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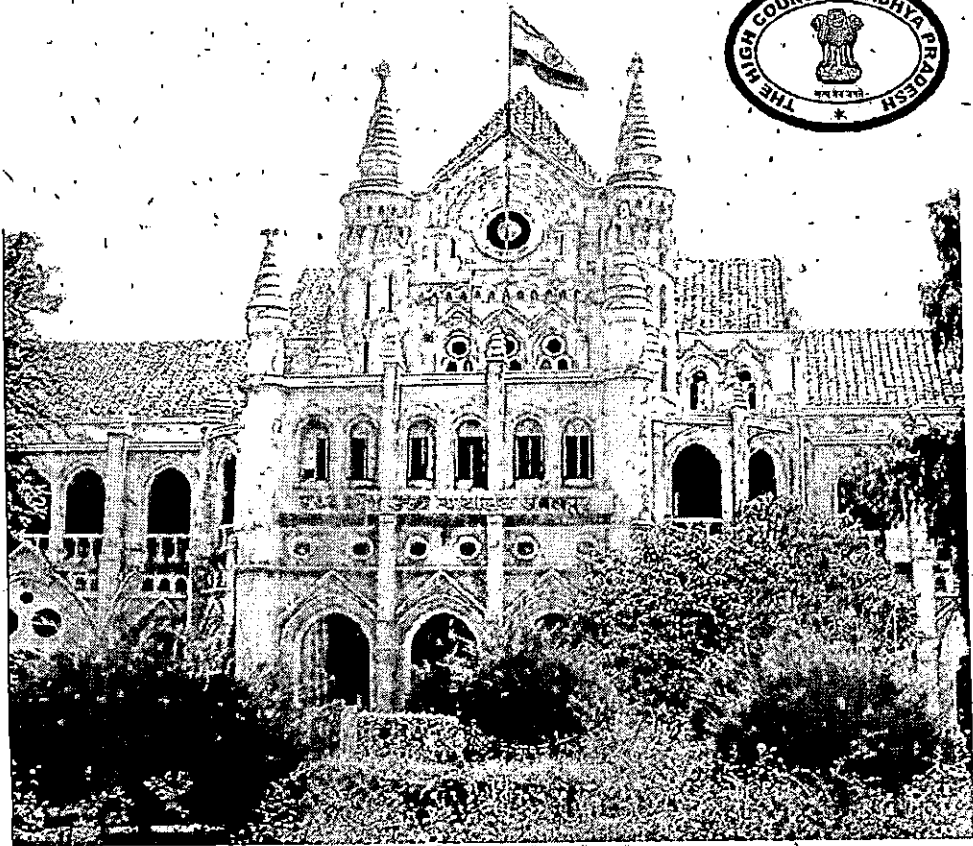
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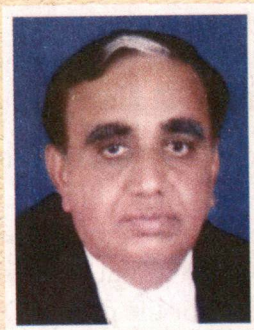
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Farewell



Justice Suresh Chandra Sinho

Born on August 20, 1950. After completing M.A., LL.B, joined Judicial Service on 20-06-1975 and was confirmed as Civil Judge w.e.f. 20.12.1977. Appointed as Civil Judge, Class-I w.e.f. 12.12.1983. Appointed as C.J.M./A.C.J.M. w.e.f. 31.08.1987. Promoted as Officiating District Judge in Higher Judicial Services w.e.f. 22.06.1989. Confirmed as District Judge in Higher Judicial Services w.e.f. 01.05.1992. Posted as Registrar in Arbitration Tribunal on deputation in the year 1992. Granted Selection Grade Scale w.e.f. 17.05.1986. Posted as Special Judge for trial of cases under SC/ST (Prevention of Atrocities) Act and N.D.P.S. Act at Tikamgarh, in the year 1999. Posted as District & Session Judge at Satna on 01.10.2001 and at Indore on 20.10.2004. Granted Super Time Scale w.e.f. 21.06.2002. Posted as Registrar (Vigilance), High Court of M.P. at Jabalpur on 31.03.2005. Posted as Registrar General, High Court of M.P. at Jabalpur on 28.05.2005.

Elevated as Additional Judge of Madhya Pradesh High Court on 15.05.2006, took oath as Permanent Judge on 15.01.2009, and demitted Office on 19.08.2012.

We wish His Lordship a healthy, happy and prosperous life.

**Hon'ble Mr. Justice Sushil Harkauli, Acting Chief Justice,
bids farewell to the demitting Judge :-**

We have assembled here today to bid an affectionate farewell to Hon'ble Shri Justice Suresh Chandra Sinho, who would be demitting Office as Judge, High Court of Madhya Pradesh on 19.08.2012.

Justice Sinho was born on 20.08.1950 at Nagpur, the then Capital of Central Provinces & Berar, where his father Late Shri S.N. Sinho, I.A.S., was posted as Extra Assistant Commissioner. He joined M.P. Judicial Service as Civil Judge, Class II on 20.06.1975 at Indore. Justice Sinho also qualified in Public Service Commission for the post of Dy. Superintendent of Police, but he did not appear in the interview as he preferred to remain in judicial service. He was promoted as Civil Judge, Class-I on 12.12.1983. He was posted as Chief Judicial Magistrate on 31.08.1987 and promoted as Officiating District Judge on 22.06.1989. Justice Sinho was granted Selection Grade on 17.05.1996 and Super Time Scale on 21.06.2002. During his tenure, he was posted at Indore, Raipur, Bhopal, Sagar, Ratlam, Tikamgarh, Satna and Jabalpur. He has worked as Registrar in Arbitration Tribunal on deputation from 08.09.1992, as Presiding Officer Special Court, Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act., Tikamgarh from 12.05.1997 to 30.09.2001. He became District & Sessions Judge on 01. 10.2001 and posted at Satna. During his tenure Pilot Project Scheme was launched by High Court and large number of pending cases were disposed of in District Satna under the able guidance of Justice Sinho. He was also subsequently transferred and posted as District Judge, Indore and he was instrumental in arranging Mega Lok Adalat and disposing of thousands of pending cases. He was thereafter transferred and posted as Registrar (Vig.) in the High Court of Madhya Pradesh at Jabalpur on 31.03.2005. He was subsequently posted as Registrar General in the High Court of Madhya Pradesh at Jabalpur on 28.05.2005.

Recognizing his merit, he was elevated as Additional Judge of High Court of M.P. on 15.05.2006 and confirmed as a Judge of this Court on 15.01.2009.

During his tenure as a Judge of M.P. High Court, Justice Sinho has disposed of large number of cases, which include Criminal Appeals, Criminal Revisions, Misc. Criminal Cases, First Appeals, Misc. Appeals, Writ Petitions etc.. Justice Sinho has disposed of 1644 writ petitions, 53 First Appeals,

1303 Misc. Appeals, 615 criminal appeals, 2453 criminal revisions and 3582 miscellaneous criminal cases. Justice S.C.Sinho has dealt with Civil and Criminal matters with equal proficiency. A number of his judgments are reported in law journals. The decisions rendered by him reflect his knowledge of law and approach in tackling complex issues.

Justice S.C.Sinho has successfully completed his tenure as a Judge of this Court and has contributed to dispensation of justice to the real and needy people, which by itself is a great satisfaction to a Judge. Justice Sinho had respect for everyone, be it Judges or lawyers.

I had the opportunity to sit with Justice Sinho in Division Bench and I have found him to be one of our finest Judges, silent, modest and dedicated to the cause of justice. He is admired and respected in the Judicial Fraternity. Shri Justice Sinho shall always be remembered as a Judge whose actions were always just, rational and reasonable. I have found his assistance in administrative matters very useful.

I am sure that his vast knowledge and experience will continue to be useful to the society even after his retirement.

On behalf of my brother & sister Judges and on my own behalf, I wish our valued colleague, Hon'ble Shri Justice Suresh Chandra Sinho and Mrs. Shobha Sinho all happiness, peace, good health and a long life.

Shri R.D. Jain, Advocate General of Madhya Pradesh, bids farewell :-

We have assembled here to bid farewell to Hon'ble Justice Suresh Chandra Sinho who is demitting the office after a distinguished career as a judge of the MP High Court. Born on 20.08.1950 and after law graduation joined judicial service on 20.06.1975. After successful career as a judge in various capacities assumed the office as a judge of the High Court on 15th of May 2006. Your Lordship's tenure as a judge of the MP High Court has been uncontroversial. Today is a parting moment and we are witnessing the day with heavy heart.

Prior to Your Lordship's appointment as a judge you had worked as judicial officer in various capacities i.e. as a civil judge, CJM, ADJ, Registrar (vigilance) and Registrar General of MP High Court and during this entire tenure of your service career you have done a great service to the institution.

As we know that every judge has his own working method, your Lordship were no exception to it. Known for giving patient hearing without interruption the legal fraternity always felt obliged. Your Lordship had advantage of vast experience of working as a judge which proved to be an asset in dispensation of justice.

Your Lordship were quick in understanding and the atmosphere of the Court has always been smiling and cordial. Your Lordship's fairness as a judge was deeply impressive. Our High Court will be deprived of the services of a brilliant judge after Your Lordship retirement. Always soft spoken and encouraging, the atmosphere of your court was soothing to new advocates.

Uprightness of Your Lordship's conduct and strict adherence to high morals were some of the qualities which you never eschewed, even amidst toughest of the time. While sitting on the Bench Your Lordship treated all members of the Bar alike. Though Your Lordship were firm and devoted to the cause of justice yet Your Lordship never lost temperament while hearing cases.

To bid farewell is always very sad and especially when you say goodbye to one whom you like and admire most. However, I hope that this moment will only be change of engagement and not renunciation of legal service.

At this moment I recollect the thoughts expressed by Justice Shiv Dayal, Ex-Chief Justice of MP who described the duty of a judge in the following words:

"Grant me grace, truly and impartially to administer Thy justice, and to maintain Thy infinite mercy. So direct and dispose my heart that I may this day fulfill all my duty in Thy fear, and fall into my error of judgment!"

"Give me grace to hear patiently, to consider diligently, to understand, rightly, and to decide justly! Grant me due sense of humility that I may not be misled by my willfulness, vanity or egotism!"

I, on behalf of M.P. Government and Law Officers of the State and on my own behalf, wish my Lord and family a healthy, happy and prosperous life.

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

We have gathered here today to bid adieu to My Lord Hon'ble Justice S.C. Sinho on his demitting the office as a Judge of this Hon'ble Court on 19th of August 2012.

Though the professional profile of My Lord is well known to all of us but to put it briefly on record, I state that My Lord joined the Judicial Services on 20th of June, 1975 and since then there was no looking back. He functioned as Registrar, Arbitration Tribunal, Bhopal; Special Judge (SC/ST and NDPS) Act Tikamgarh. He thereafter functioned as a District and Sessions Judge at Satna and Indore. He was also the Registrar General of this Hon'ble Court.

My Lord stood elevated as an Additional Judge of this prestigious High Court on 15/05/2006 and thereafter became the permanent Judge of this Court.

As a judge of this Court, My Lord displayed his firm conviction and commitment towards the Rule of Law and decided the cases without fear and favour. He was always polite and courteous towards the members of the Bar and gave them a patient hearing.

All good things come to an end and so has the tenure of My Lord but age is only a number, a cipher for the records. A man can't retire his experience. We hope that My Lord would continue to serve the down trodden with his vast knowledge and experience.

The hopes for the future of My Lord can be summed up by an Irish saying.

"May the sun shine, all day long, everything go right, and nothing wrong. May those you love bring love back to you, and may all the wishes you wish come true!"

I on behalf of the Madhya Pradesh High Court Bar Association and also on my own behalf wish you good health and success for a new journey. I pray that all the goodness of almighty be showered upon you and your family members.

Shri D.K. Dixit, President, M.P. High Court Advocates' Bar Association, Jabalpur bids farewell.-

Today we are bidding farewell to Hon'ble Justice S.C. Sinho who is demitting the office on 20.8.2012. Hon'ble Justice Sinho was born on 20.8.1950, joined judicial service on 20.6.1975 and after holding Higher post in judicial service appointed the judge of this Hon'ble Court on 15.5.2006. What has been said on that day in ovation has come true as we have seen.

Hon'ble Justice S.C.Sinho is known for his Gentleness and worked without any favour or fear. In all these years the bar has found in him a very straight forward judge worked very hard. The junior lawyers specially have got encouragement in his court and lawyers learnt a lot from him. He is a person down to earth.

On his demitting this high office we the lawyers are going to miss, a good laborious judge. We the members of the M.P. High Court Advocates' Bar Association and myself wish him a very happy healthy and pleasant life.

Shri Khalid Noor Fakhruddin, Member, State Bar Council of M.P. bids farewell.-

We have assembled here to give fare well ovation to Hon'ble Justice Suresh Chandra Sinho who started his career as judge on 20th June 1975 and thereafter graced various posts from Civil Judge to Registrar General of this Court. He was elevated as Judge of this Hon'ble Court on 15th May 2006. Justice Sinho graced this Hon'ble Court for about six years and during this period he tried to get the dispute resolved amicably between the parties. He has also delivered many land mark judgements which are reported in various journals. He was having a very wide knowledge of legal field and practical experience. While discharging his duties Justice Sinho was very soft spoken, and kind hearted. Because of his quick grasping power and deep knowledge of law he was able to discharge his duties very quickly and was fast on board. He had always encouraged and guided many junior lawyers of the bar from time to time. In his career as judge my lord has always followed the advice of his late father Shri S N Sinho, I A S Officer that "Honesty is the Best Virtue".

I on behalf of the State Bar Council of Madhya Pradesh wish my lord Justice S C Sinho and Smt. Shobha Sinho and their two sons Saket and Samvad a very good health and prosperity in the days to come.

**Shri Shekhar Sharma, Central Govt. Standing Counsel,
High Court of M.P., bids farewell.-**

This is the moment, we are bidding farewell to Hon'ble Shri Justice S.C. Sinho, Judge of this temple of Justice. The journey of judicial services of his Lordship started from 1975 when your Lordship joined Judicial Services as Civil Judge Class-II. After gracing various high offices of the judiciary, your Lordship was elevated as Additional Judge of MP High Court on 15th May 2006.

The Members of the legal fraternity are greatly influenced with Lordships deep wisdom and experience as well as with Lordships gentle, courteous and polite behavior by which his Lordship has given inspiration to all of us. As a Judicial Officer your Lordship has started his career in 1975 and right from the day has devoted himself in dispensing justice. Your Lordships remarkable performance as Hon'ble Judge of High Court of M.P., will be remembered with respect and regard in the history of this great temple of justice. Your Lordships judgments were full of wisdom and reflect humanitarian approach and sympathy for the common man.

His Lordship has decided the cases to the best of his firm fidelity and floriferous ability. His discipline, work ethics and helping behavior were outstanding. He always had a great respect for the lawyers treating them to be an important section of the society. Undoubtedly, his valuable commitment and devotion for justice was unique.

Undoubtedly after demitting your Lordships office, we the members of the legal fraternity will be deprived of your Lordships able guidance.

I, on behalf of Government of India, all the Law Officers of Central Government and on my own behalf, express my best wishes for good health, happiness and peace for the days to come to your Lordship.

**Shri Rajendra Tiwari Sr. Advocate' President, Senior
Council, bids farewell.-**

My Lord Justice Sinho was, having completed his long period of service in the Higher Judicial Service inducted as a High Court Judge on the 15th May 2006. He had a rich experience of disposal of Judicial work at the District level and from his association with the High Court as its Registrar.

Time has passed by and the date of retirement has arrived.

My Lord, the task of a Judge is very onerous and requires a Judge to be maintaining great poise and equilibrium because he has to deal with variety of cases and number of different lawyers in the working hours of the day. Even in the case of great provocation, he has to maintain his coolness and equanimity. It is really a great task to maintain balance in everything.

My Lord Frankfurter a great Judge of the United States observed at one place "If it is true of juries it is not wholly untrue of Judges that they may be impregnated by the environing atmosphere."

Francis Bacon has said " It is no grace to a Judge, first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel to short, or to prevent information by questions, though pertinent."

In this background when we look back and recapitulate your association with this High Court and the Bar, we find in your Lordship a gentlemen to the core, you would listen to the cases but remain unruffled. Your Lordship kept your Court very homogenous and Lawyer-friendly. It is always that you adjusted lawyers in the interest of justice.

My Lord, it is also true as said by Lyndon Johnson " Nothing really seems to go right from early morning till late at night."

This is in reference to a tenure of service and therefore no one can say that everything has gone right from the beginning to the end. There are always moments of concerns and then a gleaming height of satisfaction to have achieved as desired. It has therefore been my endeavour always not to compare anyone with others and make an assessment of his success in life individually.

Your Lordship will demit the office in the midnight of 19th Aug 2012 with retirement from service but not from other social, expectations. I have every feeling that your Lordship would be giving your time for uplift of others who are teeming in great number with scarce/succor to rise to high standard in their life.

Today, we have assembled to bid of your Lordship farewell and adieu.

I pray to the Almighty to give your Lordship a long life and strength to serve human causes herein after.

Farewell Speech delivered by Hon'ble Mr. Justice S.C. Sinho -

आप लोगों द्वारा मेरे सम्बन्ध में जो उद्गार एवं भावनाएं व्यक्त की गई हैं, वास्तव में मैं उनका अधिकारी नहीं हूँ तथा उपरोक्त भावनाएं आपने मेरे प्रति प्रेमवश व्यक्त की है। वस्तुस्थिति जो भी हो, मैं इन भावनाओं हेतु आपका हृदय से आभारी हूँ।

मैं अपनी खूबियों एवं खामियों से परिचित हूँ, जानता हूँ शॉर्ट टेम्पर हूँ अत्यंत जल्दी में रहता हूँ। मेरे काम करने के तरीके में, मैं कभी कभी आप लोगों को अपमानित कर गया हूँ, उंची आवाज में बोल गया हूँ, लेकिन धन्यवाद के पात्र है आप सभी लोग जिन्होंने मेरी कमी को मेरी त्रुटि मानकर नजर अंदाज किया, क्षमा किया। लगभग 39 साल की सेवाओं के पश्चात मैं पूर्ण संतुष्टि के साथ सेवा निवृत्त हो रहा हूँ।

मेरे पिता स्व. श्री एस.एन.सिन्हो (आय.ए.एस.) एक ईमानदार एवं साफ छवि वाले प्रशासक एवं माता स्व. श्रीमती प्रेम सिन्हो, एक घरेलू धर्मपरायण महिला थी। यह मेरे स्व. पिता एवं माता स्व. श्रीमती प्रेम सिन्हों का ही आशीर्वाद है कि आज मैं इस सम्माननीय पद से सेवा निवृत्त हो रहा हूँ।

मुझे मेरे जिला न्यायाधीश श्री आर.सी. श्रीवास्तव, श्री के.एल. श्रीवास्तव, श्री एन.के.जैन, श्री एस.पी. खरे एवं तत्कालीन रजिस्ट्रार जनरल श्री वाय.बी. सूर्यवंशी, जो कि बाद में इसी न्यायालय में न्यायमूर्ति बने, के अधीनस्थ रहकर एवं उनके मार्गदर्शन में कार्य करने का अवसर मिला। इसी प्रकार मेरे पूर्व जिला न्यायाधीश श्री डी.आर. पुंडलिक एवं श्री एल.जे. मांडलिक ने भी मुझ पर गहरा प्रभाव डाला।

मुझे मेरे कार्यकाल के दौरान मेरी पत्नी श्रीमती शोभा सिन्हो, पुत्र साकेत, सम्वेद एवं पुत्रवधु रानू एवं शीतल का पूर्ण सहयोग मिला है। मैं जब कनिष्ठ न्यायिक सेवाओं में पदस्थ था तब मेरे दोनों पुत्रों साकेत एवं सम्वेद जो अभी पूना तथा अमेरिका में साफ्टवेयर इंजीनियर के रूप में कार्यरत हैं, के कैरियर बनाने का पूरा श्रेय श्रीमती शोभा सिन्हों को देता हूँ, जिसने बेटों के साथ 1987 से 14 वर्षों तक भोपाल में रहकर अध्यापन कार्य किया एवं उनकी शिक्षा पूर्ण करवाई और सन् 2001 में जब मैं जिला न्यायाधीश, सतना था वह इस जिम्मेदारी से मुक्त हो गई तब वर्ष 2001 में अध्यापन कार्य छोड़कर सतना आई।

मैं रजिस्ट्री में कार्यरत रजिस्ट्रार जनरल श्री सुभाष काकडे एवं अन्य अधिकारीगण का भी हृदय से आभारी हूँ, जिन्होंने मुझे हमेशा पूर्ण सहयोग प्रदान किया। मेरे स्टाफ में कार्यरत श्री नईम खान, रीडर, श्री पी.एस. मिश्रा, निजी सहायक, श्री नवीन नागदेवे, श्री महेन्द्र कुमारी दीक्षित, निजी सहायक, सुश्री रश्मि चिकाने, स्टेनोग्राफर श्री डी.सी. शर्मा, निजी सहायक, श्री सुरेश कुमार कतिया, जमादार, जिन्होंने मुझे सहयोग दिया और जब मैं म.प्र. उच्च न्यायालय में रजिस्ट्रार (सतर्कता) एवं रजिस्ट्रार जनरल था, तत्कालीन स्टाफ में कार्यरत श्रीमती ज्योत्सना मंगतानी, असिस्टेंट रजिस्ट्रार कम पी.एस., श्री पी.जी. कुंटे रीडर, श्री मुकेश द्विवेदी, एस.ओ., श्री डी.एल. लववंशी, निजी सहायक, श्री प्रदीप जैन, कम्प्यूटर आपरेटर श्री रामप्रताप, जमादार एवं श्री यार मोहम्मद, भृत्य का भी आभारी हूँ। साथ ही डॉ.एसी सोनकर, जिन्होंने मुझे एवं मेरे परिवार को मैं भारतवर्ष में हूँ या अमेरिका में हमेशा सहयोग दिया, उसके लिए मैं उनका आभारी हूँ। मेरे कार्यकाल के दौरान तत्कालीन पी.पी.एस श्री ए.एम. येवलेकर, श्री साहा, श्री पिटवे, श्री डी.एस. बघेल, श्री वाल्मीकी पांडेय, श्री राधेश्याम श्री जॉन एवं प्रोटोकॉल अनुभाग में कार्यरत समस्त

कर्मचारीगण द्वारा की गई सेवाओं के लिए आभारी हूँ। इसके अतिरिक्त उच्च न्यायालय के गोल्डन जुबली समारोह में म.प्र. उच्च न्यायालय के सभी अधिकारीगणों एवं कर्मचारियों द्वारा सहयोग प्रदान किया, किन्तु समयभाव के कारण उनके नामों का उल्लेख करना संभव नहीं है।

मैं अधीनस्थ न्यायालय के उन न्यायाधीश जिन्होंने मुझे सहयोग दिया तथा मेरे प्रति शुभकामनाएं व्यक्त की, मुझे सहयोग प्रदान किया तथा जीवन के 39 वर्षों में उनका जो प्रेम और सहयोग मिला, उसके लिए मैं हृदय से आभारी हूँ।

मैंने अपने लगभग 39 साल के न्यायाधीश के जीवन में सदैव भयरहित तथा पक्षपातरहित होकर अपनी अंतर्आत्मा एवं समझ की आवाज पर न्याय दान किया है।

यह मेरे लिए अत्यंत सुखद एवं विरला संयोग है कि जिस कॉलेजियम द्वारा मेरा नाम न्यायमूर्ति चयन हेतु किया गया था उसमें तत्कालीन मुख्य न्यायाधिपति श्री ए.के. पटनायक, प्रशासनिक न्यायाधिपति श्री दीपक वर्मा एवं न्यायमूर्ति श्री दीपक मिश्रा सदस्य थे और आज जब मैं सेवा निवृत्त हो रहा हूँ तब ये तीनों न्यायमूर्तिगण सर्वोच्च न्यायालय में न्यायमूर्ति के पद पर कार्यरत हैं।

मेरे परम मित्र/ जीजाजी एवं मेरी पत्नी के राखी भाई डॉ. संतोष, नेत्र विशेषज्ञ एवं मेरी छोटी बहन सुधा चौधरी (आई.ए.एस.) प्रबंध संचालक, दुग्ध संघ, जो कि आज इस अवसर पर उपस्थित है, का मैं तहेदिल से आभारी हूँ। सुधा मेरी छोटी बहन जरूर है लेकिन जब भी मुझे आवश्यकता पड़ी उसे मैंने हमेशा अपने पीछे खड़ा पाया। उसने बड़ी बहन का फर्ज निभाया। बड़ा पुत्र साकेत एवं भांजा सुमित चौधरी भी यहां उपस्थित हैं, इन दोनों को सदैव मैंने मेरे पीछे साए के रूप में यह कहते हुए सुना, हम हैं ना, आप चिन्ता मत करिये, हम सब कर लेंगे।

सेवाकाल के दौरान मुझे माननीय कार्यवाहक मुख्य न्यायमूर्ति श्री सुशील हरकौलीजी, न्यायमूर्ति श्री के.के. लाहोटी, श्री अजीत सिंह, श्री अरविन्द मेनन, श्री ए.के. श्रीवास्तव, श्री राकेश सक्सेना, श्री माहेश्वरी बन्धुगण, सेवानिवृत्त न्यायमूर्ति श्री ए.के. सक्सेना, श्री एस. के. पाण्डेय, जो आज उपस्थित हैं व अन्य न्यायाधीशगण सदैव मेरा मार्गदर्शन करते रहे। इसी प्रकार मेरी पत्नी की भी मार्गदर्शिका श्रीमती प्रतिभा पटनायक भाभी, श्रीमती रेणु मिश्रा भाभी, श्रीमती माला भाभी, नीरु भाभी, अंजली भाभी, लता भाभी रही है। मैं सभी न्यायमूर्तिगण एवं भाभियों का आभारी हूँ जिनसे मुझे भरपूर सहयोग एवं प्यार मिला। मैं विशेष रूप से न्यायमूर्ति श्री गंगेले प्रशा. न्या. ग्वालियर तथा छोटे भाई न्यायमूर्ति यू.सी. माहेश्वरी का आभारी हूँ जो ग्वालियर से आज उपस्थित हैं।

अधीनस्थ न्यायालय के न्यायाधीशगण परिश्रम तथा विषम परिस्थितियों में अपना दायित्व निभा रहे हैं, इस अवसर पर मैं उनकी प्रशंसा करता हूँ तथा उनके उज्ज्वल कैरियर तथा भविष्य की कामना करता हूँ।

अन्त में इस शेर से अपनी वाणी को विराम देता हूँ—

“हंस कर जीना दस्तूर है, जिन्दगी का
एक यही किस्सा मशहूर है, जिन्दगी का
बीते हुए पल कभी लौट कर नहीं आते
यही सबसे बड़ा कसूर है जिन्दगी का।”

धन्यवाद। जय हिन्द।

अलविदाई जुमे के इस शुभ अवसर पर मैं आप सभी को शुभकामनाएं देता हूँ।

Farewell



Justice S.N. Aggarwal

Born in Delhi on August 25, 1950. Did B.Sc. and Master of Laws, both from Delhi University. Had the distinction of getting several gold medals and silver medals, both during the L.L.B. and L.L.M. studies. Enrolled as an Advocate with Bar Council of Delhi on 25-10-1980. Practised civil and criminal law, both original and appellate side in District Courts, Delhi High Court and Supreme Court. Became Advocate on record in Supreme Court in 1984 and had the distinction of attaining first position in Advocate-on-record examination. Joined Faculty of Law, Delhi university as part time Lecturer-in-Law in 1986 and continued teaching there till appointment as Additional District & Sessions Judge, Delhi on 30-11-1991. Went on deputation as Presiding Officer of Debt Recovery Tribunal, Delhi on 20-12-2000. Was appointed as Chairman of an All India Working Group for suggesting amendments in Recovery of Debts Due to Banks and Financial Institution Act, 1993. Worked as Registrar General of High Court of Delhi from 14-10-2005 till 27-02-2006. Elevated to the Bench of High Court of Delhi as Additional Judge on 28-02-2006 and was confirmed on 25-04-2007.

Was transferred to the High Court of Madhya Pradesh, took oath on 28-10-2010 and demitted Office on 24.08.2012.

We wish His Lordship a healthy, happy and prosperous life

Hon'ble Mr. Justice N.K. Mody, bids farewell to the demitting Judge :-

Time of farewell is a socio-economic phenomena which always comes in the life of a person. As per philosophy of life, farewell means mother of welfare, just as purity is the mother of peace and prosperity, Time of farewell is a very lucky moment when almighty again gives us a chance for rendering our services in the welfare of ourselves, society, nation and for the whole world. Persons who are not tired but retired and do not wish to sit idle during their post retiral days may become more busy in achieving their future prospects and providence by doing welfare work. Therefore, this occasion of farewell is celebrated, otherwise who will celebrate the moment when our best friend says good bye.

Today we have assembled here to felicitate farewell ovation to Hon. Shri Justice S.N. Aggarwal who is demitting the office today i.e. (Friday) 24th of August, 2012 accordingly Bhadra Shukla Saptmi Vikram Samvat 2069 at Gwalior Bench of M.P. High Court, after rendering his valuable services to this prestigious constitutional office of Indian Judiciary. His eminent contribution to the judicial fraternity and the personal touch which he gave to all relations will form a part of our everlasting memory.

To recount, Hon. Shri Justice S.N. Aggarwal was born in Delhi on 25.8.1950. After completion of his graduation with a lot of struggle, he passed his LL.B and LL.M examinations from Delhi University. He had the distinction of getting gold and silver medals during the law studies. He was Enrolled as an Advocate with Bar Council of Delhi on 25.10.1980. He was a practicing lawyer in District Court, Delhi High Court and Supreme Court. He became Advocate on record in Supreme Court in 1984 and had the distinction of attaining first position in Advocate-on-record examinaiton. His Lordship also joined faculty of Law, Delhi University as part time lecturer in law in 1986 and continued till appointment as Additional District & Seessions Judge, Delhi on 30.11.1991. His Lordship also went on deputation as Presiding Officer of Debt Recovery Tribunal, Delhi on 20.12.2000. His Lordship was also appointed as Chairman of an All India Working Group for suggesting amendments in Recovery of Debts due to Banks and Financial Institution Act, 1993. Before elevation His Lordship was Registrar General of Delhi

High Court. He was elevated to the Bench of High Court of Delhi as Additional judge on 28.2.2006 and was confirmed on 25.4.2007. Thereafter His Lordship was transferred to High Court of Madhya Pradesh and took oath on 28.10.2010. Transfer from Delhi to M.P. was painful to His Lordship. Since 8.11.2010 His Lordship's headquarter remained at Bench Gwalior.

Very painfully, it is pertinent to mention here that just five days after elevation as judge His Lordship had lost his Son-in-law and again he had been shocked on 14.10.2011 when His Lordships life partner had passed away but even then His Lordship's pain was never reflected on his judicial work. The judicial approach of his Lordship is excellent and is well known to all of you. He writes thoughtfull judgment and orders in a very simple & meaningful language. Many landmark judgments have been delivered by His Lordship which will always guide the entire legal fraternity in future. Unfortunately, I had no occasion to share the bench with His Lordship. However one instance will be enough to demonstrate his feelings towards pending litigation. Once in a casual meeting His Lordship told that the Registry is preparing a long list of 175-200 cases which is unjustified. His Lordship further told that since it is practically not possible to attend all the cases, therefore, not only Registry is required to make an unnecessary exercise, litigant also suffers and it also does not convey good message in the society as it gives a feeling that in Court, cases are being adjourned. The behaviour of His Lordship towards the judges, lawyers, litigants and staff members is always polite and graceful. He is a man of simple living and high thinking.

Now I would like to say that my sweet brother Hon. Shri Justice Aggarwal has reached a point of time, when

He may shine like the sun

He may spread cool and calm like the moon

He may extend power of cooperation like stars for the society at large.

His Lordships special quality of honey tongued will always make his presence felt in our hearts. Since I am a product of Bar Association, Gwalior, though living out since my appointment as Judge of this court, can say with confidence that posting at Gwalior must not be painful to

His Lordship. The respect and relationship which His lordship is commanding at Gwalior with the members of the Bar in itself is a great achievement. In few words it can be said:-

रिश्ते बहुत अजीब होते हैं,
कुछ करीब तो कुछ अजीज होते हैं
कुछ बनते हैं तो कुछ बनाते हैं,
कुछ हमें किस्मत से नसीब होते हैं।

Lastly on the eve of demitting the office of Judge of this High Court, I on my own behalf and on behalf of brother Judges individually and collectively on behalf of High Court of Madhya Pradesh congratulate my Lord for his successful judicial career and pray almighty God to bestow and enrich his life with happiness, good health, peace and prosperity and to give courage for doing work of welfare after this farewell.

Thanking all of you.

Shri P.S. Raghuvanshi, Addl. Advocate General State of M.P., bids farewell.-

We have gathered here to give farewell to My Lord Justice S.N. Aggarwal who is demitting the office of Judge of this Prestigious Institution today on 24th of August 2012.

My Lord Justice S. N. Aggarwal was born on 25th August 1950, he did B.Sc. and Master of Laws from Delhi University. Because of his meritorious performance he got Gold Medals and various Silver Medals in both Degree Course of LL.B. & LLM. He was enrolled as Advocate with the State Bar Council Delhi on 25th October, 1980. My Lord passed the examination of the Advocate on record with First Position. He was appointed as Additional District & Session Judge Delhi on 30-11-1991. He also worked as Registrar General of High Court of Delhi from 14-10-2005 till 27-02-2006 and thereafter My Lord was elevated to the Bench of High Court of Delhi as Additional Judge on 28th February, 2006 and was confirmed on April 25, 2007. Thereafter Hon'ble Shri Justice S. N. Aggarwal was posted on transfer to this Hon'ble Court and he joined us in October 2010.

Most of us had opportunity to appear and plead before your Lordship

and while appearing as an Advocate, we found that My Lord is having oceanic depth of knowledge and the quality of judgment rendered by My Lord is certainly excellent.

My Lord, believe us you have not only proved yourself to be a Good Judge but you have left your footprints on this legal system which will be remembered by your judgments time to come. As a Judge you have won over the hearts of the Advocates and at the same time you have never given up the legal provision and your judgments speak a heartious voice of a good human being with framework of law. My Lord we have seen that your behavior towards the Advocates always remained noble and you have tried your best to convince the arguing Advocates, by means of law. This is one of the reason that an advocate who lost the case before you too was seen happy and returned with smile after finishing his arguments. By this quality of a good human being your judgments have rendered justice till the last man of society. My lord it is not out of place to speak here that you are having all the qualities of Ideal Judge and that's why you have always maintained the relations between the Bench & Bar and at the same time you have also maintained the dignity of this Prestigious Institution. While working as Judge, Your Lordships has rendered so many landmark judgments which reflects upon your socio-legal concept.

My Lord we have seen you while sitting in Constitutional, Civil & Criminal Benches where we have found that you have proved yourself to be an excellent Judge in every discipline of law.

We are giving farewell to My Lord Hon'ble Shri Justice Aggarwal today but with an assurance that we will never forget you and in turn we would like to take assurance from My Lord that he will maintain love and affection developed by him.

On behalf of State of M.P., all the Law Officers and my own behalf, I pray, the almighty to keep you & your family in good health.

Shri Jai Prakash Mishra, President, High Court Bar Association, Gwalior, bids farewell.-

Your Lordship Hon'ble Shri Justice S.N. Aggarwal is completing his tenure as a judge today.

Hon'ble Shri Justice S.N. Aggarwal born on 25th August 1950. Did

B.Sc. and Master of Laws both from Delhi University. Enrolled as an Advocate with Bar Council of Delhi on 25th October 1980. Practiced on Civil and Criminal law, both original and appellate side in District Court, Delhi High Court, and Supreme Court of India. Became Advocate on Record in Supreme Court in year 1984 and had the distinction of attaining first position in Advocate on record examination. Joined Faculty of Law, Delhi University as part time lecturer in law in 1986. Appointed as Additional District & Sessions Judge, Delhi on 30 November, 1991. Handled several important matters of public importance and exercised different jurisdictions during his tenure as Member of Delhi Higher Judicial Services.

He was appointed as Chairman of All India Working Group for suggesting amendments in recovery of Debts due to Banks and Financial Institutions Act, 1993. Remained Registrar General of Delhi High Court.

Appointed as Additional Judge of the High Court of Delhi on 28 February 2000 and Permanent judge on 25th April 2007. Transferred to High Court of Madhya Pradesh on October, 2010.

Hon'ble Shri Justice S.N. Aggarwal in his tenure of judicial services assured of a patient hearing. Your lordship's Judgments are backed by forceful logic. His approach to the cases was with absolute clarity of thought. Some of such Judgments are landmarks in the judicial system.

I, on behalf of myself and on behalf of High Court Bar Association, Gwalior wish your lordship long, happy, healthy & prosperous life.

Shri Prem Singh Bhadoriya, Member, State Bar Council of M.P., bids farewell.-

आज का यह विशेष क्षण हम सभी के लिये अत्यंत महत्वपूर्ण है जब हम म.प्र. उच्च न्यायालय के माननीय न्यायमूर्ति श्री एस.एन.अग्रवाल जी के न्यायाधिपति के रूप में यशस्वी एवं सफल कार्यकाल पूर्ण होने पर उन्हें भावभीनी विदाई देने हेतु एकत्रित हुये हैं।

माननीय न्यायमूर्ति श्री एस.एन. अग्रवाल जी का जन्म भारत गणराज्य की राजधानी दिल्ली में दिनांक 25.08.1950 को हुआ था। उन्होंने अपनी प्रारंभिक शिक्षा उपरांत फारमोसी में डिप्लोमा किया एवं सर्विस जोइन की तथा सर्विस के साथ साथ विद्याध्ययन जारी रखते हुए बीएससी एलएलबी तथा विधि की मास्टर डिग्री दिल्ली विश्वविद्यालय से प्राप्त की थी।

माननीय न्यायमूर्ति को एलएलबी की शिक्षा एवं एलएलएम की परीक्षा के उपरांत स्वर्ण

पदक व रजत पदक से सुशोभित किया गया। माननीय न्यायमूर्ति द्वारा कर्मयोगी पुरुष की भांति लाभ, हानि, जीवन, मरण जिस अपजस विधि हाथ की चौपाई के साथ ईश्वर को स्मरण करते हुये न्यायदान में सहयोग का संकल्प लेते हुये अभिभाषक के रूप में राज्य अधिवक्ता परिषद दिल्ली में अभिभाषक के रूप में अपना पंजीयन 25.10.1980 को कराते हुये विधि क्षेत्र में प्रवेश कर, ज़िला न्यायालय दिल्ली एवं माननीय उच्च न्यायालय उच्चतम न्यायालय दिल्ली में विधि व्यवसाय प्रारंभ किया गया।

आपके द्वारा वर्ष 1984 में माननीय उच्चतम न्यायालय में एडवोकेट आन रिकार्ड की परीक्षा में प्रथम स्थान प्राप्त किया। आपने विधि व्यवसाय के साथ साथ दिल्ली विश्वविद्यालय में वर्ष 1986 में पार्ट टाईम लॉ फैकल्टी में व्याख्याता के रूप में भी योगदान दिया।

आपके न्यायदान के संकल्प के फलस्वरूप आपको 30.11.1991 को अतिरिक्त जिला एवं सत्र न्यायाधीश के रूप में दिल्ली में नियुक्त किया गया। न्यायिक सेवा में आपको शनैः शनैः दिये गये सभी दायित्वों का आपके द्वारा सफलतापूर्वक निर्वहन किया गया।

माननीय न्यायमूर्ति की छवि एवं विधि ज्ञान के आधार पर 20.12.2000 को आपकी नियुक्ति डेप्ट रिकवरी ट्रिब्यूनल दिल्ली में की गयी। तदोपरांत आपको बैंक तथा वित्तीय संस्थानों में होने वाले संशोधनों एवं वसूली समिति का अध्यक्ष भी नियुक्त किया गया।

आपकी सेवाओं को दृष्टिगत रखते हुए 14.10.2005 को माननीय उच्च न्यायालय देहली का रजिस्टार जनरल नियुक्त किया गया। जहाँ आपने 27.02.2006 तक अपनी सफलतापूर्वक सेवाएं दी।

आपके विधि अनुभव एवं विधि ज्ञान के आधार पर आपको दिल्ली उच्च न्यायालय में 28.02.2006 को अतिरिक्त न्यायमूर्ति के रूप में नियुक्त किया गया और 25.04.2010 को स्थायी न्यायमूर्ति के रूप में शपथ दिलायी गयी। तदोपरांत 28.10.2010 को आपको माननीय उच्च न्यायालय देहली से इस न्याय मंदिर में स्थानांतरित किया गया।

आपके द्वारा इस महान्याय मंदिर में न्यायमूर्ति के पद पर रहते हुए आपको कई कठिनाइयों का सामना करना पड़ा परंतु उसके उपरांत भी आपने किसी को आभास तक नहीं होने दिया इसके संबंध में यदि मैं यह कहूँ कि

“हम जल कर भी रोशनी फैलाते रहे, इसलिये लोग हमें जलाते रहे

मेरे जलने को किसी ने देखा ही नहीं, मेरी रोशनी पर सब मुस्कुराते रहे।”

माननीय न्यायमूर्ति द्वारा अत्यंत गरिमा शालीनता व सादगी के साथ अपने कर्तव्यों का निर्वहन किया और जिस सहजता से आपने उलझे कानूनी प्रश्नों को सरलता से सुलझाकर अनेकों न्याय दृष्टांत प्रतिपादित करते हुए पक्ष व विपक्ष के पक्षकारों के मन में संतोष का बोध कराया जो निश्चित ही आपकी कार्यशैली के प्रमुख अंग बन गये।

आपकी कार्यशैली के आधार पर मुझे एक शायर की वह पंक्ति आज भी याद आ रही है। कि

“फैज की राह सरबसर मंजिल, हम जहाँ पहुँचे कामयाब आये”

माननीय न्यायमूर्ति आपके व्यवहार में सहजता, मधुरता व अपनत्व की जो भावना झलकती थी वह सदैव हमारे लिये अत्यंत प्रेरणादायी रही। न्यायदान की प्रक्रिया में आपने जिस प्रकार पक्षकारों की मन की पीड़ा को समझकर प्रकरणों का तुरंत निराकरण किया गया। जिससे सभी पक्ष सदैव संतुष्ट नजर आये।

आने वाले समय में आपकी अनुपस्थिति से जो शून्यता व रिक्तता उत्पन्न होगी वह हमेशा महसूस होती रहेगी।

न्यायदान में आपका योगदान अत्यंत अमूल्यनीय एवं अभिनंदनीय है। आपके सफल कार्यकाल पूर्ण करने पर मैं आपसे यह अनुरोध करता हूँ कि इस अर्धविराम के पश्चात प्रभावमान होने वाली समय की गति के साथ साथ आप उसी सहजता एवं सुलभता के साथ देश के विधि व्यवसायियों एवं समाज के अन्य वर्गों के सामाजिक विकास में एवं दीन हीन की सेवा में अपना रचनात्मक योगदान देकर समाज के विकास में नई भूमिका का निर्वाहन करेंगे।

इन्हीं शुभकामनाओं के साथ मैं अपनी ओर से एवं म.प्र. राज्य अधिवक्ता परिषद के सभी सदस्यों एवं प्रदेश के विधि जगत की ओर से आपके प्रति कृतज्ञता तथा आभार व्यक्त करता हूँ, एवं आपके उत्तम स्वास्थ्य एवं मंगल पारिवारिक जीवन की कामना इन्हीं शब्दों के साथ करता हूँ कि

फूलों का आफताब हो आपकी जिन्दगी,
खुशियों का सरताज हो आपकी जिंदगी।
झलक उठे जिसकी आसमान तक
ऐसा सुंदर साज हो आपकी जिंदगी।

Farewell speech delivered by Honb'le Mr. Justice S.N. Aggarwal-

I thank each one of you for your generous comments about me. I am honoured by your kind words. Today it is my last sitting on the dais and so is your appearance as an advocate before me. Hereinafter I will no longer wear the robes of a Judge. It is the end of my innings as a judge. Today, I have so much to say, a lot to share with you and so many people to thank, but I do not know from where to begin.

Retirement by most of us is accepted with a heavy heart. And this feeling of sadness comes from the fact that after years of active life spent in discharging sovereign functions one suddenly finds oneself in wilderness. What next arises is the question? It is not a good feeling but there is a positive side to it also. Retirement provides a cooling period before one embarks upon another journey. It gives you an opportunity to reflect over your achievements and failures. But surely it is not the end of the road.

Friends, I have had a humble origin. I had lost my mother in my childhood when I was hardly three four years old and after few months of my enrolment as an advocate I lost my father. I did my B.Sc.; LL.B and LL.M. as a part timer from Delhi University while in Govt. Service and after marriage; I have had the distinction of getting several prizes, gold and silver medals for my outstanding performance at both LL.B and LL.M level of higher studies. I take pride in telling you that I was privileged to have been called for teaching LL.B classes at the same Law Faculty of Delhi University where I was once a student. I had been into teaching as a part time lecturer-in law for about five years and this greatly enriched my knowledge and became immensely helpful to me in dispensation of justice.

My formative years into the legal profession were full of struggle. After quitting Govt service as a Para Medical staff in 1980 I had joined the chamber of Late Mr. B.P.Maheshwari in the Supreme Court where I was groomed and trained as an advocate more by his munshi Late Shri Kailash Chand Jain than by Mr. Maheshwari. I acknowledge his contribution in my legal career. There came a time in my career when I had almost decided to quit the legal profession and open a chemist shop, being a qualified pharmacist. This did not happen as the luck had something higher in store for me. Fortunately to my good luck I was selected for my appointment to Delhi Higher Judicial Service from the Bar quota in 1988 and this became a turning point in my life. However, despite my selection in 1988 along with my two other colleagues, it was only in 1991 through the intervention of the High court that the three of us were formally appointed after the court was satisfied with our plea that our appointment was with mala fide intention stalled by the then Law Secretary who later retired as a judge of the Delhi High Court. Fighting one's own case in the law courts was a great experience, albeit painful. I had done eleven years at Bar and have practiced original and appellate side civil, criminal and constitutional law in almost all the courts in Delhi including as an advocate on record in the Supreme Court before my appointment as an Additional District & Sessions Judge, Delhi in 1991. I have served 21 years as a Judge out of which six and a half years in the High Court. After I had joined judicial service in 1991 as an Additional District & Sessions Judge, Delhi, I have held various positions. My journey towards High Court began on 14th October 2005 when I was telephonically called by the then Chief Justice of the Delhi High Court, Justice Markendey Katju- as his Lordship then was, and was asked to take charge as Registrar General of the High Court. I worked for four and a half months as Registrar General before my elevation as an Additional Judge of the Delhi

High Court on 28 February, 2006. My short tenure of four and a half months as Registrar General was the golden period of my life and shall always remain memorable to me for the immense administrative contribution made by me in the development of the infrastructure and manpower of the High Court and of the District Courts. I am sure that the Delhi Judiciary will bear testimony to it.

After I became a judge I had never looked back till 31.08.2010- a date which has etched on my soul and mind, On that fateful day I had received the biggest shock of my life, a one-liner from the Chief Justice of India, proposing my transfer in public interest from Delhi High Court to Madhya Pradesh High Court without spelling out any reason of such public interest. I took the letter in my hands and looked at its contents again and again. Tears slowly trickled down my eyes. Terrible thoughts gushed through my mind. What had I done to deserve this? Why did this happen to me? Why my transfer was proposed from Delhi- my Janambhoomi and Karambhoomi where I had spent more than sixty precious years of my life and more so when my wife was seriously ailing and there was no body in my family to attend to her? What now? It was as if the entire world had come crumbling down before me and I could see only the darkness of overcast clouds all around me. I was devastated and felt completely stripped and violated. In my response to the proposal, I had requested the Chief Justice of India to tell me the reason of my transfer so that I could stand up as a man and face the challenge, besides I also informed his lordship about the critical illness of my wife. Unfortunately, the reply to my response was again a one liner without disclosing me the reason of my transfer. Faced with such a terse reply I wanted to resign in protest as I felt when honour is gone, there was nothing to live for. However, my family pleaded with me to continue and accept transfer as a part of destiny. I reluctantly agreed and reached Jabalpur where I was sworn as a Judge of Madhya Pradesh High Court on 28th October 2010. I opted for Gwalior Bench of my own volition because of its proximity to Delhi so that I being the only male person in my house could at least afford week-end visits to Delhi and attend to my ailing wife who at that time was undergoing treatment for her multi organ failure in a super speciality hospital. You all know I lost my wife a few months back and her untimely death has caused not only a vacuum in my life but what is troubling me the most is the feeling that I was not available to her when she needed me the most. This feeling of guilt keeps haunting me day in and day out. All this happened because of my displacement from Delhi to Madhya Pradesh. Who should I blame for it- those at the helm of affairs or my destiny?

I firmly believe that the transfer of a judge and that too without telling him why he is transferred have cascading effects. Today I ask myself, was I not entitled to know the reason of my sudden transfer? Was I not entitled to know the public interest I had to serve in Madhya Pradesh that I was not serving in Delhi? Above all, is a judge the holder of a constitutional office not entitled even to an ordinary courtesy of a hearing from the Head of the Judiciary, more so when, under our service jurisprudence, even a lowest functionary is entitled to a show cause notice if he is to be visited with a punitive action? I am here reminded of an Urdu couplet-

बने है अहले हवस मुद्दई भी मुंसिफ भी,

किसको वकील करे और किससे मुंसफी चाहें।

I am conscious of the fact that our constitution envisage transfer of a Judge from one High Court to another but I very strongly feel that it is time now to revisit this power as it is being misused in the name of as vague a term as 'public interest'. I am a victim of such misuse. I have no hesitation in saying and say it with utmost humility and respect at my command that one of my senior colleagues then a judge in Delhi High Court, with whom I had serious differences on various issues on making it to the Supreme Court saw to it that I was sent out of Delhi High Court by using his close proximity which he has the knack of developing and which he developed in due course of time with the Head of the judiciary. Transfer, I feel is a tool in the hands of the concerned authorities to tame the inconvenient judges. Surely, I am not saying that judges are paragons of virtues. They are after all human and to err is human. Here I am reminded of a couplet-

जो नजर नजर से मिल सके उस नजर की मुझे तलाश है,

जिससे हुई न हो कभी कोई खता उस शख्स की मुझे तलाश है।

The moment we realise that the judges are also human and may commit mistake knowingly or unknowingly, then the answer is not to transfer them from one court to another, for if a judge does not deserve to remain in one court, he equally does not deserve to sit in another court. By all means remove such a judge, ridicule him, disgrace him, impeach him but for God's sake do not tarnish his image without telling him the sin he is supposed to have committed and without giving him hearing. It is being said in many quarters that the impeachment of a judge can never take place because of cumbersome procedure. If that is the case I am all for making the impeachment process

liberal. It is an irony that we judges who hold principles of natural justice so dear to us and strike down orders day in and day out for reasons of non observance of such principles have unfortunately become victim of the same malaise.

I am a firm believer of destiny. Whatever good or bad has happened to me in my life, it seems, was destined. My meeting you people in Gwalior also seems to be a part of destiny and the result of my old bondage with you probably of my past life. However, I ascribe my positive achievements in my life partly to the good fortune and sacrifices of my late wife and also of my daughters and partly to the blessings of my late parents and blessings of God. If I have lost anything in life, I ascribe it largely to my luck. Here, I am reminded of an old saying on destiny which I quote;

"Signs of destiny have always been
Those hands inscribed both good and mean
What was written came from the unseen
Though we tried without and worried within."

Meaning:

One is great
Who faces fate
Before it's late,
Appreciate
The destined state
No matter how much we debate
Oppose, engage, or calculate
Even try to accelerate
Fate only moves at its own rate.
Futile is worry, anger and hate
Joy is the only worthy mate.

Long lime back Lord Denning had said that when a judge sits in court

he himself is on trial. A short tempered judge will be told by the Bar at his much awaited retirement "Your Lordships did not suffer fools gladly." I am glad no one used that expression for me today. The administration of justice is a cooperative effort between the judges and the lawyers. I am of the view that the commitments of the Bar, its ethos and principles, its intelligence and its collegiality, are a precious thing which must be nurtured and protected. About two years back I had come on transfer from Delhi High Court to the Gwalior Bench of M. P. High Court with a lot of apprehension in my mind about the Gwalior Bar. As the time passed by I found my apprehension was misplaced. During my short tenure of less than two years here I found the lawyers of Gwalior to be no less in calibre to the Delhi Lawyers. The advocates of Gwalior are men of tremendous character and are possessed of intelligent leadership. They always remained immensely helpful, cooperative and honest in their dealings with the court. I have learnt a lot every day from them and was greatly benefited by their research in almost every case they appeared before me. I have great love & respect for each and every member of the Gwalior Bar and I hold them all in my high esteem. I wish them a good fortune, good health, peace & prosperity.

The future of the legal profession rests on the shoulders of the younger members of the Bar who are likely to take over the reins from us either adorning the Bench in the High Court or the Supreme Court or as a senior advocate. Work harder with strong determination and integrity as hard work and honesty have no substitute.

I am extremely happy that my family always stood with me through thick and thin. I had received consistent support from my late wife and also from my both the daughters in the discharge of my duties. They had to put up with my coming and goings, my odd hours and a distant lost look at times when I should have been concentrating on them, rather than lost in Court work. I have been deeply fortunate to have had such a tolerant and an understandable family which never allowed their personal problems to interfere into my professional engagements. I put on record my deep sense of gratitude to all my family members present here and also to my late wife.

I am also grateful from the core of my heart to Hon'ble the Acting Chief Justice and my other brothers and sisters Judges at all the three Benches of this court for extending me their whole-hearted co-operation and the magnanimity shown to me by them during my short tenure of a little less than

two years in this Court. I convey my special thanks to all those Hon'ble judges from the Delhi High Court and Rajasthan High Court who are present and have participated in my retirement ovation despite their busy schedule.

Before parting, I wish to put on record my sincere thanks to the Principal Registrar of this Bench Mr. B.D. Rathi, Addl. Registrar Mr. V. B. Singh, OSD Mr. P. C. Mishra, and the other staff members of the Registry of this Bench and in particular to my personal staff who remained posted with me in the court and at my cottage, for serving and attending to all my needs with complete dedication. I wish a very successful career to all the ministerial staff of this Court. I also convey my thanks to Dr. R.K. Chaturvedi and Dr. R.K. Sharma for providing medical aid to me as and when required. I also thank the protocol staff who extended necessary protocol facilities to me from time to time and made my stay here at Gwalior comfortable. Last but not the least I also convey my thanks to Dr. (Mrs.) Suman Gupta, Dean & Head, Guru Govind Singh Inderprastha University, Delhi; the senior and other members of the legal fraternity from Delhi and all my other guests who have come all the way from Delhi to Gwalior to participate in my fare well ovation ceremony.

At last, I would like to say that my departure from this Court is not a departure from my duties towards the community, legal profession or this esteemed judicial institution. I would continue to work with high spirits for the same. As today I have turned sixty two, I continue to look forward and upward. I am leaving this Court in the best of hands. I shall leave Gwalior for Delhi today evening knowing not when, where or whether ever we meet again.

Thank you all very much for coming and allowing me to express myself on this occasion. I am touched greatly by your generosity and good wishes. I wish every one of you well and extend my warmest greetings to one and all. I conclude my address with the following couplet from Bahadur Shah Zafar.

यह चमन यूँ ही रहेगा और हज़ारों जानवर,

अपनी अपनी बोलियाँ बोलकर उड़ जायेंगे।

Thank You Jai Hind

NOTES OF CASES SECTION

Short Note

***(85)**

Before Mr. Justice J.K. Maheshwari

W.P. No. 16849/2010 (Jabalpur) decided on 23 April, 2012

ASHANLAL LILHARE Petitioner
Vs.
STATE OF M.P. & ors. Respondents

Constitution – Article 226 – Service Law – Age of retirement of contingent employees and daily workers in various departments of State of M.P. – Orders of retiring the contingency paid employees and daily rated workers on attaining them age of 60 or on completion of 30 years of service prior to age of 62 years – Challenged – Disposed with directions.

- 1. Daily rated employees recruited prior to 31.12.88 status is to be checked of each and every case individually before passing the order of retirement either on completion of the age of 60 years or on completion of 30 years of service – Committee is to be constituted on district level for this purpose in every department.**
- 2. On report of committee the contingent employees would be entitled up to age of 62 years in the light of judgment *Vishnu Mutiya and ors. Vs. State of M.P.* and circular of finance department dated 20.01.2000.**
- 3. On report of Committee, the daily rated employees/daily wagers engaged prior to 31.12.88 not entitled to continue up to 62 years of age – Norms to be formulated by State Government for observance to pass the orders of retirement on completion of 60 years.**
- 4. In cases of retirement on completion of 30 years daily rated employees – Committee require to record the reason – Become unfit as per medical examination and unable to work.**
- 5. All the impugned orders retiring employees are quashed – Each**

NOTES OF CASES SECTION

and every case to be determined in light of above findings.

संविधान - अनुच्छेद 226 - सेवा विधि - म.प्र. राज्य के विभिन्न विभागों में आकस्मिकता निधि से वेतन पाने वाले कर्मचारियों की व दैनिक वेतन पाने वाले कर्मचारियों की सेवानिवृत्ति की आयु - आकस्मिकता निधि से वेतन पाने वाले कर्मचारियों को एवं दैनिक वेतन कर्मियों को, उनके द्वारा 60 वर्ष की आयु अथवा 30 वर्ष की सेवा पूर्ण करने पर, 62 वर्ष की आयु से पहले सेवानिवृत्त करने के आदेश को चुनौती दी गई - निदेशों के साथ निपटारा किया गया।

1. दैनिक वेतन कर्मचारी 31.12.88 से पहले भर्ती किये गये - स्थिति को प्रत्येक मामले को पृथक-पृथक रूप से जांचना होगा, या तो 60 वर्ष की आयु पूर्ण करने पर या 30 वर्षों की सेवा पूर्ण करने पर सेवा निवृत्ति का आदेश पारित करने से पहले - इस प्रयोजन हेतु प्रत्येक विभाग में जिला स्तर पर समिति गठित होगी।
2. समिति की रिपोर्ट पर आकस्मिकता कर्मचारी 62 वर्षों की आयु तक हकदार होगा, विष्णू मुटिया व अन्य वि. म.प्र. राज्य के निर्णय तथा वित्त विभाग के परिपत्र दि. 20.01.2000 के आलोक में।
3. समिति की रिपोर्ट पर, दैनिक वेतन कर्मचारी/दैनिक वेतन भोगी जो 31.12.88 के पहले से नियुक्त हैं, 62 वर्षों की आयु तक बने रहने के लिए हकदार नहीं - राज्य सरकार द्वारा अनुपालन हेतु सनियम विनिर्मित करने होंगे, 60 वर्ष पूर्ण करने पर सेवानिवृत्ति आदेश पारित करने के लिए।
4. दैनिक वेतन कर्मचारियों को 30 वर्ष पूर्ण करने पर सेवानिवृत्ति के मामलों में, समिति से कारण अभिलिखित करना अपेक्षित है - जो चिकित्सीय परीक्षण में अयोग्य हो गये हैं और कार्य करने में अक्षम हैं।
5. कर्मचारियों को सेवानिवृत्त करने के सभी आक्षेपित आदेश अभिखंडित - प्रत्येक प्रकरण का निर्धारण उपरोक्त निष्कर्षों के आलोक में होगा।

Cases referred :

2006(1) MPLJ 23, ILR 2010 MP 1950, (2010) 2 MPLJ 662, (2006) 4 SCC 1, 2011(3) MPLJ 210, 2011(4) MPLJ 86, 2004(3) MPHT 143, W.P. NO. 5725/2008, W.P.5152/2008(S).

Shailesh Tiwari, Ramesh Dahia, P.C. Chandak, Rajneesh Gupta, O.P. Tripathi, Suresh Raj, A.D. Mishra, Sunil Choubey, Anoop

NOTES OF CASES SECTION

Shrivastava, Malti Dadariya, B.R. Vijaywar, V.D.S. Chauhan, Rajesh Chand, J.S. Rajput, G.S. Rajput, Ashok Kumar Gupta, Manoj Chandurkar, for the petitioner.

Vivek Agrawal, G.A. for the respondents.

Short Note

*(86)

Before Mr. Justice A.K. Shrivastava

S.A. No. 863/2003 (Jabalpur) decided on 1 March, 2012

DAYAL DAS (DEAD) THROUGH LRS. ...Appellants
Vs.

RAJENDRA PRASAD GAUTAM ...Respondent

A. *Accommodation Control Act, M.P. (41 of 1961), Section 12 (1)(c) – Denial of Title* – Defendant never renounced his character as tenant and has nowhere setup title of the premises in him or in a third party and was bonafidely calling upon the plaintiff to prove his ownership without disowning his character as tenant – This act of tenant was not in any way injurious to landlord/plaintiff and he had not done any act which may likely to affect adversely and substantially to the interest of the plaintiff.

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(सी) – हक से इंकार – प्रतिवादी ने कभी भी अपनी हैसियत किरायेदार के रूप में नहीं त्यागी और कहीं भी अपने आप से तीसरे पक्षकार में स्थान का हक स्थापित नहीं किया और अपनी हैसियत किरायेदार के रूप में त्यागे बिना सद्भाविक रूप से वादी से उसका स्वामित्व साबित करने की अपेक्षा की – किरायेदार का यह कृत्य किसी भी तरह से भूमिस्वामी/वादी को आहत नहीं करता और उसने ऐसा कोई कार्य नहीं किया था जो वादी के हित को प्रतिकूल रूप से और सारतः प्रभावित कर सके।

B. *Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) – Bonafide Requirement* – In order to obtain decree under Section 12(1)(f), the plaintiff is not only required to prove that he is landlord but also required to prove that he is owner – Plaintiff admitted that his name was never recorded in the revenue records from 1978 to 1996 and was recorded in the names of other persons – Tenant was

NOTES OF CASES SECTION

also inducted by other persons in whose name the property was recorded – As the plaintiff is not found to be the owner of the suit property, therefore, it can not be said that suit accommodation is needed by him bonafide for his own requirement – Appeal allowed.

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – धारा 12(1)(एफ) के अंतर्गत डिक्री प्राप्त करने के लिए वादी को केवल यह साबित नहीं करना होता है कि वह भूमि स्वामी है बल्कि यह भी साबित करना होता है कि वह स्वामी है – वादी ने यह स्वीकार किया कि राजस्व अभिलेख 1978 से 1996 में उसका नाम कभी भी दर्ज नहीं हुआ और अन्य व्यक्तियों के नाम से दर्ज था – किरायेदार को भी अन्य व्यक्तियों द्वारा प्रतिष्ठापित किया गया जिनके नाम पर सम्पत्ति दर्ज है – चूंकि वादी को वाद सम्पत्ति का स्वामी नहीं पाया जाता है, इसलिए यह नहीं कहा जा सकता कि वाद स्थान की उसको उसके स्वयं के उपयोग के लिए सद्भाविक रूप से आवश्यकता है – अपील मंजूर।

Cases referred :

AIR 1992 MP 115, (2002) 3 SCC 375, (1999) 6 SCC 381, 1978 JIJ 416, 2008 (3) MPLJ 239, (1994) 4 SCC 250.

S.K. Dwivedi, for the appellants.

A.K. Jain, for the respondent .

Short Note (DB)

**(87)*

Before Mr. Justice Rakesh Saxena & Mr. Justice S.C. Sinho

Cr. A. No. 861/2006 (Jabalpur) decided on 26 April, 2012

MAHENDRA @ MEHANDRU

Vs.

STATE OF M.P.

...Appellants

...Respondent

Penal Code (45 of 1860), Section 302, 147, 148, 294 & 307/149 – Deceased was confronted by accused persons who were armed with knives and sword – Two accused caught hold the deceased and took him in front of house of accused No. 2 – Accused No. 1 shouted to kill him and all the accused persons assaulted him with knife and sword – Death was caused due to cumulative effect of all the injuries – Appellants guilty of committing murder – Appeal dismissed.

NOTES OF CASES SECTION

दण्ड संहिता (1860 का 45), धाराएँ 302, 147, 148, 294 एवं 307/149 — मृतक का सामना अभियुक्तगण से हुआ जो चाकू और तलवार से सुसज्जित थे — दो अभियुक्तों ने मृतक को पकड़ लिया और अभियुक्त क्रं. 2 के मकान के सामने ले गये — अभियुक्त क्रं. 1 ने उसे मार डालने के लिए चिल्लाया और सभी अभियुक्तगण ने उस पर चाकू और तलवार से हमला किया — मृत्यु का कारण सभी क्षतियों का संयुक्त प्रभाव था — अपीलार्थीगण हत्या कारित करने के दोषी — अपील खारिज।

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

S.C. Datt with Siddharth Datt, for the appellant.

Nirmala Nayak, G.A. for the respondent.

Short Note

*(88)

Before Mr. Justice K.K. Trivedi

W.P. No. 1133/2008 (Jabalpur) decided on 21 March, 2012

MANOHAR KUMARI DAGA (SMT.) & ors. ...Petitioners
Vs.

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

A. Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 10(5) – Notice of taking possession – Notice although issued in the name of holder of land was served on his minor grand-son – Service of notice on minor grand-son is no service in the eye of law – However, it is clear from the application filed by holder of land for grant of interim stay in revision, that he was aware of the proceedings initiated under Section 10(5) of Act, 1976 therefore, no prejudice is caused due to service of notice on minor grand son and only because of this lapse, the entire action was not to be vitiated at all.

क. नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, (1976 का 33), धारा 10(5). – कब्जा लेने का नोटिस – नोटिस यद्यपि भूमिधारी के नाम से जारी किया गया था किन्तु उसके अवयस्क पोते पर तामील किया गया – नोटिस की तामिली अवयस्क पोते पर विधि की दृष्टि में कोई तामिली नहीं – तथापि भूमिधारी द्वारा पुनरीक्षण में अंतरिम स्थगन प्रदान करने के लिए प्रस्तुत आवेदन से स्पष्ट है कि वह अधिनियम 1976 की धारा 10(5) के अंतर्गत आरम्भ की गई कार्यवाहियों से अवगत था, इसलिए उसके अवयस्क पोते पर नोटिस की तामिली से कोई

NOTES OF CASES SECTION

प्रतिकूल प्रभाव कारित नहीं होता और केवल इस मूल के कारण पूरी कार्यवाही को दूषित नहीं माना जा सकता।

B. Urban Land (Ceiling and Regulation) Act (33 of 1976), Section 10(5) – Information of stay order – No material on record to suggest that Tahsildar was ever authorized by State Govt. to take possession – However, Tahsildar was directed to take possession as per the endorsement made by the competent authority in the notice issued under Section 10(5) of the Act, 1976 – If competent authority had directed the Tahsildar to take possession, nothing wrong was done – Stay order was communicated to the competent authority who made endorsement in the original application, directing the Tahsildar not to take possession – However, the said order was never communicated to the Tahsildar – It can not be said that possession was taken while the Tahsildar was aware of the stay order.

ख. नगर मूमि (अधिकतम सीमा और विनियमन) अधिनियम, (1976 का 33), धारा 10(5) – स्थगन आदेश की सूचना – अभिलेख पर यह सुझाव देने के लिए कोई सामग्री नहीं कि तहसीलदार कब्जा लेने के लिए राज्य सरकार द्वारा कभी प्राधिकृत था – तथापि तहसीलदार को कब्जा लेने के लिए सक्षम प्राधिकारी द्वारा अधिनियम 1976 की धारा 10(5) के अंतर्गत जारी किये गये नोटिस में दिये गए पृष्ठांकन के अनुसार निदेशित किया गया था – यदि सक्षम प्राधिकारी द्वारा तहसीलदार को कब्जा लेने के लिए निदेशित किया गया था, कुछ गलत नहीं किया गया – स्थगन आदेश सक्षम प्राधिकारी को संसूचित किया गया था जिसने मूल आवेदन पर तहसीलदार को कब्जा नहीं लेने के निदेश का पृष्ठांकन किया – किन्तु उक्त आदेश तहसीलदार को कभी भी संसूचित नहीं किया गया – यह नहीं कहा जा सकता कि कब्जा लिया गया जबकि तहसीलदार स्थगन आदेश से अवगत था।

C. Urban Land (Ceiling and Regulation) Act, (33 of 1976), Section 10(5) – Information of stay order – Non-communication of interim order – Unless and until the prohibitory order is brought to the knowledge of the executing authority, it can not be said that act done by the said authority is a nullity.

ग. नगर मूमि (अधिकतम सीमा और विनियमन) अधिनियम, (1976 का 33), धारा 10(5) – स्थगन आदेश की सूचना – अंतरिम आदेश संसूचित नहीं किया जाना – जब तक प्रतिबंधात्मक आदेश निष्पादक प्राधिकारी की जानकारी में नहीं लाया जाता, यह नहीं कहा जा सकता कि उक्त प्राधिकारी द्वारा किया गया कार्य अकृत है।

NOTES OF CASES SECTION

D. Urban Land (Ceiling and Regulation) Repeal Act (15 of 1999), Section 3. – Proceedings for compensation – Repeal of 1976 Act by Repealing Act would not affect the proceedings for payment of compensation which had taken place before the coming into force of Repealing Act – Even if such proceedings were not initiated before coming into force of Repealing Act, it can not be said that such proceedings can not be initiated now.

घ. नगर भूमि (अधिकतम सीमा और विनियमन) निरसन अधिनियम (1999 का 15), धारा 3 – प्रतिकर के लिए कार्यवाहियां – निरसन अधिनियम द्वारा अधिनियम 1976 का निरसन प्रतिकर के भुगतान की कार्यवाहियों को प्रभावित नहीं करेगा जो कि निरसन अधिनियम के प्रवर्तित होने से पूर्व की गई थीं – यद्यपि उक्त कार्यवाहियां निरसन अधिनियम के प्रवर्तित होने से पूर्व आरंभ नहीं की गई, यह नहीं कहा जा सकता कि उक्त कार्यवाहियां अब प्रारंभ नहीं की जा सकती।

Cases referred :

AIR 1996 SC 2005, AIR 1967 SC 1386, AIR 2010 SC 2210, AIR 1987 SC 88, (2010) 8 SCC 467.

S.B. Upadhyay with Priyankush Jain & Anurag Shrivastava, for the petitioners.

R.D. Jain, A.G. with P.K. Kaurav, Dy. G.A. for the respondent/State.

Ajay Mishra with Pratyush Tripathi, for the respondent No.4.

Ravish Agrawal with A.P. Shrotri, for the respondent No.7.

Short Note

*(89)

Before Mr. Justice R.C. Mishra

Arb. A. No. 25/2010 (Jabalpur) decided on 7 May, 2012

MANOJ KUMAR AGRAWAL

Vs.

NEPAL LTD.

...Appellant

...Respondent

A. Arbitration and Conciliation Act (26 of 1996), Section 9 – Interim Measure – Court has power to grant interim measure even before actual commencement of arbitral proceedings.

NOTES OF CASES SECTION

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 9 – अंतरिम उपाय – न्यायालय को माध्यस्थम कार्यवाही वास्तविक रूप से आरंभ होने से पूर्व भी अंतरिम उपाय प्रदान करने की शक्ति है।

B. *Arbitration and Conciliation Act (26 of 1996), Section 9 – Interim Measurement – Limitation* – Power to grant interim measure is not totally independent of well known principles governing supplemental proceedings contemplated under Chapter VI of C.P.C.

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 9 – अंतरिम उपाय – परिसीमा – अंतरिम उपाय प्रदान करने की शक्ति सि.प्र.सं. के अध्याय VI के अंतर्गत अनुध्यात अनुपूरक कार्यवाहियों को शासित करने वाले भलिभांति ज्ञात सिद्धांतों से पूर्णतः स्वतंत्र नहीं।

C. *Arbitration and Conciliation Act (26 of 1996), Section 9 – Interim Measure* – Appellant himself had rescinded the contract without any lawful cause – He could recover the alleged excess amount of tax/duty from Govt. Department – Appellant failed to make out prima facie case – Discretion exercised by A.D.J. in refusing to grant interim measure does not call for any interference.

ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 9 – अंतरिम उपाय – अपीलार्थी ने स्वयं बिना किसी विधिपूर्ण कारण के संविदा विखंडित की – वह शासकीय विभाग से कथित कर/ शुल्क की अतिरिक्त रकम वसूल सकता है – अपीलार्थी प्रथम दृष्टया प्रकरण सिद्ध करने में असफल – ए.डी.जे. द्वारा अंतरिम उपाय प्रदान करने से इंकार में प्रयुक्त स्वविवेकाधिकार में हस्तक्षेप की आवश्यकता नहीं।

Cases referred :

AIR 1999 SC 565, AIR 2004 Bom.136, AIR 1999 MP 57, AIR 2007 SC 2563, (2006) 9 STJ 39 (MP), AIR 1977 Madras 109, AIR 2010 SC 488, (2011) 5 SCC 758, (1997) 1 SCC 568, (2009) 6 SCC 609.

Appellant in person.

Brian Da'Silva with Anand Singh, for the respondent.

NOTES OF CASES SECTION

Short Note (DB)

*(90)

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

Cr.A. No. 54/2000 (Indore) decided on 31 January, 2012

O.P. DIXIT & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Sections 467, 409, 120B & 409 – Ingredients stated (i) accused must be public servant, (ii) must have been entrusted, in such capacity with property (iii) must have committed breach of trust in respect of such property.

क. दण्ड संहिता (1860 का 45), धाराएँ 467, 409, 120बी व 409 – बताये गये घटक (i) अभियुक्त लोक सेवक होना चाहिए (ii) इस नाते सम्पत्ति पर अख्तियार उसमें न्यस्त होना चाहिए (iii) उक्त सम्पत्ति के संबंध में उसने न्यास मंग किया हो।

B. Penal Code (45 of 1860), Section 467 & Prevention of Corruption Act (49 of 1988), Section 13(2) – To constitute offence under Section 467, two things are required firstly accused must have forged a document and secondly document must be one of class specified in this section – First appellant can not be convicted in absence of any evidence under Section 409 & 467 – When certainly two other appellants can not be convicted under section 409/120B as story based on first appellant – Therefore, all the three appellants can not be convicted under Section 13(2) also – Prosecution not proved criminal misconduct against any of the appellants – Order set-aside – Appellants are acquitted from all charges.

ख. दण्ड संहिता (1860 का 45), धारा 467 व घृष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(2) – धारा 467 के अंतर्गत अपराध के लिए दो बातें आवश्यक – प्रथमतः अभियुक्त द्वारा दस्तावेज में जालसाजी की गई हो व द्वितीयतः दस्तावेज इस धारा में वर्गीकृत किसी वर्ग के अंतर्गत आना चाहिए – प्रथम अपीलार्थी को किसी साक्ष्य की अनुपस्थिति में भा. दं. सं. की धारा 409 व 467 के अंतर्गत दोषसिद्ध नहीं किया जा सकता – जब निश्चित तौर पर दो अन्य अपीलार्थीगण को इस धारा 409/120बी के अंतर्गत दोषसिद्ध नहीं किया जा सकता

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जबकि कहानी प्रथम अपीलार्थी पर आधारित है – इसलिए सभी तीनों अपीलार्थीगण को धारा 13(2) के अंतर्गत भी दोषसिद्ध नहीं किया जा सकता – अभियोजन ने किसी भी अपीलार्थी के विरुद्ध अपराधिक अवचार साबित नहीं किया – आदेश अपास्त – अपीलार्थीगण को सभी आरोपों से दोषमुक्त किया गया।

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

Cases referred :

AIR 1980 SC 499, Cr.A. 928/2000.

Jai Singh with Vivek Singh, for the appellants No. 1 & 3.

Ashish Vyas, for the appellant No.2.

S.D. Bohra, P.P. for the respondent/State.

Short Note (DB)

*(91)

Before Mr. Justice Rakesh Saxena & Mr. Justice S.C. Sinho

Cr.A. No. 1025/2012 (Jabalpur) decided on 17 May, 2012

PRAGYA SINGH KUSHWAHA@PRAGYABHARTI

@PAPPI DIDI@SWAMI PURNA CHETNANAND GIRI ...Appellant

Vs.

UNION OF INDIA

...Respondent

Penal Code (45 of 1860), Sections 302, 201 & 120-B, Arms Act (54 of 1959), Sections 25 & 27, National Investigation Agency Act (34 of 2008), Section 21, Unlawful Activities (Prevention) Act (37 of 1967), Sections 16 & 18 – Application filed by Inspector of Police (N.I.A.) seeking permission to interrogate the appellant in jail premises was allowed and the request made by the appellant to grant permission to be assisted by an advocate during interrogation was rejected – Held – Orders affecting or adjudicating rights of accused are not interlocutory orders therefore appeal lies – Police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime – Interrogation of the accused shall be held within the sight of her advocate or any other person duly authorized by her – Advocate or

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the person authorized by her may watch the proceedings from a distance or from beyond a glass partition, but he or she shall not be within the hearing distance and it will not be open to the appellant to have consultation with him/her in the course of interrogation – Order passed by special Court is modified – Appeal allowed.

दण्ड संहिता (1860 का 45), धाराएँ 302, 201 व 120बी, आयुध अधिनियम, (1959 का 54), धाराएँ 25 व 27, राष्ट्रीय अन्वेषण अभिकरण अधिनियम (2008 का 34), धारा 21, विधिविरुद्ध क्रियाकलाप (निवारण) अधिनियम (1967 का 37), धाराएँ 16 व 18 – जेल परिसर में अपीलार्थी से पूछताछ के लिए (एन. आई.ए.) के पुलिस निरीक्षक द्वारा प्रस्तुत आवेदन मंजूर तथा पूछताछ के दौरान अधिवक्ता की सहायता लेने की अनुमति दिये जाने संबंधी आवेदिका की प्रार्थना नामंजूर – अभिनिर्धारित – अभियुक्त के अधिकारों को प्रभावित करने वाले या न्याय निर्णित करने वाले आदेश अंतर्वर्ती आदेश नहीं है, इसलिए अपील पोषणीय होगी – अपराधियों के साथ पुलिस को दक्षता से एवं प्रभावी रूप से निपटना चाहिये तथा जो भी अपराध में संलग्न हो, उन्हें दण्डित करने की कार्यवाही करनी चाहिये – अभियुक्त से पूछताछ उसके अधिवक्ता के अथवा उसके द्वारा प्राधिकृत किसी अन्य व्यक्ति के सामने की जाये – अधिवक्ता या उसके द्वारा प्राधिकृत व्यक्ति कुछ दूरी से या कांच की दीवार के परे से कार्यवाही देख सकता है किन्तु वह सुने जा सकने की दूरी पर नहीं होगा और पूछताछ के दौरान अपीलार्थी को उससे परामर्श करने की स्वतंत्रता नहीं होगी – विशेष न्यायालय द्वारा पारित आदेश आशोधित किया गया – अपील मंजूर।

The Judgment of the Court was delivered by : RAKESH SAKSENA, J

Cases referred :

AIR 1977 SC 2185, AIR 1978 SC 47, AIR 1980 SC 962, (2001) 6 SCC 181 = AIR 2001 SC 2637, (2004) 13 SCC 292, AIR 2009 SC 984, AIR 2008 SC 3102, AIR 2009 SC 2932, AIR 1978 SC 1025, AIR 1992 SC 1795, AIR 1997 SC 610, (2011) 12 SCC 362.

R.N. Singh with Avinash Patel, for the appellant.

R.L. Gupta, Asst. Solicitor General of India, for the respondent/ State.

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Short Note

*(92)

Before Mr. Justice Sujoy Paul

Arb. C. No. 14/2011 (Gwalior) decided on 31 July, 2012

SHIVHARE ROAD LINES (M/S)

...Appellant

Vs.

M/S HPCL AND MITTAL ENERGY LTD. & anr.

....Respondents

A. Arbitration and Conciliation Act (26 of 1996), Section 11 – Cause of Action – Jurisdiction – Cause of action is a bundle of facts which has relevance and nexus with the lis forming part of cause of action – Contract was accepted by way of correspondence by the applicant at Gwalior giving rise to a part of cause of action.

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 – वाद हेतुक – अधिकारिता – वाद हेतुक तथ्यों की गठरी है जिसकी वाद के साथ सुसंगतता और संबंध है जो वाद कारण का भाग बनाते हैं – संविदा को आवेदक द्वारा ग्वालियर में पत्र व्यवहार के जरिए स्वीकार किया गया था जिससे वाद हेतुक का भाग उत्पन्न हुआ।

B. Arbitration and Conciliation Act (26 of 1996), Section 2(1)(e), 11(12)(b) – Court – If the subject matter of the arbitration would have been within the jurisdiction of the Principal Civil Court at Gwalior, the Chief Justice or his designate under whose local jurisdiction the Principal Civil Court is situated will have jurisdiction.

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 2(1)(ई), 11(12)(बी) – न्यायालय – यदि माध्यस्थम् की विषय वस्तु प्रिंसीपल सिविल न्यायालय ग्वालियर की अधिकारिता के भीतर होती, मुख्य न्यायाधिपति या उनके नामनिर्दिष्ट जिनकी क्षेत्रीय अधिकारिता के अंतर्गत प्रिंसीपल सिविल न्यायालय स्थित है, की अधिकारिता होगी।

C. Arbitration and Conciliation Act (26 of 1996), Section 11 – Jurisdiction – Agreement provides that the jurisdiction will be to the Court of a State where the project is situated – No exclusion clause/ words like *Only*, *Alone* and *Exclusion* – Part of cause of action has arisen at Gwalior – Gwalior Bench has jurisdiction to entertain application for appointment of arbitrator.

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ग. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 – अधिकारिता – अनुबंध उपबंध करता है कि अधिकारिता राज्य के उस न्यायालय को होगी जहां योजना स्थित है – कोई अपवर्जन खंड/शब्द नहीं जैसे केवल, मात्र और अपवर्जन – वाद हेतुक का भाग ग्वालियर में उत्पन्न हुआ – ग्वालियर खंड न्यायपीठ को मध्यस्थ की नियुक्ति हेतु आवेदन ग्रहण करने की अधिकारिता है।

D. Arbitration and Conciliation Act (26 of 1996), Section 11 – Two applications before different Courts – If two applications/requests are made for appointment of arbitrator before two Benches, one which is filed at an earlier point of time before a Bench which has jurisdiction alone would be maintainable.

घ. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 – भिन्न न्यायालयों के समक्ष दो आवेदन – यदि दो खंड न्यायपीठों के समक्ष, मध्यस्थ की नियुक्ति हेतु दो आवेदन/निवेदन किए गए, एक वह जिसे पूर्व समय पर उस खंड न्यायपीठ के समक्ष प्रस्तुत किया जाता है जिसे अधिकारिता प्राप्त है, वही पोषणीय होगा।

Cases referred :

AIR 1989 SC 1239, AIR 1996 Delhi 92, AIR 1983 Calcutta 186, (2010) 5 SCC 306, (1993) 2 SCC 130, AIR 1966 SC 543, AIR 2002 SC 126, (1994) 4 SCC 710, AIR 2004 SC 2432, (2009) 9 SCC 403, 1999(2) JLJ 57, (1989) 2 SCC 163, (2009) 3 SCC 107, (2012) 2 SCC 315,

Arvind Dudawat, for the appellant.

Harish Dixit, for the respondents.

Short Note (SC)

***(93)**

Before Mr. Justice Swatanter Kumar & Mr. Justice Fakkir Mohamed Ibrahim Kalifulla

Criminal Appeal No. 2472/2009 decided on 24 July, 2012

SHUDHAKAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 32 – Multiple Dying Declarations – Multiple Contradictory dying declarations – Test of common prudence would be to first examine which of the dying

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declaration is corroborated by other prosecution evidence – Condition of deceased, medical evidence and voluntariness and genuineness of statement, physical and mental fitness of deceased and possibility of deceased being tutored are some factors which would guide the exercise of judicial discretion by Court.

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – अनेक मृत्युकालिक कथन – अनेक विरोधाभासी मृत्युकालिक कथन – सामान्य प्रज्ञा की कंसोटी यह होगी कि सर्वप्रथम यह जांच की जाए कि कौन से मृत्युकालिक कथन की पुष्टि अन्य अभियोजन साक्ष्य द्वारा होती है – मृतक की स्थिति, चिकित्सीय साक्ष्य एवं स्वेच्छापूर्ण कथन एवं उसकी प्रमाणिकता, मृतक की शारीरिक एवं मानसिक सक्षमता और मृतक को सिखाए-पढ़ाए जाने की संभावना ऐसे कुछ तथ्य हैं जो न्यायालय द्वारा न्यायिक स्वविवेक का प्रयोग करने में मार्गदर्शक होंगे।

B. Penal Code (45 of 1860), Section 302 – Murder - Wife suffered burnt injuries – She immediately informed the people gathered at the place of incident that appellant has burnt her – In her 1st written dying declaration recorded in hospital in the presence of her husband, deceased stated that she caught fire while cooking food – In 2nd and 3rd written dying declarations which were certified by the Doctors, she specifically impleaded her husband – 2nd and 3rd dying declarations are supported by first oral dying declaration made to general public – Appellant also not explained in his statement under Section 313 of Cr.P.C. that how his wife caught fire – Mattress and other items were also burnt belying the story of catching fire by stove – 2nd and 3rd written dying declarations are authentic, voluntary and duly corroborated by other prosecution evidence including medical evidence – Appeal dismissed.

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – पत्नी ने जलने की क्षतियां सहन की – उसने तुरंत घटना स्थल पर एकत्रित हुए लोगों को जानकारी दी कि अपीलार्थी ने उसे जलाया – चिकित्सालय में अपने पति की उपस्थिति में अभिलिखित कराये गये अपने प्रथम लिखित मृत्युकालिक कथन में मृतिका ने कहा कि उसे खाना बनाते समय आग लगी – द्वितीय तथा तृतीय मृत्युकालिक कथनों में, जिन्हें चिकित्सकों द्वारा प्रमाणित किया गया था, उसने विनिर्दिष्ट रूप से अपने पति को आलिप्त किया – द्वितीय तथा तृतीय मृत्युकालिक कथनों को, सामान्य जन के समक्ष दिये गये प्रथम मौखिक मृत्युकालिक कथन से सहायता प्राप्त होती है – अपीलार्थी ने भी द.प्र.सं. की धारा 313 के अन्तर्गत अपने कथन में यह स्पष्ट नहीं किया है कि उसकी पत्नी को आग

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कैसे लगी – गद्दा तथा अन्य वस्तुएँ भी जलीं थी जिससे स्टोव द्वारा आग पकड़ने की कहानी झूठ साबित होती है – द्वितीय तथा तृतीय मृत्युकालिक कथन विश्वसनीय, स्वेच्छापूर्ण तथा अन्य अभियोजन साक्ष्य, जिसमें चिकित्सीय साक्ष्य समाविष्ट है के द्वारा अभिपुष्ट है – अपील खारिज।

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

Cases referred :

(2002) 6 SCC 710, (2005) 9 SCC 113, (2010) 8 SCC 514, (2012) 4 SCC 327, (2011) 10 SCC 173, (2010) 14 SCC 444, (2012) 4 SCC 722, (2004) 10 SCC 769, (2008) 4 SCC 265.

Short Note (DB)

*(94)

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

Cr. A. No. 1037/1999 (Indore) decided on 3 January, 2012

STATE OF M.P.

...Appellant

Vs.

JAGDISH CHANDRA

...Respondent

Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Illegal Gratification – Respondent demanded illegal gratification for giving favorable report – Report was not submitted till the bribe was accepted – Respondent accepted the bribe in a hotel – Tainted money also recovered from the pocket of the respondent – Independent witnesses also supported the prosecution – Judgment of acquittal reversed – Respondent convicted – Sentenced to undergo imprisonment of 6 months SI and fine of Rs. 1000 under Section 7 and imprisonment of 1 year S.I. and fine of Rs. 1000 under Section 13(1)(d) of Act, 1988.

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – अवैध परितोषण – प्रतिवादी ने अनुकूल रिपोर्ट देने के लिए अवैध परितोषण की मांग की – रिश्वत स्वीकार करने तक रिपोर्ट प्रस्तुत नहीं की गई – प्रतिवादी ने रिश्वत होटल में स्वीकार की – दूषित रकम भी प्रतिवादी की जेब से बरामद की गई – स्वतंत्र साक्षियों ने भी अभियोजन का समर्थन किया – दोषमुक्ति का निर्णय पलट दिया गया – प्रतिवादी दोषसिद्ध – धारा 7 के अंतर्गत छः माह का साधारण कारावास एवं 1000/- रुपये का अर्थदण्ड तथा अधिनियम 1988 की धारा 13(1)(डी) के अंतर्गत एक वर्ष के साधारण कारावास व 1000/- रुपये के अर्थदण्ड से दण्डित किया गया।

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

Cases referred :

AIR 2006 SC 628, (2006) 1 SCC 401, AIR 1986 SC 2045, (2010) 1 SCC 398.

L.N. Soni, P.P. with *Anand Soni*, for the appellant/State.
S.V. Abhyankar, for the respondent.

Short Note

*(95)

Before Mr. Justice G.D. Saxena

M.Cr.C. No. 3919/2012 (Gwalior) decided on 26 July, 2012

SURENDRA SANGHVI

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 313(1)(b) – Examination of Accused – Exemption of accused from his examination in a summons case – Trial Court decided the question of exemption from personal appearance at the stage of statement u/s 313, Cr.P.C. without particularly referring to proviso to Section 313(1)(b) – Held – Since there is no discussion at all in the impugned order in terms of the proviso, the impugned order is liable to set-aside – Matter remitted back.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313(1)(बी) – अभियुक्त का परीक्षण – समन्स प्रकरण में अभियुक्त को अपने परीक्षण से छूट – विचारण न्यायालय ने द.प्र.सं. की धारा 313 के अंतर्गत कथन के प्रक्रम पर व्यक्तिगत उपस्थिति से छूट के प्रश्न का विनिश्चय किया, धारा 313 (1)(बी) के परंतुक को विशिष्ट रूप से निर्दिष्ट किए बिना – अभिनिर्धारित – चूंकि आक्षेपित आदेश में परंतुक के संबंध में कोई विवेचन नहीं, आक्षेपित आदेश अपास्त किये जाने योग्य – प्रकरण प्रतिप्रेषित।

Cases referred :

AIR 2000 SC 3214, (2008) 8 SCC 447, AIR 1969 SC 381, 1988 Supp. 570.

Rajmani Bansal, for the applicant.

Nutan Saxena, P.P. for the non-applicant/State.

I.L.R.[2012]M.P. Yograj Infrass Ltd. Vs. S.Y.Eng. & Con. Co. Ltd. (SC) 1797

I.L.R. [2012] M.P., 1797

SUPREME COURT OF INDIA

Before Mr. Justice Altamas Kabir & Mr. Justice Jasti Chelameswar
Special Leave Petition (C) No. 24746/2010 decided on 31 January, 2012

YOGRAJ INFRAS. LTD.

...Petitioner

Vs.

SSANG YONG ENG. & CONSTRN. CO. LTD. & anr. ...Respondents

Arbitration and Conciliation Act (26 of 1996), Section 9 - Interim Measure - Petitioner filed criminal complaint alleging fraud on certain grounds - Order of Magistrate taking cognizance was set aside by High Court and criminal complaint was dismissed - Special Leave Petition was also dismissed - Application u/s 9 of Act, 1996 for restraining respondent from encashing Bank Guarantee - As the allegations of fraud have already been rejected while granting criminal complaint, the respondent can not be restrained from encashing Bank Guarantee as there is no fraud or special equities - Appeal dismissed.
(Paras 10 & 11)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 9 - अंतरिम उपाय - याची ने कतिपय आधारों पर कपट का आरोप लगाते हुए दाण्डिक शिकायत प्रस्तुत की - संज्ञान लेने का मजिस्ट्रेट का आदेश, उच्च न्यायालय द्वारा अपास्त किया गया और दाण्डिक शिकायत खारिज की गई - विशेष अनुमति याचिका भी खारिज - बैंक गारंटी भुनाने से प्रत्यर्थी को रोकने हेतु अधिनियम 1996 की धारा 9 के अंतर्गत आवेदन - चूंकि दाण्डिक शिकायत मंजूर करते समय कपट के अभिकथनों को पहले ही अस्वीकार किया गया है, प्रत्यर्थी को बैंक गारंटी भुनाने से रोका नहीं जा सकता क्योंकि यहां कोई कपट या विशेष पूंजी नहीं - अपील खारिज।

J U D G M E N T

The Judgment of the Court was delivered by: **ALTAMAS KABIR, J.** - The Special Leave Petition and the application filed on behalf of the Respondents for early hearing and disposal of the Special Leave Petition were taken up together for consideration. The facts on which the Special Leave Petition is based, are set out hereinbelow.

2. By its letter of acceptance No.NHAI/PH 11/NHDP/ADB/GM-11/NS1/746 dated 30th December, 2005, the National Highways Authority of India, hereinafter referred to as 'NHAI', awarded a contract to the

Respondent, SSANG YONG Engineering & Construction Co. Ltd., for the National Highways Sector II Project, Package-ADB-II/C-8, which involved the four laning of Jhansi-Lakhadon sector KM 297 to KM 351 of National Highway 26 in the State of Madhya Pradesh. The total contract amount for the aforesaid project was more than ₹750 crores. An agreement was entered into by the NHAI with the Petitioner on 13th August, 2006. Clause 27 of the Agreement incorporated an arbitration clause stipulating that all disputes and differences arising out of or in connection with the Agreement dated 13th August, 2006, would be referred to arbitration to be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules. For the purpose of reference, Clause 27 of the Agreement relating to arbitration is extracted hereinbelow :

“27. Arbitration

27.1 All disputes, differences arising out of or in connection with the Agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Ssangyong International Arbitration Centre (SIAC) Rules as in force at the time of signing of this Agreement. The arbitration shall be final and binding.

27.2 The arbitration shall take place in Singapore and be conducted in English language.

27.3 None of the Party shall be entitled to suspend the performance of the Agreement merely by reason of a dispute and/or a dispute referred to arbitration.”

3. According to Clause 1 of the Agreement read with the Appendix thereof, the Petitioner was to provide all adequate manpower, material, plant, machinery, construction equipment and all other resources, including finance, which would be required to perform the work Bank Guarantee was furnished by the Petitioner on 31st October, 2006, whereby the Bank undertook to pay to the Respondent on its first written demand and without cavil or argument any sum or sums within the limits of ₹6,05,00,000/-, without there being need to prove or give any reasons for the demand for the said sum. The guarantor also waived the necessity of the Respondent Company making a demand for the debt to the contractor/petitioner before presenting the demand. The guarantor also agreed that no change or addition or other modification of the terms of the contract or of the work to be performed thereunder or any of

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the contract documents, which may be made between the Respondent and the Petitioner, would release the Bank from its liability under the Agreement. Similarly, three Bank Guarantees of ₹ 1 crore each and one Bank Guarantee for ₹ 3 crores were also furnished to secure mobilization advance.

4. Disputes and differences arose between the parties relating to the performance of the Petitioner in completing the work contracted as per the Agreement dated 13th August, 2006. Consequently, since the Petitioner failed to carry out the works entrusted and had allegedly been over-paid to the tune of ₹ 78 crores, the Respondent Company on 22nd September, 2009, terminated the contract under Clause 23.2 of the Agreement dated 13th August, 2006 and invoked the Bank Guarantees referred to hereinbefore vide its letters dated 25th January, 2010, 27th January, 2010 and 5th March, 2010. The Respondent No.1 also made a subsequent demand for encashment of the Bank Guarantees by its letter dated 6th May, 2010.

5. In the Special Leave Petition, the Petitioner has sought for an order of injunction against the Respondent No.1 on the basis of alleged fraud on the part of the said Respondent. The Petitioner also filed a criminal complaint against the Respondent No.1 alleging fraud and making the same allegations which have been made by it in the present Special Leave Petition. The learned Magistrate took cognizance on the said complaint and issued process on 5th February, 2010.

6. Aggrieved thereby, the Respondent No.1 challenged the said order of the Magistrate dated 5th February, 2010, taking cognizance of the criminal complaint alleging fraud, by filing a petition under Section 482 of the Code of Criminal Procedure in the Jabalpur Bench of the Madhya Pradesh High Court, for quashing of the cognizance taken by the learned Magistrate. The High Court by its order dated 13th October, 2010, quashed the criminal proceedings commenced against the Respondent No.1. Challenging the said order of the High Court, the Petitioner filed Special Leave Petition (Crl) No. Crl. M.P. 2872 of 2011, which was dismissed by this Court on 18th February, 2011. On account of the above, an application for early hearing and disposal of the Special Leave Petition was filed on behalf of the Respondent No.1 urging that since the allegation of fraud had already been decided by this Court, the present Special Leave Petition could be finally disposed of in view of order passed by this Court in Special Leave Petition (Crl) No. Crl. M.P. 2872 of 2011. It is in this background that the present I.A. has been filed for early hearing and disposal of the Special Leave Petition.

7. Appearing for the Special Leave Petitioner, who is the opposite party in the Interlocutory Application filed on behalf of the Respondent No.1, Mr. Jaideep Gupta, learned Senior Advocate, contended that the stay order passed in these proceedings was liable to be continued in view of the special equities in this case. He submitted that the Petitioner Company had invested large sums of money in the project and upon termination of the contract, the dues of either party were yet to be decided and the same could only be done at the time of the final Award. Mr. Gupta submitted that his main emphasis in the Special Leave Petition was with regard to the special equities which existed and the order of stay granted by this Court restraining the Respondent No.1 Company from invoking the Bank Guarantees was liable to be continued till the passing of the final Award by the learned Arbitrator.

8. Ms. Meenakshi Arora, learned Advocate, who appeared for the Respondent Company, submitted that the prayer made on behalf of the Petitioner in the Section 9 application before the District Court, Narsinghpur, seeking injunction against the Respondent No.1 from invoking the Bank Guarantees, was dismissed by the District Judge on 4th March, 2010, and the Appeal therefrom was dismissed by the Jabalpur Bench of the Madhya Pradesh High Court on 20th August, 2010. However, this Court had stayed the invocation of the Bank Guarantees by the Respondent No.1 Company by an interim order dated 31st August, 2010. Ms. Arora submitted that once the cognizance taken by the magistrate on the petitioner's criminal complaint alleging fraud on the part of the Respondent No.1 was quashed by the Jabalpur Bench of the Madhya Pradesh High Court by its order dated 13th October, 2010, and even the Special Leave Petition preferred therefrom was dismissed by this Court on 18th February, 2011, the very basis for seeking injunction in the proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, stood removed. Ms. Arora submitted that in addition to the above, a partial Award had been made by the Arbitral Tribunal in Singapore on 30th June, 2011, in favour of the Respondent No.1. Ms. Arora submitted that in terms of the agreement between the parties, the Respondent No.1 Company had made huge cash advances to the Petitioner for completion of the project, but the same had not been fully repaid by the Petitioner and that as a result, the Respondent No.1 should be permitted to invoke the Bank Guarantees to realize the outstanding amounts. According to Ms. Arora, the dues of the Respondent No.1 Company were far beyond those claimed by the Petitioner. Ms. Arora submitted that since the partial Award had not been challenged by the Petitioner,

the execution thereof could not be stayed, and the Respondent No.1 was, therefore, entitled to recover the amount under the partial Award. According to Ms. Arora, the plea taken by the Petitioner in the criminal complaint and the present Special Leave Petition was the same and since the allegation of fraud against the Respondent No.1 by the Petitioner has been negated, the interim order restraining the Respondent No.1 from invoking the Bank Guarantees was liable to be vacated.

9. Ms. Arora submitted that since payment under a Bank Guarantee can normally be stopped only on two grounds and on no other, viz., on grounds of fraud and special equity, and the ground of fraud having been rejected upto this Court, the only other ground available to the Petitioner to stop the invocation of the Bank Guarantees was on account of special equities and in the instant case the Petitioner had failed to indicate any such special equity which entitled the Petitioner to an order of restraint against the Respondent No.1 from invoking the Bank Guarantees in question.

10. Having heard learned counsel for the parties, we are inclined to accept Ms. Meenakshi Arora's submissions that since the Petitioner's application under Section 9 of the Arbitration and Conciliation Act, 1996, was based mainly on allegations of fraud, which have been rejected, there was no foundation for the stay order passed in these proceedings to continue. We cannot lose sight of the fact that both in the criminal proceedings as also in the proceedings under Section 9 of the aforesaid Act, the Petitioner proved to be unsuccessful, at least upto the High Court stage. In the criminal proceedings, the Petitioner was unsuccessful right upto this Court. In the aforesaid circumstances, we are unable to accept the submissions relating to special equities urged by Mr. Jaideep Gupta, particularly in view of the fact that such a point had not been raised earlier.

11. In addition to the above, we also have to keep in mind the fact that a partial Award has been made by the Arbitral Tribunal which has not been questioned or challenged by the Petitioner and the Respondent No.1 is entitled to the amount awarded in the partial Award.

12. Accordingly, we are not inclined to disturb the order of the High Court and the Special Leave Petition is, therefore, dismissed with cost of ₹ 1 lakh to be paid by the Petitioner Company to the Supreme Court Legal Services Committee. The Interlocutory Application is also disposed of by this order.

Petition dismissed.

I.L.R. [2012] M.P., 1802

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 3047/2004 (Jabalpur) decided on 20 December, 2011

ARUN MOHAN

...Petitioner

Vs.

SMT. GEETA PATEL

...Respondent

A. Land Revenue Code, M.P. (20 of 1959), Sections 44 & 50 - Revision - Aggrieved person - Person aggrieved to invoke revisional power under Section 50 of Code would be a person who was party to proceeding. (Para 14)

क. मू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 44 व 50 - पुनरीक्षण - व्यथित व्यक्ति - संहिता की धारा 50 के अंतर्गत पुनरीक्षण की शक्ति का अवलंब लेने के लिए व्यथित व्यक्ति वह व्यक्ति होगा जो कार्यवाही का पक्षकार था।

B. Land Revenue Code, M.P. (20 of 1959), Sections 44 & 50 - Revision - Maintainability - No revision lies against an appellate order - It was beyond the jurisdiction of Board of Revenue to entertain revision against an order when appeal lies. (Para 18)

ख. मू राजस्व संहिता, म.प्र. (1959 का 20), धाराएँ 44 व 50 - पुनरीक्षण - पोषणीयता - अपीली आदेश के विरुद्ध कोई पुनरीक्षण पोषणीय नहीं - आदेश के विरुद्ध पुनरीक्षण ग्रहण करना राजस्व बोर्ड की अधिकारिता से परे था जब अपील पोषणीय है।

Cases referred :

1966 JLJ 547, AIR 1965 SC 1744, 1975 MPLJ 689, 1984 MPLJ 32, 1961 MPLJ 587,

A.K. Mishra with Gaurav Tiwari, for the petitioner.

G.R. Saket, for the respondent No.1.

Piyush Dharmadhikari, G.A. for the respondent No.2.

None for the intervener.

ORDER

SANJAY YADAV, J. - Heard.

1. This petition under Article 226/227 of the Constitution of India is directed against order dated 6.7.2004 passed by Administrative member,

Board of Revenue, Gwalior in Revenue Case No. 832-1/2004; whereby, while allowing the revision filed by respondent No. 1, Board of Revenue, set aside the order dated 26.9.2001 passed by Tahsildar, Bhopal in Case No. 37/31-3/91-92, which was a proceeding for mutation.

2. The crucial question, which crops up for consideration is as to whether a person who was not a party in a mutation proceeding could invoke revisional power of Board of Revenue under Section 50 of Madhya Pradesh Land Revenue Code, 1959 (hereafter shall be referred to as Code 1959), more particularly, when the order is appealable under Section 44 of Code 1959. Sub-section (1) of Section 50 stipulates:

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

Provided that-

- (i) no application for revision shall be entertained-
 - (a) against an order appealable under this Code;
 - (b) against an order of the Settlement Commissioner under Section 210;
 - (c) against an order passed in revision by the Commissioner or the Settlement Commissioner in respect of cases under Section 170-B, nor shall any such order be revised by the Board on its own motion;
- (ii) no such application shall be entertained unless presented within sixty days to the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer, as the case may be, or within ninety days to the Board of Revenue from the date of the order and in computing the

period aforesaid, time requisite for obtaining a copy of the said order shall be excluded;

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

3. In the case at hand proceedings were brought by Bhagwati Bai, Savitri Bai, Jairam Yadav, Hari Kishore Sharma and Sushila Sharma against Gitarani Ghosh and 14 others in respect of mutation of name in record of rights in respect of Khasra No. 2, village Choona Bhatti, Tahsil Huzur, district Bhopal. The application was allowed by order dated 26.9.2001. Petitioners herein were non-applicants No. 10 and 1 respectively in the said proceedings which formed subject matter of Case No. 37/अ-3/91-92.

4. Against said order Dr. Kaushal Mishra, who was non-applicant No. 8, preferred appeal before the Sub Divisional Officer under Section 44 of Code, 1959.

5. Approximately after 3 years of the passing of the order dated 26.9.2001, the petitioners on 5.7.2004 filed a Revision Petition under Section 50 of Code, 1959 before Board of Revenue; wherein except State of Madhya Pradesh through Tahsildar, Rajdhani Pariyojna, Bhopal no other persons who were parties in the Case No. 37/अ-3/91-92 were impleaded as party. The Board of Revenue vide impugned order dated 6.7.2004, set aside the order dated 26.9.2001 and remitted the matter with a direction to Tahsildar, Huzur to decide the matter afresh after affording an opportunity of hearing to all the parties concerned.

6. Petitioners challenge the order on the ground that respondent No. 1 at whose instance the impugned order was passed not a party to the proceeding in case No. 37/अ-3/91-92, as such being not a 'person aggrieved' a revision petition was not tenable at her instance. It is further contended that since against the order passed by Tahsildar, an appeal lies under Section 44 there was specific bar as per proviso (i) (a) of sub-section (1) of Section 50 of Code 1959 as to maintainability of a revision. It is further contended that the application seeking revision was filed after 3 years, i.e., much beyond the prescribed period which is 60 days without an application for condonation of delay. On these three counts the petitioners seek quashment of impugned order dated 6.7.2004.

7. Respondent No. 1, on its turn supports the order passed by Board of Revenue and submits that being a bona fide purchaser of property she was a necessary party before Tahsildar before whom the mutation proceedings were pending culminating into an order dated 26.9.2001. It is urged that it was within her right to question the order passed by Tahsildar under Section 50 of Code, 1959.

8. Persons at whose instance the mutation proceedings were initiated by Tahsildar have also joined the respondent No. 1 by intervening in the matter. It is urged that in respect of the property in question the matter is pending adjudication in the competent court of jurisdiction of title of the suit land as well as the lands purchased by purchasers from the power of attorney holder who was not authorized to sell any land in Khasra No. 2 of village Choonabhatti. It is contended that the petitioners had purchased property from one Rajendra Kumar Shrivastava, power of attorney holder, who though was not holding the power of attorney in respect of land bearing Khasra No. 2, had sold the property situated over Khasra No. 2, which was without any lawful authority.

9. It is urged that since no right, title or interest confers on the petitioners on the basis of the sale-deed executed by power of attorney holder without there being any specific authority in respect of the land in question, the petitioners have no say in the matter.

10. Be that as it may. It is not the issue in the present case as to whether the transfer in favour of the petitioner herein by Rajendra Kumar Shrivastava was valid. The question which crops up for consideration is as to whether a revision petition before the Board of Revenue would lie at the instance of a person who is not a party, against an order, whereagainst an appeal lies and whether revision could have been entertained after the expiry of the limitation as prescribed under sub-section (1) of Section 50 of Code 1959 without an application for condonation of delay.

11. In respect of first issue as to whether a person who is not a party in a proceeding could be said to be a person aggrieved under Section 50 of Code, 1959 is no more res integra and has been settled at rest by Division Bench of this Court in *Phool Singh v. Collector, Vidisha and others* [1966 J.L.J. 547]; wherein while dwelling upon the provision of Section 51 of the M.B. Land Revenue and Tenancy Act, 1950 it was said "4.... That being so, we must go by the normal judicial concept of a person aggrieved by an order as postulating

that the person was a party to the proceedings in which the order was passed. *A. Karim Vs. Municipal Committee, Raipur* (AIR 1965 SC 1744). Since the Baldwan Singh Kamoda and Kunja were not in that sense persons aggrieved by the orders passed by the Tahsildar under section 51 of the Act, they had no right of appeal and the orders passed by the Collector, the Commissioner and the Board of Revenue cannot be sustained."

12. Similarly in *Devi Prasad and another v. Nekse and others* [1975 MPLJ 689, a Division Bench of this Court held "10.... Apparently, therefore, non-petitioner No. 1 not being a party to the proceedings could not be said to be a person aggrieved and, therefore, cannot file a review or revision application against the order...."

13. In view of these decisions there remains no doubt that a 'person aggrieved' to invoke the revisional power under Section 50 of the Code 1959 would be a person who is party to the proceeding. In view whereof the first question has to be answered in favour of the petitioner that the respondent No. 1 had no locus standi to maintain the revision petition under Section 50 of the Code, 1959.

14. The second issue as to whether it was lawful for revisional authority to have entertained an application under Section 50 of the Code 1959 against an order dated 26.9.2001, which admittedly was an appealable order under Section 44 of the Code, 1959.

Clause (a) of sub-section (1) of Section 50 of the Code, 1959 stipulates that:

"(i) no application for revision shall be entertained-

(a) against an order appealable under this Code;"

Sub-section (1) of Section 44 of Code, 1959 provides that an appeal shall lie from every original order under the Code if such order is passed by any Revenue Officer subordinate to Sub Divisional Officer, whether or not the officer passing the order is invested with the powers of the Collector to the Sub Divisional Officer. [Section 44 (1) (a)].

15. In the case at hand order dated 26.9.2001 was passed by Tahsildar and as per Section 44 (1) (a) appeal lies before Sub Divisional Officer; in view whereof the Board of Revenue was not justified in entertaining revision petition against the order dated 26.9.2001. Thus, entertainment of revision

petition beside there being a bar was a nullity in the eyes of law when it is said it is not entertainable.

16. In this context reference can be had of a decision in *Hiralal Thakurdas Chowkse v. Hatesingh Laxmansingh* (1984 MPLJ 32); wherein it is observed:

"8. The difficulty arises on account of sub-section (2) of the section 12 which not only declares the prohibited transaction of loan to be absolutely null and void but also prohibits any Court to entertain any application or suit to enforce any claim of lender of money arising out of prohibited transaction of loan. Plainly read, it would mean that if by a suit or application any claim under a prohibited transaction of loan is sought to be enforced, such suit or application shall not be entertained by the Court. It means that whenever any application or suit involves a claim based on any prohibited transaction of loan, the application or suit must be rejected. The use of the word 'entertain' in sub-section (2) of section 12 of the Adhiniyam is significant. As pointed out by a Division Bench of this Court in *Khatumal v. Abdul Qadir* (1961 MPLJ 587), the word 'entertain' means 'to receive and take into consideration'. It was pointed out that the plain reading of the expression 'no Court shall entertain' would mean that no Civil Court shall have jurisdiction to a suit in its inception. Thus, when the application or suit filed before the Civil Court itself discloses that the claim laid therein arises out of a prohibited transaction of loan, that application or suit shall not be considered and shall have to be rejected."

17. In view whereof since there is a specific bar stipulated under clause (a) proviso one sub-section (1) of Section 50, it was beyond the jurisdiction of Board of Revenue to have entertained revision petition against an order whereagainst appeal under Section 44 lies. On this count also the impugned order deserves to be quashed.

18. Thirdly, clause (ii) of proviso to sub section (1) of Section 50 stipulates that no application under Section 50 shall be entertained unless presented within 60 days, Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer as the case may be or within ninety days to the

Board of Revenue from the date of the order and in computing the period aforesaid, time requisite for obtaining a copy of the said order shall be excluded, it would have been appropriate for the Board of Revenue to have dismissed the revision petition which was filed much beyond the period of limitation prescribed under the aforesaid clause.

19. As apparent from the application under Section 50, the same was filed on 5.4.2004 which was after a period of approximately three years from the date of order dated 26.9.2001. Apparently there is no application for condonation of delay either filed by respondent No. 1. In view whereof also the order deserves to be quashed.

20. Having thus considered there being substantial force in the petition, the impugned order dated 6.4.2007 deserves to be and is hereby quashed being not tenable in the eyes of law.

21. Respondent No. 1 and intervener, however, cannot be left without a remedy. Therefore, they would be at liberty to prosecute the respective cases filed by them seeking declaration of title and other relief before the competent court of jurisdiction. This order, however, will not be a precedent in respect of claim put-forth by the interveners in the said proceedings. Respondent No. 1, if law permits, is also at liberty to take recourse to the same seeking redressal of grievance qua the land allegedly belongs to her.

The petition is thus disposed of finally in above terms.

Petition disposed of.

I.L.R. [2012] M.P., 1808

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 12742/2011 (Jabalpur) decided on 5 January, 2012

ADESH GUPTA & ors

....Petitioners

Vs.

SMT. SADHNA GUPTA

...Respondent

Guardians and Wards Act (8 of 1890), Section 9 - Jurisdiction - "Where the minor ordinarily resides" is a mixed question of fact & law - Can not be decided under Order 7 Rule 11 C.P.C. - Order of trial Court set aside - Matter remanded back for framing issue and decision on merits.

(Paras 8 & 9)

संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धारा 9 – क्षेत्राधिकार – “जहां अवयस्क सामान्यतः निवासरत है” तथ्य एवं विधि का मिश्रित प्रश्न है – सि. प्र.सं. के आदेश 7 नियम 11 के अंतर्गत विनिश्चय नहीं किया जा सकता – विचारण न्यायालय का आदेश अपास्त – विवाद्यक विरचित करने के लिए तथा गुणदोषों पर निर्णय के लिए प्रकरण प्रतिप्रेषित किया गया।

Cases referred :

AIR 1978 A.P. 13, AIR 1975 Guj. 150, AIR 1988 Gauhati 22, (2011) 6 SCC 479, 1997(1) MPLJ 27, 2010 (1) MPLJ 98, AIR 1966 SC 160, (1990) 3 SCC 355, (2003) 1 SCC 557, AIR 1989 Orissa 151.

Ashok Lalwani, for the petitioners.

Anoop Saxena, for the respondent.

ORDER

ALOK ARADHE, J. - In this writ petition filed under Article 227 of the Constitution of India, the petitioners have challenged the validity of the order dated 5.5.2011 passed by the trial Court by which the application preferred by the petitioners under Order 7 Rule 11 of the Code of Civil Procedure has been rejected. In order to appreciate the petitioners' challenge to the impugned order, few facts need mention, which are stated infra.

2. The marriage of petitioner No.1 was solemnised on 28.6.1998. From the wedlock, a son and a daughter, respectively were born. The respondent filed a petition under Section 9 of the Guardian and Wards Act, 1890 (hereinafter referred to as 'the Act') on or before 18.2.2011 for appointment of respondent as guardian of the minor children and for obtaining custody of the children at Chhattarpur. The petitioners on receipt of notice of the proceeding, filed an application under Order 7 Rule 11 of the Code of Civil Procedure (hereinafter referred to 'CPC') on the ground that the children are not residing within the territorial jurisdiction of the Court at Chhattarpur and are studying in boarding school in Chandigarh, therefore, the Court has no territorial jurisdiction to deal with the petition. The respondent filed reply to the aforesaid application and opposed the prayer made in the application. It was averred in the reply that the children were taken out from Chhattarpur without her consent.

3. The trial Court vide order dated 5.5.2011 inter-alia held that respondent-wife is residing at Chhattarpur and in case there would not have

been any dispute between petitioner No.1 and the respondent, the children would have remained at Chhattarpur and, therefore, the children can be treated to be the ordinary residents of Chhattarpur and the Court therefore has the territorial jurisdiction to deal with the petition.

4. Shri Ashok Lalwani, learned counsel for the petitioners while inviting the attention of this Court to averments made in the petition filed by respondent No.1, clearly show that children are not residing within the territorial jurisdiction of the Court at Chhattarpur, and the children are living in a boarding school at Chandigarh and are prosecuting their studies at Chandigarh, and therefore, the Court has no territorial jurisdiction to try the petition. It was further submitted that either the Court at Gwalior or the Court at Chandigarh has territorial jurisdiction to deal with the petition and, therefore, the plaint should be returned for presentation to the Court of competent jurisdiction. In support of his submissions, learned counsel for the petitioners has placed reliance on the decisions of *Harihar Pershad Jaiswal Vs. Suresh Jaiswal and others*, AIR 1978 Andhra Pradesh 13, *Shah Harichand Ratanchand Vs. Virbbal and others*, AIR 1975 Gujarat 150, *Amal Saha Vs. Smt. Basana Saha*, AIR 1988 Gauhati 22 and *Ruchi Majoo Vs. Sanjee Majoo*, (2011) 6 SCC 479.

5. On the other hand, learned counsel for the respondent while opposing the submissions made by learned counsel for the petitioners submitted that infact against the impugned order, the petitioners ought to have filed a civil revision and the writ petition against the impugned order is not maintainable. It was further submitted that the order passed by the trial Court is perfectly just and legal. It was also submitted that the respondent was deprived of the custody of the minor children by shifting them from the territorial limits of the Court at Chhattarpur without her consent, therefore, the Court at Chhattarpur has territorial jurisdiction to deal with the petition. In support of his submissions, learned counsel for the respondent has placed reliance on *Vinayak Rao Jadhav and others Vs. Shweta Vinayak Rao Jadhav*, 1997(1) MPLJ 27 and *Johra Bi and others Vs. Jageshwar and others*, 2010(1) MPLJ 98.

6. I have considered the submissions made on both sides. Section 9(1) of the Act provides that application with regard to guardianship of the person of the minor shall be made to the District Court having jurisdiction in the place where the minor "ordinarily resides". The residence is a mere physical fact. It means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. When this physical fact is accompanied by

the required state of mind, neither its character nor its duration is in any way material *See: Kedar Pandey Vs. Narain Bikram Sah*, AIR 1966 SC 160. In *Yogesh Bhardwaj Vs. State of U.P. and others*, (1990) 3 SCC 355, it has been held that residence is a physical fact and no volition is needed to establish it. Any period of physical presence, however short, may constitute residence provided it is not transitory, fleeting or casual. It has further been held that residence must be voluntary.

7. It is well settled in law that while dealing with the application under Order 7 Rule 11 of the C.P.C., only the averments made in the plaint alone are to be seen *See: Saleem Bhai and others Vs. State of Maharashtra and others*, (2003) 1 SCC 557. In the case of *Ruchi Majoo*, supra, the Supreme Court while considering Section 9(1) of the Act has held that solitary test for determining the jurisdiction of the Court under Section 9 is ordinary residence of the minor. The expression used in Section 9(1) of the Act is "where the minor ordinarily resides". Whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be mixed question of law and fact. It has further been held that unless jurisdictional facts are admitted, it can never be pure question of law capable of being answered without an enquiry into the factual aspects of the controversy.

8. Thus, from the aforesaid enunciation of law by the Supreme Court, it is apparent that the question whether the minor is ordinarily residing at a given place is primarily a question of fact which cannot be answered without an enquiry into the factual aspects. Besides that it is relevant to mention here that residence by volition or by compulsion within territorial jurisdiction of the Court cannot be treated as place of ordinary residence. Similarly, the words "ordinarily resides" are not identical and cannot have the same meaning as residence at the time of filing of the application for grant of custody. The purpose of using the expressions "where the minor ordinarily resides" is probably to avoid the mischief that minor may be forcibly removed at a distant place, but still the application for minor's custody could be filed within the jurisdiction of the court from whose jurisdiction he had been removed or in other words where the minor would have continued to remain but for his removal. Similar view has been taken in *Koduparthi Venkateshwarlu and others Vs. Ramavarapu Viroja Nandan and others*, AIR 1989 Orissa 151. If the averments made by the respondent in paragraphs 4, 11, 15 and 15 of the petition filed by her are seen, it is apparent that the children have been

removed from Chhattarpur without her consent. The jurisdictional facts are not admitted and the petition contains the averment that the Court at Chhattarpur has the territorial jurisdiction to try the petition. The question whether the Court at Chhattarpur has territorial jurisdiction to try the petition is a mixed question of law and fact, as the same is dependent on the question whether the minors are residing within the territorial jurisdiction of the Court. The aforesaid question cannot be determined without holding enquiry into the factual aspects of the controversy. The scope of scrutiny at the stage of consideration of an application under Order 7 Rule 11 of C.P.C. is confined only to the averments made in the petition. Thus, the question whether the Court has territorial jurisdiction being mixed question of law and fact cannot be decided by way of an application under Order 7 Rule 11 of C.P.C.

9. For the aforementioned reasons, the order dated 5.5.2011 passed by the trial Court is hereby quashed. In case the petitioners take an objection in the written statement with regard to maintainability of the petition filed by the respondent under Section 9 of the Act on the ground of lack of territorial jurisdiction, the trial Court shall frame an issue and shall decide the same in accordance with law.

10. With the aforesaid direction, the writ petition stands disposed of.

Petition disposed of.

I.L.R. [2012] M.P., 1812

WRIT PETITION

Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice J.K. Maheshwari

W.P.No. 15162/2008 (Jabalpur) decided on 25 January, 2012

M.P. MEDICAL & SALES REPRESENTATIVE

ASSOCIATION & ors.

...Petitioners

Vs.

SENIOR GENERAL MANAGER

...Respondents

Industrial Disputes Act (14 of 1947), Section 10(1)(C) - Labour Court - Jurisdiction - Cause of action - Cause of action has to be decided on the basis of principles laid down in C.P.C. - Petitioner posted at Bhopal - Order of termination served at Bhopal - Appointment letter issued from Bombay is unilateral order would not confer jurisdiction to Bombay Court - Matter remanded back to Labour Court, Bhopal to decide on merit after affording opportunity of hearing. (Para 16)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 10(1)(सी) - श्रम न्यायालय - क्षेत्राधिकार - वाद कारण - वाद कारण का निर्धारण सि.प्र.सं. में प्रतिपादित सिद्धांतों के आधार पर किया जाना चाहिए - याची भोपाल में पदस्थ - सेवा समाप्ति का आदेश भोपाल में तामील किया गया - मुंबई से जारी किया गया नियुक्ति पत्र एकपक्षीय है, मुंबई न्यायालय को अधिकारिता प्रदान नहीं होती - प्रकरण श्रम न्यायालय, भोपाल को सुनवाई का अवसर प्रदान करने के पश्चात गुण-दोषों पर विनिश्चय करने हेतु प्रतिप्रेषित।

Cases referred :

(2007) 5 SCC 591, AIR 1967 SC 1040, AIR 1959 SC 676, AIR 1967 MP 114, 2010 (I) MPWN 39, 1962 Vol-I, Labour Law Journal 409, AIR 1955 Bom. 463, 1973 LAB. I.C. 991, 1984 Labour Industrial Cases 1254.

Anoop Shrivastava, for the petitioners.

Hemant Kumar with Anand Jain, for the respondents.

ORDER

The Order of the Court was delivered by : **J.K. MAHESHWARI, J.** - Assailing the award dated 26.4.2007 passed by the Labour Court-I, Bhopal in case No. 223/2003/ID Reference rejecting the same on the ground of jurisdiction, the M.P. Medical & Sales Representative Association has filed this petition.

2. The facts in brief are that Apurva Sarkar was appointed as Sales Representative in the employment of the respondent on 3.4.1995. On account of his satisfactory performance, he was confirmed vide order dated 28.7.1996. The service of petitioner was terminated vide letter dated 7.4.2003, communicated on 12.4.2003 at Bhopal. The petitioner-union submitted a claim before the Dy. Labour Commissioner, Bhopal Division Bhopal which could not be settled, however dispute was referred for adjudication before the Labour Court, Bhopal. The respondent by filing the reply denied the allegations of the statement of the claim and raised the preliminary objection that State of Madhya Pradesh is not the appropriate Government to refer the dispute and also that the Labour Court, Bhopal is having no jurisdiction to decide such dispute. It is said that the establishment of the respondent is at Mumbai and the salary of the petitioner was being paid from Mumbai and also as per the appointment order if any dispute arises with employer the Mumbai Court would have jurisdiction to adjudicate it, however the Labour Court Bhopal is having no

jurisdiction to decide the dispute as referred by the Government. By the order impugned said objection has been upheld giving rise to file this petition.

3. Shri Anoop Shrivastava, learned Counsel appearing on behalf of the petitioner contends that in the present case it is not in dispute that Apurva Sarkar was working at Bhopal throughout his service career. The termination order was passed at Mumabi but served at Bhopal, however the cause of action and part cause of action arose to petitioner at Bhopal. On submitting the application before Labour Commissioner, when the dispute could not be settled, it was referred to the Labour Court, Bhopal for adjudication by the State Government. However, the appropriate Government would be the State of Madhya Pradesh, who has rightly referred the dispute for adjudication by the Labour Court, Bhopal. In such circumstances rejection of dispute by the Labour Court Bhopal on the ground of jurisdiction is against the catena of judgments. He has placed reliance on the judgment of the Apex Court in the case of *Bikash Bhushan Ghosh and others Vs. Novartis India Limited and another*, (2007) 5 SCC 591 and *Workmen of Shri Ranga Vilas Motors (P) Ltd. V. Sri Rangavilas Motors (P) Ltd. and others*, AIR 1967 SC 1040. In view of the foregoing it is prayed that the order passed by Labour Court rejecting the statement of claim for want of jurisdiction is liable to be set aside, and the dispute may be directed to be decided on merits.

4. Per contra, Shri Hemant Kumar with Shri Anand Jain, learned counsel appearing on behalf of the respondent contends that the Labour Court has not committed any error in rejecting the statement of claim filed by the petitioner because the State of M.P. is not the appropriate Government to make the reference and the Labour Court Bhopal is also not having jurisdiction to decide such reference. To buttress the submission reliance has been placed on the judgment of the Apex Court in the case of *M/s Lipton Ltd. and another Vs. Their Employees*, AIR 1959 SC 676, *Association of Medical Representatives (M&V) V. The Industrial Tribunal, M.P. Indore and others*, AIR 1967 MP 114 and *Balaji Coke Industry Pvt. Ltd. V. M/s Maa Bhagwati Coke (Guj) (P.) Ltd.* 2010 (I) MPWN 39. In view of the aforesaid, it is urged that the order passed by the Labour Court may be maintained dismissing the present petition.

5. After having heard learned counsel appearing on behalf of the parties and on perusal of the record, it is apparent that by passing the impugned award the statement of claim of the petitioner has been rejected referring the

order of appointment wherein the place of adjudication of dispute has been shown as Mumbai city, relying upon the judgment of Apex Court in the case of *Association of Medical Representatives (M&V) (Supra)* and *M/s Lipton Ltd. (supra)*. However, the question for consideration is that the order passed by the Labour court, Bhopal rejecting the reference on the ground of jurisdiction is in accordance to law. It is further required to be seen in the facts and circumstances of the case whether the State of Madhya Pradesh is an appropriate Government to refer the dispute to the Labour Court, Bhopal or not.

6. The aforesaid questions relates to maintain the industrial dispute by the Labour Court, Bhopal in a case where the Head Office of the Company is situated at Bombay but the place of employment of the petitioner is in Madhya Pradesh during the service tenure. The order of termination was passed by the Head Office, Mumbai but communicated at Bhopal, however in the said context the reference made by the State of Madhya Pradesh is also an integral part to rest the controversy.

7. Prior to considering the rival submissions of the parties, the legal position emerged on the said issues by various judgments of the Apex Court, this Court and other High Courts is required to be discussed. In the case of *M/s Lipton Ltd. (supra)*, three Judges Bench of the Apex court has held as under:

"8. Civil Appeals Nos. 713 and 714 of 1957. We now turn to the other two appeals, namely, civil Appeals 713 and 714 of 1957. We have already stated that the only points which survive for decision are those relating to items 1(a), 1(b) and 4 of the terms of reference. These items relate to fixation of grades and scales of pay, whether retrospective effect should be given to the new scales of pay, and bonus for 1951. The other items of the award relating to City compensatory allowance, leave, holidays etc, have not been challenged before us. We are, therefore, saying nothing about those items of the award, which must necessarily stand. It may be made clear, however, at this stage that one off the points taken before the Industrial Tribunal on behalf of the *Lipton Ltd.*, was that the Industrial Tribunal had no jurisdiction to make an award in respect of employees of the Delhi office who were employed

outside the State of Delhi. This point of jurisdiction was decided against the appellant and the Industrial Tribunal pointed out that all the workmen of the Delhi office, whether they worked in Delhi or not, received their salaries from the Delhi office; they were controlled from the Delhi office in the matter of leave, transfer, supervision etc. and, therefore, the Delhi State Government was the appropriate Government within the meaning of S. 2 of the Industrial Disputes Act, 1947 relating to the dispute which arose between the Lipton Ltd., and the Union and under S. 18 of the said Act the award made by the Tribunal was binding on all persons employed in the Delhi office. The Appellate Tribunal upheld the decision of the Industrial Tribunal on this point and though this question of jurisdiction was raised in the appeals before us, it was not seriously pressed by the learned Attorney General. We are of the view that the Industrial Tribunal had jurisdiction to adjudicate on the dispute between the *Lipton Ltd.* and its workmen of the Delhi office."

8. In the case of *Indian Cable Co. Ltd vs. Its workmen*, 1962-Vol. 1 *Labour Law Journal* 409 having somewhat different facts to the present case, the issue came up for consideration wherein the Court has observed as under:

"The Act contains no provisions bearing on this question, which must, consequently, be decided on the principles governing the jurisdiction of Courts to entertain actions or proceedings. Dealing with a similar question under the provisions of the Bombay Industrial Relations Act, 1946, Chagla, C.J., observed in *Lalbhai Tricumlal Mills, Ltd. v. Vin and others* [1956-I L.L.J.557, 558]:

"But what we are concerned with to decide is: where did the dispute substantially arise? Now, the Act does not deal with the cause of action, nor does it indicate what factors will confer jurisdiction upon the labour court. But applying the well-known tests of jurisdiction, a Court or tribunal would have jurisdiction if the parties reside within jurisdiction or if the subject-matter of the

dispute substantially arises within jurisdiction."

In our opinion, these principles are applicable for deciding which of the States has jurisdiction to make a reference under S. 10 of the Act."

In the said case, the Court has not expressed any opinion on the point of competency of the Government making reference to the Court.

9. The Division Bench judgment of this Court in the case of *Association of Medical Representatives (M&V)* (supra) is based upon the judgment of Apex Court in the case of *M/s Lipton Ltd.* (supra), wherein this Court held as under:-

"5. In our opinion, the Tribunal was right in concluding that the Madhya Pradesh Government was not the "appropriate Government" for making a reference under section 10 (1) of the Act of the dispute regarding D'Silva's termination of services. Now, section 10 (1) does not contain any express provision as to which is the appropriate State Government for referring an industrial dispute in relation to which the State Government is the "appropriate Government" as defined in section 2 (a) (ii) of the Act. The definition of "appropriate Government" given in section 2(a) is also not very helpful for determining the "appropriate State Government". But section 10 (1) does contemplate that the appropriate Government would be that Government in whose jurisdiction the industrial dispute arises or is apprehended when it says that "where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing "make a reference. The definitions of "Employer" and "Workman" given in section 2 (g) and 2(s) show that an industrial dispute arises where the industry exists. *In Indian Cable Co., Ltd. v. Their Workmen*, (1962-63) 22 FIR 262 (SC) (supra) the Supreme Court noted that the Act contained no provision bearing on the question as to which of the States has jurisdiction under section 10 (1) to make a reference and held, approving the observations of Chagla C. J. in *Lalbhai Tricumlal Mills Ltd. v. D. M. Vin*, (1955-56) 9 F. J. R. 290 : (AIR 1955 Bom 403), that in deciding which of the States

has jurisdiction to make a reference under section 10 of the Act "the well-known test of jurisdiction" should be applied; and that Court or Tribunal would have jurisdiction to entertain the reference within whose jurisdiction the parties reside or the subject-matter of the dispute substantially arises. This test only effectuates that which is contemplated by section 10 (1), namely, that it is the Government in whose jurisdiction the industry is situated that is competent to make a reference. Applying this test here, there can be no doubt that the Madhya Pradesh Government had no jurisdiction to make the reference. The petitioner was no doubt residing in Madhya Pradesh. The residence of the parties necessary to give jurisdiction must be in relation to the existence of the industry. The Company was not carrying on business anywhere in Madhya Pradesh on the date of the reference. The dispute whether the Company was justified in dismissing D'Silva arose in Bombay inasmuch as the petitioner was employed by the Bombay office of the Company; he was paid by that office and his work was controlled and supervised by that office; and the dismissal order was also passed by the Bombay office.

6. The point of jurisdiction is really concluded by the decision of the Supreme Court in AIR 1959 SC 676 (*supra*) where it has been ruled that the Government of the State within which one of the offices of a Company is situated is the appropriate Government for referring any dispute between that Company and its workmen who are paid their salary and controlled by that office, irrespective of the fact that those workers work at a place which is outside the limits of that State. On this principle laid down by the Supreme Court in AIR 1959 SC 676 (*supra*) the Maharashtra Government was undoubtedly the appropriate Government for referring the dispute under section 10 (1)."

10. Thereafter similar issue as appeared in the present case came up for consideration before the Hon'ble Apex Court in the case of *Workmen of Shri Ranga Vilas Motors (P) Ltd. (supra)* and the Apex Court considering the observations made by the Constitutional Bench in the case of *Indian Cable*

Co. Ltd. (supra) and also of *Lalbhai Tricumlal Mills Ltd. V. Vin*, AIR 1955 Bombay 463 and the observations of Shri Chagla, C.L.J. and concluded as under:

"14 Therefore, the appeal must succeed unless the Company can satisfy us that the points decided against it should have been decided in its favour. This takes us to the other points. Mr. O. P. Malhotra strongly urges that the State Government of Mysore was not the appropriate Government to make the reference. He says that although the dispute started at Bangalore, the resolution sponsoring this dispute was passed in Krishnagiri, and, that the proper test to be applied in the case of individual disputes is where the dispute has been sponsored. It seems to us that on the facts of this case it is clear that there was a separate establishment at Bangalore and Mahalingam was working there. There were a number of other workmen working in this place. The order of transfer, it is true, was made in Krishnagiri at the Head-office, but the order was to operate on a workman working in Bangalore. In our view the High Court was right in holding that the proper question to raise is : where did the dispute arise ? Ordinarily, if there is a separate establishment and the workman is working in that establishment, the dispute would arise at that place. As the High Court observed, there should clearly be some nexus between the dispute and the territory of the State and not necessarily between the territory of the State and the industry concerning which the dispute arose. This Court in *Indian Cable Co. Ltd. v. Its Workmen*, (1962) 1 Lab.L. J. 409 (SC) held as follows:

"The Act contained no provisions bearing on this question, which must, consequently, be decided on the principles governing the jurisdiction of Courts to entertain actions or proceedings. Dealing with a similar question under the provisions of the Bombay Industrial Relations Act, 1946, Chagla, C. J., observed in *Lalbhai Tricumlal Mills Ltd. v. Vin*, 1956-1 Lab.L.J. 557, 558:(AIR 1955 Bom 463 at p. 464)

"But what we are concerned with to decide is: where did the dispute substantially arise? Now, the Act does not deal with the cause of action, nor does it indicate what factors will confer jurisdiction upon the labour Court. But applying the well-known tests of jurisdiction, a Court or Tribunal would have jurisdiction if the parties reside within jurisdiction or if the subject-matter of the dispute substantially arises within jurisdiction".

"In our opinion, those principles are applicable for deciding which of the States has jurisdiction to make a reference under S. 10 of the Act".

Applying the above principles to the facts of this case it is quite clear that the subject-matter of the dispute in this case substantially arose within the jurisdiction of the Mysore Government."

In the said case the Apex Court has upheld the judgment of the Bangalore High Court and Industrial Court deciding the issue of making a reference by the State of Mysore for decision by the Labour Court Bangalore. It is further held that as the workmen were discharging the duties at Bangalore and not at the place where the office of the company is situated in the State of Kerala, however the cause substantially arose within the jurisdiction of Mysore Government.

11. Thereafter the same issue has come up for consideration before the Division Bench of this Court in somewhat similar circumstances in the case of *S.N. Sunderson and Co., New Delhi V. Presiding Officer, Labour Court No.1, Jabalpur and another*, 1973 LAB. I.C.991. This Court referring the judgment of *Workmen of Shri Ranga Vilas Motors (P) Ltd. (supra)* has held as under:

"6. Applying the said tests to the facts of the present case we find that the dispute arose at Katni in Madhya Pradesh and no part of the dispute can be said to have arisen at Delhi where the Head Office of the petitioner-firm is located. We find that the present case is on all fours with the case of *Ram Kishan V. Shambhu Nath Vaid*, (1962) 2 Lab L.J.294 (Punj) decided

by a Division Bench of the Punjab High Court presided over by Khosla, C.J. and A.N. Grover, J. (as he then was). In that case the facts were that a workman was transferred from Amritsar to Mussoorie. He did not carry out the transfer order and, therefore, his services were dispensed with on the ground of disobedience. The industrial dispute about termination of service was taken up by fellow workmen at Amritsar and the Punjab Government referred the dispute for arbitration. It was contended on behalf of the employer that the appropriate Government was the Uttar Pradesh government wherein Mussoorie was located to which place the employee had been transferred. A Single Bench of the Punjab High Court had taken the view that the appropriate Government was the Uttar Pradesh Government. A Division Bench of the High Court, however, reversed that decision and held that the appropriate Government was the Punjab Government. In the present case, which is, as stated above, on all fours with the said Division Bench case of the Punjab High Court, it is clear that the dispute arose at Katni in Madhya Pradesh and the appropriate Government was the Madhya Pradesh Government. We would, therefore, reject the contention of learned counsel for the petitioner and we are of opinion that the Labour Court at Jabalpur was right in overruling the preliminary objection raised on behalf of the petitioner before it."

12. The similar issue came up for consideration before the Full Bench of Patna High Court in the case of *Paritosh Kumar Pal Vs. State of Bihar and others, 1984 Labour Industrial Cases 1254 (Patna) (FB)* and the Full Bench laid down a test to determine the issue of jurisdiction based on three principles which are as under:

- "(i) Where does the order of the termination of services operate?
- (ii) Is there some nexus between the industrial dispute arising from termination of the service of the workman and the territory of the State?
- (iii) That the well-known test of jurisdiction of a civil court

including the residence of the parties and the subject-matter of the dispute substantially arising therein would be applicable.

13. In the case of *Bikash Bhushan Ghosh (supra)*, the same issue came up for consideration before the Apex Court wherein the issue regarding part of cause of action has also been discussed, however approving the said Full Bench Judgment of Patna High Court, and the judgment of *M/s Lipton Ltd. And another (supra)* and *Workmen of Shri Ranga Vilas Motors (P) Ltd. (supra)*, the Apex Court in para 15 and 16 has held as under:-

"15. With respect to the Division Bench, we do not think that it has posed unto itself a correct question of law. It is not in dispute that the appellants did not join their duties at the transferred places. According to them, as the orders of transfer were illegal, their services were terminated for not complying therewith. The assertion of the respondent that the appellant were relieved from job was unilateral. If the orders of transfer were to be set aside, they would be deemed to be continuing to be posted in Calcutta. The legality of the orders of transfer, thus, had a direct nexus with the orders of termination. What would constitute cause of action, has recently been considered by this Court in *Om Prakash Srivastava v. Union of India and Another* wherein it was held: (SCC pp.211-12, paras 12-14)

"12. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above, the expression means very fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is

necessary to prove each fact, comprises in "cause of action". (See Rajasthan High Court Advocates' Assn. v. Union of India [(2001) 2 SCC 294])

13. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts, which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit (See Gurdit Singh v. Munsha Singh [(1977) 1 SCC 791])

14. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one person to obtain a remedy in court from another person (see Black's Law Dictionary). In Stroud's Judicial Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which if traversed, the plaintiff must prove in order to obtain judgment. In Words and Phrases (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf. (See Navinchandra N. Majithia v. State of Maharashtra [(2000) 7 SCC 640 : 2001 SCC (Cr1) 215])

16. Judged in that context also, a part of cause of action arose in Calcutta in respect whereof, the State of West Bengal was the appropriate government. It may be that in a given case, two States may have the requisite jurisdiction in terms

of clause (c) of subsection (1) of Section 10 of the Industrial Disputes Act. Assuming that other State Governments had also jurisdiction, it would not mean that although a part of cause of action arose within the territory of the State of West Bengal, it would have no jurisdiction to make the reference.

14. In view of the foregoing, it is apparent that the Industrial Disputes Act, 1947 does not deal either the cause of action, nor does it remotely indicate what factors will confer jurisdiction upon the appropriate government and equally to the Tribunal or the Labour Court constituted therein. However, the issue remains that where did the dispute substantially arises, to determine the issue of jurisdiction on the basis of well known principles. Simultaneously, equally acceptable principle is that the Code of Civil Procedure in specific having no application in *stricto sensu* but the principle in values of the tests underline the jurisdiction of the civil court applies to determine the issue on principles as binding precedents. In this context to determine the jurisdiction, it is to be seen where the order of termination operates and what is the nexus to the industrial dispute by termination and the territory of the State referring the matter for adjudication. As per the underlined principles of the civil courts the residence of the parties and subject matter of the dispute substantially arises having its application pertaining to cause of action or a part of cause of action affecting the situs of employment of the workman. Before the Apex Court in the case of *Workman of Shri Ranga Vilas Motors (P) Ltd.*, (*supra*) the employee was working at Bangalore and transferred to Krishnagiri (Kerala) where the office of the company was situated. The company framed the charges and removed the employee from service. In the said case Mysore Government has referred the dispute to the Labour Court Bangalore. The Apex Court answered the question of jurisdiction and held that the State of Mysore is the appropriate Government to refer the dispute because the situs of the employment of the said employee is at Bangalore applying the principles for determination of the jurisdiction of the civil court. The said judgment has been followed by the Division Bench of this Court in the case of *SN. Sunderson and Co., New Delhi (Supra)* wherein also the Head Office of the company was situated in Delhi and the employee was working at Katni in Madhya Pradesh. The reference made by the State of Madhya Pradesh for determination by the Labour Court Jabalpur was found valid. In the said case also the judgment of Division Bench of this Court in the case of *Association of Medical Representatives (supra)* has been considered but not followed in

the light of the subsequent judgment of the Apex Court in the case of *Workman of Shri Ranga Vilas Motors (P) Ltd.*, (*supra*), holding that the reference has rightly been made by the State of Madhya Pradesh. The Apex Court has again in the case of *Bikash Bhushan Ghosh (supra)* had an occasion to consider the issue of cause of action or a part of cause of action and in the said judgment the principles so laid down for determination of the issue of jurisdiction by the Full Bench of Patna High Court in the case of *Paritosh Kumar Pal (supra)* is liable to affirm. In the said judgment the Apex Court has considered the case of *M/s Lipton Ltd. (supra)* and subsequent judgment of the Apex Court in the case of *Workman of Shri Ranga Vilas Motors (P) Ltd.*, (*supra*). However, the Division Bench judgment of this Court in the case of *Association of Medical Representatives (supra)* based upon *M/s Lipton Ltd. (supra)* has been expressly in contravention to the principles laid down in the case of *Workman of Shri Ranga Vilas Motors (P) Ltd.*, (*supra*). The judgment in the case of *Workman of Shri Ranga Vilas Motors (P) Ltd.*, (*supra*) has been affirmed by the Division Bench of this Court in the case of *S.N. Sunderson and Co., New Delhi (supra)*. It is to be observed that in the judgment of *Bikash Bhushan Ghosh (supra)*, the judgments relied upon by learned counsel for the respondents has been considered by the Apex Court while taking different view and observed that the order impugned is having a direct nexus to the place where it operates. It has further been observed that on account of termination the industrial dispute arose must have nexus to the territory of the State. The cause of action and part cause of action arose to an employee must be decided on the basis of the principles of Code of Civil Procedure expressly laying down the parameters for determination of the jurisdiction of the dispute so involved in the case.

15. In view of the foregoing discussions and in the facts of the present case, it is not in dispute that petitioner Apurva Sarkar was appointed as Sales Representative by an order of the Head Office situated at Bombay but he had discharged his duties throughout at Bhopal. His services were terminated as per letter dated 7.4.2003 with effect from 31.3.2003. The said letter was communicated on 12.4.2003 at Bhopal. If the order of termination is set aside, he is required to be reinstated in Madhya Pradesh, Bhopal from where his services were terminated. Thus the situs of the employment of the petitioner was at Bhopal in State of M.P. He had submitted the application before the Dy. Labour Commissioner where the claim was resisted by the respondent, however the State of Madhya Pradesh has rightly made a reference to the

Labour Court, Bhopal to decide the dispute whether the termination of the petitioner is in accordance to law and what reliefs can be granted in the facts of the case. Thus the working of the petitioner at Bhopal is having nexus with the dispute related to termination of the service of workman. The petitioner is the resident of Madhya Pradesh, however the territory of the State having nexus with the residence as well as to the dispute. Merely having office at Bombay would not debar the State of Madhya Pradesh to make a reference and expelling from jurisdiction to the Labour Court, Bhopal established under the Industrial Disputes Act to adjudicate the issue. Thus the order passed by the Labour Court (Annexure P/1) to dismiss the reference on the ground of jurisdiction is contrary to the principles of law laid down by the Apex Court in the case of *Workman of Shri Ranga Vilas Motors (P) Ltd.*, (*supra*) and *Bikash Bhushan Ghosh* (*supra*) and the Division Bench judgment of this Court in the case of *S.N. Sunderson and Co., New Delhi* (*supra*).

16. Now the issue raised by the respondent on the basis of the appointment letter which confers jurisdiction to the Bombay Court is also required to be dealt with. On the said issue the judgment of the Apex Court in the case of *Balaji Coke Industry Pvt. Ltd.* (*supra*) has been relied upon by the respondent. In the said context it is to be observed here that the order of appointment has been issued unilaterally by the employer specifying the place of jurisdiction. The said judgment of the Apex Court is based on a bi-lateral contract of arbitration conferring the jurisdiction at a particular court. More so, the said judgment relates to arbitration agreement which is always by-lateral but in case of employees the orders of appointment are issued by the employer unilaterally. Thus the said unilateral order of appointment would not confer jurisdiction to the Bombay Court, and the argument so advanced by the respondent is hereby repelled.

17. Accordingly, the petition filed by the petitioner is hereby allowed. The impugned order (Annexure P/1) passed by the Labour Court, Bhopal is hereby set aside. The matter is remitted back to the Labour Court to decide the dispute on merit after affording the opportunity of hearing to the parties in accordance with law. In the facts and circumstances of the case, parties are directed to bear their own costs.

Petition allowed.

I.L.R. [2012] M.P., 1827

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 7601/2011 (Jabalpur) decided on 1 February, 2012

SHOBHA Y. INGOLE (SMT.)

...Petitioner

Vs.

HINDUSTAN PETROLEUM CORPORATION LTD. & ors. ...Respondents

Constitution, Article 226/227, Petroleum Act (30 of 1934), Section 20, Motor Spirit and High Speed Diesel (Regulation of supply, distribution and preventions of Mal practices) Order 2005, Clause 8 - Retesting of sample - During inspection samples of High speed diesel taken in prescribed manner - Same sample kept with the dealer/agency - Application of the petitioner for retesting of sample by another agency rejected - Held - If prayer is made for retesting of sample kept in custody of dealer, it is obligatory to grant such permission - Respondent directed to send the sample for retesting. (Paras 10 & 11)

संविधान - अनुच्छेद 226/227, पेट्रोलियम अधिनियम (1934 का 30), धारा 20, मोटर स्पिरिट और हाई स्पीड डीजल (आपूर्ति, वितरण का विनियमन व अनाचार निवारण), आदेश 2005, खंड 8 - नमूने की पुनः जाँच - निरीक्षण के दौरान हाई स्पीड डीजल के नमूने विहित रीति से लिए गए - उक्त नमूने को डीलर/एजेंसी के पास रखा गया - याची का अन्य एजेंसी से नमूने की पुनः जाँच का आवेदन खारिज - अभिनिर्धारित - यदि डीलर की अभिरक्षा में रखे नमूने की पुनः जाँच के लिए निवेदन किया जाता है तो यह बाध्यकर है कि उक्त अनुमति प्रदान की जाये - प्रत्यर्थी को नमूना पुनः जाँच हेतु भेजने के लिए निदेशित किया गया।

*D.K. Dixit, for the petitioner.**Anoop Nair, for the respondents.***ORDER**

K.K. TRIVEDI, J. - By this petition the petitioner has called in question the action taken by the respondents and the order passed on the application of the petitioner rejecting her claim for sending the sample retained in the agency of the petitioner for retesting. Such an order has been issued on 26.4.2011. The relief claimed by the petitioner is to issue a direction to the respondents to retest the sample of the High Speed Diesel (hereinafter referred to as 'HSD') which was drawn on 12.3.2011, through any impartial laboratory

other than belonging to the respondents and to furnish a report of the same. The petitioner has further claimed a relief to remove the seal put on the outlet of the petitioner and to start supply of the product to the petitioner without any interruption.

2. Facts giving rise to filing of this writ petition are that the petitioner was granted agency by the respondent Hindustan Petroleum Corporation, (hereinafter referred to as the Corporation'). An inspection of the retail outlet of the petitioner was carried out on 12.3.2011 and the samples of Motor Spirit (hereinafter referred to as 'the MS') and HSD were drawn. It is alleged by the petitioner that six samples of MS and 3 samples of HSD were drawn. Out of these samples two samples of MS and one sample of HSD were handed over to the petitioner for keeping the same in the safe custody till further advice. The remaining samples were taken by the respondents authorities and the same were got tested. Since the test report given by the laboratory of the respondents was not satisfactory and it was contended that the samples have not met with the specification, a show cause notice was issued to the petitioner on 11.4.2011 vide annexure P/2. On receipt of this show cause notice and noting down the contents of the reports of test mentioned in the said show cause, the petitioner submitted an application immediately within the period of reply to the show cause on 16.4.2011 requesting the respondents authorities to get the resampling and retesting of the petroleum products stored in the outlet of the petitioner under the provisions of section 20 of the Petroleum Act, 1934. In the application a prayer was made in the alternative that in case such a retesting/ resampling was not permissible, the sample of the petroleum product kept in the custody of the petitioner be retested.

3. It is the contention of the petitioner that under section 20 of the Petroleum Act, it was mandatory on the part of the respondents to consider the prayer of the petitioner but they have rejected the same by not giving any cogent reasons. It is simply said that since the provision of resampling under the provisions of section 20 of the Petroleum Act, 1934, is not applicable to the retail outlet dealers, therefore, such a prayer of the petitioner is not being accepted. It is contended by learned counsel for the petitioner that such an act of the respondents is per se illegal and thus the petitioner is entitled to the relief claimed.

4. Per contra, by filing return the respondents have contended that since the provisions of section 20 of the Act are not attracted, such a prayer was

rightly refused. It is further contended by the respondents that in the show cause notice reasons were assigned and thereafter action has already been taken against the petitioner. Since no reply was submitted by the petitioner, action has already been taken against the petitioner for cancellation of her dealership. It is contended that even under the provisions of the Order which are made, there is no prescription of resampling or retesting of the petroleum product. Therefore, such a prayer of the petitioner was rightly rejected. Drawing the attention of this court to the provisions made in the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2005, (hereinafter referred to as 'the Order'), it is contended by the learned counsel for the respondents that the court would be free to exercise the power only if any provision is made for resampling or retesting either in the act or under the Order. Therefore, it is contended that if there is no such prescription, on its own the court would not be justified in directing retesting of the sample or resampling of the product. It is contended that such a prayer of the petitioner was rightly refused and the writ petition is thus liable to be dismissed.

5. Heard learned counsel for the parties at length and perused the record.
6. True it is that provision is made under section 20 of the Act with respect to exercise of right to require retesting. For the purposes of understanding the provision, it is quoted thus :-

20. Right to require re-test:

(1) The owner of any petroleum, or his agent, who is dissatisfied with the result of the test of the petroleum may, within seven days from the date on which he received intimation of the result of the test, apply to the officer empowered under sec. 14 to have fresh samples of the petroleum taken and tested.

(2) On such application and on payment of the prescribed fee, fresh samples of the petroleum shall be taken in the presence of such owner or agent or person deputed by him, and shall be tested in the presence of such owner or agent or person deputed by him.

(3) If, on such re-test, it appears that the original test was erroneous, the testing officer shall cancel the original certificate

granted under sec. 19, shall make out a fresh certificate, and shall furnish the owner of the petroleum, or his agent, with a certified copy thereof, free of charge.

7. The word owner used in the provision aforesaid do not qualify that the owner means only the wholesale dealer. It is nowhere provided under the Act that the word owner used in the aforesaid section means only the owner of a wholesale depot and not a retailer. Though definition clause of the Act given in section 2 prescribe many definitions but the owner or dealer is not defined under the Act. Definition of dealer is given in clause 2(d) of the Order which reads as under :-

"dealer" means a person duly appointed by an oil company to purchase, receive, store and sell motor spirit and high sped diesel oil whether or not in conjunction with any other business and shall include his representatives, employees and agents;

8. A plain and simple reading of this will make it clear that dealer is a person duly appointed by a oil company to purchase, receive, store and sell motor spirit and high speed diesel but again it do not clarify that the retail dealers will not be a dealer within the meaning of the aforesaid definition. Therefore, to say that provisions of section 20 of the Act referred to hereinabove would be applicable only to the owner of the wholesale depots, as is indicated by the respondents in their reply to the application made by the petitioner, cannot be accepted. If such a restricted meaning was to be given to the word "dealer", it was open to the law making authority to define the word "dealer" in such a manner. Neither in the Act nor in the Order such a definition is restricted. Such a narrow interpretation of the word "dealer" by the respondents is, therefore, neither just nor proper. The refusal of the prayer of the petitioner is only on this count.

9. Counsel for the petitioner has placed reliance in the case of *M.Chakravarthi and another Vs. State Represented by the Public Prosecutor*, decided by the Andhra Pradesh High Court wherein dealing with the same circumstances, the court has considered the aspect of keeping the sample with the dealer also. Undisputedly there is a provision made in the Order that while making an inspection, the samples of products are to be drawn from the outlets of the dealers. These are the provisions made in clause 8 of the Order which reads thus :-

8. Sampling of Product-

- (1) The authorised under clause 7 shall draw the sample from the tank, Nozzle, vehicle or receptacle, as the case may be, in clean aluminum containers, to check whether density and other parameters of the product conform to 'the requirements of Bureau of Indian Standard specifications number IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Where samples are drawn from retail outlet, the relevant tank-truck sample retained by the dealer as per clause 3(b) would also be collected for laboratory analysis.
- (2) The authorized officer shall take and seal six samples of 1 litre each of the motor spirit or three samples of 1 litre each of the high speed diesel. Two samples of motor spirit or one of high speed diesel would be given to the dealer or transporter or concerned person under acknowledgement with instruction to preserve the sample in his safe custody till the testing or investigations are completed. Two samples of Motor Spirit or one of High Speed Diesel shall be kept by the concerned oil company or department and the remaining two samples of Motor Spirit or one of High Speed Diesel would be used for laboratory analysis;
- (3) The sample label shall be jointly signed by the authorised officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the sample label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name of the authorized officer, name of the dealer or transporter or concerned person or his representative;
- (4) The authorised officer shall forward the sample of the product taken within ten days to any of the laboratories mentioned in Schedule III or to any other such laboratory when it may be notified by the Government in the Official Gazette for this purpose, for analysing with a view to checking whether the density and other parameters of the product conform to the requirements of Bureau of Indian Standard specifications number IS 2796 and IS 1460 for motor spirit and high speed

diesel respectively.

(5) The laboratory mentioned in sub-clause (4) shall furnish the test report to the authorised officer within twenty days of receipt of sample at the laboratory.

(6) The authorised officer shall communicate the test result to the dealer or transporter or concerned person and the oil company, as the case may be, within five days of receipt of test results from the laboratory for appropriate action.

10. It is clear from the aforesaid provision that six samples are to be taken 1 lt. each of MS and 3 samples of 1 lt. each of HSD. Two samples of MS and 1 of HSD would be given to the dealer or transporter or concerned person under acknowledgement with instructions to preserve the sample in his safe custody till the testing or investigation are completed.

Thus, the samples are to be given in the sealed conditions so as to avoid any tampering with the sample by the dealer. Such samples are given to the dealers only with an object to order retesting of the sample of the very same material of which the samples are drawn at the time of inspection. If a prayer for retesting of the sample kept in the custody of the dealer is made, it is obligatory on the part of the Corporation to grant such a request so as to indicate the fairness in action taken against the dealers. Thus, provisions are specifically made in the Order with the object aforesaid otherwise there was no question of giving the sample in custody of the dealer also. This being so if the alternative prayer was made by the petitioner for retesting of the sample which was kept in her custody, it was not open to the respondents to refuse such a permission or prayer. The petitioner by making such an application has shown her intention that she was not agreeing with the test report of the material collected from the outlet of the petitioner obtained by the respondents from the concerned laboratory and, therefore, a justified prayer was made by her. The order passed by the respondents nowhere indicates that this particular prayer of the petitioner was also considered and rejected. Even if such a prayer is to be rejected, there must be very cogent and justified reasons. None is available in the order impugned. Therefore, submission of learned counsel for the respondents cannot be accepted that there is no provision of retesting or resampling and the provision of section 20 of the Act are not applicable to the retail outlet dealers.

11. In the considered opinion of this Court, such an approach of the

respondents was totally unjustified and improper. In view of the aforesaid, the writ petition is allowed. The order impugned is hereby quashed. The respondents are directed to send the sample of the HSD kept in the custody of the petitioner for retesting in an appropriate laboratory and to obtain a report of the same within a period of 2 months from the date of receipt of this order. Since an interim order was already passed by this Court on 7.5.2011 to the effect that any action taken subsequent to the issuance of the show cause notice by the respondents, shall be subject to final outcome of the petition, if any order of cancellation of the dealership of the petitioner is passed, the same also stand quashed.

12. In the result, the petition is allowed to the extent indicated hereinabove but with no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 1833

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No. 5732/2008 (Jabalpur) decided on 16 February, 2012

S.C. SETH

...Petitioner

Vs.

UNITED COMMERCIAL BANK & ors.

...Respondents

A. Service Law - Disciplinary Proceedings - Punishment of dismissal - Disproportionate - Petitioners found guilty for having by passed normal rules and procedure for issuing bank guarantee, thereby exposing bank for huge financial risk - However, no loss caused to bank - Disciplinary Authority was of the view that punishment of reduction of basic pay to the first stage of scale, however, petitioner was dismissed on the basis of communication sent by C.V.C. - Final decision to impose punishment was influenced by recommendation of C.V.C. - Disciplinary Authority are quasi judicial in nature - Order of punishment is bad as the same was passed under the influence of C.V.C. (Paras 19 to 24)

क. सेवा विधि - अनुशासनिक कार्यवाहियां - पदच्युति/बर्खास्तगी की शास्ति - अननुपातित - याचीगण को बैंक गारंटी जारी करने हेतु सामान्य नियम एवं प्रक्रिया की अवहेलना का दोषी पाया गया, जिससे बैंक को विशाल वित्तीय संकट में छोड़ा गया - किन्तु बैंक को कोई हानि कारित नहीं - अनुशासनिक

प्राधिकारी का यह दृष्टिकोण था कि मूल वेतनमान को प्रथम स्तर के वेतनमान पर घटाये जाने की शास्ति अधिरोपित करे, तथापि याची को सी.व्ही.सी. द्वारा संप्रेषित के आधार पर पदच्युत किया गया था – शास्ति अधिरोपित करने का अंतिम निर्णय सी.व्ही.सी. की अनुशासनों से प्रभावित था – अनुशासनिक प्राधिकारी अर्द्धन्यायिक स्वरूप के हैं – शास्ति का आदेश अनुचित क्योंकि उक्त को सी.व्ही.सी. के प्रभाव में पारित किया गया।

B. Service Law - Disciplinary Proceedings - Non-supply of enquiry report - As petitioner was handicapped in challenging the findings of enquiry officer before Disciplinary Authority and Appellate Authority - Principles of natural justice violated. (Paras 16 to 19)

ख. सेवा विधि – अनुशासनिक कार्यवाहियां – जांच प्रतिवेदन प्रदाय न किया जाना – चूंकि याची अनुशासनिक प्राधिकारी एवं अपीली अधिकारी के समक्ष जांचकर्ता अधिकारी के निष्कर्षों को चुनौती देने में अक्षम था – नैसर्गिक न्याय के सिद्धांतों का अतिक्रमण किया गया।

Cases referred :

AIR 1991 SC 471, 1994 (2) SCC 537, 1983 (2) SCC 442, (2001) 1 SCC 65, WP 5932/1998, (2010) 13 SCC 494, 1982 (I) SLR 443, 1994 (6) SLR 240, 1991 (2) SLR 784, 1995 Supp. (2) SCC 655, AIR 1980 SC 1170.

N.S. Ruprah, for the petitioner.

Manoj Sharma, for the respondents No. 1 to 4.

ORDER

RAJENDRA MENON, J. - Challenging the orders passed by the Disciplinary Authority and the Appellate Authorities in imposing the punishment of dismissal from service and rejecting the appeal and mercy appeal of the petitioner, petitioner who is presently more than 71 years of age and who is suffering from brain tumour (cancer) and is in the terminal stage, has filed this writ petition.

2- The order passed by the Disciplinary Authority dismissing the petitioner from service is Annexure P/1 dated 8.10.1993; the order passed by the Appellate Authority dismissing the appeal of the petitioner is Annexure P/2 dated 29.6.1994; and, the mercy appeal of the petitioner is rejected vide Annexure P/3, on 24.3.1995.

3- Apart from challenge to these three orders, petitioner has also challenged the order-dated 29.3.2008 - Annexure P/27, passed by the Disciplinary Authority rejecting the appeal of the petitioner again after its reconsideration in pursuance to an order passed by a Bench of this Court on 3.1.2008, in Writ Petition No.2724/1995.

4- Facts in brief, necessary for disposal of this writ petition, indicate that petitioner was initially appointed in the service of the Bank in the year 1962. Respondent No.2 is a Public Sector Bank fully owned and controlled by the Central Government and the terms and conditions of employment in the said Bank is governed by the UCO Bank Officers and Employees (Discipline and Appeal) Regulations, 1976 (hereinafter referred to as the 'Service Regulation'). It is the case of the petitioner that he has an unblemished service career spanning to a period of 32 years during which period he has never been punished nor any departmental action initiated against him. On the contrary, his work has been appreciated throughout and for the excellent work done, he has been awarded merit certificates and appreciation letters right from 21.2.1988, for various periods as is evident from the certificates filed by the petitioner vide Annexures P/4 to P/10. Be it as it may be, it is said that the petitioner, while he was functioning as Senior Manager in Rewa Branch, a charge-sheet - Annexure P/11 dated 19.11.1991 was issued to him. Apart from the petitioner, similar charge-sheets were issued to three other officers, who were working as Assistant Managers namely Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey. All the persons, including the petitioner, were alleged to have signed and issued different bank guarantees on various dates and it was alleged that the bank guarantees have been issued beyond the financial powers of the petitioner, without obtaining prior permission and approval of the competent authority and thereby the act committed by the petitioner and the other three officers had the effect of exposing the bank to heavy financial risk, during the period the bank guarantees were in operation. Even though no financial loss or liability was imposed upon the Bank on account of this act and the bank guarantees were not misused, but the act of issuing the bank guarantees beyond the financial power and without permission of the competent authority was said to be an act exhibiting lack of integrity, devotion to duty and unbecoming of a bank officer, thereby violating Regulation 3(1) of the Service Regulation. Petitioner submitted a detailed reply to the said allegations levelled in the charge-sheet, the reply of the petitioner running to more than 62 pages, explaining the circumstances, is filed as Annexure

P/12 dated 12.2.1992. It was pointed out by the petitioner that the bank guarantees were issued after obtaining sufficient backup security by way of mortgage and other collaterals, it was pointed out that the bank guarantees have not caused any financial loss, but on the contrary the bank gained by earning suitable interest and business and the Branch concerned achieved its targets, various justifications were given by the petitioner for issuing of the bank guarantees in his detailed reply running to more than 62 pages. In sum and substance, the case of the petitioner was that the bank guarantees were issued in the interest of the business and functioning of the bank after ensuring sufficient backup security, issuance of bank guarantees and other factors were within the knowledge of the higher authorities and as there was no financial loss caused to the bank and as no ulterior motive, mensrea or criminal culpability was established in the matter of issuing the bank guarantee, petitioner sought for his exoneration.

5- However, holding that the reply and explanation submitted by the petitioner and the other employees like Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey, were not satisfactory, a Departmental Inquiry was ordered and vide Annexure P/13 dated 21.3.1992 one Shri V.I. Velayudhan, Commissioner of Departmental Enquiries, Central Vigilance Commission, Government of India, New Delhi was appointed as an Inquiry Officer and one Shri Dharendra Kumar, Sub Inspector working with the Central Bureau of Investigation, was appointed as the Presenting Officer on behalf of the bank. The inquiry officer fixed the inquiry vide notice - Annexure P/14 on 24.4.1992, for consideration of petitioner's defence and his submission to the charge-sheet made on 12.2.1992, and it was held that on the said date petitioner had appeared and accepted all the charges levelled in the charge-sheet and, therefore, the inquiry was closed. The proceedings of the inquiry in this regard i.e.... the notice of the inquiry - Annexure P/13; the proceedings held on 27.4.1992 - Annexure P/14; the so-called order-sheet prepared on 27.4.1992 vide Annexure P/15; the admission of the petitioner dated 27.4.1992 was taken on record by the inquiry officer and the inquiry closed by the inquiry officer mainly on the ground that the petitioner having accepted the charges levelled against him, no further inquiry is to be held. However, after holding the inquiry to be closed, it is seen from the records that a detailed inquiry report was submitted by the Inquiry Officer and based on the report submitted, punishment of dismissal from service was imposed by the Disciplinary Authority vide Annexure P/1 on 8.10.1993. Departmental appeal and the mercy appeal

filed by the petitioner having been rejected vide Annexures P/2 and P/3, on 29.6.1994 and 24.3.1995 respectively, petitioner challenged the action before this Court by filing Writ Petition No.2724/1995 and when the matter came up for hearing after about 8 years on 3.1.2008, it was brought to the notice of this Court that in the case of the petitioner a discriminatory attitude was adopted in as much as petitioner has been dismissed from service whereas in the case of other three employees - Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey, only a punishment of censure/warning or stoppage of increment was issued and, therefore, there has been discrimination in the matter of imposing punishment. Accordingly, the matter was remanded back to the Disciplinary Authority to consider the question of imposition of punishment. On reconsideration, the claim having been rejected again vide Annexure P/27, on 29.3.2008, this writ petition has been filed.

6- Shri N.S. Ruprah, learned counsel for the petitioner, after taking me through the aforesaid documents made a four fold submission in support of his contention. His first contention was that when the charge-sheet was issued to the petitioner vide Annexure P/12, petitioner submitted a detailed reply to the charge-sheet explaining each and every circumstances with regard to issuance of the bank guarantees, eight in number - as detailed in the charge-sheet, and his explanation and justification for the same, but when the inquiry was held the inquiry authority, an officer in the Central Vigilance Commission and the presenting officer, an Inspector of the CBI, informed the petitioner that if he admits the allegations levelled in the charge-sheet, which only pertains to issuance of the bank guarantee without following the due course, he would also be dealt with leniently like the other three employees - namely Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey, and, therefore, under compulsion from the Senior Officers of the Vigilance Department and the CBI and in the absence of having any assistance from a lawyer or a defence employee, the petitioner believing the bonafide of the promise made, only admitted the charges with regard to issuance of the bank guarantees, but the inquiry officer without any further proceedings closed the inquiry on 24.4.1992 itself and it seems that a detailed inquiry report was prepared and submitted to the disciplinary authority. It is stated that the procedure followed by the inquiry officer to close the inquiry in the manner done and treating the petitioner to have admitted all the charges, has denied reasonable opportunity of defence to the petitioner and is in violation to the principles of natural justice. Accordingly, on this count it is argued that the entire action stands vitiated as

the proper procedure was not followed.

7- The second ground canvassed was that from the order passed by the disciplinary authority and the inquiry officer, it is seen that after the inquiry was closed on 24.4.1992, the inquiry officer has submitted a detailed report recording his findings on the allegations levelled against the petitioner in the charge-sheet. Not only was the report of the inquiry officer ever forwarded to the petitioner either with the show-cause notice issued or with the punishment order, but at no point of time even till date the inquiry report is not made available either to the petitioner or to this Court and the petitioner is not aware as to what is the findings recorded by the inquiry officer and what are the points considered by him and to what extent he has recorded adverse findings against the petitioner. Contending that non-supply of the inquiry report to the petitioner in the present case, even when the matter is fixed for final hearing before this Court, has resulted in a valuable right of the petitioner to challenge the inquiry finding being taken away, challenge is made to the impugned action mainly by placing reliance on the judgment of the Supreme Court in the case of *Union of India Vs. Mohammed Ramzan Khan, AIR 1991 SC 471*, and it is stated that the entire action stands vitiated as the inquiry report is not given to the petitioner and is not even produced for perusal of this Court, in this writ petition.

8- The third ground of challenge is to the effect that the entire action for imposing the punishment of dismissal from service is taken against the petitioner based on the recommendations of the CVC, Government of India, the punishment is imposed on the basis of insistence made by the Officers of the CVC without independent application of mind by the disciplinary authority. It is argued that the disciplinary authority has merely followed the dictate of the CVC and has imposed the punishment of dismissal whereas the disciplinary authority had proposed a different punishment, but due to non-concurrence on the action proposed by the disciplinary authority by the CVC, the impugned action is taken. In support of this contention Shri N.S. Ruprah, learned counsel for the petitioner, points out that after the inquiry officer gave his finding and when the entire inquiry proceedings were closed, the disciplinary authority vide Annexure P/25 indicated to the General Manager, Vigilance Department of the Bank in Calcutta and recommended that considering the fact that other co-employees namely Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey, who had also signed the bank guarantee alongwith the petitioner as Assistant Managers, have been dealt with leniently and keeping in view the

fact that the bank has not suffered any financial loss, it was stated that the extreme punishment of dismissal as recommended by the CVC would not be judicious and instead a major penalty of reduction of his basic pay to the first stage in the scale, be imposed. The disciplinary authority forwarded this recommendation to the Head Office and the Head Office was informed by the CVC, Government of India, New Delhi that the Commission sticks by its earlier advice and acceptance of the inquiry report, for imposing punishment of dismissal from service. This communication was made by the CVC to the Head Office of the Bank at Calcutta vide Annexure P/26, on 16.6.1992, and under the influence and directions of the CVC, it is stated that the disciplinary authority without application of its mind and without exercising the powers conferred upon him, imposed the punishment of dismissal from service under pressure and duress from a third agency - namely the CVC, which according to Shri N.S. Ruprah is illegal and cannot be accepted. Accordingly, on this count the challenge to the impugned action is made.

9- Finally, the last ground canvassed was that in the matter of imposition of penalty, petitioner has been discriminated whereas the other three co-employees namely Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey, have been dealt with more leniently and even though no financial loss or harm to the reputation of the Bank is caused by the action of the petitioner, ignoring the 32 years of unblemished record of the petitioner, the impugned punishment is imposed which is unsustainable. In support of the aforesaid contention, with regard to imposition of penalty and no loss being caused to the bank Shri N.S. Ruprah places reliance on the following judgments: *State Bank of India Vs. Samarendra Kishore Endow*, 1994 (2) SCC 537; *Bhagat Ram Vs. State of Himachal Pradesh and others*, 1983 (2) SCC 442; and, *Union of India Vs. K.A. Kittu*, (2001) 1 SCC 65.

10- Accordingly, it was argued by Shri N.S. Ruprah, learned counsel for the petitioner, that the petitioner has been dealt with in an arbitrary and unjust manner and now a final decision be taken by this Court either way and as the petitioner is in the death bed, it was vehemently argued by him that even if any alternate punishment is to be imposed, it be imposed by this Court in the peculiar facts and circumstances of the present case, as the petitioner may not survive to see the end result if the matter is remanded back to the Bank again for consideration after such a long period of time. Accordingly, Shri Ruprah seeks for interference into the matter.

11- Shri Manoj Sharma, learned counsel for the respondent Bank, refutes the contentions advanced by Shri N.S. Ruprah and argued that the petitioner was a Senior Manager, he was duty bound to follow the Rules and Regulations governing issuance of bank guarantee and as the same were not followed and by totally giving a go by to the set norms and procedures, the petitioner having acted in the manner done, his act is unbecoming of a Senior Bank Officer and, therefore, the decision taken by the bank does not warrant any consideration. It was argued by him that as per the norms and practice of the bank, consultation has been done with the CVC and an independent decision has been taken to impose the penalty looking to the gravity of the misconduct committed by the petitioner. It is stated that the petitioner himself having admitted the allegations levelled against him in the charge-sheet without any hesitation in the proceedings that were held on 24.4.1992, cannot now turn around and come out with a case that the action is unsustainable. It is argued that actual loss caused to the bank is of no relevance, in normal banking practice and as the petitioner has acted in a manner which is not approved for financial transaction in the banking industry, the action is proper and the same does not warrant any interference. It is submitted that in the case of three other co-employees namely Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey, they were holding inferior post and as the petitioner was a Senior Manager and a responsible officer, the impugned action is taken.

12- Placing reliance on a judgment rendered by this Court on 23.6.2011 in *Writ Petition No.5932/1998 [Hari Narayan Shrivastava Vs: The United Commercial Bank and Others]* Shri Manoj Sharma submitted that no case for interference is made out. In support of his contention with regard to the jurisdiction of this Court and the fact that no indulgence is called for, he has referred to certain judgments in paragraph 5 of his reply, which has been filed to counter the written submissions of Shri N.S. Ruprah.

13- I have heard learned counsel for the parties at length and perused the records.

14- As far as the factual assertions, as has been made by the parties are concerned, the same is not in dispute. The charge-sheet issued to the petitioner as contained in Annexure P/11 and the Article of charges therein indicate that the petitioner while functioning as Senior Manager of the Rewa Branch, in the year 1989, in active connivance with Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey is said to have signed and issued eight bank guarantees:

four of which were issued on 20.4.1989 to Shri Satya Prakash, Shri Bhaiyalal, Shri Phoolchand and Shri Siyaram; one each on 24.3.1989, 26.5.1989, 5.5.1989 and 24.6.1989 to Shri Jagdish Prasad, Shri Virendra Singh, Shri H.N. Singh and Shri Bhanupratap. It is stated that the petitioner issued and signed these bank guarantees for huge amounts ranging from ₹ 3 Lacs to ₹ 37.31 Lacs, even though these persons were not having any business dealings with the bank, by not following the laid down norms and conditions, as a result the bank had suffered in as much as the bank was exposed to financial risk. It is, however, indicated, that the bank guarantees were issued obtaining adequate back up sureties. It is stated that the bank guarantees were issued to facilitate forgery, which could have been committed by the persons to whom the bank guarantee was issued in the manner done. Petitioner denied the charges and clearly pointed out that the bank guarantees were issued after obtaining adequate sureties, the bank guarantees were signed by the petitioner and other three officers and the allegation of committing forgery or improper or illegal motive in issuing bank guarantee so also the active connivance with Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey was denied by the petitioner. Be it as it may be, when the inquiry was held, the petitioner appeared before the inquiry officer on 24.4.1992 and submitted his admission in writing before the inquiry officer and the presenting officer, an inspector in the CBI, and it seems that the inquiry officer has submitted a detailed report to the disciplinary authority with regard to the charges levelled against the petitioner, based on which the impugned action is taken.

15- As far as the question with regard to violation of the principles of natural justice and not conducting a proper departmental inquiry is concerned, it is clear that even though the inquiry was being conducted by a Senior Officer of the Central Vigilance Commission and the case of the Bank was being presented before the inquiry officer by an Inspector of the CBI, the fact remains that when the inquiry was held on 24.4.1992, the petitioner simply stated that he admitted the charges levelled against him and under these circumstances the inquiry was closed. Even though petitioner has alleged that he was made to accept the charges on the basis of use of undue influence or promise or that he was under the threat of the presenting officer of the inquiry is concerned, even after the inquiry was closed on 24.4.1992 till the impugned action is taken petitioner at no point of time complained to any of the authorities with regard to the undue influence, coercion or pressure tactics adopted by the presenting officer or the inquiry officer. Under such circumstances, the

contention of the petitioner that the inquiry was not properly conducted or that the principles of natural justice were not followed in as much as the petitioner was not given reasonable opportunity cannot be accepted. It is a case where the petitioner admitted the charges levelled against him and the inquiry was closed by the inquiry officer and there is nothing to show that in closing the inquiry, the inquiry officer has violated any of the norms, statutory or otherwise.

16- However, the **second** ground canvassed by the petitioner with regard to the report of the inquiry officer being not submitted to him and not being available even in the record of this Court till date is a matter which requires consideration. Even though the principle relied upon by Shri N.S. Ruprah in the case of *Mohammed Ramzan Khan (supra)* may not apply, but when an inquiry is conducted and when the inquiry officer records a finding of guilt against a delinquent employee and submits a report with regard to the activities or the allegations of misconduct alleged against a delinquent employee to the disciplinary authority and when the disciplinary authority takes action on the said inquiry report and imposes a punishment, even if the delinquent employee is not entitled to the inquiry report either before or at the stage of imposition of punishment, but after a final decision is taken when an employee is required to challenge the final action, he is entitled to know as to what is the finding recorded against him by the inquiry officer, what are the reasons and justification given by the inquiry officer for holding him guilty and what are the observations made by the inquiry officer against the employee and on what basis. At least for the purpose of challenging the final action and defending himself against the final action, the employee concerned is entitled to know as to what is the finding recorded against him and accepted by the disciplinary authority, and at least before a challenge can be made by the employee to the said inquiry or the action taken on the basis of that finding by the disciplinary authority, supply of the report of the inquiry officer is a requirement as per the principles of natural justice. In this regard, the principle laid down by the Supreme Court in the case of *Punjab National Bank and others Vs. K.K. Verma, (2010) 13 SCC 494*, may be taken note of. In this case after taking note of the law laid down in the case of *Mohammed Ramzan Khan (supra)* and the subsequent judgments even though it has been held by the Supreme Court that at the stage of imposing the punishment or before taking a final action even though the delinquent employee may not be entitled to the findings of the inquiry officer or the inquiry report, but the employee has a right to represent against the

findings in the inquiry report and prove his innocence and to represent against the finding in the report and denial of the report will make the final order vulnerable. In paragraph 32 of the aforesaid judgment, the following observations are made:

"32. Thus, the right to represent against the findings in the enquiry report to prove one's innocence is distinct from the right to represent against the proposed penalty. It is only the second right to represent against the proposed penalty which is taken away by the 42nd Amendment. The right to represent against the findings in the report is not disturbed in any way. Infact, any denial thereof will make the final order vulnerable."

(Emphasis supplied)

And, it is held finally that by not giving the inquiry report, the respondent is denied an opportunity to represent against the finding and this is a vital breach of the principles of natural justice.

17- In the present case also, this breach has occurred. The breach in the present case has to be viewed very seriously in view of the facts that are available on record. When the charge-sheet is issued to the petitioner, as indicated hereinabove, the charges consisted of three parts. The first part pertained to issuance of bank guarantee signed by the petitioner and the other three employees and it is alleged that in doing so, the petitioner has been in connivance with the other three employees. The second part is that in issuing the bank guarantees petitioner did not follow the normal procedure, did not get approval of the competent authority and, therefore, exposed the bank to financial risk. The third part of the charge-sheet is that the aforesaid acts of the petitioner amounts to lack of integrity, devotion to duty and is said to have been an act of forgery with some of the persons to whom the guarantee is issued. Petitioner submitted a detailed reply to the charge-sheet running to more than 62 pages and in that he clearly pointed out that the bank guarantee was issued in the interest of business for the bank, substantial interest was earned on the amount and adequate back up security was also obtained which protected the financial risk of the bank. He denied the allegations of forgery, lack of integrity and connivance with the three other employees. When the petitioner appeared before the inquiry officer, he admitted the charges and his admission has to be considered alongwith the explanation to the charge-sheet. It seems that the admission was accepted in its toto and the explanation in

reply to the charge-sheet was not at all taken note of. However, the findings of the inquiry officer was never supplied to the petitioner and even before this Court the finding of the inquiry officer is not produced and even this Court does not know as to what is recorded by the inquiry officer in the findings recorded against the petitioner. In the orders passed by the disciplinary authority and the appellate authority, it is repeatedly held that the charges are proved and the authorities accepted the report of the inquiry officer submitted in the matter; and, the punishment is imposed in the light of the findings recorded by the inquiry officer. That being so, the findings of the inquiry officer and the reasons given by the inquiry officer for holding the petitioner guilty becomes relevant, particularly with regard to the allegations of forgery, connivance with other employees and the question of lack of integrity. If the inquiry officer has held the petitioner guilty of these three aspects of the matter, then the evidence and material on the basis of which the finding is recorded should be made available to the petitioner because what is admitted by the petitioner in his reply to the charge-sheet is the fact of issuing the bank guarantee without following due procedure, but he categorically denies the allegations of connivance with the employees, lack of integrity, forgery etc. Under such circumstances, the findings of the inquiry officer becomes relevant and when the findings are not supplied to the petitioner, it can be deemed to have caused prejudice to the petitioner in as much as he is handicapped in challenging the inquiry report and its finding, which is accepted by the disciplinary authority and the appellate authority and, therefore, on this count there is breach of the principles of natural justice and the impugned action becomes vulnerable to be held unsustainable, as observed by the Supreme Court.

18- Even this Court is handicapped in appreciating the findings recorded by the inquiry officer and its acceptance by the disciplinary authority with regard to various allegations levelled against the petitioner. Accordingly, there is much force in the contentions advanced by Shri Ruprah to the extent that non-supply of report of the inquiry officer has resulted in denial of reasonable opportunity of representing against the finding to the petitioner.

19- As far as the third ground with regard to the CVC influencing the imposition of penalty is concerned, this ground has much force. If the facts and circumstances of the present case are evaluated in its totality, it would be seen that the four employees working in the bank i.e... the petitioner and Shri R.K. Tiwari, Shri N.K. Gopal and Shri H.D. Pandey, are alleged to have issued the bank guarantee without following the laid down norms beyond the

financial powers and without obtaining the prior permission of the competent authority thereby exposing the bank to heavy financial risk. Departmental inquiry is conducted against all the four persons, petitioner is dismissed from service whereas in the case of other three employees different punishments are imposed. Shri R.K. Tiwari is imposed with a minor penalty of 'withholding one increment without cumulative effect'; and Shri N.K. Gopal and Shri H.D. Pandey are only 'censured' as is evident from Annexures P/16, P/17 and P/18. Petitioner is only inflicted with the extreme punishment of dismissal from service. From the documents that have come on record in this case, it transpires that when the enquiry officer's report was submitted, the disciplinary authority had proposed some punishment to be imposed on the petitioner and the disciplinary authority was in communication with the Head Officer of the Bank at Calcutta. The General Manager (Vigilance) of the Bank from Calcutta vide Annexure P/24 dated 16.9.1992 informed the Zonal Manager, the disciplinary authority at Bhopal and referred to some communication made by the disciplinary authority and informed the disciplinary authority that the CVC has recommended imposition of penalty of dismissal from service, which should be passed without any further delay. It is, therefore, clear that the disciplinary authority before imposing the punishment referred the matter to the Head Office of the Bank at Calcutta, the Head Officer took the opinion and advice of the CVC, which recommended for imposing the punishment of dismissal from service. When communication was made by the Zonal Office to the disciplinary authority, the disciplinary authority vide Annexure P/25 on 26.12.1992/4.1.1993, made a detailed communication again to the General Manager of the Vigilance Department in the Head Office of the Bank at Calcutta, disagreeing with the proposal made by the CVC and made the following observations in the said letter:

"The Chief allegation against Shri Seth was/is that while functioning as Senior Manager of Rewa Branch, he unauthorizedly had issued eight Bank Guarantees, without adhering to Bank's relative norms and procedures and resultantly Bank remained exposed to corresponding financial risks, during the period when the said guarantees were in force. As the charge sheet also conveys, the concerned guarantees were timely cancelled and Bank on their account had not to suffer any loss. The allegation that the Bank remain exposed to financial loss during the currency of guarantees, therefore,

much relates to an apprehension rather than a fact. The record reveal that no such loss, however, was caused to the Bank.

Further, being a Disciplinary Authority, it has got to be kept in view that in the matter of disciplinary action taken against S/ Shri H.D. Pandey and N.K. Gopal, who had also signed the concerned guarantees (alongwith Shri Seth) in their capacity as Assistant Manager(s) of the branch, this office, keeping the fact that no loss to the Bank on this score was caused, had taken a very lenient view and had not imposed any punishment on them. The copies of the concerned Final Orders were sent to you alongwith our letter MPZO/VIG/HO/92/170 dated 20th September, 1992. While deciding the quantum/nature of punishment, we feel that decided cases at least having relation with The charges could certainly be grave, if the acts of Shri Seth could have put the Bank to financial loss(es) and in that eventuality there could be no reason to treat the punishment of dismissal as harsh, disproportionate or inappropriate.

In view of the above, being Disciplinary Authority over Shri Seth, we strongly feel that the punishment as suggested by CVC would not be Judicious and imposition of major penalty of reduction of his basic pay to the first stage of Scale-III (his present basic is Rs.4,910/-) would be much commensurate to the gravity of the charges made against him."

(Emphasis supplied)

20- It is, therefore, clear from this that the disciplinary authority was of the opinion that no loss was caused to the Bank, the action taken against the other employees was referred to and it was found that punishment of dismissal would be 'too harsh, dis-proportionate and inappropriate'. Accordingly, the disciplinary authority was of the view that the major penalty of 'reduction of basic pay to the first stage of Scale' be imposed, which would be commensurate to the gravity of the charges levelled against the employee. When this communication was made to the Head Office of the Bank, it was further communicated to the CVC and the CVC vide Annexure P/26 communicated to the Bank that the petitioner should be dismissed from service. It is, therefore, clear that the decision to impose the extreme penalty of dismissal from service

was arrived at by the disciplinary authority not on its own accord, but on the basis of the consistent insistence, recommendations and dictate made by the CVC. The question of imposing the punishment of dismissal was influenced by the recommendations of the CVC and it is a case where the disciplinary authority has not acted independently in the matter of imposing punishment, but was carried away by the dictate of the CVC in the matter of imposing the punishment.

21- At this stage it would be appropriate to take note of certain legal principles in this regard. It is well settled principle of service jurisprudence that in the matter of conducting disciplinary inquiry and for imposing the punishment, once a disciplinary authority is appointed in accordance to the statutory provision or otherwise, the disciplinary authority has to apply its independent mind and record a finding on its own, he may consider the opinion of recommendations made by certain authorities, but the final decision has to be that of the disciplinary authority, which should show independent application of mind by the disciplinary authority. If the facts and circumstances of the case indicate that the decision of the disciplinary authority is influenced by any third authority like the advice or recommendation made by the CVC then the final decision of the disciplinary authority stands vitiated. Even though mere consultation with the CVC may not be an evidence enough to show non-application of mind, but if the records indicate that the disciplinary authority's decision was in fact influenced by the advice and recommendations of the CVC, the entire action stands vitiated. In this regard the Gujarat High Court in the case of *A.K. Roy Choudhry Vs. Union of India and others*, 1982 (I) SLR 443, has considered similar question and it has been held that if the mind of the disciplinary authority is shown to be influenced by the CVC, rules of natural justice are violated.

22- Similarly, in the case of *V. Sai Baba Vs. The Bank of Baroda and others*, 1994 (6) SLR 240, the Andhra Pradesh High Court has considered similar questions and places reliance on an earlier decision of the Supreme Court in the case of *Nagaraj Siva Rao Kharjagi Vs. Syndicate Bank*, 1991 (2) SLR 784. In the said case of *V. Sai Baba (supra)*, one of the submissions made was that the disciplinary authority consulted the CVC before taking a decision in the matter and the decision of the disciplinary authority to impose the punishment stands vitiated as it is not arrived at independently on application of mind by the disciplinary authority, but he has been guided by and influenced by the advice tendered by the CVC, who is a Senior Officer and General

Manager of the Bank. This submission made was considered in the light of the law laid down by the Supreme Court in the case of *Nagaraj Siva Rao Kharjagi (supra)* and it was held that proceedings before the disciplinary authority are quasi judicial in nature and being so it is unrestricted. Even though the Regulations of the Bank contemplate a provision for consultation with the CVC and the Finance Ministry had issued instructions making it obligatory on the part of the bank to consult the CVC in disciplinary matters, it is held that the Supreme Court has struck down such an instruction as being made without jurisdiction and with regard to the Regulation it was observed by the Supreme Court that when proceedings are held before a disciplinary authority and when they are quasi judicial in nature even though some advice may be tendered by the CVO, it is only advisory in nature and is not binding on the Bank. It was held that if the order passed by the disciplinary authority is found to be influenced by the advice tendered by the CVO and the disciplinary authority was fettered by the advice tendered by the CVO, it was held to be illegal. It is observed in this judgment that once the disciplinary inquiry commences, it assumes a quasi judicial character and it should be proceeded with, uninfluenced by any other authority and the disciplinary authority should be left free to come to its own conclusion without there being any advice by any other authority. It was held by the Andhra Pradesh High Court in the said judgment that the consultation with the CVO contemplated in the Regulations refers to a stage prior to the commencement of the proceedings, but once the proceedings are commenced till they are concluded the quasi judicial nature has to be undertaken independently by the disciplinary authority and it cannot be influenced by any other advice.

23- In the case of *UP State Agro Industrial Corporation Limited Vs. Padam Chand Jain*, 1995 Supp (2) SCC 655, the advice tendered by an Accounts Officer, which influenced the disciplinary authority to impose the punishment was held to be illegal. Similarly, in the case of *Sunil Kumar Banerjee Vs. State of West Bengal and others*, AIR 1980 SC 1170, the question of disciplinary authority arriving at a conclusion based on consultation with the Vigilance Commissioner was taken note of. Even though in that case the question involved was as to whether the delinquent employee was entitled to certain recommendations by the Vigilance Commissioner, which was relied upon by the inquiry officer, while considering the said question the following observations were made by the Supreme Court:

"..... We think that if the disciplinary authority arrived at its

own conclusion on the material available to it, its findings and decision cannot be said to be tainted with any illegality merely because the disciplinary authority consulted the Vigilance Commissioner and obtained his views on the very same material."

this clearly indicates that if the disciplinary authority takes a decision on its own conclusion, on the material available with him and if his decision is not influenced by the advice of the CVC, there is no illegality. But, if the consultation with the CVC has influenced the decision, the inevitable conclusion would be that the punishment imposed is vitiated.

24- If the case in hand and the facts available on record are analysed in the backdrop of the aforesaid settled principle, it would be clear that in this case clearly the records indicate that the final decision to impose the punishment of dismissal was influenced by the recommendations of the CVC. The communication - Annexure P/25 issued by the disciplinary authority in this regard and the observations made by it, as reproduced hereinabove, clearly shows that the disciplinary authority was of the opinion that the major penalty of reduction of basic pay to the first stage of the Scale should be imposed, inspite thereof because of insistence of the CVC and the Head Office the disciplinary authority acted in the manner as impugned in this writ petition. It is, therefore, a case where in a departmental inquiry i.e... a quasi judicial proceeding, the decision of the disciplinary authority is found to be influenced by the advice tendered by the CVC and as the decision to impose the extreme punishment of dismissal from service is not arrived at independently by the disciplinary authority by application of its independent mind, the same stands vitiated and, therefore, the **third** ground canvassed by Shri N.S. Ruprah has to be accepted.

25- As far as the **fourth** ground of discrimination and no loss to the bank and consideration of these aspects by the bank and the authorities are concerned, the decision of the disciplinary authority itself, which is communicated to the Head Office of the Bank vide Annexure P/25, does indicate that parity has to be maintained in the matter of imposing punishment between the petitioner and other three employees and it was for these reasons that the disciplinary authority recommended and proposed a particular punishment of reduction in the basic pay. It is, therefore, a case where the imposition of the punishment of dismissal from service cannot be upheld and

it is a case where the matter has to be reconsidered.

26- In the light of the aforesaid findings recorded, it has to be held that in this case even though the inquiry is held to be conducted after following the procedure which is not in violation to the principles of natural justice, but the act of the disciplinary authority in not forwarding to the petitioner a copy of the inquiry report and even not filing the inquiry report in these proceedings before this Court makes the proceeding illegal. It is, therefore, a case where the matter should have been remanded back to the disciplinary authority for proceeding from the stage of issuance of inquiry report and thereafter to take a fresh decision in the matter. Similarly, when the imposition of punishment is also found to be influenced by the advice tendered by the CVC and when it is found to be vitiated due to discrimination, the question of imposition of punishment is also to be reconsidered by the disciplinary authority. The question now would be as to whether on these counts the matter should be remanded back to the disciplinary authority or a decision should be taken by this Court in the peculiar facts and circumstances of this case.

27- Even though the normal rule is to remand the matter back to the disciplinary authority, but in the present case certain peculiar situations are to be taken note and they are:

- (a) Petitioner is about 71 years of age and he is suffering from cancer (brain tumour), which is in the terminal stage and, therefore, if relief is not granted to the petitioner immediately, he may not survive to see as to what final orders are passed in the proceedings.
- (b) Matter is pending since the year 1993. In the first round of litigation which was held before this Court from 1993 upto 2008 i.e..... for 13 years, the matter was remanded back to the disciplinary authority and the appellate authority, and the appellate authority again rejected the matter without considering it properly.

Therefore, now in the totality of the facts and circumstances of the case, I am of the considered view that it is not a fit case where the matter should be remanded back to the disciplinary authority or the appellate authority and taking note of the facts of the case it is a fit case where appropriate orders should be passed by this Court.

28- Admittedly, the petitioner is found guilty of having by-passed the normal rules and procedure for issuing the bank guarantee and it infact exposed the bank to huge financial risk, even though no financial loss was caused to the Bank.

29- The question with regard to exonerating the petitioner completely on the basis of the grounds found to be established or the question as to whether some punishment is to be imposed upon the petitioner has to be considered taking note of the totality of the charges levelled against the petitioner and the allegations made therein. As is evident from the charge-sheet, the allegations against the petitioner is with regard to issuing eight bank guarantees without following the norms and procedure laid down for the same and insubordination to the directives of the superior authority. Apart from the aforesaid, there are allegations of lack of integrity, forgery and act unbecoming of an employee. Petitioner himself admits that he had issued the bank guarantees and while doing so, it is also a fact that the norms and procedure laid down has not been followed. Even though the allegations of forgery and question of integrity cannot be said to be established, but petitioner is a Senior Manager in the Bank and has acted in violation to the laid down norms and procedure and this is an act of misconduct, for which some punishment should be imposed.

30- That being so, I am of the considered view that the petitioner cannot be completely exonerated and let off for his act of breach of norms, rules and regulations, which did put the bank to certain amount of risk and some punishment should be imposed upon the petitioner. In the case of other three employees, punishment of censure and stoppage of increment is imposed. They are Junior Officers working under the supervision and control of the petitioner. Petitioner was a Senior Manager and has to share the major responsibility for the entire act. It was taking note of all these circumstances that the disciplinary authority made a proposal as is indicated in Annexure P/ 25. Accordingly, I am of the considered view that the petitioner cannot be completely exonerated of all the charges, instead for the act of proceeding to issue the bank guarantees without following the norms and procedure and without sanction of the competent authority, some punishment has to be imposed upon the petitioner. Based on these factors, the disciplinary authority had made up its mind and as is evident from Annexure P/25, it proposed imposition of punishment of reduction of basic pay to the first stage of Scale III. In the considered view of this Court, this proposal of the disciplinary authority should have been accepted and this was the punishment which should

have been imposed upon the petitioner as it was the disciplinary authority which was the best judge to take a final decision in the matter.

31- Keeping in view the aforesaid, this petition is allowed. Orders impugned namely - Annexures P/1, P/2, P/3 and P/27 are quashed and the punishment proposed by the disciplinary authority as indicated in Annexure P/25 is directed to be imposed upon the petitioner and after imposition of the aforesaid punishment, respondent Bank is directed to treat the petitioner to have retired on attaining the age of superannuation and settle all his pensionary claims after granting him arrears of pay, pension and all other post-retiral benefits after imposing the punishment as indicated in Annexure P/25.

32- Considering the physical condition of the petitioner, the Bank is directed to comply with the aforesaid directions within a period of 30 days from the receipt of certified copy of this order.

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

Petition allowed.

I.L.R. [2012] M.P., 1852

WRIT PETITION

Before Mr. Justice N.K. Mody

W.P. No. 8527/2011 (Indore) decided on 7 March, 2012

SANTOSH KUMAR CHOPRA & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

Suit Valuation Act (7 of 1887), Section 8, Court Fees Act (7 of 1870), Section 7(IV)(C) - Court Fees - Suit for declaration of gift deed to be void - Plaintiff is not party to the document as it does not bear the thumb impression of plaintiff - No error in holding (by trial Court) that no ad valorem Court fee is required - Plaintiff is not required to value the suit as per valuation of the document - Petition dismissed. (Paras 7 & 8)

वाद मूल्यांकन अधिनियम (1887 का 7), धारा 8, न्यायालय फीस अधिनियम (1870 का 7), धारा 7 (IV)(C) - न्यायालय फीस - दान विलेख को शून्य घोषित किए जाने के लिए वाद - वादी दस्तावेज का पक्षकार नहीं है क्योंकि उस पर वादी के अंगुठे का निशान नहीं है - विचारण न्यायालय द्वारा यह धारणा करने में कोई त्रुटि नहीं की गई कि मूल्यानुसार न्यायालय फीस की आवश्यकता नहीं - वादी को

दस्तावेज के मूल्यांकन के अनुसार वाद का मूल्यांकन करना आवश्यक नहीं -
याचिका खारिज।

Cases referred :

2011(3) MPLJ 184, 2010(1) MPJR 8, 2010 (III) MPJR (FB) 412,
AIR 2010 SC-2807.

A.K. Sethi with Harish Joshi, for the petitioners.

Lokesh Bhatnagar, for the respondent No.1.

Bhuvan Deshmukh, G.A. for the respondent No.2/State.

ORDER

N.K. Mody, J. - Being aggrieved by the order dated 17/10/2011 passed by III Civil Judge class-II, Neemuch in civil suit No.134-A/11 whereby the application filed by the petitioners under Order VII Rule 11 CPC with a prayer that suit be dismissed, was dismissed, the present petition has been filed.

2. Short facts of the case are that respondent No.2 filed a suit against the petitioners on 16/8/2011 wherein it was prayed that gift deed dated 26/12/09 alleged to have been executed by respondent No.2 in favour of petitioner No.1 be declared as void. In the suit it was alleged that by the said gift deed, the agricultural land has been given by respondent No.2 to the petitioner No.1. It was alleged that respondent No.2 has never executed the gift deed. It was alleged that gift deed does not bear the thumb impression of respondent No.2. In the suit it was alleged that suit is valued as Rs.1500/- for the purpose of declaration and Rs.500/- for the purpose of injunction and fix court fee of Rs.600/- was paid. After the notice, at the initial stage an application was filed by the petitioners under Order VII Rule 11 CPC wherein it was alleged that since gift deed is of a sum of Rs.8 Lacs, therefore valuation made by respondent No.2 is not in accordance with the provisions of Suits Valuation Act. It was also alleged that since respondent No.2 is party to the document, therefore respondent No.2 be directed to correct the valuation and pay the advalorem court fee. After hearing the parties learned court below dismissed the application, against which the present petition has been filed.

3. Learned counsel for petitioners submits that impugned order is illegal and deserves to be set aside. It is submitted that learned court below while passing the impugned order, has not at all applied its mind. It is submitted that

undisputedly gift deed alleged to have been executed by respondent NO.2 is valued as Rs.8 Lacs, therefore there was no justification on the part of respondent No.2 to value the suit as Rs.1000/- only. It is submitted that suit is under valued which is affecting the jurisdiction as well. It is submitted that inspite of specific allegation made in the application, learned court below while dismissing the application has not considered this aspect of the case. So far as court fee is concerned, learned counsel submits that even if it is alleged that document was not executed by the party concerned, then too, since respondent No.2 is party to the document therefore ad valorem court fee ought to have been paid. It is submitted that since valuation is required to be made for the purpose of jurisdiction and court fee, therefore valuation ought to have been Rs.8 Lacs and advalorem court fee ought to have been paid. For this contention, reliance is placed on a decision in the matter of *Ambika Prasad Vs. Shri Ram Shiromani*, 2011(3) MPLJ 184 wherein in a case where suit is for declaration of the sale deed by plaintiff No.1 as void alleging that it was executed by playing fraud and misrepresentation, Divisional Bench of this Court has held that relief claimed implies a relief for cancellation of sale deed, hence plaintiffs have to pay ad valorem Court fee on the consideration stated in the sale deed. It is submitted that petition be allowed and impugned order be set aside.

4. Learned counsel for respondent No.2 submits that application is nothing but delaying tactics to avoid the written statement. It is submitted that since allegation of respondent NO.2 in the plaint is that alleged gift deed does not bear the signatures/thumb impression of respondent No.2, therefore by no stretch of imagination it can be said that respondent NO.2 was party to the document. It is submitted that since document is void, therefore fix court fee is enough. It is submitted that petition has no merits and same be dismissed.

5. In the plaint respondent has challenged the validity of the gift deed dated 26/12/09. Pleadings in this regard is stated in Para 11 & 15, which reads as under:-

11. यह कि वादी द्वारा प्रतिवादी कमांक 01 संतोष में पक्ष के कोई भी दान पत्र नहीं लिखा गया है और न ही उस पर हस्ताक्षर किये गये हैं। वादी की वादग्रस्त भूमि को हड़पने के लिए प्रतिवादी कमांक 01 से 03 द्वारा फर्जी दस्तावेज तैयार किया गया है जिस पर न तो वादी ने हस्ताक्षर किए और न ही उस पर अंगूठा लगाया। इस पर प्रतिवादी कमांक 01 से 03 ने मिलकर अलग-अलग प्रकार के फर्जी हस्ताक्षर बनाये हैं जो कि प्रथम दृष्टया मूल वसीयत पत्र से मिलान करने पर भी अलग हैं।

15. यह कि प्रतिवादी कमांक 01 से 03 द्वारा जो दान पत्र दिनांक 26.12.09 को फर्जी तैयार किया गया है ऐसी स्थिति में उसे वादी के मुकाबले शून्य घोषित करवाया जाकर वादी का वादग्रस्त भूमि पर स्वत्व घोषित करवाया जाना आवश्यक होने से यह वाद प्रस्तुत किया जाना आवश्यक हुआ है। चूंकि यह प्रतिवादीगण वादग्रस्त भूमि को प्लाट में काटकर विक्रय करना चाहते हैं तथा अन्य को कब्जा भी देना चाहते हैं ऐसी स्थिति में उन्हें उनके इस अवैध कृत्य से भी रोका जाना आवश्यक होने से स्थायी निषेधाज्ञा हेतु भी वाद प्रस्तुत किया जाना आवश्यक हुआ है।

6. In the matter of *Manzoor Ahmed Vs. Jaggi Bai, 2010(I) MPJR 8* Divisional Bench of this Court has held that the main question for consideration is whether ad valorem Court fees is required to be paid. Document is shown to be void not voidable. Plaintiff has averred that she was never told about the sale deed which has been obtained by playing fraud. She never intended to execute the sale deed, she wanted to obtain the loan and taking the advantage of her advanced age and disability, sale deed was obtained. No consideration was paid. The averments made in the plaint indicate that document is shown to be void not voidable. There is difference in incident of payment of Court fees in case document is voidable at the instance of executant ad valorem Court fees is required to be paid, not in the case of void document in such cases injunction which has been prayed flows from the relief of declaration. In the matter of *Sunil Radhelia Vs. Awadh Narayan, 2010(III) MPJR (FB) 412* wherein in the relief clause, the plaintiff sought a declaration that he be declared to be entitled to receive an amount of Rs.14,80,000/- as the detained salary from the defendant No.1. He also claimed a relief that the agreement dated 26/06/2000, which was executed for an amount of Rs.3,45,000/- be declared as null and void, Full Bench of this Court has held that to sum up, the questions referred to this Court are answered thus: (1) Ad valorem Court-fee is not payable when the plaintiff makes an allegation that the instrument is void and hence not binding upon him. (2) The decision rendered in *Narayan Singh (Supra)* lays down the law correctly that the plaintiff a party to the instrument is not required to pay ad valorem court-fee as he had made an allegation that the instrument was void on the ground that the document was forged one and it does not bear the signature of the executant. In the matter of *Suhrid Singh @ Sardool Singh Vs. Randhir Singh, AIR 2010 SC 2807* in a suit for declaration that sale deed executed by plaintiff's father is null and void and for joint possession, Hon'ble Apex Court held that it is not a suit for cancellation of sale deed, hence Court-fee need not be paid on sale consideration mentioned in sale deeds.

7. From perusal of the record it is evident that the case of the respondent

No.2 is that he is not the executent of the gift deed dated 26/12/09. Further case of respondent No.2 is that the petitioners have prepared a forged document, which does not bear his thumb impression. In the matter of *Ambika Prasad (Supra)* the plaintiff was executent of the document and the case of the plaintiff was that the document was got executed by playing fraud and misrepresentation, therefore, this case has no application in the present case. In the matter of *Manzoor Ahmed (Supra)* also the case of the plaintiff was that she never intended to executed the sale deed, she wanted to obtain loan and taking the advantage of her advance age and disability sale deed was obtained and in the circumstances the Divisional Bench of this Court has held that void document does not require payment of ad valorem Court fee.

8. Keeping in view the principle laid down by the Full Bench of this Court in the matter of *Sunil Radhelia (Supra)* and also keeping in view the facts stated in the plaint wherein it is alleged that the respondent No.1 is not party to the document, as it does not bear the thumb impression of respondent No.1, this Court is of the view that the learned Court below committed no error in holding that no ad valorem Court fee is required. Since the respondent No.1 is not party to the document as alleged, therefore, also respondent No.1 is not required to value the suit as per valuation of the document. Hence, petition filed by the petitioner has no merits and the same stands dismissed.

No order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 1856

WRIT PETITION

Before Mr. Justice N.K. Mody

W.P. No. 3180/2012(S) (Indore) decided on 16 April, 2012

NARENDRA SINGH UMATH

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Compassionate appointment - Policy/circular which was in existence on date of death of the employee, shall be considered for the purpose.
(Para 6)

सेवा विधि - अनुकंपा नियुक्ति - इस प्रयोजन हेतु उस नीति/परिपत्र को विचार में लिया जायेगा जो कर्मचारी की मृत्यु की तिथि को अस्तित्व में था।

Cases referred :

1999 (II) MPLSR 228, 1994 SCC (1) 437.

M.L. Sharma, for the petitioner.

Mukesh Parwal, G.A. for the respondents/State.

ORDER

N.K. Mody, J. - Prayer in the petition is to allow the petition and to quash order dated 15/02/2008 (Annexure P/1) passed by respondent No.1 whereby the application filed by the petitioner for compassionate appointment was rejected and to direct respondents to appoint the petitioner on compassionate ground. Learned counsel for the petitioner submits that Hardayal Singh was the father of the petitioner and was working as Assistant teacher who died on 13/02/1998 when the petitioner was minor. It is submitted that after attaining majority the petitioner moved an application on 10/12/2007 for compassionate appointment which was dismissed vide Annexure P/1 on the ground that as per clause 7.1 of the circular after attaining majority the application filed by the petitioner is barred by time. It is submitted that impugned order Annexure P/1 deserves to be set aside. Learned counsel submits that on 13/02/1998 petitioner was of 9 years and 7 months of age. It is submitted that after attaining the age immediately the application was filed, therefore, it should not have rejected on the ground that the application is barred by time. It is submitted that petition be allowed and Annexure P/1 be quashed.

2. Learned counsel for the respondents submits that as per clause 7.1 of the Circular dated 22/01/2007, the application can be filed by a person who is dependent on the deceased if he has become major within a period of seven years from the date of death. Learned counsel submits that since the petitioner attains the age of majority on 4/07/2006 which is after 7 years of the death of Hardayal Singh, therefore, the application has rightly been dismissed. It is submitted that petition be dismissed.

3. Undisputedly Hardayal Singh died on 13/02/1998 and the date of birth of the petitioner is 4/07/1988. At the time of death of Hardayal Singh, the age of the petitioner Narendra Singh was 9 years and 7 months. The application is filed on 10/12/2007 and the circular which is placed on record is dated 22/01/2007 while circular for compassionate appointment ought to have been taken into consideration which was in force at the time of death of Hardayal

which is dated 10/6/1994. Clause 7.1 of the Circular dated reads as under:-

7-1 यदि दिवंगत शासकिय सेवक के परिवार में कोई पात्र वयस्क सदस्य की मृत्यु दिनांक से 7 वर्ष तक की अवधि में वयस्क होने पर अनुकंपा नियुक्ति दी जा सकेगी। इसके पश्चात् यदि वह वयस्क होता है तो अनुकंपा नियुक्ति की पात्रता नहीं होगी।

4. While clause 5 of Circular dated 10/06/1994 which was in force at the time of death of Hardayal Singh reads as under:

यदि किसी शासकीय सेवक की मृत्यु के समय उसके परिवार का सदस्य अवयस्क हो तो ऐसे अवयस्क सदस्य को अनुकम्पा नियुक्ति की पात्रता उसके वयस्क होने पर होगी और उसके आवेदन करने पर अनुकम्पा नियुक्ति दी जा सकेगी।

5. In the matter of *Ashok Kumar v/s Union of India* [1999 (II)MPLSR 228] in which father of the applicant died in 1988 and new policy was introduced in the year 1990. Division bench of Central Administrative Tribunal Bench at Jabalpur has directed to consider the age of compassionate appointment as per policy which was in existence at the relevant time. In the matter of *Govind Prasad v/s R.G.Parsad* [1994 SCC (1) 437] wherein Hon'ble Apex Court has held that the executive order of the Government cannot be made operative with retrospective effect..

6. Keeping in view the aforesaid position of law, this court is of the view that order Annexure P/1 cannot be allowed to sustain. Hence, petition filed by the petitioner is allowed and Annexure P/1 is quashed with a direction to the petitioner to file fresh application narrating full facts about the status of each member of the family of the petitioner and also the amount of family pension received on account of death of Hardayal Singh. If such application is filed supported with documents and the relevant case law then after affording an opportunity of hearing, the respondent No.1 shall decide the application afresh keeping in view the policy which was in existence at the time of death of Hardayal Singh. Needful be done within a period of three months from the date of receipt of the application.

7. With the aforesaid the petition stands disposed of.

No order as to costs.

Petition disposed of.

I.L.R. [2012] M.P., 1859

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 8055/2011 (Gwalior) decided on 9 May, 2012

MUNNA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 170A, 170B - Land belonging to Aboriginal Tribe - Patta was granted to a member of aboriginal tribe which was cancelled and then it was allotted to Petitioner - Provisions of Section 170B can not be invoked to cancel patta.
(Para 10)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170ए, 170बी - भूमि आदिवासी जनजाति की है - आदिवासी जनजाति के सदस्य को पट्टा प्रदान किया गया, जो निरस्त किया गया और तब यह याची को आवंटित किया गया - पट्टा को निरस्त करने के लिए धारा 170बी के उपबंधों का अवलंब नहीं लिया जा सकता।

B. Land Revenue Code, M.P. (20 of 1959), Section 170B - Cancellation of Patta - Cancellation of patta on the ground that it was land obtained under Bhudan - No reason or provision is shown which prohibits grant of such land on patta - As cancellation of patta has an adverse impact, therefore, reasons should have been disclosed for the same.
(Para 12)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 170बी - पट्टा का निरस्तीकरण - पट्टा का निरस्तीकरण इस आधार पर कि भूमि भूदान के अंतर्गत प्राप्त की गई - कोई कारण या उपबंध नहीं जो यह दर्शाते हों कि उक्त भूमि को पट्टा मंजूर करने में कौन प्रतिषेध करते हैं - चूंकि पट्टे के निरस्तीकरण से प्रतिकूल संघात पड़ता है, इसलिए उक्त के कारण दर्शित किए जाने चाहिए।

Case referred :

(2010) 9 SCC 496.

Yogesh Singhal, D.S. Chouhan & Ami Prabal for the petitioner.
P.S. Raghuvanshi, P.L. for the respondent/State.

ORDER

SUJOY PAUL, J. - Learned counsel for the parties submit that the matters are identical in nature. Accordingly, with the consent of parties, matters are analogously heard and decided by this common order.

2. The facts are taken from Writ Petition No. 8055/2011 (Munna Vs. State of M.P. and others).
3. The land survey no. 540540/1 area 0.836 hectare is situated at village Bhagwaj, District Sheopur. This land was earlier allotted to a tribal person namely Fudya, resident of said village. However, the patta of said land was cancelled by the S.D.O. Sheopur in Case No.24/94-95/A-86 vide order dated 22.12.1995 and 16.8.1994. The order is placed on record as Annexure P/3.
4. After cancellation of patta the land became Government land and thereafter in Case No. 06/96-97/A-99 the land was settled by granting patta in favour of the petitioner. Thereafter the petitioner is cultivating the land on the basis of said patta. Accordingly, the petitioner's name is recorded in revenue record as "Government Patta Holder". The revenue entries are marked as Annexure P/4.
5. The Sub-Divisional Officer issued a notice dated 26.10.2010 to the petitioner by invoking sections 170-A and 170-B of M.P.Land Revenue Code (MPLRC). Petitioner submitted his reply in the said suo motu proceedings initiated by the Sub-Divisional Officer. Thereafter by order dated 28.2.2011 (Annexure P/2) the allotment of the petitioner was cancelled by S.D.O. The petitioner preferred an appeal before the Collector, which was registered as Case No. 15/2010-11/Appeal Revenue, which was decided by him on 8.11.2011 (Annexure P/1). The Collector also rejected the appeal of the petitioner.
6. Shri Yogesh Singhal, learned counsel for the petitioner submits that patta in favour of the petitioner was not granted on cancellation or transfer of patta from a tribal person. He submits that patta of a tribal person was cancelled, the land became a Government land and then after following due process, of law, patta was granted in his favour. He submit that section 170-A and 170-B have no application in the facts and circumstances of the case. He further submits that another reason assigned for cancellation of land in the impugned order is that after 1992 'Bhu Dan Board' was abolished and the land with regard to 'Bhu Dan' should not have been given on patta to the

petitioner. Shri Singhal submits that this was not the reason assigned in the show cause notice nor any provision is quoted, on the strength of which such a conclusion is arrived at by the S.D.O. He further submits that even this reason does not fall within the ambit of sections 170-A and B of the MPLRC.

7. Per Contra, Shri P.S. Raghuvanshi, learned Panel Lawyer supported the order passed by the authorities.

8. I have bestowed my anxious consideration on the rival contentions of the parties.

9. For ready perusal, sections 170-A and 170-B of MPLRC are reproduced as under:

"170-A. Certain transfers to be set aside.-- (1)
Notwithstanding anything contained in the Limitation Act, 1963 (No. 36 of 1963), the Sub-Divisional Officer may, on his own motion or on an application, made by a transferer of agricultural land belonging to a tribe which has been declared to be an aboriginal tribe under subsection (6) of Section 165 on or before the 31st December, 1978, enquire into a transfer effected by way of sale, or in pursuance of a decree of a court of such land to a person not belonging to such tribe or transfer effected by way of accrual of right of occupancy tenant under Section 169 or of bhumiswami under-section (2-A) of Section 190 at any time during the period commencing on the 2nd October, 1959 and ending on the date of commencement of the Madhya Pradesh Land Revenue Code (Third Amendment) Act, 1976 to satisfy himself as to the bona fide nature of such transfer.

(2) If the Sub-Divisional Officer on an enquiry and after giving a reasonable opportunity to the persons owning any interest in such land, is satisfied that such transfer was not bona fide, he may notwithstanding anything contained in this Code or any other enactment for the time being in force,-

[(a) subject to the provisions of clause (b), set aside such transfer if made by a holder belonging to a tribe which has been declared to be an aboriginal tribe under sub-section

(6) of Section 165 and restore the land to the transfer; or]

[(a) subject to the provisions of clause (b), set aside such transfer if made by a holder belonging to a tribe which has been declared to be an aboriginal tribe under sub-section (6) of Section 165 and [restore the land to the transferor by putting him in possession of the land forthwith]; or

(b) where such land has been diverted for non-agricultural purposes, he shall fix the price of such land which it would have fetched at the time of transfer and order the transferee to pay the difference, if any between the price so fixed and the price actually paid to the transferer within a period of six months.]

"170-B. Reversion of land of members of aboriginal tribe which was transferred by fraud.-- (1) Every person who on the date of commencement of the Madhya Pradesh Land Revenue Code (Amendment), 1980 (hereinafter referred to as the Amendment Act of 1980) is in possession of agricultural land which belonged to a member of a tribe which has been declared to be an aboriginal tribe, under sub-section (6) of Section 165 between the period commencing on the 2nd October, 1959 and ending on the date of the commencement of Amendment Act, 1980 shall, within [two years] of such commencement, notify to the Sub-Divisional Officer in such form and in such manner as may be prescribed, all the information as to how he has come in possession of such land.

(2) If any person fails to notify the information as required by sub-section (1) within the period specified therein it shall be presumed that such person has been, in possession of the agricultural land without any lawful authority and the agricultural land shall, on the expiration of the period aforesaid revert to the person to whom it originally belonged and if that person be dead, to his legal heirs.

[(2-A) If a Gram Sabha in the Scheduled area referred to in clause (1) of Article 244 of the Constitution finds that any person, other than a member of an aboriginal tribe, is in

possession of any land of a bhumiswami belonging to an aboriginal tribe, without any lawful authority, it shall restore the possession of such land to that person to whom it originally belonged and if that person is dead to his legal heirs:

Provided that if the Gram Sabha fails to restore the possession of such land, it shall refer the matter to the Sub-Divisional Officer, who shall restore the possession of such land within three months from the date of receipt of the reference,]

(3) On receipt of the information under subsection (1), the Sub-Divisional Officer shall make such enquiry as may be deemed necessary about all such transactions of transfer and if he finds that the member of aboriginal tribe has been defrauded of his legitimate right he shall declare the transaction null and void and pass an order revesting the agricultural land in the transferor and, if he is dead, in his legal heirs.]

[(3) On receipt of the information under sub-section (1) the Sub-Divisional Officer shall make such enquiry as may be necessary about all such transactions of transfer and if he finds that the member of aboriginal tribe has been defrauded of his legitimate he shall declare the transaction null and void and -

(a) Where no building or structure has been erected on the agricultural land prior to such finding pass an order revesting the agricultural land in the transferer and if he be dead, in his legal heirs,

(b) Where any building or structure has been erected on the agricultural land prior to such finding, he shall fix the price of such land in accordance with the principles laid down for fixation of price of land in the Land Acquisition Act, 1984 (No. 1 of 1894) and order the person referred to in sub-section (1) to pay to the transferor the difference, if any, between the price so fixed and the price actually paid

to the transferor:

Provided that where the building or structure has been erected after the 1st day of January, 1984, the provisions of clause (b) above shall not apply:

Provided further that fixation of price under clause (b) shall be with reference to the price on the date of registration of the case before the Sub-Divisional Officer.]"

A bare perusal of section 170-A and B makes, it crystal clear that the basic intention to bring these provisions in the Statute Book was to ensure that the land allotted to a tribe should not be transferred contrary to the mandate of MPLRC. Sub-section (1) of section 170-A shows that the power can be invoked by S.D.O. suo motu or on an application by a transferer of agricultural land belonging to a tribe which has been declared to be an aboriginal tribe under sub-section (6) of section 165 on or before 31st December, 1978, enquire into a transfer effected by way of sale or in pursuance of a decree of a Court regarding transfer of such land to a person not belonging to such tribe. Sub-section (2) of section 170-A gives powers to the S.D.O. to enquire into the matter after giving reasonable opportunity to the persons having interest in such land and then decide whether transfer is bona fide or not. Section 170-B also prescribes a methodology to take action.

In this view of the matter, the basic question is whether the impugned order falls within the ambit of aforesaid sections?

10. In the present case the respondents have not applied their mind at all on the fact that the land of tribal became a Government land on cancellation of his patta and from Government it is transferred to petitioner by way of a fresh patta. Thus, admittedly, land is not transferred directly from a tribal person to the petitioner. Thus, section 170-B has no application in the facts and circumstances of the case. Learned Panel Lawyer despite repeated questions from the Bench is not in a position to demonstrate as to which sub-section of 170-B will apply in the present matter.

11. So far section 170-A is concerned, sub-section (1) will not apply for the same reason that the land is not transferred in favour of petitioner from a tribal person. However, section 170-A (2) is worded in a different fashion, yet its overriding power because of expression "*notwithstanding anything contained in this Code*" will have an operation in the event it falls within the

ambit of clauses (a) and (b) of sub-section (2). Learned Panel Lawyer is not in a position to demonstrate as to how section 170-A will have application.

12. I find force in the argument of learned counsel for the petitioner that the cancellation of the land on the basis of 'Bhu Dan' land does not fall within the ambit of sections 170-A and 170-B.. In other words the reasons/ ingredients, on the strength of which sections 170-A and B can be applied, are mentioned in extenso in those provisions. This does not contain the eventuality of 'Bhu Dan' land being transferred to somebody. Thus, under these provisions the impugned order could not have been passed. Learned Panel Lawyer, despite repeated queries, is not in a position to mention any other enabling provision under the MPLRC or otherwise, on the strength of which impugned orders could have been passed containing the reasons that the land so allotted in favour of petitioner was a 'Bhu Dan' land. Even if there was an enabling provision in this regard, the respondents should have given an opportunity to the petitioner to put forth his case in this regard.

13. On the basis of aforesaid analysis, it is clear that the respondents have erroneously applied the provisions of sections 170-A and B of the MPLRC. The respondents are not in a position to show the basis of conclusions of impugned order, Annexure P/2, i.e. regarding impermissibility of allotment of 'Bhu Dan' land in favour of the petitioner. Thus, the conclusion arrived at regarding 'Bhu Dan' land is not based on any disclosed provision and reason. Any conclusion which is not based on any reason and discussion is treated as ipse dixit of the authorities. The minimum expectation of the authorities exercising quasi judicial/judicial power is to assign reason for arriving at the conclusion. Reasons are heartbeat of the conclusion. The Apex Court in *Kranti Associates Private Limited v. Masood Ahmed Khan*, (2010) 9 SCC 496, emphasized the reasons, which reads as under-

"(a.) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

- (d) *Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
- (e) *Reasons 'reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.*
- (f) *Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
- (g) *Reasons facilitate the process of judicial review by superior courts.*
- (h) *The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.*
- (i) *Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*
- (j) *Insistence on reason is a requirement for both judicial accountability and transparency.*
- (k) *If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process' then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.*
- (l) *Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.*

(m) *It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny.*

(n) *Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence.*

(o) *In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process"*

14. In this view of the matter, I am unable to uphold the orders, Annexures P-1 and P-2. Accordingly, impugned orders are quashed. However, liberty is reserved to the respondents to proceed against the petitioner if their exists any other enabling provision. In other words, the respondents may proceed against the petitioner in accordance with law.

15. Petitions are allowed to the extent indicated above. No costs.

Petition allowed.

I.L.R. [2012] M.P., 1867

WRIT PETITION

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

W.P.No. 4638/2012 (Indore) decided on 16 May, 2012

CONFIDENCE PETROLEUM INDIA LTD. (M/S)

...Petitioner

Vs.

HINDUSTAN PETROLEUM CORPORATION LTD.

...Respondent

A. *Contract - Cancellation of - Tender document contains the clause which empowers the respondent to reject any or every tender without assigning any reason whatsoever - Respondent has right to cancel the tender.* (Para 5)

क. संविदा - का निरस्तीकरण - निविदा दस्तावेज उस खंड को

विहित करती है जिसमें प्रतिवादी को शक्तियाँ दी गई हैं कि वह किसी भी निविदा या प्रत्येक निविदा को बिना कारण बताये चाहे जो भी हैं, निरस्त कर सकता है — प्रतिवादी को निविदा निरस्त करने का अधिकार है।

B. Contract - Cancellation of - Unworkable offer - Judicial Review - Tender was floated to seek bottling assistance from private bottler - In view of the development and commissioning of double head GD/PT which was commissioned at Indore LPG plant, it was noticed that increased bottling capacity of Indore LPG plant would meet the requirement under the tender in question - The tender had become unworkable - Decision to hold the tender as unworkable is a policy decision based upon facts and figures emerged due to subsequent development - In absence of any arbitrary exercise of power, such decision can not be interfered with by the Court - Petition dismissed.

(Paras 6 & 8)

ख. संविदा - का निरस्तीकरण - अव्यवहार्य प्रस्ताव - न्यायिक पुनर्विलोकन - निजी बॉटलर से बॉटलबंदी करने में सहायता हेतु निविदा आमंत्रित की गई - डबल हेड जीडी/पीटी के विकास एवं उसके प्राधिकार दिए जाने को दृष्टिगत रखते हुए, जिसे इंदौर एल.पी.जी. प्लांट को प्राधिकृत किया गया था, यह देखा गया कि इंदौर एलपीजी प्लांट की बॉटलिंग क्षमता में बढ़ोत्तरी प्रश्नगत निविदा के अंतर्गत अपेक्षाओं को पूरा करेगी - निविदा अव्यवहार्य हो गई थी - निविदा को अव्यवहार्य समझने का निर्णय, नीतिगत निर्णय है जो कि पश्चात्तवर्ती विकास से उत्पन्न तथ्यों और अंकों पर आधारित है - किसी शक्ति के मनमाने उपयोग के अभाव में उक्त निर्णय में न्यायालय द्वारा कोई हस्तक्षेप नहीं किया जा सकता - याचिका खारिज।

Case referred :

(2001) 8 SCC.491.

Vinod Tyagi, for the petitioner.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. - Heard on the question of admission.

1. This petition under Article 226 of the Constitution of India is directed against the decision taken by the respondent in cancelling the Tender No.11000002-HD-12370 floated by it to seek bottling assistance from private bottler in Jhabua District. The petitioner is also seeking direction to the

respondent to complete the formalities of the said tender and to accept the petitioner's bid being lowest.

2. Briefly stated, in pursuance to the Notice Inviting Tender seeking bottling assistance for LPG Cylinders for Jhabua local and surrounding markets of Meghnagar, Dhar, Ratlam, Badnagar and Khachrod under Indore LPG Region of HPCL, the petitioner amongst one another submitted its bid. After opening the technical and the price bids, instead of accepting the petitioner's bid, which according to it was the lowest, the respondent, after making some correspondence, issued an order dated 12.01.2012 (Annexure P/17) informing the petitioner that the tender being unworkable, it has been decided not to further process the tender. Feeling aggrieved by the said communication dated 12.01.2012 (Annexure P/17), the petitioner has filed this petition.

3. Shri Vinod Tyagi, learned counsel for the petitioner argued that after floating the tender and after opening of the technical and price bids, the respondent could not have cancelled the tender; more particularly, in the absence of such clause being there in the tender document, unlike other tender document which has been filed for ready reference as Annexure P/20. He further argued that after submission of the tender, a right has been accrued in favour of the petitioner and in view of it, the cancellation of the tender is impermissible. In support of his submission learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in the case of *Union of India and others v. Dinesh Engineering Corporation and another* [(2001) 8 Supreme Court Cases 491].

4. Having heard learned counsel for the petitioner at length and after considering the submissions made by him, we are of the view that this petition has no merit.

5. Clause 12 of the tender document (Annexure P/4) deals about acceptance of the offer by the respondent Corporation. Clause 12 (c) of it reads thus: -

"12. Acceptance of the offer by the Corporation:

(a)

(b)

(c) The Corporation is not bound to accept the lowest offer and reserves the right to reject any and/or every tender without

assigning any reason whatsoever and/or place order on one or more tenderers and/or carry out negotiations with any tenderer in the manner considered appropriate by the Corporation. The Corporation also reserves right to reject any Unworkable offer.”

The aforesaid clause clearly provides that the respondent is not bound to accept the lowest offer and the respondent has a right to reject any and/or every tender without assigning any reason whatsoever. It also provides that the respondent/Corporation reserves right to reject any unworkable offer. True, it is that in the another tender document (Annexure P/20) there is an additional condition mentioned in the tender document enabling the respondent to withdraw/modify the tender whereas the tender in question is differently worded, however having regard to the Clause 12 (c) of the tender condition the right of the respondent to cancel the tender, if found unworkable, is unfettered and, therefore, it cannot be held that the respondent has no right to cancel the tender and are bound to process it further to the extent of accepting the bid and issue work order.

6. So far as the challenge to the impugned decision is concerned, we find that in the impugned order/decision dated 12.01.2012 (Annexure P/17) the respondent has assigned the following reasons for cancellation of the tender: -

“We state that the purpose of floating Tender was to make arrangements for private bottling assistance in Jhabua District of the State of Madhya Pradesh to cater to the increased domestic requirement in the present winter season of 2011-12.

We further state that while the matter was under consideration by us the decision to proceed further with the same required to be reviewed in view of the developments and commissioning of a double Head GD/PT which was commissioned at Indore LPG Plant in the month of August 2011. This commissioning of new facility has resulted into increased production capacity of the plant. However, the additional bottling capacity of the plant per month is more or less equal to the present requirement under this tender and is able to meet the demand for LPG for the State of Madhya Pradesh as contemplated under the present Tender.

It is therefore stated that in view of the subsequent development and in view of the fact that the requirement of LPG private Bottling assistance for which the present tender is floated does not now remain viable as the demands are already being met and the tender being unworkable it is decided that no further progress be initiated under the present Tender. HPCL states that in view of the above development its earlier decision of obtaining bottling assistance from private bottlers by floating the present tender no longer survives for the reasons stated above and therefore, it has decided not to further process tender.

We appreciate your association till date and are hopeful that you will associate with us in future as and when services are required.

We accordingly advised you to put your request for the refund of Rs.1 lakh being the EMD amount which is lying with us and which shall be refunded back as advised.”

7. Having gone through the aforesaid reasons, we find that after considering the relevant data the policy to make arrangements for private bottling assistance in Jhabua District of the State to cater to the increased domestic requirement was reviewed, in view of the development and commissioning of double head GD/PT which was commissioned at Indore LPG plant in the month of August 2011. On reviewing, it was noticed that the commissioning at Indore LPG plant has resulted into increased production capacity of the plant. It was found by the respondent that the additional bottling capacity of the plant was almost equal to the requirement under the tender in question. It was also found that new facility would be able to meet the demand of LPG as contemplated under the tender in question. Taking into consideration this subsequent development, it was held that it has not now remained viable and the tender has become unworkable. In the circumstances, the impugned decision not to further progress in the tender in question was taken, as the requirement was found to be no longer surviving.

8. The aforesaid decision taken by the respondent for cancelling the tender is a policy decision based upon the facts and figures emerged due to the subsequent development. In the absence of any arbitrary exercise of powers, such decision cannot be interfered with by the Courts. In the case of *Dinesh*

Engineering Corporation (supra), the Supreme Court has held that the power to reject any tender offer cannot be exercised arbitrarily. However, in the present case, as is clear from the impugned decision, it cannot be said to be an arbitrary decision. Therefore, in the absence of any arbitrariness and mala fide, in our considered opinion, the impugned decision which has been taken by the respondent cannot be interfered into; more particularly, when such powers are vested under Clause 12 (c) of the tender document itself. Merely because the petitioner's offer was lowest, the petitioner in the absence of mala fide or arbitrariness on the part of the respondent cannot seek directions to the respondent to accept its bid when a policy decision has been taken not to further process the tender.

9. In the circumstances, the petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 1872

WRIT PETITION

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

W.P. No. 5239/2012 (Indore) decided on 13 July, 2012

TANSUKHLAL TALATI

...Petitioner

Vs.

STATE TRANSPORT APPELLATE TRIBUNAL & ors.

...Respondents

Motor Vehicles Act (59 of 1988), Section 87(1)(c) - Temporary Permit - Grant of - Existence of a particular temporary need on the route in question - While fixing the timings Transport Authority should as far as possible avoid grant of just ahead timings and should not grant identical timings to the temporary permits with the timings of the existing operators holding permanent permits - Petition allowed.

(Para 9)

मोटर यान अधिनियम (1988 का 59), धारा 87(1)(सी) - अस्थाई अनुज्ञा-पत्र - का प्रदान किया जाना - प्रश्नगत मार्ग पर विशिष्ट अस्थाई आवश्यकता का अस्तित्व - समय निश्चित करने में परिवहन प्राधिकारी को जहाँ तक संभव हो थोड़े आगे के समय प्रदान करने से बचना चाहिए और अस्थाई अनुज्ञा-पत्रों को अस्थाई अनुज्ञा-पत्र धारक विद्यमान चालकों के समयों के समानान्तर समय प्रदान नहीं करने चाहिए - याचिका मंजूर।

M.A. Bohra, for the petitioner.

Mini Ravindran, Dy. G.A. for the respondents No. 1 & 2.

Abhay Jain, for the respondent No.3.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. - By this petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 29.03.2012 passed by the Regional Transport Authority (for short RTA), Ujjain as also the order dated 15.05.2012 passed by the State Transport Appellate Tribunal MP (for short STAT), Gwalior.

2. Briefly stated, the third respondent had applied for grant of a temporary permit for the route Ujjain – Badnawar vide application dated 19.03.2012. The said application was allowed and the third respondent was granted a temporary permit under Section 87 (1) (c) of the Motor Vehicles Act, 1988 (for short, the Act) by an order dated 29.03.2012 passed by the RTA, Ujjain.

3. In pursuance to the said order, a temporary permit was issued in favour of the third respondent with effect from 01.04.2012 to 31.07.2012.

4. The said order of RTA granting temporary permit in favour of the third respondent was challenged by the petitioner by filing a revision under Section 90 of the Act.

5. The STAT vide order dated 15.05.2012 passed in Revision No.76/2012 dismissed the revision. Feeling aggrieved, the petitioner has filed this petition.

6. According to the petitioner, the grant of temporary permit on just ahead and on identical timings with his permanent permit is causing great financial loss to him and such identical timings can also not be said to be in the public interest.

7. The third respondent, on the other hand, supported the impugned orders and submitted that the petitioner himself is plying his vehicles on identical timings with other route operator. He also submitted that on this route the

vehicles are plying with a very marginal difference in timings and therefore, it cannot be said that there is any adverse effect on the permanent permit of the petitioner.

8. Having considered the submissions of the learned counsel for the parties and after comparing the respective timings of both the parties, in our considered view, the timings which have been granted to the third respondent are identical while reaching at Ujjain, which cannot be said to be in the interest of the public.

9. The transport authorities while granting temporary permits for stage carriage under Section 87 (1) (c) of the Act are required to see existence of a particular temporary need on the route in question while fixing the timings, they are required to see that the timings which are being proposed and to be granted should be as per the frequency on the route. They should as far as possible avoid grant of just ahead timings and should not grant identical timings to the temporary permits with the timings of the existing operators holding permanent permits.

10. Having regard to the aforesaid when there is apparent conflict in timings as the reaching time at Ujjain is identical, the STAT should have interfered in the order of RTA granting temporary permit and by not doing so, in our considered view, the STAT has failed to exercise jurisdiction vested in it by law. In the circumstances, we set aside the impugned orders passed by the RTA and the STAT and direct the RTA that in case an application for grant of further temporary permit is filed by the third respondent, then an opportunity of hearing to all the route operators including the petitioner be provided and if it is found that there exists particular temporary need, to fix the timings of the temporary permit in such a manner that it may not be identical with the timings of the petitioner at any place. The fixation of the timings shall be done, keeping in view the frequency on the route and the timings of permanent permit holders.

With the aforesaid directions, the petition stands allowed.

C. c. within three days.

Petition allowed.

I.L.R. [2012] M.P., 1875

WRIT PETITION

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

W.P. No.8772/2012(S) (Jabalpur) decided on 13 July, 2012

UNION OF INDIA & ors.

...Petitioners

Vs.

AJAY KUMAR YADAV & ors.

...Respondents

Service Law - House Rent Allowance - No Accommodation Certificate - Respondents who were earlier occupying the Govt. accommodation subsequently vacated the same and shifted to their individual houses - No Accommodation certificate is imperative because unless it is established that due to non-availability of Govt. accommodation, they are required to stay in their own accommodation - Petitioners not entitled for House Rent Allowance. (Para 24)

सेवा विधि - गृह भाड़ा मत्ता - आवास नहीं होने का प्रमाण पत्र - प्रत्यर्थीगण जो पूर्व में शासकीय निवास स्थान का उपभोग कर रहे थे, ने तत्पश्चात् उसे रिक्त किया और अपने व्यक्तिगत मकानों में स्थानांतरित हो गए - आवास नहीं होने का प्रमाण पत्र अत्यावश्यक है क्योंकि जब तक यह स्थापित नहीं किया जाता कि शासकीय निवास स्थान की अननुपलब्धता के कारण उन्हें अपने स्वयं के निवास स्थान में रहना पड़ रहा है - याचीगण गृह भाड़ा मत्ता के लिए हकदार नहीं है।

S.A. Dharmadhikari, for the petitioners.

S.K. Nagpal, for the respondents.

ORDER

The Order of the Court was delivered by :
SANJAY YADAV, J. - Heard.

Order dated 18.4.2012 passed by Central Administrative Tribunal, Jabalpur Bench, Jabalpur is being assailed vide this petition under Article 227 of the Constitution of India; whereby claim by respondents for House Rent Allowance from the day they vacated the factory accommodation has been allowed.

2. The respondents are High Skilled employees in Ordnance Factory, Khamaria. While living in Government accommodation allotted to them, they got their individual houses constructed and they shifted in these houses after vacating the government accommodation on 5.12.2005, 8.6.2006, May/2003, 28.1.2005 and 21.5.2006 respectively. Applications were filed by respective

respondents for grant of House Rent Allowance but were declined by the petitioners (respondents in Original Application) on the ground that respondents have failed to produce "No Accommodation Certificate".

3. The no accommodation certificate was required, as per the petitioners, because unless established that due to non-availability of government accommodation the employees are required to live in their own accommodation in a rented accommodation, they are not entitled for the house rent allowance. And the same being an allowance and not an element of pay, the condition precedent unless fulfilled did not entitle them for the house rent allowance.

4. The respondents being aggrieved, preferred original application before the Tribunal who by order dated 8.2.2011 allowed the claim of the respondents solely on the ground of promissory estoppel, that, employees having constructed the houses after availing the loan and prior permission would bind the employer. This order, however was set aside by a Division Bench of this Court in W.P. No. 6263/2011 (S) on 25.4.2011 holding that in absence of pleading relating to promissory estoppel, the Tribunal was not justified in allowing the application only on the basis of principle of Promissory Estoppel. The matter was remitted for decision afresh.

5. On remand, the Tribunal by impugned order has allowed the application directing the petitioners herein to grant HRA to the respondents from the date they vacated the government accommodation along with interest @9% per annum if the amount is not paid within 60 days and cost of Rs.500/-.

6. The Tribunal to arrive at the conclusion in favour of respondents workmen relied upon: (i) ratio of order dated 9.2.2012 in O.A. No. 117/2009, (ii) circular dated 9.4.2003; (iii) letter dated 2.4.2009 and (iv) letter dated 16.11.2009.

7. The employer being aggrieved by the order has filed this petition, assailing the order by Tribunal on the ground that the Tribunal has committed grave folly in adjudicating the claim in favour of workmen on the basis of superseded circular and contrary to the General Rules and orders issued in respect of entitlement of House Rent Allowance.

8. Contentions and counter-contentions were put-forth for and against the claim for House Rent Allowance. Whereas, the petitioners employer placing reliance on various circulars had put-forth that the Tribunal erred in granting the claim in absence of no accommodation certificate, an imperative

precondition for the said grant. The employees on their part placing reliance on the instances wherein certain employees have been given the House Rent Allowance who are residing in private houses, supports the decision by the Tribunal. The employer during course of hearing have, however, denied the allegation that, the house rent allowance is being paid without obtaining the No Accommodation Certificate.

9. Issue which crops up for consideration is whether a no accommodation certificate is a condition precedent for grant of House Rent Allowance.

10. The House Rent Allowance, trite it is, is not a part of wages but is a compensatory allowance as defined under Fundamental Rule 44, which stipulates:

"F.R. 44. Compensatory allowance. - Subject to the general rule that the amount of compensatory allowance should be so regulated that the allowance is not on the whole a source of profit to the recipient, the Central Government may grant such allowances to any Government servant under its control and may make rules prescribing their amounts and the conditions under which they may be drawn."

11. It is held in *Director, Central Plantation Crops Research Institute, Kesaragod and others v. M. Purushothaman and others* (AIR 1994 SC 2541) that:

9. The HRA would be covered by the definition of Compensatory Allowance. It is compensation in lieu of accommodation. This definition itself further makes it clear that compensatory allowance is not to be used as a source of profit. It is given only to compensate for the amenities which are not available or provided to the employee. The moment, therefore, the amenities are provided or offered, the employee should cease to be in receipt of the compensation which is given for want of it."

12. Thus, General Rules and Orders issued by the Central Government which governs the amount and conditions for grant of House Rent Allowance. The respondents employees are not exception to these conditions.

13. The Master Circular which governs the condition precedent for grant

of HRA is the Office Memorandum issued by Government of India, Ministry of Finance, No. F-2(37)-E.II (B)/64 dated 27th November 1965.

14. Paragraph 4, 7 and 8 of the Office Memorandum dated 27.11.1965 lays down the conditions precedent for grant of HRA. It is stipulated therein:

"4. The grant of House Rent Allowance shall be subject to the following conditions:-

(a) (i) To those Government servants who are eligible for Government accommodation, the allowances will be admissible only if they have applied for such accommodation in accordance with the prescribed procedure, if any, but have not been provided with it, in places where due to availability of surplus Government accommodation, special orders are issued by the Ministry of Urban Development from time to time making it obligatory for employees concerned to obtain and furnish 'no accommodation' certificate in respect of Government residential accommodation at their place of posting. In all other places, no such certificate is necessary.

(ii) Government servants posted in localities where there is at present no residential accommodation in the General Pool owned or requisitioned by the Central Government for allotment to them, need not apply for Government residential accommodation in order to become eligible for House Rent Allowance. But where Government quarters are available for the staff of specified Departments or for specified categories of staff, the procedure for applying for accommodation will be regulated under the rules of allotment of the Department concerned or of the local office of the Central Public Works Department, as the case may be.

(b) (i) The allowance shall not be admissible to those who occupy accommodations provided by Government or those to whom accommodation has been offered by

Government but who have refused it. In the latter case, the allowance will not be admissible for the period for which a Government servant is debarred from further allotment of Government accommodation under the allotment rules applicable to him.

(ii) The House Rent Allowance drawn by a Government servant, who accepts allotment of Government accommodation, shall be stopped from the date of occupation, or from the eighth day after the date of allotment of Government accommodation, whichever is earlier. In case of refusal of allotment of Government accommodation, House Rent Allowance shall cease to be admissible from the date of allotment of Government accommodation. In case of surrender of Government accommodation, the House Rent Allowance, if otherwise admissible, will be payable from the date of such surrender."

7. (i) A Government servant living in a house owned by him, his wife, children, father or mother shall also be eligible for House Rent Allowance under these orders. ***

(ii) ***

(iii) In the case of a Government servant who owns a house at a place of duty but resides in a rented house instead, House Rent Allowance shall be paid in respect of the rented house, if otherwise admissible.

8. (a) Every Government servant shall furnish along with his first claim for House Rent Allowance, a certificate in the Form given in Annexure-II.

(b) While Non-Gazetted Officers shall furnish the requisite certificates to their Head of Office, Gazetted Officers shall furnish the same to their Accounts Officers.

(c) The following certificates shall be endorsed by the Drawing and Disbursing Officers on the bill in which Compensatory (City) and House Rent Allowances of Non-Gazetted Officers are drawn by them:-

- (i) "Certified that in the case of all Government servants for whom Compensatory (City) and/or House Rent Allowances are drawn in this bill, the eligibility of the Allowance(s) has been verified with reference to Paragraph 3 of the Government of India, Ministry of Finance, O.M. No. 2 (37)-E.II (B)/64, dated 27.11.1965."
- (ii) "Certified that the Government servants for whom House Rent Allowance is drawn in this bill (have applied for but) have not been provided with any Government accommodation."
- (iii) "Certified that the certificates prescribed by Government have been obtained from the Government servants for whom House Rent Allowance has been drawn in this bill and I am satisfied that the claims are in accordance with the orders in force."

15. The certificate referred to in paragraph 8 of Office Memorandum dated 27.11.1965 is in following term:

Certificate to be furnished by all Central Government servants

- (1) I certify that I have applied for the Government Accommodation in accordance with the prescribed procedure but have not been provided with Government accommodation/ have refused the allotment of Government accommodation during the period in respect of which the allowance is claimed.
- (2) I certify that I am residing in a house hired/owned by me/ my wife/husband/son/daughter/father/mother/a Hindu undivided family in which I am a coparcener.
- (3) I certify that I am incurring some expenditure on rent contributing towards rent

Or

I certify that the rent value of the house owned by me/owned by a Hindu undivided family in which I am a coparcener and in which I am residing is ascertainable in the manner specified in Para. 7 of O.M. No. F. 2 (37)-E.II (B)/64, dated 27.11.65. I certify that I am paying/contributing towards house or property tax.

(4) I certify that I am not sharing accommodation allotted to my parent (child) by the State/Central Government, an autonomous public undertaking or semi-Government organisation such as municipality, port trust, etc., allotted rent-free to another Government servant.

(5) I certify that my husband/wife/children/parents who is/are sharing accommodation with me allotted to another employee of the Central/State Government/autonomous public undertakings or semi-Government organizations like municipality, port trust, etc., is/are not in receipt of house rent allowance from the Central/State Government/autonomous public undertaking or semi-Government organizations like municipality, port trust, etc.

(6) I also certify that my wife/husband has not been allotted accommodation at the same station by the Central/State Government/autonomous public undertakings or semi-Government organizations such as municipality, port trust, etc.

Signature.....

Date

Designation....."

16. Thus, under the Rules, imperative it is to have no accommodation certificate for grant of HRA, and being a condition precedent unless issued and produced an employee will not be entitled for the grant of HRA. In this context reference can be had of the observations in *Director, Central Plantation Crops Research Institute, Kesragod and others v. M. Purushothaman and others* (supra) which is in context to paragraph 4 of office memorandum dated 27.11.1965:

"5. It is clear from the aforesaid provisions that paragraphs

4 (a) (i) and (ii) -lay down the procedure for making application for accommodation. Paragraph 4 (b) (i) lays down the consequences on refusal to accept the accommodation when offered. There is no doubt that paragraphs 4(a) (i) and (ii) state that an application has to be made to secure accommodation. However, that does not mean that Government or the organisation such as the appellant - organisation to which the said provisions apply, cannot on their own offer accommodation to the employees. Hence the reason given by the Tribunal that it is only if the employee applies for such accommodation and he refuses to accept the same when offered that he would be disentitled to the HRA, is not correct. It must be remembered in this connection that the Government or the organisation of the kind of the appellant spends huge public funds for constructing quarters for their employees both for the convenience of the management as well as of the employees. The investment thus made in constructing and maintaining the quarters will be a waste if they are to lie unoccupied. The HRA is not a matter of right. It is in lieu of the accommodation not made available to the employees. This being the case, it follows that whenever the accommodation is offered the employees have either to accept it or to forfeit the HRA. The management cannot be saddled with double liability, viz., to construct and maintain the quarters as well as to pay the HRA. This is the rationale of the provisions of paragraph 4 of the said Government Office Memorandum.

6. It is for this reason again that paragraph 4 (b) (i) provides that the HRA shall not be admissible to those who occupy accommodation provided for them as well as to those to whom accommodation has been offered but who have refused to accept it. The provisions of paragraph 4 (b) (i) are independent of the provisions of paragraph 4 (a) (i) and (ii). Whereas paragraphs 4 (a) (i) and (ii) speak of procedure to be followed by the employees who are in need of accommodation, paragraph 4 (v) (i) provides for the forfeiture of the HRA even when the accommodation has been offered on its own by the management whether the application for the

same has been made or not. There is no distinction made in this provision between those who have applied and those who have not applied for accommodation. Even otherwise, we are of the view that the distinction sought to be made by the Tribunal is on the face of it, irrational, particularly taking into consideration the resources spent on constructing the quarters".

17. The case at hand is to be examined in the light of these rules and orders.

18. The circular dated 9.4.2003, principally being relied by the Tribunal while adjudicating claim in favour of the respondents workman, no doubt states that, a "no accommodation certificate" be not mixed up with no occupancy certificate and where there is no occupancy the HRA be released to such employees who vacate factory quarters after constructing their own house obtaining loans/ HBA from government or from outside government sponsored agencies. The said order thus dilutes the imperative condition precedent stipulated by office memorandum dated 27.11.1965, adopted by Directorate of Estates Office memorandum dated 9.9.1988.

19. The circular dated 9.4.2003 was later on kept in abeyance vide Instruction No. 3129/A/A dated 10.8.2007 stating therein:

"That, the matter has been reviewed in the light of the existing government orders/SRO and also on the basis of reference received from the factories. On review it has been decided that the instructions contained in the circular referred above dated 9th April 2003, shall be kept in abeyance, with immediate effect".

20. Thereafter vide Instruction No. 3165/A/A dated 6.6.2008 the said circular was withdrawn after seeking clarification from Ministry of Defence. The clarification by Ministry of Defence on 31.3.2008, is in the following terms:

"OFB's above proposal has been considered in consultation with Ministry of Urban Development. Ministry of Urban Development has forwarded a copy of their instructions issued by O.M. No. F.12034/1/2007-Pol.III dt. 14.11.2007 issued in this regard for taking further necessary action in the matter (copy enclosed).

02. OFB is requested to follow the instructions issued by Ministry of Urban Development without deviation, i.e., H.R.A. can be paid only if government accommodation is not available. OFB is also requested to address audit observations appropriately."

21. The question now would be whether with the withdrawal of the circular dated 9.4.2003 by Instruction No. 3165/A/A any right survives in favour of claimants like the respondents herein. True it is that, by letter dated 31.3.2009 the effect of circular dated 9.4.2003 has been preserved till 10.8.2007 the date from which it was suspended. But whether with the withdrawal of circular dated 9.4.2003 by order dated 6.6.2008 any right would accrue in favour of the persons like respondents who though had vacated the government quarters prior to 10.8.2007 but the HRA was not claimed nor granted. Or, the effect of the letter dated 31.3.2009 would be to protect such employees in whose favour the HRA was disbursed till 10.8.2007 when the circular dt. 9.4.2003 was suspended.

22. The circular dated 9.4.2003 as apparent therefrom is issued with the approval of Chairman/Director General Ordnance Factories and does not have the concurrence of Ministry of Finance, the authority which has issued the Master Circular dated 27.8.1965 adopted by the Government of India, Directorate of Estate vide O.M. No. 1234 (1) '88 -Pol. III dt. 9th September 1988. Even for the sake of argument, it is assumed that it was within the competence of the Chairman/Director General Ordnance Factories to have issued such circular as dated 9.4.2003, but with its withdrawal on subsequent date no right can be made to survive thereafter. A right having fructified, i.e., payment of HRA made during the currency of the circular dated 9.4.2003 stands at a different footing in that case, the right having accrued, no recovery would be permissible.

23. Thus, letter dated 31.3.2009 having limited scope of operation does not lead to revival of right to receive HRA contrary to the stipulations contained in the Master Circular dt. 27.11.1965. The Tribunal, therefore, in our considered opinion is not justified in adjudicating the claim in favour of the respondent employees of their right to receive HRA without furnishing the 'no accommodation certificate'.

24. For these reasons we quash the impugned order dated 18.4.2012 and hold that unless an employee furnishes a no accommodation certificate as is

required under paragraph 4 and 8 of the memorandum dated 27.11.1965, they are not entitled for the HRA. The petitioners would be entitled to review past cases in accordance herewith and if some employees are found to be not entitled shall after giving them an opportunity of hearing pass orders in accordance with law.

The petition is disposed of finally. No costs.

Petition disposed of.

I.L.R. [2012] M.P., 1885

WRIT PETITION

Before Mr. Justice Sheel Nagu

W.P. No. 3983/2011(S) (Gwalior) decided on 24 July, 2012

GIRISH KUMAR SHUKLA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Service Law - Misconduct - Negligent handling of fire arm - Petitioner is a member of Police, an armed force - Expected to handle a fire arm which is dangerous weapon with utmost care and caution - Any negligence in handling a fire arm can lead to a serious incident, besides eroding faith of public which can be highly deleterious to the moral of entire armed force - Negligent handling of arm is a misconduct. (Para 3)

क. सेवा विधि - अवचार - अग्न्यायुध का उपेक्षापूर्वक प्रयोग - प्रार्थी पुलिस का सदस्य, जो एक सशस्त्र बल है - अग्न्यायुध, जो एक घातक शस्त्र है, का अधिक सतर्कता एवं सावधानी से प्रयोग अपेक्षित है - अग्न्यायुध के किसी उपेक्षापूर्ण प्रयोग से जनता के विश्वास को आघात पहुंचाने के साथ ही गंभीर घटना कारित हो सकती है जोकि सम्पूर्ण सशस्त्र बल के मनोबल को अतिशय हानिकारक हो सकता है - अग्न्यायुध का उपेक्षापूर्वक प्रयोग अवचार है।

B. Police Regulations, M.P. - Regulation 214, 226 - Penalty - Charge admitted by petitioner - Gross negligence has been shown by the petitioner and provisions of Regulation 226 (iv) can be invoked only when minor offence/misconduct is involved - Regulation 226(iv) would not come into play. (Para 7)

ख. पुलिस विनियमन, म.प्र. - विनियमन 214, 226 - शास्ति - याची द्वारा आरोप स्वीकार - याची द्वारा घोर उपेक्षा दर्शायी गई और विनियम 226 (iv)

के उपबंध का केवल तब अवलंब लिया जा सकता है जब गौण अपराध/अवचार समाविष्ट है - विनियमन 226 (iv) लागू नहीं होता।

C. Police Regulations, M.P. - Regulation 214 - Penalty - Regulation 214 is of a generic nature and therefore, scope, ambit and applicability of Regulation 214 can not be restricted by 226(iv), thereby entitling the competent authority to impose any of 8 penalties specified in Regulation 214. (Para 8)

ग. पुलिस विनियमन, म.प्र. - विनियमन 214 - शास्ति - विनियमन 214 समुदायिक प्रकृति का है और इसलिए विनियमन 214 की व्याप्ति, परिधि एवं प्रयोज्यता को 226 (iv) द्वारा निर्बंधित नहीं किया जा सकता, इस संबंध में सक्षम प्राधिकारी को विनियमन 214 में वर्णित 8 शास्तियों में से किसी को भी अधिरोपित करने के लिए अधिकार प्रदान करता है।

D.P. Singh, for the petitioner.

Sangeeta Pachauri, G.A. for the respondents.

ORDER

SHEEL NAGU, J. - This petition has been filed under Article 226/227 of Constitution of India assailing order of penalty of withholding of one annual increment cumulatively and also the order of rejection of appeal preferred by the petitioner against the said penalty order.

2. Learned counsel for petitioner has restricted his argument to the following two grounds:

1. That the misconduct for which the impugned penalty has been imposed cannot be categorized as misconduct since it is a mere inadvertent bona fide mistake.

2. That even assuming that the said misconduct has taken place, the said penalty cannot be imposed in view of the provisions of Regulation 226 of M.P. Police Regulations.

3. Taking the first contention, it is seen that the sole charge leveled against the petitioner was in respect of gross negligence in handling SLR Rifle leading to the weapon being fired. Learned counsel for petitioner is unable to point out as to how and in what manner the negligence alleged in charge No. 1 is not a misconduct. The petitioner who was a constable and a member of a

disciplined force is expected to handle a fire arm which is dangerous weapon with utmost care and caution. Any negligence in handling a fire arm can lead to a serious incident causing loss of life or property, besides eroding faith of public in the disciplined character of the armed force which can be highly deleterious to the moral of entire armed force. Thus this court is not impressed by the arguments of the learned counsel for petitioner and rejects the same and holds that charge No. 1 as pointed out in the charge sheet is a misconduct.

4. As regards ground No. 2, a perusal of Regulation 226 indicates that the said provision lays down guidelines to be observed in determining the quantum of penalty to be imposed by the competent authority in respect of different kinds of misconduct. Relevant clause (vi) of Regulation 226 is reproduced below for convenience:-

“(vi) In the case of head constable and constables, minor offences against discipline should be dealt with, firstly, by warning, and if this proves ineffectual, by the infliction of the minor punishments specified in regulations 216 and 217(b), or by detailing the offender to a course of more irksome and unpopular duties.”

5. The above said clause (vi) has been relied upon by learned counsel for petitioner to emphasis that the petitioner should not have been straightway imposed the penalty of withholding of one annual increment cumulatively which is major punishment, but should have first been warned and if this warning proved ineffective then minor punishment specified in Regulation 216 and 217(B) could have been imposed.

6. Regulation 214 prescribes various minor and major punishment which can be imposed without prejudice to the provision of any law or any special orders for the time being inforce. On the other hand Regulation 217(b) relates to imposition the penalty of extra fatigue duty of different kinds as mentioned therein.

7. On due consideration of the rival contentions it is seen that Clause (vi) of Regulation 226 can be invoked only when minor offence/misconduct are involved. In the instant case, gross negligence has been shown by the petitioner despite being a member of armed force in negligently handling the fire arm which by no stretch of imagination can be termed as minor offence/ misconduct and therefore, in the considered view of this court Regulation 226(vi) will not

come into operation in the instant case.

8. There is no reason for applicability of Regulation 226(vi) in the instant case as that terminology used in Regulation 214 is of a generic nature and therefore, the scope, ambit and applicability of Regulation 214 cannot be restricted by clause (vi) of Regulation 216, thereby entitling the competent authority to impose any of 8 penalties specified in Regulation 214.

9. Pertinently, the petitioner in the instant case after receiving the charge sheet did not refute the charges alleged but in fact admitted the charges by stating that the incident of firing had occurred on account of his bona fide mistake/ negligence.

10. Another aspect which dissuades this court from taking a view in favour of the petitioner is the contents of paragraph No. 5.2 of the return filed by the respondents which remain unrebutted. The respondents have contended in the said paragraph of the return that this is not the first act of misconduct in the service tenure of the petitioner as the petitioner has been found to have indulged in misconduct leading to imposition of penalty of censure and that the petitioner has earned an adverse remark in the appraisal year 2005.

11. In view of the above, this court does not think it appropriate to exercise the extra ordinary plenary power under Article 226 of the Constitution of India in favour of the petitioner.

12. Accordingly, this writ petition deserves to be and is therefore, dismissed without any order as to cost.

Petition dismissed.

I.L.R. [2012] M.P., 1888

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 7147/2011 (Gwalior) decided on 25 July, 2012

ASEEM VAISHYA

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

A. *Land Revenue Code, M.P. (20 of 1959), Sections 1(2), 2(g), 2(t), 57, 58, 59 - Forest or Reserved Forest - State is empowered to impose lease rent and premium on it.*

(Para A)

क. मू राजस्व संहिता, म.प्र. (1959 का 20), धाराएं 1(2), 2(जी), 2(टी), 57, 58, 59 — वन या आरक्षित वन — राज्य उस पर पट्टा भाटक एवं प्रीमियम अधिरोपित करने के लिए सशक्त है।

B. Forest (Conservation) Act, (69 of 1980), Section 2 - Approval - Makes it mandatory to obtain approval from the Central Govt. in the event forest land is intended to be used for any other purpose - This does not mean that forest land becomes a land of Central Govt. (Paras 9-10)

ख. वन (संरक्षण) अधिनियम (1980 का 69), धारा 2 — अनुमोदन — वन भूमि का उपयोग किसी अन्य प्रयोजन हेतु आशयित होने की स्थिति में केन्द्र सरकार से अनुमोदन प्राप्त करना आज्ञापक बनाता है — इसका अर्थ यह नहीं होगा कि वन भूमि केन्द्र सरकार की भूमि हो जाती है।

C. Land Revenue Code, M.P. (20 of 1959), Section 181 - Govt. Lessee - Nazul Junglat Land directed to be given to the petitioner on approval of the Central Govt - Petitioner would be a lessee and liable to pay lease rent. (Para 9)

ग. मू राजस्व संहिता, म.प्र. (1959 का 20), धारा 181 — सरकारी पट्टेदार — नजूल जंगलात भूमि, केन्द्र सरकार के अनुमोदन पर याची को दिये जाने के लिए निदेशित किया गया — याची पट्टेदार होगा और पट्टा भाटक अदा करने के लिए दायी होगा।

D. Land Revenue Code, M.P. (20 of 1959), Section 264 - Applicability of provisions of Code, 1959 - Petitioner could not establish that land belongs to Central Govt. - Applicability of Code, 1959 can not be excluded. (Para 11)

घ. मू राजस्व संहिता, म.प्र. (1959 का 20), धारा 264 — संहिता, 1959 के उपबंधों की प्रयोज्यता — याची स्थापित नहीं कर सका है कि भूमि केन्द्र सरकार की है — संहिता 1959 की प्रयोज्यता अपवर्जित नहीं की जा सकती।

E. Land Revenue Code, M.P. (20 of 1959), Forest (Conservation) Act, (1980) - Whether Special Act will prevail over General Act - There is no conflict between the said two Acts, and their area of operation is different, no case is made out to show that special Act will prevail over General Act. (Para 12)

ड. मू राजस्व संहिता, म.प्र. (1959 का 20), वन (संरक्षण) अधिनियम (1980), — क्या विशेष अधिनियम, सामान्य अधिनियम पर अध्यारोही होगा — उक्त

दो अधिनियमों के बीच टकराव नहीं है और उनका प्रवर्तन का क्षेत्र भिन्न है, यह दर्शाने के लिए कोई प्रकरण उत्पन्न नहीं होता कि विशेष अधिनियम, सामान्य अधिनियम पर अध्यारोही होगा।

Cases referred :

AIR 1997 SC 1228, 1989 Supp (1) SCC 504, (2008) 12 SCC 504, (2008) 7 SCC 126, (2006) 1 SCC 1, (1985) 3 SCC 643, (2009) 5 SCC 373, (2011) 5 SCC 353, (2000) 5 SCC 287, (2011) 7 SCC 639, AIR 2007 SC 1188, (1998) 7 SCC 66, AIR 1006 MP 167, 1993 SCC Suppl (3) 115, (2012) 4 SCC 148.

K.S. Tomar with R.V. Sharma, for the petitioner.

Sangita Pachauri, Dy.G.A. for the respondent/State.

ORDER

SUJOY PAUL, J.- In this petition filed under Article 226 of the Constitution, the petitioner has challenged the condition No.5 mentioned in Annxure P-2 dated 11.5.2011. Pursuant to an application submitted by the petitioner for providing him the land for use for establishment of a petrol pump, Ministry of Environment and Forest (for brevity 'Ministry') issued the order dated 25.4.2011, whereby a conditional approval was given for establishment of petroleum outlet on the land in question. In clause 5 of the letter of the said Ministry, Annexure P-1, it is mentioned that the State Government may impose any other condition on petitioner. In turn, by Annexure P-2 dated 11.5.2011 the State Government has directed the petitioner to pay premium and lease rent before transfer of the revenue forest land. This condition of Annexure P-2 is under challenge in this petition.

2. Brief facts necessary for adjudication of this matter are as under:

The petitioner, a handicapped person, submitted an application for allotment of forest land at survey no.1 village Dongarpur, District Gwalior on 22.4.2006. The stand of the petitioner is that the said land is a forest land in the revenue record since Samvat 1997. The respondent No.8 by communication dated 6.5.2006 intimated that the above land is a Nazul forest land and petitioner was asked to submit proposal on specific format under Forest Conservation Act, 1980 (for brevity 'Act of 1980'). The petitioner, in turn, submitted the proposal (Annexure P-8) and deposited the registration and processing fees. The registration was done under the Act of 1980 for

diversion of 0.720 hectares of land and registration no. 25/06 was given to the petitioner. In turn, the petitioner's proposal was sent to Principal Chief Conservator of Forest (Land Management) by Forest Conservator (respondent No.8) on 28.3.2007. The Collector, Gwalior issued a certificate of non-availability of revenue land elsewhere vide Annexure P-12. The petitioner's proposal was sent by Chief Forest Conservator (respondent No.6) to the Ministry for approval vide Annexure P-13. The Ministry, in turn, declined the proposal for the reasons stated in Annexure P-14. Subsequently, the petitioner's proposal was approved as Site Specific and sent again to respondent No.1 by Upper Chief Forest Conservator (Land Management) by communication dated 8.6.2010. The proposal met first stage sanction of Ministry by communication dated 6.7.2010 (Annexure P-16). It was made clear that the nature of forest land shall remain unaltered. Thereafter, a letter dated 7.10.2010 was issued by Upper Chief Conservator of Forest to CCFM Gwalior to get diverted land evaluated on market rates from Collector, Gwalior and to take consent of petitioner to deposit the whole amount. The petitioner submits that this is a fresh condition which was totally impermissible. It is the case of the petitioner that he obtained certain information through his counsel under the RTI Act, which shows that the land in question is a forest land and not a revenue land and, therefore, the condition imposed in Annexure P-17 dated 7.10.2010 is contrary to law. By placing reliance on Annexures P/21, P/22 and P/23 to P/26, it is stated that in similar cases no such condition has been imposed by the respondents.

The petitioner submitted his objection to the aforesaid new condition imposed vide Annexure P-28. The petitioner was required to transfer the land situated at village Singhpur for compensatory afforestation in obedience of approval letter of respondent No.1. Subsequently, a land admeasuring 0.720 Hect. at village Aron, survey no. 2035/3/2 was demarcated and handed over to Forest Department for compensatory afforestation by the petitioner on 27.11.2010 and 'Panchinama, spot map and demarcation panchnama were prepared and signed by both the parties (Annexure P-30). The aforesaid land of Aron was transferred to Forest Department by registered transfer deed dated 2.12.2010 (Annexure P-31) and it was handed over to respondent No.8 on 10.12.2010 (Annexure P-32). A demand note was issued by respondent No.8 in terms of Ministry. In compliance of demand note, the petitioner deposited the amount of Rs.19,51,830/- on 21.2.2011 as Project Cost (compensatory afforestation etc.), Rs.4,50,720/- on 21.2.2011 as Net

Present Value (NPV) and Rs. 1,44,580/- on 21.2.2011 as Inspection Fees. The petitioner gave limited consent for depositing the amount by keeping his legal rights reserved.

The Forest Conservator by communication dated 9.2.2011 demanded the consent letter to deposit the amount evaluated by Collector vide Annexure P-35. The petitioner again gave an undertaking to a limited extent by Annexure P-36. In turn, the Ministry issued the order dated 25.4.2011 (Annexure P-1) and gave final approval for diversion and allotment of forest land to the petitioner. The petitioner preferred representation against the condition mentioned in the order, Annexure P-1, whereby liberty was given to the State to impose some condition. The petitioner is aggrieved by order dated 11.5.2011 (Annexure P-2) whereby respondent No.5 directed the petitioner to pay the lease rent and premium before transfer. The petitioner preferred applications against that but the same could not fetch any result.

In the aforesaid factual backdrop, the petitioner has challenged condition no.5 of order dated 11.5.2011 (Ann. P/2).

3. Shri K.S.Tomar, learned senior counsel has raised following points to attack the aforesaid contention-

(i) As per section 1(2) of M.P. Land Revenue Code, 1959 (for brevity 'MPLRC'), the State Government is not the owner of the forest land and MPLRC has no application on land in question.

(ii) Central Government is the owner of the forest land and as per section 264 of MPLRC, nothing in the Code shall apply to a person who holds lands from the Central Government.

(iii) Section 2 of the Act of 1980 begins with a non-obstante clause and minute reading of section 2 makes it clear that Central Government is the owner of the forest land and only requirement to establish a petrol pump is the prior approval of the Central Government.

(iv) The Act of 1980 is a Special Act whereas MPLRC is a General Act and, therefore, Special Act will prevail over general.

(v) There is no provision in the Forest Act or in MPLRC to

demand any type of premium or lease rent.

(vi) The land in question is a forest land and not revenue land, therefore, MPLRC has no application.

(vii) The petitioner is a handicapped person and he is harassed by the respondents.

(viii) The petitioner is subjected to discrimination in the matter of imposing premium and lease rent whereas in similar cases no such condition is imposed.

4. The petitioner has relied on following judgments of Supreme Court:

- *T.N.Godavarman vs. Union of India*, AIR 1997 SC 1228.
- *Rural Litigation and Entitlement Kendra vs. State of UP.*, 1989 Supp (1) SCC 504.
- *A. Chowgule & Co. Ltd. vs. Goa Foundation & Ors.*, (2008) 12 SCC 646.
- *T.N.Godavarman vs. Union of India*, (2008) 7 SCC 126.
- *T.N.Godavarman vs. Union of India*, (2006) 1 SCC1.
- *Bansiram Modi & ors. vs. State of Bihar*, (1985) 3 SCC 643. (2009)5 SCC 373.
- *K. Balakrishnan Nambiar vs. State of Karnataka & ors.*, (2011)5 SCC 353.
- *Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others*, (2000)5 SCC 287.
- *Narbada Bachao Andolan, vs. State of M.P. and another*, (2011)7SCC 639.
- *State of Karnataka & ors. vs. Karnataka State Patels Sangha and others*, AIR 2007 SC 1188.
- *National Building Construction Corporation vs. S. Raghunathan and others*, (1998)7 SCC 66.

- *Kamal Kishore vs. State of MP*, AIR 2006 MP 167.
- *Tarun Bharat Sangth vs. Union of India*, 1993 5CC Supl (3) 115.
- *Raheja Universal Limited vs. NRC Limited & others*, 2012 (4) SCC 148.

5. Per Contra, Smt. Sangita Pachauri, learned Deputy Government Advocate, has supported the order Annexure P-2 and submits that the condition is in accordance with the provisions of MPLRC. She submits that even forest land falls within the ambit of MPLRC and, therefore, no fault can be found in the condition imposed. By placing reliance on Annexure P-35 dated 9.2.2011 learned counsel submits that the land in question is in "Nazul Janglat". The petitioner has not challenged the order, Annexure P-1 in the present petition in which the Ministry has authorised the State Government to impose any other condition. The other condition no.5 was imposed vide Annexure P-2 is in consonance with the MPLRC.

6. Learned counsel for the petitioner after closure of the arguments has filed his written submissions whereas learned Deputy Government Advocate has produced the original record for the perusal of this Court.

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

As to Points No.(i), (ii), (v) and (vi)

8. The basic contention of petitioner is that the land in question belongs to Central Government and State Government has no authority, jurisdiction and competence to impose condition no. 5. It is profitable to quote section 1(2) of MPLRC, which reads as under :

"1(2). It extends to the whole of Madhya Pradesh but nothing contained in this Code except the provisions relating to liability of land for payment of land revenue the assessment of land revenue with reference to the use of land, realisation of land revenue and all provisions ancillary thereto shall apply to such areas as may, from time to time, be constituted as reserved or protected forest under the Indian Forest Act, 1927 (XVI of 1927):

Provided that the aforesaid provision of the Code shall apply with reference to the use of land such areas for one or more or

more of the purposes specified in section 59."

Section 2(g) of MPLRC defines "Government forest", which reads as under:-

"2(g). "Government forest" means a forest constituted as a reserved forest or protected forest in accordance with the provision of the Indian Forest Act, 1927 (Xvi of 1927)."

Section 57(1) reads as under:-

"57. State ownership in all lands.-(1) All lands belong to the State Government and it is hereby declared that all such, including standing and flowing water, mines, quarries, minerals and forests reserved or not and all rights in the sub-soil of any land are the property of the State Government."

A conjoint reading of section 1(2), definition of "Government Forest" and section 57(1) aforesaid makes it crystal clear that all land belongs to the State Government including Government forest and forest land. Section 1(2) in no uncertain words makes it clear that even reserved and protected forest under the Indian Forest Act, 1927 falls within the sweep and ambit of MPLRC for payment of land revenue, the assessment of land revenue, realisation of land revenue and all provisions ancillary thereto. The aforesaid conjoint reading makes it clear like noon day that even if the land in question is a forest land (Nazul janglat), the provisions of MPLRC have application on it. Thus, the aforesaid points are decided against the petitioner.

So far the argument that there is no provision in MPLRC which permits the State to impose premium or lease rent is concerned, it is profitable to refer to section 2(t) of MPLRC, which defines "rents", which reads as under:

"2(t). "rents" means whatever is paid or is payable in money or in kind-

1. by an occupancy tenant to his Bhumiswami according to the provision of section 188 or by a lessee to his Bhumiswami on account of the use or occupation of land held by him from such Bhumiswami; or
2. by a Government lessee to the Government on account of the use or occupation of land leased out to him by the Government."

Similarly, section 59(5) of MPLRC reads as under:-

"59. Variation of land revenue according to purpose for which land is used.-

(1)	xxx	xxx	xxx
(2)	xxx	xxx	xxx
(3)	xxx	xxx	xxx
(4)	xxx	xxx	xxx

(5) Where land for use for any one purpose is diverted to any other purpose and land revenue is assessed thereon under the provisions of this section, the [Sub-Divisional Officer] shall also have power to impose a premium on the diversion in accordance with rules made under this Code:

Provided that no premium shall be imposed for the diversion of any land for charitable purpose."

A conjoint reading of definition of "rents" and enabling provision of section 59(5) makes it crystal clear that there exists a provision of imposition of rent in the MRLRC. The rent can be levied on a Government lessee or can be recovered from a tenant. Similarly, section 59(5) shows that premium can be imposed by the Government. Thus, in the teeth of aforesaid provisions, it is clear that the State Government is equipped with the power to impose lease rent and premium.

Section 181 of MPLRC reads as under:

"181. Government lessees and Service Land State Government or to whom a right to occupy land is granted by the State Government or to Collector and who is not entitled to hold land as a Bhumiswami shall be called a Government lessee in respect of such land."

A bare perusal of this provision clearly shows that the petitioner, at best, is a Government lessee and by no stretch of imagination he can be said to be a Bhumiswami of the land in question. Once he is a Government lessee, under section 2(t) of the MPLRC rent can be imposed on him. Under sub-section (5) of section 59 premium can be imposed on him. Thus, these points are decided against the petitioner.

Apart from this, section 58 of MPLRC is also relevant in this matter which reads as under:

"58. Liability of land to payment of land revenue.-

(1) All land, to whatever purpose applied and wherever situate, is liable to the payment of revenue to the State Government, except such land as has been wholly exempted from such liability by special grant of or contract with the State Government or under the provisions of any law or rule for the time being in force:

Provided that the abadi land, subject to the provisions of Section 245, and the land which is situated in non-urban areas and used for agricultural purposes and not exempted from such liability, is liable to payment of revenue to the Gram Sabha.

(2) Such revenue is called "land revenue", and that term includes all moneys payable to the State Government for land, notwithstanding that such moneys may be described as premium, rent lease money, quit-rent or in any other manner, in any enactment, rule, contract or deed."

A bare perusal of this provision shows that the term "land revenue" includes all moneys payable to the State Government for lands, which includes premium, lease rent, quit-rent or any other money arising out of any enactment, rule, contract or deed. This section is very wide and sub-section (1) of section 59 covers all lands to whatever purpose applied and wherever situated for the purpose of imposition of revenue except such land is exempted by law or contract. The words used are "any law or rule", which means that such exemption should be in consonance with the provisions of any law or rule. The petitioner has not shown any such exemption. Thus, by application of section 58 also it is clear that the State Government is well within its powers while imposing condition no. 5 in Annexure P-2.

As to Points No. (iii) and (iv):

9. The petitioner has placed heavy reliance on Section 264 of MPLRC. This section will apply provided it is established that the land in question belongs to Central Government. There is no material on record to show that this land belongs to Central Government. By placing reliance on section 2 of

1980 Act, it is submitted that the said provision begins with a non-obstante clause and, therefore, this entire Act will have an overriding effect over any other Act including MPLRC.

To elaborate, petitioner's case is that once prior approval is given by the Central Government, no further restriction or condition can be imposed.

10. In the considered opinion of this Court, a microscopic reading of section 2 of 1980 Act shows that the said section deals with prior approval of the Central Government for the purpose of giving forest land for various purposes mentioned in the 1980 Act. However, I am unable to read section 2 in the manner suggested by the petitioner. Reading of section 2 does not lead to a conclusion that the forest land becomes Central Government land or provision of MPLRC or any other State Act stood excluded for all purposes. Thus, this Court is of the opinion that section 2 of 1980 Act has a limited role to play, i.e., for the purpose of approval of the Central Government. Said approval, by no stretch of imagination, deprives the State Government to impose the conditions, more so when in Annexure P-1 the Central Government itself gave such permission to the State Government to impose the conditions. This portion of impugned order, whereby permission is given by the Central Government to the State Government, is not called in question in the present writ petition. Thus, these points are also decided against the petitioner. Since there is no conflict between 1980 Act and MPLRC, therefore the argument that Special Act will prevail over general, has no application.

As to Points No.(vii) and (viii):

11. The petitioner may be a handicapped person but no provision has been shown by the petitioner to establish that any immunity is given to such persons under the law for payment of lease rent and premium. In other words, there is no exemption for handicapped person from payment of lease rent and premium under the provisions of MPLRC and, therefore, on that ground the petitioner is not entitled to succeed. So far the question that in similar allotments the State Government has not imposed those conditions is concerned, in the opinion of this Court, the full facts of those cases are not before the Court. Even assuming that in such cases lease rent and premium is not imposed, no parity can be claimed by the petitioner from those persons. This will amount to claim negative equality, which is not permissible as per Article 14 of the Constitution. If some illegal concession or benefit is granted to somebody, it cannot become an example to be followed by the courts of law. Illegality

cannot be permitted to be perpetuated. The paramount consideration in bringing relevant provisions in MPLRC was to ensure that the forest land is not misused and when it also falls within the ambit of MPLRC, State can impose permissible premium and lease rent on such lands.

12. So far the judgments cited by the petitioner are concerned, it is true that in *T.N. Godavarman* (2006) 1 SCC 1 (supra) the Apex Court opined that the State is trustee of all natural resources meant for public use and enjoyment. However, the said observation of Supreme Court was given in a different context and cannot be read to mean that State is not owner of the forest or the State laws stood excluded on the reserve forest. Thus, the judgments of *T.N. Godavarman* have no application in the peculiar facts and circumstances of this case. The petitioner has also cited judgment of *Raheja Universal Limited* (supra) on the proposition that the special law prevails over the general. As discussed above, there is no conflict between 1980 Act and MPLRC and both operate in different situation, different context, different eventualities and for different purposes. Thus, the reliance on said judgment is misconceived. The other judgments cited by the petitioner has no application in the present matter.

13. Before parting with the matter, it is relevant to mention that the petitioner has filed written submissions, wherein he has quoted section 1(2) of MPLRC in bold letters and in inverted commas. The said provision reproduced by the petitioner is typed below in juxtaposition with the provision which is there in the Statute Book:

Reproduced in the written submissions	From M.P. Land Revenue Code, 1959
"(2) It extends to the whole of M.P., but nothing in this code shall apply to such areas as made, from time to time, be constituted as reserved or protected forests under the Indian Forest Act, 1927 (XVI 1927)".	"1(2). It extends to the whole of Madhya Pradesh but nothing contained in this Code except the provisions relating to liability of land for payment of land revenue the assessment of land revenue of with reference to the use of land, realisation of land revenue and all provisions ancillary thereto shall apply to such areas as may, from time to time, be constituted as reserved or protected forest under the Indian Forest Act, 1927 (XVI of 1927)

The aforesaid provision read in juxtaposition will show that the petitioner has not correctly reproduced the provision and misrepresented the provision. This practice cannot be appreciated and is strongly deprecated. Since this Court has dealt with the matter on merits in explicit, I do not propose to deal with this aspect any further.

14. On the basis of analysis made herein above, I find no legal error in the condition no.5 of Annexure P-2. Petition is bereft of merits and substance and is hereby dismissed. No costs.

15. Registry is directed to keep the "submission of written arguments" along with the record of this matter.

Petition dismissed.

I.L.R. [2012] M.P., 1900

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 4683/2012 (Gwalior) decided on 26 July, 2012

MANOHAR JATAV

... Petitioner

Vs.

STATE OF M.P. & ors.

... Respondents

A. *Hindu Minority and Guardianship Act (32 of 1956), Section 6(c), Guardians and Wards Act (8 of 1890), Sections 17(3), 19(a), Constitution, Article 226 - Habeas Corpus Petition - Welfare of Child - While dealing with a habeas corpus petition paramount consideration for the High Court is the welfare of the child - Neither the statutory provisions of the Act nor the precedence on the subject are to be blindly followed.*

(Para 14)

क. हिन्दू अप्राप्तवयता और संरक्षकता अधिनियम (1956 का 32), धारा 6 (सी), संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएँ 17 (3), 19 (ए), संविधान, अनुच्छेद 226, - बंदी प्रत्यक्षीकरण याचिका - बच्चे का कल्याण - बंदी प्रत्यक्षीकरण याचिका का निपटारा करते समय उच्च न्यायालय के लिए सर्वोपरी विचार, बच्चे का कल्याण है - ना तो अधिनियम के कानूनी उपबंधों का और ना ही इस विषय पर पूर्व निर्णय का विवेकहीनता से पालन करना चाहिए।

B. *Constitution - Article 226 - Habeas Corpus Petition - Minor girl is adamant and not willing to go with parents - Court considering the fact that on earlier occasion also she left the parents*

without information, girl child is directed to be sent to Nari Niketan with further direction to provide her counselling once in a week upto 4 weeks - Matter posted for further review after four weeks.(Para 21)

ख. संविधान - अनुच्छेद 226 - बंदी प्रत्यक्षीकरण याचिका - अप्राप्तवय बालिका का हठ है कि (वह) माता-पिता के साथ जाने के लिए रजामंद नहीं है - न्यायालय ने इस तथ्य का विचार करते हुए कि पूर्व अवसर पर भी वह बिना सूचना दिये माता-पिता को छोड़ गई थी, बालिका को नारी निकेतन में भेजे जाने के लिए निदेशित किया, आगे इस निदेश के साथ कि चार सप्ताह के लिए सप्ताह में एक बार उसे परामर्श दिया जाए - प्रकरण चार सप्ताह बाद, आगे पुनर्विलोकन हेतु नियत किया गया।

Cases referred :

(2008) 9 SCC 413, AIR 1941 Bom. 103, (1973) 1 SCC 840, (1982) 2 SCC 544, (1984) 3 SCC 698, (2008) 7 SCC 673, (2011) 6 SCC 479, AIR 2012 Madras 62..

M.S. Rawat, for the petitioner.

Pradeep Katare, for the corpus.

Vijay Sunderam, P.L., for the respondent /State.

H.D. Gupta with *Suryavanshi*, as amicus curiae.

ORDER

SUJOY PAUL, J. - In this habeas corpus petition filed by the father of Sangeeta (herein after called "corpus"), it was stated that she was taken away by respondent No. 6. Pursuant to the direction of this Court, the corpus was produced before this Court. The corpus engaged Shri Pradeep Katare as her counsel. It was stated by Shri Katare that corpus solemnised marriage with respondent No. 6 and she does not want to go with her parents. During the preliminary hearing of this matter and awaiting the ossification test report, she was sent to Nari Niketan.

2. Learned counsel for the petitioner relied on the Primary Board Marksheet of 2007 (Annexure P-2), which shows that the date of birth of corpus is 15.03.1995. As per the ossification report also, corpus was found to be minor.

3. Shri Katare heavily relied on Section 6(c) of the Hindu Minority and Guardianship Act, 1956 (herein after called "1956 Act") to submit that as per this provision even the minor married girl is required to be handed over to her

husband. He also relied on Section 19(a) and Section 17 of the Guardians and Wards Act, 1890 (herein after called "1890 Act). On the strength of these provisions, it is stated that the natural guardian of a Hindu minor girl after marriage is her husband. By placing reliance on 1956 Act, it is stated that the Court is required to see the wish of the girl also. However, Shri Katare has not disputed that the corpus is a minor girl.

4. Per Contra, Shri M.S. Rawat, learned counsel for the petitioner relied on Section 12 of the Child Marriage Restraint Act, 1929 and Section 6 of 1956 Act to submit that such marriage cannot be recognized. Shri Rawat and Shri Vijay Sundaram, learned Panel Lawyer vehemently argued that there is no material to show that even a marriage had taken place. Shri Sundaram submits that respondent No. 6 was arrested and is in custody in Crime No. 75/12 and offences under Section 363 and 366 of IPC are registered against him for forcefully and without authority of law taking away the corpus. He submits that the corpus was wrongfully detained by respondent No. 6.

5. I have also heard Shri H.D. Gupta, learned senior counsel as amicus curiae.

6. In the light of aforesaid submissions, the question is whether this Court while exercising its writ jurisdiction under Article 226 of the Constitution is bound by the aforesaid sections of 1956 Act and 1890 Act? Another question is what is the main consideration for deciding the custody of a minor in a habeas corpus writ petition? Whether writ Court is mechanically bound by the provisions of 1956 or 1890 Act?

7. Before dealing further, it is profitable to quote the aforesaid provisions relied upon by Shri Katare, which reads as under:-

Sec. 6(c) of 1956 Act:

"6. Natural guardians of a Hindu minor.-- The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(c) in the case of a married girl – the husband: provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (varaprastha) or an ascetic (yati or sanyasi)..”

Sec. 17 and 19(a) of 1890 Act:

17. Matters to be considered by the Court in appointing guardian.-(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provision of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted by Act 3 of 1951, Sec. and Sch.

(5) The Court shall not appoint or declare any person to be a guardian against his will.

19(a) of a minor who is married female and whose husband is not, in the opinion of Court, unfit to be guardian of her person; or.”

8. The questions are no more res integra. The Apex Court in (2008) 9 SCC 413 (*Nil Ratan Kundu and another Vs. Abhijit Kundu*), has held that in determining the question as to whom should be given the custody of a minor child, the paramount consideration is “welfare of child” and not the rights of the parents under a statute for the time being in force. It is noteworthy that in various countries the legal position and principles governing the field are almost same i.e. welfare of the child is paramount consideration for the purpose of custody. It is apt to quote few of them:-

“In *Halsbury's Laws of England*, 4th Edn., Vol. 24, Para 511 at p.217 it has been stated:

"511.....Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration, and may not take into consideration whether from any other point of view the father's claim in respect of that custody or upbringing is superior to that of the mother, or the mother's claim is superior to that of the father."

In Habeas Corpus, Vol. I, p. 581, Bailey states:

"The reputation of the father may be as stainless as crystal; he may not be afflicted with the slightest mental, moral or physical disqualifications from superintending the general welfare of the infant; the mother may have been separated from him without the shadow of a pretence of justification; and yet the interests of the child may imperatively demand the denial of the father's right and its continuance with the mother. The tender age and precarious state of its health make the vigilance of the mother indispensable to its proper care; for, not doubting that paternal anxiety would seek for and obtain the best substitute which could be procured yet every instinct of humanity unerringly proclaims that no substitute can supply the place of her whose watchfulness over the sleeping cradle, or waking moments of her offspring, is prompted by deeper and holier feeling than the most liberal allowance of nurses' wages could possibly stimulate."

In *McGrath (infants), Re Lindley*, L.J. Observed:(Ch p. 148):

".....The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

The Law in the United States is also not different. In *American Jurisprudence*, 2nd Edn., Vol. 39, Para 31, p. 34,

it is stated:

“As a rule, in the selection of a guardian of a minor, the best interest of the child is the paramount consideration, to which even the rights of must some times yield.”

“Generally, where the writ of habeas corpus is prosecuted for the purpose of determining the right to custody of a child, the controversy does not involve the question of personal freedom, because an infant is presumed to be in the custody of someone until it attains its majority. The Court, in passing on the writ in a child custody case, deals with a matter of an equitable nature, it is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just. Therefore, these cases are decided, not on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but on the Court's view of the best interests of those whose welfare requires that they be in custody of one person or another; and hence, a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require. In short, the child's welfare is the supreme consideration, irrespective of the rights and wrongs of its contending parents, although the natural rights of the parents are entitled to consideration.

An application by a parent, through the medium of a habeas corpus proceeding, for custody of a child is addressed to the discretion of the court, and custody may be withheld from the parent where it is made clearly to appear that by reason of unfitness for the trust or of other sufficient causes the permanent interests of the child would be sacrificed by a change of custody. In determining whether it will be for the best interest of a child to award its custody to the father or mother, the Court may properly consult the child, if it has sufficient judgment.”

In *Howarth v. Northcott* it was stated:

“In habeas corpus proceedings to determine child custody, the jurisdiction exercised by the Court rests in such cases on its inherent equitable powers and exerts the force of the State, as *parens patriae*, for the protection of its infant ward, and the very nature and scope of the inquiry and the result sought to be accomplished call for the exercise of the jurisdiction of a Court of equity.”

“The employment of the forms of habeas corpus in a child custody case is not for the purpose of testing the legality of a confinement or restraint as contemplated by the ancient common law writ, or by statute, but the primary purpose is to furnish a means by which the court, in the exercise of its judicial discretion, may determine what is best for the welfare of the child, and the decision is reached by a consideration of the equities involved in the welfare of the child, against which the legal rights of no one, including the parents, are allowed to militate.”

9. In section 4 of 1890 Act, the word “minor” is defined. As per the definition, minor is a person, who has not attained the age of majority. Word “guardian” means a person having the care of the person of a minor or his property or both. “Ward” is defined as a minor for whose person or property or both, there is a guardian. Section 7 provides power of the Court to make order as to guardianship. Section 8 of the Act enumerates the person entitled to apply for an order as to guardianship. Section 19 prohibits the Court from appointing guardian in certain cases. In Hindu Minority and Guardianship Act, 1956, the definition of “minor” and “guardian” is almost *peri materia* to the 1890 Act. Section 6 (c) of 1956 Act is heavily relied by Shri Katara which deals with “natural guardian of a Hindu minor”. However, to determine the questions involved in this matter, Section 13 of the 1956 Act is relevant:-

“13. Welfare of minor to be paramount consideration.- (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of

the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor.”

(Emphasis Supplied)

10. A bare perusal of Section 13 shows that the Courts are equipped with the power even under the said Act to decide the custody of the minor child irrespective of other provisions in the Act and for deciding the same, welfare of the child is the paramount consideration. Section 26 of Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it may deem just and proper with respect to the custody, maintenance and education of minor children.

11. A bare perusal of a development of law on this subject shows that it is the welfare of the child and not the rights of the parents which will decide the question of custody. This view has been taken by Bombay High Court way back in AIR 1941 Bombay 103 (*Sarwatibai Ved Vs. Shripad Ved*). The Apex Court in (1973) 1 SCC 840 (*Roxy Jacob Vs. Jacob A. Chakramakkal*), held that the object and principle of 1890 Act is not merely providing physical custody of minor but due protection of the rights of the ward's maintenance and education. The power of the different Court under the Act is to ensure welfare of the minor. The same view is taken in (1982) 2 SCC 544 (*Thrity Hoshie Dolikuka Vs. Hoshiam Shavaksha Dolikuka*); (1984) 3 SCC 698 (*Smt. Surinder Kaur Sandhu Vs. Harbax Singh Sandhu and another*) and (2008) 7 SCC 673 (*Mausami Moitra Ganguli Vs. Jayant Ganguli*).

12. In *Nil Ratan Kundu* (Supra), the Apex Court in Para 52 and 57 has held as under:-

“52.....A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and

favourable surroundings.”

57. In our opinion, in such cases, it is not the “negative test” that the father is not “unfit” or disqualified to have custody of his son/daughter that is relevant, but the “positive test” that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of a minor in favour of the father, the mother or any other guardian.”

13. In a recent judgment reported in (2011) 6 SCC 479 (*Ruchi Majoo Vs. Sanjeev Majoo*), the Apex Court again followed the aforesaid principle of law i.e. the welfare of the minor is the paramount consideration for the courts while exercising its *parens patriae* jurisdiction.

14. On the basis of aforesaid principles laid down by various courts, it is clear that the welfare of the child is the paramount consideration for the Court and in exercise of powers under Article 226 of the Constitution (habeas corpus), this Court is not bound by the enactments and is required to see the welfare of the child.

15. In a recent judgment by the full Bench of Madras High Court reported in AIR 2012 Madras 62 (*T. Sivakumar v. Inspector of Police, Thiruvallur Town Police Station & Ors.*), opined as under:-

“If it is accepted that as per S. 6 (c) of the Hindu Minority and Guardianship Act, the husband of a female child shall be the natural guardian, it will only amount to giving premium for the offence committed by the male. When the law aims at eradicating the evil menace of child marriages, declaring the adult male who marries a female child, as her natural guardian would only defeat the very object of the Act. A law cannot be interpreted so as to make it either redundant or unworkable or to defeat the very object of the Act. Thus, by committing an offence punishable under S. 9 of the Act, the adult male cannot acquire the legal status of the natural guardian of the female child. S. 6 (c) of the Hindu Minority and Guardianship Act must be held to have been impliedly repealed by the Prohibition of Child Marriage Act.”

Therefore, an adult male who marries a female child in violation

of S. 3 of the Prohibition of Child Marriage Act shall not become the natural guardian of the female child.

After the advent of the Prohibition of Child Marriage Act since the male contracting party to a child marriage does not attain the full status of the husband until the child attains the eligible age, like a husband of a full fledged valid marriage and consequentially since he is not the guardian of the female child of such child of such child marriage, he is not entitled for the custody of the minor. If a different interpretation is adopted to say that such husband is entitled for the custody of minor wife it will only defeat the very object of the Act. Even if the female child expresses her desire to go to his custody he shall not be entitled to custody.

The minor girl cannot be allowed to walk away from the legal guardianship of her parents. But, if she expressed her desire not to go with her parents, provided in the opinion of the Court she has capacity to determine, the Court cannot compel her to go to custody of her parents and instead, the Court may entrust her in the custody of a fit person subject to her volition. Similarly if the minor girl expresses her desire not to go with her parents, provided in the opinion of the Court she has capacity to determine, the Court may order her to be kept in a children home set up for children in need of care and protection under the Provisions of the Juvenile Justice (Care and Protection) Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the Juvenile Justice (Care and Protection) Act, 2000. In such a case Ss. 17 and 19 of Guardian and Wards Act can be taken for guidance."

On the basis of aforesaid judgments it is crystal clear that this Court is not required to mechanically apply the various provisions of the Act. The welfare of the child is the dominant consideration and therefore, the reliance placed on the aforesaid acts by Shri Katore is of no assistance to him. More so, when there is no material before this Court to show that even a marriage between corpus and respondent No. 6 had taken place. Respondent No. 6 is behind the bars. Thus, in the considered opinion of this Court, there is no question of giving custody of corpus to respondent No. 6.

16. This Court is conscious of the fact that the children are not merely chattels or toys, and therefore, they cannot be directed to be handed over mechanically by taking assistance of a Statute. The full Bench of Madras High Court opined that Section 6(c) of Hindu Minority and Guardianship Act must be held to have been impliedly repealed by the Prohibition of the Child Marriage Act. It was further held that an adult male who marries a female child in violation of Section 3 of Prohibition of Child Marriage act shall not become the natural guardian of female child.

17. Now the crucial question is whether the corpus can be given to the custody of petitioner. On more than one occasion this Court interviewed the corpus and the parents. The corpus is presently adamant and is not willing to go with parents at any cost. It is reported that earlier also she left the parents without information which created a havoc to the parents. In this factual backdrop, the question is whether this Court should forcibly give custody to the parents.

18. The Madras High Court (Full Bench) in *T. Sivakumar's case* (supra) opined that if minor girl expresses her desire not to go with her parents the Court may order her to be kept in a Children Home etc. It is also noteworthy that a minor girl between her 15 to 18 years of age floats into a state of puberty, a state of innocence and yet lacking in mature understanding more guided by "attractions". The state of mind can hardly be described as mature. If that be not so, she can hardly leave her parents for a new entrant in her life, without being mindful of what the type of such new entrant in the life is.

19. In this factual backdrop, I do not deem it proper to forcibly handover the corpus to the petitioner/parents. This may cause more harm than good.

20. This Court had an advantage to hear Shri M.P.S. Raghuvanshi, learned Additional Advocate General on the question whether any counselling facilities are available at Gwalior. Learned Additional Advocate General informed and undertook that the said facility is available at 'Parivaar Paramarsh Kendra' and necessary arrangements will be made in the event the counselling is directed by the Court. In my considered opinion, in the present state of affairs and mindset of corpus, it will not be proper to handover her to the petitioner/parents. She needs counselling so that she can improve from her present state of mind and emotional crisis.

21. In this view of the matter, I deem it proper to issue following

directions:-

(i) The Incharge of Nari Niketan Centre shall give sympathetic, compassionate and educative treatment to the corpus with a view to provide her room to come out of the crisis and distress.

(ii) The official respondents shall ensure that the corpus is given counselling by trained persons on regular basis, atleast once in a week. It will be the choice of the official respondents to provide counselling either at Nari Niketan Centre or take the corpus to 'Parivaar Paramarsh Kendra' in adequate security.

(iii) After four weeks and on completion of four counsellings, the status would be reassessed by this Court.

Consequently, the aforesaid directions be forthwith implemented from the week commencing 30th of July, 2012. The Registry is directed to list this matter on 31st August, 2012. Till such time the corpus will be retained in Nari Niketan Centre.

List on 31st August, 2012.

A typed copy of this order be given to learned Additional Advocate General for necessary compliance.

Order accordingly.

I.L.R. [2012] M.P., 1911

APPELLATE CIVIL

Before Mr. Justice K.K. Trivedi

F.A. No. 368/2007 (Jabalpur) decided on 20 April, 2012

VINOD GURU & anr.

...Appellants

Vs.

PARUL SONI

...Respondent

A. Limitation Act (36 of 1963), Section 21 - Limitation - Impleadment of Party - Where after the institution of the suit, a new plaintiff or defendant is substituted, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. (Para 5)

क. परिसीमा अधिनियम (1963 का 36), धारा 21 - परिसीमा - पक्षकार

बनाया जाना — जहाँ पर वाद संस्थित किये जाने के बाद, नये वादी या प्रतिवादी को प्रतिस्थापित किया जाता है, तब वाद को जहाँ तक उसका संबंध है, तब से संस्थित किया जाना समझा जावेगा जब उसे पक्षकार बनाया गया था।

B. Specific Relief Act (47 of 1963), Section 42 - Suit for declaration - Respondent filed suit against appellant No.1 only alleging that plaintiff has purchased the property from appellant No.2 and the appellant No.2 now wants to dispossess the plaintiff - Appellant No. 2 was a necessary party however, was impleaded as a defendant at a much later stage - Held - Cause of action accrue on 11.4.1999 therefore, suit against appellant No.2 should have been filed within 3 years from 11.4.1999 - Relief as claimed by respondent could not have been granted without impleadment of appellant No. 2 - As the suit filed by respondent against the appellant No.2 was barred by time, therefore, the suit filed by respondent is liable to be dismissed. (Paras 6 to 9)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 42 - घोषणा के लिए वाद — प्रतिवादी ने अपीलार्थी क्रं. 1 के विरुद्ध वाद केवल यह अभिकथन करते हुए प्रस्तुत किया कि वादी ने सम्पत्ति अपीलार्थी क्रं. 2 से खरीदी है और अब अपीलार्थी क्रं. 2 वादी को बेदखल करना चाहता है — अपीलार्थी क्रं. 2 आवश्यक पक्षकार था तथापि उसे प्रतिवादी के रूप में बाद में पक्षकार बनाया गया था — अभिनिर्धारित — वाद कारण दिनांक 11.04.1999 को उत्पन्न हुआ इसलिए अपीलार्थी क्रं. 2 के विरुद्ध वाद 11.04.1999 से तीन वर्ष के भीतर प्रस्तुत किया जाना चाहिए — प्रतिवादी द्वारा चाहा गया अनुतोष अपीलार्थी क्रं. 2 को पक्षकार बनाये बिना मंजूर नहीं किया जा सकता था — चूँकि प्रत्यर्थी द्वारा अपीलार्थी क्रं. 2 के विरुद्ध प्रस्तुत किया गया वाद काल वर्जित है, इसलिए प्रत्यर्थी द्वारा प्रस्तुत किया गया वाद खारिज किये जाने योग्य है।

Cases referred :

2000 (1) J LJ 373, AIR 1962 MP 301 2009 RN 42.

R.S. Tiwari, for the appellants.

K.C. Ghildiyal & Devendra Shukla, for the respondent.

J U D G M E N T

K.K. TRIVEDI, J. - This is an appeal under Section 96 of the Code of Civil Procedure by the defendants against the judgment and decree dated 23.03.2007 passed in Civil Suit No.11-A/2005 by the V Additional District Judge, Sagar. By the said judgment and decree, the suit filed by the respondent

has been decreed and it is declared that the sale-deed dated 12.09.1997 executed in favour of the appellant No.1 by appellant No.2 is not binding on the respondent/plaintiff. A further decree of injunction has been granted restraining the appellants to interfere in the possession of the respondent/plaintiff in House No.6/53-B, Sadar Bazar, Sagar.

2. Facts giving rise to filing of this appeal are that the respondent filed a suit initially against the appellant No.1 only on 05.05.1999 seeking following relief :

- “1. यह कि वाद कथित मकान नं० 6/53बी जिसका बैनामा वादी के पास है उस मकान में प्रतिवादी का कोई हक व अधिकार नहीं है ऐसी घोषणा माननीय न्यायालय द्वारा की जावे।
 2. यह कि बैनामा दि० 12.9.97 से प्रतिवादी का कोई हक अर्जित नहीं होता तथा उक्त विक्रय पत्र अवैध है जो वादी पर बंधनकारी नहीं है।
 3. यह कि वाद कथित मकान नं० 6/53बी पर प्रतिवादी का कोई अधिकार नहीं है तथा प्रतिवादी वादी के मकान नं० 6/53बी पर बलपूर्वक कब्जा करने व नुकसान पहुंचाने एवं उसके शांतिपूर्ण कब्जे में दखल करने का प्रतिवादी को कोई अधिकार नहीं है ऐसी घोषणा माननीय न्यायालय द्वारा जारी की जावे।
 4. यह कि जरिये स्थाई निषेधाज्ञा के प्रतिवादी को रोका जावे कि वह वादी की मालिकी के मकान नं० 6/53बी में किसी प्रकार का प्रवेश व हस्तक्षेप न करे कब्जा न करे व किसी तरह का नुकसान न पहुंचाये। ऐसी स्थाई निषेधाज्ञा माननीय न्यायालय द्वारा प्रतिवादी के विरुद्ध जारी की जावे।
 5. यह कि वादी को प्रतिवादी से संपूर्ण वाद व्यय दिलाया जावे तथा अन्य अनुतोष जो वादी पाने का अधिकारी हो प्रतिवादी से दिलाया जावे।
- उपरोक्तानुसार डिक्री पारित की जावे।

(The relief claimed in the unamended claim are mentioned).

The contention made in the plaint were that the respondent has purchased the house from the appellant No.2 by a registered sale-deed dated 02.03.1997 for Rs.2,00,000/- and was put in possession of the said house. The description of the house and its boundaries were mentioned. It was alleged that the respondent was minor and his father was looking after the

property. The appellant No.1 was an influential person and was intending to grab the property of the respondent/plaintiff. In the intervening night of 11.04.1999, the appellant No.1 tried to take forcible possession of the house. When he was stopped to do so and a complaint in writing was made, it was alleged by the appellant No.1 that vide registered sale-deed dated 12.09.1997 the appellant from No.1 has purchased the house for a valuable consideration from appellant No.2 and thus has become the owner of the said house. On the basis of such information, the respondent thought that a cloud is cast on his title on the strength of such a sale-deed, therefore, the suit was filed on 05.05.1999 only against the appellant No.1.

4. A written statement was filed by the appellant No.1 and it was categorically denied that the house in question was purchased by the respondent from Smt. Kamla Devi vide registered sale-deed dated 02.03.1997. It was contended that in fact a fraud was committed by the father of the respondent and for the said purposes, a complaint was lodged. In fact the house was said to be sold for a consideration of Rs.2,00,000/- but in fact a cheque of Rs.50,000/- was given to somebody else, which was never received by the appellant No.2 and, therefore, there was no sale-deed executed in favour of the respondent. In fact such a sale-deed was also a forged document. Even after making such a submission by the appellant No.1 in his written statement, the respondent/plaintiff did not consider it necessary to implead Smt. Kamla Devi as a party in the suit for a long time and ultimately taken the step for impleadment of such a person as a party only on 25.08.2003 by making an application under Order 1 Rule 10, sub-rule (2) of the Code of Civil Procedure vide I.A. No.5. An application for amendment in the plaint was also made on the same date vide I.A. No.4. The said applications were considered by the Trial Court and were allowed vide order dated 06.10.2004. Accordingly, the amendment in the plaint was done and the appellant No.2 was also impleaded as a party on 06.10.2004. It will not be out of place to mention here that in such circumstances the appellant No.2 was a necessary party in the suit as it was alleged that the sale-deed was executed in favour of the appellant No.1 as also in favour of the respondent by the said lady and certain dispute with respect to the execution of the sale-deed was also raised. Therefore, the respondent was well aware of the fact that the appellant No.2 was a necessary party for grant of an effective decree in case the respondent succeeds in the suit but no attempt was made to implead her as a party in the suit. Certain application under Section 45 of the Indian Evidence Act was made by the

appellant No.1 and this was pointed out that the thumb impression of appellant No.2 was required to be examined by an expert. Such applications were considered, permission was granted and expert report was obtained. All this was well within the knowledge of the guardian in lis of the respondent, who was required to prosecute the suit on behalf of the minor plaintiff in appropriate manner.

5. The law in this respect is well settled that the effect of substituting or adding new plaintiff or defendant would be governed by the provisions of Section 21 of the Limitation Act. It is specifically provided that where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, **be deemed to have been instituted when he was so made a party.** The proviso prescribed under the said Section empowers the Court to direct that the suit, as regards such plaintiff or defendant, shall also be deemed to be instituted on any earlier date but for that an application is required to be made, the bonafides are required to be shown and then only the Court can enlarge the period. Now in view of the aforesaid facts, it is to be examined whether the suit so filed by the respondent could be said to be filed within limitation as against the appellant No.2.

6. The factual aspects as have been narrated herein above indicate that the respondent/plaintiff was fully aware of the fact that a cloud is cast on his title over the disputed house. The execution of the sale-deed in favour of appellant No.1 was claimed to be done by the appellant No.2, who too was the transferrer of the property in favour of the respondent/plaintiff. The reliefs as were claimed in unamended plaint could not have been granted to the respondent without impleadment of the necessary party, i.e. appellant No.2. If this was within the knowledge of the respondent, it was the duty on the part of the respondent to implead appellant No.2 as a party immediately in the suit. There was callous negligence on the part of the respondent in not adding such a necessary party in the suit. The Court has passed no order on the date when the application of adding appellant No.2 as a party in the suit was allowed extending the limitation for filing of the suit as against the appellant No.2. The order simply says that the appellant No.2 was a necessary party and, therefore, is to be added as defendant in the suit. While allowing the application for amendment because of allowing the I.A. No.5, the Trial Court has passed no order in this respect exercising the powers conferred on it under the proviso to Section 21 of the Limitation Act. The record indicates that no application for the said purposes was made by the respondent/ plaintiff. Thus, it is to be

inferred that the suit was deemed to be filed against the appellant No.2 on 06.04.2010 when she was impleaded as a party in the suit. If that is the position, it is to be considered whether the suit as against the newly added person could be said to be within the limitation or not.

7. Apparently the cause of action accrued to the respondent when the suit was said to be filed against the appellant No.1 as has been described in the plaint in paragraph 14 wherein it is said that the cause of action accrued on 11.04.1999 when a threat was given by the appellant No.1 to the respondent. For such a suit where there is no limitation prescribed under the Limitation Act, the limitation of 3 years is available for filing of the suit. From 11.04.1999, the suit should have been filed against the appellant No.2 within a period of 3 years. The same cause of action is also made available for the appellant No.2 but the suit cannot be said to be filed against her within limitation on the date when she was impleaded as a party. This being so, the learned lower Court has not rightly considered this issue whether the suit as filed by the respondent was within the limitation or not. In fact the issue in this respect was not framed but was required to be framed. At least when the claim of the respondent was being considered in view of Issue No.3, this particular aspect was required to be examined. Since this has not been done, the judgment and decree passed by the Court below cannot be said to be as per law.

8. This Court in the case of *Mahesh Singh and others vs. Sewaram and others*, 2000 (1) J.L.J. 373, has considered these aspects whether the limitation for filing of the suit can be examined at a particular stage or not. This Court has held that the question of limitation being a mixed question of law and facts, can be raised at any time even if it was not raised before the lower Court. It is further held by this Court in case of *Central India Chemicals Private Ltd., Sehore vs. Union of India, Railways* (AIR 1962 M.P. 301), in para 14, which reads thus :

"Thus, in the suit limitation under Art.30 has not been expressly pleaded. Still it does not help the plaintiff. One has, in this respect to distinguish between a case where limitation is an arguable point and has therefore to be pleaded and one where it is patent and non-controversial on the proved facts. Here, for example the two crucial dates are on the plaint itself and do not admit of the least doubt or controversy. Thus, under Sec. 3 of the Limitation Act, the Court has to dismiss it whether or not limitation has been set up as a defence."

This proposition of law has further been considered by the Apex Court in various cases and it has been held that if a suit, appeal or application are preferred beyond the limitation prescribed, the same are liable to be dismissed in view of the specific provisions of sub-section (1) of Section 3 of the Limitation Act, 1963. In the case of *Noharlal Verma vs. District Cooperative Central Bank Ltd.*, 2009 RN 42, the Apex Court considered these aspects and has categorically held that such core issues are to be decided first.

9. Thus, it is clear that the suit filed by the respondent as against the appellant No.2 was not maintainable, being barred by limitation. Secondly, the effective relief as was claimed in the unamended plaint could not have been granted to the respondent by the Court below without the impleadment of the necessary party, i.e. appellant No.2. In view of these provisions of law, the suit of the respondent was liable to be dismissed.

10. Accordingly, finding that the Court below has erred in law in granting the decree in favour of the respondent, this appeal is allowed. The judgment and decree of the Court below is set aside. The suit of the respondent stands dismissed. However, looking to the facts and circumstances in the present case, parties to bear their own cost.

Appeal allowed.

I.L.R. [2012] M.P., 1917

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 560/1999 (Jabalpur) decided on 5 July, 2012

CHANDRABHAN SINGH & anr. Appellants

Vs.

GANPAT SINGH & ors. Respondents

A. Civil Procedure Code (5 of 1908), Order 9 Rule 1 - Pleadings - Object is to enable the adversary to know the case of other party - In order to have fair trial, it is imperative that party should state the essential material facts - Detailed pleadings about the property in respect of which the person is either claiming possession or title must be made. (Paras 7 & 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 1 - अभिवचन

— विरोधी पक्षकार को दूसरे पक्षकार के प्रकरण की जानकारी प्राप्त हो सकना इसका उद्देश्य है — निष्पक्ष विचारण के लिए यह अनिवार्य है कि पक्षकार, आवश्यक तात्त्विक तथ्यों को प्रकट करे — उस संपत्ति के बारे में विस्तृत अभिवचन किया जाना चाहिए जिसके संबंध में व्यक्ति या तो कब्जा या हक का दावा करता है।

B. Civil Procedure Code (5 of 1908), Order 8 Rule 10 - Written statement - Even if the defendant fails to file the written statement, the Court should proceed cautiously and exercise its discretion in a just manner - Burden of proof would remain on plaintiff and his mere assertion in plaint affidavit would not be sufficient to discharge the burden.
(Para 9)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 10 — लिखित कथन — यदि प्रतिवादी लिखित कथन प्रस्तुत करने में असफल भी होते हैं तब भी न्यायालय को सावधानीपूर्वक कार्यवाही करना चाहिए और अपने विवेकाधिकार का प्रयोग न्यायोचित ढंग से करना चाहिए — सबूत का भार वादी पर रहेगा और वाद शपथ पत्र में उसका मात्र प्राख्यान उसे भार से उन्मुक्त करने के लिए पर्याप्त नहीं होगा।

Cases referred :

(2005) 6 SCC 265, (2008) 17 SCC 491, (2009) 5 SCC 713, (2010) 11 SCC 777, (2010) 14 SCC 316, (2002) 1 SCC 134, (1987) 2 SCC 555, (2008) 17 SCC 491, (2012) 5 SCC 265, (2012) 5 SCC 370.

S.Kochar with Vikas Tiwari, for the appellants.

Ashish Tiwari, for the respondents No. 1 to 3.

J U D G M E N T

ALOK ARADHE, J. - This appeal has been preferred by the defendants no. 1 and 2. This court vide order dated 19-09-2005, while admitting the appeal had framed the following substantial questions of law :-

“1. Whether the findings of the appellate Court that Bua of Devi Singh married to Mathura is perverse and is based on surmises and conjunctures and the plaintiff without disclosing name of Bua have pleaded her marriage with Mathura which finding cannot be accepted in the absence of proper pleadings and evidence?

2. Whether the plaintiffs who are successor of Mathura

Singh are entitled to succeed property of Devi Singh.”

2. The facts leading to filling of this appeal briefly stated are that the plaintiffs filed the suit seeking a relief of declaration and permanent injunction. The claim in the suit was based on the ground that Mathura Singh and Devi Singh had half share each in the suit land admeasuring 5.829 hectares. The plaintiffs claimed the title in respect of half of the share in the suit land being the grand son's of Mathura Singh. In respect of remaining half share, the plaintiffs based their claim on the basis of an oral Will dated 12-11-1984. Alternatively, it was pleaded that since the plaintiffs were in possession of the suit land held by Devi Singh, therefore, by virtue of Section 190 of the M.P. Land Revenue Code, 1959 they have become the owners in respect of the share held by Devi Singh in the suit lands. The plaintiffs sought relief of declaration that they are the owners of the suit lands and order of mutation dated 05-03-1987, in favour of defendant no. 1 and 2 in so far as it pertains to share of the defendants no. 1 and 2 in the lands held by Devi Singh be declared null and void. The defendants no. 1 and 2 filed written statement in which *inter alia*, it was pleaded that plaintiffs are not related to Devi Singh and order of mutation dated 05-03-1987 has been duly passed in favor of the defendants no. 1 and 2 in respect of the land held by Devi Singh, and that the defendants no. 1 and 2 are in possession of the land held by Devi Singh.

3. The trial Court vide judgment and decree dated 29-06-1996 partly decreed the suit filed by the plaintiffs. The trial court, *inter alia* held that plaintiffs are owners in respect of half share of the suit lands which was held by Mathura Singh being his grand sons. It was further held that the plaintiffs have not been able to prove that half share in the suit land held by Devi Singh was bequeathed to them by an oral Will. It was also held that order of mutation dated 05-03-1987 is null and void as the same has been passed without notice to the plaintiffs. Accordingly, the suit filed by the plaintiffs was partly decreed.

4. Being aggrieved by the aforesaid decree, the plaintiffs filed an appeal. The lower appellate Court *inter alia* held that the mother of the plaintiff no. 3, was sister of Devi Singh's father and therefore, plaintiff no. 3 is legal representative of Devi Singh. It was further held that Mathura Singh and Devi Singh were related to each other as uncle and nephew. The appellate Court also held that (Exhibit P-2) shows that the names of Mathura Singh and Devi Singh were jointly recorded in the revenue record in respect of the lands in

question, which in turn, shows that they are closely related to each other. It was further found by the lower appellate Court that Devi Singh had sold part of the land vide registered sale deed to Mathura Singh and had also sold another part of lands in question to the plaintiffs. It was further found that no notice of mutation proceedings was given to the plaintiffs before passing the order dated 05-03-1987. Accordingly, the claim of the plaintiffs was decreed in entirety.

5. Learned counsel for the appellants submitted that in the plaint, by way of amendment, the plea which was incorporated is vague inasmuch as name of the sister who was married to Devi Singh was not disclosed. It was also submitted that the plaintiffs have not based their claim of title in respect of the share held by Devi Singh in the suit lands on the basis of their being the legal representatives of late Devi Singh. Learned counsel for the appellants has also invited the attention of this court to paragraphs-13 and 14 of the findings recorded by the trial court and has submitted that the defendants no. 1 and 2 have been found to be in possession of the lands held by Devi Singh. In support of his submissions, learned counsel for the appellants has placed reliance on the decisions of the Supreme Court reported in the cases of *Spun Casting & Engg. Co. (P) Ltd. Vs. Dwijendra Lal Sinha (Dead) through LR's and others* 2005 (6) SCC 265, *Bachhaj Nahar Vs. Nilima Mandal and another* (2008) 17 SCC 491, *Vimal Chand Ghevarchand Jain and Others Vs. Ramakant Eknath Jadoo* (2009) 5 SCC 713, *Sameer Kumar Pal and another Vs. Sheikh Akbar and Others* (2010) 11 SCC 777 & *Chatti Konati Rao and others Vs. Palle Venkata Subba Rao* (2010) 14 SCC 316.

6. On the other hand, learned counsel for the respondents no. 1 to 3 submitted that the amendment which was incorporated in paragraph-1(a) of the plaint was not denied in the written statement by the defendants no. 1 and 2 and therefore, the same has to be treated as admitted. It was further submitted that lower appellate Court, on the basis of meticulous appreciation of evidence on record, has recorded a finding that the plaintiff no. 3, was the legal representative of late Devi Singh. It was further submitted that the appellants have miserably failed to make out any case for interference in exercise of powers under Section 100 of Civil Procedure Code and no substantial question of law arises for consideration in the appeal. In support of his submissions, learned counsel for the respondents no. 1 to 3 has placed reliance on the decision of the Supreme court in the case of *Veerayee Ammal Vs. Seeni Ammal* (2002) 1 SCC 134.

7. I have considered the submissions made on both the sides and have perused the record. I have carefully perused the averments made in the plaint. It is pertinent to mention here that the suit was filed on 06-07-1987 in which initially the claim with regard to the share of Devi Singh was based on two grounds, firstly, on the basis of oral Will dated 12-11-1984, and secondly, on the basis of acquisition of title under Section 190 of M.P. Land Revenue Code, 1959. Thereafter, by way of amendment on 09-05-1991, it was pleaded that Daulat Singh's sister was married to Mathura Singh and therefore, Mathura Singh and Devi Singh were related to each other as uncle and nephew. It is pertinent to mention here that in paragraph-1(a) of the plaint, name of the sister of Daulat Singh has not been disclosed. Besides that, the plaintiffs have not based their claim of title in the suit lands in respect of share of Devi Singh on the ground that they are legal representatives of deceased Devi Singh. From the relief claimed in the plaint, it is apparent that the plaintiffs have claimed title in respect of the share held by Devi Singh on the basis of oral Will. It is trite law that no party should be permitted to travel beyond its pleadings and should bring all necessary and material particulars in support of the case set up by it. The object and purpose of the pleadings is to enable the adversary to know the case of the other party. In order to have a fair trial, it is imperative that party should state the essential material facts, so that other party cannot be taken by surprise. See:- *Ram Sarup Gupta (Dead) by LR's Vs. Bishun Narain Inter College and Others* (1987) 2 SCC 555 & *Bachhaj Nahar Vs. Nilima Mandal and another* (2008)(17) SCC 491.

8. From careful scrutiny of the plaint, it is clear that the plaintiffs have not claimed title in respect of the share held by Devi Singh, being the legal representatives of late Devi Singh. Besides that, the pleadings in this regard is vague as is evident from paragraph-1 (a) of the plaint. It appears to be after-thought as the suit was filed in the year 1987 and thereafter, amendment was made after a period of approximately four years ie, in the year 1991. It is also pertinent to mention that the trial Court has not framed any issue with regard to the acquisition of title by the plaintiffs on the basis of their being the legal representatives of the deceased Devi Singh. The lower appellate Court while decreeing the claim of the plaintiffs has made out a new case and has travelled beyond the pleadings of the parties which is impermissible in law. In the absence of proper pleadings, the evidence, if any adduced, in this regard, cannot be looked into .

9. It is equally well settled in law that even if the defendant does not file

the written statement, the court should proceed cautiously and exercise its discretion in a just manner. Even, in the absence of written statement, burden of proof would remain on the plaintiff and his mere assertion in the plaint affidavit, would not be sufficient to discharge the burden. See : (2012) 5 SCC 265 *C.N. Ramappa Gowda Vs. C.C Chandregowda (Dead) by LR's and another*. It is also well settled in law that detailed pleadings about the property in respect of which the person is either claiming possession or title must be made. See : *Maria Margarida Sequeira Fernandes and Others Vs. Erasmo Jack De Sequeira (Dead) through LR's* (2012) 5 SCC 370. In the absence of pleadings with regard to acquisition of title on the ground of survivorship and taking into account the fact that the plaintiffs have not claimed title in respect of the suit land on the basis of their being the legal representatives of deceased Devi Singh, the lower appellate Court committed an error of law in making out a new case on behalf of the plaintiffs while decreeing the claim of the plaintiffs in entirety. For the aforementioned reasons, the first substantial question of law is answered in affirmative whereas the second substantial question of law is answered in the negative.

10. In the result, the appeal succeeds. The judgment and decree passed by the lower appellate Court is set aside and that of the trial Court is restored. In the facts of the case, the parties shall bear their respective costs.

Appeal Succeeds.

I.L.R. [2012] M.P., 1922

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 283/2000 (Jabalpur) decided on 9 July, 2012

MOHD. IQBAL KHAN & ors.
Vs.

...Appellants

LATE MANZOOR AHMAD KHAN & ors.

...Respondents

A. Muslim Law - Hiba-bil-iwaz - It is distinguishable from hiba or simple gift - It is a gift for consideration - In reality it is a sale and where the value of the property is more than Rs. 100/- it must be effected by a registered instrument. (Para 5)

क. मुस्लिम विधि - हिब-बिल-ईवाज - यह हिब या सामान्य दान से भिन्न है - यह प्रतिफल के लिए किया गया दान है - वास्तव में यह एक विक्रय है और जहां संपत्ति का मूल्य 100/- रुपये से अधिक है उसे पंजीकृत लिखत द्वारा

प्रभावी करना चाहिए।

B. Interpretation of document - Nature of document - In order to ascertain the nature of a document, intention of the parties has to be seen and the document has to be read as a whole. (Para 5)

ख. दस्तावेज का निर्वचन - दस्तावेज का स्वरूप - दस्तावेज का स्वरूप सुनिश्चित करने के लिए पक्षकारों का आशय देखा जाना चाहिए और दस्तावेज को सम्पूर्णता से पढ़ा जाना चाहिए।

Cases referred :

AIR 1922 PC 281, AIR 1995 SC 1205, 2000(1) MPLJ 198, AIR 1963 MP 277, AIR 1949 Nagpur 426, (1950) All.L.J. 30, AIR 1927 P.C. 174, 1977 MPLJ SN 57.

A.S. Jha, with *B.M. Prasad*, for the appellants.

None for the respondents.

J U D G M E N T

ALOK ARADHE, J. - This appeal has been preferred by the defendant, who has lost in both the Courts. This Court vide order dated 30.6.2000 had admitted the appeal on following substantial questions of law:-

"1. Whether the Court below was right in holding that Ex.D/1, Hiba-bul-evaj would require registration even though the Transfer of Property Act did not apply to the transactions made in accordance with the principles of Mahomedan Law ?

2. Whether the Court below should have considered that apart from the execution of document of gift, there was oral evidence on record for fulfilling the conditions of a gift in the eyes of law prevalent among Muslims ?"

2. Facts leading to filing of the appeal in nutshell are that the respondent/ plaintiff filed a suit for partition. Admittedly, the plaintiff and defendant are related to each other as real brothers and one Haliman Bi was their mother. It is also not in dispute that father of the parties to the suit was the owner of the suit house which was recorded in the name of their mother namely Haliman Bi, after the death of their father. It is the case of the plaintiff that plaintiff and defendant have equal share in the suit house. It is pleaded in the plaint that in the portion of the suit house marked in the plaint map, the plaintiff is in

possession. However, no partition has taken place between the parties. The plaintiff demanded partition of the suit house, however, the defendant did not pay any heed to the demand made by the plaintiff. Thereupon, the suit for partition was filed. The defendant filed the written statement in which inter-alia it was denied that plaintiff and defendant are owners of half share in the suit house. Infact the suit house belongs to Kasimullah Khan and Abida Bi i.e. wife of defendant. It was further pleaded that plaintiff has sold a portion of the suit house vide registered sale deed dated 24.6.1982 for a consideration of Rs.1000/-. It was also pleaded that Haliman Bi had partitioned the suit house during her lifetime and the plaintiff is in possession of the portion which was allotted to him in partition.

3. The trial Court vide judgment and decree dated 22.10.1992 decreed the suit filed by the plaintiff. The trial Court inter-alia held that in the absence of pleading by the defendant that vide Ex.D/1 dated 26.8.1976, Haliman Bi had partitioned the suit house amongst the plaintiff, defendant's wife Abida Bi and Kasimullah Khan, the evidence in this regard cannot be looked into. The trial Court further held that Ex.D/1 has been described as gift deed whereas, Hazarilal, who is scribe to the document in question states that on execution of Ex.D/1, the partition had taken place amongst the parties to the deed. The defendant in para 3 of his statement has admitted that document Ex.D/1 does not contain the signature of plaintiff and defendant No.1. For the aforementioned reasons, the trial Court concluded that defendant has failed to prove that the house in question was subjected to partition vide Ex.D/1 and that the plaintiff and defendant are entitled to half share each in the suit house. Accordingly, the suit was decreed. The lower appellate Court inter-alia held that there is no mention of partition in Ex.D/1. It was further held that Ex.D/1 has been executed for consideration as Haliman Bi had to pay a sum of Rs.3000/- to Kasimullah. Therefore, he was allotted the share in the suit house vide Ex.D/1. It was further held that since Ex.D/1 has been executed for consideration, therefore, the same requires registration. The appellate Court also held that Ex.D/1 cannot be treated as will, as the will becomes effective after the death of the executant. In the result, the appeal preferred by the appellant was dismissed.

4. Learned counsel for the appellant submitted that plaintiff has admitted in his statement that he is in possession of the portion of the suit house marked in the plaint map. The statement of the plaintiff itself shows that partition was effected amongst the parties to Ex.D/1. It was further submitted that Haliman

Bi had the authority to allot the share to Kasimullah. It was further submitted that document Ex.D/1 does not require registration and in the state of evidence on record, the essentials of a valid gift were fulfilled. Therefore, the Courts below grossly erred in discarding the document namely Ex.D/1.

5. I have considered the submissions made by learned senior counsel for the appellant and have perused the record. From careful scrutiny of the written statement filed by the defendant, it is apparent that there is no pleading by the defendant to the effect that vide Ex.D/1 dated 26.8.1976 Haliman Bi had partitioned the suit house amongst plaintiff, defendant's wife, Kasimullah and herself and, therefore, the evidence in this regard cannot be looked into. However, since the substantial question of law have been framed in this regard, it is apposite to notice the legal position with regard to gift under the Mahomedan Law. The essentials of a gift under the Mahomedan Law are a declaration of Hiba by the donar, an acceptance express or implied of the gift by the donee and delivery of possession of the property which is the subject matter of the gift accordingly to its nature. See: *Mohamad Abdul Ghani V. Fakhr Jahan Begum*, AIR 1922 Privy Council 281, *Mahboob Sahab Vs. Syed Ismail and others*, AIR 1995 SC 1205 and *Gulamhussain Kutubuddin Maner Vs. Abdulrashid Abdulrajak Maner and others* 2000(1) MPLJ 198 (SC). It is equally well settled legal position under the Mahomedan Law that there could be a gift of immovable property without there being a registered document. See: *Noorul Haque Vs. Riyazul Haque*, AIR 1963 MP 277. *Hiba-bil-iwaz* as distinguished from a hiba or simple gift, is a gift for consideration. It is in reality a sale where the property is immovable and is of a value of Rs.100/- upwards, it must be effected by a registered instrument, as required by Section 54 of the Transfer of Property Act. See: *Zainab Bi Vs. Jamalkhan*, (1949) Nagpur 426. *Gulam Abbas Vs. Razia Begum* (1950) All.L.J. 30 and in A.I.R. 1927 P.C. 174. Similar view has been taken by this Court in the case of *Iftikhar Jahan Begum Vs. Hadeeqa Begum*, 1977 MPLJ S.N.57. It is equally well settled legal proposition that in order to ascertain the nature of a document, intention of the parties has to be seen and the document has to be read as a whole.

6. In the backdrop of aforesaid well settled legal position, if the document Ex.D/1 is seen, it is apparent that one portion of the house in question has been given to Kasimullah in lieu of loan of Rs.3000/- which was to be paid by Haliman Bi to aforesaid Kasimullah. The document is titled as 'gift'. Aforesaid Kasimullah has been allotted share in the property for a consideration,

therefore, the document Ex.D/1 is not gift in question simplicitor but is a gift for consideration. The transaction of the character contained in Ex.D/1 is nothing but a sale and, therefore requires registration. Admittedly, Ex.D/1 is not registered. As stated supra, there is no specific pleading in the written statement that vide Ex.D/1, the partition took place amongst the plaintiff, defendant's wife Hamida Bi and Kasimullah. For this reason also, the evidence adduced by the defendant that vide Ex.D/1, the suit house was subjected to partition cannot be looked into.

7. For the aforementioned reasons, the first substantial question of law framed by this Court is answered in the affirmative and against the appellant. Though, there is evidence on record to show that contents of the gift in the eyes of law prevalent amongst Muslims are fulfilled, but since the gift in question is not a gift simplicitor, but is a gift for consideration of sale, the second substantial question of law framed by this Court has no impact on the result of the case. Accordingly, the same is answered. In the result, the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

I.L.R. [2012] M.P., 1926

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 1831/1996 (Jabalpur) decided on 19 January, 2012

BALRAM SANODIYA & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 304B & 498A - Dowry death - Suspicious circumstance - Appellant got married with the deceased and she was subjected to harassment and cruelty on account of demand of Rs. 20,000/- in dowry - Held - It is apparent that prosecution could not prove the death of deceased by any burns or bodily injury or the same was occurred otherwise than under normal circumstances hence conviction under section 304B could not be sustained - Conviction of the appellants under Section 498A affirmed - Appeal allowed in part.

(Paras, 1,2, 12 & 20)

दण्ड संहिता (1860 का 45), धाराएँ 304बी व 498ए - दहेज मृत्यु - संदेहास्पद परिस्थिति - अपीलार्थी का विवाह मृतिका के साथ हुआ और उसे दहेज

में 20,000/- रुपये की मांग को लेकर प्रताड़ित किया गया और क्रूरता का व्यवहार किया गया - अभिनिर्धारित - यह स्पष्ट होता है कि अभियोजन मृतिका की मृत्यु किसी प्रकार के जलने से या शारीरिक क्षति से होना या असामान्य परिस्थितियों में घटित होना साबित नहीं कर सका, अतएव धारा 304बी के अंतर्गत दोषसिद्धि कायम नहीं रखी जा सकती - अपीलार्थी की धारा 498ए के अंतर्गत दोषसिद्धि की पुष्टि की गई - अपील अंशतः मंजूर।

Case referred :

AIR 1991 SC 1142.

S.C. Datt with Pushpendra Dubey, for the appellants.

Rakesh Kesharwani, for the respondent/State.

ORDER

U.C. MAHESHWARI, J. - The appellants/ accused have preferred this appeal being aggrieved by the judgment dated 9.10.1996 passed by Sessions Judge, Seoni in S. T. No. 20/95 convicting each of them under Section 304-B and 498-A of IPC for RI eight years in earlier section while RI two years with fine of Rs.1,000/- in later.

2. The facts giving rise to this appeal in short are that the appellant No.1 Balram Sanodiya got married with the deceased Kumari Bai on 4.5.1992. Subsequent to such marriage she was residing at her matrimonial home where she was subjected to harassment and cruelty on account of demand of Rs.20,000/- in dowry. In her life time she apprised about such act of the appellants and of other members of their family to her parents. Lastly she was taken from her parental home to matrimonial home by appellant No.1 Balram on 13.9.1994. Subsequent to it said Kumari Bai sent a letter dated 13.9.1994, which was written at her instance by some Bhagwat Singh, to her father contending that she is facing the torture and harassment of appellants and other family member on account of non-fulfillment of their demand of Rs.20,000/- in dowry. Such letter was handed over by Bhagwat Singh to the father of Kumari Bai. Thereafter on 15.9.1994 said Kumari Bai has passed away. On receiving such information her father Jagdish gave a report in writing to the Police Station Lakhanwada, District Seoni contending that deceased was taken to her matrimonial home by appellant No.1 on 13.9.1994 and thereafter on 16.9.1994 he received the information of her death. It is also stated that he has a doubt that the family members of his daughter's in-laws family have killed her because of non-fulfillment of their requisite demand of

dowry. On such report in writing (Ex.P.2) an inquest report was registered at the same police station. In the course of its inquiry after preparing the Panchnama of dead body in presence of the witnesses the same was sent to hospital where its postmortem was carried out. According to postmortem report (Ex.P.4) no definite opinion regarding cause of death was given by Dr. M. K. Tiwari (P.W.3). However, viscera was preserved and later the same was sent to FSL Sagar for its chemical examination. In the course of inquiry of said inquest the aforesaid letter dated 13.9.1994 written by Bhagwat Singh (P.W.2) at the instance of deceased Kumari Bai was also seized in presence of the witnesses. According to which the deceased informed her father regarding cruelty and harassment carried out with her by the appellants and other family members on account of aforesaid demand of dowry. In the course of inquiry it was found that the deceased died with unnatural death within seven years from the date of her marriage with the appellant No.1 and soon before death also she was subjected to demand of Rs.20,000/- in dowry. In such premises on 24.9.1994 a Crime No.88/94 was registered against the present appellants and deceased appellant No.2 the father in-law of the deceased Kumar Bai for the offence of Section 498-A and 304-B of IPC. The witnesses were interrogated and the appellants and co-accused were arrested. On completion of investigation the appellants along with co-accused the other family members of the appellants were charge sheeted for the offence of Section 498-A and 304-B of IPC.

3. After committing the case to the Sessions Court, on evaluation of charge sheet the charge of Section 498-A and 304-B of IPC were framed against the appellants and other co-accused. They abjured the guilt on which the trial was held. After recording the evidence on appreciation of the same by acquitting the co-accused Jagram and Netram from the alleged charges the present appellants and deceased Khursiram were held guilty for the offence of Section 498-A and 304-B of IPC and each of them was punished with the above mentioned punishment. Being dissatisfied with such conviction and sentence the appellants have come to this Court with this appeal.

4. Shri S. C. Datt, Senior Advocate assisted by Shri Pushpendra Dubey learned counsel of the appellants after taking me through the record of the trial Court including the evidence led by the prosecution and the exhibited papers of the charge sheet along with the impugned judgment argued that even on taking into consideration the available evidence of prosecution as accepted in its entirety even then the offence of Section 304-B as well as

Section 498-A of IPC is not made out against any of the appellants. In continuation by referring the postmortem report of the deceased Kumari Bai (Ex.P.4) along with the deposition of Dr. M. K. Tiwari (P.W.3) who prepared such report, said that it is apparent from such report and deposition that the cause of death of Kumari Bai whether the same was homicidal, accidental or suicidal could not be ascertained by the doctor. That is why no definite opinion in this regard was given by such Doctor in the postmortem report (Ex.P.4), however viscera was preserved but on its chemical examination as per FSL report (Ex.P.18) no chemical poisonous substance was found either in such viscera or on the clothes of the deceased. So in such premises, the prosecution has utterly failed to prove that Kumari Bai was died because of some unnatural death. In the lack of such material ingredient of Section 304-B of IPC, the appellants could not have been convicted under such section. He further said that in the lack of such evidence showing the Kumari Bai died with unnatural death the appellants could not be convicted even under Section 306 of IPC. In these background he said that out of three material ingredients of Section 304-B of IPC, except the death of the deceased within seven year from the date of her marriage with the appellant No.1 no other ingredients of such section have been proved by the prosecution with cogent and reliable evidence. The allegation regarding alleged demand of Rs.20,000/- in dowry by the appellants from the deceased has also not been proved. In such premises, it could not be said that soon before death the Kumari Bai was subjected to any harassment or cruelty by any of the appellants. With these submission he said that the impugned conviction of the appellants under Section 304-B of IPC is not sustainable and in the available factual matrix the same could not be converted in Section 306-B of IPC.

5. So far conviction of the appellants under Section 498-A of IPC is concerned, he argued that mere on the testimony of persons belonging to the parental family of the deceased no inference could be drawn against the appellants that the deceased in her life time was subjected to harassment or cruelty by the appellants in the matrimonial home. It is apparent fact on record that the story put forth by the prosecution regarding alleged harassment and cruelty has not been proved by any independent source of evidence. The letter (Ex.P. 1) as alleged written at her instance by some Bhagwat Singh, has also not been proved by any cogent and reliable evidence and in the available factual matrix this letter could not be deemed to be proved only on the basis of the deposition of it's writer Bhagwat Singh. According to him the possibility

of false fabrication of such letter with the assistance of Bhagwat Singh could not be ruled out. With these submission he prayed for acquittal of the appellants from the alleged charge and setting aside the impugned judgment of the trial Court by allowing this appeal. He also placed his reliance on a case of the Apex Court in the matter of "*Akula Ravinder v. State of A.P.*" reported in AIR 1991 S.C. 1142.

6. On the other hand by justifying the impugned conviction and sentence of the appellants learned Penal Lawyer Shri Rakesh Kesharwani said that same being based on proper appreciation of evidence, available on record do not require any interference at this stage either for extending the benefit of acquittal from the alleged charge or for reducing the jail sentence of the appellants in any manner. However, in response of some query of the Court he fairly conceded that the cause of the death of the Kumari Bai whether it was homicidal, accidental or suicidal has not been proved on record beyond reasonable doubt. In continuation he said that in any case on appreciation of ocular evidence of witnesses examined from parental family of the deceased and letter (Ex.P.1) with the deposition of Bhagwat Singh (P.W.2) the offence of Section 498-A of IPC is apparently proved beyond reasonable doubt against the appellants. With these submission he prayed for dismissal of this appeal.

7. Having heard the counsel at length keeping in view their arguments, I have carefully gone through the record of the trial Court so also the impugned judgment.

8. It is apparent from record that after death of Kumari Bai on receiving such information by her father before her cremation, he came to the place of incident and thereafter gave a report in writing to police Lakhnawada on 16.9.1994 contending that her daughter was brought by his son-in-law the appellant No.1 from his home on 13.9.1994 and today he received the information of her death. As per further averments, he has a doubt that due to non-fulfillment of the demand of the appellants of Rs.20,000/- in dowry his daughter has been killed. On such report (Ex.P.2) an inquest intimation (Ex.P.15) was registered. In the course of its inquiry after preparing the Panchnama (Ex.P.6) the dead body of Kumari Bai was sent to the hospital where it's autopsy was carried out and its report (Ex.P.4) was prepared by Dr. M. K. Tiwari (P.W.3). In such report the doctor had opined that "no definite opinion can be given regarding cause of death. Viscera is preserved for its chemical analysis. Duration between death and postmortem 36 to 48

hours." Accordingly, no definite opinion regarding cause of death was given in such report. The preserved viscera was sent to the FSL Sagar where on its chemical examination as per report (Ex. P. 18) no chemical poisonous substance was found in such viscera or on clothes of the deceased. Besides this Dr. M. K. Tiwari, (P. W. 3) on recording his deposition in response of some question of the Court in paragraph 7 of his deposition categorically stated that he did not found any sign of injury or mark on the dead body of Kumari Bai, on which her death could be said to be unnatural death, there was only possibility of murder or suicide by administering or consuming the poisonous substance and therefore, viscera was preserved and investigation agency was advised to get chemical examined of the same. He further stated that green colour on the skin of the dead body was not found.

9. In view of aforesaid postmortem report (Ex.P.4), FSL report (Ex.P.18) and deposition of doctor and also in the lack of admissible evidence showing the death of Kumari Bai either homicidal, suicidal or accidental, it could not be said that she died by any burn or bodily injury or otherwise then under normal circumstances as per one of the material requirement to invoke the section 304-B of IPC.

10. Besides the above, after perusing the aforesaid letter (Ex.P.1) as alleged written by Bhagwat Singh at the instance of Kumari Bai and the depositions of Jagdish (P.W.1) the father of the deceased, Babulal (P.W.2), Gulab (P.W.8) the maternal uncles of the deceased, Suraj (P.W.5) brother of the deceased and Lata Bai (P.W.7) sister-in-law of the deceased, I have not found any material evidence or circumstances in them showing the deceased Kumari Bai's death occurred otherwise than under normal circumstances.

11. Under Section 304-B of IPC the accused could not be convicted unless the following facts are proved beyond all reasonable doubts by the prosecution :

(A) The death of woman was caused by any burns or bodily injury or occurred otherwise then under normal circumstances.

(B) Such death was caused within seven years of her marriage.

(C) The deceased soon before her death was subjected to cruelty or harassment by her husband or any relative of her

husband in connection with any demand for dowry.

12. In view of aforesaid discussion in the light of aforesaid ingredients of Section 304-B of IPC on examining the case at hand it is apparent that prosecution could not prove the death of Kumari Bai by any burns or bodily injury or the same was occurred otherwise then under normal circumstances, therefore in such premises the impugned conviction of the appellants under Section 304-B of IPC could not be sustained. My view is fully fortified by the decision of the Apex Court in the matter of "*Akula Ravinder v. State of A.P.*" reported in AIR 1991 S.C. 1142. cited by the Senior counsel of the appellants in which it was held as under :

3. A perusal of the S.304B shows that one of the essential ingredients that has to be established is that death was otherwise than in normal circumstances. In this case no doubt, the other circumstance namely that the death occurred within seven years of the marriage and that before her death they have harassed her for demand of dowry are established. Coming to the other ingredient we find that the prosecution has miserably failed to establish that death was otherwise than in normal circumstances. The learned counsel appearing for the State, however, submits that the deceased was young and the death was not due to natural cause nor it was due to an accident and the only inference that can be drawn is that it was otherwise than under normal circumstances. In a case of this nature where the prosecution has failed to establish that it was an unnatural death it cannot be surmised that death must be due to unnatural circumstance. In this context the framing of the charge and the circumstances that are put to accused u/ S. 313, Cr. P.C. also assume importance. The charge was u/ S. 302, IPC and the contents of the charge are to the effect that death was only due to asphyxia. In the examination of S. 313 it was not even indicated that the death could be due to poisoning. In any event in view of the facts and circumstances regarding the death, it has become very difficult, rather impossible, to hold that the death was otherwise than the normal circumstances and consequently we are constrained to hold that this important aspect of S. 304B is not met out. Consequently the appellants

are entitled to acquittal of the said offence.

13. In the aforesaid premises, it is held that prosecution has failed to prove the charge of Section 304-B of IPC against the appellants including the deceased appellant No.2 Khursi Ram and the trial Court has committed grave error in convicting them in such Section. Hence such findings of the trial Court holding conviction against the appellants under Section 304-B of IPC along with its awarded sentence are hereby set aside and the appellants are acquitted from such charge of Section 304-B of IPC.

14. At this juncture I have also examined the matter to find out the possibility to convict the appellants under Section 306 of IPC r/w Section 113-A of Evidence Act. On going through the provisions of aforesaid both the sections I have found that to hold the conviction under such Section 306 of IPC the death of the deceased person must be proved to be suicidal death and as per aforesaid discussion, the death of Kumari Bai has not been proved by mode of suicide also. In such premises, after acquitting the appellants from the charge of Section 304-B of IPC they could not be held guilty and convicted for the offence of Section 306 of IPC, for which the alternate charge was framed by the trial Court.

15. Coming to consider the sustainability of impugned conviction of the appellants under Section 498-A of IPC. It is unrebutted evidence on record that the deceased Kumari Bai was brought from her parental home by her husband the appellant No.1 just before two-three days of her death and immediately after reaching the matrimonial home she was subjected to demand of Rs.20,000/- in dowry by the appellants and their other family members, on which she approached Bhagwat Singh (P.W.2) to write a letter on her behalf to her father on which he wrote a letter at her instance in which the alleged cruelty, harassment and torture committed by the appellants and other family members on account of demand of Rs.20,000/- in dowry with her was stated and such letter Ex.P.1 was handed over by Bhagwat Singh to her father Jagdish (PW.1). Such letter was seized from the possession of father of the deceased and same was proved by Bhagwat Singh as well as Jagdish. I have not found any evidence on which the aforesaid letter could be said to be a concocted by Bhagwat Singh or Jagdish or other family members of Jagdish subsequent to death of Kumari Bai. Keeping in view such letter Ex. P.1, on perusing the deposition of witnesses Jagdish (P. W. 1), father of the deceased, Babulal (P.W.4), Gulab (P.W.8), maternal uncles of the deceased and Latabai (PW7),

sister in-law of the deceased it is apparent that each of them has categorically stated that they were informed by the deceased Kumari Bai regarding aforesaid demand of Rs.20,000/- in dowry and due to that she was subjected to cruelty and harassment in her matrimonial home by the appellants and other family members. On going through cross-examination of aforesaid all the witnesses, I have not found any material thing destroying the version stated by them in their inchief. In such premises, I have found sufficient evidence against the appellants to affirm their impugned conviction under Section 498-A of IPC.

16. In view of aforesaid discussion the arguments advanced by the appellants' counsel for extending the acquittal to the appellants from the charge of Section 498-A of IPC is hereby failed and the impugned conviction of the appellants under such section is hereby affirmed.

17. At this juncture, learned Senior counsel submits that taking into consideration that the incident was happened long before in the year 1994 and appellants did not have any criminal antecedents or history and in such premises they are the first offenders. Besides this the appellant No.3 Jhini Bai being old aged woman of 70 years is not in a position to walk, and as per para 48 and 50 of the impugned judgment in the pendency of trial the appellant No.1 suffered the judicial custody of three months and six days while appellant No.3 suffered such custody for two days and subsequent to passing the impugned judgment on 9.10.1996 till suspending their remaining jail sentence by this Court on 7.11.1996 they also suffered near about one month out of the awarded jail sentence. Keeping in view all these circumstances after seventeen years of the incident instead to send the appellants again jail for facing the remaining jail sentence under Section 498-A of IPC by adopting some lenient view their awarded jail sentence under such section be reduced from two years to the aforesaid period for which they have already suffered the jail by enhancing some amount of fine under discretion of the Court.

18. In the available circumstances, I have found some substance in the submission of the appellants' counsel. Thus, keeping in view all the aforesaid circumstances as argued by the Senior counsel, I deem fit to reduce the jail sentence of the appellants under Section 498-A of IPC from two years to the aforesaid period for which they have already undergone by enhancing the amount of fine from Rs.1,000/- to 11,000/- against each of the appellants. The same is ordered.

19. In view of aforesaid discussion, by affirming the conviction of the appellants under Section 498-A of IPC this appeal is allowed in part, and impugned conviction of the appellants under Section 304-B of IPC along with it's awarded sentence is set aside and they are acquitted from such charge. In view of the aforesaid discussion the awarded jail sentence of the appellants under Section 498-A of IPC is reduced from two years to the aforesaid period (mentioned in the forgoing para) for which they have already undergone by enhancing the amount of fine from Rs.1,000/- to 11,000/- against each of the appellants. The enhanced fine amount is to be deposited by each of them in the trial Court within forty five days from today, failing in depositing the enhanced fine within the aforesaid period concerning appellant has to suffer further six months RI. Till this extent the impugned judgment is modified while other findings of the same are hereby affirmed. The bail bonds of the appellants are hereby discharged.

20. Appeal is allowed in part as indicated above.

Appeal partly allowed.

**I.L.R. [2012] M.P., 1935
APPELLATE CRIMINAL**

Before Mr. Justice U.C. Maheshwari

Cr.A. No.1059/1999 (Jabalpur) decided on 24 January, 2012

SUNDERLAL

...Appellant

Vs.

STATE OF M.P.

...Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) - Complainant lodged FIR against appellant who was posted as Junior Engineer alleging that he abused him with filthy language also by calling "Chamar Sale" - Held - Investigation should be carried out by an officer not below the rank of Deputy Superintendent of Police - In the present case I.O. is Sub-Inspector of police hence 3(1)(x) is not made out - Appellant could not be convicted under Section 294 and 506 IPC - Appeal allowed.

(Paras 1,2,5,13 &15)

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) - शिकायतकर्ता ने कनिष्ठ अभियंता के पद पर पदस्थ अपीलार्थी के विरुद्ध यह अभिकथन करते हुए एफ.आई.आर. दर्ज की कि उसे

अमद्र भाषा में गालियां दी गईं और 'चमार साले' कहा - अभिनिर्धारित - अन्वेषण ऐसे अधिकारी द्वारा किया जाना चाहिए जो उप पुलिस अधीक्षक से निम्न श्रेणी का न हो - वर्तमान मामले में अन्वेषण अधिकारी पुलिस में उप-निरीक्षक है, अतः 3(1)(x) गठित नहीं होता - अपीलार्थी को मा.द.सं. की धारा 294 व 506 के अंतर्गत दोषसिद्ध नहीं किया जा सकता - अपील मंजूर।

Cases referred :

2010(II) MPJR(SC) 249, AIR 1978 SC 59.

Pradeep Naveriya, for the appellant.

Rakesh Kesharwani, P.L. for the respondent.

ORDER

U.C. MAHESHWARI, J. - This appeal is directed by the appellant under section 374(2) of the Cr.P.C being aggrieved by the judgment dated 7.4.1999 passed by the Special Judge, Chhindwara (constituted under the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act (in short the Act') in Special case No 52/95 whereby he has been convicted under section 3(1)(x) of the Act with a direction to undergo for RI six months with fine of Rs 1000/- In default of depositing the fine, further RI 1 month has been awarded.

2. The facts giving rise to this appeal in short are that on dated 5.7.95 at about 21.35 in the night, the complainant Rajendra Kumar Chouria (Chamar) lodged the FIR as Crime No.303/95 at P.S. Junardeo contending that at about 8 0' Clock in the evening of 5.7.95, he accompanied with his friends, namely, Shyam, Ramesh and Badrudeen Quereshi was standing in front of Rampura Cycle Shop. At the same time, appellant, who was posted as Junior Engineer in the Madhya Pradesh Electricity Board, Suwai came there on his motorcycle and by abusing him with filthy language, also by taking name of his caste "Chamar Sale" asked him that he has set right so many persons like him at Ghansor and he will see him also. Such activity of the appellant had annoyed him as well as to his friends. As per further averments, the complainant was also asked by the appellant saying that if he will not follow his instructions then he will make arrangement for his suspension from the department. As per further averments of the FIR, the complainant was working in the same department as subordinate of the appellant. On such report, the offence of section 294,506 of the IPC and section 3(1)(x) of the Act was registered. The same was investigated. On completion of the same, the appellant was charge-

sheeted for his prosecution under the aforesaid sections. On evaluation of the charge sheet, only charge of section 3(1)(x) of the Act was framed against the appellant. He abjured the guilt, on which, the trial was held in which as many as four witnesses were examined by the prosecution while two witnesses were examined in defence on behalf of the appellant. On appreciation of the evidence, after holding guilty to the appellant under the aforesaid offence, he was punished with the above-mentioned punishment.

3. Shri Y.P.Sharma, learned counsel for the appellant after taking me through the record of the trial court as well as the impugned judgment argued that the investigation was not carried-out by the competent investigating officer as provided under Rule 7 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (in short 'the Rules'), according to which the investigation of the impugned case for the aforesaid offence under the Act could be carried-out only by such Police Officer who is not below the rank of Deputy Superintendent of Police and such Investigating Officer should be appointed by the State Government / Director General of Police or the Superintendent of Police, as per the scheme provided under such Rules. So, firstly, in such premises, the investigation was carried out by the incompetent person, the inspector or sub inspector of police, the impugned conviction under the Act, is not sustainable because the charge sheet itself was not entertainable in the lack of the investigation by the proper authority. In support of this contention, he placed his reliance on the decision of the Apex Court in the matter of *State of Madhya Pradesh Vs. Chunnilal alias Chunni Singh*-2010 (II) MPJR(SC) 249. Besides this, on merits of the matter, he argued that on accepting the entire evidence as it is, even then, in the lack of any document or the certificate of caste showing caste of the complainant/victim covered under the Act, mere on the oral testimony of the complainant/victim or other witnesses, the trial court should not have held him to be the person of such community covered under the Act. He also said that it is apparent fact on record that neither such certificate was obtained in the investigation nor produced or proved by the prosecution in any manner. In such premises, he said that in the lack of such material evidence, the appellant deserves for acquittal in the matter. He further argued that looking to the nature of the case, in order to rebut the evidence regarding caste of the complainant, the appellant could not get the opportunity of cross-examination of the Investigating Officer namely, T.R.Hindolia the Sub Inspector of Police of the case because he was not examined by the prosecution on account of his death. It was also argued that on account of some departmental dispute there was earlier enmity

between the appellant and the complainant who was working as subordinate clerk of the appellant but such aspect was also not taking into consideration. Even the evidence adduced by the appellant in his defence was not considered with proper approach. He further argued that after more than 15 years from the date of the incident, even after extending acquittal to the appellant from the aforesaid charge, on account of non-framing the charge of section 294,506 of the IPC, the case should not be remanded back to the trial court for holding the trial under such sections. In support of this contention he said that the appellant should not suffer because of non-framing the charge of above-mentioned section of the IPC and prayed for extending acquittal to the appellant by setting aside the impugned conviction by allowing this appeal.

4. On the other hand, Shri Rakesh Kesharwani, learned Panel Lawyer by justifying the impugned conviction and sentence of the appellant under the aforesaid provision of the Act said that the same being based on proper appreciation of evidence, so also on the basis of unrebutted testimony of complainant Rajendra Kumar (PW 2), do not require any interference at this stage. In response of some query of the court, he fairly conceded that the investigation of the impugned case, was neither carried-out by any Deputy Superintendent of Police or any officer above the rank of such Officer nor any specific order in this regard was passed either by the State Government or by any other senior officials of the Police. With these submissions, he prayed for dismissal of this appeal.

5. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the record of the trial court along with the impugned judgment. Before proceeding further, as ready reference, I would like to reproduce Rule-7 of the Rules enacted under the Act which has come into force since 31.3.95 before registration of the impugned offence. The same reads as under :-

"7. Investigating Officer.-

(1) An offence committed under the Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government, Director-General of Police, Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines

within the shortest possible time.

(2) The investigating officer so appointed under sub-rule (1) shall complete the investigation on top priority within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director-General of Police of the State Government.

(3) The Home Secretary and the Social Welfare Secretary to the State Government, Director of Prosecution the officer-in-charge of Prosecution and the Director-General of Police shall review by the end of every quarter the position of all investigations done by the investigating officer."

Undisputedly, the impugned case was registered with respect of the incident of dated 5.7.95 on the same day and on such date the aforesaid Rule was in existence and according to it, the investigation of the impugned case, with respect of the offence covered under the Act, should have been carried out by the Police Officer not below the rank of Deputy Superintendent of Police. But as per deposition of Mr. Mudrika Prasad (P.W. 1) Sub Inspector of Police, after registration of the FIR Ex.P/3 by Mr N.P.Devalia Inspector of Police appellant was arrested by T.R.Hindolia, Sub Inspector of Police by preparing arrest memo (ExP/1. The spot map (Ex.P/2) which was the material part of the investigation, was also prepared by T.R.Hindolia Sub Inspector of Police. It also appears from the other papers available on record that further investigation of the case was carried-out by other Police officer below the rank of Deputy Superintendent of Police. It is noted that before recording the evidence in the matter, said Sub Inspector T.R.Hindolia passed away. In such premises, the prosecution had not examined him. So, apparently, the investigation was not carried-out by the competent authority prescribed under the aforesaid Rule-7 of the Rules. In such premises, even at the initial stage, the charge sheet filed by the prosecution in respect of the offence covered under the Act, was not sustainable and pursuant to it, the impugned conviction of the appellant under section 3(1)(x) of the Act could not be sustained. As such, the trial court has committed grave error in convicting the appellant under the aforesaid section of the Act without considering the aforesaid legal position, therefore, the approach of the trial court in this regard, deserves to be and is hereby set aside.

6. My aforesaid view is fully fortified by the decision of the Apex Court

in the matter of *State of Madhya Pradesh Vs. Chunnilal alias Chunni Singh (supra)* cited by the appellant's counsel in which it was held as under:-

"6. By virtue of its enabling power it is the duty and responsibility of the State Government to issue notification conferring power of investigation of cases by notified police officer not below the rank of Deputy Superintendent of Police for different areas in the police districts. Rule 7 of the Rules provided rank of investigation officer to be not below the rank of Deputy Superintendent of Police. An officer below that rank cannot act as investigating officer. The provisions in section 9 of the Act, Rule 7 of the Rules and section 4 of the Code when jointly read lead to an irresistible conclusion that the investigation to an offence under section 3 of the Act by an officer not appointed in terms of Rule. 7 is illegal and invalid. But when the offence complained are both under the IPC and any of the offence enumerated in section 3 of the Act the investigation which is being made by a competent police officer in accordance with the provisions of the Code cannot be quashed for non-investigation of the offence under section 3 of the Act by a competent police officer. In such a situation the proceedings shall proceed in appropriate Court for the offences punishable under the IPC notwithstanding investigation and the charge sheet being not liable to be accepted only in respect of offence under section 3 of the Act for taking cognizance of that offence."

In view of the aforesaid principle of the Apex Court if the impugned case is examined then it is apparent that besides the aforesaid offence of the Act, the charge-sheet was also filed with respect of the offence of section 294, and 506 of the IPC. There is no dispute on the legal proposition that in the lack of investigation of the case by the proper authority, even after quashing or excluding the charge of any section of the Act, the case could have been proceeded further to hold the trial for the aforesaid offence of IPC.

7. It is undisputed fact that on framing the charge by the trial court, the charge of section 294 and 506 of the IPC was not framed against the appellant and being aggrieved by such order, neither the State Government nor the complainant, has come to this court, either by way revision at the interlocutory stage or against the final judgment of the trial court. So, in the lack of any such proceeding, at the instance of the State or the complainant, after more than 15

years from the date of the incident, I do not find fit to remand the matter to the trial court with a direction to frame the aforesaid charge of the offence and hold fresh trial in that regard.

8. In the aforesaid premises, keeping in view the provision of section 222(1) of the Cr.P.C, I have gone through the charges framed by the trial court. In such charge, I have found that the material ingredients of the offence of section 294 and 506 of the IPC are mentioned, although while framing the charge no such specific sections of the IPC are mentioned in the same. It is needless to state here that all the aforesaid factual matrix of the case stated in the charges were denied by the appellant, on which, the trial was held against him. So, in such premises, it could be said that the appellant has faced the trial with full understanding that by mentioning the necessary facts of the charge of section 294 and 506 of the IPC has been framed against him. So, mere non-mentioning the section 294 and 506 IPC specifically in the framed charge, does not stop the hands of the court to examine the matter keeping in view such angle also. In the aforesaid premises, keeping in view the ingredients of section 294 and 506 of the IPC, the case is being examined by me.

9. It is apparent fact from the FIR itself that the complainant was working as subordinate clerk in the office of the appellant and, on account of some departmental work there was some earlier enmity between the appellant and the complainant and, in such premises, such enmity could not be said to be the enmity on account of caste of the appellant covered under the Act. Rajendra Kumar (P.W.2) on recording his deposition categorically stated that the alleged incident took place on the public road in front of Rampura cycle Shop where he accompanied with his friends Shyam, Ramesh and Badruddin Quereshi was on evening walk. He also stated about the alleged abuse but he has not stated the specific particulars regarding alleged criminal intimidation given by the appellant to the victim. It is stated that the alleged incident took place at about 8 0' Clock in the night while the complainant had stated that the incident took place at about 7 0' clock in the evening. On perusal of the deposition of aforesaid examined all three witnesses, the fact regarding previous enmity between the appellant and the complainant has been established.

10. Undisputedly, the supporting witnesses, Rajendra (PW 2) and Ramesh (P.W.4) are the nearest friends of the appellant. So, in such premises, their depositions has to be examined carefully by the Court keeping in view the evidence led by the appellant in his defence. The appellant has examined two witnesses in his defence. Out of them Pramod (D.W. 1) who was also working

as UDC in the same department, on recording his deposition has categorically stated that the complainant was working as LDC under the subordination of the appellant and there was friction between the appellant and the complainant because on account of the political approach of the complainant and on account of such approach, he was interfering in the regular work of the department. He was also not working in accordance with the direction of the senior official. Various correspondence and complaints in this regard were received from the public against the complainant, on which, being senior officer of the department appellant gave him some notices and, on account of that the complainant had enmity with the appellant. In such premises, this possibility could not be ruled out that due to such enmity, with the assistance of the nearest friends, by fabricating the false story the appellant was falsely implicated by the complainant in the matter. It is apparent fact that even on cross-examination of this defence witness at length, the defence of the appellant regarding departmental dispute with the complainant has not been destroyed. The testimony of this witness is further supported by the documents relating to the complaint proceedings of the complainant Ex.D/1 to D/8 proved by Mr. P.Balaram Moorthy (D.W.2) the Executive Engineer of the same department.

11. Keeping in view the aforesaid defence evidence, on examining the case, I am of the view that mere on the aforesaid testimony of the complainant/victim and his above mentioned friends, namely, Shyam (P.W. 3) and Ramesh (P.W.4) the person like appellant could not be convicted under any of the aforesaid offence, unless the story put forth by these witnesses is supported by some independent witnesses or independent source of the evidence. I deem fit to mention here that as per prosecution the alleged incident took place in the evening on busy main market where so many shop-keepers and other independent persons were present but out of them none of them was examined nor any explanation regarding their not examination has been put forth by the prosecution on record.

12. It is settled proposition of the law that where there is serious animus between the accused and the complainant party then unless the story put forth by the prosecution and complainant is supported by the independent source of the evidence, the accused could not be convicted mere on the testimony of such complainant and his interested witnesses having the enmity with the accused. Such principle was laid down by the Apex Court in the matter of *Bir Singh and others Vs. State of Uttar Pradesh*-AIR 1978 SC-59 in which it was held as under :-

"9. Where all the eye-witnesses examined by the prosecution had serious animus against the accused and were interested in implicating the accused and neither independent witnesses were examined nor any reasonable explanation was given by the prosecution, the Court would be justified in drawing an adverse inference against the prosecution."

Placitum

13. In view of the aforesaid even on taking into consideration the language of the charge framed by the trial court with respect of the offence of section 294 and 506 of the IPC also, the appellant could not be convicted for such offence in the matter. In view of the aforesaid discussion, the impugned judgment being perverse, infirm and contrary to the law, deserves to be set aside.

14. Therefore, by allowing this appeal, the impugned judgment of the trial court holding conviction and sentence against the appellant under section 3(1)(x) of the Act is hereby set aside and he is acquitted from such charge. In the available circumstances, the appellant is also acquitted from the charge of section 294 and 506 of the IPC. The amount of fine, if deposited, be refunded to the appellant after proper verification. The bail bonds of the appellant are hereby discharged.

15. The appeal is allowed as indicated above.

Appeal allowed.

**I.L.R. [2012] M.P., 1943
APPELLATE CRIMINAL**

Before Mr. Justice U.C. Maheshwari

Cr.A. No. 749/1996 (Jabalpur) decided on 2 February, 2012

LALIT KUMAR TIWARI

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 498A - Cruelty - Deceased got married with elder brother of appellant - She was subjected to cruelty, harassment and torture on account of demand or in connection of dowry by the appellant and his sister - Deceased died by pouring Kerosene oil on herself - Offence under Section 304-B/34, IPC

registered - However, trial Court acquitted the appellant under Section 302, 304B/34 and convicted under Section 498A - Held - After marriage, appellant and his brother living separately hence there was no circumstance to interfere in the family affairs of each other - Hence, offence under Section 498A is not made out - Appeal allowed.

(Paras 2, 3, 6 & 11)

दण्ड संहिता (1860 का 45), धारा 498ए - क्रूरता - मृतिका का विवाह अपीलार्थी के बड़े भाई के साथ हुआ - उसे दहेज के लिए या दहेज संबंधी मांग के लिए अपीलार्थी व उसकी बहिन द्वारा क्रूरता, उत्पीड़न और यातना दी गई - मृतिका की मृत्यु अपने ऊपर मिट्टी का तेल उड़ेलने से हुई - भा.द.सं. की धारा 304बी/34 के अंतर्गत अपराध पंजीबद्ध किया गया - तथापि विचारण न्यायालय ने अपीलार्थी को धारा 302, 304बी/34 के अंतर्गत अपराध से दोषमुक्त किया और धारा 498ए के अंतर्गत दोषसिद्ध किया - अभिनिर्धारित - विवाह के बाद अपीलार्थी और उसका भाई अलग-अलग रह रहे हैं अतः एक दूसरे के परिवारिक मामले में हस्तक्षेप करने की कोई परिस्थिति नहीं - अतः धारा 498ए के अंतर्गत अपराध नहीं बनता - अपील मंजूर।

P.N. Dubey with Praveen Dubey, for the appellant.

P.K. Chourasiya, P.L. for the respondent/State.

J U D G M E N T

U.C. MAHESHWARI, J. - This appeal was initially preferred by the appellant Lalit Kumar Tiwari and Smt. Manikala (since deceased) being aggrieved by the judgment dated 13.4.1996 passed by the VIIIth Additional Sessions Judge, Jabalpur in ST. No. 43/92 whereby each of them were convicted and sentenced under Section 498-A of IPC till rising the court with fine of Rs.4000/-. In default of depositing the fine SI for four months has been awarded. In pendency of the appeal, on account of death of appellant no. 2 Smt. Manikala till her extent the appeal became abated, hence her name was deleted from the array of appeal memo. So at this stage, this appeal is being decided only in respect of appellant no. 1 Lalit Kumar Tiwari.

2. The facts giving rise to this appeal in short are that the deceased Smt. Vandana Tiwari got married with Vijay Kumar Tiwari, the elder brother of the present appellant on dated 4.7.1987. Subsequent to that while residing in the matrimonial home, she was subjected to cruelty, harassment and torture on account of demand or in connection of dowry by the present appellant and his sister Manikala, for which on her visit to parental home, she also made

complaint to her father. Before some days of the alleged incident, in which said Vandana Tiwari had died, her father visited her house. On such occasion he was ousted by the appellants from her residence. In that respect a report was also lodged in the Mahila P.S. Subsequent to such report on submitting the apology by the husband of the deceased and on giving some assurance by his family members that they would not commit such act in future, the deceased was sent to her matrimonial home. But there was no change and again Vandana was subjected to aforesaid act of cruelty, harassment and torture by the appellants. On account of such cruelty of the appellant and his sister Smt. Manikala, on dated 8.7.1991 she by pouring kerosene on herself, set fire, consequently she sustained burnt injuries, on which she was taken to Victoriya Hospital where her two dying declarations were recorded.. During the course of treatment, she succumbed to burnt injuries. On receiving such information an inquest report was registered at P.S.. Belbagh, District Jabalpur. In its enquiry, after preparing the spot map, seizure memo of the articles found on the spot and the memorandum of dead body in presence of the witnesses, the dead body was sent to hospital where its autopsy was carried out. According to postmortem report she died due to ante-mortem burnt injuries. In further enquiry of the inquest, on establishing prima facie circumstances against the appellants for the offence of Section 304-B/34 of IPC, a crime for such offence was registered against the appellant and his deceased sister, Manikala on dated 11.8.1991 at P.S. Belbagh, District Jabalpur. In investigation, the interrogatory statements of the witnesses were recorded and appellant and his sister were arrested. On completion of the investigation, they were charged for the offence of Sections 304-B, 302/34, 498-A of IPC and section 4 of the Dowry Prohibition Act. After committing the case to the Sessions Court, on framing the charges of Section 498-A, 302 in alternate of Section 304-B of IPC against Smt. Manikala while charge of Section 498-A and 304-B/34 of IPC against the present appellant, they abjured the guilt. On which the trial was held. On appreciation of the evidence, the appellants were acquitted from the charge of Section 302 and 304-B/34 of IPC while each of them was held guilty for the offence of Section 498-A of IPC and punished with the above mentioned punishment, on which the appellants came to this court with this appeal. In pendency of the same on account of death of the appellant no. 2 her name has been deleted from the record. So this is being adjudicated only till the extent of appellant no.1.

3. Shri P.N. Dubey with Shri Praveen Dubey, learned appearing counsel

for the appellant after taking me through the record of the trial court including the evidence led by the parties alongwith the exhibited papers of the charge sheet argued that on appreciation of evidence, after extending acquittal to the appellant from the charge of Section 304-B/34 of IPC, on the basis of the same evidence, there was no occasion before the trial court to convict the appellant under Section 498-A of IPC. In continuation he said that on taking into consideration the version of both dying declaration of the deceased, i.e. Ex. P-3 and Ex.P-8 as accepted in its entirety, even then the ingredients of offence of Section 498-A of IPC are not made out against the appellant. For the sake of arguments, if the allegation of the subsequent dying declaration, (Ex. P-8) is minutely examined, then it is apparent that some of the allegations were made only against deceased - appellant no. 2 Manikala and not against the present appellant. In continuation he said that in initial dying declaration, (Ex.P-3) recorded by ASI, (Police), Shri S.K. Shukla, (PW-1) at 10.45 in the morning immediately after reaching Vandana to hospital, she had not made any allegation of cruelty, harassment or torture against the appellant or any other person. The subsequent dying declaration (Ex.P-8) was also recorded in the hospital by the Executive Magistrate, Shri A.G. Jain (PW-13) at 8.55 PM on the same day, on which Ex. P-3 was recorded. He further said that if any inconsistency is found between aforesaid two dying declaration, then the version stated by the deceased in the earlier dying declaration should be relied upon because that was made by the deceased immediately after the incident. On relying on the same, the appellant could not have been convicted by the trial court under Section 498-A of IPC. In continuation he said that father and brothers of the deceased - namely Radhika Prasad Dubey, Damendra Kumar and Basant Kumar, on recording their depositions did not state any particular incident alongwith the date, time and place, on which any cruelty was committed by the appellant on the deceased. On the contrary as per deposition of Basant Kumar before some years from the date of alleged suicide of Vandana and soon after marriage of the present appellant in the year 1989, the family of the deceased alongwith her husband and the appellants were separated. So subsequent to such separation, there was no occasion to do or commit any act of cruelty by the appellant with the deceased. In support of such contention he also placed his reliance on examined defence witnesses namely Girish Kumar Sahu (DW-1), Bhagwan Das, (DW-2) and husband of the deceased Vijay Kumar Tiwari, (DW-3). With these submissions, he prayed to set aside the impugned conviction and extending the acquittal to the appellant by allowing this appeal.

4. On the other hand, responding the aforesaid arguments Shri P.K. Chourasiya, learned PL by justifying the impugned conviction and sentence of the appellant said that same being based on proper appreciation of evidence do not require any interference at this stage. He further said, that in the available factual matrix the trial court has not committed any error in relying on the subsequent dying declaration, (Ex.P-8) of the deceased, recorded by the Executive Magistrate. In continuation he said that the version of such dying declaration is also supported by the witnesses examined from the parental family of the deceased. However, he fairly conceded that the defence witness, Vijay Kumar Tiwari, (DW-3), the husband of the deceased in his deposition categorically stated that before the alleged incident he and his brother the appellant were separated and residing separately and prayed for dismissal of this appeal.

5. Having heard the counsel, keeping in view their arguments, I have carefully gone through the record of the trial court.

6. It is apparent fact on record that at the time of marriage the deceased Vandana was residing with her husband in the joint family in which the appellant-Lalit Kumar Tiwari being younger brother of her husband and the deceased appellant no.2 Smt. Manikala, the sister of the appellant were also residing with them. But from the depositions of Basant Kumar (PW-4), the brother of the deceased and the defence witnesses Girish Kumar Sahu, (DW-1) and Bhagwandas, (DW-2) and Vijay Kumar Tiwari, (DW-3), the husband of the deceased it has been proved on record that subsequent to marriage of the appellant Lalit Kumar Tiwari in the year 1989, the appellants and Vijay Kumar Tiwari were separated and since then were residing separately with their family. So in such premises, the inference could be drawn that subsequent to such separation between brothers, there was no circumstance to interfere in the family affairs of each other. Keeping in view such aspect, the court has to examine the available evidence as well as above mentioned both the dying declaration of the deceased.

7. It is apparent fact on record that above mentioned dying declarations of Vandana Tiwari, (Ex. P-3) and (Ex. P-8) were recorded by the Assistant Sub Inspector, Shri S.K. Shukla, (PW-1) and Shri KG. Jain, Executive Magistrate, Tahsildar, (PW-13) respectively after obtaining the fitness certificate regarding health condition of Vandana Tiwari from the Duty Doctors, Dr. Arun Kumar Saxena, (DW-4) and Dr. Shobha Agrawal, (PW-8) respectively. The

factual matrix of the respective dying declarations have been proved by the above mentioned witnesses who recorded the same. Dr. Arun Kumar Saxena, (DW-4) and Dr. Sobha Agrawal, (PW-8) in their respective depositions stated that after getting the fitness certificate regarding health condition of Vandana Tiwari from them, the respective dying declarations, (Ex.P-3 and Ex.P-8) were recorded by the aforesaid officers of the State. So at this juncture both the dying declarations could not be disbelieved on the point of recording the same. The court has to decide whether earlier dying declaration could be relied or subsequent should be relied and on relying on both the dying declaration, whether the impugned conviction of the appellant under Section 498-A of IPC could be upheld or not.

8. Mere perusal of the earlier dying declaration, (Ex.P-3) recorded by the ASI at 10.45 in the morning, it is apparent that in such dying declaration the deceased had not implicated to any of the family members or other persons including the appellant with the alleged incident. On the contrary, she stated that while cooking food, incidentally she got burnt and sustained injuries. Such version of the dying declaration of the deceased has been further supported by the testimony of Charan Singh, (PW-6), the Panch witnesses, of spot map and the seizure memo of articles found on the spot who in his deposition categorically stated that during the course of preparing the spot map of the kitchen the place of incident, some wet flour (Geela Aata) was also found. So such dying declaration appears to be more correct in comparison of subsequent dying declaration because in subsequent dying declaration, (Ex.P-8), she admitted that the alleged incident was happened in the kitchen while cooking the food, but simultaneously she also implicated the appellant no. 2 Manikala, (since deceased) by stating that alleged fire was set on her by such Manikala and not by the appellant. But at page 2 of such dying declaration she stated only one thing that the appellant and aforesaid Manikala used to give harassment to her husband. So except this, nothing was stated by the deceased against the appellant. In such premises, it is apparent that in subsequent dying declaration no any specific act with the particulars of any incident of cruelty was stated by the deceased against the appellant.

9. In view of aforesaid even on relying only the subsequent dying declaration, (Ex.P-8) even then there is no sufficient material in it against the appellant to draw the inference that the deceased was subjected to any cruelty or harassment by any act of the appellant. So in any case either relying upon both the dying declaration or only the subsequent dying declaration, (Ex.P-8)

or on excluding any of them, no inference could be drawn against the appellant for committing the alleged offence of cruelty with the deceased.

10. Apart the above, on going through the available recorded evidence, I have not found sufficient evidence and circumstances showing or proving that at any point of time any cruelty was committed by the appellant with the deceased. Radhika Prasad Dubey, (PW-2), the father of the deceased while recording his deposition in between para 2 of his in chief has stated that on one occasion he visited the house of his daughter. At that time, his daughter was subjected to some dispute with the appellant and his sister, on which the appellant was trying to oust his daughter from the home and when he entered in her house, then he was forcefully ousted by the appellant, on which a report was also lodged with the Mahila Police Station. Such report has neither been produced nor proved on record. In continuation he said that subsequently matter of such report was compounded between the appellant alongwith his family members and his daughter. So on account of such subsided incident, no inference could be drawn that the deceased was subjected to any cruelty by such act of the appellant. Besides this on going through the entire in chief and cross examination of this witness, so also the deposition of Davendra Kumar, (PW-3) and Basant Kumar, (PW-4), the brother of the deceased, I have not found any material, on which it could be said that at any point of time before death of deceased Vandana Tiwari, she was subjected to any cruelty, harassment or torture with any act by the appellant. On the contrary Basant Kumar, (PW-4) in para 4 in his cross examination has categorically said that the appellant and his brother in law Vijay Kumar Tiwari were residing separately since 1989, as stated above. So in such premises, it could not be said that at any point of time or even on the date of the incident, i.e. 8.7.1991 the appellant committed any alleged cruelty with the deceased Vandana Tiwari. Except aforesaid three witnesses, no other witness has been examined from the parental family of the deceased. It is apparent that on behalf of prosecution to prove the alleged cruelty, no independent eye witness of the vicinity, in which the deceased and the appellant were residing in the separate part of the house, has been examined.

11. In view of the aforesaid discussion and in lack of independent evidence showing the involvement of the appellant with the offence, the impugned conviction of the appellant could not be sustained at this stage. Thus, it is held that the trial court has committed grave error, perversity and infirmity in convicting the appellant under Section 498-A of IPC. The same deserves to

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be set aside.

12. Therefore, by allowing this appeal the impugned conviction of the appellant under Section 498-A of IPC alongwith the imposed sentence is hereby set aside and the appellant is acquitted from such charge also. The amount of fine, if deposited then after proper verification, it be refunded to the appellant. The bail bond of the appellant is hereby discharged.

13. The appeal is allowed as indicated above.

Appeal allowed.

I.L.R. [2012] M.P., 1950

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava

Cr.A. No. 759/1996 (Jabalpur) decided on 14 March, 2012

PURAN SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 376(2)(g) - Gang Rape - Rape allegedly committed by Devar and co-accused - Prosecutrix alleged that she had received number of injuries, but the Doctor did not find any injury - Further no such allegation was made in police statement - Prosecutrix was earlier expelled from community on the allegation of illicit relationship with Chowkidar - Testimony of prosecutrix do not inspire confidence - Appeal allowed. (Paras 17 & 20)

दण्ड संहिता (1860 का 45), धारा 376(2)(जी) - सामूहिक बलात्कार - बलात्कार देवर व सह-अभियुक्त द्वारा कारित किया जाना अभिकथित किया गया - अभियोक्त्री ने अभिकथन किया कि उसे बहुत सारी चोटें आईं, लेकिन चिकित्सक ने कोई चोट नहीं पाई - इसके अलावा पुलिस बयान में उक्त अभिकथन नहीं किया गया - अभियोक्त्री को पूर्व में चौकीदार के साथ अवैध संबंध के आरोप पर समुदाय से निष्कासित किया गया था - अभियोक्त्री की साक्ष्य विश्वास उत्पन्न नहीं करती - अपील मंजूर।

Cases referred :

AIR 2002 SC 620, AIR 2001 SC 3031, (2011) 7 SCC 130, (2008) 10 SCC 69.

Amanullah Usmani, for the appellant.

Vivek Lakhera, P.P. for the respondent/State.

J U D G M E N T

A.K. SHRIVASTAVA, J. - The judgment passed in this appeal shall also govern the disposal of connected Criminal Appeal No.919/1996 (*Shiv Datt Pathak vs. State of M.P.*) since both the appeals have arisen out of same judgment of learned Trial Court convicting the accused persons for the offence punishable under Section 376(2)(g) of IPC.

2. Feeling aggrieved by the judgment of conviction and order of sentence dated 24.02.1996 passed by learned Special Judge, Panna in Special Case No.6/1994 convicting the appellant under Section 376(2)(g) IPC and thereby sentencing him to suffer jail sentence of 10 years R.I. and fine Rs.2000/-; in default of payment of fine further imprisonment of 3 months, the appellant has knocked the doors of this Court by preferring this appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

3. In brief, the case of the prosecution is that accused Puran Singh is Devar in distinct relation of the prosecutrix. The prosecutrix is daughter of Rattu. According to prosecution on 23.12.1993 in the evening accused persons brought a chicken at the house of prosecutrix and asked her to cook it. But, she put her inability for want of necessary ingredients to cook the chicken in her home. Thereafter, the accused persons went to the market and brought those ingredients and they themselves cooked the chicken at the house of prosecutrix and after eating it they went away from the house and again came back after consuming liquor. It is said that they forcibly committed rape over prosecutrix, as a result of which, she screamed and on hearing the scream, father of prosecutrix arrived to whom she narrated the incident. The FIR was lodged by prosecutrix after 5 days on 28.12.1993.

4. On lodging of the FIR, the criminal law was triggered and set in motion. A case was registered under Section 376(2)(g) and also under section 3(1)(x) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (in short "Act") against the accused persons. After the investigation was over, a charge-sheet was submitted before the learned Special Judge, who framed charges under Section 376(2)(g) of IPC and under section 3(1)(x) of the Act, which both the accused persons denied and requested for trial.

5. In order to bring home the charges, the prosecution examined as many as 11 witnesses and placed Ex.P/1 to P/17, the documents on record.

6. The defence of accused persons is that after the death of husband of prosecutrix, she developed illicit relations with one village Chowkidar namely Brindavan, as a result of which she was expelled from the community by the Panchayat. On the date of incident the accused persons saw prosecutrix in compromising position with said Brindavan and in order to save herself from defamation, a false report has been lodged by the prosecutrix after five days of the incident. In support of their defence they have examined three witnesses of the same village namely Ramgulam (DW1), Shankarsingh (DW2) and Darshansingh (DW3).
7. The learned Trial Court did not find the charge under Section 3(1)(x) of the Act to be proved and eventually acquitted accused persons from the said charge. However, charge under Section 376(2)(g) IPC was found to be proved and eventually, the accused persons have been convicted to undergo the sentence which I have mentioned herein-above.
8. In this manner, this appeal as well as connected criminal appeal has been filed by the accused persons assailing their judgment of conviction and order of sentence.
9. The contention of Shri Amanullah Usmani learned counsel for appellant is that if the testimony of the prosecutrix is taken into account in true perspective it would reveal that her testimony does not inspire confidence. Learned counsel by inviting my attention to the evidence of prosecutrix has submitted that according to her evidence, on account of committing vile act of rape, the blood started oozing from her vagina and not only this, the said blood also stained her petticoat, but, no injury has been found by the lady doctor on the private part of the prosecutrix. It has also been put-forth by learned counsel that according to the prosecutrix she sustained umpteen injuries on her body but lady doctor did not notice even single injury.
10. Learned counsel for appellants by inviting my attention to testimony of father of prosecutrix Rattu (PW4) has argued that this witness who is father of prosecutrix arrived immediately after the incident but the prosecutrix did not narrate the incident to him and hence it raises a heavy doubt on the veracity of the case of prosecution. Learned counsel further submits that the prosecutrix has stated that she narrated the incident to her father but her father has stated that the prosecutrix did not state anything to him in regard to commission of offence. Thus, it raises a heavy doubt in regard to authenticity of the case of prosecution.

11. Learned counsel further submits that the prosecutrix herself has admitted that on the basis of allegations that she is having illicit relations with village Chowkidar Brindavan she was expelled from the community by the Panchayat. Although suggestion put to her that she is having illicit relations with Brindavan has been denied by her. According to learned counsel looking to the facts and circumstances and the admission made by prosecutrix that she has been expelled from the Society, coupled with the fact that defence witnesses have categorically stated that after the death of husband of prosecutrix she had established illicit relations with Brindavan, the defence appears to be quite probable.

12. Learned counsel further submits that deliberately the FIR has been lodged after five days of the incident and no satisfactory explanation has been given and therefore learned Trial Court has erred in convicting the accused persons.

13. On the other hand Shri Vivek Lakhera, learned Public Prosecutor argued in support of the impugned judgment.

14. I have heard learned counsel for the parties and having heard them I am of the view that this appeal as well as connected criminal appeal deserves to be allowed.

15. The alleged incident is said to have been taken place on 23.12.1993 and the prosecutrix was sent for medical examination after five days when she lodged in FIR on 28.12.1993. I shall scan the testimony of lady doctor Meena Namdev (PW2) lateron but before it, it would be condign to x-ray the testimony of prosecutrix herself. The accused persons are near relatives of prosecutrix. According to her, when both the accused persons committed rape over her, blood started oozing from her vagina. At this juncture, it would be relevant to mention here that the prosecutrix is having age of 42 years. According to her, at that time her father and Chowkidar Brindavan have arrived on spot and seeing them accused persons fled from the place of occurrence. Further she has stated that she lodged FIR (Ex.P/4) after five days of incident on 28.12.1993.

16. In cross-examination she has admitted that when the accused persons by overpowering her, were committing rape, her bangles were broken and pieces of glass pricked her wrist and she received abrasions. In cross-examination she admitted that when accused persons dealt shoe blows on her

thigh, she received injuries. Further she has admitted that when a towel was thrust in her mouth, injuries were received by her and all these injuries were shown by her to the lady doctor. However, the lady doctor Meena Namdeo (PW2) did not find even a single injury on the person of the prosecutrix. In examination-in-chief she says that the factum of receiving injuries by her was stated to the police, but, when this fact was confronted to her in cross-examination, she has stated that although she narrated about the injuries received by her to the police but if that fact is not mentioned in the FIR she cannot say anything. Similarly, she has stated that broken bangles lying on spot was also told by her to police personnel but this fact did not find place in her case diary statement or in the FIR. In para 14 of cross-examination she has stated that she received injuries on waist as she was thrown on ground by accused persons, but no injury was found by lady doctor on the waist of prosecutrix. According to her, on account of commission of rape over her, the blood came out and it stained her petticoat and saree but there is no positive report of chemical examiner in this regard.

17. In cross-examination para 21 the prosecutrix has admitted that 10 years prior to date of incident her husband expired and he committed suicide by hanging. Although illicit relationship with Chowkidar Brindavan has been denied by her and also denied the suggestion that on account of illicit relations with said Brindavan her husband committed suicide, but, in the same para she has admitted that on account of her illicit relation with said Brindavan 3-4 years ago she has been expelled from the community and for this reason only the accused Puran Singh did not invite her in the marriage of his daughter although accused persons are her near relatives. The suggestion put to her that villagers were objecting the illicit relationship of her with Brindavan has been denied by her. Further she has denied the suggestion put to her that when Brindavan was laying on a Cot in her house and she was massaging his legs, at that juncture, accused persons saw them and for this reason they have been falsely implicated. At this juncture, it would be condign to mention here that presence of Brindavan with whom it is said that prosecutrix is having illicit relation has been proved by the prosecutrix herself although she states that soon after incident Chowkidar Brindavan arrived at the place.

18. On scanning the testimony of prosecutrix, it is gathered that she is concealing the reality. The matter should be visualized from this angle that although she has denied the suggestion put to her that she is having illicit relations with Brindavan and on account of said relations her husband committed suicide

and further she was massaging his legs and was seen by the accused persons in that position, but, she has categorically admitted that on account of illicit relationship with said Brindavan she has been expelled from the community and for this reason she was not invited by the accused Puran in the marriage of his daughter. Hence, the probable defence which has been taken by the accused persons has been proved. In support of their probable defence, the accused persons examined three witnesses namely Ramgulam (DW1), Shankarsingh (DW2) and Darshansingh (PW3) and all these witnesses are resident of same village and in singular voice all of them are saying that the prosecutrix is having illicit relations with Brindavan and she was seen in compromising position with said Brindavan, as a result of which Panchayat was assembled and she was expelled from the community. Needless to say that the prosecutrix herself has admitted the fact of expelling from her community. According to me, the credential value of the defence witness is akin to that of prosecution and there is no law as such that merely a witness has been examined by the defence, he is not worth reliable. In this context I may profitably place reliance on the decision of Supreme Court *State of Haryana v. Ram Singh* AIR 2002 SC 620 and *Munshi Prasad v. State of Bihar* AIR 2001 SC 3031.

19. Thus, according to me, the defence appears to be quite probable. It is well settled in law that the standard of proof of the defence should not be compared with that of prosecution where prosecution is obliged to prove its case beyond all reasonable doubts. The Court is required to see whether defence is probable and if it is found probable, due weightage should be given to it.

20. Although, the prosecutrix has stated that she received umpteen injuries but not even a single injury was found by Dr.Meena Namdeo (PW2). It is well settled in law that in sexual offence conviction can be accorded solely on the basis of testimony of prosecutrix and no corroboration is needed, but, said testimony should inspire confidence. I have already held hereinabove by scanning the testimony of prosecution that her testimony does not inspire confidence.

21. Since the testimony of prosecutrix does not inspire confidence I am required to see other statements of witnesses in order to arrive at a conclusion that whether any conviction can be accorded to the accused persons. Although, the prosecutrix has stated in her examination-in-chief that when accused persons were committing rape over her, her father arrived there and several

other villagers also assembled to whom she narrated entire incident, but, the father of prosecutrix Rattu (PW4) has stated that his daughter did not narrate anything to him in regard to alleged incident. Although, this witness was declared hostile by the prosecution but he did not state that prosecutrix told anything about the incident to him. According to father of prosecutrix Rattu (PW4) he saw accused persons running away on the village path and it is admitted by him that several villagers use the said path for access.

22. Apart from what I have held hereinabove although alleged incident is dated 23.12.1993 but FIR was lodged after five days i.e. 28.12.1993 and no reasonable explanation has been given by the prosecutrix. She has stated in her testimony that on next day when she was going to lodge FIR, accused persons restrained her on way but why she did not lodge the report for another four days, there is no explanation. Although this alone cannot a ground to hold that the accused persons are innocent, but, taking into account overall aspect of the matter as well as facts and circumstances of the case, the evidence of the prosecutrix becomes highly suspicious and cannot be relied upon.

23. I have already held hereinabove that the testimony of prosecutrix is not reliable and does not inspire confidence; it is full, of inconsistencies and it is also borne out from the record that in order to save herself from defamation since she was seen with Brindavan coupled with the fact that she was already expelled from her community on the ground that after the death of her husband, she is maintaining illicit relationship with Brindavan and further that FIR was lodged deliberately after five days, it cannot be said that accused persons have committed the offence of gang rape as envisaged under Section 376(2)(g) IPC. In this regard I may profitably place reliance on the latest decision of the Supreme Court *Krishan Kumar Malik v. State of Haryana* (2011) 7 SCC 130 and another decision of Apex Court *Lalliram and another vs. State of Madhya Pradesh* (2008) 10 SCC 69.

24. Resultantly, this appeal and connected criminal appeal No.919/1996 succeed and are hereby allowed. The impugned judgment of conviction and order of sentence are hereby set aside and the appellant of both the appeals are acquitted from the charge of Section 376(2)(g) IPC. They are on bail, their bail bonds are discharged. The amount of fine, if deposited, be refunded to them.

Appeal allowed.

**I.L.R. [2012] M.P., 1957
APPELLATE CRIMINAL**

Before Mr. Justice P.K. Jaiswal & Mr. Justice Mool Chand Garg

Cr. A. No. 66/2005 (Indore) decided on 14 March, 2012

SHARAD

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 - Murder - Accused 'S' who was standing behind the deceased 'A' inflicted knife injury on his stomach due to which he fell down - Death of 'A' caused on account of solitary injury by the accused - Held - Although, death caused by accused was not premeditated and accused had no intention to cause death of the deceased, but the injury was sufficient in the ordinary course of nature to cause his death - Thus the case does not fall under the exceptions 1 & 4 to Section 300 of IPC - Appeal dismissed.

(Paras 5, 18 & 21)

दण्ड संहिता (1860 का 45), धारा 302 - हत्या - अभियुक्त 'एस' जो मृतक 'ए' के पीछे खड़ा था, ने उसके पेट पर चाकू से चोट पहुंचाई जिसके कारण वह नीचे गिर गया - 'ए' की मृत्यु, अभियुक्त द्वारा पहुंचाई गई एकमात्र चोट के कारण हुई - अभिनिर्धारित - यद्यपि, अभियुक्त द्वारा कारित मृत्यु पूर्व चिंतन से नहीं थी और मृतक की मृत्यु कारित करने का अभियुक्त का आशय नहीं था, किन्तु चोट प्रकृति के सामान्य क्रम में उसकी मृत्यु कारित करने के लिए पर्याप्त थी - अतएव प्रकरण भा.द.सं. की धारा 300 के अपवाद 1 व 4 के अंतर्गत नहीं आता - अपील खारिज।

Cases referred :

(2005) 9 SCC 650, AIR 2009 SC 87, AIR 1959 SC 465 : 1958 SCR 1495.

R.N. Gupta, for the appellant.

Deepak Rawal, P.P. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by: **P.K. JAISWAL, J.** - The perennial question whether the appellant - Sharad Yadav deserves to be convicted under Section 302 of IPC, as held by the trial Court or whether the conviction should be converted to that under Section 304 of IPC, has cropped up for consideration before us, in this appeal.

2. In the instant case, four accused persons were charged and prosecuted for commission of the offence under Section 302 and 324 and in alternative 324/34 and 302/34 and 324 in alternative 324/34 of IPC.
3. After the trial giving the benefit of doubt, Sonu, Shakti and Suraj, accused No 1,3 and 4 respectively, were acquitted by the XIIth Additional Sessions Judge, Indore, in Sessions Case No. 190 of 2003, vide its judgment and order dated 11.01.2005. The accused No.2 – Sharad Yadav, has preferred this criminal appeal. He has been convicted under Section 302 of IPC by the XIIth Additional Sessions Judge, Indore, in Sessions Trial No.190 of 2003, whereby the learned trial Court awarded life imprisonment with fine of Rs.5000/-, in default of payment of fine one year additional rigorous imprisonment and one year rigorous imprisonment under Section 304 of IPC respectively for commission of the aforesaid offence.
4. Now, in this appeal, it is prayed before us to consider, in the peculiar facts and circumstances of this case, whether, the surviving convicted appellant, Sharad Yadav deserve to be convicted for commission of the aforesaid offence or it deserves to be converted under Section 304 of IPC.
5. The prosecution story in a nutshell is as under: it is said, PW6, Amul Yadav, cousin brother of the deceased Atul Yadav (son of his mausi/maternal aunty) was involved in the criminal case along with appellant-Sharad Yadav and one more accused person. They appointed one Mr. Deepak Sharma, Advocate as their counsel. They decided that they will equally divide the fees of the Advocate. Amul Yadav, failed to pay the fees of his share and, therefore, a dispute arose between him and appellant Sharad Yadav. On account of this, Amul Yadav (PW6) and appellant were on inimical terms. On 20.3.2003 at about 11 – 12.00 PM, Balvinder Singh (PW1) and Atul Yadav, were going on their motorcycle to the house of their common friend. Balwinder (PW1) was riding the motorcycle. When they were passing from Prajapati Nagar in front of the house of the accused appellant Sharad Yadav, they saw that all the four accused persons were standing outside their house. At the instance of accused Sharad Yadav, he stopped his motorcycle and no sooner Atul Yadav, came down from the motorcycle, accused Sharad Yadav, started abusing him. Atul, asked him to stop abusing and stated that if he is having any dispute with his cousin brother, Amul Yadav (PW6), he should solve his dispute with him. On this, all four accused persons came out with their knife and on seeing this PW1 Balvinder Singh, stated that they will kill him. When PW1 tried to pacify them, the accused Sharad, who was standing behind the Atul Yadav, inflicted

knife injury on his stomach due to which he fell down. When Balvinder (PW1) tried to save his life, he sustained abrasion on right hand thumb and index finger. At the time of occurrence, Karan (PW8), Ravi (PW7) and others were present and they witnessed the incident. When Atul Yadav fell down, the accused persons ran away from the place of occurrence. Balvinder Singh (PW1) with the help of Ravi (PW7) and Karan (PW8) took the injured Atul to Arihant hospital, but before any medical treatment could be provided to him, he was declared "brought dead" (Exhibit D/4) by the doctors attended to him. Intimation of death of deceased Atul Yadav, was given by the Arihant hospital to Chandan Nagar Police Station, Indore. FIR Exhibit P/1, was lodged by Balvinder (PW1) on 20.3.2003 at Chandan Nagar Police Station naming all the four accused in the same and giving details of the injuries caused to the deceased.

6. After completion of investigation, the accused were prosecuted for commission of the aforesaid offence by the trial Court. As mentioned herein before, accused Sonu Yadav, Shakti Singh and Suraj Singh were acquitted, whereas accused Sharad Yadav was found guilty of commission of offence under Section 302 and 324 of IPC.

7. We have heard the arguments of Shri R.N. Gupta, learned counsel for the appellant and Shri Deepak Rawal, learned Public Prosecutor for respondent – State and perused the record.

8. At the outset, learned counsel for the appellant contended that looking to the nature of injury sustained by the deceased, the Court below committed grave error in finding the appellant guilty under Section 302 and 324 of IPC. It was further submitted that appellant the so-called main accused has already undergone a sentence of more than 9 years and 8 months. It has also been submitted that the incident had occurred on the spur of moment and there was neither common object nor common intention in the mind of the accused to commit the murder of deceased Atul Yadav. According to him, thus, the offence deserves to be converted under Section 304 IPC, more so when he has already undergone more than 9 years and 8 months in jail.

9. On the other hand, learned Public Prosecutor appearing for respondent – State vehemently opposed and contended that looking to the nature of the injury inflicted on vital part of the body of the deceased with deadly weapon, no scope of doubt remains that accused appellant killed the deceased. In any event, the accused was aware of the fact that the nature of injury caused by

him would be sufficient in the ordinary course of nature to cause death. It was, therefore, contended that no case for showing any leniency was made out and the finding recorded by the trial Court need not to be disturbed. Consequently, this appeal deserves to be dismissed.

10. The postmortem report (Exhibit P/17) shows that deceased Atul, had sustained one injury on his stomach. As per this report, the deceased has died of shock and hemorrhage due to stab injury to vital blood vessel. The single injury was sufficient to cause death. This postmortem report has been duly proved by autopsy surgeon Dr. Ravindra (PW11). As per postmortem report Exhibit P/17, deceased Atul, received the following injuries:

"A stab wound present obli. 3 x 15 cm x deep going on lt. Side lumbar region abdomen lat. above iliac crest, piercing deep 11.3 cm into large blood vessel aorta, clot and red ecchymosis all over present, edges well defined, everted."

11. Now the question that arises for the consideration in this appeal is whether in the facts and circumstances of the case, conviction of appellant under Section 302 can still be uphold or it deserves to be converted under Section 304 of IPC.

12. The evidence of injured witness Balwinder Singh (PW1) and two eye witnesses Ravi (PW7) and Karan (PW8) were consistent that appellant Sharad Yadav, had hit the deceased with knife and the blow inflicted has proved to be fatal.

13. Balwinder Singh (PW1) in para 11 of his statement has deposed that Amul Yadav (PW6), cousin brother of the deceased was also accused along with the appellant Sharad Yadav in some criminal case. There arose a dispute between them in respect of sharing of legal expenses of the counsel. He has further deposed in para 30 that present appellant Sharad Yadav, is his friend and hence on 20 March, 2003, he was going along with the deceased, he stopped his motorcycle in front of the house of the Sharad Yadav. All the four accused persons were standing in front of their house. Appellant – Sharad Yadav, on seeing Atul, started abusing and when Atul, asked him to stop abusing him and further contended that if he has some dispute with his brother Amul Yadav (PW6), he should sought out his dispute with him. On this, appellant who was armed with knife has caused fatal injury on the stomach of the deceased due to which he fell down and was declared dead at Arihant hospital, Indore.

14. Amul Yadav (PW6), in his statement has admitted that deceased Atul

is his cousin brother. This witness in para 13 of his cross examination has stated that PW1 was not aware about his dispute with appellant Sharad Yadav. In para 14 he has deposed that deceased had no knowledge about his dispute with appellant – Sharad Yadav.

15. Other two eye-witnesses Babulal (PW3) and Pawan (PW4) were turned hostile and have not supported the case of the prosecution.

16. Ravi (PW7) and Karan (PW8), eye witnesses of the case have virtually narrated the same fact, which was narrated by the Balvinder Singh (PW1). The evidence of PW1, PW7 and PW8, appears to be convincing and natural. PW1 was accompanied with deceased Atul, when the incident had taken place. Recovery of the knife was made from the possession of the accused appellant–Sharad Yadav. Thus, from the analysis of the aforesaid evidence, it is clear that it was accused Sharad Yadav, who had caused fatal blow on the person of deceased. Evidence of PW1 and PW6 (cousin brother of the deceased) appears to be convincing and natural.

17. To understand the legal complexities of the matter, we would consider the import of Section 299 and 300 IPC, reproduced herein below. Section 299 of IPC reads as follows:-

“299. Culpable homicide. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

18. In the instant case, there has been death of Atul caused on account of solitary injury by the aforementioned accused. The trial Court has convicted the accused for the offence of murder under Section 302 of IPC. In a plethora of cases, this Court has held that under the scheme of IPC, “culpable homicide” is the genus and “murder” its species wherein all “murder” is “culpable homicide” but all “culpable homicide” is not “murder”. Exceptions 1 to 5 to Section 300 IPC indicate the circumstances where “culpable homicide” is not “murder”. Exceptions 1 and 4 which are relevant for the present appeal reads as follows:-

“300. Murder. -

Exception 1. - When culpable homicide is not murder. -
Culpable homicide is not murder if the offender, whilst deprived

of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Exception 2. - * * *

Exception 3. - * * *

Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

19. Also, fine distinction between Section 299 and Section 300 of IPC has been eloquently and beautifully carved out by Hon'ble Dr. Justice Arijit Pasayat in a recent judgment, after considering all the previous judgments of this Court. We may quote profitably the following paras of the judgment reported in (2005) 9 SCC 650 titled *Thangaiya Vs. State of T.N.* : (SCC pp. 656-57, paras 17-20).

"17. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh v. State of Punjab AIR 1959 SC 465:1958 SCR 1495 for the applicability of clause "thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause "thirdly" of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

20. In the case of *Budhi Lal v/s. State of Uttarakhand*, reported as AIR 2009 SC 87 the Hon'ble Supreme Court in recent judgment after considering all the previous judgment of the Apex Court including the judgment of *Thangaiya Vs. State of T.N.* (supra) made a fine distinction between Section

299 & 300 of IPC, which are relevant for the present appeal reads as follows:-

16. *For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Rajwant and Anr. v. State of Kerala, (AIR 1966 SC 1874) is an apt illustration of this point.*

21. From the upshot of the aforesaid discussions, it appears that the death caused by the accused-appellant was not premeditated, the accused had no intention to cause death of the deceased, but the injury was sufficient in the ordinary course of nature to cause his death. Thus, according to the law laid down in the case of *Virsa Singh v. State of Punjab* AIR 1959 SC 465:1958 SCR 1495, the injury inflicted by the appellant is sufficient in the ordinary course of nature to cause death. It has been proved that though there was no intention to inflict that particular bodily injury, which in the ordinary course of nature was sufficient to cause the death that the injury found to be present was injury that was intended to be inflicted was sufficient in the ordinary course of nature has caused his death, hence the instant case does not fall under the Exceptions 1 & 4 to Section 300 of IPC.

22. In view of the aforesaid, the appeal has no merit and is accordingly, dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1963
APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

Cr. A. No. 254/1996 (Jabalpur) decided on 16 March, 2012

RAJU ALIAS PRADEEP

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 304 Part I - Culpable homicide not amounting to Murder - Mother of the appellant, had borrowed a sum of Rs. 400/- from deceased nearly two years prior to the incident and had not returned the amount despite repeated demands - This led to animosity between the families - Appellant used to terrorize and intimidate deceased by kicking the main door of her house at night

and appellant trespassed into the house of deceased to commit theft - Hearing some noise, she came out of the room and proceeded towards the courtyard to see as to what was happening and also to answer the call of nature - At this point of time only appellant gagged her and struck repeated blows with knife at her back and gave one on her right arm - Doctor opined that cause of death of deceased was toxemia leading to cardio respiratory failure due to eugenic peritonitis as a result of injury on the back of her abdomen - Act did not fall under the definition of 'murder' but was culpable homicide not amounting to murder and punishable under Section 304 Part-I of IPC - Appeal stands dismissed.

(Paras 1,2, & 4)

दण्ड संहिता (1860 का 45), धारा 304 भाग I - हत्या की कोटि में न आने वाला आपराधिक मानव वध - अपीलार्थी की माँ ने घटना से लगभग 2 वर्ष पूर्व मृतिका से 400/- रुपये उधार लिए थे और बार-बार माँगने के बावजूद भी नहीं लौटाये - इससे परिवारों के बीच वैमनस्यता बनी - अपीलार्थी रात के समय मृतिका के घर के मुख्य द्वार पर पैरों से प्रहार कर उसे आतंकित और घमकाता था और अपीलार्थी ने चोरी करने हेतु मृतिका के घर में गृहभेदन किया - कुछ शोर सुनकर मृतिका कमरे से बाहर आई और आँगन तक गई यह देखने के लिए कि क्या हो रहा था और नित्य क्रिया के लिए भी - इसी समय केवल अपीलार्थी ने मृतिका का मुँह बंद किया और उसकी पीठ पर चाकू से कई प्रहार किये और एक प्रहार उसकी दाहिनी भुजा पर किया - चिकित्सक की राय में मृतिका की मृत्यु का कारण उसके उदर के पीछे की ओर की चोट के फलस्वरूप रक्त विषाक्तता था जिससे उदर के अंदर की तरफ की झिल्ली में सूजन के कारण (हृदयघात), कॉर्डियो रेस्पॉरेटरी फेल्युअर हुआ है - कृत्य 'हत्या' की परिभाषा के अंतर्गत नहीं आता, लेकिन हत्या की कोटि में न आने वाले आपराधिक मानव वध की कोटि में आता है और भा.द.स. की धारा 304 भाग-I के अंतर्गत दण्डनीय है - अपील खारिज।

Cases referred :

AIR 1976 SC 2499, AIR 1958 SC 22, AIR 1976 SC 2199, 1995 Supp.(4) SCC 118, (2007) 15 SCC 465, AIR 2002 SC 2973, AIR 1972 SC 1557, AIR 1976 SC 1519.

S.C. Datt with G.P. Patel, for the appellant.

Ved Prakash Tiwari, 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 6.2.1996 passed by Second Additional Sessions Judge, Jabalpur in

S.T.No.121/93, whereby the appellant was convicted under Section 304 Part I of the IPC and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.100/- and in default, to suffer R.I. for 1 month.

2. Prosecution case, in short, may be narrated as under -

(i) At the relevant point of time, Duasiya Bai (since deceased) [hereinafter referred to as 'Duasiya'], a widow aged about 60 years, was residing in House No.70, located in Lalit Colony, Belbag, Jabalpur. Her neighbour Shantibai, the mother of the appellant, had borrowed a sum of Rs.400/- from her nearly two years prior to the incident in question and had not returned the amount despite repeated demands. This led to animosity between the families.

(ii) The appellant, during the period of nearly 10 days preceding the incident, used to terrorize and intimidate Duasiya by kicking the main door of her house at night. Around midnight between 25th & 26th December 1992, the appellant trespassed into the house of Duasiya, presumably to commit theft. Hearing some noise, she came out of the room and proceeded towards the courtyard to see as to what was happening and also to answer the call of nature. At this point of time only, the appellant gagged her and struck repeated blows with knife at her back and gave one on her right arm. In a severely injured condition, she opened the door and called neighbours Gourabai (PW1) and Balaram (PW2). Her screams also attracted attention of other inhabitants of the locality including Awadhesh Singh (PW8), Halkeram (PW4) and Krishnakant Pandey (PW3), who immediately rushed to her house.

(iii) Duasiya was taken to Victoria Hospital, Jabalpur, where information given by her was recorded by Suresh Chand Goswami (PW9), the SHO of P.S. Belbag, as Dehati Nalishi (Ex.P-13B). Accordingly, a case under Section 459 of IPC was registered. Thereafter, on 26.12.1992, Duasiya's dying declaration (Ex.P-20) was recorded by J.L. Ahake (PW13), the Executive Magistrate. Ultimately on 29.12.1992 at about 7 a.m., Duasiya breathed her last. The case was then converted

into one under Section 460 of the IPC.

(iv) After inquest proceedings, the dead body was sent to Medical College Hospital, Jabalpur for post-mortem examination. Autopsy Surgeon Dr. D.K. Sakalle (PW11) opined that cause of Duasiya's death was toxemia leading to cardio-respiratory failure due to eugenic peritonitis as a result of injury on the back of her abdomen.

(v) During investigation, the appellant was apprehended and from his possession, bloodstained white shirt and grey-coloured full pant were recovered. His finger nails were also cut and preserved for forensic examination. At his instance only, Inspector Suresh Chand Goswami (PW9) recovered the weapon of offence viz. a fish-shaped knife from the room situated in back portion of his house.

3. After due investigation, charge-sheet in respect of offences under Sections 460 and 302 of the IPC was submitted before JMFC Jabalpur, who committed the case to the Court of Session for trial. However, the appellant was charged with the offence of murder only. He abjured the guilt and pleaded false implication due to animosity. He further asserted that it was a case of mistaken identity in view of the following facts -

- (i) Raju is not his name and his only name is Pradeep.
- (ii) Name of his mother is not Shantibai but Guddan Bai.
- (iii) His residence was situated at a distance of 2 Km. from the place of the occurrence.

4. Upon consideration of the entire evidence on record, learned trial Judge, for the reasons recorded in the judgment, concluded that it was the appellant only, who had caused death of Duasiya. However, he was further of the view that the offending act did not fall under the definition of 'murder' but was culpable homicide not amounting to murder and punishable under Section 304 Part I of the IPC.

5. Legality and propriety of the impugned conviction have been challenged on the following grounds -

- (i) None of the witnesses of res gestae named in the Dehati

Nalishi (Ex.P-13B) came forward to support the prosecution version regarding disclosure by Duasiya as to identity of the appellant as the person, who had caused knife injuries to her.

(ii) Contents of dying declaration in the form of Dehati Nalishi scribed by SHO Suresh Chandra Goswami (PW9) and the statement (Ex.P-20) recorded by Executive Magistrate J.L. Ahake (PW13) were not sufficient to establish identity of the appellant as the assailant in view of the fact that in both these declarations, he was referred to as Raju, son of Shantibai, who was residing in the neighbourhood.

(iii) The doctor certifying fitness of Duasiya to give dying declaration was not examined at the trial.

6. Learned counsel for the appellant has contended that even if the prosecution case is accepted in its entirety, at the most, the offence under Section 304 Part II of the IPC would be made out. For this, reliance has been placed on the decision of the Apex Court in *Molu v. State of Haryana* AIR 1976 SC 2499. In response, learned Panel Lawyer, while making reference to the incriminating pieces of evidence, has submitted that the conviction is fully justified.

7. Before advertng to the merits of the rival contentions in a right perspective, it would be necessary to first advert to the medical evidence on record.

8. Dr. M.M. Agrawal (PW6), who had the occasion to examine Duasiya in Victoria Hospital, proved existence of the following bleeding injuries on her person-

- (a) Stab injury on Right arm size 1" x ¼" x depth
- (b) Stab injury on mid scapular region at level of D2 - D3, size about 1" x ¼" x depth
- (c) Stab injury on left infra scapular region size about 1" x ¼" x depth
- (d) Stab injury on back on mid line at level of L2-L3 size about 1" x ¼" x depth
- (e) Stab injury on left post axillary line at level of L2-L3 size 1" x ¼" x depth

In his opinion, all the aforesaid injuries were caused by hard and sharp object. According to him, he had referred the case to Medical College Hospital, Jabalpur for admission and treatment.

9. Autopsy Surgeon Dr. D.K. Sakalle (PW11) described the injuries found on the body of Duasiya in the following words -

- (i) Penetrating wound situated on back of left shoulder on its lower part $\frac{3}{4}$ " x $\frac{1}{2}$ " going inside the muscles only upto depth of 2", transverse.
- (ii) Penetrating wound situated on back of chest 2" right to midline at the level of 4th thoracic vertebrae $\frac{3}{4}$ " x $\frac{1}{2}$ "
- (iii) Penetrating wound $\frac{1}{2}$ " x $\frac{3}{8}$ " situated on back of chest at the level of T9 vertebrae, going downwards laterally upto depth of 2 $\frac{1}{2}$ ", oblique.
- (iv) Penetrating wound on back of abdomen direction to lower down and laterally 1" x $\frac{1}{2}$ ", 2 $\frac{1}{2}$ " deep, aly - the muscles of wall, transverse
- (v) Penetrating wound situated on back of abdomen 3" left to midline, 1" long, $\frac{1}{2}$ " broad at the level of IIInd lumer vertebra, going - side the abdominal cavity after penetrating the peritoneum.

As per his statement, - margins of wound were clean cut and shape was cruciate like; the margins were everted; abdominal cavity contained about 1 litre of pus; foul smelling and thick pus flakes, intestines and peritoneum were loosely adherent to each other; the abdominal viscera were covered by pus flakes; there was through and through penetration; small intestine on left side of $\frac{1}{2}$ " size; there was also penetration in descending colon through and through; this was in the line of 5th penetrating wound and the depth of wound was 4" approximately.

10. In the light of these findings, Dr. D.K. Sakalle expressed the opinion that cause of Duasiya's death was toxemia leading to cardio-respiratory failure due to eugenic peritonitis as a result of injury no.(v) [above]. According to him, all the aforesaid injuries were ante-mortem and caused by sharp and penetrating object. In his cross-examination, he further admitted that (a) only

injury no.(v) was grievous in nature and had resulted in peritonitis and (b) occurrence of peritonitis could have been prevented by resorting to proper treatment.

11. All this evidence was rightly accepted by learned trial Judge to hold that Duasiya had met with a homicidal death.

12. Coming to the other evidence on record, it may be observed that although Gourabai (PW1), Balaram (PW2), Krishnakant Pandey (PW3) and Halkeram (PW4) proved the veracity of the incident yet, none of them supported the prosecution version to the effect that Duasiya had apprised them of the fact that she had been assaulted with a knife by the appellant only. Thus, the prosecution case hinges on the dying declarations in the form of -

(a) Dehati Nalishi (Ex.P13-B), stated to have been recorded by SHO Suresh Chandra Goswami (PW9) at the instance of Duasiya at about 1.30 in the night intervening 26th and 27th of December 1992 at Victoria Hospital.a

(b) Statement (Ex.P-20) of Duasiya said to have been recorded by Executive Magistrate J.L. Ahake (PW13) on 26.12.1992 at 11.10 p.m.

13. Nothing could be elicited in the cross-examination of Suresh Chandra Goswami (PW9) so as to suggest that he was, in any way, interested in securing conviction of the appellant on absolutely false grounds. Dehati Nalishi (Ex.P13-B) was suggestive of the inference that it was the appellant only who had authored the injuries found on the body of Duasiya.

14. As propounded by the Supreme Court in *Khushal Rao v. State of Bombay* AIR 1958 SC 22, dying declaration must be examined with caution as maker of the statement cannot be subjected to cross-examination but there is no rule of law or rule of prudence that dying declaration can not be accepted unless it is corroborated. In *Munnu Raja v. State of M.P.* AIR 1976 SC 2199, although it was observed that the practice of investigating officer himself recording dying declaration ought not to be encouraged yet, it was also laid down that where after making the statement before the police, the victim succumbs to his injuries the statement can be treated as a dying declaration and is admissible under Section 32(1) of the Evidence Act.

15. Recitals of Dehati Nalishi were consistent with the contents of the dying declaration (Ex.P-20) scribed by Executive Magistrate J.L. Ahake, who

was also emphatic in stating that in answer to a query as to whether Duasiya was in a fit condition to give statement, doctor had recorded an affirmative answer.

16. While placing reliance on decisions of the Apex Court in *Kanchy Komuramma v. State of A.P.* (1995 Supp (4) SCC 118) and *Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh*, (2007) 15 SCC 465, learned Senior Counsel has submitted that non-examination of the doctor certifying fitness of Duasiya was sufficient to render it unsafe to rely on the dying declaration. However, the contention is unacceptable in view of decision of Constitution Bench in *Laxman v. State of Maharashtra* AIR 2002 SC 2973, wherein it was held that even absence of doctor's certificate as to fitness of declarant's state of mind, would not render the dying declaration unacceptable. Further, evidence on record duly proved these surrounding circumstances -

- (i) Dehati Nalishi (Ex.P13B) was scribed at about 1.30 in the night intervening 25th and 26th of December 1992.
- (ii) Dying declaration (Ex.P/20) was recorded on 26.12.1992 at 11.10 p.m.
- (iii) Duasiya had expired on 29/12/1992 at about 7 a.m.

In such a factual scenario, omission to examine the doctor who had certified that before making dying declaration, Duasiya was in a proper mental condition, did not assume any significance, particularly when the declaration was consistent in material particulars with Dahati Nalishi recorded 10 hours earlier at the instance of the declarant only.

17. Still, placing implicit reliance on the decision of the Supreme Court in *Gopal Singh v State of M.P.* AIR 1972 SC 1557, learned Senior Counsel has contended that since none of the dying declarations contained complete name and address of the appellant, conviction could not be based on them and as such, the dying declarations could not have been accepted without corroboration.

18. The defence, in substance, was that the appellant is not known by the name 'Raju' and name of his mother is Guddan Bai and not Shantibai. To substantiate the plea, he examined three witnesses. The first one namely Ramcharan (DW1), posted as Accountant in the office of District Education

Officer, Jabalpur, deposed that in the school record maintained at the office, name of the appellant was mentioned as Pradeep Kumar, son of Phool Chand. The second witness Ramsajeevan (DW2) claiming to be owner of the house situated at Shitla Mai, Jabalpur, came forward to state that father of the appellant had resided as tenant in that house during the period from 1992 upto December 1994 and the last one Nimma (DW3), who is none other the sister of appellant, while refusing to have acquaintance with Duasiya, asserted that in December 1992, her parents were not residing in Lalit colony. However, fact of the matter is that in the spot panchnama (Ex.P-4) and map (Ex.P-7) stated to have been prepared by Investigating Officer Suresh Chandra Goswami (PW9) in presence of Krishnakant (PW3) and Halkeram (PW4), the appellant was shown to be the next door neighbour of Duasiya and no dispute was raised in the cross-examination of Suresh Chandra Goswami as to the recitals of these two documents suggesting that residence of the appellant was situated adjacent east to the place of occurrence i.e. the courtyard. Both the panch witnesses, though declared hostile by the prosecution, candidly admitted that the appellant was known to them from before the occurrence. The other inhabitants of Lalit colony namely Gourabai (PW1) and Balaram (PW2) also supported the statement made by Krishnakant that the appellant had been living in their neighbourhood only.

19. Moreover, as rightly highlighted by learned trial Judge -

(i) In arrest memo (Ex.P-8), memorandum (Ex.P-5), seizure memos (Ex.P-2 and Ex.P-3), the appellant had signed as Raju Pradeep.

(ii) Ramcharan (DW1) pleaded complete ignorance of the fact that appellant is also known by the name of Raju.

(iii) No documentary evidence in the form of Ration card, voter list etc. was adduced to show that appellant's mother's name was Guddan Bai and not Shantibai.

20. In the light of these facts and attending circumstances, assertion made by Ramsajeevan (DW2) and Nimma (DW3) that in the year 1992, the appellant was residing in the house of Ramsajeevan located at Shitla Mai was rightly ignored as far from being convincing. This apart, Dehati Nalishi (Ex.P-13B) not only reflected name and caste of the assailant but also indicated that he was the son of Shantibai residing in the same locality whereas in dying

declaration (Ex.P-20), the person causing injuries to the declarant was again referred to as the son of Shanti. As indicated already, there was no document to show that Shanti was not the name of appellant's mother. Thus, it was not a case of mistaken identity as the deceased and the appellant were next door neighbours knowing each other well since long.

21. For these reasons, none of the contentions raised against the reliability of dying declarations is acceptable. The dying declarations, found to be voluntary and made in a fit mental condition, could be relied on even without any corroboration. As an obvious corollary, the fact that none of the witnesses named in the FIR substantiated the prosecution version regarding identity of the appellant as the person who had caused death of Duasiya, was of no consequence.

22. To sum up, learned trial Judge did not commit any illegality in holding that it was the appellant who had caused death of Duasiya.

23. The next question that remains to be answered is as to whether learned trial Judge committed any error in convicting the appellant under Section 304 Part I of the IPC ?

24. Learned Senior Counsel, while placing reliance on decision of the Apex Court in *Molu's* case (ibid), has submitted that at the most, appellant could have been convicted under S.304 Part II IPC. However, fact of the matter is that in that case, multiple injuries received by the deceased persons, were caused by blunt weapons like lathis and they were of minor character and none of the injuries was on any vital part whereas, in the instant case, as many as five penetrating wounds were found on the body of Duasiya. The Supreme Court, in *Jayaraj v. State of Tamil Nadu* AIR 1976 SC 1519, which was also a case of death due to peritonitis arising from stab injury, explained the difference between 304 Part I and 304 Part II in the following terms -

"The first clause of Section 300 reproduces the first part of Section 299. Therefore, ordinarily if the case comes within clause (a) of Section 299, it would amount to murder. However, if one of the special exceptions in Section 300 applies, the offence would be culpable homicide not amounting to murder.

If the act of the accused falls under clause (b) of Section 299, that is to say, if the intended bodily injury is

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likely to cause death as distinguished from one which is sufficient to cause death in the ordinary course of nature, clause Thirdly of Section 300 would not apply".

25. Existence of multiple injuries on Duasiya's back only clearly indicated that repeated blows were given with intention to deliberately cause her death.

26. Accordingly, conviction of the appellant under Section 304 Part I of the IPC deserves to be affirmed as well merited.

27. This brings me to the question of sentence. It is well settled that sentence should be commensurate with gravity of offence. Taking into consideration social impact of the offence and other facts and circumstances of the case, indicating that the injuries found fatal to Dausiya were caused after committing lurking house trespass by night, custodial sentence of 10 years' R.I deserves to be maintained.

28. Consequently, the appeal stands dismissed. The impugned conviction and consequent sentences are hereby affirmed.

29. The appellant is on bail. He is directed to surrender to his bail bonds before the trial Court on 16.5.2012 for being committed to custody for undergoing remaining part of sentence.

Appeal dismissed.

I.L.R. [2012] M.P., 1973

APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava

Cr.A. No. 597/1996 (Jabalpur) decided on 22 March, 2012

RAM KALIALIAS SUNDARIYA (SMT.) ...Appellant

Vs.

STATE OF M.P. ...Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8(C), r/w 20(b)(i) - Person of appellant was searched and Ganja was seized from her waist - Held - Mandatory provisions of Section 50 of the Act were not complied with and therefore the appellant can not be convicted - Notice under Section 50 of the Act was not given therefore mandatory conditions mentioned therein were not complied with - F.S.L. report not placed on record - Appeal allowed.

(Paras 10, 11 & 12)

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8(सी), सहपठित 20(बी)(i) – अपीलार्थी के शरीर की तलाशी ली गई और उसकी कमर पर से गांजा जब्त किया गया – अभिनिर्धारित – अधिनियम की धारा 50 के आज्ञापक उपबंधों का अनुपालन नहीं किया गया और इसलिए अपीलार्थी को दोषसिद्ध नहीं किया जा सकता – अधिनियम की धारा 50 के अंतर्गत नोटिस नहीं दिया गया इसलिए इसमें उल्लिखित आज्ञापक शर्तों का अनुपालन नहीं किया गया – एफ.एस.एल. रिपोर्ट अभिलेख पर प्रस्तुत नहीं – अपील मंजूर।

Cases referred :

AIR 2011 SC 77, (1995) 3 SCC 610, (1999) 6 SCC 172.

Shivam Singh, for the appellant.

Rakesh Kumar Kesharwani, P.P. for the respondent/State.

J U D G M E N T

A.K. SHRIVASTAVA, J. - Feeling aggrieved by the judgment of conviction and order of sentence dated 13.3.1996 passed by learned Special Judge, Satna in Special Case No.106/1995 convicting the appellant under Section 8(c) read with 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “the Act”) and thereby sentencing her to suffer R.I. for 3 months and fine of Rs.3,000/-; in default further R.I. for 3 months, the appellant has taken the shelter of this Court by preferring this appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

2. In brief the case of the prosecution is that on 6.9.1995 at 8 a.m. while patrolling, Sub-Inspector Phoolsingh Tekam received information from the informant that one lady is selling the contraband article (ganja) at Lalta Chowk. The said information was reduced in the Roznamcha of City Kotwali and necessary information in that regard was given to the Superintendent of Police from Police Kotwali. Sub-Inspector Phoolsingh Tekam along with lady constable Jyoti Bhattacharya and other police personnel arrived at Lalta Chowk where they found that appellant was selling the ganja. The Investigating Officer obtained her consent for search and thereafter the lady constable Jyoti Bhattacharya took her search and ganja weighing 200 gms. was found in a plastic bag which was tied with her waist. The ganja was seized and from the entire bulk of 200 gms. a sample of 30 gms. was taken out and the bulk and the sample were separately sealed. The appellant was arrested. The sample of contraband article (ganja) was also sent for chemical examination.

3. After completion of the investigation a charge-sheet was submitted in

the Special Court who framed the charge punishable under Section 20 of the Act. Needless to say that appellant abjured his guilt and pleaded complete innocence.

4. In order to bring home the charge the prosecution examined as many as three witnesses and also placed Ex.P-1 to P-9 the documents on record. The defence of the appellant is of false implication and the same defence she set forth in her statement recorded under Section 313 Cr.P.C. However, in support of her defence she did not choose to examine any witness.

5. The learned Special Judge on the basis of the evidence placed on record came to hold that the charge has been proved and eventually convicted the appellant and passed the sentence which I have mentioned herein-above.

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

7. It has been vehemently put forth by Shri Shivam Singh, learned counsel for the appellant that since the alleged contraband article (ganja) is alleged to have been seized from the waist of the appellant it was imperative on the part of the investigating agency to comply with the mandatory provisions of Section 50 of the Act. According to him, the appellant should be given option and should be informed that it is her right to get herself examined by the investigating officer or by gazetted officer. According to the learned counsel, this mandatory provision has not been complied with. It has also been put forth by learned counsel that the present case is on rather more worst footing for the simple reason that in the present case no notice under Section 50 of the Act was given to the appellant and therefore, the conviction cannot be accorded. In support of his contention, learned counsel has placed heavy reliance on the latest decision of the Supreme Court *Vijaysinh Chandubha Jadeja v. State of Gujarat*, AIR 2011 SC 77.

8. On the other hand, Shri Kesharwani, learned Public Prosecutor argued in support of the impugned judgment and prayed that the appeal be dismissed.

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

10. According to me, learned counsel for the appellant is correct in submitting that if the mandatory provisions of Section 50 of the Act were not complied with and therefore, the appellant cannot be convicted for the simple reason that as per the case of the prosecution the contraband article (ganja)

has been seized from her waist. In this context, I may profitably place reliance on the two decisions of Supreme Court, *Saiyad Mohd. Saiyad Umar Saiyad and others v. State of Gujarat*, (1995) 3 SCC 610 and *State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 which have been recently relied by the Apex Court in *Vijaysinh Chandubha* (supra). On bare perusal of para-22 of the aforesaid recent decision of the Apex Court it is clear that the provisions of Section 50 of the Act should be strictly complied with. On bare perusal of the testimony of the Investigating Officer Phoolsingh Tekam (PW-3) nowhere it is gathered that the provisions of Section 50 of the Act which are mandatory in character were complied with.

11. According to me, the present case is rather on more worst footing and is against the prosecution for the simple reason that in the present case even notice under Section 50 of the Act was not given and therefore, I am of the view that because the mandatory notice was not given and the mandatory conditions mentioned therein were not complied with, I have no option except to allow the appeal.

12. Apart from what I have held herein-above, in the present case, although the alleged contraband article (ganja) which was seized on the spot is said to have been sent to the FSL examiner, but, no report thereof has been placed on record and hence, an inference can also be drawn that because the contraband article was not ganja, therefore, the said report was not submitted. On further X-raying the case of prosecution and particularly the different memorandums as well as the seizure memo of the alleged contraband article nowhere it is gathered that the alleged contraband article which was seized was having any flowering or fruiting tops. To me, unless and until the contraband article is tallying with that of the definition of ganja, as envisaged under Section 2(iii)(b) of the Act, the said material which was seized, cannot be said to be ganja.

13. For the reasons stated herein-above, I am unable to uphold the conviction of the appellant under Section 8(c) read with Section 20(b)(i) of the Act.

14. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment of conviction and order of sentence is hereby set aside and the appellant is acquitted from all the charges. She is on bail, her bail bonds stand discharged. The amount of fine, if deposited, be refunded to her.

Appeal allowed.

I.L.R. [2012] M.P., 1977-

APPELLATE CRIMINAL

Before Mr. Justice P.K. Jaiswal & Mr. Justice M.C. Garg

Cr. A. No. 398/2004 (Indore) decided on 1 May, 2012

SHYAM PRASAD & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Sections 34, 300 - Common Intention - Murder - Appellants No. 1 & 2 had no prearranged plan to commit murder of deceased - Appellants No. 1 was un-armed whereas the appellant No.2 was not present at the time of incident - Only allegation is that he exhorted and asked the appellant No. 3 to give some blow - It can not be said that the appellants No. 1 and 3 had any common object to kill deceased and with the said common object they have participated in the commission of offence - They can not be made liable under Section 34 of IPC. (Para 15)

क. दण्ड संहिता (1860 का 45), धाराएँ 34, 300 - सामान्य आशय - हत्या - मृतक की हत्या कारित करने की अपीलार्थी क्रं. 1 व 2 की कोई पूर्व व्यवस्थित योजना नहीं थी - अपीलार्थी क्रं. 1 निशस्त्र था जबकि घटना के समय अपीलार्थी क्रं. 2 उपस्थित नहीं था - केवल अभिकथन यह है कि उसने कुछ वार करने के लिए अपीलार्थी क्रं. 3 को उकसाया और कहा - यह नहीं कहा जा सकता कि अपीलार्थी क्रं. 1 व 3 का मृतक की मृत्यु कारित करने का कोई सामान्य उद्देश्य था और उक्त सामान्य उद्देश्य के साथ वे अपराध कारित करने में सहभागी हुए - उन्हें भा.द.सं. की धारा 34 के अंतर्गत उत्तरदायी नहीं बनाया जा सकता।

B. Penal Code (45 of 1860), Sections 302, 304 - Murder or Culpable Homicide - Accused had no immediate motive to kill the deceased and did not give him the blow with intention to kill - It is also difficult to hold that the appellant No. 3/accused intended to cause that particular injury which was sufficient in the ordinary course of nature to cause death - In such event, the offence committed by him would be punishable u/s 304 Part-II. (Para 19)

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 304 - हत्या या आपराधिक मानववध - अभियुक्त के पास मृतक की मृत्यु कारित करने का कोई तत्काल हेतु नहीं था और मृत्यु कारित करने के आशय से उस पर वार नहीं किया - यह धारणा करना भी कठिन है कि अपीलार्थी क्रं. 3/अभियुक्त का आशय वह

विशिष्ट चोट कारित करना था जो प्रकृति के सामान्य क्रम में मृत्यु कारित करने के लिए पर्याप्त थी – ऐसी स्थिति में, उसके द्वारा कारित अपराध धारा 304 भाग-II के अंतर्गत दण्डनीय होगा।

Cases referred :

AIR 1963 SC 174, (1996) 10 SCC (Cri) 1375, (2005) SCC (Cri) 1213, (2001) 6 SCC 620, 2003 SCC (Cri) 1577, (2010) 3 SCC (Cri) 893, (1999) 8 SCC 555.

Ajay Vyas, for the appellants No. 1 & 3.

Vivek Singh with Raghuvveer Singh, for the appellant No.2.

Deepak Rawal, G.A. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
P.K. JAISWAL, J. - This appeal arises out of judgment of conviction dated 29th March, 2004, passed by the Additional Sessions Judge, Manasa, district Mandsaur in Sessions Trial No.43/2003, whereby appellant No.1 Shyam Prasad Mishra and appellant No.2 Banti @ Rajendra Tiwari have been convicted under Section 302 read with Section 34 of the IPC and each of them has been sentenced to undergo imprisonment for life with fine of Rs.10,000/- and in default of payment of fine to undergo additional RI for three years. Appellant No.3 Rajendra Prasad Mishra has been convicted under Section 302 of the IPC and sentenced to undergo life imprisonment with fine of Rs.10,000/- and in default of payment of fine to undergo additional RI for three months. The learned trial Court also directed that fine amount be paid to the mother and father of the victim (deceased Samrath).

2. The prosecution case is as follows: Appellant No.1 Shyam Prasad Mishra and appellant No.3 Rajendra Prasad Mishra @ Raju are real brother. There was a dispute between Naresh Tiwari and Radheshyam Meena, residents of village Magarda in respect of share of garlic crop, which was sown at the submerge area of dam. On 22.3.2003 in the night Radheshyam Meena along with his companions had gone to commit theft of garlic crop from the said field. The matter was reported to the police. On the basis of information received at Police Station Rampura, the police personnels reached the spot. On seeing them Radheshyam Meena and his companions left the place, after leaving tractor trolley & motorcycle towards Kedareshwar Road. When they were on the way to Kedareshwar Road, one motorcycle came there, which

was being driven by Ramesh Chand (PW7) and deceased Samrath Meena was pillion rider on the said motorcycle. At about 3 AM in the night when the said motorcycle reached in front of the hut/house of Kanwarlal Meena, appellants Shyam Mishra and Raju @ Rajendra Prasad Mishra, relatives of Naresh Tiwari were waiting for the culprits, who were trying to commit the theft of garlic crop and were hidden near the house of Kanwarlal Meena and no sooner the motorcycle came in front of the house of Kanwarlal Meena, appellants Shyam Mishra affixed 'Kalpa' (an instrument which is used for agricultural purposes) on the road and tried to stop the motorcycle. At that relevant point of time appellant No.3 Raju @ Rajendra Prasad Mishra, who was armed with sword gave sword blow to the person, who was driving the motorcycle. He bow his neck down, Samrath Meena, who was pillion rider, sustained the said sword injury on his neck, due to which he fell down and died on the spot. The allegation against the appellants is that they tried to disappear the dead body of Samrath Meena and, therefore, an offence under Sections 302 and 201 of the IPC has been registered against them. Untimely death of Samrath Meena was reported by village Chowkidar Keshrilal Meena (PW2) at Rampura Police Station of district Neemuch and on the basis of the said report marg No.4/2003 was registered under Section 174 of the Cr.P.C. and, during marg investigation vide FIR (Ex.P/11) for an offence under Section 302, 201 & 34 of the IPC was registered at Crime No.51/03. During investigation the inquest was prepared and the dead body was sent for postmortem. Dr. B.L. Rawal (PW9) conducted the postmortem. Ex.P/6 is the postmortem report. The accused persons were arrested and after completion of the investigation charge sheet was filed.

3. The prosecution examined Kanwarlal (PW1), Kaushalyabai (PW5), Ramesh Chand, driver of the motorcycle (PW7) and Radheshyam (PW8) as eyewitnesses. They deposed that appellant No.3 Raju @ Rajendra Prasad Mishra was armed with sword and caused fatal injury to the deceased. They have not stated that appellant No.2 Banti @ Rajendra was present at the time of incident. The allegation against appellant No.1 Shyam Prasad Mishra is that he was along with appellant No.3 Rajendra Prasad Mishra and it is he who affixed 'Kalpa' on the road to stop motorcycle and exhorted the appellant No.2 that motorcycle is coming and to cause injury to motorcyclist and due to his exhortation the appellant No.2, who was his brother, gave fatal blow to the pillion rider of the motorcycle. The remaining 8 witnesses, who are Investigating Officer, doctor, witnesses of seizure memo, have deposed that

there was a dispute between Naresh Tiwari and Radheshyam Meena in respect of share in garlic crop of submerge area of dam and supported the case of the prosecution.

4. The trial Court, after appreciating the evidence on record acquitted the appellants under Section 201/34 of the IPC, but convicted the appellants No.1 & 2 under Section 302/34 of the IPC and appellant No.3 under Section 302 of the IPC and sentenced them as stated herein-above.

5. Learned counsel for the appellants have submitted that the appellant No.3 was having no intention to cause particular injury, which was sufficient to cause death, nor he had any knowledge that the said injury is likely to cause death. It is also submitted that at the spur of moment the appellant No.3, who was armed with sword, gave fatal blow on neck of the deceased, resulting in his death and no case for offence punishable under Section 302/34 of the IPC can be made out against the appellants No.1 & 2 and submitted that it is a case under Section 304 Part-II of the IPC. In respect of appellant No.2 it is also submitted that he only exhorted the appellant No.3 and there was no intention, nor there was any pre-plan and with the aid of Section 34 of the IPC he has been convicted under Section 302 of the IPC. He further submitted that once the appellant No.2 was acquitted under Section 201 of the IPC and he was not present at the place of occurrence and his presence was doubtful. He came later on at 5.00 AM in the morning along with appellants No.1 & 3, the learned trial Court committed an error in convicting him. It is lastly submitted that from the evidence, which is on record, no case is made out against the appellants No.1 & 2 and prayed for their acquittal. In respect of appellant No.3 it is submitted that he is in jail for a period more than 10 years and the death caused by injury inflicted on neck of the deceased in a sudden quarrel without any intention to cause particular injury, which was sufficient to cause death, his conviction under Section 302 of the IPC be altered to Section 304 Part-II of the IPC.

6. On the other hand, learned Government Advocate drew our attention to the finding recorded by the trial Court in paragraphs 68 to 72 and the statements of the PWs 1, 5, 7 & 8 and submitted that the appellants No.1 & 2 were waiting for the victim and his companion and they were preplanned to inflict injury to them and, therefore, it cannot be said that there was no intention to commit the murder of the deceased. He submitted that the learned trial Court has not committed any legal error in convicting the appellants and prayed for dismissal of the appeal.

7. We have heard the learned counsel for the parties and perused the record. We are of the view that in the facts & circumstances of this case the offence committed by the appellant No.3 falls under Section 304 Part-II of the IPC. In respect of appellants No.1 & 2 the essential ingredients of Section 34 of the IPC i.e., a common intention was shared, has not been established by the prosecution. From the statements of all the four eyewitnesses the appellant No.2 was not present on the spot and his presence was doubtful, whereas the allegation against the appellant No.1 is that he affixed 'Kalpa' on the road to stop the motorcycle and when motorcycle of the deceased was stopped, he exhorted the appellant No.3 without any common intention to commit the murder of the deceased.

8. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common intention" to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (*Mohan Singh v/s State of Punjab*, AIR 1963 SC 174).

9. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention (vide *Krishnan v/s State of Kerala* (1996) 10 SCC (Cri) 1375 & *Harbans Kaur v/s State of Haryana* (2005) SCC (Cri) 1213).

10. In *Gopi Nath v/s State of U.P.* (2001) 6 SCC 620, the Apex Court observed as under :-

"8..... Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance

of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action be it that it was not overt or was only a covert act or merely an omission constituting an illegal omission. The Section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a preconcerted or prearranged plan or one manifested or developed on the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

11. In *Krishnan v/s State*, 2003 SCC (Cri) 1577 Apex Court observed that applicability of Section 34 is dependent on the facts and circumstances of each case. No hard-and-fast rule can be made out regarding applicability or a non-applicability of Section 34.

12. In *Virendra Singh v/s State of M.P* (2010) 3 SCC (Cri) 893 Apex Court observed that: (SCC p. 421, para 42)

"42. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified

person. In fact, the section is intended to cover a case where a number of person act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that Section read with Section 34."

13. We shall now examine whether appellant No.1 Shyam Prasad and appellant No.2 Banti @ Rajendra Tiwari could be made liable for the aforementioned offence by operation of Section 34 of the IPC? It is trite that Section 34 of the IPC does not constitute a substantive offence, and is merely in the nature of a rule of evidence and liabilities fasten on a person who may have not been directly involved in the commission of the offence on the basis of a prearranged plan between that person and the person who actually committed the offence. In order to attract Section 34 of the IPC the following ingredients must be established:

(i) there was common intention in the sense of a prearranged plan; &

(ii) the person sought to be so held liable had participated in some manner in the act constituting the offence.

14. It is manifest that common intention refers to a prior concert or meeting of minds, and though it is not necessary that the existence of a distinct previous plan must be proved, as such common intention may develop on the spur of the moment, yet the meeting of minds must be prior to the commission of offence suggesting the existence of a prearranged plan. Therefore, in order to attract Section 34 IPC, the prosecution must, prima facie, reflect a common prior concert or planning amongst all the accused.

15. As per paragraph 2 of the statement of PW1 Kanwarlal, when motorcycle came in which Ramesh Chandra (PW7) and the deceased were sitting, appellant No.1 Shyam Prasad affixed 'Kalpa' on the road. At that time appellant No.3 Raju @ Rajendra Prasad Mishra was having sword in his hand, Shyam Prasad exhorted him and, thereafter, Raju gave sword blow to the deceased and, thereafter, they ran away from the place of occurrence. PW5 Kaushalyabai also gave the similar statement in paragraph 1 of her deposition. PW7 Ramesh Chandra in paragraph 1 of his statement has deposed

that his motorcycle came in front of the hut of Kanwarlal. They affixed 'Kalpa' on the road to stop the motorcycle and then appellant No.1 Shyam Prasad asked Raju @ Rajendra Prasad, appellant No.3 that to see that motorcyclist could not ran away from here. At that moment the appellant No.3 gave sword blow to the motorcyclist who caused injury to the deceased. PW8 Radheshyam in paragraph 1 of his statement has deposed that when Ramesh Chandra (PW7) and deceased were trying to run away from the place of occurrence, at the instance of appellant No.1, the appellant No.3 caused sword injury to the deceased. From the statements of PW1, PW5, PW7 & PW8, it is clear that there was dispute between Naresh Tiwari and Radheyshyam Meena in respect of share in garlic crop, which was lying at the submerge area of the dam. On the basis of report police party came there and when police party started chasing him, they left their tractor and other equipments and ran away from the spot. PW7 was on his motorcycle and before the house of Kanwarlal, the deceased asked him for help and he gave him lift and when they reached in front of the house of Kanwarlal, the appellants, who were very well aware that police party is chasing them and when PW7 and the victim reached in front of the hut of Kanwarlal, the appellants tried to stop them and in that spur of moment when the appellant No.1 exhorted them the appellant No.3, who was armed with sword gave sword blow to the deceased. From the statement of the eyewitnesses, it cannot be said that the appellants No.1 and 2 had any prearranged plan to commit murder of deceased Samrath. At the time of incident, the appellants No.1 was un-armed armed whereas the appellant No.2 was not present. They were bare hand and against the appellant No.2, the only allegation is that he exhorted and asked the appellant No.3 to give some blow.

16. In the case of *Ramashish Yadav & Ors. v/s State of Bihar* (1999) 8 SCC 555 in which in paragraph 3 their Lordships have observed as extracted herein below:-

“Coming to the question of applicability of Section 34 for the murder of Tapeswar, we find from the evidence of the three eyewitnesses that while Ram Pravesh Yadav and Ramanand Yadav caught hold of Tapeswar, accused Samundar Yadav and Sheo Layak Yadav came with gandasa and gave blows on the head of Tapeswar, as a result of which Tapeswar died. Section 34 lays down a principle of joint liability in the doing of a criminal act. The essence

of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct feature of section 34 is the element of participation in action. The common intention implies acting in concert existence of a prearranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts."

17. From the aforesaid facts and circumstances of the case, it cannot be said that the appellants No.1 and 3 had any common object to kill Samrath and with the said common object they have participated in the commission of offence. Thus to make them constructively liable under Section 34 of IPC, for murder, the prosecution had failed to prove that the above two accused persons had the common intention to commit murder of the deceased in common with the appellant No.3, who actually committed the murder and who was their companion in joint criminal act or enterprise. Thus, they cannot be made liable under Section 34 of the IPC.

18. In such circumstances, it cannot be said that appellant No.1 Shyam Prasad and appellant No.2 Banti @ Rajendra Tiwari, are guilty of commission of offence under Section 34 of IPC. In absence of any evidence against them relating to common intention, they cannot be held liable with the aid of Section 34 of the IPC. Hence, their conviction for the commission of offence under Section 302 / 34 of IPC is liable to be set aside.

19. In view of the aforesaid, the impugned conviction and sentence of accused appellant No.1 Shyam Prasad and appellant No.2 Banti @ Rajendra Tiwari for commission of offence under Section 302 / 34 of IPC is set aside and they are acquitted of the charges levelled against them. Their bail bonds and surety bonds shall stand discharged. They be set at liberty forth with, if not required in any other case. The amount of fine, if deposited and paid to the victim shall not be refunded them.

20. As regards appellant No.3 Rajendra @ Raju is concerned, there was no intention to cause that particular injury, which was sufficient in the ordinary course of nature to cause death of the deceased. No doubt, the doctor has stated that the injury was sufficient in the ordinary course of nature to cause death of the deceased. From collective analysis and examination of the evidence on record, it is clear that Rajendra @ Raju had absolutely no

immediate motive to kill the deceased and did not give him the blow with intention to kill him or with knowledge that it was likely to cause death. Under these circumstances, we find it difficult to hold that the appellant No.3 intended to cause that particular injury which was sufficient in the ordinary course of nature to cause death.

21. Having given our earnest consideration, we think that it is not a case where Section 302 / 34 IPC is attracted. However, in causing the fatal injury the accused must be attributed the knowledge that he was likely to cause death. In such event, the offence committed by him would be punishable under Section 304 Part-II of the IPC.

22. Accordingly, we set aside the conviction and sentence of appellant No.3 Rajendra @ Raju under Section 302 of the IPC and the sentence of imprisonment of life. Instead we convict him under Section 304 Part-II of the IPC. So far as the quantum of sentence is concerned, considering the fact that he is in jail for a period more than 10 years, which in our opinion, will sufficiently meet the ends of justice, therefore, he is sentenced to the period already undergone along with fine of Rs.10,000/- as directed by the trial Court.

23. In the result, the appeal is allowed in part to the extent as indicated herein above.

Appeal partly allowed.

I.L.R. [2012] M.P., 1986

APPELLATE CRIMINAL

Before Mr. Justice N.K. Gupta

Cr. A. No. 412/1997 (Jabalpur) decided on 4 July, 2012.

MUKESH

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 326 - Grievous Injury - Change of weapon - In F.I.R. it was alleged that appellant caused the injury by means of axe whereas in Court evidence it was stated that appellant assaulted by back of an axe - In view of material contradictions in the evidence of witnesses, it is clear that appellant did not cause injury from the back of axe causing grievous injury.

(Para 11)

क. दण्ड संहिता (1860 का 45), धारा 326 - गंभीर क्षति - शस्त्र का

बदला जाना - प्रथम सूचना रिपोर्ट में यह अभिकथित किया गया कि अपीलार्थी ने कुल्हाड़ी से क्षति कारित की जबकि न्यायालयीन साक्ष्य में यह कहा गया कि अपीलार्थी ने कुल्हाड़ी के पीछे की तरफ से हमला किया - साक्षियों के साक्ष्य में तात्त्विक विरोधाभासों की दृष्टि से यह स्पष्ट है कि अपीलार्थी ने कुल्हाड़ी के पीछे की तरफ से गंभीर क्षति कारित नहीं की।

B. Penal Code (45 of 1860), Section 354 - Outrage Modesty
- In F.I.R. it was alleged that for the first time when the complainant saw the appellant, he was sitting on the bed of the prosecutrix and thereafter the appellant left the spot - Changed version of witnesses in Court that appellant snatched the hands of prosecutrix with bad intention can not be believed - Conviction under Section 354 set aside.
(Para 12)

ख. दण्ड संहिता (1860 का 45), धारा 354 - लज्जा भंग करना - प्रथम सूचना रिपोर्ट में यह अभिकथित किया कि प्रथम बार जब शिकायतकर्ता ने अपीलार्थी को देखा तो वह अभियोक्त्री के पंलग पर बैठा था और उसके बाद अपीलार्थी घटनास्थल से चला गया - न्यायालय में साक्षियों के बदले कथन कि अपीलार्थी ने अभियोक्त्री के हाथ बुरी नीयत से खींचे, पर विश्वास नहीं किया जा सकता - धारा 354 के अंतर्गत दोषसिद्धि अपास्त।

C. Penal Code (45 of 1860), Section 458 - House Breaking/ House lurking - Appellant entered in the house from a door less gate and ran away from the same gate - It can not be said that appellant did any house breaking - Similarly it can not be said that appellant took some precaution to conceal his presence during that house trespass - Appellant not guilty of offence under Section 458 but under Section 452 of I.P.C.
(Para 13)

ग. दण्ड संहिता (1860 का 45), धारा 458 - गृहभेदन/गृह अतिचार
- अपीलार्थी फाटक रहित गेट से घर में दाखिल हुआ और उसी गेट से भाग गया - यह नहीं कहा जा सकता कि अपीलार्थी ने कोई गृह भेदन किया - इसी प्रकार यह नहीं कहा जा सकता कि अपीलार्थी ने उक्त गृह अतिचार के दौरान अपनी उपस्थिति को छिपाने के लिए कोई सावधानी/बरती - अपीलार्थी धारा 458 के अंतर्गत अपराध का दोषी नहीं किन्तु मा.द.सं. की धारा 452 के अंतर्गत अपराध का दोषी।

Cases referred :

(2007) 3 SCC (Cri) 76, (2006) 2 MPLJ 586.

A.K. Jain, for the appellant.

G.S. Thakur, P.L. for the respondent/State.

J U D G M E N T

N.K. GUPTA, J. - The appellant has preferred this appeal against the judgment dated 4.2.1997 in S.T. No.27/1995 passed by the 3rd Additional Sessions Judge Damoh, whereby the appellant was convicted for the offences punishable under Sections 326, 354 & 458 of IPC and sentenced for three years R.I. with fine of ₹ 500/-, one year R.I. and three years R.I. with fine of Rs. 500/- respectively. In default of payment of fine, he was to undergo for three months S.I. on each count.

2. Prosecution's case in short is that on 29.11.1994, the victim Laxman Prasad (PW-1) was sleeping on a bed in his house situated at village Bamanpura, Police Station Patera, District Damoh. His sister-in-law Ramvati (PW-2) was also sleeping on the earth in the same room. At about 3:00 a.m. in the morning, the complainant Laxman Prasad saw that the appellant was sitting down on the bed of his sister-in-law and when he asked as to why he came to that place in the night then, the appellant ran away from the spot. After 1½ hours, the appellant came back and assaulted the victim Laxman Prasad by an axe causing him injuries on various parts of the body. Also he assaulted the victim Laxman by a dagger. On shouting of Ramvati, other witnesses Shivram (PW-3), Ramswaroop (PW-4) and Churaman (PW-6) came to the spot and when the appellant saw those witnesses, he ran away from the spot. Laxman Prasad was taken to the Police Station, Patera soon after the incident at about 7:30 a.m. in the morning, where he lodged FIR Ex.P/1. He was sent to the hospital for his medico legal examination and treatment. Dr. V.C. Jain (PW-8) examined the victim Laxman Prasad on 29.11.1994 at PHC, Patera at about 10:30 a.m. in the morning. He found 13 injuries on his body. Out of them, 12 injuries were incised wounds, whereas one injury was on the left leg caused by hard and blunt object. He was referred for x-ray examination. Dr. O.P. Dubey (PW-11) found that the lower end of left tibia bone was broken. The police Patera after due investigation filed a charge sheet before the J.M.F.C. Hata, who committed the case to the Court of Sessions and it was transferred, and ultimately it was decided by the 3rd Additional Sessions Judge, Damoh.

3. The appellant abjured his guilt. He did not take any specific plea. However, some suggestions were given by the witnesses that the appellant saw the victim Laxman Prasad and his sister-in-law Ramvati in compromising position and therefore, Ramvati assaulted the victim Laxman Prasad. He was

falsely implicated in the matter. However, no defence evidence was adduced by the appellant.

4. After considering the prosecution's evidence, learned 3rd Additional Sessions Judge, Damoh acquitted the appellant from the charges of offence punishable under Section 459 of IPC but convicted him for the offences punishable under Sections 326, 354 and 458 of IPC and sentenced him as mentioned above.

5. I have heard learned counsel for both the parties.

6. Learned counsel for the appellant has submitted that the appellant was falsely implicated in the matter. Actually, he saw the victim Laxman Prasad [Laxmi Prasad is mentioned in the deposition sheet] and his sister-in-law Ramvati in compromising position and therefore, Ramvati assaulted the victim Laxman Prasad. However, the appellant was falsely implicated in the matter. It is also submitted that a fracture was found upon the victim Laxman Prasad, which was below the wound caused by hard and blunt object and therefore, no offence punishable under Section 326 of IPC was constituted. Secondly, it was mentioned in the FIR that such injury was caused by falling of an axe and therefore, that injury was never caused by the appellant. Under such circumstances, the appellant cannot be convicted for the offence punishable under Section 326 of IPC. Similarly, he cannot be convicted for the offence punishable under Section 458 of IPC. It is nowhere alleged against the appellant that he had done any housebreaking or he tried to enter in the house by hiding his own presence. Under such circumstances, the offence punishable under Section 458 of IPC does not constitute. Similarly, as per allegations made in the FIR, it is nowhere alleged that the appellant assaulted or used any criminal force to outrage the modesty of Ramvati and therefore, no offence punishable under Section 354 of IPC is made out. Under such circumstances, the appellant is convicted without any substantial reason. In alternate, it is submitted that the appellant had to face the trial and appeal since last 17 years, whereas he remained in the custody for 52 days, therefore, his jail sentence may be reduced to the period, which he has already undergone in the custody.

7. On the other hand, learned Panel Lawyer for the State has submitted that the conviction and sentence directed by the trial Court on the basis of evidence and no interference is required either to the conviction or the sentence.

8. For the decision of the case, the points for consideration are; (a) as to

whether the appellant was the person, who caused the injuries to the victim Laxman Prasad; (b) the appellant can be convicted for the offences punishable under Sections 326, 354 or 458 of IPC and; (c) whether the sentence imposed upon the appellant can be reduced?

9. Laxman Prasad (PW-1) and Ramvati (PW-2) were examined as eyewitnesses and Shivram (PW-3), Ramswaroop (PW-4) and Churaman (PW-6) were examined as witnesses, who came to the spot after hearing hue and cry and they saw that the appellant was running from the spot. There was no suggestion given in the cross-examination of the witnesses Ramvati and Laxman Prasad that due to absence of any light, they could not identify the appellant. Ramvati has stated in para 5 of her cross-examination that light of the room was on, at the time of incident. Under such circumstances, there is no dispute regarding identification of the culprit. Ramvati and Laxman Prasad have stated that firstly the appellant was found inside the room and he was scolded therefore he ran away. After 1½ hours, he came to the spot and assaulted the victim Laxman by an axe and thereafter, by a dagger. Story of the victim Laxman Prasad is dully supported by the FIR Ex.P/1, which was lodged at the earliest in the morning at Police Station, Patera. Their version is also corroborated by the MLC report Ex.P/9 proved by Dr. V.C. Jain (PW-8) and also the x-ray report Ex.P/11 proved by Dr. Dubey (PW-11). Under such circumstances, testimony of the victim Laxman Prasad can be accepted.

10. The appellant has taken a defence that since he saw the victim Laxman Prasad and Ramvati in a compromising position, therefore, Ramvati herself assaulted the victim Laxman. The suggestions given by the defence to the witnesses appears to be hypothetical and baseless. If, spot map Ex.P/2 prepared by Patwari Koshlendra Singh Thakur (PW-10) and spot map Ex.P/4 prepared by Head Constable Mahesh Khare (PW-12) are perused, then it would be clear that the incident took place in a open room situated after the Varanda from the main road and therefore, there was no possibility of viewing either the complainant or the witness Ramvati in compromising position from the road. It is nowhere stated by the appellant that he went inside the house to view that position. Therefore, it cannot be accepted that he saw the complainant Laxman Prasad and Ramvati in compromising position. Secondly, if he saw them in such a position then it was for Ramvati and Laxman Prasad to assault the appellant so that he could not tell about that fact to anyone. Thirdly, Ramvati being a woman could not assault her brother-in-law so much as to inflict 12 to

13 injuries by sharp cutting weapon. The witnesses Shivram and Churaman etc. had seen the appellant while he was running from the spot, which indicates that he entered in the house. No reason has been given by the appellant as to why he entered in the house of the complainant. Under such circumstances, the defence taken by the appellant is unnatural and hypothetical and therefore, it is not believable. Under such circumstances, where the statements of the complainant are duly supported by the eyewitness Ramvati and other circumstantial witnesses namely Shivram, Churaman etc and also supported by the FIR and medical report, hence it is proved beyond doubt that the appellant assaulted the victim Laxman Prasad by an axe and thereafter, by a dagger.

11. 13 injuries were caused to the victim Laxman Prasad and out of them, one injury was caused by hard and blunt object and also a fracture was found below that injury. Under such circumstances, the offence punishable under Section 325 of IPC could be made out because a grave injury was found caused by hard and blunt object. Back of axe may be considered as a hard and blunt object. Under such circumstances, the injuries caused by sharp object are covered with the offence punishable under Section 324 of IPC and the grave injury caused by blunt object is an offence under Section 325 of IPC and therefore, the appellant could not be convicted for the offence punishable under Section 326 of IPC. Ramvati has stated that the appellant assaulted the victim Laxman Prasad by back of an axe causing an injury on the left ankle of the victim. However, in the FIR Ex.P/1, it was mentioned that the appellant firstly assaulted the victim by an axe and thereafter, by a dagger. During the change of weapons, alleged axe fell down causing an injury on the ankle of the victim. FIR was the first version of the incident and therefore, it appears that the eyewitnesses are now telling a changed version before the Court. Looking to the material contradictions and the facts mentioned in the FIR, it is clear that the appellant did not assault the victim from the back of the axe causing him a grievous injury and therefore, he was not responsible for that injury including the fracture. When injury was caused without any assault then, the appellant cannot be made liable for that injury. Under such circumstances, neither the offence punishable under Sections 326 of IPC nor the offence punishable under Section 325 of IPC is constituted against the appellant. However, he had caused 12 injuries to the victim by sharp cutting object. He assaulted the victim for so many times and therefore, he might have known the result of his act. Looking to the facts of the case, it is apparent

that neither any right of private defence arose to the appellant nor any provocation was given either by the victim or by the witnesses. Under such circumstances, it is established that the appellant had caused such 12 injuries voluntarily and therefore, he has committed an offence punishable under Section 324 of IPC.

12. The trial Court has convicted the appellant for the offence punishable under Section 354 of IPC because the victim Laxman Prasad and the witness Ramvati have stated that the appellant snatched the hands of Ramvati with bad intention and thereafter the incident took place. However, the version of these witnesses is different from the version given in the FIR Ex.P/1. In the FIR Ex.P/1, it was mentioned that for the first time, when the complainant saw the appellant, he was sitting on the bed of the prosecutrix Ramvati and thereafter, the victim scolded him then, the appellant left the spot. Ramvati did not complain her brother-in-law that the appellant used any criminal force or assaulted her to outrage her modesty and therefore, in the FIR, there is no such allegation made against the appellant. It is mentioned in the FIR that the appellant was found on the bed of the prosecutrix Ramvati and therefore, he was scolded and thereafter he left the spot. Under such circumstances, it is a material contradiction between the evidence of the said eyewitnesses and the FIR. If the appellant snatched the hands of the prosecutrix Ramvati then such an act would have been mentioned in the FIR and therefore, it appears that the witnesses have modified their story about that fact. Under such circumstances, the evidence contrary to the FIR given by the eyewitnesses cannot be accepted. It is nowhere proved that the appellant used any criminal force or assaulted the prosecutrix Ramvati and therefore, the appellant cannot be convicted either for the offence punishable under Section 354 of IPC or an inferior offence under Section 352 of IPC.

13. Similarly, so far as the offence punishable under Section 458 of IPC is concerned, it was to be proved by the prosecution that the appellant had done either any housebreaking or lurking house trespass. It was stated by the eyewitnesses that there was no shutter to the door of the room and also there was no shutter to the door in that premises, in which they were sleeping. When the appellant did not knock down any door to enter in the house then, it cannot be said that the appellant has done any housebreaking. Similarly, there was no closed door from the road to enter in the house and even in that premises, where the victims were sleeping. For lurking house trespass, it is

necessary for an accused to have a precaution to conceal presence during such house trespass from some persons, who has right to exclude or eject the trespasser. It is apparent from the evidence that the appellant entered in the house from a door less gate and ran away from the same gate. Under such circumstances, it cannot be said that he took any precaution to conceal his presence during that house trespass and therefore, he did not commit any lurking house trespass. Under such circumstances, where the appellant had done neither any housebreaking nor any lurking house trespass then, the appellant could not be convicted for the offence punishable under Section 458 of IPC or the lower offences of Sections 457, 456, 455, 454 and 453 of IPC. But it is established that he entered into the house with an axe that means he committed the house trespass having some preparation for causing hurt and therefore, he is liable to be convicted for the offence punishable under Section 452 of IPC.

14. Since the offence punishable under Section 324 of IPC is an inferior offence of the same nature to the offence punishable under Section 326 of IPC and similarly, the offence punishable under Section 452 of IPC is an inferior offence of similar nature of the offence punishable under Section 458 of IPC, therefore, the appellant may be convicted for the offence punishable under Section 324 and 452 of IPC without framing the charges for such offences. The appellant can be convicted for such offences in the head of charges of Sections 326 and 459 of IPC.

15. As far as the sentence is concerned, the same is to be assessed for the offence punishable under Section 324 and 452 of IPC. Learned counsel for the appellant has submitted that the appellant remained in the custody for 52 days and therefore, he may not be sent to the jail again. He has faced the trial and appeal since last 17 years and he was a young youth of 20 years of age at the time of incident and therefore, a sympathetic view may be taken with him.

16. Learned counsel for the appellant has placed his reliance on the judgment in the case of "*Manjappa Vs. State of Karnataka*" [(2007) 3 SCC (Cri) 76], wherein the sentence of the accused was reduced to the period of 45 days for the offence punishable under Section 325 of IPC subject to a direction of payment of compensation of ₹10,000/- to the injured. Learned counsel for the appellant has also shown the judgment passed by this Court in case of "*Deewan Singh Vs. State of M.P.*" [2006(2) M.P.L.J. 586], in which

the accused was punished for the offence punishable under Section 324 of IPC with the sentence for the period, which he had already undergone in the custody, whereas he remained in the custody for 45 days only also with enhancement of fine. In the present case, the appellant was above 18 years of age at the time of incident and therefore, he cannot be released on probation on the basis of his age. Looking to the numbers of assault caused by the appellant, it is not a fit case so that the appellant may be released on probation. It is true that the appellant remained in the custody for 52 days and he has faced the trial including the appeal for more than 17 years. However, the sentence should be given in such a manner so that a proper balance may be made looking to the gravity of the offence of the present case. The appellant assaulted the victim Laxman Prasad in a brutal manner and approximately, 12 injuries were caused to him. However, those assaults were not committed with a force. Under such circumstances, in the light of aforesaid judgments cited by learned counsel for the appellant, it would be proper to inflict the jail sentence upon the appellant for the period, which he has already undergone in the custody but a heavy fine is required to be imposed in addition.

17. On the basis of aforesaid discussion, the present appeal filed by the appellant is hereby partly allowed. He is acquitted from the charges of offences punishable under Sections 326, 354 and 458 of IPC but he is convicted for the offences punishable under Sections 324 and 452 of IPC. He is sentenced for both of such offences for the period, which he has already undergone in the custody. A fine of ₹ 13,000/- is imposed upon the appellant for the offence punishable under Section 324 of IPC. No separate fine is imposed for the offence punishable under Section 452 of IPC. It is further directed that said fine amount shall be deposited within two months from today before the trial Court. In default of payment of fine, the appellant shall undergo for one years' R.I. If fine is deposited by the appellant, then a sum of ₹ 10,000/- (Rupees Ten thousand) may be given to the victim Laxman Prasad by way of compensation.

18. Presence of the appellant is no more required before this Court and hence, it is directed that his bail bonds etc shall stand discharged.

19. Copy of the judgment be sent forthwith to the trial Court with its record for information and compliance.

Appeal Partly allowed.

**I.L.R. [2012] M.P., 1995
APPELLATE CRIMINAL**

Before Mr. Justice S.K. Seth & Mr. Justice M.C. Garg

Cr. A. No. 1309/2000 (Indore) decided on 10 July, 2012

SOHAN SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 376, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v), Evidence Act (1 of 1872), Section 3 - Rape - Conviction on basis of sole testimony of Prosecutrix - In the afternoon prosecutrix was coming from the village hand-pump after fetching drinking water, appellant stopped her on a pretext and then dragged her to nearby agriculture field and ravished her - Held - No ditch or culvert in the place of alleged incident - Prosecutrix is a young married woman of grown up years - Nothing on record to suggest that she was incapable of offering any resistance - No mark of violence or injury was found on her body, which was more likely to be found - Earthen pitcher which the prosecutrix was carrying was found intact - Version of rape in broad day light near a thoroughfare seems to be highly improbable and raises serious doubts - Hazardous to base the conviction of appellant on the sole testimony of the prosecutrix - Prosecution has failed to bring home the guilt of the accused beyond reasonable doubt - Appeal allowed.

(Paras 5,6 & 7)

दण्ड संहिता (1860 का 45), धारा 376, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v), साक्ष्य अधिनियम (1872 का 1), धारा 3 - बलात्कार - दोषसिद्धि अभियोक्त्री की एक मात्र परिसाक्ष्य पर आधारित - दोपहर में अभियोक्त्री गांव के हैंड पंप से पीने का पानी लेकर आ रही थी - आवेदक ने उसे बहाना बनाकर रोका और उसके बाद घसीटकर पास के खेत में ले गया और उसका बलात्कार किया - अभिनिर्धारित - कथित घटना स्थल पर कोई गड्ढा या पुलिया नहीं थी - अभियोक्त्री बदती उम्र की एक जवान विवाहित महिला है - अभिलेख पर कुछ नहीं जो इंगित करता हो कि वह किसी प्रकार का प्रतिरोध करने में असमर्थ थी - उसके शरीर पर अनुचित बल प्रयोग या क्षतियों के निशान नहीं पाये गये जैसा कि बहुधा पाया जाता है - अभियोक्त्री द्वारा ले जाया जा रहा मिट्टी का घड़ा साबुत पाया गया - दिन-दहाड़े व्यस्त मार्ग के करीब बलात्कार की कहानी पूर्णतः असंभाव्य प्रतीत होती है और घोर

संदेह उत्पन्न करती है – अभियोक्त्री की एक मात्र परिसाक्ष्य के आधार पर आवेदक की दोषसिद्धि घातक होगी – अभियोजन, अभियुक्त की दोषिता संदेह से परे साबित करने में असफल रहा – अपील मंजूर।

Yashpal Rathor, for the appellant.

L.L. Shama, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by : **S.K. SETH, J.** - Appellant is aggrieved by the judgment of conviction handed down by the Special Judge Dewas in S.T. No. 11 of 2000. By the impugned judgment, appellant has been found guilty of offences punishable under section 376 IPC and 3(2)(v) of the Scheduled caste and Scheduled Tribes(Prevention of Atrocities) Act, 1989 (hereafter referred to as 'the Act' for short) and for the later offence, he is sentenced to undergo life imprisonment.

2. Prosecution story in brief is that on 25.2.2000 prosecuterix (PW1), lodged a FIR (Ex.P1) at Police Station B.N.P. Dewas against appellant stating that that same afternoon he ravished her. Police registered the FIR for offences punishable under Section 376 IPC and Section 3(2)(v) of the Act because victim was a tribal woman (Bhil). Same day prosecuterix was medically examined by Dr. Indra Gupta (PW10) and the report is Ex.P12. Appellant was arrested on 2.3.2000 and was medically examined by Dr. Yogesh Valimbe(PW4). His report is Ex.P/3. Doctor found the applicant was capable of performing sexual intercourse. After completing the investigation charge sheet was filed and appellant was sent up for trial before the Special Judge Dewas. At trial appellant denied the charges and claimed that he was falsely implicated. However, he led no defence evidence.

3. Learned Special Judge, on consideration of prosecution evidence found the appellant guilty on both charges and sentenced him to undergo 7 years' R.I. with a fine of Rs. 5,000 u/s. 376 IPC and life imprisonment and fine under section 3(2) (v) of the Act. It was further directed that in default of payment of fine amount of Rs. 6000/appellant would undergo further jail sentence of six month's simple imprisonment. Both the sentences were directed to concurrently.

4. There is no challenge to the fact that appellant was examined by Dr. Yogesh Valimbe(PW5). He found appellant capable of performing sexual intercourse as per report Ex.P3. It is, therefore not necessary for us discuss

this evidence in detail. In case of rape, the conviction could be based on the sole testimony of prosecuterix but for such action the version of the prosecuterix must be found to be worthy of acceptability. In the present case

5. Now let us examine the evidence of the prosecuterix (PW1). Her evidence shows that in the afternoon of the fateful day, she was coming from the village hand-pump after fetching drinking water. Appellant stopped her on a pretext and then dragged her to nearby agriculture field and ravished her. There was no ditch or culvert in the place of alleged incident. In her cross examination she admitted that she did not sustain any injury, a fact confirmed by Dr. Indra Gupta(PW10) in her deposition. It is clear from the evidence on record that prosecuterix is a young married woman of grown up years (25 years). There is nothing on record to suggest that she was incapable of offering any resistance. No mark of violence was found on her body. Such marks of violence are more likely to be found on the bodies of grown up. Under ordinary circumstances, it is difficult for a single man to perform sexual intercourse with a healthy adult woman in full possession of her senses against her will, unless she is taken unaware, or placed in such a situation as to render her completely helpless. A woman belonging to labouring class who is accustomed to hard labour will be able to offer a greater deal of resistance to frustrate attempts to violate her. The version of rape in broad day light near a thoroughfare seems to be highly improbable and raises serious doubts. It would, therefore, be hazardous to base the conviction of appellant on the sole testimony of the prosecuterix in the present case.

6. Other material prosecution witnesses are Amar Singh (PW3) and Roop Singh (PW2). Husband and brother of the prosecuterix. They only stated what was told to them by the prosecuterix. In other words, their evidence has only corroborative value as regards the version of the prosecuterix. But if the version of the prosecuterix is of doubtful value, the evidence of these two corroborative witnesses is rendered of no value. Evidence of Roop Singh goes to show that the earthen pitcher which the prosecuterix was carrying was found intact. This again creates a dent in the prosecution story.

7. In view of above discussion we find that the judgment of the trial Court is unsustainable in law because in our considered view the prosecution has failed to bring home the guilt of the accused beyond reasonable doubt hence the appellant is entitled to acquittal. We therefore, allow the appeal and set aside and the convictions 5 and sentences awarded to appellant. He is in

1998 Poonam Meena (Smt.) Vs. Smt. Meera Poddar I.L.R.[2012]M.P.

jail. He be set at liberty forthwith, if not required in any cause. Fine amount, if paid, be refunded to him.

8. Ordered accordingly. Let a copy of this judgment be sent to trial with the record for necessary compliance under intimation to this Court.

Order accordingly.

I.L.R. [2012] M.P., 1998

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R. No. 344/2011(Jabalpur) decided on 23 April, 2012

POONAM MEENA (SMT.)

...Applicant

Vs.

SMT. MEERA PODDAR

...Non-applicant

Accommodation Control Act, M.P. (41 of 1961), Section, 23-A, 23-J - Bonafide Requirement - Landlady, a widow having no issue filed an application for eviction on the ground that she requires the suit premises to accommodate her brother so that he can look after her - As it was not the case that her brother requires the accommodation for his residential purposes, therefore, the condition of joint living do not arise - Revision dismissed.
(Para 6)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23ए, 23जे - वास्तविक आवश्यकता - भूमिस्वामिनी एक विधवा जिसकी कोई संतान नहीं, ने बेदखली का आवेदन इस आधार पर प्रस्तुत किया कि उसे वाद स्थान की आवश्यकता उसके भाई के निवास के लिए है, ताकि वह उसकी देखभाल कर सके - चूंकि प्रकरण यह नहीं था कि उसके भाई को अपने निवास हेतु स्थान की आवश्यकता है, इसलिए संयुक्त निवास की स्थिति उत्पन्न नहीं होती - पुनरीक्षण खारिज।

Case referred :

1989 MPLJ 233.

Sameer Seth, for the applicant.

R.D. Hundikar, for the non-applicant.

ORDER

K.K. TRIVEDI, J. - This revision is directed against the order dated

23.08.2011 passed in Case No.10/RCA/2009-10 by the Rent Controlling Authority, Capital Project, T.T. Nagar, Bhopal.

2. The facts giving rise to this revision in short are that the respondent being a widow, a specified landlady defined under Section 23-J of the M.P. Accommodation Control Act, 1961 (herein after referred to as 'Act'), approached the Rent Controlling Authority by way of filing an application under Section 23-A of the Act seeking eviction of the petitioner, a tenant in the demise residential premises, on the ground that the respondent was issueless lady, her husband has died and she was not keeping good health and she was in need of a family member to look after her. It was contended by the respondent in her application that the petitioner was introduced by a neighbour to the respondent and believing that the petitioner will also look after the old aged lady like the respondent, in good faith, a room was let out to the petitioner by the respondent. However, the respondent in the later stage started feeling that she is not to depend on such a tenant, rather it would be appropriate for the respondent to seek assistance of her own brother and for the said purposes, the respondent was in bonafide need of demise premises so that she may accommodate her own brother in the said premises for the purposes of looking after the respondent.

3. The said application filed by the respondent was contested by the petitioner by filing a reply and it was contended that such a plea raised by the respondent was not correct. Allegations were made that sufficient accommodation was available in the said suit house to accommodate the brother of the respondent in case any assistance was needed by the respondent. It was contended that the application has been filed with malafide intention to get the suit accommodation vacated so that the same may be let out to other persons on a higher rent. The Rent Controlling Authority recorded the evidence of the parties and came to the conclusion that the plea of bonafide need was made out, therefore, passed the impugned order of eviction of the petitioner, which is sought to be challenged in this revision.

4. Learned Counsel for the petitioner has vehemently contended that the respondent has adduced the evidence and in her own statement, she has admitted this fact that there is other accommodation available in the very same suit house but she is not intending to let it out to the petitioner. She has categorically contended that she is not willing to keep such a person as a tenant in her house, who is creating nuisance. From this, it is contended that

there was no bonafide need for getting the suit house vacated by eviction of the petitioner and since this particular piece of evidence is not taken into account by the Rent Controlling Authority, the order impugned is bad in law and is liable to be set aside. It is also contended that the Rent Controlling Authority has not considered the aspect that the bonafide need was for the purposes of accommodating the brother of the respondent and, therefore, since admittedly the brother of the respondent is not living jointly with the respondent, such a need was not made out in view of the definition of the member of the family as given in Section 2(e) of the Act. It is contended that these aspects have not been looked into by the Rent Controlling Authority, therefore, the order impugned is bad in law and is liable to be set aside.

5. Per contra, it is contended by the learned Counsel appearing for the respondent that the respondent is a Maharashtrian lady and merely because something is stated by her in her statement, because of the language, it cannot be said that the respondent has shown as if she is having the accommodation in the very same premises but is not willing to let it out to the petitioner. Further, it is pointed out that the petitioner has filed the proceedings before the Civil Court with respect to the very same premises against the respondent. It is contended that the statements of witnesses were recorded in the said proceedings pending before the Civil Court and if such statements are compared, it would be clear that the respondent has not shown an intention to get the suit accommodation vacated by the petitioner for the purposes of letting it out to someone else as she is not willing to accept petitioner as tenant at any cost. It is further contended by the learned Counsel for the respondent that what is the requirement of the claimant/applicant, that is to be examined and not that of the person who is to be accommodated. The requirement is that of the respondent as she is an old aged ailing lady and she wants to keep her own brother with her in the accommodation to look after her. This being the requirement of the respondent, it cannot be said that the order of eviction passed by the Rent Controlling Authority is bad in law. It is, thus, contended that there is no force in the revision and the same is liable to be dismissed.

6. After due consideration of the submissions made by the learned Counsel for the parties, this Court is of the opinion that the respondent has made out a case for passing of an order of eviction against the petitioner. The fact remains that the need shown by the respondent in her application made under Section 23-A of the Act is that she being a widow issue-less lady, wants to keep her own brother with her so that he may look after the respondent

at the time of need. It is not the requirement of the brother of the respondent to live with the respondent. Therefore, it is not to be seen whether the requirement of the brother is there nor this particular aspect is required to be considered. The definition of the member of the family as given in Section 2(e) of the Act if looked into, will mean that for need of the member of the family, who is living together with the owner/landlord of the premises, the demise premises can be get vacated by the landlord. This is what provided in the relevant provisions of the Act but if the need is that of the landlord, and specifically the pleadings are made in that respect, the condition of such a member of the family living jointly with the landlord will not be attracted at all. The reliance placed by the learned Counsel for the petitioner in the case of *Laltaprasad Shivcharanlal vs. Ramcharan Hiralal Vijayvargiya*, 1989 MPLJ 233, is thus of no help to the petitioner. Had it been the case that the need is shown that the brother of the respondent needs the accommodation for his residential purposes, then only the condition of living jointly by such a brother with the respondent was required to be satisfied. This being so, such an objection raised by the learned Counsel for the petitioner cannot be accepted nor can it be said that because of non-consideration of such an objection, the impugned order passed by the Rent Controlling Authority is bad in law.

7. The other aspect is whether merely because the respondent has contended in her statement that she was not willing to let out any part of the demise premises to the petitioner, could it be said that the need of the respondent was imaginary. In the entire statement, if examined, it has been categorically stated by the respondent that after the death of her husband, she need the assistance from her brother. Instances have been pointed out by the respondent that certain nuisances were created by the petitioner and for getting it repaired, the respondent was required to ask her brother to come. If as a whole the statement is read, it will be clear that the respondent being a Maharashtrian lady, less conversant with Hindi language, had made certain averments in her statement without properly understanding what she was stating or what would be the meaning of such statement. Because of such stray sentences, could it be said that a genuine need of respondent, a widow lady, for getting the accommodation vacated is not made out. If the order impugned is considered in this view, it will be clear that there was proper appreciation of evidence by the Rent Controlling Authority and rightly an order of eviction has been passed against the petitioner. In view of the aforesaid, there is no

2002 Sambha @ Shyam Rao Pawar Vs. State of M.P. I.L.R.[2012]M.P.

need of interference in the impugned order. The revision is liable to be dismissed.

8. Looking to the fact that the petitioner was occupying the premises demised to her and she is still continuing in possession of the same in view of the interim order passed by this Court, it is directed that the petitioner will deliver the vacant possession of the demise premises to the respondent by 1st July, 2012. In case the vacant possession of the demise premises is not delivered to the respondent by the said time, the warrant of possession be immediately issued in favour of the respondent.

9. The revision fails and is hereby dismissed. There shall be no order as to cost.

Revision dismissed.

**I.L.R. [2012] M.P., 2002
CRIMINAL REVISION**

Before Mr. Justice U.C. Maheshwari

Cri.Rev. 906/1999 (Jabalpur) decided on 24 November, 2011

SAMBHA @ SHYAM RAO PAWAR

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Section 326, Criminal Procedure Code, 1973 (2 of 1974), Section 320 - Compromise - Sentence - Parties have entered into compromise - As offence under Section 326 is not compoundable, therefore, sentence is reduced to period already undergone.
(Para 7)

दण्ड संहिता (1860 का 45), धारा 326, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320 - समझौता - दण्डादेश - पक्षकारों ने समझौता किया - चूंकि धारा 326 का अपराध शमनीय नहीं है, इसलिए दण्डादेश को पूर्व में भुगताई गयी अवधि तक घटाया गया।

Case referred :

AIR 1973 SC 2418.

Chandrahass Dubey, for the applicant.

Savita Choudhary, for the non-applicant/State.

Sanjay Kumar Patel, for the complainant.

ORDER

U.C. MAHESHWARI, J. - The applicant has preferred this revision under Section 397 of Cr.P.C. being aggrieved by the judgment dated 29.5.1999, passed by 1st Additional Sessions Judge, Chhindwara in Criminal Appeal No.15/98 affirming the judgment dated 7.1.1998 passed by JMFC Sausar in Criminal Case No.294/92 convicting the applicant under Section 326 of IPC sentenced for RI three years with fine of Rs.500/-, in default of depositing the fine for further six months RI.

2. The facts giving rise to this revision in short are that on 14.6.1992, the complainant/ victim Shivilal lodged a first information report at P. S. Bichhua contending that on the date of the incident the present applicant was doing the agricultural work for Soyabin crops on some field. On asking him by the victim not to do such work in such filed in response of it the applicant gave a blow of Axe on his right shoulder, resultantly, he sustained the injuries with bleeding. After registration of offence the victim was sent to the hospital, where on medical examination his MLC report was prepared and advised for x-ray. On carrying out the same fracture of clavicle bone in the sustained wound was revealed. On completion of investigation the applicant was charge sheeted for the offence under Section 326 of IPC.

3. After framing the charge trial was held, on appreciation of evidence the applicant was held guilty under Section 326 of IPC and punished with the above mentioned punishment. On filing the appeal the same was dismissed by affirming the judgment of the trial Court, on which the applicant has come to this Court with this revision.

4. Shri Chandrahas Dubey, learned counsel of the applicant after taking me through the record of the Courts below along with the impugned judgment instead to make any submission on merits holding the applicant guilty for the offence under Section 326 of IPC, has made his limited submission that taking into consideration the factum of compromise between the parties by adopting some lenient view the awarded jail sentence of the applicant be reduced up to the period for which he has already undergone between 29.5.1999 the date of the impugned judgment of the appellate Court till passing the order of suspension of his remaining jail sentence vide dated 11.10.1999 i. e. four months and twelve days and also 32 days for which the applicant was remained in judicial custody in pendency of trial between 24.7.1992 to 26.8.1992 and prayed to allow the revision accordingly.

5. On the other hand by justifying the impugned judgment as well as conviction and sentence of the applicant under the aforesaid section learned P. L. Ku. Savita Choudhary, said that looking to the nature of the offence and the manner in which it was committed by the applicant with the victim for which sufficient evidence is available in the record and such offence being not made compoundable under the provision of Section 320 of Cr. P. C., the impugned judgment does not require any consideration at this stage either for acquitting the applicant or reducing his jail sentence as prayed by the applicant's counsel and prayed for dismissal of this revision.

6. Having heard the counsel keeping in view their arguments, I have carefully gone through the record of the Courts below. I have not found any perversity or error in appreciation of evidence by any of the Courts below whereby the applicant has been convicted under the aforesaid section, so in such premises there is no scope in the matter to extend the benefit of acquittal to the applicant. Hence, till this extent the findings of the courts below are hereby affirmed.

7. Coming to consider the submission of the applicant's counsel to reduce the jail sentence is concerned, in the light of the decision of the Apex Court in the matter of *Ram Pujan and other Vs State of Uttar Pradesh* reported in AIR 1973 SC 2418, I have found some substance in it. Although in the aforesaid cited case of Section 326 of IPC the Apex Court has not permitted the parties to compound the offence but taking into consideration the impact of compromise between the parties the awarded jail sentence was reduced up to the period for which accused was already undergone. In the case at hand also the parties have entered into a compromise but the same could not be allowed because the offence of Section 326 is not made compoundable under Section 320 of Cr.P.C. But in view of the aforesaid law of law taking into consideration the factum of compromise, in the available circumstances of the case as stated above, I deem fit to reduce the jail sentence of the applicant from three years to the aforesaid period for which he has already undergone i.e. near about five months twenty days by maintaining the amount of fine as imposed by the trial Court and affirmed by the appellate Court with its alternate punishment in default of depositing the fine amount.

8. Therefore, by affirming the findings of the Courts below holding conviction against the applicant under Section 326 of IPC, this revision is allowed in part and the awarded jail sentence of three years with fine of Rs.500/-

is hereby reduced up to the aforesaid period of five months and twenty days for which the applicant has already undergone by maintaining the amount of fine with its alternate punishment in default of depositing the same. Till this extent the impugned judgment is modified while other findings of the same are affirmed. The bail bonds of the applicant are discharged.

9. The revision is allowed in part as indicated above.

Revision Partly allowed.

I.L.R. [2012] M.P., 2005

CRIMINAL REVISION

Before Mrs. Justice S.R. Waghmare

Cr. Rev. No. 465/2011 (Indore) decided on 14 March, 2012

ACHAL SEPAHA (DR.)

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 391 - Additional Evidence - Document and recording of evidence of one witness is essential for digging out the truth - One chance to petitioner/accused ought to be given subject to cost to be given to the complainant - Petition allowed. (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 391 - अतिरिक्त साक्ष्य - सत्य जानने के लिए दस्तावेज और एक साक्षी के साक्ष्य को अभिलिखित किया जाना आवश्यक है - शिकायतकर्ता को व्यय दिए जाने के अधीन याची/अभियुक्त को एक अवसर प्रदान किया जाना चाहिए - याचिका मंजूर।

Cases referred :

Cr. A. 441/95, AIR 1971 SC 1630.

S.K. Vyas with Harshwardhan Pathak, for the applicant.

B.L. Yadav, Dy. A.G. for the non-applicant/State.

ORDER

S.R. WAGHMARE, J. - By this petition under Section 397 of the Cr.P.C., the petitioner Dr. Achal Sepaha has challenged the order dated 29.03.2011 passed by the IXth A.S.J., Indore in Criminal Appeal No.250/2010 dismissing the application filed by the petitioner under Section 391 of

the Cr.P.C. for taking additional evidence on record.

02. The brief facts of the case in a nutshell are that the petitioner had filed an appeal against his conviction for offence under Section 304-A of the IPC, the Trial Court had convicted him and sentenced him to 3 months RI and fine of Rs. 1000/-. The appeal was filed before the Sessions Judge, Indore and it came up about that during the course of the appeal. Counsel for the petitioner submitted that P.W.4 Dr. D.S. Badkur had been examined as an expert witness in the case, certain documents though introduced at the trial stage were not proved and exhibited and this vitally affected the defence of the petitioner. Counsel submitted that the petitioner is a Consultant Nephrologist at the Choithram Hospital and Research Centre, Indore and had secured a degree in the M.B.B.S. in the year 1975 from M.G.M. Medical College at Indore. Besides doing post graduates course at Bombay university he had also taken experience in the United Kingdom as well as United States of America and was specialised in kidney transplant and was the Consultant Nephrologist at the Choithram Hospital and Research Centre at the relevant time. Whereas the complainant husband of the deceased Mr. Jagat Narayan Chaube had filed a false and frivolous case against the petitioner and the learned Trial Court had relied on the testimony of P.W.4 Dr.D.S. Badkur before whom the entire documents regarding the medical treatment of the patient Mrs. Vimla Chaube were placed. On cross-examination he had deposed before the Court only relying on the 39 pages provided by the police. Counsel vehemently urged that the patient suffered from multiple ailments like diabetes, Diabetic Nephropathy, Hypertension, chronic Renal failure, Pleural Effusion and Poor Cardiac status. Similarly if the Nurses Daily Record, intake output chart, medication sheets, temperature chart and peritoneal dialysis sheet, which were not proved and marked as exhibits would have been considered. And then doctor could have been cross-examined on these documents specifically to appreciate the fact that the patient was already a terminal case and there had been no negligence on the part of the petitioner accused.

03. Similarly Counsel stated that certain proceedings before the National Consumer Disputes Redressal Commission at Delhi for reference letter dated 11/08/96 from the Dr. D.K. Agarwal P.W.7 of Mayo Hospital at Bhopal was filed by the complainant himself. This letter clearly reveals that the complainant had made incorrect and false statement regarding the condition of the deceased/ patient when she was first brought to the Choithram hospital. The letter indicates that the petitioner had already been referred to Chennai for a kidney

transplant before she was admitted to Choithram Hospital for the first time. And thereby indicating that the deceased was brought to the accused petitioner only for the purpose of tissue matching when the complainant's intention was to take her to Chennai for kidney transplant. This important document (letter dated 11.8.96) came into the hands of the petitioner in the closing stages of the trial and therefore it could not be exhibited.

04. Counsel, therefore, vehemently urged that all these documents were of vital importance to the defence of the accused and therefore, he had made an application under Section 391 of the Cr.P.C. whereas the learned Judge of the appellate Court has interpreted this application to be dilatory tactics by the petitioner. However, these documents were essential and therefore the application under Section 391 ought to be allowed. Counsel relied on two judgments by our own High Court in the matter of *Jagganath and others Vs. State through P.S. Bilpank* in Cr.A. No.441/95 and Criminal Appeal No.210/09 (*Abid and others Vs. State of M.P.*) whereby this Court had considering the nature of the relief and the aims and objectives of this Court regarding additional evidence at late stage had also placed reliance on *Ratilal Bhanji Vs. State of Maharashtra and others* (AIR 1971 SC 1630) held that when for just decision of the case and for digging out of truth regarding the additional evidence is essential, then the application ought to be allowed and the imperative questions could be asked of the relevant witness. Counsel prayed that the benefit be granted in the present case also and prayed for setting aside the impugned order and directions for allowing the evidence to be taken.

05. Counsel for the respondent/State, per contra, has stated that there was no infirmity in the order passed by the appellate Court; the specific finding of the trial Court are based on application of mind judiciously; so also the Appellate Court according to the Counsel has considered the fact that it is not the case of the petitioner that the witness Dr. D.S. Badkur has not been examined at all; in fact, the medical documents were examined in detail and the Counsel for the accused has cross-examined him in detail. The other documents before the Consumer Forum were not at all relevant in the trial and hence were clear object of prolonging the trial. The incident is of the year 1996 and it was apparent that lacunae in the trial cannot be now filled at the appellate stage. Counsel prayed for dismissal of the petition.

06. On considering the above submissions, I find that undoubtedly a long time has elapsed since the date of the incident, the trial as well as the appeal.

However, delay should not defeat justice. Dr. Sepaha the accused petitioner as an eminent surgeon and fair trial to each person is guaranteed by our Constitution. Besides considering the Supreme Court dictat in the matter of *Ratilal Bhanji (supra)* I find that the Court has observed that this Court in the case of conviction can direct for taking additional evidence in the interest of justice and fair play rather than take a different view of the oral evidence and when such a document and recording of additional evidence of witness P.W.4 Dr. Badkur is essential for digging out the truth then one chance ought to be given to the petitioner accused. However, considering that the complainant has also suffered long trial it is directed that cost of Rs.5,000/- shall be paid to the complainant Jagat Narayan Chaube by the accused within a period of 15 days from the date of this order, subject to which it is directed as follows:

The impugned order is hereby set aside. Without making any observation on the merits of the case it is directed that the petitioner shall be given a single opportunity to examine Dr. Badkur and adduce additional evidence regarding the documents mentioned in the application and letter dated 11.8.96 on the same date.

With these aforesaid directions the petition is allowed to the extent herein above indicated.

Petition allowed.

I.L.R. [2012] M.P., 2008

CRIMINAL REVISION

Before Mr. Justice M.C. Garg

Cr.Rev. No. 489/2011 (Jabalpur) decided on 12 April, 2012

CHAKRAPANI PANDEY

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 386 - Retrial
- Appellant was tried along with other accused persons - Co-accused persons were acquitted by Trial Court and appellant was convicted - No appeal against the acquittal of other co-accused persons - Appellate Court directed for re-trial and remanded the matter - Re-trial would mean denovo trial - There can not be any splitting of trial - Order of re-trial set aside - Appellate Court directed to decide the appeal on merits.

(Paras 3 to 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 386 – पुनः विचारण – अपीलार्थी का विचारण अन्य अभियुक्तगण के साथ किया गया – सह-अभियुक्तगण विचारण न्यायालय द्वारा दोषमुक्त किये गये तथा अपीलार्थी को दोषसिद्ध किया गया – अन्य सह-अभियुक्तगण की दोषमुक्ति के विरुद्ध कोई अपील नहीं – अपीली न्यायालय ने पुनः विचारण का निदेश दिया और प्रकरण प्रतिप्रेषित किया – पुनः विचारण का अर्थ होगा नये सिरे से विचारण – विचारण का कोई विभाजन नहीं हो सकता – पुनः विचारण का आदेश अपास्त – अपीली न्यायालय को गुणदोषों के आधार पर अपील का विनिश्चय करने के लिए निदेशित किया।

Cases referred :

(1989) 3 SCC 166, (1987) 4 SCC 170.

Prakash Upadhyay, for the applicant.

Ashok Kumar Chourasiya, G.A. for the non-applicant.

ORDER

M.C. GARG, J. - Petitioner by way of this revision assailed the order passed by the Additional Sessions Judge, Rewa, in Criminal Appeal No. 194/2010 whereby, while considering the appeal filed by the appellant in Criminal Case No. 488/2010 wherein, they were convicted for the offence under Section 379 and 411 of IPC though other co-accused persons were acquitted, the case was remanded back for retrial against the present petitioner vide impugned order.

2. The petitioner was asked to appear before the trial Court to face the trial afresh.

3. The learned counsel for the petitioner submits that such an order could not have been passed by the Appellate Court inasmuch as, the impact of the order is that the entire trial stands revived and the other persons who have been acquitted may also face trial. Even though no appeal has been filed against them by the State against acquittal has referred to the judgment of the Hon'ble Supreme Court delivered in the case of *State of West Bengal and another Vs. Laisal Haque and others* [(1989) 3 SCC 1661]. In the said case dealing with the similar situation the Hon'ble Supreme Court passed the following order:

"10. Lastly, we are constrained to observe that the High Court has not examined the merits of the case at all. If it had done so, it could not have come to the conclusion that there was any material defect or omission in the framing of the charges

or giving the particulars thereof or any failure of justice was occasioned thereby. It failed to appreciate that in an appeal by the respondents under S. 374(2) of the Code, the order of acquittal passed by the learned Additional Sessions Judge as against the 26 other accused could not be interfered with. The High Court also failed to appreciate that there cannot be a piecemeal trial. The retrial directed by the High Court must necessarily revise the prosecution and must result in a trial de novo against the 42 accused. The 26 other accused acquitted by the learned Additional Sessions Judge were not impleaded as parties to the appeals before the High Court. In the absence of an appeal preferred by the State Government against their acquittal, the High Court could not under S. 386(b) on an appeal by the respondents against their conviction alter the acquittal nor can there be a splitting up of the trial. See : *State of Karnataka V Narsa Reddy*

11. Accordingly, the appeals must succeed and are allowed. The judgment and order passed by the High Court are set aside and the appeals are remitted to the high Court for a decision afresh on merits after notice to the parties."

4. In the aforesaid judgment there is also a reference to another judgment of the Hon'ble Supreme Court delivered in the case of *State of Karnataka Vs. Narsa Reddy* [(1987) 4 SCC 170] relevant paragraph of that judgment, which is also relevant for the disposal of this case is reproduce here as under:

"5. We have no manner of doubt that the direction made by the learned Single Judge presumably exercising the inherent powers of the High Court under Section 482 of the Code of Criminal Procedure was wholly unwarranted. It is somewhat strange that the learned Single Judge should have made a direction at all requiring the learned Sessions Judge to proceed with the trial as against the respondent and accused 2, Vaijinath merely because there was stay granted by the High Court in revision preferred by the co-accused Head Constable Govinda Rao and Police Constable John, accused 3 and 4 against the order passed by the learned Sessions Judge dated October 28, 1985 rejecting the objection as to the validity of trial for want of sanction. If he felt that the grant of stay would prejudicially

affect the respondent and accused 2, Vaijinath and subject them to a protracted trial, the proper course for the learned Single Judge was to have heard and disposed of the Criminal Revision No. 886 of 1985 rather than make a direction of this kind which would, in fact, result in splitting up of the trial which is apt to cause miscarriage of justice, besides serious prejudice to the prosecution. From the nature of the prosecution case, it is quite apparent that the evidence to be led by the prosecution would be more or less common as it relates to the same occurrence. It could not be said that merely because the proceedings before the learned Sessions Judge were held up due to stay granted by the High Court in that revision, the learned Single Judge could have taken recourse to the inherent powers of the High Court under Section 482 of the Code, or that it was necessary to do so either to prevent abuse of the process of Court or otherwise to secure ends of justice. Any further delay in the trial could be prevented by taking up the revision for hearing.

6. In the result, the appeal succeeds and is allowed. The order passed by the High Court is set aside and the High Court is directed to hear and dispose of Criminal Revision No. 886 of 1985 as early as possible. In the meanwhile, the proceedings in Sessions Case No. 23 of 1984 before the learned Sessions Judge shall remain stayed till the disposal of the revision."

5. Taking into consideration of the aforesaid judgments of the Hon'ble Supreme Court the case is directed to be remanded back to the Appellate Court with a direction to decide the appeal on merits and the order of remanding the case for retrial to the Court of Judicial Magistrate First Class is set aside. Petitioner to appear before the Sessions Judge on 15th May 2012.

6. Copy of this order along with the record be sent forthwith to the Sessions Court. The bail bond furnished by the petitioner before this Court shall remain in existence till the petitioner files fresh bail bond before the sessions Court to the satisfaction of that court to face the trial to appear before the Appellate Court till the bail is decided and to face the consequences thereupon.

Petition stands disposed of in terms of the aforesaid order.

Petition disposed of.

2012

Dhruv Kumar Singh Vs. State of M.P.

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

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

CRIMINAL REVISION

Before Mr. Justice M.C. Garg

Cr. Rev. No. 1079/2011 (Jabalpur) decided on 12 April, 2012

DHRUV KUMAR SINGH

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Essential Commodities Act, (10 of 1955), Section 3/7, (Khadya Padarth) Sarvajanik Nagrik Purti Vitran Scheme (M.P.), 1991; Clause 12 & 13 - Violation of Scheme - Madhya Pradesh (Khadya Padarth) Sarvajanik Nagrik Purti Vitran Scheme, 1991 is not a scheme framed by virtue of the power given u/s 3 of the Act - Prosecution of accused for violation of clause 12/13 not valid - Order is set aside with direction to trial Court to frame charges accordance with law.

(Paras 6 & 7)

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7, (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति वितरण स्कीम (म.प्र.), 1991, खंड 12 व 13 - स्कीम का उल्लंघन - म.प्र. (खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति वितरण स्कीम, 1991, अधिनियम की धारा 3 के अंतर्गत दी गई शक्ति द्वारा विरचित स्कीम नहीं है - खंड 12/13 का उल्लंघन करने के लिए अभियुक्त का अभियोजन विधिमान्य नहीं - विचारण न्यायालय को विधिनुसार आरोप विरचित करने के लिए निदेशित करते हुए आदेश अपास्त।

Case referred :

2008(2) MPHT 38.

None for the applicant.

A.K. Chourasia, G.A. for the non-applicant.

ORDER

M.C. GARG, J. - This revision petition has been filed by the petitioner under Section 397/401 of Cr.P.C. aggrieved by the order dated 19th January, 2011 framing charge against the petitioner under Section 3/7 of Essential Commodities Act, 1955 on account of violating the scheme framed by the State of Madhya Pradesh i.e. Madhya Pradesh (Khadya Padarth) Sarvajanik Nagrik Purti Vitran Scheme, 1991 and in particular clause 12 thereof which

has been made punishable under clause 13 of the Scheme.

2. It is a matter of record, that the petitioner who is a wholesale dealer of kerosene oil and is allotted a very heavy quota of kerosene oil which is required to be distributed in terms of the Scheme violated that scheme with immensity on many occasions by supplying the less/more quantity of kerosene oil to the authorized dealers and in this manner violated that scheme. Later on, an FIR was registered under Section 3/7 of the Essential Commodities Act on 28th June, 2009 vide Crime No.396/2009.

3. It was argued by the petitioner that for violation of a scheme prepared by the State Government which has not been prepared under Section 3 and 5 of the Essential Commodities Act cannot be punished Under Section 3/7 of the said Act. He has relied upon a judgment delivered by this Court in *Arvind Kumar Vs State of Madhya Pradesh*, reported in 2008 (2) MPHT 38 on the basis whereof the present petition was admitted.

4. I have perused the aforesaid judgment and the impugned order passed by the Court of Judicial Magistrate First Class, Burhar, District Shahdol dated 19th January, 2011;

5. The judgment relied upon by the petitioner has been cited in that order.

6. In the aforesaid judgment, this Court has considered the validity of lodging a case against a person who violates the scheme i.e. Madhya Pradesh (Khadya Padarth) Sarvajanik Nagrik Purti Vitran Scheme, 1991 under Section 3/7 of the Essential Commodities Act, 1955 holding that Madhya Pradesh i.e. Madhya Pradesh (Khadya Padarth) Sarvajanik Nagrik Purti Vitran Scheme, 1991 is not a scheme framed by Virtue of the power given under Section 3 of the Essential Commodities Act. This Court held, that prosecution of the accused in that case was not valid inasmuch as, the scheme itself has a provision to sentence the violator for imprisonment for a period of three months and to pay fine of Rs.2000/- and in default of fine to suffer RI for a period of three months as such, prosecution of a person who has violated the scheme under Section 3/7 of the Essential Commodities Act was not held to be valid. it will be also fruitful to reproduce paragraph 6 and 7 of the said judgment which is as under :-

6. The validity of the "Scheme" was considered in

AIR. 1981 SC 2001 *Madhya Pradesh Ration Vikreta Sangh and others v State of MP* and it was held that the "Scheme" was not made in exercise of any power conferred by the order u/s 3 of E.C. Act Clause 2(d) of the order only defines the expression of "Government Scheme" and it does not confirm any power to make scheme. The definition itself postulates that the "scheme" is one which is made in exercise of its Executive Power. The executive power of the State is provided in Art. 162 of the Constitution extends to the matter with respect of which the legislature of the State has power to make laws. It was the duty and burden of the prosecution to prove the nature of "scheme", and whether the "scheme" for violation of which appellant has been convicted is framed under the provisions of Section 3/5 of the E.C. Act.

7. It will be fruitful to reproduce *Shiv Kumar v. State of MP* 2005 (II) MP Weekly Note No.86 where it is held:

"Section 3 of the Essential Commodities Act confers power on the Central Government as well as on the State Government to provide for regulations for prohibition, production, supply and distribution of essential commodities and section 7 of the Act provides penalties for contravention of any order made under section 3. First condition for prosecuting a person under section 7 is that there should be a contravention of the control order issued by the State Government under section 3 of the Essential Commodities Act. Any Scheme framed under the executive powers by the State Government may not come within the purview of the control order and for that it would not be necessary that it should satisfy the provisions laid down under section 3 of the Act. Therefore, in order to prosecute a person for violation of the terms and conditions of the scheme it is necessary for the prosecution to prove that the scheme is in the nature of control order and further to prove that the same has been issued under section 3 of the Essential

Commodities Act and in the absence of such an evidence, any scheme framed under executive power cannot fall within the purview of the control order and the person can not be prosecuted and held guilty.

In the case of *M.P. Ration Vikreta Sangh Jabalpur and others v. State of M.P. And another* [1981 JLJ 564] it has been held that the scheme was not made in exercise of any powers conferred by the Act. Division Bench held that the scheme was not made in exercise of powers conferred under section 3 read with section 5 of the Essential Commodities Act and was made only in exercise of executive powers of State. It was also pointed out that the aforesaid decision was affirmed by the apex court in appeal in the case of *M.P. Ration Vikreta Sangh Society v. State of M.P.* [AIR1981 SC 2001]. Similar view has been taken by this Court in the cases cited above. Therefore, when any scheme framed is covered under section 3/5 of the Essential Commodities Act the case can be taken for its violation but if the scheme is not framed under the authority of the Act. and it is only framed under the executive powers of the State Government, accused cannot be prosecuted for the violation of executive orders of the State Government."

7. In view of the aforesaid, the order framing charge against the petitioner under Section 3/7 of the Essential Commodities Act vide order dated 19.1.2011 is set aside but with direction to the Trial Court to frame charges as could be framed against the petitioner in accordance with law for which, the case is remanded back to the Trial Court where the parties are directed to appear on 10th May, 2012.

8. Let a copy of this order be sent to the Trial Court. The petitioner is also directed to appear before the Trial Court on that date failing which his bond filed subsequent to the order of suspension of sentence by this Court would stand cancelled and the Trial Court will be free to take steps to apprehend the petitioner for further trial of the petitioner in this case.

Order accordingly.

I.L.R. [2012] M.P., 2016**CRIMINAL REVISION****Before Mr. Justice M.C. Garg**

Cr.Rev. No. 448/2012 (Jabalpur) decided on 13 April, 2012

TARACHAND

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Negotiable Instruments Act, (26 of 1881), Section 138 - Dishonour of Cheque - Cheque issued by appellant by signing twice - Notice also given within period of limitation - Complaint also filed within period of limitation - No infirmity in the order of conviction - Revision dismissed. (Para 2)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - चेक का अनादरण - अपीलार्थी ने चेक को दो बार हस्ताक्षर कर जारी किया - नोटिस भी परिसीमा अवधि के भीतर दिया गया - शिकायत भी परिसीमा अवधि के भीतर प्रस्तुत की गई - दोषसिद्धि के आदेश में कोई त्रुटि नहीं - पुनरीक्षण खारिज।

ORDER

M.C. GARG J. - Petitioner has come in revision against the order passed in Criminal Appeal No.71/2012 whereby, the appeal filed by the petitioner against the order of conviction passed by the Court of JMFC in a complaint filed under Section 138 of the Negotiable Instrument Act (for short 'NI Act') was decided in favour of the respondent and the petitioner was convicted under Section 138 of the NI Act on account of dishonoured the cheque Ex. P/1 and having not paid the amount of necessary cheque despite receipt of notice within 15 days thereof, the petitioner was directed to undergo R.I. for six months as also to pay a sum of Rs.85,000/- as compensation. Appeal filed by the petitioner assailing the order of conviction primarily on the ground that there was no cause of action in filing the petition under Section 138 of the NI Act in favour of the respondent has not been found favour with the appellate court. This aspect has been considered and discussed in paragraphs 6, 7 and 8 of the judgment. Infact, a confusion was sought to be raised regarding issuance of two cheques. This confusion has been cleared by Smt. Kiran Dubey in her examination and cross-examination, both has taken note of the averments made by the said complainant in her examination and cross-examination in para 10 of the judgment. The portion of that paragraph

alongwith paragraph 12 and 13 are reproduced herein under :

10. यह सही है कि परिवादिनी श्रीमति किरण दुबे (परि. सा. क्र.1) ने प्रति-परीक्षण के पैराग्राफ क्र. 12 एवं 13 में यह स्वीकार किया है कि उसने अभियुक्त को श्री राजेन्द्र गुप्ता अभिभाषक के माध्यम से दि. 14.11.2005 को सूचना- पत्र भिजवाया था,

उनके आधार पर परिवाद की प्रस्तुति की है, सूचना - पत्र परिवाद के साथ प्रस्तुत नहीं किया है । यहां यह उल्लेखनीय है कि पारिवाद की प्रस्तुति श्री सुरेन्द्र शुक्ला अभिभाषक द्वारा दि. 14/11/2005 को भिजवाये गये सूचना-पत्र पर आधारित है । सर्वप्रथम तो दस्तावेजी साक्ष्य से मौखिक सरक्ष्य के अपवर्जन के सिद्धांत पर परिवादिनी द्वारा प्रति-परीक्षण में की गयी उक्त स्वीकारोक्ति जो दस्तावेजी साक्ष्य के विपरीत है, को अपवर्जित किया जाना होगा । दूसरे, यदि श्री राजेन्द्र गुप्ता, अभिभाषक द्वारा प्रदर्श पी-1 के चैक के संबंध में, यदि कोई यदि सूचना-पत्र अभियुक्त को भिजवाया गया था जो कि अभिकथित रूप से अभियुक्त के ज्ञान में भी रहा है तो उसे अभियुक्त के द्वारा ही प्रस्तुत किया जाना आवश्यक था, जिसमें अभियुक्त पूर्णतः असफल रहा है ।

12. अभिलेख में उपलब्ध साक्ष्य का समग्रता में विचार में लेकर, अभियुक्त के विद्वान अभिभाषक के इस तर्क में कि, विचारण न्यायालय द्वारा परिवादिनी के पक्ष में प्रदर्श पी 6 के सूचना-पत्र के आधार पर, वाद-हेतुक उत्पन्न नहीं हुआ होना, निष्कर्षित किया जाना चाहिए था, कोई बल नहीं पाता हूं। प्रकरण के तथ्यों एवं परिस्थितियों के पूरी तरह सुभिन्न होने से अभियुक्त के विद्वान अभिभाषक द्वारा अवलंबित न्याया दृष्टांतों जनके गांधी वि. मोहन मंडेलिया एवं अनंश 2005 (1) एमपीएचटी 5, दिनेश साहू वि. डॉ. आर के जैन एवं एक अन्य 2007 (1) एम. पी. वीकली नोट 78, प्रेमचंद विजय कुमार वि. यशपाल सिंह 2005 (11) एम.पी. वीकली नोट 90 : 2005 सी.एल.डी.सी. 276 सुप्रीम कोर्ट, मेसर्स अजुदिया सुगर मिल्स और अन्य वि. में एल्कोबेक्स मेटल्स लि. 2005 सी.एल.डी.सी. 148 राजस्थान उच्च न्यायालय, एसआईएल, इम्पोर्ट यूएसए वि. में एग्जिम एडिस स्लिक एक्सपोर्ट्स बेंगलोल 2000 (1) एम.पी.एच.टी. 576

कृष्णा एक्सपोर्ट्स एवं अन्य वि. राजूदास 2005 (2) एम.पी.एल. जे. 91, मोतीलाल शर्मा वि. ओम प्रकाश कुलश्रेष्ठ 2011 () एम. पी. वीकली नोट 98 एवं डॉ. अखिलेश सराफ वि. श्रीमति उषा तिवारी 2011 (1) एम.पी. वीकली नोट 101 से वाद हेतु के उत्पन्न नहीं होने संबंधी अभियुक्त के विद्वान अभिभाषक के तर्क को कोई समर्थन प्राप्त नहीं होता है।

13. विचारणीय प्रश्न क्रमांक 3 के संबंध में —इस तरह अभियुक्त यह प्रमाणित करने में असफल रहा है कि उसने प्रदर्श पी 1 का चैक जारी नहीं किया था, परिवादिनी द्वारा उक्त चैक के संबंध में प्रदर्श पी 6 के अतिरिक्त अन्य कोई सूचना पत्र भिजवाया गया था। दूसरी ओर परिवादिनी यह स्थापित करने में सफल हुई है कि उसके पक्ष में वाद हेतु उत्पन्न हुआ है, प्रदर्श पी 6 के सूचना पत्र की प्राप्ति के 15 दिन के भीतर प्रदर्श पी 1 के चैक की राशि सक संदाय करने में अभियुक्त असफल रहा है, वाद हेतुक उत्पन्न होने के एक माह के भीतर उसके द्वारा परिवाद दाखिल किया गया था। आलोच्य निर्णय में कोई विपर्यस्यतता परिलक्षित नहीं होती है। आलोच्य निर्णय अभिलेख में उपलब्ध मौखिक एवं दस्तावेजी साक्ष्य की उपयुक्त विवेचना कर पारित किया गया है। निर्णयज विधि को उचित रूप से लागू किया गया है। अधिरोपित कारावास, जुर्माना और प्रतिकर भी उपयुक्त हैं। आलोच्य निर्णय में हस्तक्षेप की कोई गुंजाईश नहीं है।

2. I have also perused the record of the case. On perusal of the cheque in question which was dishonoured shows that the said cheque has been issued by the petitioner on 15.10.2005. The cheque has been drawn in very clear words and has been signed twice by the petitioner. The notice has been issued by the complainant within 15 days of the dishonour of the cheque. The aforesaid cheque and the complaint has been filed within limitation after the payment was not made by the petitioner. No infirmity is found in the order of conviction by the Trial Judge or that of the Appellate Court.

The revision petition is dismissed.

Revision dismissed.

I.L.R. [2012] M.P., 2019

CRIMINAL REVISION

Before Mr. Justice Rakesh Saxena & Mr. Justice S.C. Sinho

Cr. Rev. No. 422/1994 (Jabalpur) decided on 3 May, 2012

PRAKASHWATI (SMT.) & anr.

...Applicants

Vs.

MANGAL SINGH & anr.

...Non-applicants

Penal Code (45 of 1860), Section 305 - Appellant and deceased were in love and were exchanging letters - Deceased a young girl of 16-17 years of age and student of Class XI - Appellant was her neighbour - Deceased consumed poisonous substance (Sulphas) and died during treatment - Number of love letters seized - Appellant tried to expose her letters to others - Held - Age of the deceased was 16 years - As per Principal of Govt. Higher Secondary School date of birth is 16.09.1971 - There is no mensrea to commit the offence - Requisite ingredients of the offence u/s 107 & 305 of IPC are not established - It is not established by prosecution that appellant instigated, intentionally aided, provoked, incited deliberately created such circumstances - Appeal allowed. (Paras 3, 11, 22 & 23)

दण्ड संहिता (1860 का 45), धारा 305 - अपीलार्थी व मृतिका के प्रेम संबंध थे और पत्रों का आदान प्रदान करते थे - मृतिका 16-17 वर्ष की आयु की एवं कक्षा XI की छात्रा - अपीलार्थी उसका पड़ोसी था - मृतिका ने विषारी पदार्थ (सल्फास) का सेवन किया और उपचार के दौरान उसकी मृत्यु हो गई - कोई प्रेम पत्र जब्त किये गये - अपीलार्थी ने उसके पत्र अन्यों को प्रदर्शित करने का प्रयास किया - अभिनिर्धारित - मृतिका की आयु 16 वर्ष थी - सरकारी उच्चतर माध्यमिक शाला के प्राचार्य के अनुसार जन्म तिथि 16.09.1971 है - अपराध कारित करने के लिए कोई आपराधिक मनःस्थिति नहीं - मा.द.सं. की धारा 107 व 305 के अंतर्गत अपराध के आवश्यक घटक स्थापित नहीं किये गये - अभियोजन द्वारा यह स्थापित नहीं किया गया कि अपीलार्थी ने उकसाया, साशय सहायता की, जानबूझकर उद्यपित किया और ऐसी परिस्थितियां निर्मित की - अपील मंजूर।

Cases referred :

AIR 1983 SC 906, AIR 2011 SC 1238, AIR 1990 SC 209.

*R.P. Agrawal with Pramod Sahu, for the applicants.**Surendra Singh with Manish Mishra, for the non-applicant No.1.**Amit Pandey, P.L. for the non-applicant No.2.*

J U D G M E N T

The Judgment of the Court was delivered by :
RAKESH SAKSENA, J. - Since the aforesaid criminal revision and the criminal appeal arise out of the common impugned judgment, this judgment shall govern disposal of both the cases.

1. Appellant/accused Mangal Singh has filed this appeal against the judgment dated 2.5.1994, passed by II Additional Sessions Judge, Sehore, in Sessions Trial No.41/1989, convicting him under Section 305 of the Indian Penal Code and sentencing him to rigorous imprisonment for 10 years with fine of Rs.2000/-. In default of payment of fine, further rigorous imprisonment for one year.

2. Complainants viz. Smt. Prakashwati and Premnarain have filed the aforesaid revision against the impugned judgment of conviction praying for enhancement of sentence of accused.

3. In short, the facts of the case are that accused Mangal Singh and Jyotibala, the deceased, were in love and were exchanging letters. Jyotibala was a young girl of about 16-17 years of age and was a student of Class XI of Government Higher Secondary School, Rehti. Mangal Singh was her neighbour. On 19.8.1987, she came back from school earlier than scheduled time. At about 2.00 O'clock, when she was alone in her house, she consumed some poisonous substance (Sulphas). Attempts were made to save her life by administering some drugs, but her condition deteriorated. She was taken to PHC, Rehti, but Dr. N.P. Agrawal (PW-14) referred her to Hamidiya Hospital, Bhopal for adequate treatment. She was taken to Hamidiya Hospital, but she died. On a report about her death, Police Station Talaiya, Bhopal registered a Murg No.127/1987. Her dead body was sent for postmortem examination. Dr.D.K. Satpathi, Sr. Forensic Specialist, Medical College, Bhopal conducted postmortem examination and vide his report Ex.P/1 and Ex.P/6 found that she died due to cardio respiratory failure as a result of suspected poisoning. Her viscera was preserved and sent to Forensic Science Laboratory, Sagar. Vide FSL report Ex.P/199 aluminum phosphide (Sulphas) insecticide was detected in viscera.

4. In the course of investigation, a number of love letters written by deceased as well as by accused were seized. A letter in the nature of suicide note (Ex.P/35) was also seized from the possession of the mother of deceased

which indicated that accused made deceased to write love letters by scaring her that if she did not write letters to him, he would consume poison and also that he would defame her if she did not yield to his wishes. It was also alleged that co-accused Kaliya exhibited letters written by her in front of school and accused Mangal Singh tried to expose her letters to others. Therefore, she committed suicide.

5. After completion of investigation, police filed charge sheet under Section 305 of the Indian Penal Code against accused Mangal Singh and Kaliya for abetting deceased, who was a minor girl under age of 18 years, to commit suicide.

6. Appellant/accused abjured his guilt and pleaded false implication stating under Section 313 Cr.P.C. that he was falsely implicated on the move of the parents of deceased because she was in love with him which they did not like. He never harassed her; probably she committed suicide under misapprehension of the fact that accused Kaliya showed her letters to some boys.

7. In support of its case, prosecution examined 23 witnesses. Relying mainly on the evidence of letters produced by the prosecution including Ex.P/35, the evidence of Prakashwati (PW-1), Premnarain (PW-16), Anjan Singh (PW-6), Mehtab Singh (PW-7) and Balakram Patel (PW-17) learned trial judge held the appellant guilty, convicted and sentenced him as mentioned above. However, finding the evidence insufficient against accused Kaliya, acquitted him of the charge.

8. Shri Surendra Singh, learned senior counsel for appellant Mangal Singh, submitted that the learned trial judge committed serious error in holding the appellant guilty of the charge under Section 305 of the Indian Penal Code. He submitted that it was not proved by legal evidence that appellant exhibited letters written by the deceased to others with a view to defame her. Learned trial judge illegally placed reliance on the hearsay evidence. The evidence in respect to the fact that accused Kaliya showed letters of deceased to other boys was found not proved by the trial court. He submitted that there was no evidence on record to indicate that appellant in any manner abetted deceased to commit suicide since it was not established that appellant by his act intended that the deceased should commit suicide. Per contra, learned Penal Lawyer for the State and learned Senior Counsel Shri R.P.Agrawal for the complainant submitted that appellant, who was a married person, harassed, pressurized, dominated and exploited deceased due to which she committed suicide.

According to learned counsel, the conduct of appellant fell within the definition of 'abetment' as defined in Section 107 of the Indian Penal Code.

9. We have heard learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

10. It has not been disputed that Jyotibala committed suicide by consuming aluminum phosphide (Sulphas).

11. According to prosecution, the age of deceased, at the time of incident, was about 16 years i.e. under 18 years as postulated in Section 305 of the Indian Penal Code. Prakashwati (PW-1), the mother of deceased, stated that at the time of death the age of Jyotibala was 16 years. S.G.Ali (PW-9), Principal of Government Higher Secondary School, Rehti stated that the date of birth of Jyotibala, according to school record, was 16.9.1971. He made this statement in his letter (Ex.P/26) written to Station Officer of Police Station, Rehti. He, however, could not say as to in which year Jyotibala was admitted in the school and who recorded her date of birth in the school record. In these circumstances, the evidence of S.G.Ali could not be held sufficient to prove the age of Jyotibala. However, by the evidence of Prakashwati it stood established that at the time of occurrence the age of Jyotibala was under 18 years.

12. Madhu Sudan Sharma (PW-2) and Braj Bhushan Sharma (PW-19) who were the students of same school in which Jyotibala studied stated that accused Kallu @ Kaliya had a paper in his hand having something written with red ink. He showed that paper to them and asked as to what was written in the paper. He did not give that paper in their hands, therefore, they could not see what was written therein. The evidence of these witnesses did not create any incriminating circumstance against the appellant as well as against accused Kaliya. Learned trial judge did not find anything incriminating in the said evidence, therefore, acquitted accused Kaliya.

13. Anjan Singh (PW-6), a neighbour of deceased as well as of accused, stated that at about 3.00 pm when he was going back to his house, he saw people assembled in front of the house of Jyotibala. On his asking, people told that Jyotibala was not well. She was taken to hospital. She never talked to him about any letters. This witness was declared hostile. He denied all the suggestions put to him by the prosecution suggesting that Jyotibala disclosed to him that Mangal Singh pressurized her to yield to his wishes. He however

disclosed that at the time of occurrence Mangal Singh was married.

14. Mehtab Singh (PW-7) stated that he did not know the accused persons. He, however, had once purchased manure from the shop of Mangal Singh in the year 1991. He denied that Mangal Singh gave any letter to him. He denied that he knew daughter of Premnarain. Evidence of this witness did not help the prosecution.

15. Balakram Patel (PW-17) stated that he knew appellant, but he did not know Jyotibala. At about 3.00 pm when he was going to the house of appellant to fetch his calender, on way, near the house of Jyotibala, he saw appellant and Arjun Standing and reading some paper. He, however, did not know as to what was written in that paper. At that time Jyotibala, who was sitting in front of her house, sent a boy to Mangal Singh and Arjun for telling not to show her letters to anybody, else she would eat something. He, Mehtab, Arjun and Mangal Singh thereafter sat on a cot in a shade. After some time, that boy again approached to them and informed that Jyotibala was dissolving something like 'Sharbat'. Hearing this Mangal Singh went inside her house. When he did not come back for sometime, he and Arjun also went there and saw Jyotibala lying on a table having froth coming out of her mouth. Mangal Singh informed him that she had consumed something. Thereafter they went and informed to her mother and also to a doctor. They carried her to hospital at Rehti. They also brought medicine for her and gave it to her. This witness, however, did not say anything to indicate that appellant exhibited letter written by Jyotibala. Learned counsel for the appellant submitted that the evidence of this witness (PW-17) was inadmissible being hearsay in nature since the boy, who allegedly informed accused that he should not show letter of deceased to anybody, was not examined in the court. He placed reliance on the ratio of *Bhugdomal Gangaram and others v. The State of Gujrat*-AIR 1983 SC 906 wherein it has been observed that the evidence of a person who got information of a fact from somebody else would not be admissible if the informant of that fact was not examined as a witness. We find substance in the submission of learned senior counsel. Since the boy, who informed appellant and Balakram as to what deceased told, was not examined in the Court, the evidence of Balakram about that fact would not be admissible. Apart from it, mere fact that accused and Arjun were reading some paper on public way in front of the house of deceased, it cannot be held that appellant was showing the letter of deceased to Arjun. Learned trial court proceeded on the assumption that even if it was not proved that the paper shown by

appellant was the letter of deceased, yet his conduct created an impression that he was showing her letter to others for defaming her and her parents. We are unable to accept this hypothesis in the absence of at least some positive evidence to the effect that appellant told or in any other manner expressed that the paper which he showed to others was letter of deceased. In the absence of such evidence, no incriminating inference could be drawn against the appellant.

16. Learned senior counsel for the appellant next submitted that from the evidence adduced by the prosecution including the letter (Ex.P/35), a suicide note, it was not established that appellant abetted deceased to commit suicide. He placed reliance on *M. Mohan vs. State*-AIR 2011 SC 1238. On the other hand, learned senior counsel for complainant and the counsel for State submitted that from the photograph (Ex.P/21) and the letter (Ex.P/35) it was established that appellant harassed and intimidated deceased to defame her with a view to compel her to obey his illicit demand, and because of that deceased, who was a minor girl, was left with no option but to commit suicide. A number of letters written by the accused were seized on production by Prakashwati (PW-1), the mother of deceased. Similarly many letters were seized from the house of the accused written by deceased. These letters were duly proved. From the contents of these letters it was established that appellant and deceased were in deep love and used to exchange letters. From the evidence of Anjan Singh (PW-6) it was revealed that at the time of occurrence appellant was a married person, but as we have already discussed, it has not been established that appellant in any manner defamed deceased by showing her letters to anybody.

17. Now the question before us is whether by other evidence adduced by the prosecution could it be inferred that appellant abetted deceased to commit suicide? Learned trial judge referring to letter of appellant (Ex.P/14) held that he was pressurizing or exerting influence on the deceased that if she did not do as he wished, he would go away from her. Learned court below wrongly mixed up this issue with the issue that deceased demanded her photograph from appellant which was in his possession. According to trial court, this was indicated from the fact that appellant in his letter mentioned that if she was weeping, he would give her photograph back. This part of the letter did not indicate that appellant threatened deceased to blackmail her. In another part of this letter he mentioned that if it was not possible for him to get her, it would be a difficult situation for him and he would go away from her for 2-3 years. It

does not appear to us that these words would have been uttered by appellant with a view to unduly influence or pressurize deceased to meet his any nefarious demands.

18. Learned trial court drew inference that appellant wanted to persist sexual relation with deceased. Since some words indicating sexual relations between them were mentioned in the letter (Ex.P/8), therefore, it had to be concluded that appellant psychologically pressurized deceased to obey his demands. Dr. D.K. Satpathi (PW-13), who conducted autopsy, deposed that hymen of the deceased was not torn. Learned trial judge however remained obsessed with the feeling that appellant because of his unending sexual desires mounted pressure on deceased. After perusal of various letters it seems to us that it was not indicated that appellant and deceased indulged in sexual relationship.

19. Learned trial court after observing the photographs (Ex.P/20 and P/21) held that photograph Ex.P/21, which was a joint photo of appellant and deceased, was fabricated one. It is true that photographer Ganesh (PW-5) stated that he had snapped the photograph (Ex.P/20) of Jyotibala and the photograph (Ex. P/21) in which appellant was shown with the deceased was manufactured with the negative of Ex.P/20. But in this regard no expert was examined in the court. It was not Ganesh (PW-5) who created Ex.P/21, therefore, in our opinion, it was not possible to hold that the photograph (Ex.P/21) was fabricated. Apart from it, from the letters of deceased it appears that she knew that her photographs were in possession of appellant. It is an admitted and also proved position that appellant and the deceased were in deep love and were writing letters to each other. There appeared absolutely no evidence on record to indicate that appellant used the said photographs or the letters of deceased for blackmailing her. Even if it is assumed that on the strength of photographs or the letters written by the deceased appellant wished her to continue the love relationship with him, in our opinion, it cannot be held that appellant intended that deceased should commit suicide. In case of *M.Mohan* (supra), the Apex Court, explaining abetment in relation to Section 306 and Section 107 IPC, observed:

“Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of accused to instigate or aid in committing suicide, conviction cannot be sustained. The

intention of legislature and the ratio of cases decided by this court are clear that in order to convict a person under Section 306 IPC, there has to be a clear mensrea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased in such a position that he/she committed suicide.”

20. Learned senior counsel for the complainant referring to letter Ex.P/35 submitted that appellant knew that deceased, who was a girl under the age of 18 years, if exploited, would commit suicide. Therefore, it had to be presumed that appellant intended to leave no option for the deceased except to commit suicide. No doubt in Ex.P/35 deceased mentioned that appellant obtained letters from her by putting her under fear, but it appears that he scared her that if she did not write letters to him, he would consume poison because he loved her too much. In these circumstances, in our opinion, it could not be inferred that appellant wished to defame her or intended that she should commit suicide.

21. Placing reliance on *Gurbachan Singh vs. Satpal Singh and others*-AIR 1990 SC 209 learned counsel for the State submitted that abetment does not involve the actual commission of the crime abetted; it is a crime apart. There is no dispute about the aforesaid proposition of law, but here no such question is involved. The only question is whether from the proved facts could it be inferred that appellant intended that deceased should commit suicide? From the intention of the legislature and the various cases decided by the Apex Court it is clear that in order to convict a person under Section 306 IPC there has to be a clear mensrea to commit the offence.

22. After taking into consideration all the evidence including the letters written by accused as well as by deceased, we are of the opinion that the requisite ingredients of the offence under Section 107 which form essential part of the offence under Section 305 of the Indian Penal Code are not established. It has not been established by the prosecution that appellant instigated, intentionally aided, provoked, incited or deliberately created such circumstances that no option was left with deceased except to commit suicide. Learned court below, in our opinion, did not appreciate the evidence on record in correct perspective and illegally recorded the finding of conviction of appellant under Section 305 of the Indian Penal Code.

23. Accordingly, **Criminal Appeal No.503/1994 is allowed.** The

conviction of appellant Mangal Singh under Section 305 of the Indian Penal Code and the sentence awarded to him thereunder is set aside. He is acquitted of the charge. His bail bond and surety bond are discharged. **Criminal Revision No.422/1994 filed by applicants Smt. Prakashwati and Premnarain for enhancement of sentence of respondent Mangal Singh is dismissed.**

24. A copy of this judgment be kept in Criminal Appeal No.503/1994.

Order accordingly.

I.L.R. [2012] M.P., 2027

CRIMINAL REVISION

Before Mr. Justice G.D. Saxena

Cr. Rev. No. 261/2012 (Gwalior) decided on 17 July, 2012

SHRIRAM SHARMA & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 91 - Production of documents - Previous statements - Stage - Language of Section 91 of Cr.P.C. is wider than the language of Sections 172, 161 and 162 of Cr.P.C. - If the Court comes to conclusion that production of document is necessary or desirable, then the Court is entitled to summon the document under Section 91 of Cr.P.C. - Case Diary is maintained under Section 172 of Cr.P.C. and it is a document contemplated under Section 91 - If Court comes to conclusion that production of such a document is necessary or desirable, then the Court is entitled to summon the document for the purpose of using the statements made in the diary for contradicting a witness - There is no embargo for the Court to summon the documents at earlier point of time, if the Court trying the case considers that production of such documents are necessary and desirable for the purpose of trial - Order framing charge quashed - Prosecution directed to produce the previous statements and thereafter Court is directed to proceed with the matter in accordance with law.

(Paras 8,9 &11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 - दस्तावेजों का प्रस्तुतीकरण - पूर्ववर्ती कथन - प्रक्रम - द.प्र.सं. की धारा 91 की भाषा, द.प्र.सं. की धारा 172, 161, व 162 की भाषा से अधिक विस्तृत है - यदि न्यायालय इस

निष्कर्ष पर पहुँचता है कि दस्तावेज प्रस्तुत करना आवश्यक या वांछनीय है तब न्यायालय को द.प्र.सं. की धारा 91 के अंतर्गत दस्तावेज समन करने का अधिकार प्राप्त है – द.प्र.सं. की धारा 172 के अंतर्गत केस डायरी का संधारण किया जाता है और धारा 91 के अंतर्गत अनुध्यात एक दस्तावेज है – यदि न्यायालय इस निष्कर्ष पर पहुँचता है कि दस्तावेज को प्रस्तुत किया जाना आवश्यक या वांछनीय है तब न्यायालय को साक्षी का खंडन करने के लिए डायरी में दिये गये कथनों का उपयोग करने के प्रयोजन हेतु दस्तावेज समन करने का अधिकार है – पूर्ववर्ती समय पर दस्तावेजों को समन करने के लिए न्यायालय पर कोई प्रतिरोध नहीं है, यदि विचारण करने वाला न्यायालय समझता है कि ऐसे दस्तावेजों का प्रस्तुतीकरण विचारण के प्रयोजन हेतु आवश्यक या वांछनीय है – आरोप विरचित करने का आदेश अभिखंडित – अभियोजन को पूर्ववर्ती कथन प्रस्तुत करने के लिए निदेशित किया गया और तत्पश्चात विधिनुसार प्रकरण में कार्यवाही करने के लिए न्यायालय को निदेशित किया गया।

Case referred :

AIR 2005 SC 359 = 2004 AIR SCW 6813.

Vijay Sunderam, for the applicants.

F.A. Shah, P.L. for the non-applicant/State.

ORDER

G.D. SAXENA, J. - This revision petition under Section 397/401 of the Code of Criminal Procedure 1973 is directed against both the orders dated 16th and 21st February 2012 recorded in Sessions Case No. 71/2012, by the First Additional Sessions Judge, Gwalior firstly thereby rejecting the application preferred by the petitioners under Section 91 of Cr.P.C. and secondly after hearing the prosecution and accused, the charges were framed against all of the accused for commission of offence punishable under Sections 365, 366 506 Part-II of I.P.C. A charge for commission of offence punishable under Section 376(1) of Cr.P.C. was also framed against accused-petitioner Shriram.

(2) In short, relevant facts for adjudication of the matter are that on the day of incident, all the accused abducted knowingly or had reason to belief that the victim will be compelled to marry with accused Shriram or intercourse against her will or her wishes and after abduction confined her when she was wearing ornaments of gold and having cash of Rs. 20.000/-, in a secret place. It is alleged that thereafter, at Shivpuri, accused Shriram committed rape on her. It is further stated that all the accused criminally intimidated her to cause death of her brother and father. They also caused injuries by throwing Acid on

her body. On the report lodged, an investigation was commenced. The victim was recovered and thereafter charge-sheet was filed. On committal, the trial is under progress.

(3) The contention of the learned counsel appearing for the petitioners/accused is that all the accused are closely related to each other and are residing at different places. They are engaged in their separate business. It is contended that the victim went with accused No.1 as per her free will and lived with him in a different place. She willfully married to him. Their marriage was duly registered before the authorities at Gaziabad U.P. After recovery of the victim, she gave her statement before the I.O. on 23rd April 2011. It is submitted that the statement recorded on 23rd April 2011 of the victim was withheld by the I.O. and he did not file the same at the time of filing charge-sheet before the court. It is contended that after 23rd April 2011, the victim was handed over in a custody to her uncle. At later stage of the investigation, the I.O. recorded her another statement which was against the accused and filed with the charge-sheet in the court. It is further submitted that during trial, the petitioners/accused filed the application before the court-below under Section 91 of Cr.P.C. seeking direction to file all the documents collected during investigation as well as the statement of the prosecutrix dated 23rd April, 2011 recorded earlier by the I.O., which were necessary to prove the innocence of the accused before the court, but their prayer was rejected by the learned trial Judge and the charges have been framed, hence, this revision.

(4) *Per contra*, the learned Panel Lawyer appearing for the respondent/State apposed the contention of the petitioners and by supporting the impugned order passed by the trial Judge contended that the order has been passed after due consideration on the documents filed alongwith the charge-sheet and after hearing the counsel for both the sides. Accordingly, it is prayed that the revision may be dismissed.

(5) Heard the learned counsel appearing on behalf of the petitioners/accused as well as the learned Panel Lawyer for the respondent/State. Also perused the petition and all the documents available with case diary.

(6) At this juncture, it would be useful to reproduce Section 91 Cr.P.C, which reads as is under:

91. Summons to produce document or other thing.-

(1) Whenever any Court or any officer in charge of a police

station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

(7) In the case of *State of Orissa Vs. Debendra Nath Padhi* (AIR 2005 SC 359) = 2004 AIR SCW 6813, the Hon. Apex court held:

"25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under

the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

27. In so far as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt inherent limitations as to the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object. Before the trial Court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations

are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us herein before. Further, the observations cannot be understood to mean that the accused has a right to produce any document at stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19."

(8) On reading of Section 162 of Cr.P.C. and Section 145 of the Evidence Act and bearing in mind the object of the said sections, it is clear that an accused in a criminal trial has the right to make use of the previous statement of a witness including the statements recorded by the Investigating agency during the course of an investigation for the purpose of establishing a contradiction in the evidence of a witness or to discredit the witness. But the question for consideration is, how does the accused exercise this right with reference to a previous statement of a witness which is recorded by the I.O. in that case ? This right, certainly does not flow from Section 162 of Cr.P.C. read with Section 145 of the Evidence Act nor does it flow from Section 172 of Cr.P.C., nor is the accused is entitled to these previous statements under Section 207 of the Code. But the accused cannot be denied of his limited benefit of using the said previous statements given during the course of another investigation. The answer to this question lies in Section 91(1) of Cr. P.C. The language of Section 91 of the Code is much wider than the language of Sections 172, 161 and 162 of Cr.P.C. If that be so and if the Court comes to the conclusion that production of such document is necessary or desirable, then the Court is entitled to summon the document under Section 91 of the Code.

(9) It is well-settled law that the case diary maintained under Section 172 of Cr.P.C. is a document as contemplated under Section 91(1) of Cr.P.C. If the Court comes to the conclusion that production of such a document is necessary or desirable, then the Court is entitled to summon the document under Section 91 of the Code for the purpose of using the statements made in the diary for contradicting a witness.

(10) Now coming to the factual aspects of the present case, it appears that in the course of inquiry on the report lodged by the father of victim about missing of the prosecutrix, after her recovery from petitioner-accused Shriram, her statement was recorded on 23rd April 2011 and thereafter missing inquiry was closed. Later on, under Section 156(3) of Cr.P.C., the F.I.R. was lodged

and investigation was conducted. In the charge-sheet papers filed before the criminal court, the statements recorded by the Inquiry Officer with respect to inquiry of missing person were not filed and the copy of the statement of victim was not delivered to the accused. When the victim is called by the prosecution in the trial court and her statement is to be reduced into writing, her statement recorded by the inquiry-officer/investigation to prove his defence for purpose of contradiction/omission may be used by the accused. Other statements of witnesses under Section 233 (3) of Cr.P.C. recorded by the Inquiry Officer may be called by the accused at the time of defence.

(11) In view of the aforesaid dictum laid down by the Apex Court, there is no embargo for the Court to summon the documents and the statement made before the police by the prosecutrix, at earlier point of time, if the Court trying the case considers that production of such documents are necessary and desirable for the purpose of trial, in exercise of its power under Section 91 of Cr.P.C.

(12) In this view of the matter, in the opinion of this court, the previous documents pertaining to the trial in hand could be directed to be filed by the Investing Agency under Section 91 of the Code.

(13) As the case is at the initial stage, no harm or prejudice will be caused to the prosecution, if the said documents are called for. Thus, by considering the matter from any angle, I am of the view that the said documents are necessary for the purposes of proper adjudication of the matter and to arrive at just and proper conclusion in the trial. The aforesaid aspect of the matter is not considered by the trial court in proper perspective, while rejecting the application filed on behalf of the accused-petitioners herein. Absolutely, no proper reasons are assigned by the trial court to conclude as to how the documents to be called for are irrelevant for the purpose of deciding this case. Under such circumstances, this Court is of the considered opinion that the trial court has erred in rejecting the application filed on behalf of the accused-petitioners under Section 91 of Cr.P.C.

(14) Consequently, the orders in question are liable to be quashed. Hence, the following order is made.

(15) Revision is allowed. The impugned orders dated 16th and 21st February, 2012 are set aside. The application filed on behalf of the accused-petitioners under Section 91 of Cr.P.C. is allowed. It is directed that the learned

trial court shall summon the documents mentioned in the application filed by the petitioners through the Investigating Agency and thereafter proceed with the matter in accordance with law, without being influenced by any of the observations made during the course of this order.

Revision allowed.

**I.L.R. [2012] M.P., 2034
CRIMINAL REFERENCE**

Before Mr. Justice Rakesh Saxena & Mr. Justice T.K. Kaushal

Cr. Ref. No. 2/2011 (Jabalpur) decided on 25 July, 2012

IN REFERENCE

...Applicant

Vs.

RAHUL RAJAK & ors.

...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 27 - Recovery of Dead Body - Appellant disclosed that they had thrown the dead body in the river at a particular place - Dead Body recovered from another place - Held - It is common knowledge that a thing thrown in river may not be found at the same place, as it might have travelled to some other place with the flow of water - Dead body thrown in the river may not be recovered at the time when it is being searched and it may appear after some more time - If the body of deceased was recovered by other persons on the disclosure made by accused, it is to be deemed to have been recovered in consequence of the information given by accused. (Para 37)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 27 - शव की बरामदगी - अपीलार्थी ने प्रकट किया कि उन्होंने शव को नदी में एक विशिष्ट स्थान पर फेंका था - शव अन्य स्थान से बरामद - अभिनिर्धारित - यह सामान्य ज्ञान है कि नदी में फेंकी गई कोई वस्तु उसी स्थान पर नहीं पाई जाती क्योंकि वह पानी के प्रवाह के साथ किसी अन्य स्थान पर जा सकती है - हो सकता है कि नदी में फेंका गया शव उस समय बरामद न हो सके जब उसकी तलाश की जा रही हो और कुछ समय पश्चात् प्रकट हो सकता है - यदि मृतक का शव अभियुक्त द्वारा किये गये प्रकटन के आधार पर अन्य व्यक्तियों द्वारा बरामद किया गया, तब उसे अभियुक्त द्वारा दी गई सूचना के परिणामस्वरूप बरामद किया जाना समझा जाना चाहिए।

B. Evidence Act (1 of 1872), Section 9 - Identification of articles - Details of ornaments - Merely because no details of design

of chain or other articles were given by the father of the deceased would not make his evidence unreliable as the articles were identified by him because deceased used to wear these articles - Initial suspicion was that of abduction and demand of ransom and only after recovery of dead body the father of the deceased came to know that the aforesaid articles were removed from the body of his son - Recovery of the articles from the possession of the appellant proved. (Para 51)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 9 - वस्तुओं की पहचान - आमूषणों का विवरण - मात्र इसलिए कि मृतक के पिता द्वारा चैन और अन्य वस्तुओं की डिजाईन का विवरण नहीं दिया गया, उसकी साक्ष्य को अविश्वसनीय नहीं बनायेगा, चूंकि उसने वस्तुओं की पहचान की क्योंकि मृतक उन वस्तुओं को पहना करता था - प्रारंभिक संदेह व्यपहरण व फिरौती की मांग का था और केवल शव बरामद होने के पश्चात मृतक के पिता को पता चला कि उसके पुत्र के शरीर से उपरोक्त वस्तुओं को हटाया गया था - अपीलार्थी के कब्जे से वस्तुओं की बरामदगी साबित की गई।

C. *Penal Code (45 of 1860), Sections 302, 411 - Recovery of articles belonging to deceased* - Evidence clearly show that the recovered articles were stolen either before or after the death of deceased - Recovery of articles belonging to and in possession of deceased at the time of his murder, recovery of the same at the instance of the accused, certainly establishes close link of accused in commission of offence. (Para 57)

ग. दण्ड संहिता (1860 का 45), धाराएं 302, 411 - मृतक की वस्तुओं की बरामदगी - साक्ष्य स्पष्ट रूप से दर्शाता है कि बरामद की गई वस्तुएं चोरी की गई, या तो मृतक की मृत्यु से पूर्व या उसकी मृत्यु के पश्चात - अभियुक्त की निशानदेही पर वस्तुओं की बरामदगी जो हत्या के समय मृतक की थी और उसके कब्जे में थी, निश्चित रूप से अभियुक्त का अपराध कारित करने में नजदीकी संबंध स्थापित करती है।

D. *Criminal Procedure Code, 1973 (2 of 1974), Sections 306, 307 - Grant of Pardon - Recording of statement of approver* - Pardon was granted by Trial Court after framing of Charge - Provisions of Section 306 would apply when the pardon is granted at committal stage - After the commitment, the pardon has to be granted by the Trial Court subject to the conditions specified in Section 306(1) of Cr.P.C. - Section 307 does not contemplate recording of any statement of approver. (Para 65)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 306, 307 – क्षमा प्रदान की जाना – इकबाली साक्षी का कथन अभिलिखित किया जाना – विचारण न्यायालय द्वारा आरोप विरचित किए जाने के पश्चात क्षमा प्रदान की गई – धारा 306 के उपबंध तब लागू होंगे जब क्षमा को उपापण के प्रक्रम पर प्रदान किया जाता है – उपापण पश्चात विचारण न्यायालय द्वारा द.प्र.सं. की धारा 306(1) में विनिर्दिष्ट शर्तों के आधीन प्रदान किया जाना चाहिए – धारा 307 इकबाली साक्षी के किसी कथन को अभिलिखित किया जाना अनुध्यात नहीं करती।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 307, Evidence Act (1 of 1872), Section 27 - Disclosure Statement of approver - Disclosure statement made under Section 27 of Evidence Act could be treated as a previous statement - Omission of certain facts in disclosure statement would not render the evidence of approver unreliable because the purpose for which this statement was recorded was the recovery of mobile set. (Paras 67, 68)

ड. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 307, साक्ष्य अधिनियम (1872 का 1), धारा 27 – इकबाली साक्षी का प्रकटन कथन – साक्ष्य अधिनियम की धारा 27 के अंतर्गत दिया गया प्रकटन कथन, पूर्ववर्ती कथन के रूप में माना जा सकता है – प्रकटन कथन में कतिपय तथ्यों का लोप इकबाली साक्षी के साक्ष्य को अविश्वसनीय नहीं बनाएगा क्योंकि जिस प्रयोजन हेतु यह कथन अभिलिखित किया गया था वह था मोबाईल सेट की बरामदगी।

F. Penal Code (45 of 1860), Section 120B - Conspiracy - Conspiracies are proved by circumstantial evidence - Existence of conspiracy and its objectives have to be inferred from the circumstances and conduct of accused persons - Incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. (Para 69)

च. दण्ड संहिता (1860 का 45), धारा 120बी – षडयंत्र – षडयंत्र को परिस्थितिजन्य साक्ष्य द्वारा साबित किया जाता है – षडयंत्र का अस्तित्व एवं उसके उद्देश्यों का निष्कर्ष परिस्थितियों से और अभियुक्तगण के आचरण से निकालना होता है – दोषी बनाने वाली परिस्थितियों से घटनाक्रम की ऐसी श्रृंखला तैयार होनी चाहिए जिससे अभियुक्त के दोषी होने के बारे में निष्कर्ष निकाला जा सके।

G. Criminal Procedure Code, 1973 (2 of 1974), Sections 307 - Approver - Corroboration - There must be some additional evidence rendering it probable that the story of the accomplice is true and that is reasonably safe to act upon it - Independent evidence must not only

make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of accomplice or complainant that accused has committed the crime - Corroboration must come from independent sources and ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another - Corroboration need not be direct evidence that the accused committed the crime.

(Para 70)

छ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 307 - इकबाली साक्षी - पुष्टि - कुछ अतिरिक्त साक्ष्य होनी चाहिए जिससे कि सह अभियुक्त की कहानी सत्य होने की संभावना बन सके और उस पर कार्यवाही किये जाने के लिए जो युक्तियुक्त रूप से सुरक्षित है - स्वतंत्र साक्ष्य न केवल उस पर यह विश्वास करने के लिए सुरक्षित होना चाहिए कि अपराध कारित किया गया है बल्कि सह अभियुक्त या अभियुक्त की परिसाक्ष्य के कुछ तात्त्विक विशिष्टियों की पुष्टि कर किसी प्रकार अभियुक्त को अपराध से युक्तियुक्त रूप से संबद्ध या संबद्ध होने की ओर प्रवृत्त कर सकना चाहिए कि अभियुक्त ने अपराध कारित किया है - पुष्टि स्वतंत्र स्रोत से होनी चाहिए और सामान्यतः एक सह अभियुक्त की परिसाक्ष्य अन्य की परिसाक्ष्य की पुष्टि करने के लिए पर्याप्त नहीं होगी - पुष्टि को प्रत्यक्ष साक्ष्य होना आवश्यक नहीं कि अभियुक्त ने अपराध कारित किया है।

H. Penal Code (45 of 1860), Section 302 - Death Penalty - Rarest of Rare Case - Deceased was called by approver at the instance of appellant No.1 as the accused were known to the deceased - Approver took the deceased to Bhedaghat where all the three accused were present - Sim used by approver was taken back by accused No. 2 - Deceased was never seen alive thereafter - Dead body of deceased was recovered from the river at the instance of the accused - Articles belonging to deceased were recovered from accused - Demand of ransom was made from the parents of deceased using the mobile phone of deceased - Delivery of 30 lacs was picked by accused No. 1 which was recovered from his possession - Case does not fall within the category of rarest of rare case - Death reference rejected - Accused persons sentenced to imprisonment for life. (Paras 73 to 75)

ज. दण्ड संहिता (1860 का 45), धारा 302 - मृत्युदण्ड - विरल से विरलतम प्रकरण - अपीलार्थी क्र. 1 के कहने पर इकबाली साक्षी द्वारा मृतक को बुलाया गया क्योंकि अभियुक्तों से मृतक परिचित था - इकबाली साक्षी मृतक को भेड़ाघाट ले गया जहां सभी तीनों अभियुक्त उपस्थित थे - इकबाली साक्षी द्वारा

प्रयोग की गई सिम अभियुक्त क्रं. 2 द्वारा वापिस ली गई – मृतक को इसके पश्चात कभी जीवित नहीं देखा गया – अभियुक्त की निशानदेही पर मृतक का शव नदी से बरामद किया गया – मृतक की वस्तुएं अभियुक्त से बरामद की गई – मृतक के मोबाईल फोन का उपयोग कर मृतक के माता-पिता से फिरोती की मांग की गई – 30 लाख की सुपुर्दगी अभियुक्त क्रं. 1 द्वारा उठायी गई थी जिसे उसके कब्जे से बरामद किया गया था – प्रकरण विरल से विरलतम की श्रेणी में नहीं आता – मृत्यु निर्देश अस्वीकार – अभियुक्तगण को आजीवन कारावास से दण्डादिष्ट किया गया।

Cases referred :

AIR 1974 SC 2294, AIR 1982 SC 839, AIR 1971 SC 2016, AIR 1991 SC 1388, (2003) 3 SCC 106, AIR 1956 SC 54, AIR 1977 SC 1063, AIR 1980 SC 1753, AIR 1982 SC 1227, (2011) 11 SCC 724, AIR 1963 SC 599, AIR 1968 SC 594, AIR 1964 SC 961, AIR 1973 SC 1188, AIR 1975 SC 856, AIR 2000 SC 3352, AIR 2008 SC 2991, AIR 2008 SC 391. (2011) 3 SCC 306.

Umesh Pandey, G.A. for the applicant/State.

Surendra Singh with Ashwani Kumar Dubey, for the complainant.

S.C. Datt with Siddharth Datt, R.S. Patel, Alok Vagrecha, for the respondents/Accused.

J U D G M E N T

The Judgment of the Court was delivered by :
RAKESH SAKSENA, J. - Aforesaid criminal reference and appeals arise out of the common impugned judgment, therefore, this judgment shall govern the disposal of all the above cases.

1. Appellants have filed appeals against the judgment dated 30th July 2011, passed by III Additional Sessions Judge (Fast Track Court), Narsinghpur, in Sessions Trial No.214/2009, convicting them under Sections 364A/34, 302/34 and 302/120B, 201 and 404/34 of the Indian Penal Code and sentencing them to death with fine of Rs.100/-, rigorous imprisonment for seven years with fine of Rs.1000/- and rigorous imprisonment for three years with fine of Rs.100/-, on each count respectively. In default of payment of fine, appellants have further been sentenced to rigorous imprisonment for one month, on each count respectively.

2. Learned trial judge has since awarded death sentence to all the appellants, he has made reference to this Court for confirmation of the same.

3. In short, the prosecution case is that on 6.5.2009, at about 10.30 am, Smt. Nidhi Thakur made a telephonic report to police station, Narsinghpur that her brother Pankaj had gone to Jabalpur in the morning of 5.5.2009 for getting his Wagon R car No. MP-20-CA-6184 serviced. He was with Pradeep Dubey till 4.00 O'clock in the evening, but, thereafter, he could not be contacted. His mobile was also switched off. In the night, at about 12.30 pm, from the mobile of Pankaj some unknown person made a call on the mobile of Krishna Rajput, the mother of Pankaj, that Pankaj had been abducted in Jabalpur and if they wanted him to be released, they will have to pay ransom. He threatened that if information was given to police, Pankaj would be killed. On 6.5.2009, at about 9.00 am, Krishna Rajput again received a call that if she wanted to see her son alive, she will have to manage Rs.80 lacs as ransom. Ultimately, the deal was struck for Rs.30 lacs. On the report lodged by Smt. Nidhi Thakur, a case under Section 364 of the Indian Penal Code was registered by ASI Umesh Dubey (PW-22).

4. On the orders of DIG, Anti Terrorist Squad (for short ATS), a team of ATS headed by Sub Inspector Ritesh Sahu (PW-21) was constituted to proceed on the directions of Superintendent of Police, Narsinghpur. Ritesh Sahu, in the morning of 7.5.2009, went at the house of Pankaj Thakur and suggested his family members to negotiate with the abductor. Abductor asked Raghuvir Singh, the father of Pankaj, to bring money to Jabalpur in a car. Raghuvir Singh arranged Rs.30 lacs and kept them in two bags and left for Jabalpur in a Scorpio jeep with Inspector Ritesh Sahu in the garb of driver. In Jabalpur, on the instructions of abductor, they put the bags of money on a hand cart in the market and kept a vigil from the jeep. After some time, accused Rahul Rajak picked up the aforesaid bags on a motorcycle and went to hotel Blue Moon. Inspector Sahu informed his team and followed the accused. When accused Rahul entered his room of hotel, inspector Sahu with his team made a raid and took control of accused Rahul Rajak, who alone was in room. Inspector Sahu searched Rahul and his room and seized the currency notes of Rs.30 lacs kept in two bags. He also seized two mobile sets and motorcycle used for carrying money from the possession of accused. Inspector Sahu alongwith accused, Raghuvir Singh and the seized money went back to Police Station, Narsinghpur.

5. At about 9.30 pm, on 7.5.2009, accused Rahul disclosed that he threw dead body of Pankaj in Narmada river at Bhedaghat and left the Wagon

R car of Pankaj at Raj Marg near Police Station Suatala. This information was recorded in memorandum (Ex.P/19) and Rahul was arrested vide arrest memo Ex.P/23. Wagon R car of deceased was already seized by police Suatala lying abandoned.

6. On 8.5.2009, Sub Inspector Swarnjeet Singh Dhami (PW-23) was called from Police Station Themli and was handed over the investigation of the case. On the basis of information given by accused, Inspector Dhami alongwith accused and witnesses went to Bhedaghat. The dead body of Pankaj was recovered from Narmada river at Sarawati Ghat. A Murg intimation was recorded and the dead body was identified by Sunil and Hemant Yadav. After recording inquest memorandum (Ex.P/7), body was sent to Medical College, Jabalpur for postmortem examination.

7. Dr. Abhishek Singh (PW-12) conducted postmortem examination of the body of deceased and found injuries including stab injuries on his body. He gave postmortem examination report (Ex.P/16).

8. On 8.5.2009, Sub Inspector Swarnjeet Singh Dhami (PW-23) arrested accused Dolly Ladiya and on her disclosure recovered a Nokia mobile from her kitchen.

9. On the information given by accused Rahul on 10.5.2009 a broken knife and his clothes were seized from his house. On the same day, two gold rings of deceased were recovered and seized from his shop vide seizure memo Ex.P/22. Inspector Dhami obtained the sample of the voice of accused Rahul in CD. He also seized the register of Blue Moon Hotel.

10. On 20.5.2009, Inspector Dhami interrogated accused Ashok Vishwakarma and on his information seized two mobile phones, a gold chain and a motorcycle from his possession. On the same day, on the information of accused Satish Parochi, he seized two mobiles and a broken gold bracelet from his possession vide seizure memo Ex.P/28.

11. On 1.8.2009, test identification parade in respect of seized gold rings, chain and bracelet was conducted by Tehsildar/Executive Magistrate Atul Singh (PW-9). Articles were identified by Raghuvir Singh, the father of deceased.

12. On investigation, it was found that Preeti Katariya (PW-4) introduced accused Rahul Rajak to accused Dolly Ladiya (PW-1). Dolly Ladiya then got acquainted with deceased Pankaj, accused Ashok Vishwakarma and Satish

Parochi who were friends. All the accused persons hatched conspiracy to abduct Pankaj for obtaining ransom from his parents and also to commit his murder. To fulfill the said design, on 5.5.2009, at the insistence of accused Rahul, Dolly Ladiya called Pankaj and took him to Bhedaghat, where he was killed.

13. After obtaining call records of various seized mobile phones and completion of the investigation, charge sheet against accused persons including accused Dolly Ladiya was filed in the Court of Chief Judicial Magistrate, Narsinghpur. The case was then committed to the trial court.

14. During trial, on 3.11.2009 accused Dolly Ladiya made an application before the trial court seeking tender of pardon expressing her desire to become a witness in the case. By order dated 20.11.2009, trial court exercising its powers under Section 307 Cr.P.C. allowed that application and tendered pardon to her on the condition of her disclosing full account of the facts known to her in respect of the occurrence.

15. On charges being framed, accused persons abjured their guilt and pleaded false implication.

16. Learned trial judge upon trial, after appreciating the evidence on record, held accused persons guilty and convicted and sentenced them as aforesaid.

17. Aggrieved by their conviction and sentence, accused/appellants have filed appeals before this Court, and since the sentence of death has been passed, the trial judge has made reference under Section 366 Cr.P.C. for conformation of the death sentence.

18. Learned counsel for the appellants submitted that there is no direct evidence in the case, the conviction of appellants has been based on circumstantial evidence including the evidence of approver Dolly Ladiya (PW-1). He submitted that the trial court misappreciated the evidence of Dolly Ladiya and committed error in placing reliance on it. The investigation in the case was defective. It was not proved that all the accused persons had conspired to abduct deceased for obtaining ransom. The recovery of the dead body and the ornaments of deceased at the instance of accused persons was not reliable. Shri R.S. Patel, learned counsel for accused Rahul Rajak submitted that the recovery of ransom money from the possession of Rahul was suspicious since his arrest was not made at the time of alleged recovery of money. In the alternative, learned counsel submitted that in the facts and

circumstances of the case it was not a rarest of rare case calling for award of death penalty. On the other hand, Shri Umesh Pandey, learned Government Advocate and Shri Surendra Singh, learned senior advocate for the complainant, submitted that the evidence adduced by the prosecution was sufficient to bring home the charges against accused persons. Trial court committed no error in relying upon the evidence of approver Dolly Ladiya and on the evidence of recovery of various articles belonging to deceased at the instance of accused persons. They supported and justified the judgment of conviction and sentence of death passed by the trial court.

19. We have heard the submissions made by the learned counsel for the parties, perused the impugned judgment and the evidence on record carefully.

20. It has not been disputed that Pankaj, the deceased, has died and his death was homicidal. Sub Inspector Umesh Dubey (PW-22) stated that he recorded first information report (Ex.P/4) lodged by Smt. Nidhi Thakur, sister of Pankaj, that Pankaj had been abducted. Accused Rahul Rajak was brought to Police Station, Narsinghpur on 7.5.2009 by ATS team in the night. At about 9.30 Rahul Rajak made a disclosure statement that he had thrown the dead body of Pankaj in Narmada river at Bhedaghat. He recorded the memorandum of information (Ex.P/19). Sub Inspector Swarnjeet Singh Dhami (PW-23) alongwith accused went to Bhedaghat where, at Saraswati Ghat, Shobharam (PW-5) and Prem Chand (PW-6) took out the dead body. Hemant Yadav (PW-10), a tenant of deceased, and brother-in-law of deceased viz. Sunil identified the said body of Pankaj. A memorandum (Ex.P/14) was drawn in this regard and before witnesses an inquest memorandum (Ex.P/7) was also recorded. Murg intimation reports (Ex.P/8 & P/9) were also recorded. Dead body of deceased was sent to medical college for postmortem examination. Dr. Abhishek Singh (PW-12) conducted the postmortem examination on 8.5.2009 and vide his report Ex.P/16 found his whole body distended having washerman skin over legs and palms. Lips and nostrils were eaten by aquatic animals. Tongue and eyes were bulging out. Marbling was present over the skin. Petrified froth with blood was coming out from nostrils. Following injuries were found on the body:-

- “ 1. Contusion over forehead 4” x 2½ “.
2. Contusion irregular on antero lateral and middle part of leg 3” x 2½ “.

3. Stab wound over right hypochondrium region 7" below from right nipple 3" x 1", elliptical in shape with margins clean cut. This wound had reached the abdomen cavity cutting liver and peritoneum.

4. Stab wound 8½" below the right nipple 3" x 1", 4" lateral to first stab wound, direction lightly lowered down.

In the opinion of doctor, the injuries on the body of deceased were ante-mortem and homicidal in nature. The death of deceased had been caused due to haemorrhagic shock due to knife injuries in the abdomen. His death appeared to have been caused within two days before the postmortem examination."

21. From the above evidence, in our opinion, learned trial judge rightly found that the dead body was of Pankaj, he had died due to injuries, and his death was homicidal.

22. Now the question before this Court is that whether accused appellants abducted Pankaj for ransom, caused his death and with a view to conceal offence destroyed the evidence by throwing the dead body in river.

23. Krishna Thakur (PW-7), mother of deceased, stated that on 5th May 2009 her son Pankaj alongwith his friend Pradeep Dubey had gone to Jabalpur for servicing of his car. Until 4.00 pm he was in contact with her on phone, but he did not return in the evening. In the night, at about 12.00 O'clock, she received a call from some unknown person on her mobile from the mobile of Pankaj that Pankaj had been abducted and if she wanted his release, they will have to pay for it. She wanted to talk to Pankaj, but he informed that he had administered chloroform to him. She informed the above fact to her husband, her daughter Nidhi and son-in-law Abhishek Rajput, who lived in Dhanare Colony. She also asked her daughter not to come to her house as abductor had threatened to kill Pankaj if she informed anybody. Her relatives were informed by Abhishek Rajput. In the morning Abhishek and Nidhi came to her house. Again she received a call from the abductor making demand of Rs.80 lacs for which she expressed her inability. After talks, deal was finalized for Rs.30 lacs. Abductor asked her to send money by a train to Jabalpur. When money was arranged and was carried to Jabalpur by Abhishek Rajput, it was not picked up from the appointed place instead it was told by the

abductor on phone that he did not take money because she had sent police also. Money was brought back. Thereafter police inspector Ritesh Sahu came to her house and along with her husband went to Jabalpur taking money in the jeep. Ritesh Sahu acted as driver of the jeep.

24. The evidence of Krishna Thakur (PW-7) finds corroboration from the evidence of her husband Raghuvir Singh (PW-8), Ritu Tomar (PW-3) and son-in-law Abhishek Rajput (PW-11).

25. Nidhi Rajput (PW-2) stated that till 4.30 pm she was in contact with her brother on mobile. Thereafter, her mother Krishna Thakur informed her about the occurrence. On next day in the morning she talked to the Superintendent of Police, Narsinghpur on phone and informed about the incident. On his instructions she informed the incident on phone to Sub Inspector Umesh Dubey. On the basis of her information report (Ex.P/4) was recorded. This information was treated as first information report. Learned counsel for the appellants submitted that the information recorded by police officer on telephone could not be taken as first information report. In our opinion, the submission made by the learned counsel for the appellants cannot be accepted as the aforesaid information was not against any particular person and no names of accused persons were disclosed in it, but the investigation started on its basis. Apart from it, Nidhi Rajput stated that because of fear she lodged the report on telephone. In view of the fact that Pankaj was in the clutches of abductor, who had threatened to his mother not to inform the incident to anybody including police, else he would be killed, it was quite natural to inform the police without going to police station.

26. Raghuvir Singh Rajput (PW-8), the father of deceased, corroborated the narration of Krishna Thakur (PW-7) and stated that he had sent Rs.30 lacs with son-in-law to Jabalpur, but the said money was not picked up by the abductor. Abhishek Singh (PW-11) also stated that he took Rs.30 lacs to Jabalpur in two bags and on the instructions of abductor put the same near State Bank ATM opposite Railway Platform No.1. From the evidence of these witnesses it has been established that deceased had been abducted and the abductor had demanded Rs.30 lacs as ransom for his release.

27. Raghuvir Singh (PW-8) stated that on the demand of abductor he arranged for a scorpio jeep to take ransom money to Jabalpur. Ritesh Sahu (PW-21), sub inspector in ATS, stated that on the orders of senior officers, he contacted Superintendent of Police and Police Inspector of Kotwali,

Narsinghpur and in the garb of driver of the scorio jeep went with Raghuvir Singh to Jabalpur. He kept Rs.30 lacs arranged by Raghuvir Singh in two bags containing Rs.22 lacs and Rs.8 lacs. According to him, on way, when abductor wanted to talk to driver of the jeep, he talked to him. On his instructions, he reached at Teen Patti square and put both the bags containing money on a handcart near the road. When he proceeded ahead, he kept an eye on the bags and informed the events to other members of the ATS team. After some time, a boy (Rahul Rajak) came on a motorcycle and picked up the bags. He followed that boy, who went to Blue Moon Hotel and parked his motorcycle. He carried bags in the hotel. Alongwith other members of team and witness Murad Ali, he raided the room of that boy, who disclosed his name to be Rahul Rajak.

28. Ritesh Sahu (PW-21) took search of Rahul and also the room of hotel. He seized two bags containing Rs.30 lacs and two mobile phones from the possession of accused Rahul. He also seized the motorcycle on which Rahul carried money to hotel, vide seizure memo Ex.P/11.

29. The evidence of Inspector Ritesh Sahu (PW-21) stood corroborated by the evidence of Murad Ali (PW-16) and Raghuvir Singh (PW-8).

30. Since accused Rahul gave no satisfactory answer about Pankaj, Ritesh Sahu brought him to Narsinghpur Police Station.

31. Learned counsel for the appellant Rahul contended that the evidence of aforesaid witnesses about the recovery of seizure of Rs.30 lacs from the possession of accused Rahul was not reliable because the arrest of Rahul was not made then and there. He placed reliance on *Sadaram vs. State of M.P.* - AIR 1974 SC 2294 and *Mohanlal Gangaram Gehani vs. State of Maharashtra* - AIR 1982 SC 839.

32. In case of *Sadaram* (Supra), accused was though named in the first information report as an assailant, but was not arrested by the police till a day after the occurrence and there was no acceptable evidence against him of any eyewitness to the occurrence. Therefore, the Apex Court held that his name was inserted in FIR due to enmity. In the instant case, the situation is different. The accused was not named in the first information report, but the ransom money was recovered from him in the hotel and the seizure memo was prepared in the hotel, therefore, even if the formal arrest of accused Rahul was made subsequently when ATS team handed over his custody to the investigating

officer of the case, no infirmity can be held to have been committed. In case of *Mohanlal* (Supra), similarly, police though came to know the name of assailant, but did not take any step to arrest or to cause the arrest of any of the accused. The facts of instant case are quite different.

33. The evidence of Ritesh Sahu (PW-21) stood further corroborated from the evidence of Ajab Singh (PW-3), the manager of Blue Moon Hotel, who stated that a police inspector seized register of the hotel vide seizure memo Ex.P/18. In this register it was mentioned that on 7.5.2009 at 10.10 am Rahul Lunawat had taken a room. Ajab Singh identified accused Rahul in court as a person who had taken the room No.304 in his hotel on rent. He also stated that Inspector Ritesh Sahu seized Rs.30 lacs in two bags from Rahul.

34. Raghuvir Singh (PW-8) and Abhishek Singh (PW-11) further proved that they had kept cash of Rs.30 lacs for payment as ransom in two bags in the house of Raghuvir Singh. In that regard memorandum (Ex.P/10) was drawn by Inspector Ritesh Sahu. The same cash in bags was taken to Jabalpur and was picked up by accused Rahul and ultimately seized from Rahul. In our opinion, it has been proved beyond doubt that the money arranged by Raghuvir Singh for payment as ransom to abductor was recovered from the possession of accused Rahul.

35. The next question is whether the dead body of Pankaj was recovered at the instance of accused Rahul. According to Inspector Ritesh Sahu (PW-21), after recovery of money he brought accused Rahul and the bags of money to Police Station, Narsinghpur and handed over money and accused to Sub Inspector Umesh Dubey (PW-22), who was investigating the case. Umesh Dubey in the night of 7.5.2009 at about 9.30 interrogated Rahul whereupon he disclosed that he threw the dead body of Pankaj in Narmada river at Bhedaghat and that the Wagon R car MP-20-CA-6184 in which Pankaj had gone to Jabalpur was left by him on Raj Marg. A disclosure memo (Ex.P/19) was recorded in presence of Dipak Sahu (PW-14). Inspector Swarnjeet Singh Dhami (PW-23) deposed that on the basis of disclosure made by Rahul he went to Bhedaghat taking Rahul with him and got a search made for the body. Dead body of Pankaj was found in the river at Saraswati Ghat (Bhedaghat). A Murg intimation report (ExP/9) in that regard was recorded by him. The dead body was identified by Hemant Yadav (PW-10) and a memorandum of identification (Ex.P/14) was recorded. Evidence of Inspector

Swarnjeet Singh stood corroborated by the evidence of Shobh Ram (PW-5) and Premchand (PW-6), who, on the requisition of police, took out the body from Narmada river and witnessed inquest. Murg intimation reports (Ex.P/8 and P/9) were signed by Premchand (PW-6).

36. Learned counsel for the appellant Rahul submitted that the recovery of dead body of deceased from Saraswati Ghat cannot be held to have been on the information given by accused Rahul because it was not made in his presence. In this regard, evidence of Inspector Swarnjeet Singh Dhami (PW-23) is significant, who deposed that on the basis of disclosure (Ex.P/19) made by accused Rahul, he went to Bhedaghat taking Rahul with him and got the dead body searched. When the body was found, a Murg (Ex.P/9) was recorded.

37. Even otherwise, the scope of discovery of an article from a river has to be appreciated in a different manner. It is common knowledge that a thing thrown in a river may not be found at the same place, as it might have travelled to some other place with the flow of water. The dead body thrown in the river may not be recovered at the time when it is being searched and it may appear after some more time. In these circumstances, if the body of deceased was recovered by other persons on the disclosure made by accused, it is to be deemed to have been recovered in consequence of the information given by accused. An accused, who made disclosure, cannot be made to sit near the river all the time till the body or article is recovered.

38. Shri R.S. Patel, learned counsel for accused Rahul placing reliance on the case of *Bakshish Singh v. The State of Punjab*-AIR 1971 SC 2016 submitted that the recovery of body at the instance of accused Rahul is not a conclusive circumstance to indicate that he committed murder of deceased.

39. In case of *Bakshish Singh* (supra) the only incriminating evidence against the appellant was his pointing the place where the dead body of deceased had been thrown. The Apex Court held it not to be a conclusive circumstance though it raised a strong suspicion against the appellant. It was observed that even if appellant was not a party to a murder, he could have come to know the place where the dead body of deceased had been thrown. Further, from the fact that at the bank of river, where the dead body was thrown, the broken teeth and parts of human body were lying, therefore, any one, who saw those parts could have inferred that the dead body must have been thrown into the river near about that place. In our opinion, the facts of

the instant case are clearly distinguishable.

40. The facts of the case of *Jaharlal Das vs. State of Orissa*-AIR 1991 SC 1388 cited by learned counsel for accused Rahul are also different wherein Apex Court observed that where the circumstance relied on by the prosecution that the accused and the deceased were last seen together was not proved beyond doubt nor the recovery of dead body at the instance of accused was proved nor it was mentioned in the inquest report as to how the body was recovered and no Panchnama under Section 27 of the Evidence Act of the recovery of the body was made, accused was entitled to acquittal on benefit of doubt.

41. In the present case, before the information given by accused Rahul, it was not in the knowledge of any one that the dead body of Pankaj was to be found in the river at Bhedaghat.

42. From the evidence adduced by the prosecution, we are satisfied that the dead body of Pankaj was recovered at the instance of accused Rahul.

43. Learned counsel for the appellants next submitted that the recovery of the ornaments from accused/appellants allegedly belonging to deceased is doubtful. Learned trial judge committed error in holding that the articles seized from accused persons belonged to deceased.

44. Inspector Swarnjeet Singh Dhami (PW-23) stated that on 10.5.2009 at about 4.00 pm accused Rahul disclosed that the knife used in commission of offence was kept by him in the balcony of his kitchen and two gold rings belonging to deceased were kept by him concealed in drawer of his shop. A memorandum (Ex.P/2) in this regard was recorded by him. On the same day, at about 4.30 pm, a knife was recovered from the house of Rahul and similarly two gold rings were seized from his shop viz. Sharda Jewelers. Memorandum of seizure (Ex.P/22) in respect of rings was drawn in presence of Dipak Sahu and Rakesh. Dipak Sahu (PW-14) supported the evidence of Inspector Swarnjeet Singh.

45. Swarnjeet Singh Dhami (PW-23) further deposed that on 20.5.2009 he interrogated accused Ashok Vishwakarma, who informed that the gold chain of deceased was kept in a box in his house. This information was recorded by him in presence of Rajkumar (PW-17) in memorandum (Ex.P/25). In consequence of that information, Ashok Vishwakarma produced the gold chain from his house, which was seized vide memorandum Ex.P/27:

46. According to Inspector Dhami (PW-23), accused Satish Parochi, on 26.5.2009, gave information about a gold bracelet of deceased, which was recovered in consequence of his information from a bag kept in his house. The said information (Ex.P/26) and recovery/seizure (Ex.P/28) were recorded before witness Rajkumar (PW-17). Rajkumar (PW-17), the attesting witness of aforesaid memoranda (Ex.P/25, P/27, P/26 and Ex.P/28), corroborated the evidence of Inspector Swarnjeet Singh Dhami (PW-23). On examination of the statement of aforesaid witnesses, we find their evidence reliable in respect to recoveries of gold rings, gold chain and bracelet from the possession of accused/appellants.

47. Learned counsel for the appellants vehemently argued that it was not established that the articles seized from the accused persons belonged to deceased. Except Raghuvir Singh Rajput (PW-8), the father of deceased, and approver Dolly Ladiya (PW-1) none else identified the seized articles as the articles of deceased. The evidence of Dolly Ladiya (PW-1) was not reliable since her evidence had no corroboration from any prior test identification evidence.

48. On perusal of the evidence of Dolly Ladiya, we find that in the court she identified rings, bracelet and gold chain and stated that these articles were worn by the deceased. She had seen rings in the hand of deceased while he was driving the car. In cross-examination, she admitted that she had seen these articles in police station while she was in custody. Admittedly, she did not participate in any prior test identification parade. She admitted that she did not disclose to anybody that she could identify the said ornaments of deceased prior to her statement in the court. In the above circumstances, we do not find it safe to place reliance on the evidence of Dolly Ladiya (PW-1) in respect to identification of ornaments.

49. Raghuvir Singh Rajput (PW-8), the father of deceased, identified the aforesaid articles being that of his son. According to him, when Pankaj left his house, he was wearing the said articles. He identified the rings, gold chain and bracelet in test identification parade (Ex.P/13) because Pankaj used to wear these articles on his body and he used to see. Evidence of Raghuvir Singh Rajput (PW-8) finds corroboration from the test identification parade conducted by Tahsildar Atul Singh (PW-9). Atul Singh (PW-9) stated that on 1.8.2009 he conducted test identification parade of the rings, gold chain and bracelet in meeting hall of Tahsil Office. Raghuvir Singh correctly identified

these articles.

50. Learned counsel for the appellants submitted that the aforesaid articles were recovered/seized in the month of May 2009, but they were put up for test identification parade on 1.8.2009. In view of the unexplained delay and the fact that the ornaments were of common pattern which were commonly available in the market, the evidence of test identification done by Tahsildar could not be relied upon. He placed reliance on the case of *Bharat vs. State of M.P.* (2003) 3 SCC 106. We are unable to agree with the submission made by the learned counsel for the appellants; firstly for the reason that the defence did not seek any explanation from the investigating officer for the delay and the fact that the circumstances in the case of *Bharat* (supra) were different. In that case the stolen articles put for identification were the ornaments of common pattern like silver ornaments (Toda and Khaghwari) not of any particular design, but were commonly available in the market and generally worn by village ladies. In that case, some portion of paper was also stuck to the recovered ornaments, which was visible at the time of identification.

51. Learned counsel for the appellants pointed out that the gold chain, which was recovered from accused Ashok contained some white metal also, but this fact was not stated by Raghuvir Singh (PW-8). Merely because no details of the design of chain or other articles were given by this witness, who happened to be the father of deceased, his evidence cannot be discarded. He categorically stated that these articles were identified by him because deceased used to wear these articles. It is true that in his police statement (Ex.D/1) he did not say that he would identify the bracelet, chain and rings of deceased, but on perusal of Ex.D/1 we find that he disclosed that after recovery of the body he came to know that the aforesaid articles were removed from the body of his son. It is also significant to note that initially it was suspected to be a case of abduction for ransom and not of robbery of the articles belonging to deceased. In the fact situation of the instant case, it is quite natural for Raghuvir Singh (PW-8) to have identified the articles belonging to his son. We hold that the finding recorded by the trial court that the articles recovered from the possession of accused/appellants belonged to and were in possession of the deceased is just and proper.

52. Learned counsel for the appellants placing reliance on AIR 1956 SC 54-*Sanwat Khan & Anr. vs. State of Rajasthan*, AIR 1977 SC 1063-*Hukam Singh vs. The State of Rajasthan*, AIR 1980 SC 1753-*Nagappa Dondiba*

Kalal vs. State of Karnataka and AIR 1982 SC 1227-*Joga Gola vs. State of Gujrat* submitted that merely on the basis of recovery of articles belonging to deceased it could not be presumed that accused/appellants abducted and committed murder of deceased. The incident is said to have taken place on 6.5.2009, but the articles belonging to deceased were recovered on 10.5.2009, 20.5.2009 and 26.5.2009. Therefore, at the most accused persons could be held liable under Section 411 of the Indian Penal Code.

53. In case of *Sanwat Khan* (supra) the Apex Court held that "No hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer." In our opinion, the facts of the instant case are clearly distinguishable. In the present case there appears no room for suspicion that the articles belonging to deceased were stolen either before or after the death of deceased. The articles were on the body of deceased when he was killed.

54. In case of *Hukam Singh* (supra), the Apex Court observed that something more would be required to connect the accused with the murders than mere possession of ornaments and other articles belonging to deceased because it was quite possible that the accused may have had nothing to do with the murder and he might have merely stolen the ornaments and other articles belonging to deceased after murders were committed by some others. With due respect, this precedent does not help appellants since murder of deceased was not committed in his residential house as in case of *Hakam Singh*.

55. In case of *Nagappa Dondiba* (supra), the conviction of accused rested entirely on the evidence of recovery of some gold ornaments at the instance of accused. Apex Court observed that there was nothing to connect the accused with the murder of deceased. In these circumstances, it was held that accused could be convicted under Section 411 of the Indian Penal Code as a receiver of stolen property on the basis of presumption of Section 114 of the Evidence Act. In the case in hand, the prosecution case is not based only on recovery of the articles belonging to deceased, but also on the evidence of Dolly Ladiya (PW-1), who left the deceased with accused persons soon before

he was killed. It is also significant to note that in case of *Nagappa Dondiba*, the appellant was acquitted by the sessions judge, but in an appeal filed by the State before the High Court, the acquittal was set aside and the appellant was convicted.

56. The facts of the case of *Joga Gola* (supra) are entirely different. In this case two deceased had gone to the fields with buffaloes and did not return. It was found from the evidence that the buffaloes did not return, but were seized from the possession of the accused. The Apex Court held that since buffaloes belonged to deceased persons, the accused could not escape from conviction under Section 411 IPC though they could not be convicted for murder because it was quite possible that accused may have got hold of the buffaloes from some other fields and tried to steal them away.

57. Learned counsel for the appellants placing reliance on (2011) 11 SCC 724-*Mustkeem vs. State of Rajasthan* submitted that disclosure of a fact alone would not automatically lead to conclusion that the offence was committed by accused. Burden lies on the prosecution to establish close link between discovery of material object and its use in commission of offence. We are in no disagreement with the proposition laid down by the Apex Court. The recovery of articles belonging to and in possession of deceased at the time of his murder, at the instance of accused, certainly establishes close link of accused in the commission of offence.

58. Learned counsel for the appellants next contended that the trial court committed serious error in placing reliance on the evidence of approver Dolly Ladiya (PW-1) about the conspiracy, motive and the fact of last seen of deceased with the accused persons. Her evidence was discrepant and contradictory. There was no independent corroboration of her evidence. She made improvements in stating that accused Rahul wanted to obtain Rs.80 lacs from Pankaj and that she had left Bhedaghat in an auto instead on motorcycle with accused Ashok Vishwakarma. Placing reliance on the decisions rendered by Apex Court in AIR 1963 SC 599-*Bhiva Doulu Patil vs. State of Maharashtra*, AIR 1968 SC 594-*Lt. Commander Pascal Fernandes vs The State Of Maharashtra & Others*, AIR 1964 SC 961-*Piara Singh Vs. State of Punjab*, AIR 1973 SC 1188-*Ram Narain vs. State of Rajasthan*, AIR 1975 SC 856-*Ravinder Singh vs. State of Haryana* and AIR 2000 SC 3352-*Narayan Chetanram Chaudhary & Anr. vs. State of Maharashtra* learned counsel further submitted that there should be corroboration of the evidence of approver in material particulars for each accused and that the

court tendering pardon to any person must know the nature of the evidence of the person seeking conditional pardon.

59. In case of *Bhiva Patil* (supra), the Apex Court observed that "The combined effect of Sections 133 and 114, Illustration (b) may be as follows: According to the former, which is a rule law, an accomplice is competent to give evidence and according to latter which is rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of accomplice cannot be said to be illegal yet the courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particular. There should be corroboration of the approver in material particulars and qua each accused."

60. In *Piara Singh* (supra) the Apex Court held that it is well settled that the appreciation of approver's evidence has to satisfy double tests. His evidence must show that he is a reliable witness and that is a test which is common to all the witnesses. If this test is satisfied, the second test which still remains to be applied is that approver's evidence must see sufficient corroboration.

61. In *Ram Narain* (supra) the Apex Court held that court should evaluate the approver's evidence and if the same is found uninspired and unacceptable then corroboration would be futile There is real danger of his telling a story true in general outline, but containing some untruth which he can easily work into the story. It is for this reason that the courts as a matter of prudence and caution anxiously look for some corroboration to satisfy their conscience that the approver's testimony which is clearly admissible is also worthy of belief.

62. In *Ravinder Singh* (supra) Apex Court observed that approver must prove his worthiness for credibility in court. This test is fulfilled, firstly, if the story he relates involves him in the crime and appears intrinsically to be natural and probable catalogue for events that had taken place and secondly the story given by an approver so far as the accused on trial is concerned, must implicate him in such a manner as to give rise to a conclusion of guilt beyond reasonable doubt.

63. On perusal of record, we find that Dolly Ladiya (PW-1) was charge sheeted as accused in the crime. After the charge was framed on 5.11.2009, while in jail, she submitted an application in the trial court seeking tender of pardon on the condition of giving evidence in the case. Learned counsel of the accused before the trial court opposed the said application on the ground

that the statement of Dolly Ladiya should, first, be recorded under Section 164 Cr.P.C. Learned trial judge in view of no objection of public prosecutor, held that there was no necessity for getting the statement of Dolly Ladiya recorded under Section 164 Cr.P.C. for exercising the powers under Section 307 Cr.P.C. and allowed the application subject to condition that she shall disclose the truth of all the concerned circumstances against herself and all the persons concerned who were involved in the crime.

64. Learned counsel for the appellant submitted that before the special judge acts to tender pardon, he must know the nature of the evidence the person seeking conditional pardon is likely to give and the nature of his complicity in the crime. In case of *Lt. Commander Pascal* (supra) the Apex Court, with reference to Section 8(2) of the Criminal Law (Amendment) Act, observed that there was nothing in the language of that section to show that the special judge must be moved by the prosecution. He may consider an offer by an accused. Before the special judge acts to tender pardon, he must, of course, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused. To determine whether accused's testimony as an approver is likely to advance the interest of justice, the special judge must have material before him to show that what nature of that testimony will be. Apex Court further observed that ordinarily it is for the prosecution to ask that a particular accused may be tendered pardon, but even where the accused directly applies to the special judge, he must first refer the request to the prosecuting agency. Since the power which judge exercises is not of his own behalf, but on behalf of prosecuting agency, it must, therefore, be exercised only when the prosecution joins in the request.

65. From the order sheet of the trial court i.e. 20.11.2009 it appears that public prosecutor expressed no objection on the application filed by accused Dolly Ladiya and the learned trial judge after considering it tendered conditional pardon to her. It is also significant to note that this pardon was granted at the stage when charges had already been framed against accused Dolly Ladiya. The provisions of sub-section (4) (a) of Section 306 Cr.P.C. are attracted only at a stage when the case is not committed to the court of session. After commitment, the pardon has to be granted by the trial court subject to the conditions specified in sub-section (1) of Section 306 Cr.P.C., i.e. approver's making full and true disclosure of the whole of the circumstances within his

knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. Section 307, in its present form, does not contemplate the recording of the statement of approver twice (*Narayan Chetanram Chaudhary vs. State of Maharashtra-AIR 2000 SC 3352*).

66. In the light of above proposition of law, we find that trial judge committed no error in tendering pardon to approver Dolly Ladiya.

67. Dolly Ladiya (PW-1) stated that accused Rahul Rajak introduced her to Satish Parochi and Ashok Vishwakarma. He also introduced her to deceased. On 5.5.2009, Rahul Rajak asked her to bring deceased to Bhedaghat. When she asked about the purpose, he told to her that he will obtain Rs.80 lacs from his parents out of which he will give Rs. 10 lacs to her. She called deceased, and alongwith him went to New Bhedaghat in his Wagon R. At New Bhedaghat, a lonely place, she found all the three accused persons present in advance. They called deceased and asked her to go back. According to her, accused Rahul had given her a mobile with sim to talk with deceased. When she was asked to go back, the sim of this mobile was taken out from the mobile by accused Ashok. Later on, she came to know from newspaper that deceased was murdered at the place where she had left him. On 8.5.2009, she was arrested by the police. On interrogation by the police, she disclosed that the mobile set given by Rahul was with her. In this regard, a disclosure memo (Ex.P/1) was recorded and the said mobile was seized from her. This witness though identified the ornaments/articles recovered from the possession of accused persons in the court, but we, for the reasons given in para 48 of this judgment, have already held this part of her evidence unworthy of reliance. Learned counsel for the appellants submitted that it would not be safe to rely on rest of her evidence firstly for the reason that there was no previous statement of this approver witness from which her veracity could have been tested; at least her statement under Section 164 Cr.P.C. ought to have been recorded, and secondly that her evidence suffered with omissions and contradictions on material particulars of the case. Though she stated that she went back home from Bhedaghat by auto, but this fact was found missing in her statement (Ex.P/1) recorded by police by way of disclosure memo under Section 27 of the Evidence Act. Similarly, the fact that accused Rahul Rajak told to her that he will obtain Rs.80 lacs from the parents of deceased was also not mentioned by her in the said statement. We are not impressed by the submission made by the learned counsel for the appellants. This witness was

tendered pardon at the stage when charges had already been framed before the sessions court. There was no occasion for having recorded her statement under Section 161 Cr.P.C. by the police. It was also not possible to have recorded her statement under Section 164 Cr.P.C., since a confession or statement could be recorded by a Magistrate in the course of investigation or at any time afterwards before the commencement of the enquiry or trial. We, however, find substance in the submission made by the learned counsel for the appellants that the statement of disclosure made by approver Dolly Ladiya under Section 27 of the Evidence Act could be treated as a previous statement recorded under Section 161 Cr.P.C., and that the learned trial judge committed error in holding that she could not be confronted with the said statement (Ex.P/1) because it was recorded under Section 27 of the Evidence Act. In Ex.P/1, Dolly Ladiya (PW-1) stated that on 5.5.2009 she went back from Bhedaghat to her home with Ashok Vishwakarma on his motorcycle. Inspector Swarnjeet Singh Dhami (PW-23) proved the statement of Dolly Ladiya (Ex.P/1) recorded under Section 27 of the Evidence Act. He also stated that he verified the fact that accused Ashok Vishwakarma had taken Dolly to her house from Bhedaghat. Learned counsel of Ashok Vishwakarma submitted that by the fact that accused Ashok Vishwakarma went back from Bhedaghat alongwith Dolly Ladiya it became doubtful that he was involved in commission of murder of deceased. We find no substance in the submission because it has not been stated by Dolly Ladiya (PW-1) that after reaching Bhedaghat she went back with Ashok Vishwakarma immediately.

68. It is true that Dolly Ladiya (PW-1) in Ex.P/1 did not say that accused Rahul told to her about obtaining Rs.80 lacs from the parents of deceased, but, in our opinion, this omission cannot be held to render her evidence unreliable because the purpose for which this statement was recorded was the disclosure of a mobile set in her possession. It could not be expected to have contained the whole of the prosecution story. Further, the fact that motive of accused Rahul was to obtain ransom from the parents of deceased finds corroboration from the fact that he made a demand of Rs.80 lacs initially but later obtained Rs.30 lacs on the pretext of ransom from them. From the evidence of Dolly Ladiya, it is revealed that accused Rahul Rajak used her as a bait for calling deceased to Bhedaghat. All the three accused persons and the deceased were residents of Narsinghpur, but they did not themselves call deceased to Bhedaghat. This clearly indicated their connivance and intention to abduct the deceased. Though Dolly Ladiya stated that her relations with deceased were only professional, but the manner in which she called him and

persuaded him to go to Bhedaghat where he ultimately was murdered indicated that her relations with deceased were some what more than mere professional. From the evidence of Dolly Ladiya it is clearly established that the deceased was last seen alive with all the three accused persons.

69. Learned counsel for the appellants submitted that the trial court committed error in holding that the evidence of Dolly Ladiya indicated conspiracy between accused persons to commit murder and obtain ransom from his parents. There is seldom direct evidence of conspiracy. Mostly the conspiracies are proved by the circumstantial evidence. The existence of conspiracy and its objective have to be inferred from the circumstances and the conduct of accused persons. The incriminating circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn (*Yogesh @ Sachin Jagdish Joshi vs. State of Maharashtra-AIR 2008 SC 2991*).

70. Learned counsel for the appellants reiterated that the evidence of Approver cannot be accepted unless it finds corroboration on material particulars. The Apex Court in case of *Sitaram Sao @ Mungeri vs. State of Jharkhand-AIR 2008 SC 391* observed that "The rule is that the necessity of corroboration is a matter of prudence except when it is subject to dispense with such corroboration. Although S. 114 illustration (b) of Evidence Act provides that the court may presume that the evidence of an accomplice was unworthy of credit unless corroborated, 'may' is not 'must' and no decision of Court can make it must. As regards nature of corroborative evidence that is necessary, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent witness in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. The corroboration need not be direct evidence that the accused committed the crime."

71. On a careful examination of the evidence of Dolly Ladiya (PW-1) in the light of above propositions we find that her evidence with respect to the fact that accused Rahul wanted to obtain money from the parents of deceased stands corroborated from the evidence of Inspector of ATS Ritesh Sahu (PW-21), Raghuvir Singh (PW-8) and Murad Ali (PW-16) about the recovery of Rs.30 lacs delivered to him by way of Ransom. The fact that deceased was last seen by her together with accused persons at Bhedaghat finds corroboration from the fact that his dead body was recovered from Bhedaghat on the information given by accused Rahul Rajak and further from the fact that ornaments/articles which were in the possession of deceased were recovered from the possession of accused persons. In these circumstances, we find the evidence of Approver Dolly Ladiya (PW-1) trustworthy.

72. From the evidence on record, following circumstances stand proved beyond reasonable doubt:

(1) Accused Rahul gave mobile with sim to Dolly Ladiya (PW-1) to keep contact with deceased.

(2) On the instructions of accused Rahul Rajak, Dolly Ladiya called the deceased and took him to Bhedaghat.

(3) Though accused persons were known to deceased and were residents of Narsinghpur where the deceased resided, yet they did not themselves call deceased to join them at Bhedaghat.

(4) All the three accused persons were present at Bhedaghat when Dolly Ladiya took deceased there.

(5) Accused Ashok Vishwakarma took back sim of the mobile of Dolly Ladiya at Bhedaghat which was used by her for calling deceased.

(6) Deceased, who was left in the company of accused persons, was thereafter never seen alive.

(7) Dead body of deceased was discovered from river at Bhedaghat on the information given by accused Rahul Rajak.

(8) Gold rings, gold chain and the bracelet of deceased were recovered from the possession of accused persons.

(9) A demand of ransom was made from the parents of

deceased. This demand was made from the mobile of deceased.

(10) On delivery of Rs.30 lacs in two bags, the money was picked up by accused Rahul Rajak.

(11) The ransom money was recovered and seized from the possession of accused Rahul Rajak.

73. In our opinion, on the basis of above circumstances, learned trial judge committed no error in holding that the chain of circumstances proved by the prosecution unerringly indicated that the accused/appellants under a conspiracy by deceitful means induced deceased to go to Bhedaghat and caused his death in order to compel his parents to pay ransom and further that they dishonestly misappropriated the property possessed by deceased at the time of his death and threw his body in river Narmada for causing disappearance of the evidence of offence. We accordingly affirm the conviction of appellants Rahul Rajak, Ashok Vishwakarma and Satish Parochi under Sections 364-A/34, 302 r/w Section 120-B, 201 and 404/34 of the Indian Penal Code.

74. As far as the question of death sentence to appellants is concerned, learned counsel for the appellants submitted that in the facts and circumstances of the case it cannot be held to be a rarest of rare case calling for death penalty. Per contra, learned counsel for the State and also the learned counsel for the complainant submitted that the offence committed by accused is so mean and heinous that it falls clearly in the ambit of a rarest of rare case justifying capital punishment.

75. It is true that the accused kidnapped deceased for extracting ransom from his parents in a preplanned manner and even after deceased was murdered, accused Rahul Rajak made them to believe that deceased was alive and would be released if they pay ransom, but, in our opinion in the facts and circumstances of the case it cannot be held to be a rarest of rare case. No doubt the act of accused persons is inhumane, yet there was nothing particularly brutal, grotesque or dastardly in manner of its execution. For judging whether a case falls in the category of 'the rarest of rare cases', the Apex Court in case of *Wakkar vs. State of U.P.* – (2011) 3 SCC 306 observed that the decision of the High Court to award life imprisonment alone and not the death sentence was correct as it considered "For awarding death sentence: There is no direct evidence as to the manner in which the gruesome murder has taken place. It is not possible to discern and arrive at any definite

conclusion as to the role played by each of the accused in the commission of dastardly crime. No doubt they committed the crime in cold blood, but did it quite stealthily. The entire case rests on the circumstantial evidence. The High Court having taken all relevant factors rightly came to the conclusion that the case is not the one which falls in the category of 'the rarest of rare cases'. In the instant case, the age of two accused persons viz. Rahul Rajak and Satish Parochi is about 25, 28 years. Nothing has been brought on record to indicate the probability that the accused would commit criminal acts of violence as would constitute a continuous threat to society and that there is no probability that they cannot be reformed and rehabilitated. It is apparent that accused persons in this materialistic society could not control their greed for money by indulging in nefarious activities. In the facts and circumstances of the case and particularly in view of the above mitigating circumstances we find that the case is not one which falls in the category of 'the rarest of rare cases' calling for death penalty.

76. For the aforesaid reasons:

1) The criminal Reference No.2/2011 made by the trial court for confirmation of death sentence awarded to accused Rahul Rajak, Ashok Vishakarma and Satish Parochi is rejected. Death sentences awarded to them are not confirmed.

2) In Criminal Appeal No.1780/2011, Criminal Appeal No.1793/2011 and Criminal Appeal No.1818/2011 conviction of accused/appellants under Sections 364-A/34, 302 r/w Section 120-B, 201 and 404/34 of the Indian Penal Code is affirmed. However, death sentence awarded to aforesaid appellants is reduced to the imprisonment for life. Sentences awarded under Sections 201 and 404/34 of the Indian Penal Code are also affirmed.

77. Subject to modification as indicated above, appeals fail and are dismissed.

78. Copy of this Judgment be kept in the records of Criminal Appeal No.1780/2011, Criminal Appeal No.1793/2011 and Criminal Appeal No.1818/2011.

Appeal dismissed.

I.L.R.[2012]M.P. Jetu Steels (M/s) Vs. Dy. Comm. of Income Tax (DB) 2061

I.L.R. [2012] M.P., 2061

INCOME TAX APPEAL

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

I.T.A. No. 6/2012 (Indore) decided on 10 May, 2012

JETU STEELS (M/S)

...Appellant

Vs.

DEPUTY COMMISSIONER OF INCOME TAX

...Respondent

Income Tax Act (43 of 1961), Section 253 - Appeal - Condonation of delay - Appellant clearly stated in its application for condonation of delay that it was initially a partnership firm - Firm was dissolved - Copy of order of Commissioner Income Tax was served on the appellant however, the same was misplaced due to voluminous paper work involved pertaining to partnership period owing to dissolution of firm - Copy of order could not be handed over to the Counsel for filing the appeal on account of strain of dissolution firm, joint family separation and constant heavy losses - Appellant had made out a case for condonation of delay in filing the appeal - Dismissal of the appeal as barred by limitation not proper - Delay in filing appeal condoned - Appellate Authority directed to decide the appeal on merits. (Para 8)

आयकर अधिनियम (1961 का 43), धारा 253 - अपील - विलंब हेतु माफी - अपीलार्थी ने अपने आवेदन में विलम्ब की माफी के लिए स्पष्ट रूप से कथन किया कि प्रारंभ में यह एक साझेदारी फर्म थी - फर्म विघटित हो गई - आयकर आयुक्त के आदेश की छायाप्रति अपीलार्थी पर तामील की गई, किन्तु वह फर्म के विघटन के कारण साझेदारी की अवधि संबंधी भारी कागजी कार्यवाही में गुम हो गई - फर्म के विघटन के तनाव, संयुक्त परिवार के अलग होने और भारी हानि के कारण आदेश की छायाप्रति अभिभाषक को अपील प्रस्तुत करने के लिए नहीं सौंपी जा सकी - अपील प्रस्तुत करने में विलम्ब की माफी के लिए अपीलार्थी का प्रकरण बनता है - परिसीमा द्वारा वर्जित होने के कारण अपील की खारिजी उचित नहीं - अपील प्रस्तुत करने में विलम्ब माफ किया गया - अपील गुण-दोषों पर निर्णित करने के लिए अपीली प्राधिकारी को निदेशित किया गया।

Peyush Jain, for the appellant.

R.L. Jain with Veena Mandlik, for the respondent.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. - Heard on the question of admission.

2. The appeal is admitted on following substantial question of law: -

“Whether, the learned Income Tax Appellate Tribunal erred in holding that, the assessee has utterly failed to show any reasonable cause for condonation of delay, where the negligence is attributable to the erstwhile manager of the assessee firm?”

3. Copy of the memo of appeal is supplied to the learned counsel for the respondent.

4. With consent heard finally.

5. The appellant – a proprietorship firm, which was earlier a partnership firm, engaged in the business of manufacture of steel bars filed a return of income on 31.10.2006. The case was selected for scrutiny and after issuance of notices under Section 143 (2) and 142 (1) (ii) of the Income Tax Act, an assessment order was passed on 16.12.2008. The Assessing Officer assessed the total income of the assessee by making an addition of Rs.9,00,000/- under Section 68 of the Income Tax Act, on account of cash credit. The Assessing Officer also disallowed interest amounting to Rs.18,272/- by applying Section 14-A of the Income Tax Act read with Rule 8-D of the Rules made thereunder. Aggrieved, the appellant filed an Appeal IT No.302/2008-09 before the Commissioner of Income Tax (Appeals)-I, Indore. The said appeal was dismissed by the Commissioner of Income Tax (Appeal)-I on 16.12.2009. The appellant preferred a further appeal before the Income Tax Appellate Tribunal (for short, the Tribunal). Since the appeal was barred by limitation, an application seeking condonation of delay was filed by the appellant. The Tribunal vide order dated 16.12.2011 passed in ITA No.34/Ind/2011 dismissed the appeal holding it to be barred by limitation by observing that the assessee has utterly failed to show any reasonable cause for condonation of delay in filing the appeal. Aggrieved, the assessee has filed this appeal under Section 260-A of the Income Tax Act.

6. Learned counsel for the appellant has drawn our attention to the application for condonation of delay which was filed before the Tribunal duly supported by affidavit of the appellant and contended that the detailed reasons were stated in the said application seeking condonation of delay but without going into the said reasons stating the sufficient cause and without considering the explanation offered by the appellant, the Tribunal has dismissed the appeal on the ground of limitation in a slipshod manner, causing great prejudice to the appellant.

7. Learned Senior Counsel appearing for the respondent, on the other hand, supported the impugned order passed by the Tribunal.

8. Having considered the submissions made by the learned counsel for the parties, we are of the view that the substantial question of law requires to be answered in favour of the assessee and against the revenue. We find that in the application seeking condonation of delay, the appellant-assessee had clearly stated that the business of the appellant – a proprietorship firm was being run in the name and style of a partnership firm viz. M/s. Jetu Steels having two partners Dilip Birani and Anil Birani. The said firm was dissolved with effect from 28.11.2008. It has been further stated that the order of CIT (Appeal) was served on the appellant on 22.01.2010. However, the same was misplaced because of voluminous paper work involved pertaining to partnership period owing to dissolution of the firm and it could not be handed over to the counsel for filing the appeal on account of strain of the dissolution of the firm, joint family separation and constant heavy losses. In support of the reasons stated in the application, an affidavit of Dilip Birani, proprietor of the appellant-firm and affidavit of R.S. Pasari, Manager of the Firm were filed. The said averments were not controverted by the respondent by filing any counter affidavit. However, the Tribunal vide its order dated 16.12.2011 dismissed the appeal by holding that the appellant had failed to show any reasonable cause for condonation of delay.

9. On going through the order of the Tribunal, it is clear that the Tribunal has not gone into the reasons stated by the appellant and has dismissed the application in a slipshod manner. On due consideration of the said reasons, we are of the view that the reasons assigned in the application seeking condonation of delay are sufficient reasons and are forming a reasonable cause for condonation of delay.

10. In the circumstances, we hold that the Tribunal has erred in recording the finding that the assessee has utterly failed to show any reasonable cause for condonation of delay. On the other hand, as observed, the assessee had sufficiently explained the delay in filing the appeal before the Tribunal and had made out a case for condonation of delay in filing the appeal. As a result, we answer the question in favour of the assessee and condone the delay.

11. The Tribunal is directed to decide the appeal on merits, in accordance with law. No orders as to costs.

Order accordingly.

I.L.R. [2012] M.P., 2064

MISCELLANEOUS CRIMINAL CASE

Before Mrs. Justice S.R. Waghmare

M.Cr.C. No. 8813/2011 (Indore) decided on 14 March, 2012

AZIZ KHAN PATHAN

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 427, 482 - Sentence to run concurrent with previous sentence - When may be directed - Inherent powers - While deciding both the cases and appeal, such a prayer was not made before the Courts - In a petition u/s 482 r/w 427, Cr.P.C., sentence can not be directed to run concurrently. (Para 5)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 427, 482 - दण्डादेश को पूर्ववर्ती दण्डादेश के साथ-साथ भुगताया जाना - कब निदेशित किया जा सकता है - अंतर्निहित शक्तियां - दोनों प्रकरण और अपील का विनिश्चय करते समय ऐसी प्रार्थना न्यायालयों के समक्ष नहीं की गई - धारा 482 सहपठित 417 द.प्र.स. के अंतर्गत याचिका में, दण्डादेश को एक साथ भुगताये जाने के लिए निदेशित नहीं किया जा सकता।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 427 - Condition Precedent - At the time of passing the second conviction against same accused, he must be undergoing a sentence (of previous case) - Only then the Court can pass a direction to make the subsequent sentence concurrent - Application dismissed. (Para 6)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 427 - पुरोभावी शर्त - एक ही अभियुक्त के विरुद्ध द्वितीय दोषसिद्धि पारित करते समय वह (पूर्ववर्ती प्रकरण का) दण्डादेश भुगत रहा होना चाहिए - केवल तब न्यायालय पश्चात्तवर्ती दण्डादेश को एक साथ करने के लिए निदेश पारित कर सकता है - आवेदन खारिज।

Cases referred :

1989 M.P.L.J. 116, 1974 MPLJ 769, 2000 CRLJ 4662, 2004 CR LJ 2945, 1999 CRLJ 3801, (2007) 2 SCC 772.

Nilesh Dave, for the applicant.

R.S. Parmar, for the non-applicant/State.

ORDER

S.R. WAGHMARE, J. - By this application under Section 482 of the Cr.P.C. read with Section 427 of the Cr.P.C. the applicant Aziz Khan Pathan who is in jail has moved the application for directing the sentence to run concurrently.

02. Brief facts necessary for elucidation are that there were two convictions against the present accused applicant Aziz Khan for two separate offences as follows:

In the first offence the date of the incident was 10.8.1997, and the applicant was being proceeded for offence under Section 8/21(B)(C) of the N.D.P.S. Act. The Trial Court convicted him on 17.06.2004 and sentenced him to 10 years rigorous imprisonment and fine of Rs.1 lac. The sentence was however reduced to 7 ½ years in Criminal Appeal No.1140/2004 decided on 31.07.2008.

In the second offence the date of the incident is 19.10.2001. The Trial Court convicted him for offence under Section 8/21(B) of the NDPS Act and sentenced to 10 years rigorous imprisonment with fine of Rs.1 lac on 17.06.2004. In appeal, i.e. Cr.A. No.796/04 the sentence was upheld on 5.04.2010, however the default clause regarding the payment of fine was modified to simple imprisonment of 2 months.

03. Counsel for the petitioner has candidly admitted that there was no prayer for making the sentence, to run concurrent either in the earlier appeal No.1140/2004 or in the appeal No.796/2004 which was decided at later date i.e.5.04.2010; and that, this present application is being moved separately under Section 482 of the Cr.P.C. since the applicant is in custody from 20.10.2001. He prayed for direction that the sentence be directed to run concurrently as the applicant will have completed his entire sentence in both the cases. Counsel relied on the following few judgments of the Apex Court as well as various High Courts.

Relying on full judgment of Madhya Pradesh in the matter of *Shersingh Vs. State of M.P.* [1989 .P.L.J. Page 116], Counsel stated that a Full Bench while considering similar question when the accused was convicted of 2 distinct and separate offences and sentence were passed by two different Courts and

they had become final, the application was moved by the accused before the High Court under Section 482 to make the sentences run concurrently. The Apex Court had held that such an application was maintainable by the High Court under exercise of its inherent jurisdiction. The High Court is competent to issue such direction and the High Court has power in appropriate cases to entertain an application under Section 482 of the Code by invoking its inherent power at any time subsequent to it in a given case even if the Trial Court or the Appellate Court or the Revisional Court has failed to exercise its discretion under Section 427 (1) of the Code. The Apex Court further declared that the decision of M.P. High Court in the matter of *A.S. Naidu Vs. State* reported in 1974 MPLJ 769 was no longer good law to the extent as it says that the power under Section 427(1) of the Cr.P.C. can be exercised by the trial or appellate Court at any stage at any time even after decision on merits in the case, but not under Section 482 since the court does not become functus officio.

Relying on another judgment of the Andhra Pradesh High Court in the matter of *Ammavasai and another vs. inspector of Police, Valliyanur and others* [2000 CRI.L.J. 4662] whereby considering the benefit of the sentences to run concurrently the Court had held that the occurrences of all the cases be taken place between 3 to 5 months and the offence against the appellants were found in all cases to be under Section 395 of the IPC, the appellants have been directed to undergo 7 years rigorous imprisonment in each case and the appellants claimed benefit under Section 427 to avoid undergoing imprisonment of total period of 28 or 35 years in jail and the benefit if allowed to the appellants, they would be out of after serving sentence of 7 years in one case, however, the Apex Court had directed that to meet the end of the justice the appellants were to undergo total period of 14 years of imprisonment in respect of all the convictions passed against them.

Relying on judgment of the Bombay High Court Counsel stated that in the case of *Mohan Bhanudas Mohite vs. State of Maharashtra* [2004 CRI. L. J. 2945] the Bombay High Court had considered the similar question of concurrent running of sentence against the accused for offence under Section 21 of the N.D.P.S. Act and the Court was posed the question whether Section 32-A of the N.D.P.S. Act would Act as a bar of such a direction for making sentence to run concurrently because Section 32-A of the NDPS Act prohibits suspension, remission or commutation of sentence and the Court was pleased to hold that Section 427 of the Cr.P.C. is not hit by Section 32-A of the N.D.P.S. Act. The Bombay High Court had relied on the earlier judgment by

the Apex Court in the matter of *Ammavasai* (supra) Counsel prayed that the application be allowed and benefit of the sentence to run concurrently be granted to the accused.

04. *Per contra* Counsel for the respondent/State has relied on two decisions to oppose the Counsel for the applicant. Relying on judgment of Andhra Pradesh High Court in the matter of *Amarnath Umakanth v. State of A.P.* [1999 CRI. L.J. 3801] Counsel stated that the learned single Judge had categorically considered the question whether the inherent powers of the High Court to direct subsequent sentence to run concurrently with earlier sentence was considered in its entire scope. The Court found that the petitioner had undergone the earlier sentence and the said sentence was not suspended during the pendency of the appeal and in this light order directing subsequent sentence to run concurrently with the earlier sentence could not be passed. Moreover the same view has been reiterated recently by the Apex Court in the matter of *M.R. Kudva Vs. State of A.P.* [2007 (2) SCC 772] whereby the Apex Court had specifically considered the question whether in a given case when the provision under Section 427 of the Cr.P.C. was not invoked in the original cases or appeals or separate application filed before the High Court after the dismissal of the SLP was not maintainable, the Court held that the High Court could not have exercised its inherent jurisdiction in a case of this nature which it has previously not exercised while deciding the appeals. The Apex Court further held that the application under Section 482 of the Cr.P.C. is not an appropriate remedy as neither of the trial Judge nor High Court while convicting and sentencing the appellants indicated that sentences passed against him in both the cases shall run concurrently or that 427 of the Cr.P.C. would be attracted and hence Section 427 of the Cr.P.C. could not rightly be applied in a separate and independent proceedings by the High Court and the appeal was therefore dismissed. Counsel prayed for dismissal of the application.

05. On considering the above submissions I find that as already observed above in the present case while deciding both the appeals by the High Court such a prayer was not made before the Court and in this light although there is a Full Bench judgment of this High Court of M.P, it is of the year 1989 and whereas the judgment of the Apex Court in the matter of *M.R. Kudva* (supra) is of the year 2007 and it would be applicable in full force in the present case. Moreover the case of *Ammavasai* (supra) has already been considered by the Apex Court in para-10 of its decision and in these circumstances I find

that the application is without merit and the sentence cannot be directed to run concurrently.

Even otherwise, I find that, at the time of decision of the second case, i.e., Criminal Appeal No.796/2004 the sentence in the first offence was already over and the sentence had begun to run in the second case only thereafter. In such circumstances, even if the specific words of Section 427 of the Cr.P.C. are considered, I find that the Section 427 mandates that **“a person already undergoing the sentence of imprisonment is sentenced of subsequent conviction”** whereas during decision of the second case Cr.A. No.796/04 i.e., appeal before the High Court there was no conviction pending against the present applicant on 5.4.2010 the date of the judgment. And I find that in this light the application is not maintainable because then the provision of Section 427 are not attracted at all.

06. After having bestowed my anxious consideration to the facts of the case and the provision of Section 427 of the Cr.P.C. I find that at the time of passing the second conviction against the same accused; the condition precedent is that, the accused must be undergoing a sentence; only, then the Court can pass a direction to make the subsequent sentence concurrent.

The application is thus without merit and is **dismissed** as such.

Application dismissed.

I.L.R. [2012] M.P.,2068

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.S. Solanki

M.Cr.C. No.2966/2012 (Jabalpur) decided on 27 March, 2012

B.K. MEHRA

...Applicant

Vs.

C.B.I.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 438 - Anticipatory Bail - Applicant issued cheques without verifying the signatures of the authorized person - Although applicant is aged about 59 years and is suffering from heart ailment but since it is the case in which custodial interrogation is required - Applicant not entitled for anticipatory bail. (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 - अग्रिम जमानत -

आवेदक ने प्राधिकृत व्यक्ति के हस्ताक्षरों को सत्यापित किए बिना चेक जारी किए — यद्यपि आवेदक करीब 59 वर्ष की आयु का है और हृदय की बीमारी से ग्रसित है किन्तु चूंकि यह ऐसा प्रकरण है जिसमें अभिरक्षा में पूछताछ आवश्यक — आवेदक अग्रिम जमानत का हकदार नहीं।

Shashank Shekhar, for the applicant.

R.L. Gupta, Asst. Solicitor General for the non-applicant/State.

ORDER

G.S. SOLANKI, J. - Heard finally.

This is the second bail application filed by applicant under Section 438 of the Cr.P.C. for grant of anticipatory bail. The first application was dismissed on merits vide order dated 19/01/2012 in M.Cr.C. No. 736/2012.

2. The applicant is apprehending his arrest in connection with Crime No. R.C. No. 0092010A0007/2010, registered at police station C.B.I., ACB Jabalpur for the offence punishable under Sections 420, 467, 468, 471, 477-A and 120-B of IPC read with section 13 (2) read with section 13 (1) c & d of Prevention of Corruption Act.

3. Learned counsel appearing on behalf of applicant submits that applicant is suffering from heart ailment. It is further submitted that his son Sonam and daughter Sonika are mentally retarded persons and in the event of arrest no one would be available to look after these minor children. His contentions are duly supported by documents issued by treating doctor of the applicant as well as disablement certificate issued by Medical Board (Annexures A-8 and A-9) respectively. It is submitted that as per the Rule 331 of Office Manual Part II of Defence Accounts Department, role of this applicant is different than AAO/SO (A) and he signed the cheques in compliance of aforesaid Rule 331. The department issued the show cause notice against this applicant to explain the circumstances in regard to the disputed cheques vide Annexure A-3 and he explained the circumstances vide letter dated 8/11/2010 (Annexure A-4) and submitted that he initialed as a token of confirmation that the cheques have been prepared as per the entries in the DP sheet. In this way, he signed and verified the specimen signature of the person concerned therefore, in the light of aforesaid given circumstances, learned counsel for the applicant prays for grant of anticipatory bail to the applicant.

4. Learned counsel appearing on behalf of respondent/CBI submits that this applicant has issued the disputed cheques without verifying the signature of

authorized person. It is further submitted that this is the case in which custodial interrogation is required therefore, he prays for dismissal of the application.

5. I have perused the case diary and the previous order passed by this Court on 19/01/2012.

6. The contention of the verification of signature has already been considered. The department had not initiated any inquiry against this applicant. On the basis of reply given by this applicant vide letter dated 8/11/2010 (Annexure A-4) which may be the defence of the applicant at the time of trial. There is a prima facie case against this applicant that he issued the disputed cheques without verifying the signatures and he also issued the cheques in the month of April and signed the DP sheets of that month allegedly same was not having the signatures of Jitendra Kumar and Saranjeet Singh Bhatia. As far as health conditions of this applicant and his son and daughter are concerned, no doubt he is aged person of 59 years and suffering from the heart ailment but at the same time it is the case in which custodial interrogation is required. Therefore, I am not inclined to grant anticipatory bail to the applicant under the special provisions of section 438 of Code of Criminal Procedure.

7. Accordingly, application is hereby dismissed.

Application dismissed.

I.L.R. [2012] M.P., 2070

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No.11010/2011 (Jabalpur) decided on 25 April, 2012

ANURAG SONI

...Applicant

Vs.

RAKESH VISHWAKARMA

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent Powers of the High Court - Are to be exercised ex debito justitiae to prevent abuse of the process of the Court but not to stifle a legitimate prosecution, when the issue involved, whether the factual or legal, can not be decided without sufficient material. (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - उच्च न्यायालय की अंतर्निहित शक्तियाँ - इनका प्रयोग न्यायालय की प्रक्रिया का दुरुपयोग रोकने के लिए अधिकारतः किया जाना चाहिए किन्तु विधिसंगत अभियोजन को कुचलने के लिए

नहीं, जब अंतर्गत विवादक, या तो तथ्यात्मक या विधिक, का पर्याप्त सामग्री के बिना विनिश्चय नहीं किया जा सकता।

Cases referred :

(2010) 6 SCC 243, A IR 1981 SC 1514, AIR 2001 SC 2037.

Sanjay K. Agrawal, for the applicant.

Prakash Upadhyay, for the non-applicant.

ORDER

R.C. MISHRA, J. - With consent the matter is finally heard.

This is a petition for quashing of the proceedings pending as Criminal Case No.1237/2011 in the Court of CJM, Balaghat. In that case, cognizance of the offence under Section 500 of the IPC has been taken upon a complaint made by the respondent against the petitioner, who is the Director of British School of English, an Institution imparting education to learners of English language at Jabalpur.

2. Subject matter of the complaint is the Public Notice (Annexure A/4), published by the petitioner in a local newspaper in Vernacular,

- (a) depicting photograph of the respondent;
- (b) warning the public at large against dealing with the respondent, describing him as franchisee to the School involved in cheating and criminal breach of trust in respect of money collected as fees and Royalty on behalf of the Institution and materials used for the specialized coaching, and;
- (c) informing further that a criminal case had already been registered against the respondent, who was still absconding, upon the FIR lodged by the petitioner.

3. Learned counsel for the petitioner has submitted that his prosecution for the offence is an abuse of the process of the Court as he, in good faith, had cautioned the public not to enter into any transaction with the respondent under the impression that he being the franchisee was authorized to act for and on behalf of the School. According to him, the act in question is squarely covered by Exception 1 and 10 of Section 499 of the IPC.

4. In reply, learned counsel for the respondent, while placing reliance on decision of the Apex Court in *Jeffrey J. Diermeier and another Vs. State of*

West Bengal and another ((2010) 6 SCC 243), has submitted that "good faith" and "public good" are questions of fact to be decided on the basis of evidence. In that case "Word of Caution" published by the appellant had formed basis of the prosecution for the offence of defamation and the decline to quash the complaint was affirmed by the Supreme Court.

5. The proposition that the question as to protection under any of the exceptions to Section 499 of the IPC can not be examined for quashing of the complaint under Section 482 of the Code is well settled. The leading decision on the point is one delivered by the Apex Court in *Sewakram Sobhani Vs. R.K. Karanjiya, Chief Editor, Weekly Blitz* AIR 1981 SC 1514 that was followed in all subsequent decisions including *M.N. Damani Vs. S.K. Sinha* AIR 2001 SC 2037. Accordingly, it is for the accused/petitioner to plead and prove that his case would come within any one of the exceptions to Section 499 of the IPC.

6. This apart, the inherent powers, under Section 482 of the Code are to be exercised *ex debito justitiae* to prevent abuse of the process of the Court but not to stifle a legitimate prosecution, when the issue involved, whether factual or legal, can not be decided without sufficient material.

7. In this view of the matter, no interference, under the inherent powers, is called for.

8. The petition, therefore, stands dismissed.

9. As an obvious consequence, interim stay granted on 10/10/11 stands vacated. Trial Court be informed accordingly.

Petition dismissed.

I.L.R. [2012] M.P. 2072

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No.2231/2012 (Jabalpur) decided on 15 May, 2012

RAM SINGH AAZAD & ors.

...Applicants

Vs.

SMT. MAYA SINGH

...Non-applicant

A. *Protection of Women from Domestic Violence Act (43 of 2005), Section 12 - Proviso to Section 12 - Even an interlocutory order directing issuance of notice would not be excluded from the rigour of the proviso - Magistrate ought to have passed a reasoned order holding*

that prima facie a case existed for asking the petitioners as to why the reliefs, as claimed in the application should not be granted. (Para 9)

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 - धारा 12 का परंतुक - नोटिस जारी करने के लिए निदेश देते हुए अंतर्वर्ती आदेश भी परंतुक की शास्ति से अपवर्जित नहीं होगा - मजिस्ट्रेट को यह धारण करते हुए सकारण आदेश पारित करना चाहिए था कि याचीगण से पूछे जाने के लिए कि आवेदन में दावा किए गये अनुतोष क्यों प्रदान नहीं किए जाने चाहिए, प्रथम दृष्टया प्रकरण बनता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482, Protection of Women from Domestic Violence Act (43 of 2005), Section 12 - Inherent Powers - On taking the allegations made against the petitioners in the application at their face value and accepting in their entirety, no justification for initiation of action against them would be made out in view of the admitted fact that during the relevant period, they are residing separately from the respondent - Matter falls under the category attracting interference under inherent power - Proceedings quashed. (Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 - अंतर्निहित शक्तियाँ - आवेदन में याचीगण के विरुद्ध लगाए गए आरोपों को प्रत्यक्षतः पूर्णतः स्वीकार किए जाने पर, उनके विरुद्ध कार्यवाही आरंभ करने का कोई न्यायोचित्य नहीं बनता, इस स्वीकृत तथ्य को दृष्टिगत रखते हुए कि सुसंगत अवधि के दौरान वे प्रत्यर्थी से अलग निवास कर रहे हैं - अंतर्निहित शक्ति के अंतर्गत हस्तक्षेप आकर्षित करने की श्रेणी के अंतर्गत प्रकरण आता है - कार्यवाही अभिखंडित।

Cases referred :

2008 CRLJ 264, 2010(1) MPHT 133, 2011 CRLJ 1687, AIR 2010 SC 2239, AIR 1992 SC 604.

Mukesh Mishra, for the applicants.

Saurabh Shrivastava, for the non-applicant.

ORDER

R. C. MISHRA, J. - Arguments heard.

This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), for quashing the proceedings, pending as MJC No. 314/11 in the Court of Smt. Usha Tiwari, JMFC, Bhopal. In that case, notices

have been issued to each one of the petitioners to show cause as to why the reliefs as prayed for by the respondent in her application, under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short the 'Act'), should not be granted.

2. According to the petitioners, proceedings are apparently an abuse of the process of the Court in view of the following facts -

(i) Marriage of the respondent was solemnized with Rahul Singh, son of petitioner nos.1 and 2 and brother of other petitioners on 11.9.2000 in the Arya Samaj Mandir in Bhopal as it was an inter-caste love marriage. In the wedlock, they are blessed with two daughters.

(ii) Soon after the marriage, the respondent and her husband started residing together separately from the petitioners.

(iii) The petitioner nos.1 and 2 are senior citizens.

(iv) No specific incident of domestic violence was illustrated in the application and most of the alleged acts of domestic violence related to the period prior to the date with effect from which the Act was brought into force.

3. Coming to the legal aspect of the matter, learned counsel for the petitioners has urged that the application, under Section 12 of the Act, is not maintainable against petitioner nos.3 and 4, who are the sisters of Rahul, for the reason that the respondent, as defined in Clause (q) of Section 2 of the Act, means only adult male person.

4. *Per contra*, learned counsel for the respondent has submitted that there is no sufficient ground to interfere with legitimate proceedings under the inherent powers. According to him, in the light of the facts stated therein, no option was left to the respondent except to move the Court, by filing the application for the reliefs as contemplated in Sections 18, 19, 20, 22 and 23 of the Act.

5. In response, learned counsel for the petitioners, inviting attention to the contents of notice dated 18.11.2011 issued to Rahul Singh on behalf of his father, the petitioner no.1 and its reply, has contended that the proceedings have been maliciously initiated at the instance of Rahul with an ulterior motive to

wreak vengeance in the wake of his father's inclination to disqualify him from claiming any share or inheriting the property terming the same as self-acquired.

6. At the outset, it may be observed that the argument as to maintainability of the application as against petitioner nos.3 and 4 presumably based on the view taken by a co-ordinate Bench of this Court in *Ajay Kant v. Alka Sharma* 2008 CRI.L.J. 264 and reaffirmed in *Tehmina Qureshi v. Shazia Qureshi* 2010 (1) MPHT 133, does not deserve acceptance in the wake of pronouncement of the Supreme Court in *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade* 2011 CRI.L.J. 1687. Accordingly, female relatives of husband/male partner may also be arrayed as respondent to the application under Section 12 of the Act.

7. The averments made in the application suggest that during the preceding period of nearly 10 years, the respondent had been subjected to cruelty and harassment inter alia for the under-mentioned reasons -

(i) Caste-difference.

(ii) Non-satisfaction of the dowry demand for a sum of Rs.20 lacs.

(iii) Inability to beget a male child.

8. However, fact of the matter is that the application filed on 2.11.2011 by the respondent neither contains details of any recent incident of domestic violence, as defined in Section 3 of the Act, nor, furnishes any explanation for non presentation of the application at an earlier point of time despite the fact that the Act has been brought into force on 26/10/2006. Further, the order dated 12.1.2012, does not indicate as to what was there in the report of Protection Officer that weighed with learned Magistrate in directing issuance of notice to secure presence of the petitioners on 30.1.2012.

9. It is, therefore, apparent that the impugned order was passed without taking into consideration the report prepared by the Protection Officer, ignoring the proviso to Section 12, that reads thus -

"Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider".

[Emphasis supplied]

The proviso ordinarily carves out an exception from the general rule enacted in the main provision. It is also well settled that the word 'any' would mean one or more out of several and includes all (See. *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement* AIR 2010 SC 2239). In this view of the matter, even an interlocutory order directing issuance of notice would not be excluded from the rigour of the proviso. Accordingly, learned Magistrate ought to have passed a reasoned order holding that *prima facie* a case existed for asking the petitioners as to why the reliefs, as claimed in the application, should not be granted.

10. In the ordinary course, the matter would have been remanded for recording a reasoned order but I refrain from doing so simply because even if the allegations made against the petitioners in the application, are taken at their face value and accepted in their entirety, no justification for initiation of action against them would be made out in view of the admitted fact that during the relevant period, they were residing separately from the respondent. As such, the matter falls under categories (1), (5) and (7) of the cases, as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting interference under the inherent powers.

11. For these reasons, the petition stands allowed and the proceedings in MJC No.314/11 (above) are hereby quashed.

C.C. as per rules.

Petition allowed.

I.L.R. [2012] M.P., 2076

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.S. Solanki

M.Cr.C. No. 12535/2010 (Jabalpur) decided on 19 May, 2011

HARIKISHAN

... Applicant

Vs.

STATE OF M.P. & anr.

... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 457 - Supurdagi of Tractor - Applicant purchased the tractor after making payment of 5,60,000 to the dealer - Tractor was sent for addition of some equipment and was stationed in front of the showroom where it was seized in minor offences - Proprietor of show room admitted the

minor offence and took possession of the tractor and sold it to respondent No. 2 for a consideration of Rs. 3,90,000/-- As subsequent owner is also an accused on the report lodged by the applicant, therefore, the order of Sessions Court releasing the tractor on Supurdagi in favor of respondent No.2 set aside - Tractor directed to be released on supurdagi in favor of applicant on furnishing supurdaginama in a sum of Rs. 5 lacs. (Para 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 457 - ट्रैक्टर की सुपुर्दगी - आवेदक ने डीलर को 5,60,000/- का भुगतान करने के पश्चात् ट्रैक्टर खरीदा - ट्रैक्टर को कुछ अतिरिक्त उपकरण जोड़े जाने के लिए भेजा गया और शो-रूम के सामने खड़ा कर दिया गया जहाँ उसे गौण अपराधों के लिए जब्त किया गया - शो-रूम के मालिक ने गौण अपराध स्वीकार किया और ट्रैक्टर का कब्जा ले लिया और प्रतिवादी क्र. 2 को 3,90,000/- के प्रतिफलार्थ बेच दिया - चूंकि पश्चात्वर्ती स्वामी भी आवेदक द्वारा दर्ज की गई रिपोर्ट में अभियुक्त है इसलिए ट्रैक्टर को प्रत्यर्थी क्र. 2 के पक्ष में सुपुर्दगी पर मुक्त करने का सत्र न्यायालय का आदेश अपास्त - 5 लाख की रकम का सुपुर्दगीनामा पेश करने पर आवेदक के पक्ष में सुपुर्दगी पर ट्रैक्टर को मुक्त करने के लिए निदेशित किया गया।

A.K. Jain, for the applicant.

A.K. Shukla, P.L., for the non-applicant No. 1.

Manish Datt, for the non-applicant No.2.

ORDER

G.S. SOLANKI, J. - Petitioner has filed this petition being aggrieved by order dated 3.11.2010 passed by Additional Sessions Judge, Hoshangabad in Cr. Revision No. 144/2010 whereby the petition filed by the petitioner under section 457 of Cr.P.C. for Supurdginama of disputed tractor was dismissed.

2. The facts,, in short, giving rise to this petition are that on 14.4.2009, petitioner purchased a tractor bearing engine No. 3A20684H 08 and Chasis No. 18113H 08 after paying a sum of Rs. 5,60,000/- to Dharmendra Rajpoot, proprietor of Vanshika Abhikaran, who issued the receipt and delivery chalan of the aforesaid tractor (Annexure P-1 and P-2). It is further alleged that the aforesaid cost included registration charges as well as insurance. Dharmendra Rajpoot has not issued sale letter in favour of the petitioner. It is further alleged

that on 11.3.2010, petitioner made a complaint (P-3) to Supdt. of Police against Dharmendra Rajpoot. It is further alleged that petitioner sent the aforesaid tractor for addition of some equipments through one Mahendra Patel Narmada Udyog, the shop of Manohar Lodhi at Vidisha on 9.3.2010 and same was stationed in front of Narmada Udyog. It is further alleged that Dharmendra Rajpoot made a false report in police station Vidisha where offence under section 39/192, 130(3)/ 170 of Motor Vehicles Act was registered and case was filed before the CJM, Vidisha. Dharmendra Rajpoot admitted his guilt and took the disputed tractor in his possession. It is further alleged that Dharmendra Rajpoot, proprietor of Vanshika Abhikaran, Piparia, sold the same tractor to respondent No. 2. When petitioner came to know about this fact, he reported the matter to P.S. AJK, where case was registered as per crime No. 1512010 vide Crime No. 408, 420, 467, 294, 506-B of IPC and section 3(1)(10) of SC/ST (Prevention of Atrocities) Act against Dharmendra Rajpoot.

3. During investigation, tractor was seized from the possession of respondent No. 2 Uttam Singh. It is undisputed that before JMFC, Hoshangabad, this petitioner as well as subsequent purchaser respondent No. 2 filed an application under section 457 of Cr.P.C. for taking the tractor on Supurdginama during pendency of aforesaid criminal case. Learned Magistrate dismissed both the applications vide order dated 16.7.2010 (P-4). Being aggrieved, both of them filed criminal revisions before the Sessions Court and same was disposed of vide common order dated 3.11.2010 whereby the revision of this petitioner was dismissed and revision of respondent No. 2 Uttam Singh was allowed and disputed tractor was released on Supurdginama to respondent No. 2, hence this petition.

4. Learned counsel for the petitioner has submitted that learned trial Court committed illegality by overlooking the fact that Cr. No. 15/2010 registered against respondent No. 2, who is not bonafide purchaser of tractor, due to which petitioner suffered great hardship because he has paid a sum of Rs. 5,60,000/- to Vanshika Abhikaran. He has further submitted that there is grave miscarriage of justice, hence has prayed for setting aside the impugned order passed by learned Additional Sessions Judge and has prayed for to direct the release of disputed tractor on his supurdginama.

5. Learned counsel for respondent No. 2 has submitted that respondent No. 2 is a bonafide purchaser of disputed tractor. He has further submitted that respondent No. 2 purchased the said tractor through State Bank of India, has further submitted that tractor was also insured in the name of respondent No. 2 and respondent No. 2 also filed an application for registration, however, same was seized during the investigation of Cr. No. 15/2010. He has further prayed that the revisional Court did not commit any mistake which amounted to grave miscarriage of justice

6. I have heard learned counsel for the respective parties, perused the record, case diary and impugned order dated 3.11.2010. It is apparent on record that petitioner purchased the disputed tractor after paying a sum of Rs. 5,60,000/- to Vanshika Abhikaran while respondent No. 2 Uttam Singh paid only Rs. 3,99,000/- through bankers cheque. There is a difference of a sum of Rs. 1,61,000/- in both the considerations. Learned Additional Sessions Judge failed to consider this fact, which shows that respondent No. 2 Uttam Singh is not the bonafide purchaser of disputed tractor. It also reveals from the record that disputed tractor was sent for repair by complainant from where it was seized in Cr. No. 382/2010 under section '39/192, 130(3), 170 of Motor Vehicles Act. Proprietor of Vanshika Abhikaran admitted the aforesaid minor offence and took the possession of aforesaid tractor and thereafter sold the same to respondent No. 2 for a lesser consideration as mentioned hereinabove. Since respondent No. 2 made also accused in Cr. No. 15/2010, which is pending before the trial Court and trial would take considerable time to conclude, in these circumstances, the petition is allowed, impugned order dated 3.11.2010 is hereby set aside and it is ordered that disputed tractor seized in Cr. No. 15/2010 bearing engine No. 3A20684IJ 08 and Chasis No. 18113H 08 be released in favour of the petitioner on his furnishing supurdginama in a sum of Rs. 5,00,000/- (Rs. Five Lakhs only) with a surety in the like amount to the satisfaction of trial Court within one month from today with the condition that the petitioner shall not alienate or transfer the disputed vehicle till the disposal of the criminal case.

This is M. Cr C. is disposed of.

M. Cr C. disposed of.

I.L.R. [2012] M.P.,2080

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice Anil Kumar Sharma*

M.Cr.C. No. 2696/2012 (Gwalior) decided on 10 July, 2012

SARVESHARORA

...Applicant

Vs.

STATE OF M.P. & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 245 - Framing of Charge - In a case registered on a private complaint, Judicial Magistrate is bound to consider the evidence recorded by him and come to conclusion that if such evidence, if unrebutted, would warrant the conviction of accused - Otherwise, trial Magistrate has to discharge the accused - Matter of consideration of evidence can not be deferred till conclusion of trial. (Para 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 245 - आरोप विरचित किये जाना - व्यक्तिगत शिकायत पर पंजीबद्ध किये गये प्रकरण में, न्यायिक मजिस्ट्रेट उसके द्वारा अभिलिखित साक्ष्य पर विचार करने के लिए बाध्य है और इस निष्कर्ष पर पहुंचे कि यदि उक्त साक्ष्य, यदि अखंडित है, तब अभियुक्त को दोषसिद्ध करना आवश्यक होगा - अन्यथा, विचारण मजिस्ट्रेट को अभियुक्त को आरोप मुक्त करना होगा - साक्ष्य पर विचार का मामला विचारण की समाप्ति तक अस्थगित नहीं किया जा सकता।

Case referred :

2009 STPL(LE) 41367 SC.

Sanjay Gupta, for the applicant.*R.K. Shrivastava*, P.P. for the non-applicant No. 1/State.*D.D. Bansal*, for the non-applicant No.2/Complainant.**ORDER****A.K. SHARMA, J.** - This petition has been filed under Section 482 of

Cr.P.C. against the order dated 28.02.2012 passed by the Additional Sessions Judge, Shivpuri in Criminal Revision No.76/2011 confirming the order dated 11.05.2011 passed in Criminal Case No.459/09 by learned Judicial Magistrate First Class, Shivpuri (Shri Deepak Choudhary) by which charges for the offence punishable under Sections 406, 323 and 294 of IPC has been framed against the petitioner.

2. The respondent no.2 has filed a private complaint against the petitioner/accused for criminal breach of trust with regard to vehicle purchased by complainant/respondent no.2 which is financed by the petitioner/accused by selling it to another person. It is the defence of the petitioner/accused that vehicle has been sold by respondent no.2 himself as the sale letter has been signed by him, therefore, no criminal breach of trust or any offence has been made out against him.

3. Learned counsel for the petitioner has drawn attention towards the evidence and submitted that the sale letter of the vehicle has been signed by the complainant himself, therefore, it shall be presumed that vehicle has been sold by complainant. Learned trial Court while passing order by which charges have been framed as deferred the consideration of evidence on merit till the disposal of the case. Learned counsel for the petitioner has submitted that dispute between complainant and accused are of civil nature, therefore, no criminal liability arises from the civil act of the petitioner while the learned counsel for the respondent no.2 has cited a judgment of the Hon'ble Apex Court in the matter of *State of Punjab Vs. Pritam Chand and Others*, 2009 STPL(LE) 41367 SC, in which it has been held that for a breach of trust with regard to property entrusted to the accused, a criminal case may arise out of breach of contract.

4. On perusal of the orders of the trial Court and learned revisional Court, it is clear that both the Courts have overlooked the provisions of Section 245 of Cr.P.C. because case has been registered on the basis of a private complaint

filed by respondent no.2 and after taking evidence before charge under Section 244 of IPC, Court is bound to pass an order framing charge in accordance with provisions of Section 245 of Cr.P.C. and it can frame charges only when evidence available on record. The provisions of Section 245 of Cr.P.C. are reproduced below:

"245. When accused shall be discharged- (1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

5. Therefore, looking to the provisions of Section 245 of Cr.P.C., Judicial Magistrate is bound to consider the evidence recorded by him and come to the conclusion that if such evidence if unrebutted would warrant the conviction of the accused, otherwise learned Magistrate has to discharge the accused. Therefore, the matter of consideration of evidence cannot be deferred till conclusion of trial.

6. Therefore, the impugned order dated 11.05.2011 passed by the learned trial court framing the charges against the petitioner is hereby quashed and learned trial Court is directed to rehear the parties and pass appropriate orders for framing of charge in the light of provisions of Section 245 of Cr.P.C.

7. The petition is allowed and disposed of with the aforesaid direction.

Petition allowed.

I.L.R. [2012] M.P., 2083

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No. 8163/2012 (Jabalpur) decided on 7 August, 2012

RAJKUMAR KANATHE & ors. ... Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

Penal Code (45 of 1860), Section 498A - Husband - Husband would cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in Section 498A of I.P.C. (Para 3)

दण्ड संहिता (1860 का 45), धारा 498ए - पति - पति में ऐसा व्यक्ति सम्मिलित है जो वैवाहिक संबंधों में प्रवेश करता है और इस प्रकार के पति होने की उद्घोषित या ढोर्गी हैसियत की आद में संबंधित महिला के साथ क्रूरता का व्यवहार करता है या किसी प्रकार से प्रपीड़ित या भा.द.सं. की धारा 498ए में प्रमाणित किसी प्रयोजन हेतु व्यवहार करता है।

Case referred :

AIR 2004 SC 1418.

K.N. Agrawal, for the Applicants.**ORDER****R.C. MISHRA, J.** - Heard on admission.

1. This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code') for quashing of the proceedings pending as Cri. Case No.1537/06 in the Court of JMFC, Multai Distt. Betul. In that case, cognizance of the offence punishable under Section 498A read with 34 of the IPC has been taken against the petitioners upon a charge sheet submitted by SHO of P.S. Multai after due investigation into the FIR lodged by Geeta Bai, the respondent no.2 here, whose marriage was solemnized with the petitioner

no.1 namely Raj Kumar on 20.6.1999.

2. Learned counsel for the petitioners has strenuously contended that their prosecution for the offence is an abuse of the process of the Court in view of the fact that the marriage has already been declared as null and void, vide judgment and decree dated 22.6.2004 passed by Additional District Judge, Multai in Civil Suit No.1A/03, on the ground that Geeta had already contracted marriage with one Ganesh on 10.12.1995.

3. However, as propounded by the Supreme Court in *Reema Aggarwal v. Anupam* AIR 2004 SC 1418, the expression "husband" would cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in Section 498A of the IPC.

4. In this view of the matter, no interference with a legitimate prosecution is called for under the inherent powers.

The petition, therefore, stands dismissed in limine.

Petition dismissed.