and being dissatisfied with such order have come to this court with this revision.

4. Shri M.K. Tripathi, learned appearing counsel of the applicants after taking me through the copy of the charge sheet alongwith the impugned order and the charge framed against the applicants argued that on taking into

consideration the face value of the evidence placed by the investigating agency in the charge sheet as accepted in its entirety, the ingredients of the offence of Section 306 of IPC alongwith Section 34 of the IPC are not made out against any of the applicants. In continuation he argued that for the sake of arguments, if it is deemed that the applicants demanded Rs.6000/- from Praveen with criminal intimidation that on non giving such sum to them, they will involve him in the alleged murder case of Shabnam otherwise, he may go and die even then the applicants could not be prosecuted under Section 306 of IPC treating them to be offender to instigate the deceased for committing the suicide. As such after giving the alleged extortion and intimidation by the applicants, the deceased had a remedy to approach the public authority/ Police Authority to get prosecuted the applicants for their offending act and if instead to adopt such way without approaching to the public authority, if Praveen by consuming poisonous substance has committed suicide, then the same could not be treated to be the abetment or instigation to the deceased on the part of the applicants. According to him the evidence collected by the investigating agency does not establish the ingredients of the offence of abetment of a thing defined under Section 107 of IPC and, therefore, the applicants could not be prosecuted for offence of Section 306 of IPC and prayed for discharging the applicants by admitting and allowing this revision.

5. Having heard the applicant's counsel at length on admission, keeping in view the arguments advanced by him, I have carefully gone through the copy of the charge sheet alongwith the Police Report filed under Section 173 of Cr.P.C. so also the impugned order and the framed charges against the applicants.

6. True it is that after consuming the poisonous substance Praveen Kunbi was taken to hospital where he being unconscious was not in a position to give statement or to record the dying declaration and during treatment in the hospital due to complication of alleged poisonous substance he died, on which an information in writing was sent by the concerning Doctor to the Police Outpost of such hospital from where it was received at the Police Station, Lalbagh, Burhanpur, on which a merge intimation was registered and in its enquiry after preparing dead body Panchanama, the postmortem of the same was carried out, according to which the cause of death of Praveen Kunbe was found asphyxia, most probably as a result of poison. However, viscera was preserved and the same was sent for chemical examination. As per charge sheet the report of forensic laboratory in this regard is still awaited,

as the same is not placed on the record.

7. Besides the aforesaid, in the enquiry of the inquest report the interrogatory statements of as many as nine witnesses named in the FIR were recorded, on which it was established that in the life time of the deceased, he was subjected to alleged demand of Rs.6000/- by the applicant and to fulfill such demand, he was under fear and extortion of the applicants who asked him either to pay them such sum or may go and die, otherwise they will implicate him in the murder case of said Shabnam. Pursuant to that abetment and instigation given by the applicants, the deceased proceeded to commit suicide and committed the same, on which the impugned FIR was registered against the applicants for the offence of Section 306/34 of IPC. After registration of the offence again interrogatory statements of as many as 13 witnesses were recorded. On going through the copies of the interrogatory statements of such witnesses placed on the record, it is apparent from the interrogatory statements of Churaman Kunbi, Gopal Kunbi, Pramod, Rahul, Gajendra, Pramod, Yogesh, Jitendra, Prakash, S/o Kaddu Mahajan, Dinesh, Smt. Rupali, Wid./O Praveen that the deceased Praveen was subjected to harassment, abetment and instigation of the applicants' act of extortion whereby under criminal threat, they were demanding Rs.6,000/- from the deceased saying if such amount is not paid to them, then they would involve the deceased in the alleged murder case of Shabnam, otherwise he may die and due to such fear and extortion given by the applicants, the deceased - Praveen proceeded to commit suicide and by consuming the alleged poisonous substance committed the same.

8. In the aforesaid circumstances, for the sake of arguments for a moment, if it is deemed that in the life time of the said deceased -Praveen the aforesaid fear under the activities of extortion had not been given by the applicants to him, then there was no occasion for the deceased to proceed and commit the suicide. So in such circumstances, one thing is certain that the applicants by carrying out the extortion activities and creating fear on the deceased to implicate in the murder case of Shabnam created such situation, in which the deceased was abeted and instigated to commit suicide and committed the same.

9. Apart the above, there is sufficient evidence in the charge sheet showing that both the applicants had agreed in the criminal conspiracy to create aforesaid fear on the deceased and thereby in furtherance of their common intention, with above mentioned extortion abeted to the deceased for committing suicide. In such premises, also the case of the prosecution against

the applicants is squarely covered with the definition of "abetment of thing" defined under Section 107 of IPC and in such premises, the impugned charge of Section 306/34 of IPC has been rightly framed by the trial court.

10. As ready reference, I would like to reproduce the concerning part of aforesaid both the Sections. The same are read as under:-

"107. Abetment of a thing.- A person abets the doing of a thing, who-

First- Instigates any person to do that thing; or

Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing."

"306. Abetment of suicide-- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

11. In view of the aforesaid provision, on examining the case, it is apparent that Praveen Kunbi committed suicide because of the instigation given by the applicants to him by creating the fear under the activities of extortion and thereby both the applicants engaged themselves with each other to instigate the deceased-Praveen to commit suicide and pursuant to that he committed suicide. Accordingly such act of the applicants are squarely covered under the first and second ingredients of said Section 107 of the IPC. In such premises, the trial court has not committed any error in framing the alleged charge of Section 306/34 of IPC against the applicants.

12. In view of aforesaid discussion, I have not found any perversity, illegality, irregularity or anything against the propriety of law in the order impugned framing charge of Section 306/34 of IPC against the applicants requiring any interference under the revisional jurisdiction of this court. Consequently this revision being devoids of any merits is hereby dismissed.

Revision dismissed.

I.L.R. [2012] M.P., 1068

CRIMINAL REVISION

Before Mr. Justice Sujoy Paul

Cr. Rev. No. 01/2012 (Gwalior) decided on 3 January, 2012

BALBEER SINGH

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 360 & 361 – Probation – If a person fulfills the requirement of the section, the competent Court is under a legal and mandatory obligation to consider his case in the touch stone of the provisions for the purpose of granting him benefit of probation. (Para 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 360 व 361 – परिवीक्षा – यदि व्यक्ति धारा की अपेक्षाओं को पूरा करता है, सक्षम न्यायालय उसे परिवीक्षा का लाभ प्रदान करने के लिए उपबंधों की कसौटी पर उसके प्रकरण का विचार करने के लिए विधिक एवं आज्ञापक बाध्यता के अधीन है।

B. Criminal Procedure Code, 1973 (2 of 1974), Sections 360 & 361 – Probation – No material on record which shows that petitioner was previously convicted – The age of petitioner is above 21 years – Held – Petitioner was eligible for consideration by the Court for the purpose of grant of benefit of probation. (Para 6)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 360 व 361 – परिवीक्षा – अभिलेख पर कोई सामग्री नहीं जो दर्शाती हो कि याची को पूर्व में दोषसिद्ध किया गया था – याची की आयु 21 वर्ष से ऊपर – अभिनिर्धारित – याची परिवीक्षा का लाभ प्रदान किये जाने हेतु न्यायालय द्वारा विचार किये जाने योग्य था।

Cases referred :

1992(1) MPJR 331, (2000) 9 SCC 245.

Amit Lahoti, for the applicant.*B.K. Sharma*, P.P. for the non-applicant.**ORDER**

SUJOY PAUL, J. - This revision under Section 397/401 of Cr.P.C. is directed against the judgment dated 28.12.2011. The petitioner is convicted and sentenced by order dated 19.4.2011 passed by J.M.F.C. Vidisha in

Criminal Case No.908/09 whereby he was held guilty for the offence punishable under Sections 354 and 448 of IPC and was ordered to undergo R.I. of two months and three months respectively for the said offences, which would run concurrently.

2. Shri Amit Lahoti, learned counsel for the petitioner, apart from pointing out perversity and apparent contradictions in the statements of prosecution witnesses, also stated that both the Courts below have not addressed on the question of grant of benefit of probation to the petitioner as per Sections 360 and 361 of Cr.P.C.

3. Shri Lahoti, in nutshell submits that the petitioner fulfills the eligibility for grant of said benefit of probation as per section 360(1) of Cr.P.C. He submits that both the provisions ought to have been taken into account by the courts below. On this score alone, Shri Lahoti submits that the petitioner deserves to succeed.

4. I have also heard Shri B.K.Sharma, learned Public Prosecutor, on this ground.

5. Section 360(1) Cr.P.C. shows that if a person is above 21 years of age and is punished for a term of less than seven years, his case may be considered for grant of benefit of probation. Another requirement is that there is no previous conviction against such person.

6. A careful perusal of the order of J.M.F.C. Dated 19.4.2011 shows that in para 15 there is a specific finding that there is no material on record which shows that petitioner was previously convicted in any other matter and he became accused for the first time. Admittedly, the age of petitioner is above 21 years. Thus, I find force in the argument of Shri Lahoti that the petitioner was eligible for consideration by the court for the purpose of grant of benefit of probation.

7. Sections 360 and 361 of Cr.P.C. were considered by this Court in a case reported in 1992 (1) MPJR 331 (*Prakash vs. State of MP*). Relevant paragraphs no.5,6 and 7 are reproduced here as under:-

5. *The criminal jurisprudence dealing with imposition of sentence has undergone a change with the enactment of the Act, which is a milestone in the progress of the modern liberal trend of reform in the field of*

penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. See Rattanlal v. State of Punjab (AIR 1965 SC 444).

6. *It is with this purpose of reformation of the offender that Sections 360 and 361, Cr.P.C. have been enacted. S. 360 empowers the Court to deal leniently with a person who has committed an offence for the first time by releasing him on probation of good conduct instead of giving punishment, in order to give him a chance of reforming himself and to protect him from being corrupted and turned into a regular criminal. If the Court refrains from dealing with an offender under Section 360 Cr.P.C. or under the provisions of the Act, or any other law for the treatment, training or rehabilitation of youthful offenders, where the Court could have done so, Section 361, which is a new provision in the Code of Criminal Procedure, 1973, makes it mandatory for the Court to record in its judgment the 'special reasons' for not doing so. Section 361 thus casts a duty upon the Court to apply the provisions of Section 360 wherever it is possible to do so and to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Sections 361 must be such as to compel the Court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. See Bishnu Deo V. State of West Bengal (AIR 1979 SC 964).*
7. *Looked with that view, in fact, no special reasons have been assigned by the appellate Court for not applying the provisions of the Act, which was mandatory for the Court to record in its judgment for not giving the benefit under Section 360, Cr.P.C. compelling the Court to hold that it is impossible to reform and rehabilitate the offender. The applicant being an employee in the Municipality, a first offender deserves to be given the benefit of probation u/S.*

360, Cr.PC., as the incident was not preplanned nor the injury caused was of serious nature. Therefore, in the circumstances of the case and having regard to the nature of the offence as also the character of the offender, it is expedient to release the applicant on probation of good conduct for a period of one year from the date of execution of bond.

The applicant's sentence of fine shall remain suspended during this period, provided he executes a bond of Rs. 1000/- with one solvent surety in the like amount to the satisfaction of the Judicial Magistrate, First Class, Sabalgarh, within a period of one month from today. If the applicant fails to maintain peace and good behaviour during the period, the sentence of fine shall be received by the applicant.

8. The Apex Court in (2000) 9 SCC 245 (*Chandreshwar Sharma vs. State of Bihar*) held as under:

"From the perusal of the judgment of the learned Magistrate as well as the Court of appeal, and that of the High Court, it transpires that none of the forums below had considered the question of applicability of Section 360 of the Code of Criminal Procedure. Section 361 and Section 360 of the Code on being read together would indicate that in any case where the Court could have dealt with an accused under Section 360 of the Code, and yet does not want to grant the benefit of the said provision then it shall record in its judgment specific reasons for not having done so. This has apparently not been done, inasmuch as the Court overlooked the provisions of Sections 360 and 361 of the Code of Criminal Procedure. As much, the mandatory duty cast on the Magistrate has not been performed. Looking to the facts and circumstances of the present case, we see no reason not to apply the provisions of Section 360 of the Code of Criminal Procedure. We accordingly, while maintaining the conviction of the appellant, direct that he will be dealt

with under Section 360, and as much, we direct that the appellant be released on probation of good conduct instead of sentencing him, and he should enter into a bond with one surety to appear and receive the sentence when called upon during the period of one year for the purpose in question. The bond for a year shall be executed before the learned Chief Judicial Magistrate, Ranchi, within 3 weeks from today. The appeal is disposed of accordingly.

9. A bare perusal of aforesaid judgments make it crystal clear that the provisions of sections 360 and 361 are mandatory in nature. The courts below are under a mandatory obligation to consider the case in the light of aforesaid sections.

10. In *Prakash vs. State of MP* (supra) this Court has taken note of the change in criminal jurisprudence dealing with imposition of small punishments and the object of sections 360 and 361 Cr.P.C. with a view to deal with first accused leniently for releasing him on probation of good conduct instead of giving him punishment in order to give him a chance of reforming him and to protect him from being corrupted or turned into a regular criminal. With this holly object sections 360 and 361 were provided in the Code of Criminal Procedure.

11. A bare perusal of the order passed by learned J.M.F.C. and Sessions Judge, Vidisha shows that both the courts below have not applied the provisions of sections 360 and 361. Accordingly, the judgment impugned cannot be upheld.

12. This Court is of the considered opinion that if a person fulfills the requirement of section 360(1) of Cr.P.C., the competent Court is under a legal and mandatory obligation to consider his case in the touch stone of the aforesaid provisions for the purpose of granting him benefit of probation. The courts are bound to consider his case as per the provisions of sections 360 and 361 of Cr.P.C.

13. It is profitable to quote section 360(4) of Cr.P.C., which reads as under:-

"360(4) An order under this section may be made by any Appellate court or by the High Court or Court of Session when exercising its powers of revision."

14. This provision makes it clear that even this Court has power to invoke sections 360 and 361 Cr.P.C. while exercising its powers of revision. On the basis of apparent facts, I deem it proper to invoke sections 360 and 361 in exercise of powers of revision as per section 360(4) of Cr.P.C.

15. Accordingly, while maintaining the conviction of the petitioner, I direct that he will be dealt with section 360 Cr.P.C. and shall be released on probation of good conduct instead of further sentencing him, on his entering into a bond with one surety in the sum of Rs. 15,000/- (Rupees Fifteen Thousand) to the satisfaction of learned JMFC, Vidisha, to appear and receive the sentence when called upon during the period of one year. The bond shall be executed for a period of one year.

16. The revision is disposed of accordingly.

Revision disposed of

I.L.R. [2012] M.P., 1073

CRIMINAL REVISION

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

Cr. Rev. No. 494/2001 (Jabalpur) decided on 1 February, 2012

STATE OF M.P.

...Applicant

Vs.

NANHE SINGH

...Non-applicant

A. *Prevention of Corruption Act (49 of 1988), Sections 2 & 19 – Public Servant – M.L.A. is a public servant – Cognizance can not be taken in absence of sanction.* (Para 7)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 2 व 19 – लोक सेवक – एम.एल.ए. लोक सेवक है – मंजूरी के अभाव में संज्ञान नहीं लिया जा सकता।

B. *Prevention of Corruption Act (49 of 1988), Section 19 – Cognizance – Once cognizance is taken, the Trial Court can not recall or review the same.* (Para 7)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – संज्ञान – एक बार संज्ञान लेने के बाद विचारण न्यायालय उसे वापस नहीं ले सकता या उसका पुनर्विलोकन नहीं कर सकता।

C. *Prevention of Corruption Act (49 of 1988), Section 19 –*

Cognizance – Respondent was public servant when the cognizance was taken – Taking of cognizance against sitting M.L.A. in absence of sanction was incompetent and illegal – Trial Court may consider the question of taking cognizance afresh in case requisite sanction is obtained or it is established that need of sanction for taking cognizance is no longer an essentiality. (Paras 9 &10)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 – संज्ञान – प्रत्यर्थी लोक सेवक था जब संज्ञान लिया गया – वर्तमान एम.एल.ए. के विरुद्ध बिना मंजूरी संज्ञान लेना अक्षम एवं अवैध – विचारण न्यायालय नया संज्ञान लेने के प्रश्न पर विचार कर सकता है यदि आवश्यक मंजूरी अभिप्राप्त कर ली जाती है अथवा यह स्थापित किया जाता है कि संज्ञान लेने के लिये मंजूरी की अब आवश्यकता नहीं रही।

Cases referred :

AIR 1998 SC 2120, (2004) 7 SCC 338, (2007) 5 SCC 54, (2008) 9 SCC 140, M.Cr.C. No. 9098/2010.

Aditya Adhikari, Spl. P.P. for the applicant.

S.M. Patel, for the non-applicant.

ORDER

The order of the court was delivered by : **RAKESH SAKSENA, J.** - State has filed this revision against the order dated 13.1.2001 passed by Special Judge [Prevention of Corruption Act], Mandla in Special Case No.1/95 whereby learned Special Judge discharged the respondent of the charges under sections 7 and 13(1)(d) read with section 13(2) of the Prevention of Corruption Act (for brevity 'the Act').

2. Brief history of the case is that a first information report was recorded by Special Police Establishment, Lokayukt that respondent, who happened to be the M.L.A. from Dindori, demanded and received Rs.20,000/- as bribe from four complainants for their appointments on the post of Teacher. After completion of investigation, petitioner filed charge sheet against the respondent without obtaining sanction for prosecution under section 19 of the Act.

3. Charge sheet was filed in the Court of Special Judge on 17.5.1995. On 29.5.1995, a bailable warrant was issued for securing presence of respondent in the Court. On 18.12.1995 charges under sections 7 and 13(1)(d) read with section 13(2) of the Act were framed and the case was fixed for

recording of the evidence. Statements of 12 prosecution witnesses were recorded till 8.9.1998.

4. In the course of trial, respondent filed number of applications challenging his prosecution in the absence of sanction under section 19 of the Act, but they were rejected on the ground that he did not challenge the order of taking cognizance and of framing charge in the High Court. However, on 13.1.2001, learned Special Judge in the light of Apex Court's decision rendered in *P.V. Narasimha Rao Versus State(CBI/SPE)* [AIR 1998 SC 2120] holding that since respondent, at the time of taking cognizance, was a member of Legislative Assembly, as such a public servant, the prosecution against him could not be continued, discharged him. Aggrieved by the aforesaid order, petitioner 'SPE' has filed this revision.

5. Learned counsel for the petitioner submitted that once cognizance against the respondent was taken, the charges were framed and the evidence was recorded, the respondent could not have been discharged since the impugned order of discharge amounted to recall or review of the order taking cognizance or framing charge in the case against the respondent. He placed reliance on the law laid by the Apex Court in the case of *Adalat Prasad Versus Rooplal Jindal and others* [2004(7) SCC 338] and *Everest Advertising (P) Ltd. Versus State, Govt. of NCT of Delhi and others* [2007(5) SCC 54]. In the case of *Adalat Prasad* (supra), Apex Court observed: "It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 CrPC because the Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 CrPC. The view of the Supreme Court in Mathew case, (1992) 1 SCC 217 that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law." Similarly in case of *Everest Advertising (P) Ltd.* (supra), approving the decision rendered by it in *Adalat Prasad* (supra), Supreme Court held that in a case where summons were issued by the learned Magistrate by reason of an order. He recalled the said order. He did not have any jurisdiction in that behalf. A Magistrate does not have and, thus, cannot exercise any inherent jurisdiction.

6. In the case of *Bholu Ram v. State of Punjab* [(2008) 9 SCC 140], Apex Court observed: "If the act of taking cognizance, issuance of process or joining of an innocent person as an accused is totally uncalled for or ex facie bad in law, it is open to the aggrieved party to invoke inherent jurisdiction of the High Court under section 482 CrPC. If the High Court is satisfied that the order passed by the Magistrate was illegal, improper or arbitrary, it can exercise inherent powers and quash criminal proceedings initiated against the party. But that power is independent and has nothing to do with recalling of an earlier order by the Court which passed it."

7. It has been settled by the Supreme Court in *P.V. Narasimha Rao's case* (supra) that a member of Parliament or a member of State Legislature who holds an office and is required to perform public duties is, therefore, a 'public servant'. No doubt cognizance against a public servant for an offence under the provision of the Act cannot be taken in the absence of previous sanction under section 19 of the Act, but the settled position of law is that once the cognizance is taken, the said order cannot be recalled or reviewed by the same Court even if the same happened to be illegal or bad in law. It would only be open to the aggrieved party to invoke the revisional or inherent jurisdiction of the High Court, as the case may be, to get the illegality or mistake rectified.

8. Taking into consideration the facts and circumstances of the present case, in the light of the aforesaid propositions of law, we are of the view that the learned Special Judge committed error in recalling the order taking cognizance and discharging the respondent. Accordingly, the impugned order passed by the learned Special Judge is set aside.

9. In the peculiar facts and circumstances of the case, in view of the law laid down by the Apex Court in the case of *P.V. Narasimha Rao* (supra) and also in view of the ratio of Division Bench decision of this Court rendered in *Gambhir Singh and another v. State of M.P.*, M.Cr.C.No.9098/2010, dated 11.2.2011 (Jab.Bench), we hold that taking of cognizance against the respondent for the offence under sections 7 and 13(1)(d) read with section 13(2) of the Act in the absence of sanction under section 19 of the Act, at the time when respondent was a sitting M.L.A., was incompetent and illegal and, therefore, deserved to be quashed. Accordingly, the order of taking cognizance and consequent criminal proceedings against the respondent including charges are quashed.

10. The Special Judge shall, however, be at liberty to consider the matter for taking cognizance afresh against the respondent in case requisite sanction is obtained by petitioner or the petitioner is able to establish that the need of sanction for taking cognizance against the respondent is no longer an essentiality according to law.

11. Subject to above directions, the revision stands disposed of.

12. Record of the trial Court be sent back immediately.

Revision disposed of.

I.L.R. [2012] M.P., 1077

CRIMINAL REVISION

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

Cr. Rev. No. 771/2011(Jabalpur) decided on 6 March, 2012

B.K. SAHOO (DR.)

...Applicant

Vs.

CENTRAL BUREAU OF INVESTIGATION

...Non-applicant

Prevention of Corruption Act (49 of 1988), Section 13(1)(d)(e), Criminal Procedure Code, 1973 (2 of 1974), Section 300 – Double Jeopardy – C.B.I. registered one case under Section 13(1)(e) of Act, 1988 – Another case was registered under Section 13(1)(d) of Act, 1988 for having issued forged fitness certificates after obtaining illegal gratification – Applicant pleaded that as charge sheet under Section 13(1)(d) has already been filed therefore, prosecution of applicant under Section 13(1)(e) bad – Held – Section 300 would apply only when a person has been tried once and convicted by Court of competent jurisdiction – As trial of any of the case has not been completed therefore, this provision would not apply – Although the offence remain criminal misconduct by public servant but the constituent ingredients of both the offences are different – Applicant can be prosecuted for both the offences – Revision dismissed. (Paras 6 to 10)

अप्स्टाचार निवारण अधिनियम (1988 का. 49), धारा 13(1)(डी)(ई), दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 300 – दोहरा संकट – सी. बी. आई. ने अधिनियम 1988 की धारा 13 (1)(ई) के अंतर्गत एक प्रकरण दर्ज किया – अन्य प्रकरण अधिनियम 1988 की धारा 13(1)(डी) के अंतर्गत, अवैध परितोषण अभिप्राप्त करने के पश्चात कूटरचित स्वस्थता प्रमाणपत्र जारी करने के लिये दर्ज किया गया – आवेदक ने अविवाक किया कि धारा 13(1)(डी) के अंतर्गत आरोप पत्र पहले ही

प्रस्तुत किया जा चुका है इसलिए आवेदक का धारा 13(1)(ई) के अंतर्गत अभियोजन अयोग्य - अभिनिर्धारित - धारा 300 लागू होगी जब किसी व्यक्ति का सक्षम अधिकारिता के न्यायालय द्वारा एक बार विचारण किया जा चुका है और दोषसिद्ध किया गया है - चूंकि किसी प्रकरण का विचारण पूर्ण नहीं हुआ है इसलिए, यह उपबंध लागू नहीं होगा - यद्यपि अपराध लोक सेवक द्वारा आपराधिक अवचार बना रहेगा परन्तु दोनो अपराधों के घटकांग भिन्न हैं - आवेदक को दोनों अपराधों के लिये अभियोजित किया जा सकता है - पुनरीक्षण खारिज।

P.R. Bhawe with Bhanu Pratap Yadav, for the applicant.

Vikram Singh, for the Non-applicant /C.B.I..

ORDER

The order of the court was delivered by :
RAKESH SAKSENA, J. - Applicant has filed this revision against the order dated 1.4.2011 passed by Special Judge C.B.I., Bhopal in Special Case No. 1/ 2011, whereby the application filed by him under Section 300 (1) read with Section 245 of the Code of Criminal Procedure dated 14.3.2011 has been dismissed.

2. Briefly stated the facts of the case are that applicant was posted as Chief Medical Officer in Composite Hospital, BSF Academy, Takenpur, Gwalior (M.P.). On the basis of a complaint dated 9.3.2002 submitted by Mr. Jagir Singh Shran, Commandant, BSF Academy Takenpur, Camp at New Delhi about the recovery of a huge cash by the Board of Officers of BSF, amounting to Rs. 49, 35, 500/- from Quarter no. 383, Sector-VII, Pushp Vihar, New Delhi, kept in two suit cases which were concealed by the applicant, a case was registered by C.B.I./A.C.B/ New Delhi. It is alleged that accused Dr. Sahoo disclosed that he had concealed the ill-gotten money in two suit cases in the residential premises of Sh. Ramesh Sharma, Assistant Commandant, BSF and on the basis of above disclosure at the instance of Dr. Sahoo, it was recovered. On opening of the suit cases by Dr. Sahoo in presence of Board Members and Officers of BSF, an amount of Rs. 49, 35, 500/- was recovered. It was seized and sealed by BSF Officials. On an enquiry by the BSF Authorities Takenpur, it was revealed that Dr. B.K.Sahoo had been taking illegal gratification from various candidates desirous of recruitment in BSF as Constables and that he had concealed the said money in the aforesaid suit cases at the residence of Sh. Ramesh Sharma, Assistant Commandant. In these circumstances, SP/CBI/ACB registered the case and arrested the applicant Dr. Sahoo. During investigation, various documents relating to the assets acquired by Dr. Sahoo, his wife and family members

were seized. Since, the assets found in the possession of Dr. Sahoo were disproportionate to the known sources of his income, the offence punishable under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for brevity 'the Act') was registered. After obtaining the sanction, charge sheet has been filed.

3. Since, Dr. Sahoo, under a conspiracy with other accused persons was found to have dishonestly issued forged medical fitness certificates for grant of fake admit cards for the selection of desirous candidates in BSF after obtaining the illegal gratification and other pecuniary advantage, cases under Sections 420, 468, 471 read with Section 120-B of the Indian Penal Code and Section 13(1)(d) read with Section 13(2) of the Act were also registered.

4. Learned counsel for the applicant contended that in view of the provision of Section 300 (1) of the Code of Criminal Procedure read with Article 20(2) of the Constitution of India applicant could not have been prosecuted in respect of the recovery of Rs. 49,35,500/- twice. Since the charge sheets for the offences under Indian Penal Code and the offence under Section 13(1)(d) read with Section 13(2) of the Act have already been filed, the prosecution of applicant under Section 13(1)(e) read with Section 13(2) of the Act was not possible and the applicant ought to have been discharged.

5. We have heard the learned senior counsel and perused the record.

6. Provision of Section 300(1) of the Code of Criminal Procedure reads as under:

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

7. A bare perusal of the above provision reveals that once a person has been tried and convicted by the Court of Competent jurisdiction, he shall not be liable to be tried again. This provision is clearly not applicable in the circumstances of the case, since the trial of any of the case has not been

completed.

8. Article 20(2) of the Constitution of India provides as under:

20. Protection in respect of conviction for offences.-

(1)

(2) No person shall be prosecuted and punished for the same offence more than once.

(3)

9. On perusal of the provisions of the Act and the accusations made against the applicant in the aforesaid two cases, it is apparent that by their nature the offences under Section 13(1)(d) and 13(1)(e) of the Act are different having altogether different ingredients. The offence under Section 13(1)(d) postulates that a public servant commits a misconduct 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.

Whereas, when a public servant or any other person on his behalf is found in or has, at any time during the period of his office, been in possession of pecuniary resources or property disproportionate to his known sources of income, which he cannot satisfactorily account for, he is said to have committed the offence of criminal misconduct under Section 13(1)(e) of the Act.

10. Though, the offences remain criminal misconduct by the public servant, yet the constituent ingredients of both the offences are entirely different. Since, the acts alleged against the applicant constitute offences falling in two separate categories, he can be prosecuted for both of them. The prosecution of applicant for the charge under Section 13(1)(e) of the Act, therefore, in our opinion, cannot be said to be the prosecution for the same offence.

11. For the aforesaid reasons, we find no error in the impugned order passed by the Court below.

12. Revision is, accordingly, dismissed.

Revision dismissed.

I.L.R. [2012] M.P., 1081

CRIMINAL REVISION

Before Mr. Justice N.K. Gupta

Cr. Rev. No. 1302/2011 (Jabalpur) decided on 13 April, 2012

ANIL ALIAS NONI PANDA & anr.

....Applicants

Vs.

STATE OF M.P.

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 – Framing of Charges – Veracity of witnesses can not be considered at the time of framing charges – However, evidence produced should be considered to evaluate that the charges relating to that crime may be framed or not. (Para 7)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 – आरोप विरचित किये जाना – आरोप विरचित करते समय साक्षियों की सत्यता को विचार में नहीं लिया जा सकता – किन्तु प्रस्तुत की गई साक्ष्य को इस बात का मूल्यांकन करने के लिये विचार में लिया जाना चाहिए कि अपराध से संबंधित आरोपों को विरचित किया जा सकता है अथवा नहीं।

B. Penal Code (45 of 1860), Sections 307, 323 & 324 – Attempt to murder – Applicants armed with firearms and assaulted by base of firearm but no grievous injury was caused to victim – No intention or knowledge on the part of applicants to cause murder of victim is prima facie established – No charge under Section 307 of IPC can be framed. (Para 8)

ख. दण्ड संहिता (1860 का 45), धाराएँ 307, 323 व 324 – हत्या का प्रयत्न – आवेदकगण अग्नेयास्त्रों से सुसज्जित और अग्नेयास्त्र के चालू और से हमला किया, आहत को कोई गंभीर चोट कारित नहीं हुई – आवेदकगण का पीड़ित की मृत्यु कारित करने का कोई आशय या ज्ञान नहीं था, प्रथम दृष्टया स्थापित होता है – भा.द.स. की धारा 307 के अंतर्गत कोई आरोप विरचित नहीं किया जा सकता।

C. Penal Code (45 of 1860), Section 329 – Nature of Injuries – To constitute offence under Section 329, nature of injuries should be grievous – No bony injury was found – No offence under Section 329 made out. (Para 9)

ग. दण्ड संहिता (1860 का 45), धारा 329 – क्षतियों का स्वरूप – धारा 329

के अंतर्गत अपराध के गठन के लिये क्षतियों का स्वरूप गंभीर होना चाहिए – अस्थि की कोई चोट नहीं पाई गई – धारा 329 के अंतर्गत कोई अपराध गठित नहीं होता।

Cases referred :

(2001) 4 SCC 333, (2000) 1 SCC 722, AIR 1980 SC 52, (1989) 1 SCC 715, AIR 1990 SC 1962, AIR 1988 SC 2127, AIR 1990 SC 1984, AIR 1969 SC 414, AIR 1980 MP 129.

Manish Datt, for the applicants.

R.P. Tiwari, P.P. for the non-applicant/State.

ORDER

N.K. GUPTA, J. - By the instant criminal revision, the applicants have challenged the order dated 20.7.2011 passed by the 4th Additional Sessions Judge, Tikamgarh in ST No.33/2011 by way of a revision whereby charges of offence punishable under Sections 307 or 307/34, 329 or 329/34, 294, and 506(2) of IPC were framed.

2. Prosecution case in short is that on 28.8.2010 at about 8:00 PM in the night where the complainant Ramswaroop was present in his house, accused Noni Panda came to his house and informed that other accused Nanna Panda was calling him, and therefore complainant Ramswaroop went to the house of Nanna Panda. At the house of Nanna Panda, both the accused Noni Panda and Nanna Panda told him to provide a. sum of Rs.5 lakhs immediately otherwise they would kill him. Accused Rajesh @ Kallu Panda assaulted him by the base of a firearm on his head causing him some injuries on his head. Similarly, Noni Panda had also assaulted him by base of the katta on his nose and as a result blood oozed out of his nose. Thereafter they assaulted Ramswaroop by the base of firearm and also by kicks and fists. After hearing the noise of Ramswaroop, mother of the complainant Ramswaroop reached the spot and she saved the complainant. The FIR was lodged on the same very day. Complainant Ram swaroop was sent to the hospital for his medico legal examination. and. treatment. Doctor. found 5-6 injuries on his person. Out of them, two injuries were incised wounds situated on. middle of the head and right ear, whereas other wounds were found on head, chest and other parts of the body, and therefore X-ray was advised. In X-ray report no bony injury was found either on skull, nose or chesat. After due investigation challan was filed..

3. Learned 4th Additional Sessions Judge, Tikamgarh vide order dated

20.7.2011 framed the aforesaid charges against the applicants and recorded their plea.

4. Heard the learned counsel for the parties at length..

5. Learned counsel for the applicants has submitted that there was no intention of the applicants to kill the victim. No fatal or grievous injury was caused to the victim Ramswaroop, and therefore neither any offence under Section 329 nor under Section 307 of IPC was made out. The case was triable by the Court of Judicial Magistrate First Class, but the learned Additional Sessions Judge unnecessarily framed the charges of offence punishable under Sections 307 and 329 of IPC and also alternate charges under Section 34 of IPC. Learned counsel for the applicants has further submitted that learned Additional Sessions Judge did not mention any reason as to how the charges of offence punishable under Section 307 or 329 of IPC were made out. Under such circumstances, it is submitted that the learned Additional Sessions Judge has passed a non-speaking order, which suffers from legal errors and therefore that may be quashed.

6. On the other hand, learned counsel for the State has refuted the contentions made by learned counsel for the applicant. He has submitted that offence under Section 307 of IPC is clearly made out. The applicants have assaulted the victim on his head and nose, and therefore their intention appears to be apparent. Secondly, learned counsel for the State has referred the judgment of the Hon'ble Apex Court in the case of *"Om Wati (Smt.) and another Vs. State through Delhi Admn. and others"*, [(2001) 4 SCC 333] and in the case of *"Kanti Bhadra Shah & another Vs. State of WB"*, [(2000) /SCC 722] in which it is directed that if trial Court discharges any accused from some charges, then a detailed order will be passed, but at the time of framing of charges, if charges are framed, then there is no need to mention any reason in details. Under such circumstances, it is prayed that the present revision may be dismissed with costs.

7. According to the provisions of Sections 227 and 228 of Cr. P.C., it is for the trial Court to consider the material available on record with the object that if it is not rebutted, then whether the accused can be convicted for a particular offence or not. By considering such material, if the accused is convicted for that offence, then charges for that offence shall be framed. The Hon'ble Apex Court in the case of *"Supdt. & Remembrancer of Legal Affairs, West Bengal Vs. Anil Kurnar Bhunja & others"*, (AIR 1980 SC

52) by referring the view taken in the case of *"State of Bihar Vs. Ramesh Singh*, AIR 1977 SC 2018 took the following view:-

"18..... the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence".

Similarly, in the case of *"Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia & another"*, [(1989) 1 SCC 715] took the following the view:-

"14..... It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor it is necessary to delve deep into various aspects. All that the court has to consider is whether the evidenciary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into".

It would also be seen from the view taken by the Hon'ble Apex Court in para 7 in the case of *"Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijja & others"*, (AIR 1990 SC 1962), which reads as under:-

"7..... It seems well-settled that at the Sections 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face-value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to

common sense or the broad probabilities of the case" ..

Therefore, at the stage of framing of charges, veracity of the witnesses is not required to be considered, but evidence produced by the police should be considered to evaluate that the charges relating to that crime may be framed or not.

8. Under such circumstances, the matter may be considered in the light of the aforesaid judgments passed by the Hon'ble Apex Court. For consideration of offence punishable under Section 307 of IPC, intention and knowledge of the accused should be considered. In this context, the judgment of the Hon'ble Apex Court in the case of "*Hari Kishan Vs. State of Haryana*", (AIR 1988SC 2127) may be referred, in which it is held as under-

"Under Section 307 IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under Section 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention".

If the facts of the present case are considered in the light of the aforesaid judgment, then it would be clear that the applicants were armed with firearms at the time of incident, but no fire was done by any of the applicants. Secondly, the applicants assaulted the victim Ramswaroop by base of the firearm on his head and nose, which were the vital parts of the body, but assault was not done using any force, and therefore no grievous injury could be caused to the victim Ramswaroop, and therefore looking to the overt-acts of the applicants, it cannot be said that intention of the applicants was to kill him. On the contrary, it appears that they wanted to threaten the complainant so that he would make the payment. Doctor who examined the victim Ramswaroop in the medico legal examination did not opine that any of the injury was fatal. No treatment report is submitted with the challan to show

that some surgery took place upon the victim Ramswaroop, otherwise he could die. Bleeding from the nose or skin of the head cannot be said to be a fatal or grievous in nature. Under such circumstances, it would be clear that the applicants neither fired from firearms, nor used any deadly weapon nor assaulted the victim in forceful manner therefore, it is apparent that they were not intended to kill the victim. Similarly, by injuries caused to the victim, it cannot be said that the applicants had any knowledge that by their act victim Ramswaroop could die. Under such circumstances, it is apparent that no intention or knowledge of the applicants is established prima facie to show that by their overt-acts victim Ramswaroop could die, and therefore no offence under Section 307 of IPC may be constituted. At the most the case may come within the purview of Sections 324 and 323 of IPC only. However, it is apparent that no offence under Section 307 of IPC is made out against the applicants either directly or with the help of Section 34 of IPC.

9. First of all if the case is considered on the basis of the facts, then it would be apparent that in X-ray report no grievous injury was found upon the victim Ramswaroop, and therefore no offence under Section 329 of IPC is made out against the applicants. For constitution of offence punishable under Section 329 of IPC, injuries caused to the victim must be grievous otherwise only offence under Section 327 of IPC may be constituted, which is triable by the Court of Judicial Magistrate First Class. In the present case, no grievous hurt as defined under Section 320 of Cr.P.C. was caused to the complainant Ramswaroop, and therefore prima facie no offence under Section 329 of IPC is made out.

10. Similarly if the matter is to be considered for the offence punishable under Section 329 of IPC, then for commission of that offence, it is necessary that some grievous injury is caused to the victim in the incident. There is no grievous injury found by the doctor. Grievous injury is required to be such which fulfills the ingredients of Section 320 of IPC, and therefore if any injury caused to the victim which endanger his life, then, it would be covered in grievous injury. But in the present case, injuries caused to the victim Ramaswaroop were neither fatal nor grievous, and therefore prima facie no offence under Section 329 of IPC was made out. At the most offence under Section 327 of IPC may be constituted, which is triable by the Court of judicial Magistrate First Class.

11. Since no offence under Section 307 or 329 of IPC is made out either

directly or with the help of Section 34 of IPC, then the case remains to be triable by the Court of Judicial Magistrate First Class and it does not remain to be triable by the Court of Sessions and it was for the learned Additional Sessions Judge to remand the case under Section 228 of Cr.P.C. to concerned Chief Judicial Magistrate, and therefore a legal mistake has been committed by the learned Additional Sessions Judge, Tikamgarh which can be cured in the instant revision.

12. Learned counsel for the applicants has submitted that it is apparent from the record that charges of offence under Section 307 or 329 of IPC were framed without any basis and therefore it was expected from the learned Additional Sessions Judge to mention some reasons in short for framing of such charges whereas learned Public Prosecutor has submitted that the Hon'ble Apex Court has directed not to mention anything if charges are framed. If the judgment of the Hon'ble Apex Court in the case of *Kanti Bhadra Shah (supra)* is perused, then it would be clear that the Hon'ble Apex Court interpreted the provision of Sections 227 and 240 of Cr.P.C. For the ready reference, the relevant portion is reproduced as under:-

".....If the trial Court decides to frame a charge there is no legal requirement that he should pass an order specifying the reasons as to why he opts to do so. Framing of charge itself is prima facie order that the trial Judge has formed the opinion, upon considering the police report and other documents and after hearing both sides, that there is ground for presuming that the accused has committed the offence concerned. Even in a trial before a Court of Session, the Judge is required to record reasons only if he decides to discharge the accused (vide Section 227 of the Code). But if he is to frame the charge he may do so without recording his reasons for showing why he framed the charge".

In the aforesaid judgment, it is also held that there is no legal requirement that trial Court should write an order showing the reason for framing of charges, there is no need to further burden the already burdened trial Courts with such extra work.

13. Similarly, in the case of *Om Wati (supra)*, the Hon'ble Apex Court has referred the judgment of *Kanti Bhadra's case (supra)* and held that

there is no legal requirement that trial Court should write the order showing the reasons for framing of charges. Some portion of para 7 of that judgment may be read as under:-

"7.....The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. If a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at this stage, such as issuing process, remanding the accused to custody, framing of charges, passing over to next. stages in the trial"

14. At present if some trials of Section 306 of IPC may be considered where no presumption under Section 113-A of the Evidence Act is applicable, then charges under Section 306 of IPC can only be framed if overt-act of the accused falls within the purview of Section 107 of IPC. At present so many revisions are pending before this Court, because the trial Court did not examine at the time of framing of the charges that, whether the overt-act of the accused falls within the purview of Section 107 of IPC. Similarly, in the case of offence punishable under Section 307 of IPC when accused contests the case that no fatal or grievous injury was inflicted upon the victim and apparently on the basis of the documents filed by the police, there was no intention or knowledge of the accused to kill the victim, then in such cases charges for offence punishable under Section 307 of IPC cannot be framed, but such type of charges are being framed by the trial Courts without application of mind and a bulk of revisions are pending against such orders.

15. Learned counsel for the applicants submits that looking to the aforesaid condition, though there is no provision under Sections 227 and 240 of Cr.P.C. but a speaking order is to be passed by the trial Court at the time of framing of charges on the basis of principles of natural justice. However, such contention cannot be accepted, because in the case of "*S.N.Mukherjee Vs. Union of India*", (AIR 1990 SC 1984) the Hon'ble Apex Court on the basis of its previous judgment in *Som Datt Datta's case* (AIR 1969 SC 414) has

observed as under:-

"38.....Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and. it may dispense with such an requirement."

16. Similarly, the Full Bench of this Court in the case of "*Rana Natwarsingh Vs. State of Madhya Pradesh & others*", (AIR 1980 MP 129) has held as under:-

"9.....Apart from any requirement imposed by the statute or statutory rule expressly or by necessary, implication, we are unable to accept: the contention of Mr. Dutta that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision..... The decision in *Som Datt Vs. Union of India* (supra) is an authority for the propositions that, (i) unless expressly or impliedly required by a statute or the rules; there is no obligation. on a tribunal to give reasons, (ii) the giving of reasons is not a requirement of natural justice, and (iii) a non-speaking order could not be set aside merely the ground that it was non-speaking."

Under such circumstances, it would be clear that since there is no provision under Sections 227 and 240 of Cr.P.C. to pass a speaking order, if charges are framed, then principles of natural justice cannot be applied in such a manner in light of the decisions given by the Hon'ble Apex Court in the cases of *Som Datt (Supra)* and *S.N. Mukherjee (supra)* and the Full Bench of this Court in case of *Rana Natwarsingh (supra)*

17. There are so many cases beyond the above quoted examples in para 14 of this order in which such type of situation arises that Presiding Officer of the trial Court does not apply his mind at the time of framing of charges, and therefore number of criminal revisions before this Court are unnecessarily increasing. In such revisions, sufficient time is required for their disposal. Defence counsel appearing before the Lower Court takes time before the Lower Court with the pretext that revision is pending and due to such type of orders unnecessarily delay causes in the disposal of the cases. Though trial Court cannot be directed to pass a speaking order while framing of charges and in each case trial Court is not supposed to pass a speaking order at the time of framing of charges, but looking to the aforesaid situations, trial Courts are advised not to avoid the application of judicial mind at the time of framing of charges. Some reasons in concise manner may be given if charges are framed in such vulnerable cases.

18. Moreover, it is appropriate to quote one more situation that if police files charge sheet for particular offences with one set of facts and trial Court finds that some more offences are constituted, and therefore trial Court while framing of charges adds charges of those sections of which offence was constituted, then there is no procedure given in Section 227 or 240 of Cr.P.C. for such a situation. For example, if husband and family members are facing a trial of murder of bride by burning and challan was filed for commission of offence punishable under Sections 302 and 498-A of IPC, trial Court feels that parents and relatives of the deceased have made allegations of dowry demand and harassment also, and therefore charge under Section 304-B of IPC may also be added or appended. This is not a case for modification of the charges, but it is a case where charges are to be framed for the first time. Such type of situation cannot be governed under Section 227 or 240 of Cr.P.C. and in such a case accused has a every right to know as to why such charge was framed and therefore principle of natural justice shall apply. It is for the Court to show the reason as to why additional charge of offence is framed. To such a situation, the dictum laid down by the Hon'ble Apex Court in the case of *Om Wati* (supra) and *Kanti Bhadra's case* (supra) shall not be attracted. Under such circumstances, it is for the trial Court to mention reasons for framing of charges in such a peculiar situation.

19. By aforesaid. discussion, it would be clear that where it is required for

the trial Court to mention concise reasons for framing of particular charge under the provisions of principle of natural justice then it is the duty of the Presiding Officer to that Court to mention reasons for framing of such charge, whereas in general trial Court is not required to pass a speaking order in each and every case. In other vulnerable cases as mentioned in para 14 of this order, trial Court is advised to apply its mind and in such peculiar cases without mentioning much details in the order some, to the point reasons may be given for framing of charges, so that the Revisionary Court can be well informed on the view of the Judge at the time of framing of charges in such cases.

20. In the present case, learned Additional Sessions Judge did not consider that no grievous or fatal injury was caused to the victim and no intention or knowledge of the applicants was visible that they intended to commit a murder. On the aforesaid discussion, it would be clear that neither any offence under Section 307 nor Section 329 of IPC is made out against the applicants either directly or with the help of Section 34 of IPC. The offence under Sections 327 and 324 of IPC may be constituted against the applicants either directly or with the help of Section 34 of IPC, and therefore it is apparent that a legal error has been caused by the learned Additional Sessions Judge, Tikamgarh. The case was to be remanded to the Court of Chief Judicial Magistrate under Section 228 of Cr.P.C., but it was kept pending before the Sessions Court. Under such circumstances, revision filed by the applicants deserves to be allowed.

21. Consequently, the present revision filed by the applicants is hereby allowed and the order dated 20.7.2011 passed by the 4th Additional Sessions Judge, Tikamgarh relating of framing of charges against the applicants is hereby quashed. Learned Additional Sessions Judge, Tikamgarh is directed to remand the case to Chief Judicial Magistrate, Tikamgarh for trial of offences punishable under Sections 327 or 327/34, 324 or 324/34, 294, 506(2) of IPC.

22. A copy of this order be sent forthwith to the trial Court for information and compliance.

Revision allowed.

I.L.R. [2012] M.P., 1092

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice G.S. Solanki*

M.Cr.C. No. 4798/2010 (Jabalpur) decided on 16 December, 2011

BRIJPAL SINGH

...Applicant

Vs.

PRAMOD KUMAR & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 321 – Withdrawal from prosecution – Counter case – Application for withdrawal from prosecution of one party allowed – Held – In trial of cross cases, it is imperative on the part of trial court to reach to the conclusion that out of two parties who was the aggressor in the incident and thereafter dispose the cases on merit – Compelling one of the two parties to face trial and give benefit to another party while withdrawing the cases pending against him can not be said to be in public interest – Criminal case restored–Analogous trial of both cases ordered. (Para 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 – अभियोजन को वापस लेना – प्रति दावा – अभियोजन वापस लेने के लिए एक पक्षकार का आवेदन मंजूर किया गया – अभिनिर्धारित – प्रति प्रकरण के विचारण में, विचारण न्यायालय को इस निष्कर्ष पर पहुंचना आवश्यक है कि दोनों पक्षकारों में कौन घटना में आक्रामक था और तत्पश्चात प्रकरण का गुण-दोषों पर निपटारा करे – दो पक्षकारों में से एक को विचारण का सामना करने के लिये विवश करना और अन्य पक्षकार को उसके विरुद्ध लंबित मामले को वापस लेकर लाभ देना लोक हित में नहीं माना जा सकता – आपराधिक प्रकरण पुनःस्थापित – दोनों प्रकरणों में सदृश्य विचारण के लिए आदेशित।

Case referred :

2008(3)MPLJ 96,

Umesh Shrivastava, for the applicant.

A.K. Chaurasia, G.A. for the non-applicant/State.

None for the non-applicant No.1.

ORDER

G.S. SOLANKI, J. - The petitioner has filed this petition, invoking extra ordinary jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, being aggrieved by order dated 4.2.2010 passed in criminal revision

No. 11/2009 whereby order dated 30/7/2008 passed by learned Judicial Magistrate First Class, Beohari in criminal case No. 604/2004 (*State of Madhya Pradesh Vs. Pramod Kumar*) for withdrawing the prosecution under Section 321 of Cr.P.C. was affirmed, prays for quashment of orders passed by the Courts below.

2. The facts, in short, giving rise to this petition are that on 21.9.2004 there was quarrel between petitioner and respondent No. 1, a report was lodged by one Ram Kumar Patel, friend of the petitioner. On the basis of that first information report, a criminal case was registered against respondent No.1 Pramod Kumar under Sections 294, 323, 506-B/34 of IPC. Respondent No.1 also lodged a report against the petitioner for the same incident on 21.9.2004 and criminal case was registered against the petitioner under Sections 342, 294, 323, 506-B/34 of IPC and after investigation, petitioner was charge sheeted for the offence under Sections 147, 148, 149, 294, 323, 324, 342/34 & 325 of IPC and respondent No.1 was charge sheeted for the offence under Sections 294, 323 & 506-B/34 of IPC and trial was pending as criminal case No. 604/2004 (*State of Madhya Pradesh Vs. Pramod Kumar*). Since both criminal cases were the counter cases of each other, however, on 30/7/2008, A.D.O.P. (Prosecutor) moved an application under Section 321 of Cr.P.C. and same was allowed by Judicial Magistrate First Class, Beohari and respondent No.1 was acquitted to the aforesaid charges alleged against him. Being aggrieved, petitioner filed a revision before the Sessions Court and same was dismissed vide order dated 4.2.2010. Hence this petition.

3. Despite service of notice, none appeared on behalf of the respondent No.1.

4. Learned counsel for the petitioner submitted that learned Courts below have failed to consider the fact that both criminal cases were arose out of same incident and was a counter case of each other. He further submitted that no public interest will serve by compelling one of the two parties to face the trial while withdrawal of prosecution of one of the parties. He placed reliance on the judgment of *Ramnaresh Tyagi and another Vs. Arjun Mohan Singh and others*, 2008(3) M.P.L.J. 96 passed by this Court.

5. Learned counsel for the State justified and supported the impugned orders passed by the Courts below.

6. I have perused the impugned order dated 4.2.2010 passed by the learned Additional Sessions Judge to the Court of Third Additional Sessions Judge (Fast Track Court), Beohari District Shahdol and order dated 30.7.2008 passed by the JMFC, Beohari.

7. It is undisputed on record that criminal case pending against the petitioner as criminal case No. 1259/2004 and criminal case pending against the respondent No. 2 as criminal case No. 604/2004 had arisen out of the same incident took place on 21.9.2004. In these circumstances, both cases were the cross cases.

8. It is well established principle of law that in the trial of cross cases, it is imperative on the part of the trial Court to reach to the conclusion that out of two parties who was the aggressor in the incident and thereafter dispose of the cases on merit. Since, Courts below have failed to consider the aforesaid matter of fact and allowed the application under Section 321 of Cr.P.C. of A.D.O.P. for withdrawal from prosecution. It is also pertinent to note that co-ordinate Bench of this Court in *Ramnaresh Tyagis case* (supra) was of the view that by compelling one of the two parties to face the trial and given benefit to the another party while withdrawing the cases pending against him cannot be said to be in public interest.

9. In these circumstances, I am of the view that if the order passed by the Courts below shall remain continued then it will be amount to harassment to the petitioner and further amount to abuse of process of law. Thus, the present petition is allowed and the order passed by the Courts below in criminal case No. 604/2004 (*State of Madhya Pradesh Vs. Pramod Kumar*), is hereby set aside. It is directed to the trial Court to restore the criminal case No. 604/2004 to its original number and proceed further in accordance to law. It is further directed to Chief Judicial Magistrate, Beohari if criminal case No. 1259/2004 is not pending in the Court of Additional Chief Judicial Magistrate, Beohari then this case be immediately transferred to the Court of Additional Chief Judicial Magistrate, Beohari for analogous trial of both cross cases in the light of observation made in this order.

10. A copy of this order be sent to the learned Chief Judicial Magistrate, Shahdol and Additional Chief Judicial Magistrate, Beohari for compliance and necessary action.

Petition allowed.

I.L.R. [2012] M.P., 1095

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sheel Nagu

M.Cr.C. No. 9314/2011 (Gwalior) decided on 27 January, 2012

CHHOTE KHAN

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 438 & 439 – Bail Application – Directly before High Court – Approaching High Court without first approaching Sessions Court/Trial Court is permissible – However, entertainment of bail applications directly filed in High Court is permissible subject to the applicant's satisfying existence of special extraordinary convincing reasons. (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 438 व 439 – जमानत आवेदन – सीधे उच्च न्यायालय के समक्ष – पहले सत्र न्यायालय/विचारण न्यायालय के समक्ष जाये बिना उच्च न्यायालय के समक्ष आना अनुज्ञेय है – तथापि, सीधे उच्च न्यायालय में प्रस्तुत जमानत आवेदन को ग्रहण करना, आवेदक द्वारा विशेष असामान्य विश्वासयोग्य कारणों के अस्तित्वमान होने की संतुष्टि के अध्याधीन है।

Cases referred :

2003(2) MPLJ 587, (2010) 4 CrLJ 4628, AIR.1979 AP 146.

Ashok Kumar Jain, for the applicant.*Mukund Bharadwaj*, P.P.for the non-applicant/State.**ORDER**

SHEEL NAGU, J. - The Registry has raised an objection as to maintainability of this bail application on the ground that the applicant without first approaching the Sessions Court has directly filed this bail application before this Court under Section 438, Cr.P.C.

2. A perusal of the provisions contained in Sections 438 and 439 of Cr.P.C. clearly indicate that concurrent powers are vested in the High Court as well as the Sessions Court, permitting the applicant concerned to choose his Forum without compelling him to first approach the Sessions Court.

3. The insistence of approaching the Court lower in the hierarchy of

Courts is for the sake of convenience and to ensure the advantage to the High Court of availability of a reasoned order of rejection of bail by the Sessions Court. Such a course of procedure adopted for the sake of convenience ensures proper administration of justice at the level of the High Court, which is not only benefited by the availability of the reasoned order of the Sessions Court, but is also prevented from getting overburdened by directly filing bail application before it.

4. The above said view finds support in an earlier decision of this Court in Single Bench in the case of *Manisha Neema Vs. State of MP reported in 2003 (2) MPLJ 587*, which has considered various earlier judicial pronouncement on the point. The decision of the Full Bench of Calcutta High Court in the case of *Sudip Sen vs. State of West Bengal reported in (2010) 4 Cri.L.J.4628* and another decision of in the case of *In re Puritipati Jagga Reddy reported in AIR 1979 AP 146* are being profitably quoted in support of the proposition that the statute does not bar filing of bail applications directly to the High Court under Section 438/439 of Cr.P.C., but it is only for the sake of convenience as stated above that the course of action of insisting the person concerned to approach the Court lower in the hierarchy of Courts is adopted to enable High Court to have the advantage of availability of a reasoned order of the Sessions Court.

5. Having thus held the power of this Court and Sessions Court for taking cognizance of bail applications u/Ss. 438 and 439, Cr.P.C. to be concurrent and the availability of statutory right of applicant to choose his forum, this Court deems it appropriate to impose certain conditions on applications filed directly before this Court, so as to prevent flood of such bail applications. Consequently the following conditions are imposed to regulate the filing of such direct bail applications.

6. Accordingly, the objection raised by the Registry is overruled subject to the fact that :-

- 1) Whenever an application under Section 438/439, Cr.P.C. is filed directly to the High Court without first approaching the Sessions Court, the bail application should contain the special, emergent and extraordinary, convincing reasons for doing so;
- 2) Whenever such directly filed bail applications are

received by the Registry containing the special, emergent and extraordinary convincing reasons, then the same should be separately marked in the cause title as direct bail applications;

3) In case directly filed bail applications do not contain any such special, emergent and extraordinary convincing reasons, then the Registry should list the same along with an endorsement or objection in regard to maintainability of the same.

7. Since the case diary is now available with the counsel for State, this Court is of the view that though no special, emergent and extraordinary convincing reasons are shown in the instant bail application for directly approaching this Court without first filing the application before the Court of Sessions, this Court is of the view that this matter can be finally heard in the next week.

List the case for final hearing in the next week.

Order accordingly.

I.L.R. [2012] M.P., 1097

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.N. Aggarwal

M.Cr.C. No. 1284/2012 (Gwalior) decided on 24 February, 2012.

MADHU GUPTA (SMT.)

...Applicant

Vs.

VEER K. SHRIVASTAVA & ors.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 87, Negotiable Instruments Act (26 of 1881), Section 138 – Issuance of Arrest Warrant – Case under Section 138 Negotiable Instruments Act is decided summarily – Magistrate satisfied that accused is absconding the process of Court – Service is not possible in ordinary course – Magistrate have power to compel presence of accused by issuance of arrest warrant under Section 87 – Impugned order set aside – Petition allowed. (Para 4)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 87, परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – गिरफ्तारी वारंट का जारी किया जाना – परक्राम्य लिखित अधिनियम की धारा 138 के अंतर्गत प्रकरण संक्षिप्त: निर्णित किया

गया - मजिस्ट्रेट की संतुष्टि की गई कि अभियुक्त न्यायालयीन कार्यवाही से फरार है - सामान्य अनुक्रम में तामीली संभव नहीं - मजिस्ट्रेट को धारा 87 के अंतर्गत गिरफ्तारी वारंट जारी कर अभियुक्त की उपस्थिति बाध्य करने की शक्ति है - आक्षेपित आदेश अपास्त - याचिका मंजूर।

Uma Kushwaha, for the applicant.

ORDER

S.N. AGGARWAL, J. - This petition under section 482 Cr.P.C. is directed against an interlocutory order of the trial court dated 28th November, 2011 dismissing the application of the petitioner under section 87 Cr.P.C. and thereby declining his request to compel the appearance of respondent No.1 through issuance of nonailable warrants.

(2) It is submitted by the learned counsel appearing on behalf of the petitioner that respondents No.1 to 3 are the accused persons in a private complaint under section 138 of NI Act filed against them. Respondents No.2 and 3 are stated to have already entered appearance and secured their bail from the trial court. It is submitted that respondent No.1 is absconding and despite summons being sent to him twenty times it was not possible to serve him in the ordinary course. Compelled by the same, an application under section 87 Cr.P.C. was filed by the petitioner which has been rejected by the trial court vide the order impugned in the present petition mainly on the ground that the complaint under section 138 NI Act is decided summarily and, therefore, warrants cannot be issued.

(3) It shall be relevant to refer to the provisions contained in section 87 Cr.P.C. which are extracted hereunder:

"87. Issue of warrant in lieu of, or in addition to, summons.- A court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant of his arrest -

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is

proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure."

(4) A bare perusal of the above statutory provisions contained in section 87 Cr.P.C. would show that in case it is not possible to serve summons to an accused person. in the ordinary course, then the court is not powerless to compel his presence through issuance of warrants of arrest against him. The view taken by the trial court in the impugned order that since the complaint under section 138 NI Act is to be decided summarily, warrants of arrest cannot be issued against the accused person, appears to be contrary to law and in the present case if the said view is accepted then it will occasion in miscarriage of justice to the petitioner. She is not able to prosecute the complaint under section 138 NI Act for want of service upon respondent No.1. In case summons have already been issued to respondent No.1 twenty times as submitted by the learned counsel for the petitioner, then there is every reason to believe that respondent No.1 is absconding from the process of court and it would be necessary to compel his presence through warrant of arrest. It is a fit case to exercise the inherent powers of this Court under section 482 Cr.P.C. to remedy the injustice caused to the petitioner/complainant by not allowing her request for compelling the presence of respondent No.1 through issuance of warrants of arrest against him.

(5) In view of the foregoing and having regard to the facts and circumstances of the case, the impugned order of the trial court is set aside. This petition is allowed. The Trial Court is directed to direct issuance of warrants of arrest against respondent No.1 to compel his presence before it in the proceedings under section 138 NI Act pending against the respondents.

Petition allowed.

I.L.R. [2012] M.P., 1099

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No. 3687/2010 (Jabalpur) decided on 12 March, 2012

MOHANI MEHROTRA (SMT.)

...Applicant

Vs.

SMT. SHILPI MEHROTRA

...Non-applicant

Penal Code (45 of 1860), Section 177 – Major part of the cause

of action against all the petitioners had accrued at Kota, where most of the alleged acts of cruelty were committed and on the other, no part of cause of action against women petitioners had arisen at Jabalpur – The Offence under Section 498-A of the IPC must be tried by a Court at Kota and not by the Court at Jabalpur – Trial Magistrate directed to return the complaint filed against the petitioners for presentation before a Court of competent jurisdiction at Kota. (Paras 8 to 10)

दण्ड संहिता (1860 का 45), धारा 177 – सभी याचीगण के विरुद्ध वाद कारण का मुख्य भाग कोटा में प्रोद्भूत हुआ, जहाँ क्रूरता के अधिकतम अभिकथित कृत्य कारित किये गये दूसरी ओर महिला याचीगण के विरुद्ध वाद कारण का कोई भी भाग जबलपुर में उत्पन्न नहीं हुआ – धारा 498-ए भा.द.सं. के अंतर्गत अपराध का विचारण कोटा के न्यायालय द्वारा किया जाना चाहिए और न कि जबलपुर के न्यायालय द्वारा – विचारण मजिस्ट्रेट को याचीगण के विरुद्ध प्रस्तुत की गई शिकायत को कोटा के सक्षम अधिकारिता के न्यायालय के समक्ष प्रस्तुत करने हेतु वापस करने के लिए निदेशित किया गया।

Cases referred :

(1997) 5 SCC 30, (2004) 8 SCC 100, AIR 2005 SC 1989, (2007) 1 SCC 262, AIR 2008 SC 2666.

Amit Verma, for the applicant.

Ramesh Yadav, for the Non-applicant No.1.

Ashok Chourasia, G.A. for the Non-applicant No.2/State.

ORDER

R.C. MISHRA, J. - This common order shall govern disposal of both the petitions filed by the petitioners for getting the criminal proceedings, pending as Complaint Case No.1923/2009, before Shri Sanjay Singh, JMFC, Jabalpur, quashed, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the 'Code'). In that case, cognizance of offences punishable under Sections 498A read with 34 of the IPC and Sections 3 read with 4 of the Dowry Prohibition Act, 1961 has been taken upon a complaint filed by Shilpi Mehrotra, impleaded as respondent no.1 in both the cases.

2. Marriage of the complainant/respondent no.1 was solemnized with Pankaj, who is the son of Kedarnath and Mohani and brother of Ruchi, on 9.2.2007 at Kota (Rajasthan).

The complaint *inter alia* contained the following allegations -

(i) Soon after the marriage, the petitioners started subjecting the complainant to cruelty and harassment for not bringing sufficient dowry and on 1.3.2007, upon her return to parental home at Jabalpur, she apprised her parents of the mal-treatment at the hands of the petitioners for non-fulfillment of their expectation for dowry worth Rs.25-30 lacs.

(ii) On 30.4.2007, parents of the complainant took her to the matrimonial home at Kota where Pankaj, Kedarnath and Mohani impressed upon them to purchase a flat for them in Mumbai or any other Metropolitan City. Still, she was made to stay there under the hope for improvement in behavioral pattern of her husband and in-laws.

(iii) Ultimately, on 30.5.2007, Pankaj and Kedarnath left the complainant at her parental home in Jabalpur, saying that she will be taken back only upon satisfaction of the demand for a flat. Thereafter, Mohani and Ruchi also reiterated telephonically the same pre-condition for her reentry to the matrimonial home.

3. The complaint was forwarded, under Section 156(3) of the Code, to police for investigation and upon the corresponding report; the complaint was rejected for want of territorial jurisdiction. However, by way of order-dated 5.2.2009, learned Magistrate proceeded to reconsider the question of jurisdiction in the light of the decision of the Apex Court in Sujata Mukherjee v. Prashant Kumar Mukherjee (1997) 5 SCC 30 [that had already been distinguished on facts in a subsequent judgment rendered in Y. Abraham Ajith v. Inspector of Police, Chennai (2004) 8 SCC 100], completely ignoring the bar of review as contained in Section 362 of the Code and directed issuance of process against the petitioners in respect of the aforesaid offences.

4. Learned counsel for the petitioners has strenuously contended that the Court at Jabalpur had no jurisdiction to take cognizance of the offences as none of the alleged acts of cruelty and harassment was committed within its territory. According to him, the complainant had resided at her matrimonial home at Kota initially, for a period of 19 days and thereafter, for 29 days.

5. In response, learned counsel for respondent no.1, while placing reliance on Sujata Mukherjee's case (ibid), has submitted that the complaint was

entertainable at Jabalpur in view of the allegations suggesting that on 30.5.2007, while leaving the complainant at Jabalpur, Pankaj and Kedarnath had again put a condition for fulfillment of demand for a flat as a precondition for taking her back to the matrimonial home. However, in that case, the distinguishing feature was that though the dowry demands were made earlier, husband of the complainant went to the place where she was residing and had also assaulted her. Moreover, as explained by the Apex Court in *Y. Abraham Ajith's* case (supra) and reiterated in *Ramesh v. State of Tamilnadu* AIR 2005 SC 1989 and *Manish Ratan v. State of M.P.* (2007) 1 SCC 262, the offence punishable under Section 498-A of the IPC is not a continuing offence. As further observed in *Manish Ratan's* case (supra), the term "ordinarily" has to be considered having regard to the provisions under Section 178(c) of the Code.

6. In *Ramesh's* case (supra), it was alleged that relatives of the complainant had met her in-laws at a hotel in Chennai and there was again a demand for dowry and threat to torture her in case she was sent back to Mumbai without the money and articles demanded. On these facts, the Supreme Court proceeded to hold that Court at Trichy, where wife was residing with her parents had no jurisdiction and complaint was transferred to Magistrate at Chennai where only a part of cause of action has arisen primarily for the reason that matrimonial petitions were pending for decision at that place.

7. It is relevant to note here, that in the instant case, the decree for restitution of conjugal rights has been passed by the Family Court at Kota only.

8. Venue of the trial is primarily to be determined by the allegations, as contained in the complaint. On one hand, the major part of the cause of action against all the petitioners had accrued at Kota, where most of the alleged acts of cruelty were committed and on the other, no part of cause of action against women petitioners had arisen at Jabalpur (See. *Bhura Ram v. State of Rajasthan* AIR 2008 SC 2666).

9. In this view of the matter, the offence under Section 498-A of the IPC must be tried by a Court at Kota and not by the Court at Jabalpur. A contrary view taken by the Magistrate, therefore, deserves interference particularly in view of the fact that the objection as to lack of territorial jurisdiction was taken at the outset.

10. In the result, both the petitions are allowed and the corresponding

order-dated 5.2.2009 (above) is hereby set aside. The trial Magistrate is directed to return the complaint filed against the petitioners for presentation before a Court of competent jurisdiction at Kota.

Copy of this order be retained in the connected MCrC.

Petition allowed.

I.L.R. [2012] M.P., 1103

INCOME TAX APPEAL

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

I.T.A. No. 13/2010 (Indore) decided on 24 November, 2011

COMMISSIONER OF INCOME TAX

...Appellant

Vs.

SHRI KAMAL KISHOR LATH

...Respondent

Income Tax Act (43 of 1961), Section 40-A(2) – Dis-allowance
– proprietor of the concern, who is mother of respondent-assessee had paid due taxes at the same rate as the assessee would have paid and there was no avoidance of tax – Held – No attempt to evade tax was involved, hence, no dis-allowance could be made in respect of payment made to the sister concern – Appeal dismissed. (Para 3)

आयकर अधिनियम (1961 का 43), धारा 40-ए(2) – नामंजूरी – संस्थान
की स्वत्वधारी जो प्रत्यर्थी निर्धारिती की मां है, ने देय करों का उसी दर से मुग्तान किया जैसा कि निर्धारिती द्वारा किया गया होता और कर का कोई परिवर्जन नहीं किया – अभिनिर्धारित – कर बचाने का कोई प्रयत्न सम्मिलित नहीं था, अतएव सहोदर संस्थान को किये गये मुग्तान के संबंध में कोई नामंजूरी नहीं की जा सकती – अपील खारिज।

Cases referred :

(2008) 219 CTR 562, (2009) 316 ITR 426 (RAJ).

R.L. Jain with Veena Mandlik, for the appellant.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. - Heard on the question of admission.

1. This appeal under Section 260-A of the Income Tax Act, 1961 is filed

against the order dated 13/19.11.2009 passed by the Income Tax Appellate Tribunal Indore Bench (for short, the Tribunal) in Income Tax Appeal No.709/IND/2007 in regard to the assessment year 2004-05.

2. In regard to the deletion of addition made by the Assessing Officer disallowing payment on account of folding/checking and mending charges made to the respondent's sister concern M/s. Pawan Enterprises in excess of the expenses of the previous year and disproportionate to the increase in turnover, the CIT (Appeal) and the Tribunal had taken note of the fact that the proprietor of the said concern M/s. Pawan Enterprises, who is mother of respondent-assessee had paid due taxes at the same rate as the assessee would have paid and held that there was no avoidance of tax, and therefore, provisions of Section 40-A (2) of the Income Tax Act could not have been applied. In support of this proposition of law, the Tribunal placed reliance on the judgment of High Court of Bombay in the case of *CIT v. Indo-Saudi Services (Travel) (P) Limited* [2008] 219 CTR 562 and the decision of Rajasthan High Court in the case of *CIT V. Udaipur Distillery Company Limited* [2009] 316 ITR 426 (*Raj*) as also the circular 6-P dated 6th July, 1968.

3. Having regard to the aforesaid judgments and the circular, in our considered view, the Tribunal has committed no error in holding that since no attempt to evade tax was involved, hence, no dis-allowances could be made under Section 40-A(2) of the Income Tax Act in respect of payment made to the sister concern.

In the circumstances, the appeal fails and is hereby dismissed.

Appeal dismissed.