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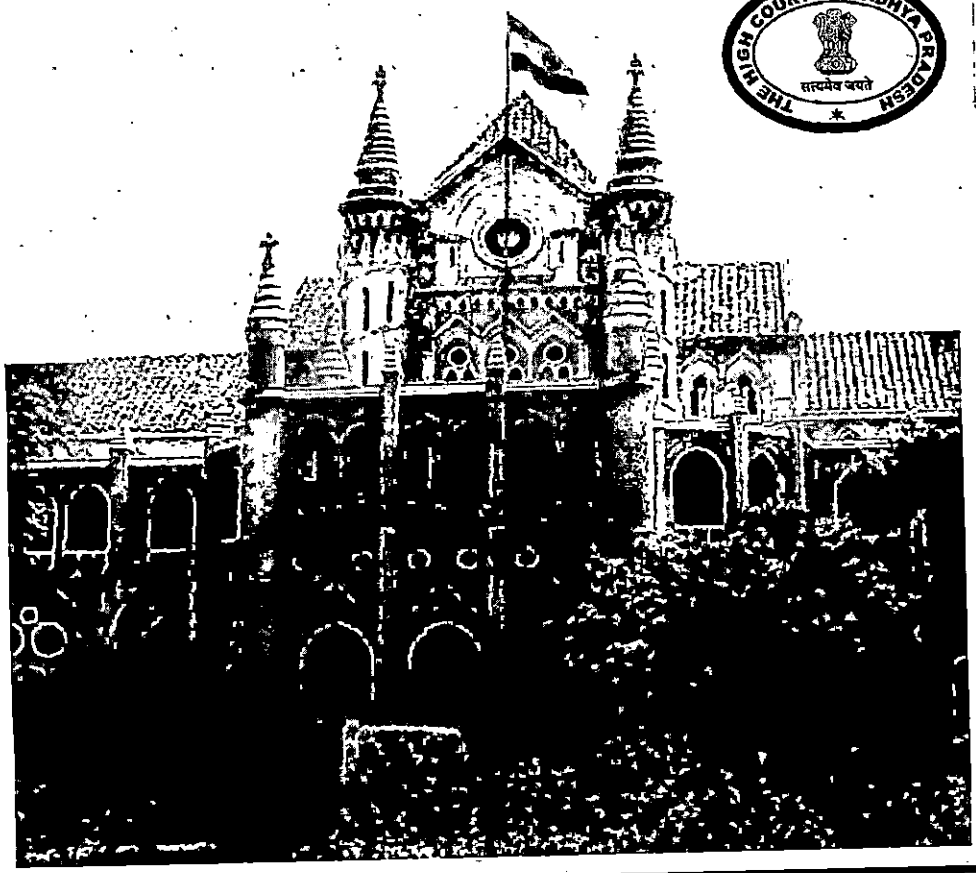

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TABLE OF CASES REPORTED

(Note : An asterisk (*) denotes Note number)

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NOTES OF CASES SECTION

Short Note

****(11)***

Before Mr. Justice Sujoy Paul

W.P. No. 7169/2011 (Gwalior) decided on 2 December, 2011

ALOK GUPTA ...Petitioner

Vs.

M.P. PROFESSIONAL EXAMINATION BOARD & ors ...Respondents

A. *Constitution – Article 226 – Examination – Question and Answer* – Judicial Review of incorrect questions and wrong answers – Held – Limited to the extent of seeing whether any reasonable body of men well-versed in the particular subject would regard it as correct.

क. संविधान – अनुच्छेद 226 – परीक्षा – प्रश्न और उत्तर – गलत प्रश्नों व गलत उत्तरों का न्यायिक पुनर्विलोकन – अभिनिर्धारित – का विस्तार यह देखने तक सीमित है कि क्या कोई व्यक्तियों का युक्तियुक्त समूह जो विशिष्ट विषय में निपुण है उसे सही माना जायेगा या नहीं।

B. *Constitution – Article 226 – Questions* – Discrepancy in framing of questions – Held – Writ Court, in absence of any malice against experts, can not sit as an Appellate Authority to examine the same unless the questions and answers selected by the experts are proved to be wrong.

ख. संविधान – अनुच्छेद 226 – प्रश्न – प्रश्न विरचित करने में विसंगति – अभिनिर्धारित – रिट न्यायालय विशेषज्ञों के विरुद्ध किसी विद्वेष की अनुपस्थिति में अपीलीय प्राधिकारी की तरह उसका परीक्षण करने के लिये नहीं बैठ सकता जब तक यह साबित नहीं हो जाता कि विशेषज्ञों द्वारा चयनित प्रश्न व उत्तर गलत थे।

C. *Constitution – Article 226 – Impact of questions* – Effect of discrepancy in framing questions and answers has similar impact on all the candidates, no interference is warranted.

ग. संविधान – अनुच्छेद 226 – प्रश्नों का प्रभाव – प्रश्न व उत्तर विरचित करने में विसंगति सभी छात्रों पर समान प्रभाव डालती है, हस्तक्षेप की आवश्यकता नहीं है।

Cases referred :

AIR 1983 SC 1230, AIR 1990 MP 253, AIR 1994 MP 164, 2004(3) Kar LJ 218.

Anil Mishra, Prashant Sharma, N.K. Gupta, & D.S. Raghuvanshi for the petitioner.

B.K. Sharma, G.A. for the respondent/State.

Deepak Chandna, for the respondent/Board.

Short Note (DB)

****(12)***

Before Mr. Justice Sanjay Yadav & Mr. Justice T.K. Kaushal

W.P. No. 13913/2006(S) (Jabalpur) decided on 12 December, 2011

D. SUBRAHMANYAM (Dr.) ...Petitioner

Vs.

DR. D.K. PANDEY & ors. ...Respondents

A. Words and Phrases – Weed Science – **Weed is a plant that is objectionable and interfere with the activities and welfare of man – They are no separate group of plants.**

क. शब्द और वाक्यांश – घासपात/कृतृण विज्ञान – घासपात आपत्तिजनक पौधा है और मनुष्य के कार्यकलाप एवं कल्याण में हस्तक्षेप करता है – वे पौधों का पृथक समूह नहीं है।

B. Service Law – Conditions of Service – **Conditions of service are intended to be construed reasonably and too technical a view can defeat the essential spirit and intent embodied in them.**

ख. सेवा विधि – सेवा की शर्तें – सेवा की शर्तों का युक्तियुक्त रुप से अर्थान्वयन आशयित है और अति तकनीकी दृष्टिकोण उनमें समाविष्ट सारभूत भावना एवं आशय को विफल कर सकता है।

C. Service Law - Essential Qualifications - **It is the screening committee comprising of expert who are the best judge to ascertain whether a candidate fulfill the essential qualifications – When subject experts constitute the panel of selection committee, selection by them should not be lightly set aside.**

ग. सेवा विधि – अनिवार्य अर्हता – वह छानबीन समिति है जिसमें विशेषज्ञ समाविष्ट हैं जो यह सुनिश्चित करने के लिए उत्तम निर्णेता है कि क्या अभ्यर्थी अनिवार्य अर्हताओं की पूर्ति करता है – जब विषये विशेषज्ञ चयन समिति के पैनल को गठित करते हैं तब उनके द्वारा किये गये चयन को हल्केपन से अपास्त नहीं किया जाना चाहिए।

D. Service Law – Selection Committee – Assignment of reasons – **Unless statutes provides for the selection committee, which is neither judicial nor adjudicatory but purely an administrative, is under no legal obligation to record reasons in support of its decision.**

घ. सेवा विधि – चयन समिति – कारण देना – जब तक कि चयन समिति, जो न तो न्यायिक है ना ही अधिनिर्णायक है बल्कि शुद्ध रुप से प्रशासनिक है, के लिये कानून उपबंध नहीं करता, वह अपने निर्णय के समर्थन में कारण अभिलिखित करने के लिये विधिक बाध्यता के आधीन नहीं है।

The order of the Court was delivered by : SANJAY YADAV, **J.**

Cases referred :

AIR 1980 SC 1547, (1980) 3 SCC 202, AIR 1976 SC 1404, AIR 1980 SC 2141, AIR 2000 SC 3457, AIR 1975 SC 446, AIR 1990 SC 434, AIR 1992 SC 1806, AIR 1994 SC 579.

D.K. Dixit, for the petitioner.

Praveen Dubey, for the respondent No.1.

S.A. Dharmadhikari, for the respondents No. 2 to 4.

Short Note

****(13)***

Before Mr. Justice Anil Sharma

M.Cr.C. No. 6332/2011 (Gwalior) decided on 9 December, 2011

MAHESH KUMAR DHAWAN ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

A. Penal Code (45 of 1860), Sections 493 & 495, Criminal Procedure Code, 1973 (2 of 1974), Section 198 – Mandatory – **Provisions of Section 198 are mandatory and the word complaint used in Section 198 does not include police report – Cognizance of offence under Section 493,495 can not be taken by a Magistrate on the basis of Police Report.**

क. दण्ड संहिता (1860 का 45), धाराएँ 493 व 495, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 198 – आज्ञापक – धारा 198 के उपबंध आज्ञापक हैं और धारा 198 में प्रयुक्त शब्द 'शिकायत' पुलिस रिपोर्ट को शामिल नहीं करती – पुलिस रिपोर्ट के आधार पर मजिस्ट्रेट द्वारा धारा 493, 495 के अंतर्गत अपराध का संज्ञान नहीं लिया जा सकता।

B. Penal Code (45 of 1860), Sections 493, 495, 375 - Concealment of former marriage – **Bodily relationship or sexual intercourse by a husband with his second wife falls under Sections 493,495 and can not be treated as rape as defined under Section 375 of I.P.C.**

ख. दण्ड संहिता (1860 का 45), धाराएँ 493, 495, 375 – पूर्ववर्ती विवाह का छिपाव – पति और उसकी दूसरी पत्नी के बीच शारीरिक संबंध या लैंगिक संभोग धारा 493, 495 के अंतर्गत आते हैं और भा.द.सं. की धारा 375 के अंतर्गत परिभाषित बलात्कार की तरह नहीं समझा जा सकता।

C. *Penal Code (45 of 1860)*, Section 498-A – Void Marriage – Applicant alleged to have contracted second marriage during the subsistence of first marriage – Second marriage is null and void – Any allegation of misbehavior or harassment made by second wife would not fall under the provisions of Section 498-A of I.P.C.

ग. दण्ड संहिता (1860 का 45), धारा 498–ए– शून्य विवाह – आवेदक द्वारा प्रथम विवाह के जारी रहने के दौरान द्वितीय विवाह के लिये संविदा करना अभिकथित किया गया – द्वितीय विवाह बातिल/अकृत और शून्य है – दुर्व्यवहार या तंग करने का द्वितीय पत्नी द्वारा किया गया कोई अभिवचन भा.द.सं. की धारा 498–ए के उपबंधों के अंतर्गत नहीं आयेगा।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 188 – Offence committed outside of India – **Offences alleged to have been committed outside India – Can not be inquired into or tried in India except with previous sanction of Central Government.**

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 188 – भारत के बाहर कारित अपराध – अपराध भारत के बाहर कारित होना अभिकथित किया गया – केन्द्र सरकार की पूर्वानुमति के बिना भारत में इसकी जाँच या विचारण नहीं किया जा सकता।

Cases referred :

2000 SCC (Cri) 147, (1990) 1 SCC 550, 1988 Cr.L.J. 544, (2009) 3 SCC (Cri) 36, (2011) 3 SCC (Cri) 772.

V.D. Sharma & Rajesh Shukla, for the applicant.

Prabal Solanki, P.P. for the non-applicant No. 1/State.

None for non-applicant No. 2 though served.

Short Note

**(14)*

Before Mr. Justice R.C. Mishra

E.P. No. 23/2009 (Jabalpur) decided on 16 December, 2011

MANOJ KUMAR AGRAWAL ...Petitioner

Vs.

SMT. ARCHANA CHITNIS ...Respondent

A. Representation of the People Act (43 of 1951), Section 123 – Corrupt Practice – **Poster containing the photograph of Lal Deval Temple – Held – If picture of Respondent and election symbol is removed, the poster would only present a panoramic view of Rajghat situated on the bank of river Tapti – Rajghat has other structures which are used for assessing water level – All temples shown in poster contain broken or abandoned idols considered as unworthy of worship – Structures visible in poster include a dilapidated mosques at Rajghat – It is difficult to hold that poster depicts any religious symbol within the meaning of Section 123.**

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 123 – भ्रष्ट आचरण – पोस्टर में लाल देवाल मंदिर के चित्र अंतर्विष्ट हैं – अभिनिर्धारित – यदि प्रत्यर्थी का चित्र व चुनाव चिन्ह हटा दिया जावे, तो पोस्टर केवल ताप्ती नदी के किनारे स्थित राजघाट का सर्वांगी दृश्य प्रस्तुत करेगा – राजघाट का अलग संरचनात्मक ढांचा है, जिसका उपयोग जल स्तर का निर्धारण करने के लिये किया जाता है – पोस्टर में जो मंदिर दर्शाये गये हैं, उनमे सभी में टूटी या परित्यक्त मूर्तियां हैं, जिन्हें पूजा के लिये अयोग्य माना गया है – पोस्टर में दर्शित संरचना में राजघाट पर जीर्ण अवस्था में मस्जिद शामिल हैं – यह निर्धारित करना कठिन है कि पोस्टर धारा 123 के अर्थों में किसी धार्मिक चिन्हों/प्रतीक का चित्रण करता है।

B. Representation of the People Act (43 of 1951), Section 123 – Corrupt Practice – Appeal to vote on the ground of religion – **Poster merely depicts panoramic view of Rajghat – Evidence on record shows that feelings of muslim voters were not hurt – Mere reference to prophets or religions or to deities venerated in a religion or to their qualities and deeds does not necessarily amount to an appeal to the religious sentiments of electorate – Election Petition dismissed.**

ख. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 123 – भ्रष्ट आचरण – धार्मिक आधार पर मतदान करने की अपील – पोस्टर मात्र राजघाट का

सर्वांगी दृश्य दर्शित करता है – अभिलेख पर साक्ष्य दर्शाती है कि मुस्लिम मतदाताओं की भावनायें चोटिल नहीं होती – मात्र पैगम्बर या धर्म का संदर्भ या किसी धर्म के आदरणीय देवताओं का संदर्भ देना या उनके गुणों एवं कृत्यों का संदर्भ मतदाताओ की धार्मिक भावनाओं की अनुनय करने की कोटि में आवश्यक रुप से नहीं आता – निर्वाचन याचिका खारिज।

Cases referred :

AIR 1964 MP 137(DB), AIR 1965 SC 183, AIR 1965 SC 669, AIR 1975 SC 2299, AIR 1994 SC 1627, AIR 1975 SC 667, (2009) 10 SCC 239, AIR 1965 SC 141, AIR 1996 SC 391, AIR 1988 SC 1274.

Y.M. Tiwari, for the petitioner.
Mrigendra Singh with *Amit Khatri* for the respondent.

Short Note (DB)
****(15)***
Before Mr. Justice Sanjay Yadav & Mr. Justice T.K. Kaushal
W.P. No. 2476/2007(S) (Jabalpur) decided on 13 October, 2011

PATRAKAR PRAKASHAN (P) (M/S) & anr. ...Petitioners
Vs.
SMT. VANADANA AWASTHY & anr. ...Respondents

A. ***Industrial Disputes Act (14 of 1947), Section 33 C(2), Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, (45 of 1955), Section 17 – Recovery of Money Due from an Employer*** **– Power of Labour Court extends to interpretation of the award or settlement on which the workman's right rests, like Executing Court – Labour Court has interpreted the Wage Board – Application before Labour Court was maintainable.**

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33 सी(2), श्रमजीवी पत्रकार और अन्य समाचार–पत्र कर्मचारी (सेवा की शर्तें) और प्रकीर्ण उपबंध अधिनियम, (1955 का 45), धारा 17 – नियोक्ता से बकाया रकम की वसूली – श्रम न्यायालय की शक्ति अवार्ड या समझौता जिस पर कर्मचारी का अधिकार निर्भर है, के निर्वचन तक विस्तारित है, निष्पादन न्यायालय के समान – श्रम न्यायालय ने मजदूरी बोर्ड का निर्वचन किया – श्रम न्यायालय के समक्ष आवेदन पोषणीय।

B. Industrial Disputes Act (14 of 1947), Section 33 C (2), Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, (45 of 1955), Section 17 – Without Prejudice to any other mode of recovery – **Maintainability of application under Section 33(C)2 of 1947 Act was challenged on the ground of availability of form under Section 17 of 1955 Act – Held – A provision enacted without prejudice to another provisions has not the effect of affecting the operation of the other provision and any action taken under it must not be inconsistent with such other provision – Objection with regard to maintainability sans merits.**

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33 सी(2), श्रमजीवी पत्रकार और अन्य समाचार–पत्र कर्मचारी (सेवा की शर्तें) और प्रकीर्ण उपबंध अधिनियम, (1955 का 45), धारा 17 – वसूली की अन्य कोई विधि प्रतिकूल प्रभाव के बिना – अधिनियम 1947 की धारा 33(सी)2 के अंतर्गत आवेदन की पोषणीयता को अधिनियम 1955 की धारा 17 के अंतर्गत फार्म की उपलब्धता के आधार पर चुनौती दी गई – अभिनिर्धारित – अन्य उपबंधों पर प्रतिकूल प्रभाव के बिना अधिनियमित उपबंध अन्य उपबंध के प्रवर्तन को संभावित करने में कोई प्रभाव नहीं डालता है और इसके अंतर्गत की गई कोई कार्यवाही ऐसे अन्य उपबंध से असंगत नहीं होनी चाहिये – पोषणीयता के संबंध में आक्षेप बिना गुण–दोष के हैं।

The order of the Court was delivered by : SANJAY YADAV, J.

Cases referred :

(1995) 1 SCC 235, (1998) 8 SCC 671, (2001)1 SCC 73, (2005) 8 SCC 58, (2008) 7 SCC 22, AIR 1964 SC 743, (1994) 2 SCC 647, (2006) 4 SCC 278.

V.S. Shroti with *Vikram Johri*, *Uttam Maheshwari* for the petitioners.

Anoop Nair, for the respondents.

Short Note (DB)

****(16)***

Before Mr. Justice Shantanu Kemkar & Mr. Justice S.K. Seth

W.P. No.14078/2010 (Indore) decided on 8 November, 2011

SAJNI BAJAJ (SMT.) (DR.) ...Petitioner

Vs.

INDORE DEVELOPMENT AUTHORITY & ors. ...Respondents

A. ***Constitution – Article 226 – Maintainability of writ – Termination of Lease*** – **Lease granted in favor of petitioners was cancelled on the ground of violation of terms of lease – Involves disputed questions of fact – Writ Petition challenging the order of cancellation of lease not maintainable as questions relate to the civil rights of the parties.**

क. संविधान – अनुच्छेद 226 – रिट की पोषणीयता – पट्टे की समाप्ति – पट्टे की शर्तों का उल्लंघन किये जाने के आधार पर याचीगण को प्रदान किया गया पट्टा निरस्त किया गया – तथ्य के विवादित प्रश्न अन्तर्ग्रस्त – पट्टे के निरस्तीकरण के आदेश को चुनौती देने वाली रिट याचिका पोषणीय नहीं क्योंकि प्रश्न पक्षकारों के सिविल अधिकारों से संबंधित है।

B. ***Constitution – Article 226 – Possession*** – **Indore Development Authority can not dispossess the petitioners after canceling the lease deed without following due procedure of law – There is no question for IDA to resort to an extra judicial method of taking possession and possession has to be taken only in accordance with law.**

ख. संविधान – अनुच्छेद 226 – कब्जा – इंदौर विकास प्राधिकरण विधि की प्रक्रिया का पालन किये बिना पट्टा विलेख के निरस्तीकरण के पश्चात याचीगण को बेकब्जा नहीं कर सकती – इंदौर विकास प्राधिकरण के लिये कब्जा लेने के लिये न्यायातिरिक्त पद्धति की सहायता लेने का कोई प्रश्न नहीं और कब्जा केवल विधि के अनुसार ही लेना चाहिये।

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

Cases referred :

AIR 1989 SC 997, AIR 1961 SC 1570.

G.M. Chaphekar with *Vandana Kasrekar*, for the petitioner.

A.S. Kutumbale with *Sudarshan Joshi*, for the respondents No. 1 &2.

None for the respondent No.3.

Mini Ravindran, Dy. G.A. for the respondent No.4/State.

Short Note

**(17)*

Before Mr. Justice R.S. Jha

W.P. No. 14386/2011 (S) (Jabalpur) decided on 1 December, 2011

SIKANDAR SABANA (KU.) ...Petitioner

Vs.

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

***Shashkiya Sewak (Adhiwarshik Aayu) Adhiniyam (M.P.) 1967, Section 2, Shashkiya Sewak (Adhiwarshik Aayu) Adhiniyam (M.P.) 2011, Public Health and Family Welfare (Gazetted) Service Recruitment (M.P.) Rules 2007, Public Health and Family Welfare Department (Directorate of Health Services) M.P. Class III, Nursing Services Recruitment Rules 1989, Medical Education (Gazetted) Services Recruitment Rules (M.P.) 1987 Schedule I* – The petitioners are school teachers and have not been appointed under the provisions of M.P. Educational Service (Collegiate Branch) Recruitment Rules 1990, or M.P. Technical Education Engineering College (Teaching Cadre) Service (Recruitment) Rules, 2004 or M.P. Technical Education Polytechnic College (Teaching Cadre) Service (Recruitment) Rules 2004 and therefore enhanced age of superannuation as prescribed by Rule 56(1-g),(1-h) and (1-i) of Fundamental Rules is not applicable to them as they are governed by the provisions of Rule 56(1-A) – Superannuation age continues to be 62 years – Rule 56(1-c) does not deal with the age of superannuation of teachers – Order of State Government confirmed – Few petitioners granted liberty to withdraw and challenge the vires of amended provisions – Rest petitions dismissed.**

शासकीय सेवक (अधिवार्षिक आयु) अधिनियम (म.प्र.) 1967 धारा 2, शासकीय सेवक (अधिवार्षिक आयु) अधिनियम (म.प्र.) 2011, लोक स्वास्थ्य और परिवार कल्याण (राजपत्रित) सेवा भर्ती म.प्र. नियम 2007, लोक स्वास्थ्य और परिवार कल्याण विभाग (स्वास्थ्य सेवाओं का निदेशालय), म.प्र. वर्ग III, नर्सिंग सेवा भर्ती नियम 1989, चिकित्सीय शिक्षा (राजपत्रित) सेवा भर्ती नियम (म.प्र.), 1987 अनुसूची I – याचीगण शाला अध्यापक है और म.प्र. शैक्षणिक सेवा (महाविद्यालयीन शाखा) भर्ती नियम 1990 या म.प्र. तकनीकी शिक्षण अभियांत्रिकी महाविद्यालय (अध्यापन संवर्ग) सेवा (भर्ती) नियम, 2004 या म.प्र. तकनीकी शिक्षण पॉलीटेक्निक महाविद्यालय (अध्यापन संवर्ग) सेवा (भर्ती) नियम 2004 के उपबंधों के अंतर्गत नियुक्त नहीं किये गये

हैं और इसलिए उन्हें बढ़ायी गई अधिवर्षिता आयु, जैसा कि मूलभूत नियम के नियम 56 (1–जी), (1–एच) व (1–आई) द्वारा विहित हैं लागू नहीं होती क्योंकि वे नियम 56(1–ए) के उपबंधों द्वारा शासित होते हैं– अधिवर्षिता आयु 62 वर्ष बनी रहेगी – नियम 56(1–सी) शिक्षकों की अधिवर्षिता की आयु से सबंधित नहीं – राज्य सरकार का आदेश अभिपुष्ट – कुछ याचीगण को (याचिका) वापिस लेने और संशोधित उपबंधों की शक्तिमत्ता को चुनौती देने की स्वतंत्रता प्रदान की गई – शेष याचिकायें खारिज।

Ashok Pali, A.P. Shah, Mahendra Choubey, S.P. Tiwari, Jitendra Tiwari, Rajesh Dubey, Anirudh Pandey, Manoj Rajak, S.K. Singh, Amit Singh, V.P. Singh, R.P.Mishra, D.P. Choubey, Ashok Kumar Mishra, Shakti Soni, Satish Shrivastava, Gulraj Rajput, Benod Tiwari, O.P.Tripathi, Amit Choudhary, K.P. Singh, Jitendra Arya, Rakesh Singh, Dharmendra Kumar Pandey, for the petitioner.

P.K. Kaurav, Dy. A.G. for the respondents.

I.L.R. [2012] M.P., 305
SUPREME COURT OF INDIA
Before Mr. Justice Dr.B.S. Chauhan & Mr.Justice T.S. Thakur
Criminal Appeal No. 2126/2011, decided on 16 November, 2011

GULAB DAS & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 307 – Compromise/ Compounding – **Non-compoundable offences can not be compounded – However, settlement/ compromise between the parties can be taken into consideration for the purposes of determining the quantum of sentence – Sentence reduced to period already undergone.**
(Paras 7,8 & 10)

दण्ड संहिता (1860 का 45), धारा 307 – समझौता/शमन – अशमनीय अपराध शमनीय नहीं हो सकते – फिर भी पक्षकारों के मध्य समझौता/समाधान को दण्डादेश की मात्रा का निर्धारण करने के लिये विचार में लिया जा सकता है – दण्डादेश पूर्व में भुगतायी जा चुकी अवधि तक घटाया गया।

Cases referred :

(1999) 2 SCC 213, (2008) 15 SCC 667.

JUDGMENT

The Judgment of the court was delivered by : **T.S. THAKUR, J. :-** Leave granted.

2. This appeal calls in question the correctness of an order passed by the High Court of Madhya Pradesh at Jabalpur whereby Criminal Appeal No.1509 of 2000 filed by the appellants challenging their conviction and the sentences awarded to them by the Additional Sessions Judge, Hoshangabad, in Sessions Trial No.60/1995 has been dismissed.

3. Appellant No.1, Gulab Das and his brother, Veeraji are residents of village Sonasavri, District Hoshangabad in the State of Madhya Pradesh. Both of them have built their respective houses that are adjacent to each other. Three days prior to the incident Gulab Das had put up a partition fence between the two properties. On 30th September, 1994 at about 7.45 a.m. while Veeraji was shifting the partition fence, alleging that it encroached on his property, an

exchange of hot words started between Gulab Das and his two sons who are appellant Nos. 2 & 3 on one hand and Veeraji, his wife and sons on the other. A free fight followed in which both the parties received injuries resulting in registration of cross cases by them in Police Station Itarsi, District Hoshangabad. While the case registered against the appellants was for offences punishable under Sections 307, 325, 323 read with Section 34 IPC, that registered against the opposite party was for the alleged commission of offences punishable under Sections 325, 323, 294 read with Section 34 IPC. Separate charge sheets in relation to both the cases were filed by the police before the Jurisdictional Magistrate who committed the cases to the Court of Sessions Judge, Hoshangabad. The case against the appellants was made over to the First Additional Sessions Judge, Hoshangabad, who acquitted the appellants for some of the offences while convicting them for some others with which they were charged. The operative portion of the trial Court's order was in the following words:

> "Therefore, accused persons Rajendra @ Rajjan and Chetan is being held guilty for charges under section 307 IPC for causing deadly injuries with intention to cause death of Veeraji and accused Gopaldas is being held guilty under section 323 IPC for causing voluntary simple injuries on Veeraji and accused persons Chetan is held guilty under Section 323 IPC for causing simple injuries on Phoolabai. Accused Chandrashekhar is being acquitted from charges under sections 307, 307/34, 325/34, 323/34, 323/34 IPC. Accused Gulabdas is being acquitted from charges under sections 307, 307/34, 325/34, 323/34, 323/34 IPC and accused Chetan is acquitted from charges under sections 307/34, 325/34, 323/34 IPC."

4. Appellant No.1 Gulab Das, and Appellant No.2, Chetan were resultantly sentenced to undergo imprisonment for a period of one month under Section 323 IPC. Appellant No.2 Chetan was further sentenced to undergo rigorous imprisonment for a period of three years and a fine of Rs.500/- under Section 307 IPC. In default of payment of fine, he was sentenced to undergo further imprisonment for a period of one month. Appellant No.3 was similarly sentenced to undergo three years' imprisonment and a fine of Rs.500/- under Section 307 IPC and in default of payment of fine to further undergo one month's rigorous imprisonment. The sentences were directed to run concurrently.

5. Aggrieved by their conviction and sentence the appellants appealed to the High Court of Madhya Pradesh at Jabalpur which failed and has been dismissed by the order impugned in this appeal. The appellants have in the present appeal by special leave assailed the said order of dismissal.

6. Ms. June Chaudhari, learned senior counsel for the appellants argued that during the pendency of the case in this Court the parties have entered into an amicable settlement/compromise and filed Criminal Misc. Petition No.20418 of 2011 for permission to compound the offences of which the appellants stand convicted. She drew our attention to the compromise deed filed along with the application and argued that since the parties had buried the hatchet by amicably settling their disputes, this Court could allow the matter to be compounded or in the alternative take a lenient view in regard to the sentence awarded to them. It was further submitted that so far as Appellant No.1 is concerned he has already served the sentence awarded to him under Section 323 IPC.

7. In the light of the submissions made at the bar the only question that falls for determination is whether the prayer for composition of the offence under Section 307 IPC could be allowed having regard to the compromise arrived at between the parties. Our answer is in the negative. This Court has in a long line of decisions ruled that offences which are not compoundable under Section 320 of the Cr.P.C. cannot be allowed to be compounded even if there is any settlement between the complainant on the one hand and the accused on the other. Reference in this regard may be made to the decisions of this Court in *Ram Lal and Anr. v. State of J & K (1999) 2 SCC 213*, and *Ishwar Singh v. State of Madhya Pradesh (2008) 15 SCC 667*. We have, therefore, no hesitation in rejecting the prayer for permission to compound the offence for which Appellant Nos. 2 and 3 stand convicted.

8. Having said that we are of the view that the settlement/compromise arrived at between the parties can be taken into consideration for the purpose of determining the quantum of sentence to be awarded to the appellants. That is precisely the approach which this Court has adopted in the cases referred to above. Even when the prayer for composition has been declined this Court has in the two cases mentioned above taken the fact of settlement between the parties into consideration while dealing with the question of sentence. Apart from the fact that a settlement has taken place between the parties, there are few other circumstances that persuade us to interfere on the question of sentence awarded to the appellants. The incident in question had taken place in the

year 1994. The parties are related to each other. Both Appellant nos. 2 and 3 were at the time of the incident in their twenties. It is also noteworthy that the incident had led to registration of a cross case against the complainant party in which the trial Court has already convicted Veeraji and others for offences punishable under Sections 325/34 and 323 IPC and sentenced them to undergo imprisonment for a period of two years and a fine of Rs.300/- and imprisonment of six months under Section 323 IPC. We are told that the parties having settled the matter, will approach the High Court for an appropriate order in the appeal pending before it. More so, the appellants have already served substantial part of the sentence awarded to them.

9. In the totality of the circumstances we are of the view that the settlement arrived at between the parties is a sensible step that will benefit the parties, give quietus to the controversy and rehabilitate and normalise the relationship between them.

10. In the result, while upholding the order of conviction recorded by the Courts below, we reduce the sentence awarded to the appellants to the sentence already undergone by them. The appeal is to that extent allowed and the impugned orders modified. The appellants shall be set free forthwith if not otherwise required in any other case.

Appeal allowed

I.L.R. [2012] M.P., 308

WRIT APPEAL

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

W.A. No. 594/2011 (Indore) decided on 16 November, 2011

PRATAP SAMBHAJI RAO KHUTAL ...Appellant

Vs.

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

***National Highways Act (48 of 1956), Sections 3(G)5, 3E – Possession* – Quantum of compensation determined by authority challenged by appellant before arbitrator on the ground of inadequacy – Section 3 empowers to take over possession on determination and deposit of compensation amount by competent authority – Taking over of possession can not wait till decision is given by arbitrator – Appeal dismissed.** (Para 8)

राष्ट्रीय राजमार्ग अधिनियम (1956 का 48), धाराएँ 3(जी)5, 3ई – कब्जा – प्राधिकारी द्वारा निर्धारित प्रतिकर की मात्रा को अपीलार्थी द्वारा मध्यस्थ के समक्ष अपर्याप्तता के आधार पर चुनौती दी गई – सक्षम प्राधिकारी द्वारा प्रतिकर की मात्रा जमा करने और निर्धारण करने पर धारा 3 कब्जा लेने के लिये अधिकृत करती है – कब्जा लेने के लिये माध्यस्थ द्वारा निर्णय देने तक इंतजार नहीं किया जा सकता – अपील खारिज।

Amit Mishra, for the appellant.
Ms. M. Raveendran, Dy. G.A. for the respondent No.1.

ORDER

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

This writ appeal under *section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005,* is filed against the order dated 20.10.2011 passed by learned Single Judge of this Court in W.P. No.8327 of 2011.

2. Briefly stated, the appellant / petitioner filed the aforesaid writ petition seeking quashment of the notice dated 19.05.2011 (Annexure P-1) issued under *section 3H of the National Highways Act, 1956* (for short, the Act of 1956) informing the appellant that the compensation has been determined by the competent authority as provided under section 3G of the Act of 1956.

3. Before the learned Single Judge the appellant raised grounds about inadequacy of the compensation amount determined by the competent authority. The learned Single Judge examined the appellant's contention and dismissed the writ petition on the ground that if the appellant / petitioner is aggrieved by the determination of amount of compensation he has remedy to approach the arbitrator as provided under section 3G(5) of the Act, 1956.

4. Feeling aggrieved by the order passed by learned Single Judge, the appellant has filed this intra court appeal.

5. Before this Court for the first time a plea has been raised by the appellant that during the pendency of the matter before the arbitrator the respondents are not entitled to take possession of the land/property in question.

6. Having heard learned counsel for the appellant, in our view the appellant is not entitled to raise a new plea for the first time in this appeal. However, we

have examined the plea on merits but we are of the view that the plea has no merit.

7. Section 3A of the Act of 1956 provides powers of the Central Government to acquire land. Section 3C provides hearing of objections of any person interested in the land. Section 3E provides powers to take possession. It provides that where any land is vested in the Central Government under sub section (2) of section 3D of the Act of 1956 and the amount determined by the competent authority under section 3G with respect to such land has been deposited under sub section (1) of section 3H with the competent authority by the Central Government, the competent authority may by notice in writing direct the owner as well as any other person who may be in possession of such land to surrender or deliver possession thereof to the competent authority or any person duly authorized by it in this behalf within sixty days of the service of the notice. Sub section (2) of section 3E provides procedure for getting compliance of the directions made under sub section (1) of section 3E.

8. We find that the competent authority under the Act of 1956 vide award dated 18.03.2011 has determined the compensation payable to the appellant and has deposited the same as provided under sub section (1) of section 3H in the manner provided under sub section (1) of section 3H. In the circumstances, merely because the appellant has invoked the provisions of section 3G(5) of the Act of 1956 by approaching the arbitrator on being dissatisfied with the amount determined by the competent authority, he is not entitled to resist taking over possession of the land by the competent authority. Section 3E empowers taking over possession on determination and deposit of the amount of compensation by the competent authority and the taking over of the possession cannot wait till decision is given by the arbitrator.

9. In view of the aforesaid provisions contained under the Act of 1956, no case is made out to make interference in the order passed by the learned Single Judge and to restrain the respondents from taking possession of the appellant's land till the matter is decided by the arbitrator.

As a result, the appeal fails and is hereby dismissed.

C.c. as per rules

Appeal dismissed.

I.L.R. [2012] M.P., 311

WRIT PETITION

Before Mr. Justice Sanjay Yadav & Mr. Justice T.K. Kaushal

W.P. No. 10092/2009(S) (Jabalpur) decided on 13 October, 2011

UNION OF INDIA & ors. ...Petitioners

Vs.

SHRI DEVRAJ BAIS & ors. ...Respondents

A. Service Law – Rules – Relaxation – **Power is conferred not for a person but in exigency of service, a factor depending upon the circumstances which may arise giving rise to occasional exercise of power to relax.** (Para 19)

क. सेवा विधि – नियम – शिथिलीकरण – शक्ति व्यक्ति के लिये नहीं बल्कि उत्पन्न हो सकने वाली परिस्थितियों पर निर्भर कारक सेवा की अत्यावश्यकता के लिये प्रदत्त है जो शिथिल करने की शक्ति का यदा–कदा प्रयोग उत्पन्न करती है।

B. Service Law – Advertisement – Mistake therein – Correction – **Recruitment is an administrative function – There exist possibility of committing of administrative mistake – If there is a mistake the same has to be corrected.** (Para 23)

ख. सेवा विधि – विज्ञापन – में त्रुटि – सुधार – भर्ती एक प्रशासनिक कार्य है – प्रशासनिक त्रुटि कारित हो सकने की संभावना अस्तित्वमान है – यदि कोई त्रुटि है उसे सुधारा जाना चाहिए।

C. Service Law – Recruitment – Mistake – Vested Right – **If due to mistake some benefit is extended in favour of person(s) not eligible for such benefit, there is no accrual of right.** (Para 24)

ग. सेवा विधि – भर्ती – त्रुटि – निहित अधिकार – यदि त्रुटि के कारण ऐसे व्यक्ति (यों) के पक्ष में लाभ दिया गया जो ऐसे लाभ के हकदार नहीं, तब अधिकार प्रोद्भूत नहीं होता।

D. Service Law – Recruitment – Mistake – Correction thereof – **Mistakes can be corrected by affording an opportunity of hearing to the incumbents.** (Para 26)

घ. सेवा विधि – भर्ती – त्रुटि – का सुधार – पदधारियों को सुनवाई का अवसर देकर त्रुटि को सुधारा जा सकता है।

E. **Service Law – Advertisement – Mistake therein – Correction - Four posts of welder in Group "C" Highly skilled to be filled only by deputation/re-employment were released – Respondents were appointed however after assumption of charge they were served with amended appointment order by which they were posted Welder Skilled, a post lower than on which recruitment was made – Held – Post of Welder (Skilled) is earmarked to be filled in by re-employment for ex-servicemen whereas there is no such reservation for recruitment of Welder (Highly Skilled) – Amendment of recruitment order in absence of any malafide does not suffer from vice of violation of Principle of Natural Justice.** (Paras 30 & 31)

ङ. सेवा विधि – विज्ञापन – में त्रुटि – सुधार – ग्रुप 'सी' में अति कुशल वेल्डर के चार पद केवल प्रतिनियुक्ति/पुनः नियोजन द्वारा भरने के लिये प्रकाशित किये गये – प्रत्यर्थीगण को नियुक्त किया गया किन्तु पद ग्रहण करने के पश्चात उन्हें संशोधित नियुक्ति आदेश तामील किया गया जिसके द्वारा उन्हें वेल्डर कुशल पदस्थ किया गया, जो उस पद से कनिष्ठ था जिस पर भर्ती की गई थी – अभिनिर्धारित – वेल्डर (कुशल) का पद भूतपूर्व सैनिक हेतु पुनः नियोजन द्वारा भरा जाना चिन्हित है जबकि वेल्डर (अति कुशल) की भर्ती हेतु ऐसा कोई आरक्षण नहीं है – भर्ती आदेश का संशोधन किसी असद्भाव की अनुपस्थिति में नैसर्गिक न्याय के सिद्धांत के अतिलंघन के दोष से ग्रसित नहीं।

Cases referred :

1993 Supp.(3) SCC 575, (2008) 2 SCC 750, AIR 1992 SC 1806, (2000) 7 SCC 529.

Brian D' Silva with *V. Bhide*, for the petitioners.
Rakesh Pandey, for the respondents.

ORDER

The Order of the court was delivered by, SANJAY YADAV, J.: Order dated 6.4.2009 passed by the Central Administrative Tribunal, Jabalpur Bench in an application under Section 19 of the Administrative Tribunals Act, 1985. O.A. No. 137/2009 is being challenged by the petitioner.

2. The controversy was whether the petitioners (who were respondents in O.A. 137/2009) were justified in their action of reducing the status of the respondents (who were applicants in O.A. 137/2009) from that of Group 'C'

(Industrial), highly skilled in pay scale of Rs.4000-6000 to that of Group 'C' (Industrial) skilled in the pay scale of Rs.3050-4590.

3. Four posts of Welder in Group 'C' (Industrial) Highly Skilled in the pay scale of Rs.4000-6000 along with posts of TCM (03), Inst. Mech (02), EE Mech (01) and Elect (01) to be filled only by deputation/re-employment were released by the Directorate General of EME :Master General of Ordnance Branch : Integrated HQ of MOD (Army) DHQ: Delhi vide circular No. B/15198/Dep/Re-emp/Rel/EME Civ-2 dated 7th September 2007. The circular was issued on the strength of HQ letter No. B/15198/Policy/Dep/ Re-emp/EME-Civ-2 dated 2/12/2005. The recruitment was to be strictly in accordance with Recruitment Rules (SRO 29/2006).

4. Pursuance to said recruitment respondents herein were appointed as Welder Group 'C' Highly skilled in grade Rs.4000-6000 on various dates in 2007-08 as Ex Serviceman on Re-employment.

5. After assumption of charge of the post on which they were appointed, the respondents were served with order dated 16.1.2009 amending the appointment letter that, in place of pay scale of Rs.4000-100-6000, their appointment was made on pay scale of Rs.3050-75-3950-80-4590, which is the pay-scale of Welder Skilled, a post lower than on which recruitment was made.

6. Reasons for amendment though are not borne out from the authority letter, i.e., Directorate General of EME Integrated HQ of MOD (Army) letter No. B/15198/Dep/Re-emp/Rel/EME Civ-2 dated 05th January 2009 on the basis whereof the amendment in the appointment letter has been effected, but is spelt out in the counter reply filed before the Tribunal that the post of Welder, Group 'C' (Industrial) Highly Skilled Grade Rs.4000-100-6000 is a promotional grade of skilled grade Rs.3050-4590 which under S.R.O. 29/2006 can be filled in by promotion only. That a mistake had occurred due to a typographical error in the letter dated 17.9.2007 wherein the trade Welder was erroneously shown under the Highly skilled grade Rs.4000-6000 instead of 3050-4590.

7. The Tribunal on the principle of constructive estoppel and deemed relaxation of rules and that only the pay scale was changed and that the entire recruitment being not set at naught, rejected the plea that the typographical mistake had crept in the release letter.

8. Petitioner questions the correctness of the order on the ground that the recruitment Rules SRO 29/2006 does not provide for appointment of Welder in Grade Rs.4000-6000 which is high skilled (Industrial) Grade either by deputation/re-employment or direct recruitment, but is to be filled by 100% promotion from the skilled grade. Whereas recruitment of Welder in Grade Rs.3050-4590 can be by direct recruitment or by deputation or re-employment. It is urged that in absence of express order relaxing the Rules regarding mode of recruitment by the Central Government, which is empowered under Rules 5 of SRO 29/2006, an erroneous assumption of an authority, subordinate to the central government will not create any right in favour of respondents. It is urged that the Tribunal has erred in holding that there was a deemed relaxation under SRO 29/2006. It is urged that there being a specific condition of recruitment, appointments in deviation thereto, in absence of order of relaxation, were illegal and were rightly rectified, instead of cancelling the entire selection.

9. Reliance is placed on the decision in *Syed Khalid Rizvi and others v. Union of India and others* [1993 Supp (3) SCC 575] and *Union of India and another v. Narendra Singh* [(2008) 2 SCC 750] to substantiate the submissions.

10. The respondents on their turn support the decision by the Tribunal. It is urged that a conscious decision was taken by the competent authority to fill in the post of Group 'C', High Skilled Welder in Grade Rs.4000-100-6000 through re-employment. The authority cannot now turn around, to the detriment of the respondents and treat the recruitment as for a lower post. Petitioner places reliance on the decision in Union of India and others v. MES Employees Union and another W.P. No. 4510/1999 decided on 5.7.2000.

11. Considered the rival submissions.

12. The Rules which govern the field are Corps of Electronics and Mechanical Engineer Industrial Recruitment Rules, 2006 which are framed under Article 309 of the Constitution.

13. Rule 3 stipulates that the method of recruitment, age limit, qualification and other matters relating to the said posts is as specified in columns (5) to (14) of the schedule appended with rules.

14. The post of Welder (Highly Skilled) in Grade Rs.4000-6000 is at Srl.

No. 20 of the Schedule, column 11 whereof prescribes the mode of recruitment by "Promotion" whereas column 12 stipulates the feeder grade wherefrom the promotion is made to the post of Welder (Highly skilled). It provides that "welder skilled with a pay scale of Rs.3050-75-3950-80-4590 having 8 years regular service in the grade on the basis of qualifying departmental tests held for the purpose." A note appended thereunder stipulates: "Note: Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, which ever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who have already completed such qualifying or eligibility service".

15. Whereas the post of Welder (skilled) in grade of Rs.3050-4590 at Sl. No. 34 which is also a Group C post as per column 11 can be filled by "Promotion, failing which by absorption, failing both by deputation re-employment for ex-servicemen and failing all by direct recruitment." Column 12 stipulates "Promotion : Tradesmen Mates with a pay scale of Rs.2650-65-3300-70-4000 of this trade having 4 years regular service in the grade on the basis of qualifying department test held by the purpose: **Absorption:** Absorption of persons holding similar or higher posts in defence services and possessing the qualifications and experiences as laid down in column (8). **For Ex-serviceman : Deputation/re-employment:** The armed Forces personnel including combatants from Corps of Electronics and Mechanical Engineers due to retire or who are to be transferred to reserve within a period of one year and having the requisite experience and qualifications prescribed for them in column (8). Such persons would be given terms up to the date on which they are released from armed Forces, thereafter they may be continued on re-employment. **Note:** Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors would also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who have already compeled such qualifying or eligibility service.

16. Thus, under Rules the post of Welder (Skilled) is earmarked to be filled in by re-employment for ex-servicemen; whereas there is no such

reservation in favour of ex-serviceman for recruitment of Welder (Highly Skilled).

17. Rule 5 of the Rules empowers the Central Government to relax any of the provision of Rules with respect to any class or category of persons. It stipulates:

> "5. Power to relax:- Where the Central Government is of the opinion that it is necessary or expedient so to do, it may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons."

18. Thus the condition precedent for forming an opinion to relax rules are that (i) it is necessary and expedient so to do (ii) the reasons must be recorded in writing. Unless these conditions are fulfilled there cannot be an exercise of power. In other words the rule not only requires an express formation of an opinion but also the reasons based on necessity and expediency of service.

19. The power conferred upon the Central Government to relax any provision of Rules is not for a person but in the exigency of service which is a factor depending upon the circumstances which may arise giving rise to occasional exercise of power to relax. Whether there exists any such situation giving rise to exercise of such power in the case at hand. Admittedly, there is no express order by the Central Government in exercise of its power under Rule 5 of S.R.O. 29/2006. In absence whereof the Tribunal has taken into certain facts to arrive at a conclusion that there is a deemed sanction.

20. In our consideration unless there exists the need which when taken into consideration could lead to formation of an opinion as required by the Rules, then, it is only then, that, an inference can be drawn that there was a deemed sanction.

21. The Tribunal in the present case takes the following the facts as the indices to hold that there was a deemed sanction: "Admittedly, vide circular dated 17.9.2007 (A-5) the Directorate General of EME, Master General of Ord. Branch, Integrated Headquarter of MOD (Army) New Delhi, released 4 vacancies in the trade of Welder Group C (Industrial)Highly Skilled post in the pay scale of Rs.4000-6000 to be filled by deputation/re-employment. On the strength of said circular applicants, who were Ex-servicemen having

rendered more than two decades of service, were appointed against those vacancies in the pay scale of Rs.4000-6000. It is not the case of the respondents that said circular has either been withdrawn or necessary corrections were made before issue of offer of appointment. To a specific query raised by the Bench, to the effect that how their pay scale was reduced when according to respondents said appointments were not made strictly in terms of the RRs, counsel for respondents was unable to answer as to why only scale has been reduced and why the entire selection process was not set at naught. We may note that SRO 29 of 2006 which has been strongly relied upon by the respondents vide Rule 5 thereof provides "Power to relax" rules. In this circumstance, one would be justify to conclude that there is deemed relaxation of RRs."

22. These facts are not the facts preceding the decision, but are post decisional facts which cannot be brought within the aspect of deemed factors. The Tribunal in our considered opinion grossly erred in holding that there was a deemed sanction. In fact, as the record reveals there is no sanction to fill in the post of Welder (Highly Skilled) in grade Rs.4000-6000 by way of Re-employment of ex army personnels.

23. Now coming to aspect of mistake. Trite it is that recruitment is an administrative function (see *National Institute of Mental Health and Neurosciences v. Dr. K. Kalyan Raman and Ors.* (AIR 1992 SC 1806 Paragraph 7). There exist the possibility of committing of administrative mistake. If there is a mistake the same has to be corrected (A quasi-judicial or a judicial error also could be rectified by exercising the power of review).

24. Question is whether such a mistake would create a vested right in favour of the person/persons who are benefited by such mistake. In our considered opinion if due to mistake some benefit is extended in favour of person/persons not eligible for such benefit there is no accrual of right.

25. In *Union of India and another v. Narendra Singh* (2008) 2 SCC 750 it is observed : "32. It is true that the mistake was of the Department and the respondent was promoted though he was not eligible and qualified. But, we cannot countenance the submission of the respondent that the mistake cannot be corrected. Mistakes are mistakes and they can always be corrected by following due process of law."

26. Thus no right accrues on the basis of a mistaken order and the same

can be undone; however, by taking recourse to due process of law. In other words the mistakes can be corrected by affording an opportunity of hearing to the incumbents.

27. In the case at hand the order amending the earlier order of appointment has the effect of appointing on a lower grade of Rs.3050-4590. The respondents were therefore, entitled for an opportunity of hearing. It is seen from the record that after passing of order amending the appointment, respective employees represented to the competent authority who passed the speaking order duly communicated to respective employees. Thus, the employees are subjected to post decisional hearing.

28. In respect of post decisional hearing, placing reliance on various decisions in the field of 'natural justice' or the 'fair play in action' the learned Author in Principles of Statutory Interpretation : by Justice G.P. Singh : 12th Edn. 2010 observe in Chapter 5 synopsis 6 at page 461 that "Briefly stated 'natural justice' means 'fairplay in action' and requirements of natural justice depend upon the facts of each case. Therefore, in judging the validity of an order when the complaint is about non-compliance with the principles of natural justice, in cases where the attack is not on ground of bias, a distinction has to be drawn between cases of 'no notice' or 'no hearing' and cases of 'no fair hearing' or 'no adequate hearing'. If the defect is of the former category, it may automatically make the order invalid but if the defeat is of the latter category, it will have to be further examined whether the defect has resulted in prejudice and failure of justice and it is only when such a conclusion is reached that the order may be declared invalid. Even in cases of 'no notice' or 'no hearing' the superior courts may in the exercise of their discretion decline to interfere by judicial review (under Article 32 or 226 as the case may be) where on admitted or undisputed facts the view taken by the impugned order is the only possible view and it would be futile to issue any writ to compel observance of natural justice. This is called the useless formality theory. For example, when the petitioner was appointed even though he was not qualified on the cut off date (last date for receipt of applications) and was ineligible to be considered for appointment, cancellation of his appointment without hearing him was not interfered with as it would have been a futile exercise."

29. In *Aligarh Muslim University Vs.Mansoor Ali Khan* (2000) 7 SCC 529, it is held:

> 25. The 'useless formality' theory, it must be noted, is an

exception. Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, De: Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the Court will be prejudging the issue. Some others have said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

26. It will be sufficient, for the purpose of the case of Mr. Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in *S.C. Kapoor Vs. Jagmohan,* namely, that on the admitted or indisputable facts - only one view is possible. In that event no prejudice can be said to have been caused to Mr. Mansoor Ali Khan though notice has not been issued.

30. In view of above, the action taken by the petitioner in absence of any mala fides does not suffer from the vice of violation of principle of natural justice.

31. Having thus considered we are of the view that the Tribunal was not justified in quashing the orders whereby the appointment orders of respective respondents was corrected from Welder (Highly Skilled) grade Rs.4000-6000 to Welder (Skilled) Grade Rs.3050-4590. The order passed by Tribunal is hereby quashed.

32. In the result petition is allowed to the extent above. No costs.

Petition allowed

I.L.R. [2012] M.P., 320
WRIT PETITION

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain
W.P. No. 7282/2010 (Jabalpur) decided on 1 November, 2011

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

Court Fees Act (7 of 1870), Sections 35, 16C, Civil Procedure Code (5 of 1908), Section 89, Legal Services Authorities Act (39 of 1987), Sections 21, 89 – First Appeal – Matter settled in Lok Adalat – Refund of Court fees ordered – **Registry deducted 10% of Court fees under the notification dated 24.03.2003 issued by Law Department – Held – State is not empowered to deduct any amount from Court fee payable – No amendment was made by State legislature – Assent of president not obtained – Notification dated 24.03.2003 quashed – State is directed to refund full amount of the court fee for matters settled in Lok adalat – Petition allowed.** (Para 15)

न्यायालय फीस अधिनियम (1870 का 7), धाराएँ 35, 16सी, सिविल प्रक्रिया संहिता (1908 का 5), धारा 89, विधिक सेवा प्राधिकरण अधिनियम (1987 का 39), धाराएँ 21, 89 – प्रथम अपील – लोक अदालत में मामले को निपटाया गया – न्यायालय फीस वापसी का आदेश दिया गया – विधि विभाग द्वारा जारी अधिसूचना दिनांक 24.03.2003 के अंतर्गत रजिस्ट्री ने न्यायालय फीस में से 10 प्रतिशत की कटौती की – अभिनिर्धारित – देय न्यायालय फीस में से कोई भी राशि की कटौती करने की राज्य को शक्ति नहीं – राज्य विधानमंडल द्वारा कोई संशोधन नहीं किया गया – राष्ट्रपति की अनुमति प्राप्त नहीं की गई – अधिसूचना दिनांक 24.03.2003 अभिखण्डित – लोक अदालत में निपटाये गये प्रकरणों में पूरी न्यायालय फीस वापिस करने के लिये राज्य को निदेशित किया गया – याचिका मंजूर।

Akshay Sapre, for the petitioner.
R.D. Jain, A.G. with *Vivek Agrawal*, G.A. for the respondents.

ORDER

The order of the court was delivered by :
K.K. Lahoti, J.:- In compliance of our order dated 19.10.2011, Shri K.D. Khan, Principal Secretary, Law and Shri R.K. Verma, Secretary, Law have appeared to assist us.

2. It is stated that an affidavit has been filed by the Law Secretary stating that the notification Annexure P/8 was issued by the State Government in view of the powers as contained in Section 35 of the Court Fees Act, 1870. It is submitted by Shri Jain that in view of the provision as contained in Section 16C of the Court Fees Act, 1870, the State can deduct the amount from the court fee paid by the plaintiff towards administrative expenses incurred by the State for the court-fee.

3. Learned counsel appearing for petitioner submitted that Section 16 of the Court Fees Act, 1870 does not empower the State Government to deduct any amount of the court-fee which was paid by the petitioner/appellant on the memo of appeal if the case is settled as per the provisions under Section 89 of the Code of Civil Procedure, 1908, the appellant/petitioner is entitled for the full amount of the court-fee paid in respect of memo of appeal.

4. We have heard learned counsel for parties.

5. Facts of the case are that the petitioner filed a First Appeal bearing No.537/2002 before Indore Bench of this Court. Aforesaid matter was settled in Lok Adalat on 21.12.2008. The Bench constituted for the Lok Adalat directed for refund of the court-fee on the memo of appeal in accordance with law. Thereafter, the petitioner moved an application for refund of the court-fee paid on the memo of appeal. While processing the matter, the Registry deducted 10% of the court-fee paid by the petitioner on the memo of appeal. An explanation was furnished to the petitioner that the aforesaid amount is to be deducted by the Registry in view of the notification dated 24.3.2003 issued by the Law and Legislative Affairs Department.

6 Contention of the petitioner is that in view of the specific provision as contained in Section 16 of the Court Fees Act, 1870 read with Section 21 of the Legal Services Authority Act, 1987, the petitioner is entitled for full refund of court-fee without any deduction.

7. Notification of the State Government dated 24.3.2003 reads thus:-

"NOTIFICATION

F.No. 1 7(E)4/2003/234/21 -B(II)-In exercise of the powers conferred by section 35 of the Court Fees Act, 1870 (No.7 of 1870), the State Government hereby makes the following amendment in this Department's notification No.9-1-86-B-XXI

dated 10 April, 1987, namely:

AMENDMENT

In the said notification, in sub-para (3) of para (1) for the words "the party shall be entitled to refund of the court-fees already paid by him", the words "the party shall be entitled to refund of an amount after deduction of 10 percent of the court-fee already paid by him."

BY ORDER AND IN THE NAME OF THE GOVERNOR OF

Sd/- G.S.Solanki, Addl.Secretary,
Law and Legislative Affairs"

Aforesaid notification has been issued by the State under Section 35 of the Court Fees Act, 1870. Section 35 of the Court Fees Act, 1870 provides thus:-

> **35. Power to reduce or remit fees-** The appropriate Government may, from time to time by notification in the Official Gazette, reduce or remit, in the whole or in any part of the territories under its administration all or any of the fees mentioned in the first and second schedules to this Act annexed, and may in like manner cancel or vary such order.

8. Aforesaid provision specifically provides that the State Government may subject to such condition or restriction, as it may think to impose, by notification in the Official Gazette, **reduce or remit** in the whole or in any part of the State under its administration all or any of the fees mentioned in the first and second schedules to this Act annexed, and may in like manner cancel or vary such order. Aforesaid provision specifically provides that the State Government may reduce or remit the court-fee payable in respect of the items mentioned in the first and second schedules of the Act, but it does not give any power to the State Government to deduct any amount which is to be refunded to the petitioner in view of Section 16 of the Court Fees Act. Section 16 of the Court Fees Act, 1870 provides thus:

> **16.Refund of fee-** Where the Court refers the parties to the suit to any of the mode of settlement of dispute referred to in Section 89 of the Code of Civil Procedure, 1908 (5 of 1908)

the plaintiff shall be entitled to a certificate from the Court authorising him to receive back from the Collector, the full amount of the fee paid in respect of such plaint.

(emphasis supplied)

Section 21 of the Legal Services Authorities Act, 1987 provides thus:

Section 21- Award of Lok Adalat- (1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870 (7 of 1870)

(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

10. Aforesaid both provisions specifically provides that in a case where the matter is settled under Section 89 of the Code of Civil Procedure, the petitioner/appellant shall be entitled for the full refund of the court-fee paid in respect of such plaint or appeal. Section 21 of the Legal Services Authorities Act, 1987 also provides that where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act, 1870.

Shri R.D.Jain, learned Advocate General has placed reliance to Section 16C of the Court Fees Act, 1870 which reads thus:

16-C Procedure for obtaining refund when a person becomes entitled to a refund of court-fee-The Court shall grant a certificate authorising him to receive back from the Collector the amount specified therein, calculated according to the provisions of this Act.

12. But the aforesaid amendment is applicable in the State of Goa, Daman and Diu and not in the State of M.P. Though in the Book provided to us by

Shri R.D.Jain by M.N.Basu on Law of Court Fees & Suits Valuation on page 480, there is such local amendment by State of Goa, Daman and Diu. We have also verified the aforesaid and find that this amendment is applicable in the State of Goa, Daman and Diu and is not applicable in the State of M.P. So the provision as referred by Shri Jain does not help him.

13. Section 89 of the Code of Civil Procedure has been amended by the Code of Civil Procedure (Amendment) Act, 1999 which has been made effective from 1.7.2002, which is reproduced as under:-

Section 89. Settlement of disputes outside the Court-

(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-

(a) arbitration;

(b) conciliation

(c) judicial settlement including settlement through Lok Adalat; or

(d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of subsection (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person

shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act:

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

14. Section 16 of the Court Fees Act, 1870 has been also inserted by the Act No.46 of 1999 by the Code of Civil Procedure (Amendment) Act, 1999 (Act No.46 of 1999) which has been made effective from 1.7.2002. Aforesaid provision has been inserted by the Parliament by the aforesaid Act which provides that after settlement of the dispute referred to the Lok Adalat under Section 89 of the Code of Civil Procedure, 1908, petitioner/ appellant shall be entitled to a certificate from the Court authorising him to receive back from the Collector the full amount of the fee paid in respect of memo of appeal. In view of the specific provision as contained in Section 16 of the Court Fees Act, 1870, the petitioner/appellant is entitled for full refund of the fee paid on appeal.

15. In the light of aforesaid discussion, no deduction could have been made by the authorities even on the strength of the Circular Annexure P/8 dated 24.3.2003. As stated hereinabove, there is no provision in Section 35 of the Court Fees Act, 1870 empowering the State to deduct any amount which is refundable under Section 16 of the said Act, but inspite of this, aforesaid amount has been directed to be deducted by the State Government. We have examined Sections 16 and 35 of the Court Fees Act, 1870 as argued by Shri R.D.Jain, learned Advocate General, but we do not find any such provision in both the sections empowering the State Government to deduct any amount from the court-fee payable under Section 16 of the Court Fees Act, 1870. Apart from this, the aforesaid enactment has been made by the Parliament with the assent of the President and if the State was of the view that any amount is to be deducted from such court-fee, then after due amendment in the provision, assent of the President was necessary. In this case, no averment has been made by the State that any such amendment was made by the State Legislature in Section 16 and the assent of the President was obtained. In view of the aforesaid, notification dated 24.3.2003 is contrary to Section 16 of the Court Fees Act, not sustainable under law and is hereby quashed.

16. State is directed to refund full amount of the court-fee in respect of the matters which are settled in Lok Adalat in view of the specific provision as contained in section 16 of the Court Fees Act, 1870 and section 21 of the Legal Services Authorities Act, 1987.

17. This petition is allowed with costs. Counsel's fee Rs. 2,000/-

Petition allowed

I.L.R. [2012] M.P., 326
WRIT PETITION

Before Mr. Justice Sanjay Yadav & Mr. Justice T.K. Kaushal
W.P. No. 5944/2010 (Jabalpur) decided on 2 November, 2011

PRAKASH KUMAR SAHU ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

A. Service Law – Suspension – Non-duty – **Petitioner was placed under suspension due to prosecution of petitioner in criminal case – Petitioner acquitted – Period of suspension was directed to be treated as non duty and not counted for the purpose of pension – Held – Suspension of petitioner was statutory suspension as it was not because of pending or contemplated departmental enquiry, but due to his prosecution in criminal case – Authority was justified in treating the period of suspension as non-duty for the purpose of duty and not a break in service.** (Paras 10-18)

क. सेवा विधि – निलम्बन – नॉन ड्यूटी – याची का दाण्डिक प्रकरण में अभियोजन चलने के कारण याची को निलम्बन में रखा गया – याची दोषमुक्त किया गया – निलम्बन अवधि को नॉन ड्यूटी मानने और पेंशन के प्रयोजन हेतु गणना न करने के लिये निदेशित किया गया – अभिनिर्धारित – याची का निलम्बन कानूनी निलम्बन है क्योंकि वह लम्बित या विचारित विभागीय जाँच के कारण नहीं हुआ था, बल्कि उसका आपराधिक प्रकरण में अभियोजन चलने के कारण हुआ था – प्राधिकारी द्वारा निलम्बन अवधि को कर्तव्य के प्रयोजन हेतु नॉन ड्यूटी मानना, न कि सेवा में व्यवधान न्यायोचित है।

B. Central Civil Service (Pension) Rules, 1972 – Rule 3(q) – Qualifying service – **When there is no break in service, a non-duty period can not be excluded from counting the said period of suspension for the purpose of pension – Petition allowed.** (Para 21)

ख. केन्द्रीय सिविल सेवा (पेंशन) नियम 1972 – नियम 3(क्यू) – अर्हकारी सेवा – जब सेवा में कोई व्यवधान नहीं है तो उक्त निलम्बन की अवधि की गणना से नॉन ड्यूटी की अवधि को पेंशन के प्रयोजन हेतु अपवर्जित नहीं किया जा सकता – याचिका मंजूर।

Cases referred :

(1996) 11 SCC 603, (2004) 1 SCC 121, 2006 SCC (L&S) 35, AIR 1994 SC 552, W.P. 1363/2001, decided on 14.3.2006, 2005(3) MPHT 125, 2003 AIR SCW 3507.

Akash Choudhary, for the petitioner.
S.A. Dharmadhikari, for the respondents.

ORDER

The order of the court was delivered by : SANJAY YADAV, J :-Challenge in this petition is to an order passed by the Central Administrative Tribunal, Bench Jabalpur on 26.5.2009; whereby, Original Application preferred by petitioner against the order dated 3.7.2006 passed by respondents was dismissed.

2. By order dated 3.7.2006, the period from 30.7.1999 to 11.8.2000 during which the petitioner was under suspension because of the prosecution of the petitioner for a charge under Section 302 in alternate under Section 306 and 498 of the Indian Penal Code, has been treated as non duty and the period though not treated as break in service has not been counted for the purpose of pension.

3. Petitioner was employed under the respondent No. 3, Gun Carriage Factory, Jabalpur as Lower Division Clerk. For an offence initially registered under Section 498-A and 304 B of IPC the petitioner later on was tried for an offence under Section 302 in alternate under Section 306 and 498 IPC. Because of the arrest and the launching of prosecution, the petitioner was placed under suspension by order dated 28.8.1999. The petitioner was exonerated of the criminal charges and the order of acquittal wad recorded on 4.7.2000 by the Seventh Additional Sessions Judge, Jabalpur. The acquittal led to revocation of suspension. The petitioner in pursuance, resumed his duties on 12.8.2000.

4. The petitioner after his reinstatement was subjected to a show cause notice regarding the period of suspension. After considering the representation

respondents passed, an order on 3.7.2006 whereby the period from 30.7.1999 to 11.8.2000 was directed to be treated as non-duty without additional pay and allowance, except the subsistence allowance already paid and the period will not count for pension and other benefits but will not constitute as break in service.

5. The operative part of the order dated 3.7.2006 read thus:

> 5- अतः उपर्युक्त समस्त बिंदुओं को मद्देनजर रखते हुए अब यह आदेश दिया जाता है कि श्री प्रकाश कुमार साहू की संपूर्ण निलंबनावधि यथा दिनांक 30.7.1999 से 11.8.2000 को नॉन ड्यूटी (NON-DUTY) समझा जाये। पूर्व में अदा की गयी निर्वाह भत्ते की राशि को इसी समय तक सीमित रखते हुए उन्हें अन्य कोई वेतन या भत्ते देय नहीं होंगे। इस कालावधि को ड्यूटी पर व्यतीत न समझते हुए इस पेंशन और अन्य लाभों हेतु नहीं जोडा जायेगा और इस अवधि में उनकी सेवा भी भंग नहीं मानी जायेगी।"

Aggrieved, petitioner filed an original application before Central Administrative Tribunal.

6. The Tribunal relying on the decisions by the Supreme Court in *Ranchhodji Chaturji Thakore v. Supdt. Engineer, Gujarat Electricity Board* [(1996) 11 SCC 603], *Union of India v. Jaipal Singh* [(2004) 1 SCC 121] and *Baldev Singh v. Union of India* [2006 SCC (L&S) 35] and *Management of Reserve Bank of India v. Bhopal Singh Panchal* (AIR 1994 SC 552), declined to interfere with the order dated 3.7.2006.

7. Aggrieved, petitioner is before us vide this petition under Article 227 of the Constitution of India.

8. Contentions put-forth by the learned counsel for the petitioner is that the Tribunal has erred in distinguishing the decisions in *Uma Shankar Choubey v. Union of India and others :* W.P. No. 1363/2001 decided on 14.3.2006 and *Munnalal Mishra v. Union of India and others* [2005 (3) MPHT 125]. It is also contended that the Tribunal failed to appreciate that the authority concerned had failed to exercise the discretion vested in it vide Fundamental Rule 54 B.

9. Respondents on their turn support the order dated 3.7.2006 as well as the order passed by the Tribunal.

10. The question as to how the period of suspension, where the suspension is because of the criminal prosecution, on its revocation after acquittal of the

Government servant, is it to be treated, is governed by Rules, viz., Fundamental Rules 54 B. Sub-rules (1), (3) and (8) of FR 54 B are relevant in the context. These sub rules stipulate:

> "F.R. 54-B. (1) When a Government servant who has been suspended is re-instated or would have been so re-instated but for his retirement on superannuation while under suspension, the authority competent to order re-instatement shall consider and make specific order-
>
> (a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with re-instatement or the date of his retirement on superannuation, as the case may be, and
>
> (b) whether or not the said period shall be treated as a period spent on duty.
>
> (3) Where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government servant shall subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled had he not been suspended:
>
> Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reason directly attributable to the Government servant it may, after giving him an opportunity to make his representation [within 60 days from the date on which the communication in this regard is served in him and after considering the representation, if any, submitted by him direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.
>
> (8) The payment of allowances under sub-rule (2), sub-rule (3) or sub-rule (5), shall be subject to all other conditions under which such allowances are admissible.

Sub-Rule (1) obligates the competent authority in case where Government servant who was suspended is reinstated to make a specific order

(i) regarding pay and allowances to be paid to Government servant for the period of suspension ending with reinstatement (ii) whether or not the said period shall be treated as a period spent on duty. The decision to be taken under sub-rule (1) is bridled with the decision required to be taken under sub-rule (3), i.e., where the suspension is held to be wholly unjustified, then the government servant is entitled for full pay and allowance subject to provisions of sub-rule (8). In other words even executive instructions issued to that effect will hold the field when it comes to payment of full pay and allowances. Whereas sub-rule (1) and sub-rule (3) makes a provision regarding pay and allowances to be paid in the events mentioned therein. Sub-rule 8 provides for payment of allowances contains under which such allowances are payable.

11. However, in a case where the suspension is held to be wholly justified, an employee will not be benefited of sub-rule (3) and sub-rule (8) of FR 54 B. In such circumstances, the petitioner is not benefited by the verdict in *Umashankar Choubey* (supra) wherein the instance was of the case where the suspension was held as unjustified.

12. Sub-rule (3) of F.R. 54-B cast the discretion in the competent authority to form an opinion whether the suspension of a government servant is wholly unjustified.

13. In the case at hand, the petitioner was placed under suspension not because of the pending departmental enquiry nor in contemplation of a departmental enquiry. The suspension was because of his arrest in connection with a criminal charge. Such a suspension has been held to be a statutory suspension. In *Union of India v. Rajiv Kumar* (2003 AIR SCW 3507) it is held:

> 15. Rule 10(2) is a deemed provision and creates a legal fiction. A bare reading of the provision shows that an actual order is not required to be passed. That is deemed to have been passed by operation of the legal fiction. It has as much efficacy, force and operation as an order otherwise specifically passed under other provisions. It does not speak of any period of its effectiveness. Rules 10(3) and 10(4) operate conceptually in different situations and need specific provisions separately on account of interposition of an order of Court of law or an order passed by the Appellate or reviewing authority and the

natural consequences inevitably flowing from such orders. Great emphasis is laid on the expressions "until further orders" in the said sub-rules to emphasise that such a prescription is missing in Sub-rule (2). Therefore, it is urged that the order is effective for the period of detention alone. The plea is clearly without any substance because of Sub-rule 5(a) and 5(c) of Rule 10. The said provisions refer to an order of suspension made or deemed to have been made. Obviously, the only order which is even initially deemed to have been made under Rule 10 is one contemplated under Sub-rule (2). The said provision under Rule 10(5)(a) makes it crystal clear that the order continues to remain in force until it is modified or revoked by an authority competent to do so while Rule 10(5)(c) empowers the competent authority to modify or revoke also. No exception is made relating to an order under Rules 10(2) and 10(5)(a). On the contrary, specifically it encompasses an order under Rule 10(2). If the order deemed to have been made under Rule 10(2) is to loose effectiveness automatically after the period of detention envisaged comes to an end, there would be no scope for the same being modified as contended by the respondents and there was no need to make such provisions as are engrafted in Rule 10(5)(a) and (c) and instead an equally deeming provision to bring an end to the duration of the deemed order would by itself suffice for the purpose."

And are held to be justified even when the employee/accused is exonerated of charges and acquitted (Please see 1968 MPLJ 49 and 466).

14. In *Ranchhodji Chaturji Thakore* (supra) it is held:

"3. The reinstatement of the petitioner into the service has already been ordered by the High Court. The only question is whether he is entitled to back wages. It was his conduct of involving himself in the crime that was taken into account for his not being in service of the respondent. Consequent upon his acquittal, he is entitled to reinstatement for the reason that his service was terminated on the basis of the conviction by operation of proviso to the statutory rules applicable to the situation. The question of back wages would be considered

only if the respondents have taken action by way of disciplinary proceedings and the action was found to be unsustainable in law and he was unlawfully prevented from discharging the duties. In that context, his conduct becomes relevant. Each case requires to be considered in its own backdrop. In this case, since the petitioner had involved himself in a crime, though he was later acquitted, he had disabled himself from rendering the service on account of conviction and incarceration in jail. Under these circumstances, the petitioner is not entitled to payment of back wages. ...."

15. In *Jaipal Singh* (supra) it is held :

"4. ..... If prosecution, which ultimately resulted in acquittal of the person concerned was at the behest or by department itself, perhaps different considerations may arise. On the other hand, if as a citizen the employee or a public servant got involved in a criminal case and if after initial conviction by the trial court, he gets acquittal on appeal subsequently, the department cannot in any manner be found fault with for having kept him out of service, since the law obliges, a person convicted of an offence to be so kept out and not to be retained in service..... ...."

16. The principle then was followed in *Baldev Singh* (supra) in following terms:

"7. As the factual position noted clearly indicates the appellant was not in actual service for the period he was in custody. Merely because there has been an acquittal does not automatically entitle him to get salary for the concerned period. This is more so, on the logic of no work no pay. It is to be noted that the appellant was terminated from service because of the conviction. Effect of the same does not get diluted because of subsequent acquittal for the purpose of counting service. The aforesaid position was clearly stated in *Ranchhodji Chaturji Thakore v. Supdt. Engineer, Gujarat Electricity Board.*"

17. True it is that these were not the cases regarding FR 54 B; however,

the suspension, the circumstances which led to such suspension and the consequence in the event of the revocation was dwelt upon in these cases, wherein it is unanimously held that in case the suspension is because of the involvement of the Government employee in a criminal case not at the instance of the department, a revocation of suspension after his acquittal will not entitle him for back-wages as such suspension cannot be said to be unjustified.

18. In the circumstances of present case the authority concerned, was well justified in treating the period of suspension as non-duty for the purpose of the benefit and not a break in service. To that extent the order cannot be interfered with.

19. The issue, however, still remains to be answered is as to whether, when the entire period of suspension has not been treated as break in service (इस अवधि में उनकी सेवा भी भंग नहीं मानी जायेगी), the competent authority was justified in not counting the said period for the purpose of pension.

20. Pension of a Central Government servant is governed by Central Civil Service (Pension) Rules, 1972.

21. Rule 3 (q) of the Rules, 1972 defines "qualifying service" which means "service rendered while on duty or otherwise which shall be taken into account for the purpose of pension and gratuities admissible under these rules. Thus it is the service rendered while on duty or otherwise which entitles/qualifies a government servant for pension, and not the duty alone. Thus in a case, as the given one there is no break in service, a non-duty period cannot be excluded from counting the said period of suspension for the purpose of pension. The decision of the competent authority for not treating the period of suspension, having condoned the break in service, being patently erroneous, cannot be given approval.

22. In the result though the order of treating the period of suspension as non-duty and that the petitioner shall not be entitled for further pay and allowances for the said period except the subsistence allowance and that the period shall not be treated as break in service cannot be faulted with. However, for the reasons that the period of suspension having not been treated as break in service, the order is modified to the extent that the period spent on suspension shall be counted towards pension.

23. The petition is allowed to the extent above. No costs.

Petition allowed

I.L.R. [2012] M.P., 334
WRIT PETITION

Before Mr. Justice K. K. Lahoti & Mrs. Justice Sushma Shrivastava
W.P. No.14103/2010 (Jabalpur) decided on 4 November, 2011

SVIL MINES LIMITED. ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Value Added Tax Act, M.P. (20 of 2002), Section 55 – Search – **Letter of Authorization not shown to the officers of Petitioner – Independent witnesses not called during search – Documents seized without recording of reasons by Commissioner and receipt of seizure not issued – Entire Search and seizure vitiated.** (Para 16)

क. मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 55–तलाशी – याची के अधिकारियों को प्राधिकार पत्र नहीं दिखाया गया–तलाशी के दौरान स्वतंत्र साक्षी नहीं बुलाये गये – संभागायुक्त द्वारा बिना कारण उल्लेखित किये दस्तावेज जब्त किये गये और जब्ती की पावती जारी नहीं की गई – पूरी तलाशी व जब्ती दूषित।

B. Value Added Tax Act, M.P. (20 of 2002), Section 55 – Illegal search – Effect – **Respondents had seized documents during search – Although Entire Search and seizure was illegal but respondents may proceed on the basis of documents seized by them to find out whether there was any evasion of tax by Petitioner – Authority shall evaluate the evidence with great caution.** (Para 18)

ख. मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 55 – अवैध तलाशी – प्रभाव – प्रत्यर्थीगण द्वारा तलाशी के दौरान दस्तावेज जब्त किये गये – यद्यपि पूरी तलाशी व जब्ती अवैध थी, लेकिन प्रत्यर्थीगण उनके द्वारा जब्त किये गये दस्तावेजों के आधार पर यह जानने के लिये कार्यवाही कर सकते हैं कि क्या याची द्वारा किसी कर का छिपाव किया गया – प्राधिकारी को साक्ष्य का मूल्यांकन बहुत ज्यादा सावधानी से करना होगा।

Cases referred :

AIR 1963 SC 822, AIR 1974 SC 348, (1985) 3 SCC 72, AIR 1968 SC 59, AIR 1999 SC 2378, AIR 1956 SC 411.

G.N. Purohit with *Abhishek Oswal*, for the petitioner.
R.D. Jain, A.G. for the respondent Nos. 1 to 4 & 6 to 8.
Deepak Awasthy, for the respondent No. 5.

ORDER

The order of the court was delivered by :

KRISHN KUMAR LAHOTI, J : The petitioner has sought following reliefs :-

> "(i) To call for the records from the respondents for the perusal of the Hon'ble Court for the satisfaction that there were proper reasons to constitute a reason to believe for initiation of search.
>
> (ii) That, it may please be held that the search conducted in violation of the procedure as laid down in the Criminal Procedure Code, 1973 renders the search illegal and void and it may please be held that the search was illegal should be quashed.
>
> (iii) That, entire search proceedings being illegal and void all subsequent proceedings undertaken by the Commercial Tax Department may please be quashed.
>
> (iv) That, a writ of mandamus may kindly be issued directing the respondents to return all the seized documents in possession of the officers of the M.P.V.A.T. Department.
>
> (v) That, it may kindly be held that the search carried out by the M.P.V.A.T. Department is illegal and void.
>
> (vi) Any other relief considered necessary and expedient under the facts of the case alongwith the cost of this litigation may kindly be allowed to the petitioner."

The petitioner has challenged the letter of authorization, issued by respondent no.2, authorizing the search of premises of petitioner under section 55 of the M.P. Value Added Tax Act, 2002 and the search conducted in the premises on 28.8.2010.

2. The aforesaid letter of authorization and search are assailed by the petitioner in this petition on the ground that search of business and residential premises of petitioner Company were made without any valid reasons, illegal authorization and without showing the authorization for search to the persons present at the business premises and residential premises of the Managing Director of petitioner. The search is also assailed on the ground that procedure

as laid down under section 100 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.' for short) was not followed and the entire search, conducted violating the provisions under section 100 of Cr.P.C., vitiates. The petitioner has also raised allegations in respect of behaviour, use of language by the authorized officers, and challenged the same on the grounds, that procedure at the time of conduction of search and seizure was not followed. Engagement of private security personnel, avoiding local police to help the aforesaid persons for the search and seizure is also a ground to challenge the search.

4. The facts of the case are :

(a) that petitioner is a body Corporate registered under the Companies Act as a limited company and is engaged in the business of mining operations at village Gudri, Tahsil Bahoriband, District Katni. It is having mines at village Pipraud, National Highway No.7, Katni and processing unit for marbles at Gudri. The Company is having its registered office at E-3, Mangolpuri, Industrial Area, New Delhi and work site at village Bahoriband, District Katni. The petitioner is a registered dealer under the M.P. Value Added Tax, 2002 (hereinafter referred to as 'VAT Act' for short) having TIN No.23606206423 and is regularly paying the Value Added Tax by filing return to the concerned authority. The petitioner's assessments have been completed upto the assessment period 2007-08. The petitioner was not penalized in the past for any breach of law or default in payment of Commercial Tax.

(b) That on 28.8.2010 the team of near about 40 persons under the authorization of respondent no.2 and headed by respondent no.3 made entry in the various premises of petitioner. These persons were allowed ingress and were provided facility of inspection of documents, however no authorization letter was shown by the group leader to the person Incharge at various places.

(c) During the search, the team collected various documents, papers and stacked in two rooms. The documents were brought by another group of search party from residential bungalow situated at Anand Vihar Colony, Katni, from Unit no.2 at village Niwas, Unit No.3 and 4 at Village Pipraud. Some of the documents were stored in 3 boxes and remaining were sealed in two rooms. A request was

made on behalf of petitioner to draw a proper panchnama and give receipt of documents which were intended to be taken away by the search parties, stored in 3 boxes, but it was denied by the search party. When insistence was made for issuance of receipt and it was denied then it gave rise to a dispute with the staff present at the site and search party. The staff of the petitioner approached to the Incharge of Police Station Saleemnabad, District Katni made a complaint in respect of non issuance of receipt of documents, which were intended to be taken away from the factory premises. On this information, the T.I., Saleemnabad reached to the site and a letter was handed over to him at 10.30 in the night on 28.8.2010. A copy of the letter is enclosed as Annexure P-1.

(d) On the intervention of Incharge of Police Station, Saleemnabad a letter, addressed to the person Incharge to the search party requesting him to give the receipt of boxes those were taken away by the search party, was served, but by putting a note on the same application that no such procedure is provided under section 55 of the VAT Act and the receipt was not issued. A copy of letter dated 28.8.2010 addressed to the Incharge of Enforcement Team along with his reply is filed as Annexure P-2.

(e) That the search party was under the leadership of P.K. Singh, Assistant Commissioner of Commercial Tax, Bhopal. The search party was also accompanied by a private security agency belonging to ISF (Indian Security Force, Jabalpur). These persons were dressed in black clothes. Section 55 of the VAT Act does not provide any assistance to such search party of private security forces. Sub-section 7 of section 55 of the VAT Act authorizes the Commercial Tax Officer to take assistance from the local police officers.

(f) That during the search and till the aforesaid records were intended to be taken away by the search party, the entire staff was cooperative with the search party.

(g) That because of the aforesaid request made by the employees of petitioner to the search party for issuance of receipt, the behaviour of search party changed and the private security force manhandled the staff of petitioner. Derogatory and abusive languages were used by respondent no.5 with the staff of petitioner.

(h) That the procedure as envisaged under section 55 of the VAT Act and section 100 of the Cr.P.C., was not followed. Neither two independent witnesses were called at the time of search, nor panchnama was prepared and no receipt was issued by the search party, which was contrary to the statutory provisions and mandate of section 100 of Cr.P.C. The search party ought to have prepared a list of all the documents, properties seized, which should have been duly signed by the independent witnesses, but neither independent witnesses were called nor any search panchnama was prepared. On the contrary when the receipt was asked from the respondents in respect of seized documents, which were intended to be taken away from the factory premises, the respondents denied it and misbehaved and abused with the employees of petitioner, who were present at the time of search and seizure.

(i) That under section 55 sub-section 5 of the VAT Act, the procedure as envisaged under section 100 of Cr.P.C., was to be followed, but the entire provision were given go-bye while conducting search and seizure by the search party.

(j) Sub-section (1) of section 55 of the VAT Act specifically provides for recording of reasons by the Commissioner before issuing an authorization for search. The case of petitioner is that no reasons were before the respondent no.2 to constitute a reasonable belief that petitioner was evading payment of Tax or indulged in evasion of tax to constitute a reason to believe for initiation of search action.

(k) That the respondents while conducting the search took the help of private security agents, while under sub-section (7) of section 55 of the VAT Act, it was mandatory on the part of search party to take assistance of local police officers and no where it provides to take help of private security agencies.

(l) That the petitioner moved an application before the Commercial Tax Officer, Anti Evasion Bureau, Jabalpur requesting him to inspect the search file, so that petitioner may satisfy itself that the search was conducted under the proper authorization of Commissioner, but no permission was granted, as was prayed by Annexure P-4.

On the aforesaid grounds, petitioner has prayed that the

authorization, search and seizure made by the respondents may be declared as illegal and void and the entire proceedings may be quashed.

5. The respondents have filed reply in which they have justified their action in respect of issuance of letter of authorization, search and seizure. In nutshell the reply filed by the respondents is as under :-

(a) That as per the requirement of section 55(1) of the VAT Act, the Commissioner, Commercial Tax had directed for initiating proceedings to investigate into the matter of tax evasion by the petitioner. On 18.8.2010 the Deputy Commissioner, Anti Evasion Bureau (A.E.B.) Jabalpur had confidentially communicated to the Commissioner, Commercial Tax that "there are sufficient material to believe that the petitioner is evading huge tax with respect of sale of marbles." On such information, the Commissioner, Commercial Tax, had directed investigation into the complaint of tax evasion by the petitioner.

(b) That the preliminary report dated 7.9.2010 was sent by the Deputy Commissioner, A.E.B. Jabalpur to Commissioner, Commercial Tax, which reveals that there was sufficient material so as to reasonably belief that the petitioner was indulged in tax evasion, while showing the sales to be of "inter-State" instead of "intra-State".

(c) That the A.E.B. was constituted vide order dated 24.4.2007 Annexure R-1. The Commissioner, Commercial Tax on 25.8.2010 in exercise of powers conferred under section 55 of the VAT Act had delegated his powers to the officers mentioned in order to exercise the powers under section 55(3) to 55(7) of the VAT Act with respect to investigation into tax evasion by the petitioner. A copy of the orders dated 25.8.2010 are filed as Annexure R-2 and R-3.

(d) That on 28.8.2010 the inspection team went to the petitioner's place and carried out the inspection of petitioner's premises. During inspection the petitioner's officers namely Anil Gupta, Jayant Goswami, Pushpraj Singh and Fotedar were available, but they had not cooperated in the inspection. Anil Gupta in his statement has stated that regular books of accounts were not kept at Katni, but were kept at company's headquarter at Delhi. Only second copies of invoices were found. There was no record with respect of bilties to show that

the sales were made. Anil Gupta in his statement has stated that he will produce the regular books of accounts after collecting the same from Delhi office. A copy of statement of Anil Gupta is filed as Annexure R-4.

(f) As regular books of accounts were not made available, as they were stated to be at Delhi, therefore it was not possible for the respondents to scrutinize the record, so they prepared the seizure in exercise of powers under section 55(4) of the VAT Act. The documents were kept in a box for the purpose of seizure.

(g) That it is evident that the seizure of documents were not effected at the spot and the documents were sealed for the purposes of effecting proper seizure as per the proviso of sub-section (4) of section 55 of the VAT Act. That on 28.8.2010 the available officers of petitioner caused obstructions to the inspecting team while returning back from the main gate. The main gate was closed and the other employees of the petitioner came over there. The inspecting team, thereafter, intimated the police, local administration and with the help of police and District Administration the sealed container/boxes were carried out by the inspecting team. That immediately at Police Station Saleemnabad the report with regard to the obstructions caused by the employees of petitioner was lodged as Annexure R-5. A Criminal case as crime no.287/2010 under section 147, 353 and 342 of I.P.C., was registered against Jayant Goswami, Pushpraj Singh, Fotedar Mishra and Anil Gupta. The accused persons had made an application for grant of bail before the C.J.M., Katni and vide orders dated 30.8.2010 and 31.8.2010 they were granted bail with the condition that they would fully cooperate with the investigation of the case. The copies of the orders are enclosed as Annexure R-6.

(h) That thereafter on 31.8.2010 again the inspection continued and the documents which were kept in two rooms were put up in two boxes, and were carried out from the petitioner's premises.

(i) That on 1.9.2010 the investigation for Tax Evasion at the petitioner's site was completed by taking physical stock. On 3.9.2010 a notice was issued to the petitioner for seizure of documents as required under the proviso of sub-section (4) of Section 55 of the VAT Act. A copy of notice is enclosed as Annexure R-7. The case

was fixed for 7.9.2010 and on 7.9.2010 an Advocate Shri Manoj Agrawal along with company Accounts Executive appeared and because of absence of regular books of account they sought time to produce the regular books of accounts. Time till 23.9.2010 was granted to them as per Annexure R-8.

(j) That on 10.9.2010, another Advocate Shri Abhishek Oswal, appeared on behalf of petitioner and filed an application dated 9.9.2010 Annexure R-9, in which a request was made to inspect the record which were sealed in boxes. As another Advocate Shri Manoj Agrawal had already sought time on earlier occasion, therefore, in absence of production of any regular books of accounts the application was not entertained.

(k) That on 13.9.2010 another application was filed by the Advocate of petitioner that they do not want to inspect the seized documents, but they only want to peruse the file for investigation made by A.E.B. A copy of application is on record Annexure R-10. This application was also not entertained on the ground that the file was confidential and considering the importance of file and its non-availability at the level of Deputy Commissioner, A.E.B., the application was rejected.

(l) That on 23.9.2010 the Accounts Executive Shri Ravi Kumar Khare appeared on behalf of company and filed an application for adjournment of the case for the reasons that regular books of accounts could not be produced and time was sought. Time period upto 30th September, 2010 was granted.

(m) That on 29.9.2010 again the application was filed for grant of time and time period upto 6.10.2010 was granted.

(n) That so far as deployment of private security guard for search is concerned, it was denied. It is explained that the help of private security guard was restricted only upto the entrace gate of administrative building. There was no reason to accompany them within the premises of petitioner. The respondents seek the assistance of police officers when ever they feel resistance by the dealer. In the present case there was no reason for obstructing or objecting the investigation by the dealer and accordingly on 28.8.2010 the Police was not intimated,

however, after the obstruction was caused by the petitioner, the police was intimated immediately and a report was lodged. The petitioner has not made any averment with regard to participation in the investigation process by the security people in his earlier complaints. The security guards were engaged for ensuring the security of the vehicles of the officers and other allied purposes. It is stated that the security guard do not in any way were allowed to participate in investigation and they being unskilled employee cannot in any manner could be useful for the investigation purposes. During investigation some times the officers require to continuously work for hours together and they need refreshment and food. In the situations of investigation it is not possible to get any cooperation from the dealer and the atmosphere normally becomes tense, so it is necessary for the officers to have some people to provide them refreshment and water etc. The private security people were allowed for the aforesaid purposes and no other work was taken from them. The vehicles of the officers were also required to be parked under the supervision of some person other than the person associated with the dealer. In case of any resistance only the Police officers are called for. In this regard the Commissioner had issued instructions Annexure R-15.

(o) That under the proviso of sub-section (4) of section 55 which requires that for seizure, the Commissioner shall serve upon the dealer, a notice in the prescribed form, and on the date fixed, he shall open the seal of the seized box or bag or container or packet in the presence of the dealer or any agent of the dealer entitled to appear in accordance with the provisions of section 23. Thereafter in presence of at least two other persons, the examination of the document is required to be done. Thereafter a receipt of seizure is required to be given to the dealer. This stage of seizure has not yet come till the date of filing of reply on 5.10.2010. In absence of petitioner's cooperation no seizure was made. The sealed containers are lying as they are.

(p) In para 11 of the reply it is submitted that no seizure under section 55(4) of the VAT Act was made. The regular books of accounts were not submitted by the petitioner till the date of filing of reply.

(q) That Section 55 A of the VAT Act provides for assessment of the case relating to detection and provision of tax evasion. In this

case, scrutiny report as per Rule 68 is required to be sent to the Assessing Officer, who shall follow the provision of section 55 A of the VAT Act. Thereafter respondents will require to provide opportunity of hearing before passing an order of assessment. The petitioner thereafter may avail remedy of appeal under section 46 of the VAT Act.

Submitting aforesaid, it is contended that this petition is pre-mature and may be dismissed.

6. The petitioner has filed rejoinder to the return filed by the respondents in which in para 3 of the rejoinder, it is stated that in this case the authorization was given as per Annexure R-3 under section 55(3) to section 55(6). Section 55(6) empowers the authorities to search a place of business of such dealer or any place whether such place is the place of business or not, where the Commissioner believes that documents, registers or stock of the business is kept. He is also authorized to break open the lock of any door, box, locker, safe almirah or any other in order to continue inspection where the keys thereof are not produced on demand or not available. Section 55(8) provides that while making entry, search and seizure under section 55 of the VAT Act the authorities exercise the same power and have to follow the same procedure as are exercised by and or required to be followed by police officer in relation to entry, search and seizure under the provisions of the Code of Criminal Procedure, 1973. Thus the procedure as laid down under section 100 of the Cr.P.C., is to be mandatorily followed. Section 100(4) of the Cr.P.C., mandatorily requires presence of two independent witnesses of the locality before commencement of search. No independent witnesses were called by the authorities. Sub-section 5 of section 100 requires the search party to prepare a list of all things seized in the course of search and other places, in which they are respectively found the list shall be prepared by such officer and signed by such witnesses. In this case though the list was not prepared but the documents were placed in boxes. The search party was duty bound to prepare a list duly signed by two independent witnesses recording the facts of taking possession of the documents and a copy of the same ought to have been supplied to the petitioner as provided in sub-section 7 of Section 100 of the Cr.P.C.

In para 5 it is stated that the employees of petitioner had not caused any obstruction during the course of search or thereafter, expect making a

request to the officers of the search party for providing a copy of the receipt of documents taken in possession by the search party. The F.I.R., was made at 1.35 a.m., on 29.8.2010, while the staff of petitioner itself had called the police around 10.00 p.m., on 28.8.2010, which is evident from Annexure P-1 a copy of the letter addressed to T.I. Saleemnabad. Another letter was addressed to search party has been also filed as Annexure P-2 with the petition, by which the search party was requested to give the receipt of three boxes, which were sealed by them, but the same was denied by the search party on the same letter, which is evident from the perusal of Annexure P-2. The F.I.R., lodged by the officers of the search party was an after thought to cover up the mis deeds of manhandling the security officers and use of unparliamentary, threatening language to them.

7. The respondents have filed additional reply in the matter, in which it is stated by the respondents thus :-

(a) That non-showing of authorization warrant to the petitioner was denied in para 6 of the additional reply.

(b) That respondents had acted in accordance with the provisions of section 55 of the VAT Act. The applicability of section 100 of Cr.P.C., was not disputed, but it was stated that the procedure as contained in section 55 of the VAT Act was followed by the officers in respect of preparation of list of documents, which were kept in a box. It is explained that the proviso of sub-section (4) specifically provides that if the Commissioner cannot examine the documents on spot, the same can be sealed in a box. The list of document has to be given only when the seal of the seized box is opened in the presence of dealer or his agent in presence of at least two other persons and after examination of the documents, the Commissioner shall seize such documents and grant a receipt thereof. So it is clear that the respondents have collected the documents, accounts and registers relating to the business of the petitioner and put them in a box, duly sealed in the presence of the officers of the Company. This finds support with the statement of Anil Gupta Annexure R-4. At the time of seizure of the box, containing documents, the officers of the petitioner were present and they have duly signed the slip, which was affixed on the box.

(c) The officers and staff of the petitioner had created all the possible hindrances to the stop the inspection and faced with such a

situation, the inspection party had lodged an F.I.R., and the case was registered against the officers and employees of the petitioner.

(d) That as per section 55 the sealed documents, in boxes which were containing documents recovered at the time of inspection, were opened in the presence of authorized representative of petitioner Pushpraj Singh and two independent witnesses on 7.10.2010 and after examination of the documents, the Commercial Tax Officer, Anti Evasion Bureau, Jabalpur has seized the documents necessary for the purpose of scrutiny and receipt thereof was issued to the authorized signatory of the petitioner on 7.10.2010 itself. A copy of seizure memo and statement of Shri Pushpraj Singh is filed as Annexure R-17.

(e) That thereafter the competent officer, the Assistant Commissioner, Commercial Tax, Katni has undertaken the proceedings for scrutiny of documents, but inspite of extending more opportunities the petitioner has not rendered co-operation.

8. That the respondent no.5 has filed separate return reiterating same contentions, which were raised by other respondents.

9. From the perusal of aforesaid, we find that this petition involves following questions for our consideration :-

(1) Whether the authorization/search letter was issued in accordance with law?

(2) Whether before inspection/search such authorization was shown to the persons in occupation of the premises of petitioner?

(3) Whether independent witnesses were called at the time of search and seizure ?

(4) Whether any receipt was issued by the respondents before taking over seized documents from the premises of petitioner, if not then, effect of aforesaid ?

10. So far as the first contention of the petitioner that search warrant was not issued by the respondent no.2 after applying his mind and no reasons were recorded by the respondent no.2 before issuance of search warrant are concerned, we have perused the documents produced before this Court. A

report dated 18.8.2010 was submitted before the respondent no.2 by the Deputy Commissioner, Anti Evasion Bureau, Commercial Tax, Jabalpur that the petitioner is engaged in intra state sale, but was showing the sale as inter state sale and thereby evading the tax. In the said report it was intimated that the petitioner was not possessing required documents to send the goods to Rajasthan and was preparing forged documents in this regard so that intra State sale may be shown as inter state sale. The respondent no.2 on the basis of aforesaid information formed the opinion that there were sufficient reasons to believe that the petitioner was indulged in evasion of tax and on the basis of this directed issuance of authorization letter under section 55 of the VAT Act and thereafter authorization letter Annexure R-2 dated 25.8.2002 was issued. Various officers whose names are appearing in Annexure R-2 were authorised under section 55(3) to 55(7) for search and seizure of accounts books documents and goods. From the perusal of aforesaid, it is apparent that there was sufficient material before respondent no.2 for issuance of authorization in respect of search and seizure. From the perusal of order dated 25.8.2010 it is also apparent that the respondent no.2 applied his mind and after recording his satisfaction in this regard, the letter of authorization was issued. In these circumstances, the first contention of petitioner that the letter of authorization was issued without recording sufficient reasons or without applying mind by respondent no.2 has no force.

11. Now the second contention of the petitioner may be looked into. The petitioner's contention is that before the conduction of search by the authority, letter of authorization was not shown to any of the officers/employees of the petitioner is concerned, no material is produced before this Court in respect of the contention of respondents that before commencement of inspection/ search such letter of authorization was shown to any of the employees of the petitioner, who were present on various premises of the petitioner, which were searched by the respondents. If the authorization letter was shown to any of the employees then a specific note/panchnama ought to have been prepared by the officers of the respondents about showing such authorization to the employees of the respondents. So far as the contention of respondents that no such ground was raised by the petitioner in the petition is concerned in this regard para 5.3 may be looked into, in which petitioner has specifically stated that "it is pertinent to note that no authorization was shown by the group leader to the persons in-charge at various places." The respondents in reply nowhere stated that such letter of authorization was shown to any of the

employee of petitioner. Though initially a short reply was filed by the respondents, but later on the respondents have filed additional reply in which also this fact has not been mentioned by the respondents that such authorization was shown to the employees of the petitioner, in possession of various premises, which were inspected and search was carried out. Apart from this in para 6.1 of the additional reply the respondents stated thus :-

> "6(i) In relation to the contention of the petitioner that no warrant of authorization was shown to the staff of the petitioner, while entering into the premises, it is respectfully submitted that the same is specifically denied and respectfully submitted that the officers, who have conducted inspection are the public officers and understand the provisions of law and therefore the aforesaid contentions is without any substance more so the same is a disputed questions of fact."

Even from the perusal of aforesaid it is apparent that the respondents have not come with specific case that such authorization was shown to any of the employee. If such authorization could have been shown then the respondents ought to have disclosed this fact specifically in the reply, disclosing the name of the employee to whom such authorization was shown. So the contention of petitioner that before carrying out inspection/search such authorization letter was not shown to the staff/employee of the petitioner cannot be disbelieved.

12. Now the third contention of the petitioner is, that at the time of search and seizure independent witnesses were not called, in this regard the reply of respondents may be looked into. The respondents in para 5 of the reply have stated thus :-

> "5. That, bare perusal of the provisions recorded by the inspection team and also on the perusal of the provisions of sub-section 4 of section 55 of the VAT Act 2002, it is evident that the seizure of the documents has not been effected at the spot and the documents have been sealed for the purposes of effecting proper seizure as per the proviso of sub section 4 of section 55 of the Act of 2002. It is respectfully submitted that on 28.8.2010 the available officers of the petitioner's caused obstructions to the inspecting team while returning back from the main gate. The main gate was closed and the other

employees of the petitioner came over there. The inspecting team, thereafter, intimated the police and administration and with the help of police and District Administration the sealed container/boxes were carried out by the inspecting team. It is submitted that immediately at police station Saleemnabad the report with regard to the obstructions caused by the petitioner was lodged. A copy of the FIR is being filed herewith as Annexure R-5. Bare perusal of the FIR, it is apparent that Crime No.287/2010 dated 29.8.2010 has been registered at police station Saleemnabad for offence punishable under section 147, 353, and 342 of IPC against Jayat Goswami, Pushpraj Singh, Fotedar Mishra and Anil Gupta. The answering respondents respectfully submit that the accused persons of the aforesaid crime have made an application for grant of bail before the court of CJM Katni and the learned CJM vide order dated 30.8.2010 and 31.8.2010 has granted bail with the condition that they should fully cooperate with the investigation of the case. A copy of the order dated 30.8.2010 and 31.8.2010 are being filed herewith as Annexure R-6."

From the perusal of aforesaid, it is apparent that though documents were sealed for the purposes of effecting seizure, but no witness was called on the spot for seizure of the documents. The contention of petitioner is, that without preparing seizure of documents when the officers of the respondents were taking over the boxes, in which documents were kept, they demanded the receipt and insisted for the seizure memo and then the dispute occurred. In this regard, certain documents may be looked into. Annexure P-1 is the report which was lodged by the employees of petitioner at 10.30 p.m. on 28.8.2010 itself, reveals following facts:-

"The Town Inspector,
Saleemnabad,
District Katni

Sub:- Mr.P.K.Singh Asst Commissioner Sales Tax and Staff Exceeding 40 persons -

Sir,

This is to intimate that officers of above department have turned up at various premises at Katni and without

handing over a proper letter of raid/seizure, they have taken possession of our documents in three tin boxes without indicating the list of whatsoever nature documents they have taken. On simply being asked to issue a list, all the members of sales tax team threatened and used force on employees/ staff besides warned for dire consequences, as a result of which we requested you to come over to the premises and thereafter the situation is known to you.

It is height of things that a respected officer of Asst Commissioner Level/CTO level have used slang language and threatened closure of the company and functioning of the unit.

Kindly as such take suitable action under rules.

Yours faithfully,

- Sd/-

For SVIL Mines

28/08/2010"

From the perusal of aforesaid, it is apparent that the employees immediately intimated to the Police in respect of non seizure and non issuing receipt of documents which were taken into possession by the respondents and were tried to be taken over from the premises of petitioner. It is apparent from the perusal of aforesaid that when the employees asked the list and receipt of documents, which were taken over by the respondents the dispute arose. Even from the perusal of report lodged by the respondents at police station, which is on record as Annexure R-5, there is no reference that the authorization letter was shown to the employees of the petitioner. There was no obstruction or resistance by the employees till the documents were taken over by the respondents from the premises of petitioner. It appears that the employees resisted for taking over the seized and sealed boxes of documents and at that time obstruction was made by the aforesaid employees. At that time the employees of the petitioner resisted to take over the three boxes which were sealed. At that time, the police was intimated. It appears that this report was lodged on 29.8.2010 at 1.35 A.M. Meaning thereby that the dispute arose at the time when the officers of the respondents tried to take over the

sealed boxes from the premises of petitioner. Even in Annexure R-5 it is not stated that the seizure memo was prepared or any receipt was issued in respect of the taking over of three boxes from the premises of the petitioner. The aforesaid circumstances reveals that the documents were sealed in three boxes and the respondents were taking over the aforesaid documents from the premises of the petitioner. No seizure memo was prepared. No receipt was issued to the employees present on the spot in respect of the boxes containing documents, from the premises of petitioner. It is also apparent that till 1.35 A.M. on 29.8.2010 police was not informed, in respect of inspection and seizure, by the respondents.

13. In the light of aforesaid facts the statutory provision may be looked into. Section 55 of the VAT Act is relevant, which provides power of Commissioner to investigate into tax evasion by the dealer. Section 55 is quoted as under :-

> **"55 : Detection and checking of evasion of tax by dealers liable to pay tax and power of commissioner to investigate into tax evasion by a dealer**
>
> (1) If upon any information which has come into the knowledge of Commissioner and he has reason to believe that any dealer has evaded payment of tax or is indulging in evasion of tax under this Act or under the Act repealed by this Act, for reasons to be recorded in writing, he may direct any of the officers referred to in clauses (c) to (g) of sub-section (1) of section 3 to proceed to investigate into the tax evasion by such dealer.
>
> (2) Omitted
>
> (3) In pursuance of the provisions of sub-section (1), the Commissioner shall, subject to such conditions as may be prescribed,-
>
> (a) require the dealer to produce before him any accounts, registers or documents relevant to his business or to furnish such other information as he may deem fit for scrutiny, or
>
> (b) inspect the place of business of such dealer and for this purpose all accounts, registers and documents relating to the business of such dealer and all the goods kept in such place of

business shall be open to inspection by the Commissioner.

(4) If on scrutiny of the records produced by the dealer or on inspection of his place of business under sub-section (3), the Commissioner is satisfied that the dealer has evaded payment of tax payable by him for any year, he may for reasons to be recorded in writing, seize such accounts, registers or documents relating to the business of such dealer as he considers necessary, and grant a receipt therefor to the dealer and shall detain them only for so long as may be necessary, for examination thereof or for assessment of tax or for prosecution.

Provided that if the Commissioner can not examine the documents relating to the business of such dealer on the spot, he may ,for reasons to be recorded in writing, seal such documents in a box or bag or container or packet and seize the box or bag or container or packet and after the seizure, the Commissioner shall serve upon the dealer, a notice in the prescribed form ,and on the date fixed, he shall open the seal of the seized box or bag or container or packet in the presence of the dealer or an agent of the dealer entitled to appear in accordance with the provisions of section 23 and in the presence of at least two other persons examine the documents kept in the box or bag or container or packet and after examination of the documents, the Commissioner may seize such documents as he considers necessary and grant a receipt thereof to the dealer.

(5) For the purpose of clause (b) of sub-section (3), the Commissioner may -

(a) enter and search any place of business of such dealer or any other place whether such place be the place of his business or not, where the Commissioner has reason to believe that the dealer keeps or is for the time being keeping any accounts, registers or documents of his business or stock of goods relating to his business and the Commissioner may, for exercising the powers under this clause, seal or break open the lock of any door, box, locker, safe, almirah or any other receptacle in order to continue the inspection subsequently or

where the keys thereof are not produced on demand or are not available;

(b) also search any person who leaves or is about to enter or is already in the place referred to in clause (a), if the Commissioner has reason to suspect that such person has secreted about his person, books of account or other documents relating to the business of such dealer; and

(c) if considered necessary, get the search proceedings video graphed or recorded in suitable electronic medium for use as evidence.

(6) (a) If in the course of scrutiny of accounts, registers or documents produced by the dealer or in the course of inspection of the place of business of such dealer, the Commissioner has reason to believe that the dealer has stored or kept goods liable to tax, without accounting for them in books, registers or accounts maintained by him in the course of his business, with a view to their surreptitious sale in order to evade payment of tax, in any building, place or vehicle under the ownership or control of the dealer in either case whether exclusively or in association with some other person or in any building, place or vehicle in each case belonging to some other person with express or implied permission of such other person, the Commissioner may enter any such building, place or vehicle and inspect and verify if the goods have been accounted for and in the event of his reasonable belief that the dealer has not accounted for such goods with the intention of evading tax, the Commissioner may seize all such goods and take all necessary steps for their removal, proper custody and preservation :

Provided that a list of all goods seized under this clause shall be prepared by the Commissioner in presence of at least two respectable persons and a copy thereof shall, on demand, be furnished to the dealer or, as the case may be, to the person from the whose possession or custody they were seized.

(b) The Commissioner shall as soon as possible, after seizure of the goods under clause (a), serve upon the dealer, a

notice in the prescribed form to show cause within a period or thirty days of service of such notice as to why a penalty equal to 3.5 times amount of tax payable and calculable on the price which such goods would have fetched on their assumed sale in Madhya Pradesh, on the date of seizure, be not imposed on him for the dealers default in not making entries in respect of such goods in his books of account or register or other documents, as the case may be, maintained by him in the course of his business.

(c) If the Commissioner, after taking into consideration the explanation of the dealer and after giving him an opportunity of being heard, is satisfied that the entries relating to the said goods were not made in the books of accounts, registers or other documents of the dealer without any proper justification, the Commissioner shall pass an order imposing a penalty not less than three times but not exceeding 3.5 times the amount of tax referred to in clause (b).

(d) The Commissioner may, at any time after the service of the notice under clause (b) and before passing an order imposing penalty under clause (c), release the goods seized if the dealer or the person from whom the goods were seized furnishes security in the form of cash security or bank guarantee to the satisfaction of the Commissioner, in each case for such reasonable amount as the Commissioner may specify by order in writing with due regard to the amount of penalty proposed. On payment by the dealer of the penalty imposed upon him under clause (c), if the security furnished is in the form of bank guarantee, the bank guarantee shall be released and if such security has been furnished in the form of cash security, it shall be adjusted towards the penalty so imposed and the balance, if any, shall be refunded to the dealer.

(e) Where no security is furnished under clause (d), the dealer shall pay the amount of penalty, within thirty days of the service of the order imposing penalty on him and on payment of such amount goods seized shall be released forthwith.

(ea) Subject to such restrictions and conditions and in such

manner as may be prescribed, a dealer, on whom a penalty has been imposed under clause (c), may opt to pay in lieu of penalty a lump sum amount, which shall be twice the amount of tax referred to in clause (b) and once the dealer has exercised the option he shall not have any right to challenge the order of penalty in any forum.

(f) If the dealer fails to pay within the period specified in clause (e) the penalty imposed under clause (c), the Commissioner shall, subject to other provisions of this Section, dispose of the goods by way of sale in such manner as may be prescribed and apply the sale proceeds thereof towards the penalty imposed and the expenses incurred on account of and incidental to the custody, protection, preservation and sale of such goods and shall refund the balance, if any, to the dealer or person entitled.

(g) The penalty imposed under clause (c) shall be without prejudice to any other action under any other provision of this Act.

(h) Where any objection is made to the seizure of the goods seized under clause (a) on the ground that such goods do not belong to the dealer or are not otherwise liable to seizure, the Commissioner shall proceed to decide the objection:

Provided that no such objection shall be entertained -

(i) where, before the objection is made, the goods seized had already been sold, or

(ii) where the Commissioner considers that the objection was designedly or unnecessarily made.

(i) All questions including question relating to right, title or interest in the goods seized arising between the parties to such proceeding or their representatives and relevant to the adjudication of the claim or objection, shall be determined by the Commissioner dealing with the claim or objection.

(j) Upon the determination of the question referred to in clause (i), the Commissioner shall, in accordance with such

determination:-

(i) allow the claim or objection and release the seized goods either wholly or to such extent as he thinks fit, or

(ii) disallow the claim or objection, or

(iii) pass such order as, in the circumstances of the case, he deems fit.

(k) where any claim or objection has been adjudicated upon under clause (j) or where the Commissioner refuses to entertain a claim or objection under the proviso to clause (h), any such order made shall be deemed to be an order relating to assessment of tax against a dealer under Section 20 and shall be subject to the same condition as to appeal, revision or any other remedy under this Act.

(7) Where the Commissioner, apprehends any resistance to entry, search or seizure of goods he may for reasons to be recorded in writing requisition the services of any police officer of the State Government, having jurisdiction over the local area in which such entry, search or seizure is to be made, to assist him for all or any of the purposes specified in sub-section (3) or clause (a) of sub-section (5) or clause (a) of sub-section (6) and it shall be the duty of such police officer to comply with such requirement.

(8) The Commissioner while making entry, search and seizure under this Section shall, unless otherwise expressly provided by or under this Act exercise the same power and follow the same procedure as are exercised by and are required to be followed by a Police Officer in relation to entry, search and seizure under the provisions of the Code of Criminal Procedure, 1973 (No.2 of 1974)"

The aforesaid provision specifically provides that an inspection can be carried out by the officers of the respondents when an authorization is issued under sub-section (1) of section 55 of the VAT Act. Sub-section (4) provides that if on the scrutiny of records produced by the dealer or on inspection of his place of business under sub-section (3), the Commissioner is satisfied that

the dealer has evaded payment of tax payable by him for any year, he may for reasons to be recorded in writing, seize such accounts, registers or documents relating to the business of such dealer as he considers necessary, and grant a receipt there for to the dealer and shall detain them, only for so long as may be necessary, for examination thereof or for assessment of tax or for prosecution. Though the proviso of sub-section (4) provides that if the commissioner cannot examine the documents relating to the business of such dealer on the spot, he may for reasons to be recorded in writing, seal such documents in a box or bag or container or packet and seize the box or bag or container or packet and after the seizure, the Commissioner shall serve upon the dealer a notice in the prescribed form and on the date fixed, he shall open the seal of the seized box or bag or container or packet in the presence of the dealer or an agent of the dealer entitled to appear in accordance with the provisions of section 23 and in presence of at least two other persons examine the documents kept in the box or bag or container or packet and after examination of the documents, the Commissioner may seize such documents as he considers necessary and grant a receipt thereof to the dealer.

14. From the perusal of aforesaid provision, it is apparent that sub-section (4) takes care in respect of seizure of documents, but before it the Commissioner has to record his reasons in writing. No such satisfaction note is produced before us that the Authorized officer after inspection of the premises of the petitioner was of the view that seizure of the documents was necessary. The provision also provides that at the time of seizure a receipt of document shall be issued to the dealer and the Commissioner can detain them for examination or for assessment of tax or for prosecution. Though the proviso provides that at the time of inspection the Commissioner can seize the documents or at the time of search he can seize the documents and keep them in a box but it does not provide that the commissioner can take over the sealed documents along with him without issuance of any receipt to the dealer. In both the circumstances he was required to record his reasons in writing, but as stated hereinabove no material is produced before this Court that after the search any such reasons in writing were recorded by the officer incharge of the search. Apart from this, there is no material before this Court to show that before taking over the sealed boxes from the premises of the petitioner any receipt was issued in this regard. Sub-section (8) provides that the commissioner while making entry, search and seizure under this section shall, unless otherwise expressly provided by or under this Act exercise the same power and follow the same procedure as are exercised by and are required

to be followed by a Police Officer in relation to entry, search and seizure under the provisions of Code of Criminal Procedure, 1973. The relevant provision in this regard is section 100 of Cr.P.C., which provides for search of premises. For ready reference we quote section 100 of Cr.P.C., which reads thus :-

> **"100. Persons in charge of closed place to allow search.**
>
> (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.
>
> (2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in the manner provided by sub-section (2) of section 47.
>
> (3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.
>
> (4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.
>
> (5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the court as a witness of the search unless

specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860)."

15. Now in the light of statutory provision as quoted hereinabove and factual position of the present case, legal position may be examined. In *Radha Kishan Vs. State of Uttar Pradesh* (AIR 1963 SC 822) the Apex Court considering the question in respect of search in contravention of section 103 and 165 of Cr.P.C., held that where the provisions of section 103 and 165 of Cr.P.C., are contravented, the search can be resisted by the person whose premises are sought to be searched. It may also be that, because of the illegality of the search, the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues, and the seizure of the articles is not vitiated.

In *Pooran Mal Vs. Director of Inspection (Investigation) of Income-tax, New Delhi and others* (AIR 1974 SC 348) the Apex Court while considering the provision of Income Tax in respect of search and seizure held that provisions of section 132(1)(5), 132A and Rule 112A are directed against persons who are believed on good grounds to have illegally evaded the payment of tax on their income and property, drastic measures to get at such income and property with a view to recover the government dues would stand justified in themselves. The Apex Court further held in para 26 of the judgment that even assuming as was done, that the search and seizure were in contravention of the provisions of section 132 of the Income Tax Act, still the material seized was liable to be used subject to law before the Income

Tax authorities against the person from whose custody it was seized and therefore, no writ of prohibition in restraint of such use could be granted.

In *Dr.Pratap Singh and another Vs. Director of Enforcement, Foreign Exchange Regulation Act and others* [(1985) 3 SCC 72] the Apex Court held that the illegality of search would not render the seizure effected pursuant to the search also illegal so as to enable the accused to claim return of the seized material, however the Courts must be cautious while dealing with evidence collected during the illegal search.

In *Commissioner of Commercial Taxes, Board of Revenue, Madras and another Vs. Ramkishan Shrikishan Jhaver etc.* (AIR 1968 SC 59) the Apex Court held thus in para 17 :-

> "We are therefore of opinion that safeguards provided in section 165 also apply to searches made under sub-sec. (2). The safeguards are (i) the empowered officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction, (ii) he must be of the opinion that such thing cannot be otherwise got without undue delay, (iii) he must record in writing the grounds of his belief, and (iv) he must specify in such writing so far as possible the thing for which search is to be made. After he has done these things, he can make the search. These safeguards, which in our opinion apply to searches under sub-section (2) also clearly show that the power to search under sub-section (2) is not arbitrary. In view of these safeguards and other safeguards provided in Chapter VII of the Code of Criminal Procedure which also apply so far as may be to searches made under sub-section (2), we can see no reason to hold that the restriction, if any on the right to hold property and to carry on trade, by the search provided in sub-section (2), is not a reasonable restriction keeping in view the object of the search, namely, prevision of evasion of tax."

The Apex Court in *State of Punjab Vs. Baldev Singh* (AIR 1999 SC 2378) held thus :-

> **"23.** In *Mohinder Kumar* v. *State, Panaji, Goa* (1998) 8

SCC 655) a three-Judge Bench (to which one of us, Sujata V. Manohar, J., was a party) once again considered the requirements of Sections 42 and 50 of the Act. In that case the police officer "accidentally" reached the house while on patrol duty and had it not been for the conduct of the accused persons in trying to run into the house on seeing the police party, he would perhaps not have had any occasion to enter the house and effect search. But when the conduct of the accused persons raised a suspicion, he went into the house and effected the search, seized the illicit material and caused the arrest. The Court opined that in the facts and circumstances of the case, when the investigating officer accidentally stumbled upon the offending articles and himself not being the empowered officer, then on coming to know that the accused persons were in possession of illicit articles, then from that stage onwards he was under an obligation to proceed further in the matter only in accordance with the provisions of the Act. On facts it was found that the investigating officer did not record the grounds of his belief at any stage of the investigation, subsequent to his realising that the accused persons were in possession of charas and since he had made no record, he did not forward a copy of the grounds to his superior officer nor did he comply with the provisions of Section 50 of the Act, inasmuch as he did not inform the person to be searched that if he required, his search could be conducted before a Gazetted officer or a Magistrate. The Bench held that for failure to comply with the provisions of Sections 42 and 50, the accused was entitled to an order of acquittal and consequently the appeal was allowed and the order of conviction and sentence against the accused was set aside.

25. To be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act. It appears to have been incorporated in the Act keeping in view the severity of the punishment. The rationale behind the provision

is even otherwise manifest. The search before a Gazetted Officer or a Magistrate would impart much more authenticity and creditworthiness to the search and seizure proceeding. It would also verily strengthen the prosecution case. There is, thus, no justification for the empowered officer, who goes to search the person, on prior information, to effect the search, of not informing the person concerned of the existence of his right to have his search conducted before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It is, however, not necessary to give the information to the person to be searched about his right in writing. It is sufficient if such information is communicated to the person concerned orally and as far as possible in the presence of some independent and respectable persons witnessing the arrest and search. The prosecution must, however, at the trial, establish that the empowered officer had conveyed the information to the person concerned of his right of being searched in the presence of a Magistrate or a Gazetted Officer, at the time of the intended search. Courts have to be satisfied at the trial of the case about due compliance with the requirements provided in Section 50. No presumption under Section 54 of the Act can be raised against an accused, unless the prosecution establishes it to the satisfaction of the court, that the requirements of Section 50 were duly complied with.

26. The safeguard or protection to be searched in the presence of a Gazetted Officer or a Magistrate has been incorporated in Section 50 to ensure that persons are only searched with a good cause and also with a view to maintain the veracity of evidence derived from such search. We have already noticed that severe punishments have been provided under the Act for mere possession of illicit drugs and narcotic substances. Personal search, more particularly for offences under the NDPS Act, are critical means of obtaining evidence of possession and it is, therefore, necessary that the safeguards provided in Section 50 of the Act are observed scrupulously. The duty to inform the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate is a

necessary sequence for enabling the person concerned to exercise that right under Section 50 because after *Maneka Gandhiv. Union of India*(1978) 1 SCC 248 it is no longer permissible to contend that the right to personal liberty can be curtailed even temporarily, by a procedure which is not "reasonable, fair and just" and when a statute itself provides for a "just" procedure, it must be honoured. Conducting a search under Section 50, without intimating to the suspect that he has a right to be searched before a Gazetted Officer or a Magistrate, would be violative of the "reasonable, fair and just procedure" and the safeguard contained in Section 50 would be rendered illusory, otiose and meaningless. Procedure based on systematic and unconscionable violation of law by the officials responsible for the enforcement of law, cannot be considered to be a "fair", just or reasonable procedure. We are not persuaded to agree that reading into Section 50, the existence of a duty on the part of the empowered officer, to intimate to the suspect, about the existence of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so requires, would place any premium on ignorance of the law. The argument loses sight of a clear distinction between ignorance of the law and ignorance of the right to a "reasonable, fair and just procedure".

28. This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. We are not able to find any reason as to why the empowered officer should shirk from affording a real opportunity to the suspect, by intimating to him that he has a right "that if he requires" to be searched in the presence of a Gazetted Officer or a Magistrate, he shall be searched only in that manner. As already observed the compliance with the procedural safeguards contained in Section 50 are intended to serve a dual purpose — to protect a person against false accusation and frivolous charges as also

to lend creditability to the search and seizure conducted by the empowered officer. The argument that keeping in view the growing drug menace, an insistence on compliance with all the safeguards contained in Section 50 may result in more acquittals does not appeal to us. If the empowered officer fails to comply with the requirements of Section 50 and an order or acquittal is recorded on that ground, the prosecution must thank itself for its lapses. Indeed in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the Court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted.

43. ..... Prosecution cannot be permitted to take advantage of its own wrong. Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors. Courts cannot allow admission of evidence against an accused, where the court is satisfied that the evidence had been obtained by a conduct of which the prosecution ought not to take advantage particularly when that conduct had caused prejudice to the accused.

55. ....(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action

against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair."

16. In view of aforesaid settled law it is apparent that in the present case letter of authorization was not shown to the officers/employees of the petitioner. Independent witnesses were not called during the search and seizure and the respondents took over the boxes, without issuing any receipt, from the premises of petitioner, which vitiates the entire search and seizure conducted by the respondents. The aforesaid provisions have been made to safeguard the interest of persons who are effected by such search and seizure. It was obligatory on the part of the officer about to execute the search warrant to call on two or more respectable inhabitants of the locality where the search was to be conducted, as has been held by the Apex Court in *Sunder Singh Vs. State of Uttar Pradesh* (AIR 1956 SC 411). It was the legal obligation on the part of respondents to call two independent respectable inhabitants of the locality to attend the search and seizure, made by them. But it is apparent that the entire procedure was given go by by the respondents. Even they have not cared to call any of the witness at the time of search and seizure. It is not the case of the respondents that no witness was available or attended the aforesaid search and seizure, in absence of which the entire seizure can be held to be illegal.

17. In the aforesaid circumstances, the action of the respondents in respect of search and seizure cannot be approved by this Court and it is held that the entire search and seizure was illegal.

18. Now after declaring the search and seizure as illegal what directions

can be issued is to be seen.

The respondents have seized various documents alleging evasion of tax by the petitioner. Though the entire search and seizure has been held to be illegal, but the respondents may proceed on the basis of documents seized by them to find out whether there was any evasion of tax by the petitioner. However, the evidence so collected by the respondents in respect of evasion of tax by the aforesaid search and seizure, which has been held to be illegal, the authority considering the matter shall evaluate the evidence with great caution, as per the law laid down by the Apex Court in *Baldev Singh* (supra).

In view of aforesaid, this petition is allowed in part and following directions are issued :-

That the search and seizure effected by the respondents is held to be illegal. However the respondents may proceed, on the basis of documents seized to examine, but with great caution, that whether there was any evasion of tax by the petitioner, in accordance with law.

Considering the facts of the case, there shall be no order as to costs.

Petition Partly allowed

I.L.R. [2012] M.P., 365
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 4595/2009 (Gwalior) decided on 23 November, 2011

SAVINA PARK RESORTS & TOURS PVT. LTD. ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Land Revenue Code, M.P. (20 of 1959), Section 50 – Suo motu Revision – Computation of period of limitation*** **– 180 days shall be counted from the date of knowledge of illegality, impropriety and irregularity.** (Paras 8,9,10)

क. *भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 – स्व–प्रेरणा पुनरीक्षण – परिसीमा अवधि की संगणना* – 180 दिनों की गणना अवैधता, अनौचित्य और अनियमितता का ज्ञान होने के दिनांक से की जायेगी।

B. ***Words and Phrases – Date of Knowledge*** **– It has a definite meaning and connotation – Information, representation or complaint**

only gives reason which creates doubt – When finding comes after investigation, only then it can be said that the authority gathered knowledge–*Doubt, Reason to believe,* and *knowledge* have different meaning–*Reason to believe* is a higher level of state of mind–*Knowledge* will be slightly on a higher plane than *reason to believe – Reason to believe* is on a higher plane than *doubt* or *suspicion.* (Para 14)

ख. शब्द और वाक्यांश – ज्ञान होने की तारीख – इसका निश्चित अर्थ और बोध है – सूचना, प्रतिवेदन या शिकायत केवल कारण देता है, जो संदेह उत्पन्न करता है – अन्वेषण के बाद जब निष्कर्ष आते हैं, केवल तब यह कहा जा सकता है कि प्राधिकारी ने ज्ञान एकत्रित कर लिया है – संदेह, विश्वास करने का कारण और ज्ञान के पृथक अर्थ हैं – विश्वास करने का कारण दिमाग की उच्चतर अवस्था है – ज्ञान, विश्वास करने के कारण से थोड़ा उच्चतर स्तर पर है – विश्वास करने का कारण संदेह या संशय से उच्चतर स्तर पर है।

C. Land Revenue Code M.P. (20 of 1959), Section 165(6-b) **– This Section is also subject to Section 165(7-b) – Ratification is permissible only if it fulfills the requirement of the Code and not otherwise.** (Para 16)

ग. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165 (6–बी) – यह धारा भी धारा 165(7–बी) के अध्याधीन है – अनुसमर्थन अनुज्ञेय है, केवल तब जब वह संहिता की अपेक्षाओं को पूरा करता है न कि अन्यथा।

D. Land Revenue Code, M.P. (20 of 1959), Section 165(7-b) **– If permission is not obtained from the Collector to sell a *patta land*, even after ten years it can not be sold in contravention to the provisions – If permission of Collector is not obtained, such sale or transfer is void ab initio.** (Para 17)

घ. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165 (7–बी) – यदि पट्टा भूमि को बेचने की कलेक्टर से अनुमति प्राप्त नही की गई है, तब 10 वर्ष बाद भी उपबंधों के उल्लंघन में इसे बेचा नहीं जा सकता – यदि कलेक्टर की अनुमति प्राप्त नहीं की गई है तो उक्त विक्रय या अंतरण आरंभतः शून्य है।

Cases referred :

AIR 2011 MP 27, (2007) 11 SCC 447, 1993 Supp. (2) SCC 497, 2002(2) MPLJ 480, 1996 (7) SCC 765, 2002(1) MPLJ (Note) 2.

Gaurav Sarin & Yogesh Chaturvedi, for the petitioner.

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

ORDER

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

2. The petitioner allegedly purchased the land situated in Survey No. 55/1/M-3 Rakba 0.470 hectare and 85/5 Rakba 0.627 hectare, from Harmukha by the alleged registered sale deeds dated 5.4.2008 and 15.1.2008. The petitioner received "*Bhu Adhikar Rin Pustika*" from the respondents. The petitioner's case is that in the land records the name of Harmukha was recorded as Bhumiswami and there was no mention regarding any *"patta"*. The petitioner further submits that after purchase of land, petitioner filed mutation application before respondent No.4 Tahsildar. He was informally informed that the land purchased by the petitioner may have been *"patta land"*. At this stage, petitioner preferred an application to Collector for ratifying the transfer and validating the transaction as per Section 165 (6-b) of the Madhya Pradesh Land Revenue Code (for brevity, the 'Code'). The petitioner submits that this application (Annexure P/7) is received in the Office of Collector on 26.8.2008.

3. The petitioner at this stage filed present petition for a direction to take a decision on the application dated 3.1.2008 before Tahsildar for mutation and on application dated 26.8.2008 before the Collector for ratification of aforesaid sale transaction.

4. During pendency of the petition, the Collector passed its order dated 14.1.2010 by taking up the matter in a *suo motu* revision. By way of amendment, the petitioner challenged this order dated 14.1.2010 as well.

5. Shri Gaurav Sarin and Shri Yogesh Chaturvedi, learned counsel for the petitioner have raised following points to assail the impugned order:-

(A) The Collector took the matter in *suo* motu revision under the Code on 28.10.2009, which was barred by time. The impugned order dated 14.1.2010 is passed after 505 days from the date of application of petitioner to the Collector dated 26.8.2008. As per Full Bench judgment of this Court in *Ranveer Singh and others vs. State of MP and others*, reported in *AIR 2011 MP 27*, it is held that *suo motu* powers could not have been exercised beyond a period of 180 days.

(B) The respondents cannot take advantage of their own

wrong; as at the time of purchase of land there was no remark in the revenue document that it is a *"patta land"*. Support is drawn from *(2007) 11 SCC* 447 *(Kusheshwar Prasad Singh vs. State of Bihar and others).*

(C) The application dated 26.8.2008 for ratification is not considered and dealt with, which is contrary to the mandate of Section 165 (6-b) of the Code and Collector was under a legal obligation to decide it either way.

(D) The transfer of land by Bhu Swami is after a period of ten years and thus, the sale transaction was neither fraudulent nor forged but legal and capable of ratification under Section 165 (6-b) of the Code.

6. *Per Contra,* Shri Bhagwan Raj Pandey, learned Government Advocate would submit that no relief is due to the petitioner in the present writ petition. He submits that in sale deed not a single word is mentioned regarding name of seller Harmukha showing him to be owner of the land on the basis of *patta* granted by the Government. In other words, learned Government Advocate submits that there is no mention of *"patta land"* in the alleged sale deed. Accordingly, this cannot be said that on perusal of this sale deed the Collector had gathered knowledge regarding the sale deed executed by a *"patta holder"*. It is the case of the State that when one Pushpendra Singh Sengar filed a complaint to the Collector with regard to transaction made between the parties, upon this an enquiry was felt necessary to ascertain the correctness and legality of the same. He further submits that the Collector on the said complaint of Shri Sengar ordered on 10.4.2009 to investigate the matter by Sub-Divisional Officer (S.D.O.). Accordingly, investigation was made and enquiry report was forwarded to the Collector. On perusal of enquiry report it was found that the land in question was granted on lease which was illegally sold to the petitioner without following the mandate prescribed under the Code. The Collector for the first time came to know on 28.10.2009 regarding the illegality and the fact that *"patta"* was granted to the seller namely Harmukha in the year 1994 and on the basis of this *patta* he became Bhumiswami of the land and such a land was non-transferable and if it is transferred without permission of the Collector, such a transaction is *void ab* initio. In nutshell, the case of the Government is that the date of knowledge of Collector is 28.10.2009 and not 26.8.2008 as alleged by the petitioner.

The learned Government Advocate also placed reliance on the same judgment of Full Bench rendered in *Ranveer Singh* (supra). The Government prayed for dismissal of the writ petition. No other point is pressed by parties.

7. I have bestowed my anxious consideration on the rival contentions of the parties and heard them at length. I have also perused the written submissions filed by both the sides.

8. Before dealing with legal points, it is relevant to mention certain important facts. On 9.4.2009 one Shri Sengar made a complaint against the petitioner before the Collector. On 10.4.2009 Collector directed for investigation. On 13.5.2009 Tahsildar prepared his report. The report of Tahsildar was placed before the Collector and Collector came to know about illegality and irregularity on 22.5.2009 and directed for issuance of show cause notice and started *suo motu* revision. In turn, on 28.10.2009 show cause notice was issued, which ended with issuance of final order on 14.1.2010.

Point (A):

8. The Full Bench of this Court in *Ranveer Singh*'s case (supra) held as under:-

> "38. Ab judicatio for the reasons stated hereinabove we hereby answer the question referred to us as under:-
>
> The suo motu powers can be exercised by the Revisional Authority envisaged under Section 50 of the Code within a period of 180 days from the date of the knowledge of illegality, impropriety and irregularity of the proceedings committed by any Revenue Officer subordinate to it even if the immovable property is Government land or having some public interest. What should be the irreparable loss, it should be considered on the facts and circumstances of each case as no definite yardstick in that regard can be drawn. We have already mentioned hereinabove certain instances which can be said to be the "irreparable loss"."
>
> (emphasis supplied)

9. In the light of this Full Bench judgment, it is clear that a reasonable period is construed as 180 days from the date of knowledge of illegality, impropriety and irregularity. Thus, for applying the ratio of this judgment, the

pivotal question is as to what is the starting point/date. The petitioner submits that it is 26.8.2008, the date when he preferred application for ratification. whereas the State submits that it is 28.10.2009 when Collector gathered knowledge about the illegalities. The answer of Point (A) would depend on the starting date.

10. In the opinion of this Court, the answer given by the Full Bench to the question referred is self-explanatory and explicit in nature. Consciously, the Full Bench has chosen to use the words *"within a period of 180 days from the date of knowledge of illegality, impropriety and irregularity."* Reverting back to petitioner's application dated 26.8.2008 would show that petitioner has merely enclosed the sale deed, khasra and perhaps copy of *'Bhu Adhikar Rin Pustika'*. The Office of Collector merely forwarded this letter for taking action to Tahsildar. Neither in this letter (Annexure P/7) nor in the sale deed it is mentioned that the land in question was *"patta land"*. Therefore, I am unable to hold that the Collector gathered knowledge on receiving Annexure P/6 on 26.8.2008 regarding any illegality, impropriety and irregularity in the matter. I find that on receiving complaint of said Shri Sengar when investigation was ordered, it is only on 22.5.2009 the Collector gathered the knowledge regarding the illegality and irregularity caused in the matter. Accordingly, he took up the matter in *suo motu* revision, issued show cause notice on 28.10.2009 and passed the order on 14.1.2010 which are within 180 days from the date of knowledge, a permissible time even as per the Full Bench judgment. On the basis of aforesaid facts, it is clear that the submission of petitioner's application dated 26.8.2008 before the Collector cannot amount to bringing irregularity and illegality in the knowledge of Collector. Same is the case with the complaint of Shri Sengar, which was preferred on 9.4.2009. At best, these two letters contain some information. If the Collector had a doubt or suspicion about alleged irregularity/illegality on receiving Shri Sengar's complaint, the only course open for him was to direct a proper investigation to gather knowledge of actual situation. He did so. The question is as to what is knowledge, which will determine the point of date of knowledge. The Apex Court although in a different context in *1993 Supp (2) SCC 497 (Joti Parshad vs. State of Haryana)* dealt with this issue in following words:-

> ""Knowledge" is an awareness on the part of the person concerned indicating his state of mind. "Reason to believe" is another facet of the state of mind. "Reason to believe" is not the same thing as "suspension" or "doubt" and mere seeing

> also cannot be equated to believing. "Reason to believe" is a higher level of state of mind. Likewise "knowledge" will be slightly on higher plane than "reason to believe". A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same."

On the basis of this analogy, it can be safely concluded that when complaint of Shri Sengar was received by the Collector, at best he had a doubt but he gathered knowledge only when the enquiry report was produced before him. Thus, the starting point would be the date when enquiry report was produced before him, i.e., 22.5.2009 and from this date, *suo motu* powers are exercised by the Collector within 180 days. Before this date even on receiving the petitioner's representation dated 26.8.2008 or complaint of Shri Sengar, by no stretch of imagination, it can be said that Collector had gathered knowledge about illegality, impropriety and irregularity. Thus, this point needs to be decided against the petitioner. Accordingly, the action of taking up the matter in *suo motu* revision is upheld because it is taken up within 180 days.

Point (B):

11. True it is that in khasra entries (Annexure P/3) in relevant columns it is not mentioned that Harmukha was a *"patta holder"* or land in question is a *"patta land"*, however, in the opinion of this Court, merely because those entries are kept blank or even the entry is wrongly filled up will not confer any legal right to the seller. The principle of law laid down in *Kusheshwar Prasad Singh*'s case (supra), which is heavily relied by the petitioner, is of no help to the petitioner. The ratio of that judgment is that no man shall take advantage of his own wrong to gain favourable interpretation of law. The principle is that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong". This principle has no application in the facts and circumstances of this case. The Government has not taken any benefit out of their non-performance nor Government can be said to be a wrongdoer in the fact situation of this case. On the contrary, the seller was a wrongdoer who, despite knowing the fact that it is a *"patta land"* allegedly sold the said land to the petitioner without following the mandate of the Code. Thus, this contention is rejected. Apart from this, even if it is not mentioned in the khasra entries that such land is restricted and cannot be

transferred, this will not bestow any right to the seller or to the purchaser. Once admittedly the said land was a *"patta land"*, its transfer is permissible only in accordance with the mandate of the Code. Thus, mere non-mention or incorrect mention in khasra entries will not give any right of transfer to the petitioner.

Point (C) :

12. Shri Sarin, learned counsel for the petitioner submits that when the petitioner came to know that it is a *"patta land"*, he preferred the application dated 26.8.2008 for ratification of the same. He heavily relied on Section 165 (6-b) of the Code, which reads as under:-

> "(6-b) Notwithstanding anything contained in the Limitation Act 1963 (No. 36 of 1963), the Collector may on his own motion at any time or on an application made in this behalf within three years of such transaction in such form as may be prescribed, make an enquiry as he may deem fit, and may, after giving a reasonable opportunity of being heard to the persons affected by the transfer, pass an order ratifying the transfer or refusing to ratify the transfer."

He would further submit that Section 165(7) has no application in the fact situation of the present case.

13. It is profitable to quote Section 165 (7-b) of the Code which reads as under:-

> "(7-b) Notwithstanding anything contained in sub-section (1), [a person who holds land from the State Government or a person who holds land in bhumiswami rights under sub-section (3) of section 158] or whom right to occupy land is granted by the State Government or the Collector as a Government lessee and who subsequently becomes bhumiswami of such land, shall not transfer such land without the permission of a Revenue Officer, not below the rank of a Collector, given for reasons to be recorded in writing."

14. Although Section 165 (6-b) gives power to the Collector to ratify the transfer or refuse the same in accordance with law, the question is whether the order passed by the Collector is in consonance with Sec. 165 of the

Code. The order passed by the Collector dated 14.1.2010 shows that the report was obtained from the Revenue Officer by the Collector and it was found that *patta* was granted to Harmukha on 4.1.1994 treating him to be a landless person. The report placed before the Collector shows that said seller never obtained any permission as per Section 165 (7-b) from the competent authority to sell it. Accordingly, on *suo motu* revision the sale was found to be *void* and *non est* in the teeth of the provisions of the Code by the Collector. Interestingly, Harmukha son of Shamle, caste Jatav, in his reply before the Collector stated that he never sold the land in question nor the sale deed contains his signature. The Collector accordingly gave a finding that admittedly the mandate of Section 165 (7-b) is violated. No permission is obtained by the seller as mandated in aforesaid provision to sell the land in question. Accordingly, the Collector cancelled the *patta,* which was issued on 4.1.1994 and came to hold that the said sale deed is *void ab initio.*

15. A Division Bench of this Court in *2002 (2) MPLJ 480 (Mulayam Singh vs. Budhwa Chamar)* held as under:-

> "5. It is not in dispute that no permission from the Collector was obtained and the sale was made without the permission of Collector. The respondent cannot transfer his land even though he is declared Bhumiswami, without the permission of the Collector. Transfer was made without such permission, so the appellants will not get any legal rights. In the circumstances, the Additional Collector has rightly held that the sale was in contravention of the provisions of section 165 (7-B) of the Code and is void. Mutation effected on the basis of sale was set aside and the land was directed to be recorded in the name of the respondent No.1."
>
> (Emphasis added)

16. Accordingly, I am unable to hold that the Collector has committed any error of law in passing the impugned order. So far the question of not deciding the petitioner's application dated 26.8.2008 preferred under Section 165 (6-b) of the Code is concerned, since the alleged transaction was *void ab initio*, there was no need to pass any separate order and said application is deemed to be rejected on passing of final order by the Collector on 14.1.2010. It is also relevant to mention that the Supreme Court in *(1996) 7 SCC 765 (Keshabo and another vs. State of MP and others)*, held as under:-

> "The M.P.Revenue Code is a welfare legislation made to protect the ownership rights in the land of a Scheduled Tribe to effectuate the constitutional obligation of Articles 39 (b) and 46 of the Constitution read with the Preamble. Economic empowerment of a tribal to provide economic democracy is the goal. Prevention of their exploitation due to ignorance or indigency is a constitutional duty under Article 46. Agricultural land gives economic status to the tiller. Therefore, any alienation of land in contravention of the above objectives is void."

Therefore, I have no hesitation to hold that any transaction by petitioner and Harmukha is void and Collector has not committed any illegality in passing the impugned order. Thus, this point is also decided against the petitioner.

Point (D):

17. So far the contention that the transfer of land by Bhumiswami is after a period of ten years is concerned, this point is also no more *res integra.* The Division Bench in *Mulayam Singh's* case (supra) held as under:-

> "This provision was enacted on 28.10.1992, much after the transaction of sale in this case. Though it provides that after expiry of a period of ten years, the land may be transferred but it is also subject to the prohibition of section 165 (7-B) of the Code. So until and unless such a permission is granted by the Collector with cogent reasons, the sale is not permissible. The abovesaid enactment has been made to restrict the transfer of the land which has been granted on lease by the State Government to landless person and such person cannot be deprived of the land by any transfer except as permissible under section 165 (7-B) of the Code and gives jurisdiction to the Collector to consider such a prayer only after a period of ten years and not before that."

This Court in *2002 (1) MPLJ (Note 2) (Budhuwa Chamar vs. Board of Revenue, M.P. and ors.)* held as under:-

> "(b) M.P.Land Revenue Code, 1959, Ss. 165 (7-B) and 50 – Transfer of Land by Bhumiswami – *If permission of Collector is not obtained such transfer is void ab initio* – In absence of permission when the transfer is bad in law, by no stretch of

imagination it can be said that the sale-deeds would be treated as valid in the eye of law – One need not seek declaration that the sale-deeds are bad in law as they do not confer any right for the simple reason that there was no prior permission of the Collector."

18. In the light of aforesaid, I have no hesitation to hold that no right accrued in favour of the petitioner merely because the land was sought to be transferred after ten years from 4.1.1994. Accordingly, this point is also decided against the petitioner.

19. In the result, since petition is bereft of merits and substance, it is hereby dismissed. No costs.

Petition dismissed

I.L.R. [2012] M.P., 375
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 8621/2011 (Indore) decided on 24 November, 2011

MEGA ENTERPRISES (M/S) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Value Added Tax Act, M.P. (20 of 2002), Section 7, Schedule I – Interpretation of entries – **Commercial Tax Officer while holding that Salt Cake would not fall in Entry No. 35 (Salt) did not make any effort to find out whether salt cake would be covered under various other entries – Held – If there is a conflict between two entries, one leading to an opinion that it comes within the purview of a specific entry and another the residuary entry, the former should be preferred – Recourse to residuary entry should be made as a last resort - Order not in consonance with the requirement of Section 70 – matter remitted back for deciding it afresh.** (Para 10 to 12)

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 7, अनुसूची I – प्रविष्टियों का निर्वचन – वाणिज्यक कर अधिकारी ने यह निर्धारित करते हुए कि साल्ट केक प्रविष्ट क्रं. 35 (साल्ट) के अंतर्गत नहीं आती, यह जानने का कोई प्रयत्न नहीं किया गया कि क्या साल्ट के विभिन्न/अन्य प्रविष्टियों के अंतर्गत आयेगी – अभिनिर्धारित – यदि दो प्रविष्टियों के मध्य विरोध है, एक इस मत की ओर ले जाती

है कि यह विनिर्दिष्ट प्रविष्टि के अंतर्गत आती है और अन्य अवशिष्ट प्रविष्टि के अंतर्गत, तब पूर्ववर्ती को प्राथमिकता दी जानी चाहिये – अवशिष्ट प्रविष्टि का अवलम्ब अंतिम उपाय के रुप में करना चाहिए – आदेश धारा 70 की अपेक्षा के अनुरुप नहीं – पुनः निर्णित किये जाने हेतु मामला प्रतिप्रेषित किया गया।

Case referred :

(2008) 13 STJ 127 (SC).

Sumit Nema, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondents.

ORDER

The order of the court was delivered by : **SHANTANU KEMKAR, J** :-With consent heard finally.

The petitioner who is engaged in the business of sale and purchase of grocery items has.challenged the order dated 18.08.2011 passed under Section 70 of the M.P. VAT Act, 2002 (for short VAT Act) by the Commissioner of Commercial Tax, Indore (for short the Commissioner) in Revision No.20/11/70/11.

2. Shortly stated, the petitioner in its return submitted before the Commercial Tax Officer (for short CTO) declared 'salt cake' as a type of salt and claimed exemption from tax on the basis of Entry No.35 of the Schedule I of VAT Act providing salt to be under tax free goods. The petitioner's claim for treating 'salt cake' as type of 'salt' was rejected by the CTO vide order dated 24.06.2011 (Annexure P-1).

3. After the said order being passed by the CTO the petitioner submitted an application under Section 70 of the VAT Act before the Commissioner raising a question for determination in respect of rate of tax on 'salt cake'. The said application has been decided by the learned Commissioner vide impugned order dated 18.08.2011 (Annexure P-3) holding that the salt cake is not a type of salt and is not covered under the entry 'salt'. Having held so the Commissioner has ordered to treat salt cake in residuary Entry under Part-IV of Schedule II provided under VAT Act.

4. Feeling aggrieved by the order by which the Commissioner has ordered to treat salt cake under residuary entry providing tax @ 13% (substituted for the figure 12.5 by VAT (Amendment) Act, 2010), the petitioner has filed this

petition under Article 226 of the Constitution of India.

5. Shri Sumit Nema, learned counsel for the petitioner argued that under Section 70 of the VAT Act, the Commissioner was required to make an order determining the rate of tax. The Commissioner while determining the rate of tax has resorted to the residuary entry without making an attempt to find out as to whether the entry answers the description of the contents of the basic entry. He argued that the Commissioner has only taken into consideration the entry 'salt' without taking into consideration the other entries in which the 'salt cake' would be covered. Taking us to the impugned order of the Commissioner he pointed out that salt cake would certainly come under the Entries No.28, 36 and 175 of Serial No.55 of Schedule-II of VAT Act which pertains to 'industrial inputs and packing materials' providing for tax @ 4% upto 31.07.2009 and @ 5% w.e.f. 01.08.2009.

6. Ms. Mini Ravindran, learned Dy. Govt. Advocate on the other hand supported the impugned order passed by the Commissioner and has argued that the learned Commissioner has rightly held that, having regard to the use of 'salt cake', its contents and how it is understood in common parlance, salt cake cannot be said to be a type of salt and in the circumstances has committed no error in treating it to be in the residuary entry.

7. We have considered the submissions made by learned counsel for the parties and we have gone through the relevant entries under the VAT Act.

8. Section 70 of the VAT Act provides for determination of disputed questions, it empowers the Commissioner either on his own motion on any question in respect of the rate of tax on any goods may, at any time, or if any question is raised by a dealer in respect of the rate of tax on any goods, to make an order determining the rate of tax on such goods in accordance with the procedure prescribed for the said purpose.

9. In the present case, the Commissioner while deciding the question raised by the petitioner in respect of rate of tax on salt cake has considered the singular entry salt and held that salt cake is not covered under the entry salt an entry under tax free goods. The Commissioner did not examine as to whether the salt cake is covered under any other entry provided under the Schedule of VAT Act. Instead he has taken recourse to the residuary entry and held that salt cake would be taxable @ 13% under the residuary entry.

10. In the case of *Mauri Yeast India Pvt. Ltd. Vs. State of U.P. and another. [(2008) 13 STJ 127 (SC)]*, the Supreme Court has held that in interpreting different entries, attempts should be made to find out as to whether the same answers the description of the contents of the basic entry. Only in the event if it is not possible to do so, recourse to the residuary entry should be made as a last resort. If there is a conflict between two entries one leading to an opinion that it comes within the purview of a specific entry and another the residuary entry the former should be preferred. In the present case, the learned Commissioner has not made any efforts to find out whether the salt cake would be covered under the various other entries more particularly Entry No.28,36 and 175. Instead of making such efforts the Commissioner on recording the finding that it is not covered under the entry 'salt' has straightaway ordered that the salt cake is liable to be taxed @ 13% under residuary entry.

11. In the circumstances in our considered view the order passed by the learned Commissioner is not in consonance with the requirement of Section 70 of the VAT Act and is also contrary to the law laid down by the Supreme Court in the case of *Mauri Yeast India Pvt. Ltd. Vs. State of U.P. and another* (supra).

12. Having regard to the aforesaid the impugned order passed by the learned Commissioner deserves to be and is hereby quashed. The matter is remitted to the Commissioner for deciding it afresh keeping in view the observations made hereinabove. The petition is allowed to the extent indicated above. No orders as to costs.

Petition allowed

I.L.R. [2012] M.P., 378
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No.7168/2011 (S) (Indore) decided on 24 November, 2011

UJJAIN DEVELOPMENT AUTHORITY ...Petitioner
Vs.
KAILASH GHAVRI ...Respondent

A. ***Industrial Disputes Act (14 of 1947), Section 25F – Retrenchment – 240 days*** **– Employee categorically made statement that he had worked more than 240 days in the year preceding to his termination – His evidence that he was working since 1-2-1996 till**

12-5-2000 remained un-rebutted – Employer also did not file any service record although admittedly maintained by it – No permission was sought from the Labour Commissioner prior to termination of service of respondent – Termination of respondent amounts to illegal retrenchment. (Paras 6 &7)

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ – छंटनी – 240 दिन – कर्मचारी ने स्पष्ट रुप से कथन किया कि उसने सेवा से हटाये जाने के पूर्व के वर्ष में 240 दिन से ज्यादा कार्य किया – उसकी साक्ष्य कि उसने 1.2.1996 से 12.5.2000 तक कार्य किया अखंडित रहा – नियोक्ता ने कोई सेवा अभिलेख भी प्रस्तुत नहीं किया यद्यपि उसके द्वारा अनुरक्षित किया जाना उसने स्वीकार किया – प्रत्यर्थी को सेवा से हटाये जाने से पूर्व श्रम संभागायुक्त से कोई अनुमति प्राप्त नहीं की गई – प्रत्यर्थी को सेवा से हटाया जाना अवैध छंटनी की कोटि में आता है।

B. *Industrial Disputes Act (14 of 1947), Section 25F – Re-instatement* – Respondent had worked for more than 4 years – Looking to tenure of service, order of re-instatement by Labour Court proper. (Para 8)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ – बहाली – प्रत्यर्थी ने 4 वर्ष से अधिक समय तक कार्य किया – सेवा की अवधि को देखते हुए, श्रम न्यायालय का बहाल करने का आदेश उचित।

Case referred :

(2004) 8 SCC 161, 2005 AIR SCW 1729, (2009) 15 SCC 327, AIR 2004 SC 4282.

A.K. Sethi with Harish Joshi for the petitioner.

ORDER

The order of the court was delivered by : **SHANTANU KEMKAR, J.:-** By this petition, the petitioner has challenged the award dated 04.05.2011 passed by the Labour Court, Ujjain in case No.55/2009 ID Reference, whereby the Labour Court has directed reinstatement of respondent, without back wages.

2. Brief facts necessary for disposal of this petition are that the respondent/workman worked as a daily wager under the petitioner from 01.02.1996. His services were dispensed with on 12.05.2000. Aggrieved, the petitioner approached to the Deputy Labour Commissioner of the State

Government under the Industrial Disputes Act, 1947 (for short, the Act) for conciliation. On failure of conciliation proceedings, the Deputy Labour Commissioner referred the dispute under Section 10 of the Act to the Labour Court, Ujjain. The Labour Court, Ujjain after giving opportunity to the parties to complete the pleading and to lead evidence, passed the impugned award dated 04.05.2011 whereby the respondent/workman has been ordered to be reinstated, without back wages. Feeling aggrieved, the petitioner/employer has filed this petition.

3. It has been contended by the learned Senior counsel for the petitioner/ employer that on the basis of bald statement of the respondent, that he had worked for more than 240 days in the year preceding his termination, the Labour Court has committed error in recording the finding that he had worked for 240 days in the year. He argued that in the absence of any cogent evidence in support, the Labour Court could not have recorded such finding. He placed reliance on the judgment of the Supreme Court in the case of *Rajasthan State Ganganagar S. Mills Limited* v. *State of Rajasthan & another [(2004) 8 SCC 161]* and in the case of *Manager, RBI, Bangalore* v. *S. Mani and others [2005 AIR SCW 1729]* in support of his contention. He also contended that the Labour Court, instead of ordering for reinstatement, should have ordered for payment of compensation to the respondent, keeping in view the fact that he was merely a daily wager. To support this contention, he placed reliance on the judgment of the Supreme Court in the case of *Jagbir Singh* v. *Haryana State Agriculture Marketing Board and another [(2009) 15 SCC 327].*

4. On going through the impugned award, we find that in order to prove his case, the respondent examined himself. He had deposed that he was working since 01.02.1996 and had worked for more than 240 days in the year prior to termination of his services on 12.05.2000. He stated that he has not been paid the requisite amount of retrenchment compensation; the employees, who were appointed after him, have been retained; and no procedure for retrenchment, as provided under the Act, has been followed. In rebuttal, the petitioner/employer examined one witness Chandrakant Patel. He did not dispute that the respondent/workman was working since 01.02.1996 till his termination. He, however, stated that he never worked continuously for 240 days in the year preceding to his termination. He deposed that the petitioner had paid one month's notice pay and retrenchment compensation to the respondent.

5. The Labour Court initially in paragraph 7, though has stated that termination of the respondent is not illegal retrenchment, but thereafter, on further discussion and on detailed appreciation of the evidence, recorded a finding in favour of the respondent that he had worked for more than 240 days in the year and that he had worked for more than five years. The Labour Court has also recorded a finding that retrenchment compensation amount, which was paid to the respondent/workman was less than the amount, for which he was entitled for. A finding has also been recorded by the Labour Court that number of employees, who were appointed after appointment of the respondent, have been retained and there is violation of the principles of "last come first go". Having recorded these findings, the Labour Court directed the reinstatement of the respondent, without back wages, taking note of the fact that the respondent was a daily wager.

6. In the case of *Rajasthan State Ganganagar S. Mills Limited* (supra), the Supreme Court found that the Labour Court had failed to notice that even if the period stated by the workman is taken into consideration, requirement of 240 days work during the twelve months preceding the alleged date of termination, prima facie does not appear to be fulfilled. On the basis of this factual foundation, the Supreme Court remanded the matter to the Labour Court. In the case of *Manager, RBI* (supra), the workman had failed even to make a statement on oath to substantiate his pleading that he had worked for more than 240 days. Whereas, in the present case, the workman had made a categorical statement that he had worked for more than 240 days in the year preceding to his termination. His evidence that he was working since 01.02.1996 till 12.05.2000 also remained un-rebutted. The petitioner's witness, on the other hand, has stated that: -

> "हमारे यहॉ जो कर्म0 काम करते हैं उसकी उपस्थिति एवं वेतन का रिकार्ड रखा जाता है प्रार्थी का भी रिकार्ड रखा गया होगा । यह सही है कि उक्त रिकार्ड देखने से यह ज्ञात हो जाता कि प्रार्थी ने 96 से 12.5. 2000 तक किस वर्ष में कितने दिन काम किया है। यह सही है कि उक्त रिकार्ड हमारे द्वारा कोर्ट में पेश नहीं किया । उक्त रिकार्ड न्यायालय में पेश नहीं करने का कारण मैं नहीं बता सकता ।

He also admitted that prior to termination of service of the respondent, no permission was sought from the Labour Commissioner.

7. Thus, in our considered view, the workman having discharged the initial burden and on the basis of statement of the employer's witness, as extracted

above, the Labour Court has not committed any error in drawing an adverse inference for non-production of relevant record by the petitioner. The respondent's termination being ordered without following the procedure prescribed under Section 25-F of the Act, inasmuch as the compensation was not paid equivalent to fifteen days average pay for every completed year of continuous service, no notice to the appropriate Government in the prescribed manner was given, the same is an illegal retrenchment as held by the Supreme Court in the case of *Krishna Bahadur* v. *M/s. Purna Theatre and others (AIR 2004 SC 4282)* and as such, has rightly been set aside by the Labour Court.

8. As regards the plea that instead of reinstatement the Labour Court should have awarded compensation, we find that in the case of *Jasbir Singh* (supra), the Supreme Court taking into consideration the short tenure of service of the workman, which was about eleven months, ordered for payment of compensation in place of reinstatement. Whereas, in the present case, the respondent/workman had worked for more than four years, and therefore, looking to the tenure of service if the Labour Court has ordered for reinstatement, in our view, no error has been committed by the Labour Court.

9. Thus, we find no ground to interfere in the award passed by the Labour Court ordering reinstatement of the respondent without back wages in this petition under Article 227 of the Constitution of India. Accordingly, the petition fails and is hereby dismissed. No order as to costs.

Petition dismissed

I.L.R. [2012] M.P., 382
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P.No.10000/2010 (Jabalpur) decided on 2 December, 2011

HOME GUARD SAINIK EVAM PARIVAR KALYAN SANGH & ors. ...Petitioners
Vs.
STATE OF M.P. & anr. ...Respondents

A. ***Constitution – Article 226 – Recommendations of Human Rights Commission*** **– Court can not issue *Mandamus* for implementing the recommendations of the State Human Rights Commission – However, the findings recorded by Human Rights**

Commission can be considered unless it is shown to be perverse or opposed to some principle of law or facts. (Paras 21,43)

क. संविधान – अनुच्छेद 226 – मानव अधिकार आयोग की सिफारिशें – राज्य मानव अधिकार आयोग की सिफारिशों को लागू करने के लिये न्यायालय परमादेश जारी नहीं कर सकता – तथापि मानव अधिकार आयोग द्वारा अभिलिखित निष्कर्षों को विचार में लिया जा सकता है जब तक यह दर्शित नहीं होता कि वह विकृत या विधि के कुछ सिद्धांतों या तथ्यों के विपरीत है।

B. Equal Work for Equal Pay – **As the method of recruitment of Home Guard and Police Constables appointed in the regular establishment of Police Department and even in the manner of discharging the duty and exercise of powers, there is no exact similarity – Principle of *equal work for equal pay* can not be enforced in its totality.** (Para 22)

ख. समान कार्य के लिये समान वेतन – चूंकि होम गार्ड की भर्ती पद्धति और पुलिस विभाग की नियमित स्थापना में नियुक्त पुलिस आरक्षकों की भर्ती की पद्धति में तथा कर्तव्य निर्वहन एवं शक्तियों के प्रयोग की रीति में भी कोई निश्चित समानता नहीं – समान कार्य के लिये समान वेतन के सिद्धांत को इसकी पूर्णता में लागू नहीं किया जा सकता।

C. Constitution – Article 23 – Beggar – **Atleast minimum wages to an employee working in an establishment should be paid as a fundamental right of the employee and anything done to deprive an employee of this right would be nothing but an act amounting to beggar.** (Para 33)

ग. संविधान – अनुच्छेद 23 – भिक्षुक – स्थापना में कार्यरत कर्मचारी को न्यूनतम मजदूरी दी जानी चाहिए जो उसका मूलभूत अधिकार है और कर्मचारी को इस अधिकार से वंचित करने के लिये किया गया कोई भी कार्य और कुछ नहीं बल्कि भिक्षुक की कोटि में आयेगा।

D. Minimum wages – Home Guards – **Home Guards discharging all duties which are being performed by a regular police personnel except actual investigation into a crime and anti-dacoity operations – State directed to take note of recommendations of State Human Rights Commission – Till then employees working in Home Guards department be granted salary at the minimum/basic of pay prescribed for Constable in police department.** (Para 49)

घ. *न्यूनतम वेतन – होम गार्डस्* – होम गार्डस् द्वारा उन सभी कर्तव्यों का निर्वहन किया जाता है जो नियमित पुलिस कर्मिक द्वारा किये जाते हैं सिवाय कि अपराध का वास्तविक अन्वेषण और डकैती विरोधी कार्यवाहियाँ – राज्य को राज्य मानव अधिकार आयोग की सिफारिशों से टिप्पणी लेने के लिये निदेशित किया गया – तब तक होम गार्डस् विभाग में कार्यरत कर्मचारियों को पुलिस विभाग के आरक्षक के लिये विहित न्यूनतम/मूल वेतन प्रदान किया जाए।

Cases referred :

AIR 2003 SC 3569, AIR 2004 SC 852, AIR 2010 SC 2587, (1999) 8 SCC 560, (2009) 14 SCC 173, (1988) 3 SCC 354, AIR 1955 Nag 175,(1990) 2 SCC 707, AIR 2004 SC 1272, W.P. No. 3668/2000, 2000(4) MPHT 398, (2006) 9 SCC 321, (1993) 1 SCC 539, (1996) 10 SCC 1, (1998) 1 SCC 177, AIR 2003 SC 33, (2002) 6 SCC 72, (2007) 2 SCC 230, 2008 Cal LT (2) 315, 2003 ILR DLH (11) 272, 2005 PLJ (3) 355, 2007 AIR Bom. R(1) 441, 2008 KCCR (2) 818, (1982) 3 SCC 235, (1990) 2 SCC 396, (1998) 9 SCC 595, AIR 2010 SC 2587, 1999 Cr.L.J. 456.

Mrigendra Singh, for the petitioners.

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

ORDER

RAJENDRA MENON, J. :- As common questions of law and facts are involved in all these three petitions and other connected cases, which were heard together, are being decided by this common order.

2- For the sake of convenience, the documents and material available in the record of *W.P.No. 10000/2010* is being referred to in this order.

3- Petitioners in all these cases are either individual persons, working as Sainiks/Sepoys in the Home Guards' Organization or are Association of Employees working in the same Organization in similar capacity. The relief claimed for in these writ petitions are, that the petitioners be declared as holders of "civil post" and treating them to be so, all consequential benefits be granted to them as is being granted to regular employees of the State Government, particularly in the Police Department. That apart, further direction sought for is to issue a *'mandamus'* to the respondents directing them to frame rules and regulations governing conditions of service for the persons working in the Home Guards Organization, particularly with reference to pay

scale, allowances, increments, pensionary benefits and other service conditions. Further prayer made is to grant the benefit of pay and allowances as is paid to other employees of the Police Department and treat the petitioners as regular employees in the department and finally it is claimed that after so regularizing and absorbing them in the regular establishment, the system of calling off duty, which is followed be done away with.

4- In the year 1947, the Madhya Pradesh Home Guards Act (hereinafter referred to as 'Act of 1947') was enacted. This Act was created to establish a body of volunteers to supplement the police force and to assist the regular police force in case of emergency and as a general measure for public welfare in the State of Madhya Pradesh. Section 2(a) of the Act defines a Home Guard to be a person, who is appointed under section 6. Thereafter, various provisions are contained in this Act, which deal with appointment, duties and training, calling of Home Guards, the competent authorities and the protection available to them. A copy of the Act is filed as Annexure P/1, and it contains various procedure for regulating the activities of Home Guard. Even though there is no specific mention in the Act that the organization is a voluntary organization, but the State Government has come with a case that the Organization is a voluntary organization and, therefore, the persons engaged as Home Guard are volunteers. It is also seen from the records that after due selection in accordance to the provisions contained in the Act of 1947, the Home Guards appointed are designated as Naik, Lance Naik, Constable, Sepoys etc. The persons so employed are deployed to work mainly under the operational control of the MP Police, but the over all control is exercised by respondent No.2 – the Director General, Home Guards and Civil Defence with Headquarters at Jabalpur.

5- The duties of a Home Guard are those which are assigned to them in the Act of 1947 itself. Thereafter, a provision for calling of duty is contained. Section 10 of the Act of 1947, stipulates the duty of a Home Guard, the same reads as under:

> "**10. Duties.** Subject to any general or special order of the District Magistrate, the Nagar-sainiks (Home Guards) called out under sub-rule (1) of rule 9 may be required to perform all or any of the following duties:
>
> (a) the prevention of commission of offences;

(b) the protection of life and property;

(c) collection and communication to the superior officer of information;

(d) the regulation of traffic;

(e) the suppression of disorder;

(f) to report the currency of false rumours and check it;

(g) to control and regulation of fairs and large assemblies;

(h) to assist the regular fire-fighting services in fighting fires resulting from rioting or sabotage;

(i) to render first-aid and to help in the removal of casualties under escort to hospital;

(j) to combat subversive activities; and,

(k) generally to assist the police in discharge of their lawful duties;

*[(l) to perform such duties as may, in the event of strike or general disorder, be assigned to a Nagar-Sainik (Home Guard) for the purposes of maintaining supplies and services which, in the opinion of the Provincial Government, are essential to the life of the community.]

*Added vide Police Department Notification No.922-946-IV dated 23rd January, 1949."

6- It is the case of the petitioners, in all these cases, that the aforesaid duties being performed by the Home Guards are nothing but regular duties which are performed by the persons employed in the regular police establishment in the State of Madhya Pradesh and inspite of the fact that the Home Guards are performing all these duties, they are neither classified as "civil post" holders nor is the benefit of regular pay and other conditions of service applicable to an employee of the Police Department granted. It is the case of the petitioners that even though various statutory rules have been framed like the Madhya Pradesh Home Guards (Gazetted) Service Rules, 1973; the Madhya Pradesh Home Guards [Class III Ministerial] Service Recruitment Rules, 1973 and various other statutory rules providing for creating

a substantively defined organization is enacted, but nothing has been done, neither posts are created nor are the pay scale prescribed under various statutory provisions granted to the employees. By referring to the Madhya Pradesh Home Guards Class III [Executive] Service Recruitment Rules, 1973, filed as Annexure P/4, it is stated that even though posts and pay scale are created by the said rules, but the same is not being implemented. It is stated that for the last more than 50 years, the Home Guards are discharging duties like the police personnel and by treating them to be a voluntary organization, benefits available to a regular employee by enforcing the rules framed under Article 309 of the Constitution is not being given. Instead, a pick and choose policy is adopted and in case of some persons even though the benefits are given, but in case of the petitioners, who are before this Court neither the regular pay scale is given nor any service benefit granted. They are only paid an honorarium of ₹120-125/- per day alongwith certain additional benefits like washing allowance etc. Vide orders – Annexures P/7 and P/8, certain reservation to the extent of 5% for recruitment on the post of Security Guard in the MP State Electricity Board, and to the extent of 15% in the regular appointment to the Police Department, is granted, but no other service benefit or regular pay scale are granted.

7- Accordingly, in sum and substance, grievance of all the petitioners in these cases are that the Organization is functioning for the last more than 50 years. Even though it was initially started as a voluntary organization, but with the passage of time it lost its voluntary characteristics, instead has become a regular establishment assisting the regular police force of the State and even though persons like the petitioners are required to perform regular duties, they are neither paid regular salary or pay scale and other service benefits. Interalia contending that no statutory rules or regulations have been framed and in an arbitrary manner the respondents are treating the petitioners to be volunteers and denying them their statutory benefit, these petitions are filed.

8- Interalia contending that the voluntary nature of the organization, which existed initially 50 years back, no more survives Shri Mrigendra Singh, Shri A.K. Jain, Shri Gopal Singh and other counsel appearing for the petitioners, took me through the provisions of the Act of 1947, the rules framed thereunder and various judgments to emphasize that the petitioners are entitled to the benefit as claimed for. Placing reliance on a judgment of the Supreme Court, in the case of *State of West Bengal Vs. Pantha Chattarjee*, AIR 2003 SC 3569, and the observations made by the Supreme Court therein to the effect

that the Home Guards organization is no more a voluntary organization, learned counsel emphasized that petitioners are entitled to be benefit as claimed for. That apart, inviting my attention to the following judgments: *Union of India Vs. Tarit Ranjan Das,* AIR 2004 SC 852; *State of Karnataka Vs. M.L. Kesari,* AIR 2010 SC 2587; *Government of India Vs. Court Liquidator Employees Association,* 1999 (8) SCC 560; and, *Union of India Vs. Parul Devnath,* 2009(14) SCC 173; *Jaspal Singh Vs. State of Haryana,* (1988) 3 SCC 354, it was argued that in view of the provisions of Articles 14, 16 and 23 of the Constitution and the law laid down by the Supreme Court, in the aforementioned cases, on the principle of 'equal work for equal wages', the petitioners are entitled to the relief as claimed for.

9- Finally, inviting attention to a report submitted by the MP State Human Rights Commission, filed as I.A.No.11324/2011, in the record of Writ Petition No.10000/2010, referring to this detailed report submitted by the Commission on 23.6.2011, during the pendency of this writ petition, learned counsel for the petitioners argued that the Human Rights Commission has found that the engagement of the petitioners in the manner done by paying them a meagre honorarium of ₹ 120-125/- with certain washing allowance and following the system of calling off and granting employment only for a period of 8 months in a year, is an arbitrary, illegal and unconstitutional decision violating the provisions of Articles 14, 21 and 23 of the Constitution, so also amounts to breach of their human rights, the recommendations of the Commission are to the effect that the petitioners should be brought into the regular establishment and regular benefit granted by framing appropriate rules and regulations.

10- Accordingly, contending that now in the light of the recommendations made by the State Human Rights Commission, respondents cannot deny benefits to the petitioners, exploitation of the Home Guards should be done away with, relief is sought for.

11- Finally, by placing reliance on a judgment of the Division Bench of the Nagpur High Court – *Sher Singh Malhan Vs. State of Madhya Pradesh,* AIR 1955 NAGPUR 175, it is emphasized that in this case the Division Bench has held that Home Guard is a civil post holder and, therefore, '*mandamus*' and declaration as sought for be granted. Accordingly, in sum and substance, it is the case of the petitioners that the voluntary nature of the organization has ceased to exist with the passage of time, the Home Guards are performing regular duties as are performed by members of the regular police staff in the

State and, therefore, treating the petitioners to be regular employees, applying the principle of 'equal work for equal wages' and by declaring the action of the State Government in not doing so to be an arbitrary and an illegal decision, contrary to the mandate of Article 14, 21 and 23 of the Constitution, the relief be granted.

12- Shri R.D. Jain, learned Advocate General appearing for the State, refuted the aforesaid contentions and submitted that the recommendations made by the Human Rights Commission is not legal. The recommendations made by the Human Rights Commission is beyond the powers conferred on the Commission under law and the Commission has no authority to recommend or direct the State Government to frame rules and regulations for laying down the service conditions of the Home Guards, the Home Guards organization is a voluntary organization and until and unless the statutory Act of 1947 is not declared as '*ultra vires*' and so long as the said Act is in existence, engagement of the volunteers as Home Guards under the said Act is permissible, the Human Rights Commission has no authority to make any recommendation as has been done in the present circumstances. Contending that the Human Rights Commission has travelled beyond its jurisdiction in making the recommendation and the recommendations made by the Commission to formulate the rules and regulations cannot be enforced by this Court Shri R.D. Jain, learned Advocate General, sought for rejecting the claim of the petitioners.

13- Placing reliance on a judgment of the Supreme Court, in the case of *Mallikarjuna Rao and others Vs. State of Andhra Pradesh and others, (1990) 2 SCC 707*, and referring to paragraphs 9 to 13 thereof, Shri R.D. Jain, learned Advocate General, argued that the recommendations made and the directions given by the Human Rights Commission cannot be enforced by this Court. Thereafter, placing reliance on the judgment of the Supreme Court, in the case of *N.C. Dhoundial Vs. Union of India and others,* AIR 2004 SC 1272, learned Advocate General argued that the Home Guards are not "civil post" holders, they are only volunteers and as they are not civil post holders, it is stated that no relief can be granted to them.

14- Emphasizing that the judgment rendered by the Nagpur High Court, in *Sher Singh Malhan* (supra), was based on the benefit to be granted and the protection available under Article 311 of the Constitution, it is without referring to the statutory provisions of the Act, the same is no more good law in view of the subsequent judgments rendered by this Court, particularly in the case of

Kedar Prasad Mishra Vs. State of MP and others, Writ Petition No.3668/2000 decided on 14.7.2000; and, *Punpratap Singh and another Vs. State of MP and others,* 2000 (4) MPHT 398, learned Advocate General submits that the contention of the petitioners that they are civil post holders cannot be accepted.

15- Inviting my attention to various judgment Shri R.D. Jain, learned Advocate General, submitted that the principle of 'equal work for equal wage' will not apply in the case under the present set up, for the simple reason that the method of recruitment, the nature of work, the control and power exercised by the Home Guards are entirely different from those exercised by the employees of the regular police establishment and, therefore, it is stated that the principle of 'equal work for equal wage' will not apply. Placing reliance on various judgments as is indicated hereinabove Shri R.D. Jain, learned Advocate General, argued that quantity and quality of work done by the Home Guards, the capacity of the work to be performed by them, the method of recruitment and all other factors are different and, therefore, the principle of 'equal work for equal wage' will not apply. The judgments relied upon are: *Punpratap Singh* (supra); *State of Haryana and others Vs. Charanjit Singh and others,* (2006) 9 SCC 321; *State of Madhya Pradesh and another Vs. Pramod Bhartiya and others,* (1993) 1 SCC 539; *Sita Devi and others Vs. State of Haryana and others,* (1996) 10 SCC 1; *Union of India and another Vs. S.K. Sareeen,* (1998) 1 SCC 177; *State of Orissa and others Vs. Balaram Sahu and others,* AIR 2003 SC 33; *State of Haryana and another Vs. Haryana Civil Secretariat Personal Staff Association,* (2002) 6 SCC 72; *Raghunath Rai Bareja and another Vs. Punjab National Bank and others,* (2007) 2 SCC 230; *State of West Bengal Vs. Kinkar Karmakar,* 2008 Cal LT (2) 315; *Delhi Home Guards Welfare Association (Delhi Pradesh) Vs. Lieutenant Governor, Delhi,* 2003 ILR DLH (11) 272; *Manibhushan Kumar Rao Vs. State of Bihar,* 2005 PLJ(3) 355; *Prakash Balwantrao Dethe Vs. Collector, Yavatmal,* 2007 AIR Bom R (1) 441; *Narayan S. Bhat Vs. State of Karnataka,* 2008 KCCR (2) 818.

16- Shri R.D. Jain, learned Advocate General, taking me through the organizational set up of the Home Guards, the work being done by the regular police personnel, submitted that except for certain duties with regard to public safety, none of the work performed by the Home Guards fall in the category of a work, which is performed by the regular police personnel and, therefore, the same benefit of 'equal work for equal wage' cannot be granted.

Distinguishing the principle laid down by the Supreme Court in the case of *Pantha Chatterjee* (supra) and contending that the said case has been subsequently explained by the Calcutta High Court in the case of *Kinkar Karmakar* (supra) Shri R.D. Jain, learned Advocate General, argued that the benefit cannot be granted to the petitioners.

17- Thereafter, inviting my attention to certain judgments of the High Court of Patna, High Court of Bombay, High Court of Karnataka, particulars of which are given hereinabove, Shri R.D. Jain, learned Advocate General, argued that the Home Guards set up throughout the country is in the nature of a voluntary organization and the work done by the Home Guards is entirely different from that of a regular police personnel and, therefore, the Home Guards and the petitioners herein have no right to claim any benefit. Accordingly, contending that the recommendations of the Human Rights Commission cannot be enforced by this Court; the Commission is not empowered to issue the recommendations or directions as contained in its report dated 23.6.2011, and further submitting that the Home Guards are not civil post holders nor does the principle for 'equal work for equal wage' applies, learned Advocate General resists the claim made by the respondents.

18- Finally, it was also submitted by Shri R.D. Jain, learned Advocate General, that if the prayer made by the petitioners are to be considered and accepted, the financial implication of the same will create burden on the State Government, which the State Government is unable to bear and, therefore, no '*mandamus*' can be issued which would have the effect of upsetting the entire economic and financial set up of the State Government. Accordingly, contending that the petitioners and the Home Guards chose to come into the organization which is voluntary in nature, governed by the Act of 1947 and having accepted the same, they cannot now claim any further benefit. Accordingly, on the aforesaid contentions, Shri R.D. Jain, learned Advocate General, prays for dismissal of the writ petition.

19- Having heard learned counsel for the parties at length and after taking note of the various contentions advanced at the time of hearing and further on a close scrutiny of the report submitted by the State Human Rights Commission, the matter is being decided.

20- As far as the claim made by the petitioners for treating them as "civil post" holders and further issuing a direction for treating them as regular employees of the department are concerned, the same is to be considered in

the light of submissions made by Shri R.D. Jain, learned Advocate General, particularly with reference to the rights and power of the Human Rights Commission.

21- In the light of the principles laid down by the Supreme Court in the case of *Mallikarjuna Rao* (supra), relied upon by Shri R.D. Jain, learned Advocate General, this Court cannot issue a '*mandamus*' for implementing the recommendations of the State Human Rights Commission. To that effect, the relief claimed for by the petitioners cannot be accepted.

22- Similarly, as the method of recruitment of the petitioners and the employees appointed in the regular establishment of the Police Department and even in the manner of discharging the duty and exercise of powers, there is no exact similarity. As such, the principle of 'equal work for equal wages' cannot be enforced in its totality in the facts and circumstances of the present case. Particularly, in the light of the law laid down by the Supreme Court in the cases relied upon by learned Advocate General. To that effect Shri R.D. Jain, learned Advocate General, may be right in contending that the relief claimed for by the petitioners cannot be granted.

23- However, this Court can very well take note of the findings recorded by the State Human Rights Commission and consider as to under the facts and circumstances that have come on record, whether the relief of directing for their continuation in service without calling off and the relief of paying them a reasonable salary can be granted. To that affect, I am of the considered view that the report of the Human Rights Commission can very well be examined and after taking note of the manner in which the Home Guards establishment is functioning in the State of Madhya Pradesh, during the long period of 50 years, a decision can be taken.

24- Even though initially when the Act of 1947 was enacted, the same was enforced for establishing a voluntary organization and the organization that came into force was also a voluntary organization, but the voluntary nature of the organization lost its identity, with the passage of time and the nature of work which the organization started performing also underwent substantial change in due course of time, it attained the status of a regular establishment. Even the employees, like the petitioners, who are working have continued to work for more than 10- 20 years and it is, therefore, correct on the part of the petitioners in contending that with the passage of time and with the manner in which the organization had progressed, the voluntary nature of the

organization had ceased to exist. This aspect of the matter is considered by the Supreme Court in the case of *Pantha Chatterjee* (supra) and after taking note of the continued deployment of Home Guards for a period of more than 10 years, in that particular case, it has been held by the Supreme Court that the voluntary nature of the organization has lost its identity and it has become more or less a regular establishment. It is held by the Supreme Court that in the prevailing situation, it is unfair on the part of the competent authorities to contend that it is a voluntary organization and no relationship of master and servant exists. It has been held that the scheme, which was originally indicated as a voluntary organization, has lost its characteristic and now it is nothing but a regular establishment, catering to the needs of the State in various matters.

25- Even though under the Act of 1947, the Home Guards organization is termed to be a voluntary organization, the nature of duties of the Home Guards as is specified in Section 10 clearly indicates that the Home Guards have to perform various duties. The duties performed by the Home Guards and the findings recorded by the Human Rights Commission in this regard would be referred to after some point of time. For the present, it may be taken note of that the State Government itself feeling that the Home Guards organization is no more a voluntary organization, temporary in nature, has enacted various rules exercising powers under Article 309 of the Constitution and if these rules are taken note of, it would be seen that the State Government had been harping upon an idea of creating a permanent organization with a permanent set up, regular substantive posts were to be created with a particular pay scale. The statutory rules framed in this regard namely the Madhya Pradesh Home Guards (Gazetted) Service Rules, 1973; the Madhya Pradesh Home Guards [Class III Ministerial] Service Recruitment Rules, 1973; The Madhya Pradesh Home Guards Class III (Ministerial) Service Recruitment Rules, 1973; The Madhya Pradesh Home Guards Class III (Executive) Recruitment Rules, 2000; The Home Guards Class III (Executive) Recruitment Rules and the Pension Rules are all examples of various enactment made by the State Government for giving a permanent characteristic to the Home Guards organization.

26- At this stage, it would be relevant to take note of certain findings recorded by the State Human Rights Commission, in its report, which is available on record. The report of the Human Rights Commission indicates that various complaints were received by the Commission in the year 2008-09 from various quarters, including registered organizations, pointing out the

miserable conditions under which the Home Guards are performing the duties and the prayer made in these complaints were that an enquiry be conducted into their working conditions and proper recommendations be made for betterment of the same. The report further indicates that between 24.3.2009 to 8.4.2009, various complaints were received and even though notices were issued to the State Government and the Director General (Home Guards) to give their response to the Commission. The State Government and the Home Guards organization did not respond to the notices issued by the Human Rights Commission and, therefore, steps were taken for summoning the Director General and it was only on 25.5.2009 that the Director General (Home Guards) gave his written reply to the State Human Rights Commission. The reply was sent to various authorities, including the Chief Secretary, and their comments on the same were called for. It is revealed from the report that on 20.7.2009, the Director General of Home Guards – Shri Hemant Sareen, appeared before the State Human Rights Commission and it was stated by him before the Commission that a Home Guard Sainik except for conducting investigations into an offence and participating in anti-dacoity operations are discharging all the duties, which is discharged by a normal police personnel. In paragraph 6 of the report submitted by the Human Rights Commission, the following statements are made:

> " .....*उनके द्वारा बताया गया कि होमगार्ड सैनिकों के द्वारा अपराध अनुसंधान एवं डाकू उन्मूलन को छोडकर पुलिस की सभी ड्यूटियां ली जा रही है।* चूंकि होमगार्ड सैनिक स्वयंसेवी है और शासकीय सेवक नहीं है, अतः इन पर काई शासकीय सेवा के नियम लागू नहीं होते है। विगत वर्ष पुलिस विभाग की क्रमी को देखते हुये, अधिक संख्या में होमगार्ड की मांग की थी एवं शासन द्वारा अतिरिक्त कॉल आउट की स्वीकृति दी गई थी, जिसकी वजह से 4 माह तक सैनिकों को मानदेय एवं भोजन तथा नाई–छोबी भत्ता प्रदान नहीं किया जा सका। यह स्थिति पुनः निर्मित न हो, इस कारण से होमगार्ड मुख्यालय ने यह निर्णय लिया कि बजट को ध्यान में रखते हुये ही काल, आउट किया जाना चाहिये। इस मीटिंग में प्रमुख सचिव, गृह एवं प्रमुख सचिव, वित्त विभाग उपस्थित नहीं हुये।"
>
> *(Emphasis supplied)*

which clearly goes to show that the Home Guards are discharging all the duties, which are being performed by a regular police personnel except actual investigation into a crime and anti-dacoity operations and this is the admission of the Director General before the Commission.

27- It is also seen from this report that keeping in view the increasing demand of the Home Guards and due to non-grant of adequate financial assistance from the State Government, the system of calling off duty was introduced, in his statement the Director General has admitted this position. It is, therefore, clear from the statements of the Director General (Home Guards) that the calling of duty was necessitated due to economic and financial constraints inspite of requirement for the work. Thereafter, if the report is scrutinized, it would be seen that on the basis of material that was collected, the Commission thought it appropriate to constitute a Committee to conduct a detailed enquiry and study into the working of the Home Guards. Accordingly, a High Level Committee consisting of Shri D.P. Khanna–Director General of Police (Retired), Home Guards, Bhopal; Shri Prakash Singh Rajput, Divisional Commandant (Retired), Home Guards, Jabalpur; and, Shri Pradeep Roonwal, Director General of Police, Human Rights Commission, Bhopal was constituted. After transfer of Shri Pradeep Roonwal, Shri H.K. Sareen replaced him as a Member in the Committee. Shri D.P. Khanna was nominated as Chairman of the Committee and Shri H.K. Sareen was the Convener of the Committee. The points for determination, which was referred to the Committee, was as under:-

> "1- Whether the present working condition of Home Guards conform to the Human Rights declared and accepted by India being a Member Country of the United Nations in the Universal Declaration of Human Rights 1948, and particularly the provisions in Articles 23, 24 and 25 therein?
>
> 2- Whether the Central Province and Berar Home Guards Act, 1948 being a pre-constitutional law (saved and applicable to the State of Madhya Pradesh) is in consonance with the fundamental human rights guaranteed to every citizen under Articles 19 and 23 of the Constitution and the Directive principles of State Policy contained in Articles 38, 39, 41 and 42 of the Constitution?
>
> 3- What RECOMMENDATIONS deserve to be made to the Executive and Legislature of the State for providing 'humane working conditions' to the Home Guards."
>
> *(Emphasis supplied)*

28- After conducting a detailed study on the basis of enquiry conducted, the Committee gave its detailed report and the recommendations on the basis of the report recorded by the Human Rights Commission indicates that even though initially the Home Guards establishment was created for the purpose of meeting the emergency need and subsequently in the year 1962, they were used for protecting the country against the Chinese aggression, but with the passage of time and the change which took place, the work of the organization also changed from time to time and the Government started taking assistance of the organization in various day-to-day activities concerning maintenance of law and order, as a result the organization lost its original characteristic and started performing various activities, which are normally performed by the regular police organization. In paragraph 19 of the report, more than eight duties which are performed by the Home Guards are detailed. Finally, in paragraph 20, it is reported by the Commission that for the present, in the State of Madhya Pradesh, the Home Guards organization is continuing and carrying out all the duties, which is carried out by a regular police force except the duties pertaining to investigation of a criminal offence and participating in anti-dacoity operation. The findings in this regard are recorded in paragraph 20 of the report of the Human Rights Commission, indicates that in Madhya Pradesh the strength of Home Guards consist of 16005 Sainiks, who are continuously working for about 8 months every year. The Commission has also found adverse affect in the call off duty procedure being followed and has reported that the same has affected adversely not only on the force, but also on the physical and mental health of the Sainiks, working in the Home Guard.

29- Thereafter, in paragraph 21 of the report, it is stated that the factual position as on date is that the Home Guard is not a voluntary or temporary organization, a Home Guard Sainik is performing the regular duties like the police jawan, he is enrolled in the name of a volunteer at the age of 19 years and from the date of appointment he continues upto the age of 60 years in the same manner and is discharged after the age of 60 years without granting him any benefits. He is only paid an honorarium/daily wage and some washing allowance. Apart from the same no other benefit is granted to him. After meticulously analyzing each and every aspect of the matter, the allowance being paid to a Home Guard Sainik and the work being performed by them and after evaluating the totality of the facts and circumstances, in its 43 page report, the State Human Rights Commission has indicated that the manner in

which the Home Guards are treated in the State of Madhya Pradesh amounts to violation of the provisions of Article 14, 21 and 23 of the Constitution, is contrary to the norms laid down in the Universal declaration of Human Rights, to which India is a party, and the recommendations made are to the effect that there should be rules and regulations governing their service conditions; the principle of 'equal work for equal wage' should be made applicable and various other recommendations are made on the ground that the nature of the work performed by the Home Guards is the regular work performed by a regular Government Department and, therefore, they should be treated as a regular employee of the State Government. These recommendations are to be acted upon by the State Government and it is for the State Government to consider these recommendations and take a decision with regard to formulating a scheme or a provision, statutory in nature, for laying down the service conditions of the Home Guards. In this regard no '*mandamus*' can be issued by this Court except a direction to consider the recommendations and proceed in accordance with law.

30- However, the report does indicate the following factors:

(a) The Home Guards are required to work continuously once they are empanelled at the age of 19 years and most of them continue to work upto the age of 60 years.

(b) For the work done by them during this period except for granting them daily wage or honorarium and some washing allowance etc, alongwith some medical facility, no benefit available to a regular employee of the State Government or a regular employee of the Police Department is granted.

(c) The action of the State Government in so treating the employees is nothing but an arbitrary and unjustified action of the State Government, which amounts to violating the Human Rights of the Home Guards.

(d) Finally, it is found that the Home Guards are entitled to work continuously without the rotation or calling off duty procedure being implemented.

It is under the back drop of these findings and certain reports submitted by Shri K.F. Rustom Ji, the then Chief of MP Police in the year 1960, wherein it was indicated that the Home Guards are receiving salary which is very meagre

and cannot be enough to even sustain them for their day to day living, that this Court is now required to consider as to what directions can be issued and what relief can be granted to the petitioners.

31- On a close scrutiny of the report of the Human Rights Commission and the principle laid down by the Supreme Court, in the case of *Pantha Chatterjee* (supra), this Court is constrained to take note of certain observations made by the Supreme Court in the case of *Peoples' Union for Democratic Rights Vs. Union of India,* (1982) 3 SCC 235.

32- In the aforesaid case, Hon'ble Supreme Court was considering the question of paying wages to employees engaged for construction activity under the Asian Games Organization, in the year 1982, and after taking note of the provisions of Article 23 of the Constitution, in paragraphs 12, 13 and 14, the observations made read as under:

> "12. Article 23 enacts a very important fundamental right in the following terms:
>
> "**Art. 23** : Prohibition of traffic in human beings and forced labour-
>
> (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and 483 any contravention of this provision shall be an offence punishable in accordance with law.
>
> (2) Nothing in this Article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.
>
> Now many of the fundamental rights enacted in Part III operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and they are enforceable only against the State. But there are certain fundamental rights conferred by the Constitution which are enforceable against the whole world and they are to be found inter alia in Articles 17, 23 and 24. We have already discussed the true scope and ambit of Article 24 in an earlier

portion of this judgment and hence we do not propose to say anything more about it. So also we need not expatiate on the proper meaning and effect of the fundamental right enshrined in Article 17 since we are not concerned with that Article in the present writ petition. It is Article 23 with which we are concerned and that Article is clearly designed to protect the individual not only against the State but also against other private citizens. Article 23 is not limited in its application against the State but it prohibits "traffic in human beings and begar and other similar forms of forced labour" practiced by anyone else. The sweep of Article 23 is wide and unlimited and it strikes at traffic in human beings and begar and other similar forms of forced labour" wherever they are found. The reason for enacting this provision in the chapter on fundamental rights is to be found in the socioeconomic condition of the people at the time when the Constitution came to be enacted. The Constitution makers, when they set out to frame the Constitution, found that they had the enormous task before them of changing the socioeconomic structure of the country and bringing about socioeconomic regeneration with a view to reaching social and economic justice to the common man. Large masses of people, bled white by wellnigh two centuries of foreign rule, were living in abject poverty and destitution with ignorance and illiteracy accentuating their helplessness and despair. The society had degenerated into a status-oriented hierarchical society with little respect for the dignity of individual who was in the lower rungs of the social ladder or in an economically impoverished condition. The political revolution was completed and it had succeeded in bringing freedom to the country but freedom was not an end in itself, it was only a means to an end, the end being the raising of the people to higher levels of achievement and bringing about their total advancement and welfare. Political freedom had no meaning unless it was accompanied by social and economic freedom and it was therefore necessary to carry forward the social and economic revolution with a view to creating social economic conditions in which every one would be able to enjoy basic human rights and participate in the fruits of freedom and liberty in an egalitarian social and economic

framework. It was with this end in view that the constitution makers enacted the Directive Principles of State Policy in Part IV of the Constitution setting out the constitutional goal of a new socio-economic order. Now there was one feature of our national life which was ugly and shameful and which cried for urgent attention and that was the existence of bonded or forced labour in large parts of the country. This evil was the relic of feudal exploitative society and it was totally incompatible with the new egalitarian socio-economic order which, "We the people of India" were determined to build and constituted a gross and most revolting denial of basic human dignity. It was therefore necessary to eradicate this pernicious practice and wipe it out altogether from the national scene and this had to be done immediately because with the advent of freedom, such practice could not be allowed to continue to blight the national life any longer. Obviously, it would not have been enough merely to include abolition of forced labour in the Directive Principles of State Policy, because then the outlaying of this practice would not have been legally enforceable and it would have continued to plague our national life in violation of the basic constitutional norms and values until some appropriate legislation could be brought by the legislature forbidding such practice. The Constitution makers therefore decided to give teeth to their resolve to obliterate and wipe out this evil practice by enacting constitutional prohibition against it in the chapter on fundamental rights, so that the abolition of such practice may become enforceable and effective as soon as the Constitution came into force. This is the reason why the provision enacted in Article 23 was included in the chapter on fundamental rights. The prohibition against "traffic in human beings and begar and other similar forms of forced labour" is clearly intended to be a general prohibition, total in its effect and all pervasive in its range and it is enforceable not only against the State but also against any other person indulging in any such practice.

13- The question then is as to what is the true scope and meaning of the expression "traffic in human beings and beggar and other similar forms of forced labour" in Article 23? What

are the forms of 'forced labour' prohibited by that Article and what kind of labour provided by a person can be regarded as 'forced labour' so as to fall within this prohibition? When the Constitution makers enacted Article 23 they had before them Article of the Universal Declaration of Human Rights but they deliberately departed from its language and employed words which would make the reach and content of Article 23 much wider than- that of Article 4 of the Universal Declaration of Human Rights. They banned 'traffic in human beings which is an expression of much larger amplitude than "slave trade" and they also interdicted "begar and other similar forms of forced labour". The question is what is the scope and ambit of the expression 'begar and other similar forms of forced labour?" In this expression wide enough to include every conceivable form of forced labour and what is the true scope and meaning of the words "forced labour?" The word 'begar' in this Article is not a word of common use in English language. It is a word of Indian origin which like many other words has found its way in the English vocabulary. It is very difficult to formulate a precise definition of the word begar' but there can be no doubt that it is a form of forced labour under which a person is compelled to work without receiving any remuneration. Molesworth describes 'begar' as "labour or service exacted by a government or person in power without giving remuneration for it." Wilson's glossary of Judicial and Revenue Terms gives the following meaning of the word 'begar': "a forced labourer, one pressed to carry burthens for individuals or the public. Under the old system, when pressed for public service, no pay was given. The Begari, though still liable to be pressed for public objects, now receives pay: Forced labour for private service is prohibited." "Begar" may therefore be loosely described as labour or service which a person is forced to give without receiving any remuneration for 'it. That was the meaning of the word 'begar' accepted by a Division Bench of the Bombay High Court in *S. Vasudevan v. S.D. Mital,* AIR 1962 Bom 53. 'Begar' is thus clearly a film of forced labour. Now it is not merely 'begar' which is unconstitutionally prohibited by Article 23 but also all other similar forms of forced

labour. This Article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. The practice of forced labour is condemned in almost every international instrument dealing with human rights. It is interesting to find that as far back as 1930 long before the Universal Declaration of Human Rights came into being, International Labour organization adopted Convention No. 29 laying down that every member of the International Labour organization which ratifies this convention shall "suppress the use of forced or compulsory labour in all its forms" and this prohibition was elaborated in Convention No. 105 adopted by the International Labour organization in 1957. The words "forced or compulsory labour" in Convention No. 29 had of course a limited meaning but that was so on account of the restricted definition of these words given in Article 2 of the Convention. Article 4 of the European Convention of Human Rights and Article 8 of the International Covenant on Civil and Political Rights also prohibit forced or compulsory labour. Article 23 is in the same strain and it enacts a prohibition against forced labour in whatever form it may be found. The learned counsel appearing on behalf of the respondent laid some emphasis on the word 'similar' and contended that it is not every form of forced labour which is prohibited by Article 23 but only such form of forced labour as is similar to 'begar' and since 'begar' means labour or service which a person is forced to give without receiving any remuneration for it, the interdict of Article 23 is limited only to those forms of forced labour where labour or service is exacted from a person without paying any remuneration at all and if some remuneration is paid, though it be inadequate, it would not fall within the words 'other similar forms of forced labour. This contention seeks to unduly restrict the amplitude of the prohibition against forced labour enacted in Article 23 and is in our opinion not well founded. It does not accord with the principle enunciated by this Court in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, that when interpreting the provisions of the Constitution conferring fundamental rights, the attempt of the court should be to expand

the reach and ambit of the fundamental rights rather than to attenuate their meaning and content. It is difficult to imagine that the Constitution makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. Could there be any logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that Article? If this were the true interpretation, Article 23 would be reduced to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Article 23. We do not think it would be right to place on the language of Article 23 an interpretation which would emasculate its beneficent provisions and defeat the very purpose of enacting them. We are clear of the view that Article 23 is intended to abolish every form of forced labour. The words "other similar forms of forced labour are used in Article 23 not with a view to importing the particular characteristic of 'begar' that labour or service should be exacted without payment of any remuneration but with a view to bringing within the scope and ambit of that Article all other forms of forced labour and since 'begar' is one form of forced labour, the Constitution makers used the words "other similar forms of forced labour." If the requirement that labour or work should be exacted without any remuneration were imported in other forms of forced labour, they p would straightaway come within the meaning of the word 'begar' and in that event there would be no need to have the additional words "other similar forms of forced labour." These words would be rendered futile and meaningless and it is a well recognized rule of interpretation that the court should avoid a construction which as the effect

of rendering any words used by the legislature superfluous or redundant. The object of adding these words was clearly to expand the reach and content of Article 23 by including, in addition to 'begar', other forms of forced labour within the prohibition of that Article. Every form of forced labour 'begar' or otherwise, is within the inhibition of Article 23 and it makes no difference whether the person who is forced to give his labour or service to another is remunerated or not. Even if remuneration is paid, labour supplied by a person would be hit by this Article if it is forced labour, that is, labour supplied not willingly but as a result of force or compulsion. Take for example a case where a person has entered into a contract of service with another for a period of three years and he wishes to discontinue serving such other person before the expiration of the period of three years. If a law were to provide that in such a case the contract shall be specifically enforced and he shall be compelled to serve for the full period of three years, it would clearly amount to forced labour and such a law would be void as offending Article 23. That is why specific performance of a contract of service cannot be enforced against an employee and the employee cannot be forced by compulsion of law to continue to serve the employer. Of course, if there is a breach of the contract of service, the employee would be liable to pay damages to the employer but he cannot be forced to continue to serve the employer without breaching the injunction of Article 23. This was precisely the view taken by the Supreme Court of United States in *Baily v. Alabama*, 291 US 219, while dealing with a similar provision in the Thirteenth Amendment. .....

It is therefore clear that even if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt or even remuneration, he cannot be forced by compulsion of law or otherwise to continue to perform such service, as that would be forced labour within the inhibition of Article 23. This Article strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to

provide labour or service *Vide Pollock v. Williams*, 322 US 1: 88 L Ed 1095. The reason is that it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be in breach of the contract entered into by him. There should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person. Moreover, in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend the authority of law to the exploitation of the poor helpless employee by the economically powerful employer. Article 23 therefore says that no one shall be forced to provide labour or service against his will, even though it be under a contract of service.

14- Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wager when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is 'forced

labour' that is labour or service which a person is forced to provide and 'force' which would make such labour or service 'forced labour' may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as 'force' and if labour or service is compelled as a result of such 'force', it would we 'forced labour'. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly 'forced labour.' There is no reason why the word 'forced' should be read in a narrow and restricted manner so as to be confined only to physical or legal 'force' particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socioeconomic justice for all and every one shall have the right to work, to education and to adequate means of livelihood. The constitution makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-

economic objective of the Constitution. It is not unoften that in capitalist society economic circumstance exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word 'force' must therefore be constructed to include not only physical or legal force but also force arising from the compulsion of economic circumstance which leaves no choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is 'forced labour' because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words 'forced labour' under Article 23. Such a person would be entitled to come to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be 'forced labour' and the breach of Article 23 is remedied. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23."

(Emphasis supplied)

It has been further held that if the wages paid to the labourers are less than the minimum wages, the same amounts to 'begar'. It has been held by the Supreme Court in the said case that if Sugar Barons and the Liquor Kings of the country have fundamental right to carry on their business and fatten

their purses by exploiting the consuming public, can the down trodden persons belonging to the lower strata of society be denied their fundamental rights even to earn an honest living through sweat and toil. It has been held by the Supreme Court that the only civil and political rights meaningful to this larger section of the society would be to remake the material conditions and restructure the social and economic order, so that these persons may be able to realize the economic, social and cultural rights.

33- If the aforesaid judgment of the Supreme Court is scanned in its totality and the principles scrutinized, it would be seen that the Supreme Court has laid stress to the fact about payment of atleast the minimum wages to an employee for working in the establishment as a fundamental right of the employee and anything done to deprive an employee of this right, would be nothing but an act amounting to 'begar'. It is true that in the set up, in the organization of the Home Guards, no pay scale is prescribed, but in the statutory rules proposed to be framed by the State Government and as indicated hereinabove, certain posts and pay scales have been prescribed. It is for the State Government and the Expert Authorities to deliberate on these issues and prescribe an appropriate pay scale or conditions of service, which can be termed as the reasonable conditions for these persons. However, the fact remains that as on date nothing is prescribed and the Home Guards are made to work on a payment of an amount of ₹ 120-140/- paid to them every day, which is much less than even the Basic Pay prescribed to a Constable in the Police Department.

34- During the course of hearing, it was stated that now they are being paid a sum of about ₹160/- per day. If they are paid salary of ₹160/- per day, compared to the salary which is received by a constable in the Police Department, there is a great disparity. According to the indications made in paragraph 26, of the Report of the Commission, it is seen that the Commission has referred to a note of one Shri P.V. Rajagopal, Director General of Home Guards, and it is indicated that on examining the duties being performed by Home Guards Personnel, one would find that they are in the same lines as that prescribed for a police personnel under the MP Police Regulations. It is thereafter observed that in the fitness of things, the Sainiks should be given daily allowance, which would work out to be equivalent to the average daily income of a police constable, in the State of Madhya Pradesh. Thereafter, a detailed chart is indicated which shows that when a Home Guard Sainik received about ₹3000/- per month, a Police Constable was receiving about

₹10233/- per month. It is reported that as on date, a police constable is receiving near about ₹11,000/- to 12,000/- per month. While considering the question of payment of salary and emoluments to daily wage employees and while taking note of the claim made by the daily wage employee for payment of salary on the principle of 'equal pay for equal work', the Supreme Court in the case of *Dharwad District PWD Literate Daily Wage Employees Association and others Vs. State of Karnataka and others*, (1990) 2 SCC 396, has taken note of various constitutional provisions and has held that even though the Court is not entitled to issue a direction to regularize and make payment of salary to the employees in a particular pay scale of pay and thereby burdening the State Exchequer unduly, but the meaning of the word 'socialist' as appearing in the preamble of the Constitution and the socialistic philosophy adopted by the Constitution should be implemented in its letter and spirit. Therefore, a scheme should be formulated in such a manner that daily wage employees are not exploited to such an extent that their constitutional rights are infringed.

35- While considering the same question in the case of *State of Punjab Vs. Devinder Singh*, (1998) 9 SCC 595, and taking note of the applicability of the principle of parity of employment and 'equal pay for equal work' in the case of daily wage ledger keepers, it was held by the Supreme Court that even if daily wage employees are not entitled to the regular pay scale and other benefits according to a post against which they are working, they are atleast entitled to the minimum of the pay scale prescribed for the post (i.e... ledger keepers in this case).

36- Similar view is again laid down by the Supreme Court in the case of *U.P. Land Development Corporation Vs. H. Anwar*, AIR 2010 SC 2587. If the aforesaid principle laid down by the Supreme Court and the concept of payment of minimum wages or a fair living wage to the employees discharging duties for the State Government are taken note and if the working conditions of the Home Guards are evaluated in the back drop of the findings recorded by the Human Rights Commission, it is clear that the Home Guards in the State of Madhya Pradesh are not being paid emoluments and other service benefits in accordance to the service performed by them and in the light of the recommendations made by the Human Rights Commission, the entire matter has to be reconsidered and reviewed. But, at the same time as the aforesaid process would take some time, the Home Guards cannot be permitted to

suffer, having already suffered for the last more than 50 years. They are to be given some benefit so that the emoluments or salary earned by them for the work done can atleast be termed as a living wage sufficient enough to sustain them and their family. This is the requirement of the constitutional mandate and this Court cannot lose sight of this mandate of the Constitution. The Constitution further mandates the State Government to ensure that conditions of working are atleast such that the employee working for the State or its instrumentalities are paid salary, which is sufficient enough for sustaining them and their family i.e.... they get atleast a living wage.

37- As already indicated hereinabove, this Court cannot issue any '*mandamus*' to the State Government for implementing the recommendations of the Human Rights Commission in its totality nor can the principle of 'equal pay for equal work' be enforced. Similarly, the declaration sought by the petitioners for declaring them as civil post holders and, therefore, to regularize treating them to be "civil post" holders can also be not granted in view of the judgments rendered by this Court in the case of *Kedar Prasad* (supra) and again in the case of *Pun Pratap Singh* (supra), wherein it has been held by Division Bench of this Court that as the Home Guards are not civil post holders and they did not enjoy 'equal pay for equal work' in the absence of rules being framed and made applicable to them by the State Government. To that effect, the objections raised by Shri R.D. Jain, learned Advocate General, has to be upheld.

38- But, at the same time taking note of the fact that the petitioners, who are Home Guards, and are required to work continuously year after year and are not even getting the bare minimum salary as is given to their counterparts in the Police Department, the amount paid presently is not sufficient enough to sustain them and their family, relief has to be granted to them so that they can earn living wage by working as Home Guards and at the same time the system of calling of, which is not at all justified in any manner, should be done away with.

39- During the course of hearing of this petition Shri R.D. Jain, the learned Advocate General, except for contending that the recommendations made by the State Human Rights Commission cannot be enforced, did not point out even a single error or illegality or perversity in the findings of fact recorded by the State Human Rights Commission, with regard to the manner in which the Home Guards are treated in the State of Madhya Pradesh. Not a single ground

was canvassed during the time of hearing to show as to why the findings recorded in this Report be not taken to be correct. If the facts that have come out in the Report are correct, then it clearly shows that the constitutional and fundamental rights of the Home Guards are being violated and the State Government is not even following the mandate of the Constitution for protecting the rights of the Home Guards.

40- This Court had passed an interim order directing for payment of certain minimum salary and doing away with the system of calling of. Even though the order was passed more than three months back on 22.9.2011, the order has not been given affect to and the State Government by filing an application for recall has not given any reason as to why the said directions cannot be implemented. Except for contending that the financial and economic condition of the State Government prevents the State Government from implementing the said directions, no justifiable reason is given as to why the decision cannot be implemented. Financial constraints of the State Government cannot be an excuse for denying the constitutional rights of an employee discharging duties for the State Government. The Home Guards are performing duty by protecting the life and liberty of the citizens of the State and safeguarding the properties and assets of the State Government and whey they are doing so, the bare minimum of paying them some living wage, enough to sustain them has to be granted and mere financial constraints cannot be an excuse for denying the said benefit to the petitioners.

41- In a welfare State and particularly when the State has to act as a model employer, the State is required to set an example by giving wages and salary sufficient enough to sustain an employee and his family. The State cannot be permitted to act like a private employer and exploit the working class or the labour force doing duties for the State and citizens. The State has to act as a model employer and in the absence of any cogent justification from the Government for not doing so, the excuse of financial constraints cannot be accepted.

42- The emphasis on behalf of the State Government by Shri R.D. Jain, learned Advocate General, for denying the benefits to the petitioners are mainly two folded. His first contention is that the recommendations made by the State Human Rights Commission are not enforceable and the Human Rights Commission has no authority under the Human Rights Act to issue any such direction, much less the direction to frame statutory rules and regulations or

legislation. It was also emphasized by him that due to various factors as indicated hereinabove, the principle of 'equal wage for equal work' does not apply. Except for contending so, nothing is brought to the notice of this Court to show as to why the findings recorded by the State Human Rights Commission in its report dated 25.6.2011, with regard to the manner in which the Home Guards are treated, be not accepted as a correct projection of the entire picture.

43- The Human Rights Commission is a fact finding body and the report submitted by the Commission on the basis of enquiry can be taken cognizance of. Infact, in the case of *Paramjit Kaur Vs. State of Punjab*, 1999 Cr.L.J 456, the Supreme Court ruled that the Human Rights Commission is a fact finding commission and just like any fact finding body, even the Supreme Court can direct the Commission to conduct enquiry and collect information. The information collected by the State Human Rights Commission and the report submitted by the said Commission, available on record, in my view, has some value and in the absence of the findings recorded in the report being shown to be perverse or opposed to some principle of law or facts, which is shown to be incorrect, the report has to be given due credence, particularly in the present case when the report is based on an enquiry conducted by a High Level Committee, which consisted of Senior Police Officers of the Rank of Director General of Police etc.

44- It is pertinent to note that during his entire submissions Shri R.D. Jain, learned Advocate General, did not make any allegation to the effect that any of the findings recorded by the State Human Rights Commission in its report or the facts mentioned on the basis of enquiry conducted is not correct. Except for taking the legal plea that the recommendations cannot be accepted, based on the law laid down in the case of *Mallikarjuna Rao* (supra), he did not give any reasons as to why the findings recorded by the Commission cannot be taken cognizance of by this Court for dispensing justice to the petitioners herein.

45- The findings recorded by the State Human Rights Commission and the violation of the Human Rights, the provisions of Articles 14 & 23 of the Constitution as indicated therein, have to be taken note of and even if the recommendations have no binding or statutory force, which can be enforced by this Court, but if the report show violation of not only the human rights of the petitioners before this Court, but also their constitutional rights, the question

is can this Court be a mute spectator and leave it to the Government to take a decision on the report, without any direction for safeguarding the rights and interests of the petitioners exercising jurisdiction under Article 226 of the Constitution.

46- India alongwith various States is a party to various covenants and International Charter, proclaimed by the United Nations, which have been issued after due deliberations in accordance to the Universal Declaration of Human Rights. One such covenant is the International Covenant on Economic, Social and Cultural Rights. India is a signatory to this Covenant and has also ratified the same. The preamble to this Covenant indicates that the United Nations and the States parties to the said Covenant recognizes the need for inherent dignity, equal and inalienable right of all members of the human family, this is stated to be the foundation of freedom, justice and peace in the world. The Covenant on economic, social and cultural rights is proclaimed realizing the effect that every individual living human being has a right to enjoy certain economic, social and cultural rights and in furtherance thereof, various provisions are made in this Covenant. Part III, Article 7 of this Covenant contemplates that the States parties to the present Covenant recognizes the right of everyone for the enjoyment of just and favourable conditions of work, which ensure that the remuneration provided to all workers are atleast the minimum with regard to fair wages that can fetch them a decent living for themselves and their family, provide for safe and healthy working conditions and various other aspects concerned with the rights of a working individual. Even though Article 7 of this Covenant contemplates various benefits to be extended, including remuneration, public holidays, time for leisure, health and safety. One of the basic conditions is that remuneration provided should be the minimum fair wages, which can enable an individual to have a decent living and this right under the Covenant is nothing but a Human Right. That apart, under Article 23 of the Universal Declaration of Human Rights, it is provided as under:

"**Article 23**.

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests."

(Emphasis supplied)

47- While evaluating the facts with regard to working conditions of the Home Guards, the State Human Rights Commission has found that in the matter of prescribing working conditions of the petitioners and in the matter of granting them various facilities, the basic human rights requirement are not complied with and it is violative of Articles 14, 21 and 23 of the Constitution. If that be so and if the basic human rights and constitutional rights are found to be violated, this Court cannot simply close its eyes and leave it to the Government to take a decision at its own sweet will. For more than 50 years, nothing has been done and it is not known as to for how many more years, the petitioners and Home Guards will have to suffer this violation of their basic human rights in the matter of giving them a fair wage and other working and service conditions, decent enough to maintain themselves and their family.

48- Under such circumstances, even though this Court deems it appropriate to leave it to the State Government to take a final decision into the matter, but with a view to do immediate justice to some extent to the petitioners, the interest of not only justice, but the constitutional mandate requires that till a final decision is not taken by the State Government, as a measure of interim relief or interim benefit, some relief should be granted to the petitioners so that their grievance are mitigated to some extent and the violation of their human and constitutional rights are to some extent remedied and it was taking note of all these factors that an interim order was passed by this Court on 22.9.2011, directing the respondents atleast to give to each of the petitioners the minimum of the pay, payable to a Constable in the Police Department and in doing away with the principle of calling of or rotation of duty.

49- In view of the aforesaid and in the facts and circumstances of the case, for the grounds and reasons indicated hereinabove, these petitions are allowed in part. Even though this Court does not deem it appropriate to issue any '*mandamus*' with regard to the prayer made by the petitioners for declaring them as civil post holders or for granting them regular service alongwith regular

benefits available to a personnel in the police department, the following directions are issued in the facts of the present case;

(a) On receipt of a certified copy of this order, the State Government shall take note of the recommendations made by the State Human Rights Commission and if required after constituting a High Level Committee or Commission to go into the questions and recommendations made by the Human Rights Commission and after studying the organization, working set up and other factors in the establishment of the Home Guards, make endeavour to lay down schemes, rules or regulations for regulating the working of the Home Guards establishment and if required, may formulate statutory rules and regulations in this regard, for prescribing their service conditions.

(b) Till the aforesaid exercise is not completed, all the employees working in the Home Guards department and who are petitioners before this Court, so also other similarly situated persons, who may have not filed writ petitions, be granted salary at the minimum/basic of the pay prescribed for the lowest post i.e.... constable in the police department, without any running pay scale, allowances etc.

(c) All the employees would be entitled to the minimum of the pay scale i.e.... the basic of the pay, as is payable to a constable in the police department, and the said benefit shall be extended to the employees with effect from 1.1.2011.

(d) The employees would be paid the aforesaid amount with revision of basic pay, if any, in the corresponding police department from time to time hereafter, till a final scheme or regular rules and regulations are not formulated for working in the Home Guards organization.

(e) Apart from the aforesaid, the system of calling of duty shall be done away with and the employees shall be employed throughout the year subject to their being physically fit or otherwise entitled to work in accordance to law.

50- If this Court does not grant even this bare minimum relief to the petitioners, this Court would be failing in its duty of protecting the constitutional

rights of the petitioners and having been prima facie satisfied that the action of the State Government is unjustified and amounts to violation of the constitutional and human rights, cannot sit back and look without issuing any directions. It is under these compelling circumstances that this Court is constrained to pass this order so that till the State Government takes a final decision into the matter, the petitioners are granted some interim benefit.

51- With the aforesaid directions, all these petitions stand allowed and disposed of.

Petition allowed

I.L.R. [2012] M.P., 416
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 10162/2003 (Jabalpur) decided on 8 December, 2011

RAM PRAKASH VERMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law – Departmental Enquiry – Non-supply of documents – Prejudice* – Petitioner admitted the charge of issuing the Rin Pustikas – Non-supply of documents looses significance – Plea taken in writ petition regarding compulsion, force or threat for taking his signature not raised before the Enquiry Officer – No infirmity in the order of disciliplinary and appellate authority – Petition dismissed.**
(Paras 8, 9 & 10)

सेवा विधि – विभागीय जाँच – दस्तावेजों का प्रदाय न किया जाना – प्रतिकूल प्रभाव – याची ने ऋण पुस्तिकाऐं जारी करने का आरोप स्वीकार किया – दस्तावेजों का प्रदाय नहीं किया जाना महत्वहीन हो जाता है – उसके हस्ताक्षर लेने के लिये बाध्यता, बल या भय के संबंध में अभिवाक् रिट याचिका में लिया है, जिसे जांचकर्ता अधिकारी के समक्ष नहीं उठाया गया – अनुशासनिक और अपीली पाधिकारो के आदेश में कोई दोष नहीं – याचिका खारिज।

Cases referred :

(2010) 4 SCC 491, (1993) 4 SCC 727, (2010) 3 SCC 556.

Brindwan Tiwari, for the petitioner.
Rahul Jain, G.A. for the respondents.

ORDER

R.S. JHA, J. :- The petitioner, who at the relevant time was working as Patwari, has filed this petition being aggrieved by order dated 31.3.1993 passed by the Sub Divisional Officer, Rajnagar, District Chhatarpur, whereby he has been dismissed from service pursuant to departmental proceedings being conducted against him. The petitioner has also assailed order dated 4.8.1994 passed by the Appellate Authority dismissing the petitioner's appeal.

2. The brief facts leading to the filing of the present petition, are that the petitioner was appointed as a Patwari on 4.1.1982 and was thereafter posted at village Jhamtuli, Tehsil Rajnagar, District Chhatarpur. It is submitted that the petitioner was placed under suspension on 12.4.1991 as a charge sheet was filed against him before the competent criminal court under section 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1988. Thereafter a charge sheet was served upon the petitioner on 3.3.1992 in respect of certain misconduct relating to accepting bribe, issuance of false pattas and Rin Pustikas and allotting Government land illegally to unqualified persons.

It is submitted that the petitioner filed applications for supply of documents relied upon by the respondents in the charge sheet. However, the same were not supplied to the petitioner and ultimately an inquiry report was submitted on the basis of which the impugned order dismissing the petitioner from service was issued by the Sub Divisional Officer, Rajnagar on 31.3.1993. The petitioner, being aggrieved, filed an appeal which also suffered dismissal by order dated 4.8.1994, hence this petition.

3. It is submitted by the learned counsel for the petitioner that the impugned orders deserve to be quashed as they suffer from patent illegalities and irregularities and that they have been passed without following the procedure prescribed under the Rules and the principles of natural justice inasmuch as copies of documents were not supplied to the petitioner nor was the inquiry report supplied to him.

4. The learned Government Advocate, per contra, submits that the inquiry was duly conducted against the petitioner and thereafter, as the petitioner had admitted signing the documents, receiving the Rin Pustikas and distributing the same as well as affixing a note on the concerned register on 16.4.1991, the Inquiry Officer submitted a report recording a finding that the charges stood proved before the authority on the basis of which the impugned order

has been passed. It is submitted that as the inquiry report submitted by the Inquiry Officer was cursory, the disciplinary authority, by order dated 1.11.1992 directed the Inquiry Officer to submit a detailed inquiry report which was duly submitted and on that basis the impugned order has been passed and, therefore, no infirmity can be found with the impugned order specifically in view of the fact that the petitioner has in fact admitted the charges levelled against him except charge no.1 relating to acceptance of bribe.

5. On the request of the learned counsel for the petitioner the departmental enquiry proceedings were summoned and have been perused by this Court as well as by the learned counsel for the parties. From a perusal thereof it is clear that the charges were levelled against the petitioner regarding acceptance of bribe, withdrawal of Rin Pustikas in the name of wrong persons and issuance of the same, making an entry in the register and preparation of false pattas. Though it is not apparent from the record as to how the application, filed by the petitioner, seeking documents was processed by the authorities during the departmental enquiry, however from a perusal of the statement made by the petitioner during inquiry it is apparent that he had admitted the fact that he has affixed his signatures, that after his suspension from service on 12.4.1991 he signed the register, withdrew 22 Rin Pustikas, made entries in the register and issued the same, though he has denied and refuted the charges relating to acceptance of bribe or money. It is further clear from a perusal of the impugned order passed by the disciplinary authority that the authority, on going through the record as well as the statement of the petitioner and finding that he had admitted the aforesaid afixation of signature, withdrawal of Rin Pustikas and making entires in the register on 16.4.1991 after his suspension on 12.4.1991, has held the petitioner guilty on account of his admission and, therefore, imposed a punishment of dismissal from service which has been affirmed by the appellate authority.

6. It is submitted by the learned counsel for the petitioner that even if the present case is one of admission, in view of the provisions of Section 14 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966, the respondent authorities were bound to supply the documents as well as the inquiry report and in the absence of the same, the impugned orders are perse illegal and void and deserves to be quashed relying upon the decision of the Supreme Court rendered in the case of *L.I.C of India and Another vs. Ram Pal Singh Bisen*, (2010) 4 SCC 491.

7. It is settled law, as laid down by the Supreme Court in the case of *Managing Director, ECIL., Hyderabad and Others vs. B. Karunakar and others*, (1993) 4 SCC 727 and *Sarva U.P Gramin Bank vs. Manoj Kumar Sinha* (2010) 3 SCC 556, that the petitioner alleging non-supply of documents or inquiry report has to establish the prejudice caused to him due to non-supply before he can claim or seek quashing of the order due to non-supply of documents or inquiry report.

8. In the instant case, admittedly and undisputedly the petitioner has admitted the charges levelled against him relating to affixing of his signatures, signing of the register for the purpose of issuance of 22 Rin Pustikas and making entries in the register on 16.4.1991 after his suspension on 12.4.1991, though he has denied and refuted the charges relating to acceptance of bribe or money and in such circumstances inspite of repeated query, it has not been pointed out to this Court as to what was the prejudice that was caused to the petitioner due to non-supply of documents or the inquiry report and as to what difference would it have made on the conclusion of the departmental enquiry even if the documents would have been supplied to the petitioner.

9. As the petitioner has admitted the charges, the contention of the petitioner regarding quashing of the inquiry report on the ground of non-supply of documents and the inquiry report looses significance as no prejudice whatsoever is caused to him. I am also of the considered opinion that in view of the admission of the petitioner regarding some of the charges levelled against him, the law laid down by the Supreme Court in the case of *L.I.C of India* (supra) also does not come to the assistance of the petitioner as the case before the Supreme Court in the aforesaid judgment was a contested case in which the delinquent employee had not admitted the charges and it was under those circumstances that the Supreme Court held that the documents relied upon by the prosecution must be supplied, scrutinized and proved.

10. It is next contended by the learned counsel for the petitioner that though the petitioner admitted affixing of signatures and obtaining Rin Pustikas and making entries in the register, etc. however the aforesaid signatures of the petitioner were obtained by the authorities by compulsion, force and threat. The aforesaid submission of the petitioner is not borne out or substantiated from the statement of the petitioner made in the departmental enquiry itself as the petitioner has not made any such allegation of compulsion, force or threat in his statement made before the Inquiry Officer.

11. In the circumstances, I do not find any substance in the petition or the submission made therein specifically in view of the fact that the petitioner has admitted part of the charges levelled against him. In view of the aforesaid, I do not find any infirmity in the impugned order passed by the disciplinary authority dated 31.3.1993 dismissing the petitioner from service or the order passed by the appellate authority dated 4.8.1994 dismissing the appeal.

12. In view of the aforesaid, the petition filed by the petitioner being meritless is, accordingly, dismissed. In the facts and circumstances of the case there shall be no order as to the costs.

Petiton dismissed

I.L.R. [2012] M.P., 420
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P.No. 8192/2011(S) (Gwalior) decided on 12 December, 2011

AWADESH KUMAR SHRIVASTAVA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Service Law – Transfer – Beyond the seniority unit*** **– Permissible in absence of any prohibition in rules.** (Para 8)

क. *सेवा विधि – स्थानांतरण – वरिष्ठता इकाई से परे* – नियम में किसी प्रतिषेध की अनुपस्थिति में अनुज्ञेय।

B. ***Service Law – Seniority*** **– Is a civil right and not a fundamental right – Employee has no right to a particular number in gradation list – He has only a right of seniority to be counted from the date of his appointment – If he is transferred to another seniority unit on administrative ground, he has a right to enjoy seniority from the same date of appointment.** (Para 9).

ख. *सेवा विधि – वरिष्ठता* – नागरिक अधिकार है और न कि मौलिक अधिकार – वरिष्ठता सूची में एक विशेष नम्बर होने का कर्मचारी का कोई अधिकार नहीं है – उसका केवल यह अधिकार है कि उसकी वरिष्ठता की गणना उसकी नियुक्ति के दिनांक से की जावे – यदि उसका स्थानांतरण प्रशासनिक आधार पर दूसरी वरिष्ठता इकाई में किया गया है, तो उसके पास अधिकार है कि उसी नियुक्ति दिनांक से वरिष्ठता का उपभोग करे।

C. *Service Law – Seniority* – **Chances of promotion are not fundamental right – Right of consideration is fundamental right on the basis of existing seniority – Change in seniority unit results in reduction of chances of promotion – Plea untenable.** (Para 11)

ग. *सेवा विधि – वरिष्ठता* – पदोन्नति के अवसर मौलिक अधिकार नहीं है – वर्तमान वरिष्ठता के आधार पर विचार करने का अधिकार मौलिक अधिकार है – वरिष्ठता इकाई में बदलाव के फलस्वरुप पदोन्नति की संभावना कम हो जाती – अभिवचन असमर्थनीय।

Cases referred :

1994(1) MPJR 198, 2008(2) MPHT 80 (CG), (2003) 11 SCC 614, (1991) 1 SCC 505.

Raj Shrivastava, for the petitioner.
Bhagwan Raj Pandey, G.A. for the respondent/State.

ORDER

SUJOY PAUL, J. :- Since, both the matters are identical in nature, with the consent of parties, matters are heard together and decided by this common order.

2. Facts are taken from W.P.No. 8192/2011. This is second visit of the petitioner to this Court. Against the transfer order dated 05/10/2011, petitioner filed W.P.No. 6815/2011, which was disposed of by this Court on 13/10/2011 with a direction to the respondents to consider the representation of the petitioner. In turn, respondents have rejected the representation by Annexure-P/1. Against which, present petition is directed.

3. The singular contention raised by Shri Raj Shrivastava, learned counsel for the petitioner is that petitioner's seniority is maintained circle wise and by impugned transfer order, he has been transferred beyond his seniority unit, which is impermissible. Learned counsel has also placed reliance on statutory recruitment rules to show that for the purpose of promotion the zone of consideration is the particular circle and employees of that particular circle are entitled to be considered according to their seniority. Learned counsel submits that if petitioner is transferred outside his seniority unit, he will loose his seniority number and may be placed in the different seniority list at a lower number.

To elaborate, Shri Shrivastava submits that for example, if petitioner's seniority number is 80 in the present circle, at transferred place he may be at No.120, which will affect his chances of promotion. He submits that the effect of impugned transfer order is loss of seniority and reduction of chances of promotion. In support thereof, he relied two judgments 1994 (1) M.P.J.R. 198 *[Suresh Kumar Sharma Vs. Municipal Council, Ambah & others]* and 2008 (2) M.P.H.T. 80 (CG) *[Abhishek Kumar Dani Vs. State of Chhattisgarh and others.*

4. Per Contra, learned Government Advocate supported the order.

5. I have heard parties at length and perused the record.

6. In 1994 M.P.J.R. in Para 10 & 11, the Division Bench of this Court held as under:-

> "10. It is well-known that transfer is normally resorted in same cadre without adversely affecting the conditions of service so that any person entering the service may feel secure of equality in continuance, promotion etc. Any executive action violating it cannot be upheld. Seniority is an incidence of service which cannot be eroded or curtailed by a rule which operates discriminately. See, recent decision of the Supreme Court in *K. Narayanan Vs. State of Karnataka* (AIR 1994 SC 55).
>
> 11. In case of *Arun Kumar Chatterjee Vs. South Eastern Railway* (AIR 1985 SC 482), the Supreme Court has observed that loss of seniority of aGovernment servant with consequent loss of promotional prospects of higher pay and emoluments is a matter of serious consequence to him".

7. The CG High Court in *Dani's case* (supra) held that transfer of the petitioner from one district to another district would affect his service career and prospects and he would get opportunity of consideration for promotion to higher post at a later point of time in the transferred district. For these reasons CG High Court allowed the petition and quashed the order.

8. In the opinion of this Court, the seniority has a definite connotation in service jurisprudence. The seniority is a civil right, which is determined from the date of initial appointment of an employee to a service on substantive

basis. In other words, an employee enjoys seniority from a date, when he became member of the service as per rules. The Apex Court in catena of judgments including in (2003) 11 SCC 614 (Constitution Bench) *[Prafulla Kumar Das and others Vs. State of Orissa & others]* in paragraph 44, held as under:-

> "44. Seniority is not a fundamental right but is merely a civil right. The right of seniority in this case was also not a vested or accrued right".

9. Thus, seniority is neither fundamental nor constitutional right, it is merely a civil right. The right which permits the employees to count his service from the date of appointment. None has a legal right to a particular number in the seniority list. Thus, I am unable to hold that if petitioner is transferred from one seniority unit to another seniority unit, it amounts to loss of his seniority. In the considered opinion of this Court, there will be no loss of seniority because when an employee is transferred in administrative exigency, he carries his seniority with him and enjoys it at the transferred place from the same date, on which he was enjoying it before transfer. There may be change in the position in the gradation list depending upon the cadre, strength of that particular seniority unit and number of senior employees above him. Some times, it may be beneficial to the employee, when he is transferred to a unit where senior employees are less in number qua some other seniority unit. Meaning thereby, one has a right only to the extent of a particular date of seniority and not a particular number in a particular seniority list.

10. So far contention that the petitioner's transfer and downgrading in number in the seniority list will diminish/ reduce his chances of the promotion is concerned, it is profitable to quote a part from the judgment of Supreme Court in the case of *Union of India and others Vs. S.L. Dutta and another* reported in (1991) 1 SCC 505 as under:-

> "A right to be considered for promotion is a term of service, chances of promotion are not. Hence the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service".

11. In the light of this judgment, it is clear that right of consideration may be a fundamental right, chances of promotion are not. The Constitution Bench.

of Prafulla Kumar Das and S.L. Dutta are not considered by CG High Court and therefore, the said judgment is distinguishable. In the light of aforesaid judgments, it cannot be said that by transferring a person from one seniority unit to another seniority unit amounts altering his service conditions to his detriment. Such transfer and change of seniority unit neither infringes his fundamental right nor legal or civil right. He enjoys same seniority from the date of his initial appointment. On the cost of repetition, it is held that none has a right to a particular number in a particular seniority list. The petitioner has not shown any other rule, which prohibits the transfer beyond the seniority unit. The recruitment rules only show that promotion units are respective circles. For the reasons stated above, the judgment of *Suresh Kumar Sharma* (Supra) also has no application in this matter.

12. In this view of the matter, I am unable to hold that the transfer orders were not permissible.

This is settled in law that the transfer order can be interfered with when it violates a statutory provision, changes service conditions of an employee to his detriment, order is proved to be malafide or it is issued by an incompetent authority. None of these conditions are available here which warrants interference of this Court. On the basis of aforesaid analysis, no fault can be found in the impugned transfer order.

13. Resultantly, petitions are dismissed being meritless. No costs.

Petition dismissed

I.L.R. [2012] M.P., 424
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P.No. 5963/2011(S) (Gwalior) decided on 13 December, 2011

GOPAL CHAWALA & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution – Article 14, 39(d) – Equal Work for Equal Pay – Guruji and Adhyapak – **Petitioners who were appointed as Guruji could not establish that their method of recruitment, nature of work, quantum of work, quality of work, nature of responsibility, place of**

work etc. identical to that of Adhyapak – Wholesome equality could not be established by Petitioners. (Para 14)

क. संविधान – अनुच्छेद 14, 39(डी) – समान कार्य के लिये समान वेतन – गुरुजी और अध्यापक – याचीगण जिन्हें गुरुजी के रुप में नियुक्त किया गया था, स्थापित नहीं कर सके कि उनकी भर्ती की पद्धति, कार्य का स्वरुप, कार्य की मात्रा, कार्य का गुण, दायित्व का स्वरुप, कार्य का स्थान इत्यादि, अध्यापक के समान है – याचीगण द्वारा लाभप्रद समानता स्थापित नहीं की जा सकी।

***B. Constitution – Article 23, 43 – Honorarium – Honorarium is not Salary* – However, whatever emoluments in the name of honorarium is being paid to Gurujis is used by them for the purpose of keeping their body and soul together – Various notifications show that wager payable to unskilled employee in private and Government employment is much higher than the honorarium paid to Guruji – Respondents directed to reconsider the amount of honorarium which is being paid to Guruji.** (Paras 20,21,24)

ख. संविधान – अनुच्छेद 23, 43 – मानदेय – मानदेय वेतन नहीं है – किन्तु, गुरुजीयों के मानदेय के रुप में जो भी परिलब्धियां दी जा रही हैं उनके द्वारा इसका उपयोग अपने आपको (शरीर व आत्मा) को बनाये रखने हेतु किया जाता है – विभिन्न अधिसूचनाऐं दर्शाती हैं कि प्राईवेट एवं शासकीय नियोजन में अकुशल कर्मचारी को देय वेतन गुरुजी को दिये जा रहे मानदेय से बहुत अधिक है – गुरुजी को दिये जा रहे मानदेय की रकम पर पुनर्विचार करने के लिये प्रत्यर्थीगण को निदेशित किया गया।

Cases referred :

AIR 1982 SC 879, AIR 1986 SC 584, AIR 1987 SC 2049, AIR 1988 SC 1504, 2001 (88) FLR 282, 2003(98) FLR 625, 2007(115) FLR 657, 2010 (127) FLR 12, 2011 (3) SCT 357, AIR 1996 SC 3466, (2008) 10 SCC 1, (2004) 4 SCC 646, (2002) 4 SCC 556, (2009) 13 SCC 635, (2011) 11 SCC 122, (1982) 3 SCC 235, (1973) 4 SCC 225.

S.K. Sharma, Gaurav Samadhiya & B.S. Dhakad, for the petitioners.
M.P.S. Raghuvanshi, Addl. A.G. for the respondents/State.

ORDER

SUJOY PAUL,J. :-By this common judgment, following writ petitions are decided, as these matters were heard analogously with the consent of parties.

(1)	W.P. 7774/2011(s)	Narayan Singh Karoriya Vs. State of MP
(2)	W.P. 5444/2011(s)	Arun Kumar Shrivastava vs. State of MP
(3)	W.P. 5445/2011(s)	Ranvir Singh Jat vs. State of M.P.
(4)	W.P. 5446/2011(s)	Balvindar Singh Vs. State of M.P.
(5)	W.P. 5482/2011(s)	Abhilash Sharma Vs. State of M.P.
(6)	W.P. 5483/2011(s)	Shobharam Chaubey Vs. State of M.P.
(7)	W.P. 5515/2011(s)	Harish Chandra Tiwari Vs. State of M.P.
(8)	W.P. 5516/2011(s)	Shivpal Singh Yadav Vs. State of M.P.
(9)	W.P. 5517/2011(s)	Hariom Bhargava Vs. State of M.P.
(10)	W.P. 5518/2011(s)	Pappu Lal Mahore Vs. State of M.P.
(11)	W.P. 5564/2011(s)	Mahesh Kumar Ahirwar Vs. State of M.P.
(12)	W.P. 5565/2011(s)	Gautam Singh Vs. State of M.P.
(13)	W.P. 5566/2011(s)	Smt. Manju Shrivastava Vs. State of M.P.
(14)	W.P. 5567/2011(s)	Surat Singh Vs. State of M.P.
(15)	W.P. 5568/2011(s)	Dinesh Singh Raghuwanshi Vs. State of M.P.
(16)	W.P. 5569/2011(s)	Rambabu Sharma Vs. State of M.P.
(17)	W.P. 5627/2011(s)	Santosh Kumar Sharma Vs. State of MP
(18)	W.P. 5628/2011(s)	Smt. Saroj Soni Vs. State of M.P.
(19)	W.P. 5629/2011(s)	Shivcharan Yadav Vs. State of M.P.
(20)	W.P. 5656/2011(s)	Ramavtar Singh Gurjar Vs. State of M.P.
(21)	W.P. 5724/2011(s)	Rakesh Singh Solanki Vs. State of M.P.
(22)	W.P. 5725/2011(s)	Hari Krishan Dwedy Vs. State of M.P.
(23)	W.P. 5726/2011(s)	Shaitan Singh Vs. State of M.P.
(24)	W.P. 5727/2011(s)	Narbda Shankar Bhargava Vs. State of M.P.

(25) W.P. 5728/2011(s) Girraj Soni Vs. State of M.P.
(26) W.P. 5796/2011(s) Ravindra Singh Parihar Vs. State of M.P.
(27) W.P. 5797/2011(s) Brijendra Singh Vs. State of M.P.
(28) W.P. 5798/2011(s) Matadin Thakur Vs. State of M.P.
(29) W.P. 5926/2011(s) Mohammad Hanif Vs. State of M.P.
(30) W.P. 5927/2011(s) Manoj Kumar Sharma Vs. State of M.P.
(31) W.P. 5945/2011(s) Kapil Dev Pathak Vs. State of M.P.
(32) W.P. 5946/2011(s) Laxman Singh Chouhan Vs. State of M.P.
(33) W.P. 5947/2011(s) Phool Singh Yadav Vs. State of M.P.
(34) W.P. 5948/2011(s) Nirbhay Singh Parihar Vs. State of M.P.
(35) W.P. 5949/2011(s) Virendra Singh Yadav Vs. State of M.P.
(36) W.P. 5950/2011(s) Ashok Kumar Shrivastava Vs. State of M.P.
(37) W.P. 5951/2011(s) Sundar Singh Rajput Vs. State of M.P.
(38) W.P. 5952/2011(s) Yudhisthar Singh Vs. State of M.P.
(39) W.P. 6039/2011(s) Rajesh Kumar Raghuwanshi Vs. State of M.P.
(40) W.P. 6040/2011(s) Santosh Upadhyay Vs. State of M.P.
(41) W.P. 6041/2011(s) Smt. Sarita Sharma Vs. State of M.P.
(42) W.P. 6050/2011(s) Prakash Yadav Vs. State of M.P.
(43) W.P. 6123/2011(s) Kishanlal Shivhare Vs. State of M.P.
(44) W.P. 6172/2011(s) Radha Mohan Singh Vs. State of M.P.
(45) W.P. 6200/2011(s) Shyamacharan Vs. State of M.P.
(46) W.P. 6202/2011(s) Gopal Das Namdew Vs. State of M.P.
(47) W.P. 6203/2011(s) Gyanendra Sharma Vs. State of M.P.
(48) W.P. 6204/2011(s) Sujan Singh Vs. State of M.P.
(49) W.P. 6218/2011(s) Parwat Singh Rawat Vs. State of M.P.
(50) W.P. 6248/2011(s) Satish Kumar Sharma Vs. State of M.P.
(51) W.P. 6274/2011(s) Rambabu Dubey Vs. State of M.P.
(52) W.P. 6275/2011(s) Chhotelal Rathor Vs. State of M.P.

(53)	W.P. 6276/2011(s)	Sudama Prasad Sharma Vs. State of M.P.
(54)	W.P. 6277/2011(s)	Toran Singh Rajput Vs. State of M.P.
(55)	W.P. 6280/2011(s)	Jagdish Prasad Jatav Vs. State of M.P.
(56)	W.P. 6281/2011(s)	Vinod Kumar Lodhi Vs. State of M.P.
(57)	W.P. 6352/2011(s)	Raj Bahadur Singh Yadav Vs. State of M.P.
(58)	W.P. 6353/2011(s)	Ram Kirat Singh Kushwah Vs. State of M.P.
(59)	W.P. 6354/2011(s)	Antram Banjaraa Vs. State of M.P.
(60)	W.P. 6702/2011(s)	Rajesh Kumar Sharma Vs. State of M.P.
(61)	W.P. 6703/2011(s)	Mukesh Kumar Gupta Vs. State of M.P.
(62)	W.P. 7178/2011(s)	Vijay Kumar Shrivas Vs. State of M.P.
(63)	W.P. 7203/2011(s)	Kuber Singh Vs. State of M.P.
(64)	W.P. 7220/2011(s)	Ram Datt Sharma Vs. State of M.P.
(65)	W.P. 7342/2011(s)	Manoj Kumar Genda Vs. State of M.P.
(66)	W.P. 7345/2011(s)	Ramroop Singh Tomar Vs. State of M.P.
(67)	W.P. 7448/2011(s)	Jabar Singh Tomar Vs. State of M.P.
(68)	W.P. 7624/2011(s)	Shiv Kumar Shrivastava Vs. State of M.P.
(69)	W.P. 5797/2011(s)	Veer Singh Lodhi Vs. State of M.P.

The facts are taken from Writ Petition No. 5963/2011(S) (Gopal Chawala and others vs. State of M.P. and others).

2. The petitioners have passed Higher Secondary Examination and some of them passed Certificate of Diploma in Education. It is stated that they are trained teachers. For making cent percent literacy in Madhya Pradesh, a special drive was initiated by State Government and to achieve that goal, a policy was introduced. The said policy is placed on record as Annexure P-R/14 with the rejoinder and called as "Education Guarantee Scheme" (EGS). It is stated that as per the EGS, in every village where there was no Government school, the EGS was introduced with the job to impart education to the pupil. The local authorities were required to invite applications from eligible candidates and then appoint them as Shikshakarmis/Teachers in the EGS. The petitioners have disclosed the names of their EGS in para 4 of the writ petition. The

petitioners were imparting education to the children up to primary level. It is further stated by the petitioners that after coming into force of Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (Adhiniyam), certain posts were created as Shikshakarmi, Samvidakarmi etc. They submit that except the designation of petitioners i.e., "Guruji", they are exactly similarly situated to the Assistant Teachers. The petitioners further submit that initially they were getting Rs.1000/- as honorarium, which was lateron enhanced to Rs.2500/-. Their EGS centres were also lateron converted into full-fledged Government Schools. They are performing similar nature of duties and possess similar qualification. Thus, by applying the doctrine of "equal pay for equal work", the petitioners prayed for following reliefs:-

> *"(i) That, the impugned order dated 12.8.2011 Annex.P/1 may kindly be quashed.*
>
> *(ii) That, respondents may kindly be directed to grant all the benefit which petitioners availing on regularization and the whole action and orders issued adversely effecting the service conditions of the petitioners be declare illegal.*
>
> *(iii) That, in the alternate it be declared that petitioners be paid minimum pay of the post of Assistant Teacher of which work they are performing by issuing suitable direction to the state to make the service condition better so that respectable salary of the teacher be paid to the petitioners.*
>
> *(iv) That, any other relief which this Hon'ble High Court may deem fit, with cost of the petition."*

3. Learned counsel appearing for the petitioners further submitted that to eradicate the anomaly amongst teachers, an expert body was constituted headed by Shri D.P.Dubey, IAS, who prepared the report and submitted before the Government for consideration. This document is placed on record as Annexure P/9. It is stated that the fairness is an integral part of a good administration. A welfare State should ensure that similarly situated persons are given similar treatment. Thus, by placing reliance on various judgments, it

is stated that the petitioners are infact entitled for equal pay for the work rendered by them as 'Guruji' at par with Adhyapak.

4. Shri S.K.Sharma submits that the respondents have correctly passed the order, thereby petitioners were assimilated/absorbed as Asstt. Teachers, but without giving them opportunity the said order was cancelled by Annexure P/1.

5. Learned counsel for the petitioners relied on various judgments of Supreme Court, reported in AIR 1982 SC 879 *(Randhir Singh vs. Union of India and others);* AIR 1986 SC 584 *(Surinder Singh and another v. The Engineer in Chief, C.P.W.D. And others);* AIR 1987 SC 2049 *(Bhagwan Dass and others v. State of Haryana and others);* AIR 1988 SC 1504 *(Jaipal and others etc. vs. State of Haryana and others);* 2001 (88) FLR 282 *(Harnam Singh and others vs. Punjab State Electricity Board and others);* 2003 (98) FLR 625 *(State of West Bengal and others vs. Pantha Chatterjee and others);* 2007 (115) FLR 657 *(Paresh Dey and others vs.. State of West Bengal and others);* 2010 (127) FLR 12 *(State of Karnataka and others vs. M.L.Kesari and others)* and, 2011 (3) SCT 357 *(Jetha Ram Deora vs. India Telephones Industries Ltd. and others).*

6. *Per Contra,* Shri M.P.S.Raghuvanshi, learned Additional Advocate General, submits that petition is misconceived. Certain 'Gurujis' earlier also filed a petition before this Court for the same relief. Said writ petition was registered as W.P.No. 3810/2009(s). Relief was not granted by writ court. Against that order Gurujis preferred a Writ Appeal No.596/2010. The only contention put forth by Gurujis before the Division Bench was that they are serving on the post of Guruji and are getting only honorarium despite the fact that they are performing the work of Assistant Teacher/ Shikshakarmi/Samvida Shala Shikshak Class-3. The stand was that at least minimum of the scale of those post be given to the petitioners. The said writ appeal was disposed of with the direction to scrutinize the cases of petitioners and pass necessary orders in this regard. Shri Raghuvanshi submits that in turn, the respondents have passed a detailed order dated 28th November, 2011 which was filed along with a list of documents. Learned Additional Advocate General submits

that each and every aspect of the matter was taken care of in this reasoned and speaking order. The claim of the petitioners was not tenable and, therefore, it is rejected by this order. Petitioners have not challenged the validity of this order and therefore, they are not entitled for any relief from this Court.

7. The stand of the State Government is that petitioners were not appointed pursuant to any statutory recruitment rules. They were appointed pursuant to a policy without subjecting them to any recruitment process. In the scheme itself it was mentioned that they will get honorarium and not the salary. The petitioners were imparting education in EGS whereas Adhyapak, Shikshakarmis and Samvida Shala Shikshak were imparting education in full-fledged Government schools. Shri Raghuvanshi stated that the first stage was introduction as EGS. Subsequently the statutory recruitment rules were made which were known as *"Madhya Pradesh Panchayat Shiksha Karmis (Recruitment and Conditions of Service) Rules, 1997"*. Rule 5 of these rules deals with classification. Selection method of Shiksha Karmis is also prescribed in the said rules. The stand of the Government is that the petitioners never underwent this selection process when they were appointed as 'Guruji'. Subsequently, *'Madhya Pradesh Panchayat Samvida Shala Shikshak (Appointment and Conditions of Contract) Rules, 2001'* came into being. Thereafter, yet another rules *"Madhya Pradesh Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005"* were introduced followed by *"Madhya Pradesh Panchayat Adhyapak Samvarg (Employment and Conditions of Service) Rules, 2008"*. To elaborate, Shri Raghuvanshi would submit that in all these rules a method of selection, eligibility, etc. is prescribed. The persons who were selected pursuant to a particular rule is required to possess a qualification and eligibility. In other words, the mode of selection in all the rules are different and, therefore, by no stretch of imagination, it can be said that the petitioners are similarly situated. By placing reliance on rule 2(f), 2(g) and 2(h) of 2008 Rules (supra), Shri Raghuvanshi submits that Adhyapak, Shiksha Karmi and Samvida Shala Shikshak are three different statutory posts under the relevant rules. 'Guruji' is on different footing altogether.

8. In nutshell, the stand of Government is that the doctrine of '*equal pay*

for equal work' cannot be pressed into service. The recruitment method, job nomenclature, extent of responsibility, place of working is different for the petitioners qua the post with whom parity is prayed for. Shri Raghuvanshi has relied on AIR 1996 SC 3466 *(State of West Bengal and others vs. Monirujjaman Mullick and others);* (2008) 10 SCC 1 *(Official Liquidator vs. Dayanand and others);* (2004) 4 SCC 646 *(M.P.Rural Agriculture Extension Officers' Association vs. State of MP and another);* (2002) 4 SCC 556 *(State Bank of India and another vs. M.R.Ganesh Babu and others),* and (2009) 13 SCC 635 *(State of M.P. and others vs. Ramesh Chandra Bajpai).*

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

10. The doctrine of *'equal pay for equal work'* is flowing from Article 39(d) of the Constitution of India. This Article is under the directive principles in the Constitution. This principle can be pressed into service when it is read with Article 14 of the Constitution. However, for making it a reality, one has to prove the wholesome equality.

11. The Apex Court in *Monirujjaman Mullick*'s case (supra) held as under:-

> *"We are of the view that the non-formal educational centres cannot be equated with the primary schools which are regularly run by the Education Department of the State Government. Apart from the basic qualitative differences between the two institutions even the nature of work of the non-formal instructors and the primary school teachers is not identical. The method of appointment, the source of recruitment, method of teaching, hours of the teaching and the mode of payment are entirely different. In the facts and circumstances of this case the High Court fell into patent error in applying the principle of "equal pay for equal work".*

12. The Apex Court in its latest judgment, reported in (2011) 11 SCC

122 *(Steel Authority of India Limited and others vs. Dibyendu Bhattacharya)*, held as under:-

> *"Parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India while establishing that the eligibility, mode of selection/ recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be same but the skills and the responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity must plead necessary averments and prove that all things are equal between the posts concerned. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties. In other words, the equality clause can be invoked in the matter of pay scales only when there is wholesome/ wholesale identity between the holders of two posts. The burden of establishing right and parity in employment is only on the person claiming such right."*

The Apex Court while passing the said judgment has considered all the judgments delivered on this aspect on earlier occasion. Thus, it is not necessary for this Court to deal with each and every judgment relied upon by the parties. The Apex Court while summarizing has laid down the aforesaid legal principles.

13. Thus, the only question is whether the petitioners fulfill the requirement and were able to show the wholesome parity to succeed in the present matter.

14. In the opinion of this Court, the petitioners could not establish that their method of recruitment, nature of work, quantum of work, quality of work, nature of responsibility, place of work, etc. are identical. In other words, the wholesome equality could not be established by the petitioners.

15. Apart from this, their writ petition was already dismissed by this Court. In writ appeal the Division Bench has not quashed and set aside the order passed by the learned Single Judge in the earlier round of litigation. The Division Bench in Writ Appeal No. 596/2010 merely directed for consideration of their minimum of the scale. In turn, the respondents have passed the order dated 28th November, 2011. The petitioners have not chosen to challenge this order. In nutshell, the petitioners have failed to establish the wholesome parity with the post of Asstt. Teacher/Shiksha Karmi Grade-3. Thus, in absence of any such parity, relief claimed cannot be granted to the petitioners.

16. In this petition the benefit of assimilation/absorption was granted to the petitioners as Asstt. Teacher and was cancelled by Annexure P/1. Since this Court has already held that there is no such legal right in favour of the petitioner to get automatically absorbed as Asstt.Teacher and get the similar pay scale or minimum of the pay, no fault can be found in Annexure P/1. Accordingly, Annexure P/1 is upheld.

17. However before parting with the matter it is relevant to refer to Article 23 of the Constitution of India, which reads as under:-

> "Article 23. 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
>
> 2. Everyone, without any discrimination, has the right to equal pay for equal work.
>
> 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
>
> 4. Everyone has the right to form and to join trade unions for the protection of his interests."

Article 23 was considered and interpreted by Supreme Court in catena of judgments. In *Peoples' Union for Democratic Rights Vs. Union of India, (1982) 3 SCC 235*, the Apex Court held as under:-

"It is difficult to imagine that the Constitution makers should have intended to strike only at certain forms of forced labour leaving it open to the socially or economically powerful sections of the community to exploit the poor and weaker sections by resorting to other forms of forced labour. Could there be any logic or reason in enacting that if a person is forced to give labour or service to another without receiving any remuneration at all it should be regarded as a pernicious practice sufficient to attract the condemnation of Article 23, but if some remuneration is paid for it, then it should be outside the inhibition of that Article? If this were the true interpretation, Article 23 would be reduced to a mere rope of sand, for it would then be the easiest thing in an exploitative society for a person belonging to a socially or economically dominant class to exact labour or service from a person belonging to the deprived and vulnerable section of the community by paying a negligible amount of remuneration and thus escape the rigour of Article 23.

The Apex Court in the same judgment again opined as under:-

"Moreover, in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so ."

It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a

complaint against violation of the fundamental right of the workmen under Article 23."

(Emphasis supplied)

18. If the aforesaid judgment of the Supreme Court is scanned in its totality and the principles scrutinized, it would be seen that the Supreme Court has laid stress to the fact about payment of atleast the minimum wages to an employee for working in the establishment as a fundamental right of the employee and anything done to deprive an employee of this right, would be nothing but an act amounting to *'begar'*. In a welfare State the Government has to act as a model employer. The State is required to set an example by giving wages and salary sufficient enough to sustain an employee and his family. The State cannot be permitted to act like a private employer and exploit the working class doing duties for the State and citizens.

19. Article 43 of the Constitution, which is under directive principles, reads as under:-

"Living wage, etc., for workers.— The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."

The purpose of directive principles and its implementation is considered in extenso by Supreme Court in the case of *His Holiness Kesavananda Bharati Sripadagalvaru vs. State of Kerala and another, reported in (1973) 4 SCC 225* (13 Judges). The following findings from the said judgment are relevant:-

"While most cherished freedoms and rights have been guaranteed the government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV

which embody them have to be balanced and harmonisedthen alone the dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III, and IV were enacted.

Parts III and IV essentially form a basic element of the Constitution without which its identity will completely change. A number of provision in Parts III and IV are fashioned of the U.N. Declaration of Human Rights.

Article 39(b) and (c) together with the other provisions of the Constitution contain one of the main objectives, namely, the building of a welfare State and an egalitarian social order in our country. While the Constitution-makers envisaged development in the social, economic and political fields, they did not desire that it should be a society where a citizen will not have th dignity of the individual. Part III of the Constitution shows that the founding fathers were equally anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of the individual. Our Constitution-makers did not contemplate any disharmony between the Fundamental Rights and the Directive Principles. They were meant to supplement one another. It can well be said that the Directive Principles prescribed the goal to be attained and the Fundamental Rights laid down the means by which that goal was to be achieved.

The Directive Principles embodied in Part IV of the Constitution or at any rate most of them are as important as the rights of individuals. The Directive Principles and the Fundamental Rights mainly proceed on the basis of Human Rights. Freedom is nothing else but a chance to be better. It is this liberty to do better that is the theme of the Directive Principles of State Policy in Part IV of the Constitution.

The Fundamental Rights and the Directive Principles

constitute the 'conscience' of our Constitution. The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfill the basic needs of the common man and to change the structure of our society. It aims at making the Indian masses free in the positive sense. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution.

What is implicit in the Constitution is that there is a duty on the Courts to interpret the Constitution and the laws to further the Directive Principles which under Article 37, are fundamental in the governance of the country.

I think there are rights which inhere in human beings because they are human beings-whether you call them natural rights or by some other appellation is immaterial. As the amble indicates, it was to secure the basic human rights like liberty and equality that the peoplegave unto themselves the Constitution and these basic rights are an essential feature of the Constitution; the Constitution was also enacted by the people to secure justice, political, social and economic. Therefore, the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a Court of law in case the State fails to implement its duty *but, nevertheless, they are fundamental in the governance of the country and all the organs of the State, including the judiciary, are bound to enforce those directives.*

The Nation stands today at the cross-roads of history

and exchanging the time-honoured place of the phrase, may I say that the Directive Principles of State Policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the Fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it."

20. True it is that the respondents are giving the payment in the name of "*honorarium*" to the Gurujis. As per settled legal position, "*honorarium*" is not salary. However, without entering into this debate any further, I would only like to observe that whatever emoluments in the name of honorarium is being paid to the Gurujis is used by them for the purpose of keeping their body and soul together. In other words, the payment in the shape of "*honorarium*" is their livelihood which is used by them to sustain their family in the present days of price hike. To run the cart of their family, legitimate expectation is that payment should be at least that much which can provide them a dignified life of a human being.

21. Pausing here for a moment, it is relevant to refer the recent notification issued by the State Government introducing the rates of minimum wages for unskilled, semi-skilled and skilled workers. This Court is conscious of this fact that Minimum Wages Act as such is not applicable on Gurujis. By no stretch of imagination Gurujis can be brought within the ambit of the said Act. However, the said notification is referred only with a view to show that on the one hand the Government is fixing the rates for the skilled, unskilled and semi-skilled categories in Government and private employment, which is much higher than what has been paid to the Gurujis. On the cost of repetition, it can be said that the petitioners cannot claim the minimum wages under the said Act. However, the minimum wages are determined by a scientific method which includes the factor of inflation/price index and other relevant factors to ensure that such workers can live in human condition. These wages show the bottom line and "minimum" amount necessary for a dignified human life. The "minimum" amount of wages so determined under the said Act, when examined in juxtaposition with Honorarium of 'Gurujis', it clearly shows that present

amount of Honorarium is grossly inadequate. In the notification dated 24.9.2011 the State Government has introduced the minimum wages. Schedule 'A' is reproduced here as under:-

अनुसूची – अ

35 अनुसूचित नियोजन में मासिक एवं दैनिक वेतन की दरें जिसमें परिवर्तनशील मंहगाई भत्ता सम्मिलित है। (आंकड़े रुपयों में)

न्यूनतम मूल वेतन		परिवर्तनशील मंहगाई भत्ता		फुल वेतन	रुपये में राउण्डअप कर दैनिक दरें	श्रमिकों का वर्ग	न्यूनतम मूल वेतन	परिवर्तनशील मंहगाई भत्ता		फुल वेतन	रुपये में राउण्ड अप कर दैनिक दरें
प्रतिमाह	प्रतिदिन	प्रतिमाह	प्रतिदिन	प्रतिमाह	प्रतिदिन		प्रतिमाह	प्रतिदिन	प्रतिमाह	प्रतिदिन	प्रतिदिन
(दिनांक 01.04.2011 से 30.09.2011 तक)						(दिनांक 01.10.2011 से 31.3.2012 तक)					
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
3070.00	118.07	1325.00	50.96	4395.00	169.03	169.00	अकुशल	3070.00	118.07	1475.00	57.00	4545.00	175.07	175.00
3200.00	123.08	1325.00	50.96	4525.00	174.04	174.00	अर्धकुशल	3200.00	123.08	1475.00	57.00	4675.00	180.08	180.00
3350.00	128.85	1325.00	50.96	4675.00	179.81	180.00	कुशल	3350.00	128.85	1475.00	57.00	4825.00	185.85	186.00

स्पष्टीकरण–

(1) मजदूरी निर्धारण में पैसे तथा रुपये के गुणांको को राउण्ड अप करके ही दैनिक एवं मासिक मजदूरी निर्धारित की जावेगी। वित्त विभाग के परिपत्र क्रमांक एफ 9–7/2006/नियम/चार, दिनांक 20 सितम्बर, 2006 में 50 पैसे अथवा उससे अधिक पैसे हो तो, उन्हें अगले उच्चतर रुपये में पूर्णांकित किया जावेगा और 50 पैसे से कम राशि को छोड़ दिया जावेगा।

(विनोद कुमार)
श्रमायुक्त,
मध्यप्रदेश, इंदौर

टीप :–न्यूनतम वेतन अधिनियम 1948, के अंतर्गत 35 अनुसूचित नियोजनों की सूची परिशिष्ट–अ तथा इस संबंध में स्पष्टीकरण परिशिष्ट–ब में देखें।

परिशिष्ट–अ

न्यूनतम वेतन अधिनियम के अंतर्गत अनुसूचित नियोजनों की सूची

भाग – एक –

क्र.	नियोजन का नाम
1	2
1	किसी कपास जिनिंग एवं प्रेसिंग कारखाने में नियोजन
2	वन उपज तथा वन लगाने में नियोजन
3.	मार्गों के निर्माण तथा अनुरक्षण या भवन निर्माण कार्यों में नियोजन
4	लोक मोटर परिवहन में नियोजन
5	इंजिनियरिंग उद्योग में नियोजन
6	सिंचाई कार्यों के निर्माण तथा संधारण में नियोजन
7	केमिकल्स तथा फार्मास्युटिकल्स में नियोजन
8	किसी आरा मिल में नियोजन
9	किसी तेल मिल में नियोजन
10	किसी चावल मिल, आटा मिल या दाल मिल में नियोजन
11	किसी मुर्गीपोहा निर्माणी में नियोजन.
12	खाद्य पदार्थ जिसमें केक्स, बिस्किट्स, कन्फेक्शनरी , आईसक्रीम, आईसकेंडी सम्मिलित है एवं पेय के निर्माण में नियोजन
13	पत्थर तोड़ने या पत्थर पीसने के कार्य में नियोजन
14	किसी दुकान, वाणिज्यिक संस्थान, आवासीय होटल, रेस्टोरेंट तथा नाट्यगृह में नियोजन
15	किसी मुद्रणालय में नियोजन
16	सीमेंट पोल अथवा सीमेंट से निर्मित उत्पादन तथा सीमेंट निर्माण में नियोजन
17	प्लास्टिक उद्योग में नियोजन
18	फ्यूएल कोक में नियोजन
19	चूना भट्टा में नियोजन
20	ईंट भट्टों में नियोजन
21	पावरलूम जिसमें सायजिंग एवं प्रोसेसिंग भी सम्मिलित है, में नियोजन
22	किसी स्थानीय प्राधिकरण में नियोजन
23	कोसा उद्योग में नियोजन
24	खांडसारी उद्योग में नियोजन
25	पाटरिज जिसमें रिफैक्ट्री सामान, फायरब्रिक्स, सैनेटरी वेअर्स, इन्सूलेटर्स, टाईल्स, (सीमेंट से निर्मित टाईल्स को छोड़कर) स्टोन वेअर्स पाईप्स, फरनेस, लाइनिंग, ब्रिक्स तथा अन्य सिरेमिक्स सामान सम्मिलित है, मे नियोजन
26	कंबल निर्माण कार्य में नियोजन
27	किसी स्लेट पेंसिल निर्माण शाला में नियोजन
28	कत्था उद्योग में नियोजन
29	रामरज या गेरू के निर्माण में नियोजन
30	हाथकरघा उद्योग में नियोजन
31	वोन मिल में नियोजन
32	टाईल्स, जिसमें मेंगलोर टाईल्स अलाहाबाद टाईल्स, तथा अन्य स्थानीय नाम से प्रचलित टाईल्स सम्मिलित है परंतु सीमेंट से निर्मित टाईल्स सम्मिलित नहीं है, के निर्माण में नियोजन
33.	किसी विनिर्माणी प्रक्रिया जिसमें विनिर्माण प्रक्रिया जो कि कारखाना अधिनियम 1948 की धारा –2 (क) में परिभाषित की गई, चलाई जाती है जो अनुसूची में दी गई किसी अन्य प्रविष्टी के अंतर्गत नहीं आती है, में नियोजन
34.	किसी प्रायवेट अस्पताल जिसमे परामर्श केन्द्र तथा परीक्षण केन्द्र, विकृति विज्ञान (पेथालोजिकल प्रयोगशाला सम्मिलित है), में नियोजन
35	किसी प्रायवेट शैक्षणिक संस्था, जिसमे कोचिंग केन्द्र भी सम्मिलित है, में नियोजन

भाग–दो 1. कृषि नियोजन

This Schedule governs 35 scheduled employments which are given in Annexure 'A' of this notification. It includes in item 35 'an employment in private educational institution including coaching centre".

Reading this notification in totality would show that the persons working in private educational institutions in the capacity of Laboratory Technician, Librarian, Laboratory Assistant, Chemist etc. are treated as skilled workers and for them minimum wages were Rs.180/- per day prior to 1.10.2011 and after 1.10.2011 it is Rs.186/-. Multiplying this amount by 30 makes it much more than what a Guruji is getting per month, i.e., Rs.2500/-. The same notification in another Schedule-I deals with the similar workers working in the State Government departments. For them per day wages are fixed before 1.11.2011 as Rs.156/- and after 1.11.2011 as Rs.161/-. Multiplying this amount by 30 also makes it much more than what Guruji gets. The aforesaid notification issued under the Minimum Wages Act shows that the wages payable to an unskilled employee in private and Government employment is also much higher than the honorarium of a Guruji. Honorarium of Rs.2500/- is shockingly inadequate in the present scenario.

22. The purpose of quoting this example is only to show that the minimum wages are derived by a scientific method to ensure that the workers may sustain themselves in the era of inflation and price hike.

23. Thus, merely because petitioners are not getting "salary" and payment made to them is termed as "*honorarium*", should not deprive them from getting adequate amount which is in consonance with the constitutional mandate flowing from Articles 23 & 43 of the Constitution of India.

24. In totality, I am unable to hold that the petitioners are either entitled for equal pay for equal work or for even minimum of the scale because there is no wholesome parity demonstrated by them. I am also unable to hold that the petitioners are entitled to get minimum wages. However, on the basis of aforesaid analysis, I am inclined to direct the respondents to reconsider the amount of "*honorarium*" which is being paid to the petitioner in the present days of price hike. If necessary, the respondents may appoint an expert body for the said purpose. However, the entire exercise should be done keeping in view the principles flowing from Articles 23 & 43 of the Constitution of India.

25. Thus, in the interest of justice, I deem it proper to direct the respondents to reconsider the adequacy of amount of "*honorarium*" payable to the Gurujis.

This exercise be completed within four months and appropriate orders be passed.

25. With the aforesaid, petitions stand disposed of.

Petition disposed of

I.L.R. [2012] M.P., 443
WRIT PETITION

Before Mr. Justice Krishn Kumar Lahoti & Mrs. Justice Vimla Jain
W.P. No. 18086/2011 (Jabalpur) decided on 13 December, 2011

ZILA SAHKARI KENDRIYA BANK MARYADIT ...Petitioner
Vs.
RAJJU KHAN & ors. ...Respondents

Payment of Gratuity Act (39 of 1972), Section 4(6) – Forfeiture of gratuity **– Right to gratuity is a statutory right of respondent who had taken voluntary retirement – Petitioner/Employer permitted respondent No.1 to take voluntary retirement – Services of respondent No.1 were not terminated on the ground of any misconduct – Therefore, his gratuity can not be forfeited to recover loss caused to Petitioner/ Bank – Forfeiture of gratuity was illegal.** (Paras 4 to 8)

उपदान संदाय अधिनियम (1972 का 39), धारा 4(6) – उपदान का समपहरण – उपदान का अधिकार प्रत्यर्थी का कानूनी अधिकार है, जिसने स्वैच्छिक सेवानिवृत्ति ली थी – याची/नियोक्ता ने प्रत्यर्थी क्रं. 1 को स्वैच्छिक सेवानिवृत्ति लेने की अनुमति दी – प्रत्यर्थी क्रं. 1 की सेवा किसी दुराचरण के आधार पर समाप्त नहीं की गयी थी – इसलिये, याची/बैंक को हुई हानि को वसूलने के लिये उसके उपदान का समपहरण नहीं किया जा सकता – उपदान का समपहरण अवैध।

Case referred :

2005(5) SCC 245.

Manoj Sharma, for the petitioner.

ORDER

The order of the court was delivered by :
(SMT) VIMLA JAIN, J. :- The petitioner, being aggrieved by order dated 7.9.2011 (Annexure P/1) passed in Second Appeal No. 137/2010 by respondent No.2 M.P. State Cooperative Tribunal Bhopal, confirming the

order dated 2.6.2010 (Annexure P/2) passed by respondent No.3 Joint Registrar, Cooperative Societies, Sagar directing the petitioner/Zila Sahkari Kendriya Bank Maryadit, Panna (for brevity petitioner-Bank) to release a sum of Rs.76,069/- to respondent No.1 Rajju Khan alongwith the interest has come to this Court by filing a writ petition under Article 227 of the Constitution of India.

2. Briefly stated the facts of the case are that the respondent No.1 served the petitioner-Bank as a Branch Manager and retired on 31.8.2011. The Primary Cooperative Societies, working under his supervision, were allocated the distribution of pesticides including its storage, control and supervision during his posting as Branch Manger, Branch Shahnagar. But due to his carelessness, the pesticides could not be sold and returned back to M.P.Agro Industries and Development Corporation and thus a loss had occurred to the petitioner-Bank. Therefore, a detailed enquiry was conducted against respondent No.1 for the loss incurred to the petitioner-Bank and it was decided to recover a sum of Rs.76,069/- from the retiral benefits of the respondent No.1. Respondent No.1 had taken voluntary retirement on 31.8.2011 and pursuant thereto, the petitioner-Bank had released all the retiral dues to respondent No.1 but from the gratuity of Rs.1,83,000/-; the aforesaid sum of Rs.76,069/- was deducted and the balance amount was paid to respondent No.1.

3. Being dissatisfied by such action of the petitioner-Bank, the respondent No.1 submitted a claim under Section 64 of the M.P. Cooperative Societies Act, 1960 (hereinafter referred to as the 'Act') before respondent No.3 Joint Registrar, Sagar who in turn transferred it to respondent No.4 Assistant Registrar, Panna for disposal. The Assistant Registrar, Panna, by its order *Annexure P/3* dated 9.6.2008 directed the petitioner-Bank to refund a sum of Rs.76,069/- to respondent No.1 alongwith interest. The order *Annexure P/3* dated 9.6.2008 was challenged by the petitioner-Bank before the respondent No.3-Joint Registrar, Sagar who by its order *Annexure P/2* dated 2.6.2010 in Case No.78-45/2008 dismissed the appeal. Being dissatisfied with the orders dated 9.6.2008 and 2.6.2010, the petitioner-Bank filed Second Appeal No.137/2010 before the respondent No.2 M.P. State Cooperative Tribunal, which vide its order *Annexure P/1* dated 7.9.2011 dismissed the second appeal. Hence, the petitioner has filed the present writ petition.

4. The learned counsel for the petitioner submitted that the Bank can recover the loss occurred to it from the gratuity of the respondent. He placed

reliance in the case of *Secretary, ONGC Limited and another vs. V.U. Warrier* reported in 2005 (5) SCC 245. It is also submitted that the penalty by way of recovery of Rs.76,069/- was imposed in the departmental enquiry held against the respondent No.1. It was argued that M.P.State Agro Industries and Development Corporation was necessary party but the said Corporation was not made a party in the authority/Tribunal. Thus, on these grounds, the petition deserves to be allowed.

5. The Apex Court in *Secretary, ONGC Limited and another vs. V.U. Warrier (supra)* held thus:-

> "Respondent officer of ONGC, after retirement did not vacate official quarter allotted to him, even after four months' time granted to him. His prayer for extension of time was rejected in view of several officers waiting for quarter. He was also informed that penal rent as per ONGC's policy would be recovered from him on his not vacating the quarter within time. But respondent vacated the quarter only after eviction proceedings were initiated against him. In these circumstances it was held that the action of ONGC of deducting penal rent from gratuity in terms of the Regulations was not arbitrary, unlawful or unreasonable. ONGC had a right to withhold gratuity by deducting the amount found due to it and payable by respondent towards penal charges for unauthorized occupation of the quarters."

6. The citation referred to by learned counsel for the petitioner has no direct bearing on the facts of the instant case.

7. The right to gratuity is a statutory right of the respondent who took voluntary retirement. It is a fact that his services were not terminated by the Bank. Therefore, he is entitled to full amount of gratuity. It will be appropriate to quote the relevant legal provisions which reads thus:-

> Section 4(6) of the Payment of Gratuity Act, 1972 provides thus:-
>
> "Notwithstanding anything contained in Sub section (1),
>
> (a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging

to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited;

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or ....."

8. It is clear that the dispute was between the manager and its employer-bank. The manager had no claim against the M.P.Agro Industries and Development Corporation. The bank did not choose to file any application before the authorities and Tribunal to make M.P.Agro Industries and Development Corporation as party. Therefore, such objection is not sustainable before this Court.

9. It is a fact that the respondent had taken voluntary retirement before this superannuation. The petitioner permitted his voluntary retirement. It is also a fact that his services had not been terminated on the ground of any misconduct. Therefore his gratuity cannot be forfeited under Section 4(6) of the payment of Gratuity Act 1972. Thus, the forfeiture of gratuity of the respondent by the petitioner was illegal.

10. For the aforementioned reasons, we do not find any merit in the writ petition. Therefore, we dismiss the petition at the stage of motion hearing itself.

Petition dismissed

I.L.R. [2012] M.P., 446
WRIT PETITION
Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav
W.P. No. 3597/2004 (Jabalpur) decided on 2 January, 2012

NAGRIK UPBHOKTA MARGDARSHAN MANCH ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

A. ***Constitution – Article 19(1)(a) & (g) – Freedom of Speech and to Assembly – Bundh/Strike –*** **There may be a voluntary call to support (Bundh/Strike) but since it has an element of force it**

would not fall under Article 19(1)(a) &(g). (Para 10)

क. संविधान – अनुच्छेद 19(1)(ए) व (जी) – वाक् स्वातंत्र्य और एकत्र होने की स्वतंत्रता – बंद/हड़ताल – समर्थन के लिए आवाहन स्वैच्छिक हो सकता है, परन्तु चूंकि इसमें बल का तत्व है इसलिये यह अनुच्छेद 19(1)(ए) व (जी) के अंतर्गत नहीं आयेगा।

B. Constitution – Article 226 – Bundh/Strike – **State directed to take steps to prevent the coercion or the force applied by callers.** (Para 15)

ख. संविधान – अनुच्छेद 226 – बंद/हड़ताल – आवाहनकर्ताओं द्वारा प्रपीड़न या बल प्रयोग करने से रोकने के लिए राज्य को कदम उठाने के लिये निदेशित किया गया।

C. Constitution – Article 226 – Bundh/Strike – Compensation – **State free to quantify the damage and call upon the callers to compensate in case it finds that public property has been damaged – Individuals also at liberty to recover compensation in accordance with law.** (Para 15)

ग. संविधान – अनुच्छेद 226 – बंद/हड़ताल – प्रतिकर – राज्य हानि की मात्रा का निर्धारण करने के लिये स्वतंत्र है और आवाहनकर्ताओं को प्रतिकर देने के लिये बुला सकता है, यदि वह पाता है कि लोक सम्पत्ति को हानि पहुंचाई गई है – व्यक्ति भी विधि के अनुसार प्रतिकर वसूलने के लिए स्वतंत्र है।

Cases referred :

AIR 1998 SC 184, AIR 1997 KERALA 291.

Dinesh Upadhyay, for the petitioner.
Kumaresh Pathak, Dy. A.G. for the respondent No.1/State.
Greeshm Jain, for the respondent No.2.
Vivek Rusia, for the respondent No.3.

ORDER

The order of the court was delivered by :
AJIT SINGH J. :- Petitioner Pro Bono Publico vide this petition seeks mandamus that Bundhs/strikes called by respondents No. 2 and 3 on 26-08-2004 and 02-09-2004 be declared as illegal. Further direction is sought to the State of Madhya Pradesh and its functionaries to ensure that in future no coercive or forcible Bundhs are called by political parties and ensure

protection of citizens, their properties and of public properties during Bundhs/ strikes called out by the political party.

2. Bundh on 26-08-2004 and 02-09-2004 as apparent from the pleadings on record and more particularly the admission by respondent No.1/State of Madhya Pradesh in paragraph 3 of its return was respectively called by respondents No. 2 and 3/national political parties.

3. As per petitioner, the said Bundh had paralyzed the normal movements in the city as a result whereof no commercial activities took place, the schools were closed and working in the offices was also hampered. It is urged that bundh hampered even the movement of railways as a result whereof there was colosial national loss to the exchequer and has adversely effected the earning of a common man in the town. It is urged that despite of the mandate by the Supreme Court in *Communist Party of India (M) v. Bharat Kumar* : AIR 1998 SC 184, the respondents No. 2 and 3, in blatant violation of the said mandate, not only called for the Bundh on 26-08-2004 and 02-09-2004, the State Government and its functionaries turned to be a mute spectator, instead of preventing the Bundh. It is further contended that in pursuance to the Bundh call the members of respondents No. 2 and 3 roamed around in the street preventing the citizens from discharging their daily functions. It is urged that the State Govt. and its functionaries did not take preventive steps to stop the respondents from proceeding with the Bundh call. It is therefore urged that the State Government and its functionaries be directed that no coercive or forcible Bundhs are activated by political parties in future and in respect of loss which incurred because of the two aforesaid Bundhs the respondents No. 2 and 3 be directed to compensate the same to be quantified by the State Govt. and be deposited with the State Govt. or the Municipal Corporation.

4. Respondents on being noticed have filed their respective return.

5. Respondent No. 1 while not disputing the fact that Bundh on 26-08-2004 and 02-09-2004 are at the instance of respondents No. 2 and 3 has to submit that the Bundhs were peaceful, orderly and benign. Respondent No. 1 further denied that the life of the city of Jabalpur was paralyzed because of the Bundhs and also caused financial loss to the Government. It is urged that the State authorities did not receive any report in respect of any loss having been committed to the private or the public property or the person. It is urged that the Bundhs have been voluntary and were out of sympathy of the public

at large with the Organizations who organized the Bundhs. It is stated that specific steps were taken to prevent any untoward incident during the call. The respondent No. 1 further denies that any coercive steps tactics were employed by the members of respondents No. 2 and 3 and that any incident to private or public property has taken place. It is also denied that any force was applied to get the schools and colleges closed.

6. Respondent No. 2 in its reply though does not dispute the fact that a Bundh was called on 26-08-2004, it is, however, submitted that the same did not adversely effect the daily life of citizens of Jabalpur. It is urged that no force was applied rather request was made to the common person to support the cause. Respondent No. 2 further denies the alleged loss said to have been incurred during the said Bundh. It is further contended that there was no complaint from any corner of force being used to implement the Bundh call. It is contended that it was a peaceful movement organized with a support of the citizens of the town. It is urged that no industrial activity, commercial activity or educational activity were ever forced to be closed down by workers of respondent No. 2.

7. Respondent No. 3 in its return though denies that any Bundh was called, it is urged that due to wrong decision taken by the Govt. that the respondent with support of local people and shop keepers had lodged the protest in the process whereof certain private establishments were closed down. It is urged that a voluntary closing down of the establishment by the citizens cannot be termed as Bundh. It is urged that the executive committee of the respondent only decided to host a flag at a place called 'Keshav Kuti' after marching through the road. It is contended that the petitioner has concocted the entire facts and has wrongly projected the same s if the respondent No. 3 has taken recourse to Bundh. It is further contended that being a political party it is within its right to hold demonstration as the same is protected under Article 19 (1) (a) and (b) of the Constitution to protest in a democratic manner the wrong policies of the Govt. It is contended that it is within the right of the respondent No. 3 to call for a voluntary support from the citizens against the wrong policies of the Govt. It is urged that if in pursuance to such call, the citizens in support closed down their establishments, the same cannot be said to be the Bundh as is nomenclatured by the petitioner. It is urged that there being no violation of the provisions of the Constitution of India the petition being devoid of substance is liable to be dismissed.

8. Considered the rival submissions.

9. The issue as to whether there can be a fundamental right in a political party to call for Bundh by force, intimidation or coercion is no more res integra and has been held to be not a fundamental right of a political party.

10. In *Communist Party of India (M) v. Bharat Kumar* (supra) while approving Full Bench decision of the High Court it was held by the Supreme Court "3.....There cannot be any doubt that the fundamental right of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of the people. It is on the basis of this distinction that the High Court has rightly concluded that there cannot be any right to call or enforce a 'Bandh' which interferes with the exercise of the fundamental freedoms of other citizens, in addition to causing national loss in many ways. We may also add that the reasoning given by the High Court, particularly those in paragraphs 12, 13 & 17 for the ultimate conclusion and directions in paragraph 18 is correct with which we are in agreement."

11. In paragraphs 12, 13 & 17 of *Bharat Kumar K. Palicha and another v. State of Kerala and others* (AIR 1997 Kerala 291) the Full Bench of Kerala High Court observed :

> "12. It is true that there is no legislative definition of the expression 'bundh' and such a definition could not be tested in the crucible of constitutionality. But does the absence of a definition deprive the citizen of a right to approach this Court to seek relief against the bundh if he is able to establish before the Court that his fundamental rights are curtailed or destroyed by the calling of and the holding of a bundh ? When Article 19(1) of the Constitution guarantees to a citizen the fundamental rights referred to therein and when Article 21 confers a right on any person—not necessarily a citizen—not to be deprived of his life or personal liberty except according to procedure established by law, would it be proper for the Court to throw up its hands in despair on the ground that in the absence of any law curtailing such rights, it cannot test the constitutionality of the action? We think not. When property understood, the calling of a bundh entails the restriction of the free movement of the citizen and his right to carry on his avocation and if the Legislature does not make any law either prohibiting it or curtailing it or regulating it; we think that it is the duty of the Court to step into protect the rights of the

citizen so as to ensure that the freedoms available to him are not curtailed by any person or any political organisation. The way in this respect to the Courts has been shown by the Supreme Court in *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

13. It is argued on behalf of the respondents that a bundh could be peaceful or violent and even if the Court were to act, it could act only to curtail violent bundhs and not peaceful bundhs. It is contended that the Court cannot presume or generalise that the calling of a bundh always entails actual violence or the threat of violence in not participating in or acquiescing in the bundh. The decision in *Kameshwar Prasad v. State of Bihar*, AIR 1962 SC 1166 is referred to in that context. This theoretical aspect expounded by counsel for the respondents does not appeal to us especially since as understood in our country and certainly in our State, the calling for a bundh is clearly different from a call for a general strike or a hartal. We have already noticed that a call for a bundh holds out a warning to the citizen that if he were to go out for his work or to open his shop, he would be prevented and his attempt to take his vehicle on to the road will also be dealt with. It is true that theoretically it is for the State to control any possible violence or to ensure that a bundh is not accompanied by violence. But out present set u the reluctance and sometimes the political subservience of the law enforcing agencies and the absence political Will exhibited by those in power at the relevant time, has really led to a situation where there is no effective attempt made by the law-enforcing agencies either to prevent violence or to ensure that those citizens who do not want to participate in the bundh are given the opportunity to exercise their right to work, their right to trade or their right to study. We cannot also ignore the increasing frequency in the calling, holding and enforcing of the bundhs in the State and the destruction of public and private property. In the face of this reality, we think that when we consider the impact of a bundh on the freedom of a citizen, we are not merely theorising but are only taking note of what happens around us when a bundh is called and a citizen attempts either to defy it or seeks

to ignore it. We are not in a position to agree with counsel for the respondents that there are no sufficient allegations either in O.P. 7551 of 1994 or in O. P. 12469 of 1995 which would enable us to come to such a conclusion. In fact, the uncontroverted allegations in O.P. 12469 of 1995 are specific and are also supported by some newspaper clippings which though could not be relied on as primary material, could be taken note of as supporting material for the allegations in the Original Petition.

17. No political party or organisation can claim that it is entitled to paralyse the industry and commerce in the entire State or Nation and is entitled to prevent the citizens not in sympathy with its view point, from exercising their fundamental rights or from performing their duties for their own benefit or for the benefit of the State or the Nation. Such a claim would be unreasonable and could not be accepted as a legitimate exercise of a fundamental right by a political party or those comprising it. The claim for relief by the petitioners in these Original Petitions will have to be considered in this background."

12. The aforesaid observation having been upheld in *Communist Party of Indian (M) v. Bharat Kumar* (supra) is binding and cannot be digressed by any of the parties before us.

13. A call for Bundh since has the element of coercion cannot be taken recourse to at the cost of fundamental right of the people as a whole. Be there a call for voluntary support but since it has an element of force, it does not lie in the mouth of the respondent that it is the fundamental right under Article 19(1)(a) & (b) of the Constitution to call for Bundh/ Hartal/Strike.

14. However, in the case at hand there is a dispute as to whether when a bundh was called on 26-08-2004 and 02-09-2004 any element of force or coercion was displayed by members of respective political parties. Return filed by the State of Madhya Pradesh and its functionaries also no where points out that any force or coercion was applied by respondents No. 2 and 3. In view whereof and in absence of any cogent material on record except the newspaper clipping which we refrain to place reliance the relief as claimed by the petitioner to direct for payment of compensation cannot be granted. Further more, it cannot also be held that a force or coercion was applied

when a bundh was called on 26-08-2004 and 02-09-2004. To that extent the petition stands dismissed.

15. However, before parting with the matter we observe that, since bundh/ hartal/strike involves an element of force which has been declared to be not a fundamental right, it is directed that in future the State of Madhya Pradesh and its functionaries in case where there is a bundh/hartal/strike to take steps to prevent the coercion or the force applied by respective callers. The respondent/ State of Madhya Pradesh would also be at liberty in case it finds that public property/private property has been damaged in furtherance of such calls, to quantify the damage and call upon the callers to compensate the same. Individuals whose properties get damaged during such bundh or call are also at liberty to recover damages in accordance with law.

Petition dismissed

I.L.R. [2012] M.P., 453
WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav
W.P.No. 11791/2009(S) (Jabalpur) decided on 3 January, 2012

UNION OF INDIA & ors. ...Petitioners
Vs.
BHAIYA LAL NAI ...Respondent

Administrative Tribunals Act (13 of 1985), Fundamental Rule 56 Note 6 – Date of Birth – Transfer certificate contains date of birth **– At the time of appointment date of birth recorded as 20.09.1954 which was accepted by the petitioners therefore, the same can not be altered after 28 years of service – Deliberate attempt on the part of respondent to show incorrect date of birth for unfairly obtaining service benefits – Held – Petitioners are not debarred under Fundamental Rule 56 Note 6 in correcting date of birth – Petition allowed.** (Para 8)

प्रशासनिक अधिकरण अधिनियम (1985 का 13), मूलभूत नियम 56 नोट 6 – जन्म तिथि – स्थानांतरण प्रमाण पत्र में जन्म तिथि दी गई है – नियुक्ति के समय जन्म तिथि 20.09.1954 दर्शाई गई जो कि याचीगण द्वारा स्वीकार की गई, इसलिये सेवा के 28 वर्ष बाद उसको परिवर्तित नहीं किया जा सकता – प्रत्यर्थी द्वारा सेवा का अनुचित लाभ प्राप्त करने के लिये जानबूझकर गलत जन्म तिथि दर्शाने का प्रयत्न किया गया – अभिनिर्धारित – याचीगण मूलभूत नियम 56 नोट 6 के अंतर्गत जन्म तारीख को सही करने से विवर्जित नहीं – याचिका मंजूर।

Cases referred :

2003(3) MPHT 22(DB), (2003) 8 SCC 319, 2009 SC 2568.

S.A. Dharmadhikari, for the petitioners.
N.S. Ruprah, for the respondent.

ORDER

The order of the court was delivered by :
AJIT SINGH, J. :- This petition, under Article 227 of the Constitution, is directed against the order dated 10.9.2009 passed by the Central Administrative Tribunal, Jabalpur Bench (in short, "the Tribunal") whereby it has allowed the respondent's Original Application No.693/2008.

2. On 2.5.1980 the respondent was appointed in the Grey Iron Foundry, Jabalpur, as Labour "B". At the time of appointment, the respondent produced a transfer certificate dated 15.3.1976 issued by the Government Pre-Middle School, situated at Lauri, Tahsil Sirmour, District Rewa, showing his date of birth as 20.9.1954. On the basis of this transfer certificate the date of birth of respondent was recorded as 20.9.1954 in his service book. After about 20 years, on 21.11.2001 the respondent was transferred to Ordnance Factory, Khamaria, Jabalpur, of which petitioner nos.2 and 3 are the General Manager and Joint General Manager. At the time of verification of the respondent's date of birth by the Accounts Office, it was found that the transfer certificate dated 15.3.1976 annexed to his service book was not legible because it was in torn condition. Therefore, an affidavit was sought from him in this regard. The respondent submitted his affidavit on 24.1.2006 and stated therein that he is class sixth pass. But his transfer certificate dated 15.3.1976 showed that he was class seventh pass. This difference created suspicion in the minds of petitioners. Hence, by letter dated 20.7.2006 they requested the Government Pre-Middle School, Lauri, to provide a duplicate of the transfer certificate dated 15.3.1976 for verification of the date of birth of respondent. The school accepted the request by sending duplicate transfer certificate of the respondent along with its letter dated 3.8.2006. The duplicate transfer certificate was identical to the transfer certificate dated 15.3.1976 in all respects but for the date of birth of respondent. In the duplicate transfer certificate the date of birth of respondent was shown as 20.9.1948 and not 20.9.1954 as mentioned in the transfer certificate dated 15.3.1976.

3. Difference in the dates of birth of respondent entered in the aforesaid two transfer certificates persuaded the petitioners to call for clarification vide

letter dated 28.8.2006 from him. In the letter, the respondent was also called upon to explain why his correct date of birth be not considered as 20.9.1948 and the same be entered in the service book instead of 20.9.1954. The respondent along with his reply dated 25.9.2006 submitted a copy of the transfer certificate dated 16.9.2006 issued by another school namely Government Primary School, Mahajan Kendra, Padua, District Rewa, and also his affidavit declaring therein that his correct date of birth is 20.9.1954. Dissatisfied with the reply, the petitioners by letter dated 27.10.2006 asked the respondent to provide the details i.e. name of the school, its address, year of passing and class passed mentioned in the certificate submitted at the time of his appointment but he did not give any reply. The transfer certificate dated 30.8.2006 issued by the Government Pre-Middle School, Lauri, District Rewa, and the transfer certificate dated 16.9.2006 submitted by the respondent reflected his different dates of birth. The petitioners, therefore, requested the District Education Officer, Rewa, to investigate into the genuineness of the certificates in respect of the date of birth of respondent. The District Education Officer, after examining the records, by his letter dated 24.4.2008 informed the petitioners that the correct date of birth of respondent is 20.9.1948 and not 20.9.1954 as claimed by the latter.

4. The petitioners thereupon issued a show cause notice dated 2.5.2008 to the respondent seeking an explanation as to why disciplinary action may not be initiated against him for submitting a false affidavit and an incorrect transfer certificate regarding his date of birth. The respondent, in his reply dated 15.5.2008, requested the petitioners not to initiate disciplinary action against him and that he had no objection if his date of birth was altered in the service book on the basis of documents available with the department. The petitioners, after considering the reply of respondent, by order dated 10.6.2008 altered his date of birth in the service book from 20.9.1948 to 20.9.1954. In the result the respondent, on attaining the age of superannuation, retired from service on 30.9.2008.

5. Aggrieved, the respondent challenged the order dated 10.6.2008 in Original Application No.693/2008 before the Tribunal on the ground that the petitioners had no authority to alter his date of birth in the service book. He, in support of his submission, referred to Fundamental Rule 56 Note 6. The Tribunal agreed with the contention of respondent and by order dated 10.9.2009 quashed the order dated 10.6.2008. It is in this background, the petitioners have filed the present petition for quashing of order dated

10.9.2009.

6. It is argued on behalf of the petitioners that the Tribunal committed an illegality in allowing the respondent's original application by wrongly applying Fundamental Rule 56 Note 6 in his favour. It has also been argued that the Fundamental Rule 56 Note 6 does not in any manner curtail the power of petitioners in correcting an entry in the service book pertaining to the date of birth of a Government servant on the discovery of fraud committed by such Government servant regarding his date of birth. The petitioners, in support of their submission, placed reliance on a decision of this High Court rendered in *Mahendra Kumar Soni v. State of M. P.* 2003 (3) M.P.H.T. 22 (DB). The learned counsel for respondent, on the other hand, defended the order passed by the Tribunal.

7. Fundamental Rule 56 Note 6, on which the Tribunal has relied for allowing the original application of respondent and quashing the order dated 10.6.2008 passed by the petitioners altering his date of birth in the service book from 20.9.1954 to 20.9.1948, reads as under:

> "Note 6 – The date on which a Government servant attains the age of fifty eight years or sixty years, as the case may be, shall be determined with reference to the date of birth declared by the Government servant at the time of appointment and accepted by the appropriate authority on production, as far as possible, of confirmatory documentary evidence such as High School or Register. The date of birth so declared by the Government servant and accepted by the appropriate authority shall not be subject to any alteration except as specified in this note. An alteration of date of birth of a Government servant can be made, with the sanction of a Ministry or Department of the Central Government, or the Comptroller and Auditor-General in regard to persons serving in the Indian Audit and Accounts Department, or an Administrator of a Union Territory under which the Government servant is serving, if -
>
> (a) a request in this regard is made within five years of his entry into Government service;
>
> (b) it is clearly established that a genuine bona fide mistake has occurred; and

(c) the date of birth so altered would not make him ineligible to appear in any School or University or Union Public Service Commission examination in which he had appeared, or for entry into Government service on the date on which he entered Government service."

8. The Tribunal has taken the view that at the time of appointment, the respondent declared his date of birth as 20.9.1954 which was accepted by the petitioners and, therefore, the same cannot be altered after 28 years of service unless an exception stated in the Fundamental Rule 56 Note 6 existed. But we are unable to agree with the Tribunal. The transfer certificate dated 15.3.1976 issued by the Government Pre-Middle School situated at Lauri, District Rewa, was relied by the respondent at the time of appointment that his date of birth was 20.9.1954. However, in an inquiry held later it was found that the transfer certificate issued by the same school contained the date of birth of respondent as 20.9.1948. During the course of hearing, we also examined the original service book of the respondents produced by the petitioners. On examining the same we find that in the transfer certificate dated 15.3.1976 the year of birth of respondent is not legible at all. It is, therefore, clear that at the time of appointment there was a deliberate attempt on the part of respondent to show his incorrect date of birth for unfairly obtaining service benefits. This conduct of the respondent apparently amounts to fraud. The difference in the two dates is of six years and it is not possible to infer that the respondent was mistaken about his date of birth when he joined the service. Fundamental Rule 56 Note 6 does not in any manner restrict the right of the Government in altering the date of birth even on the discovery of fraud committed by the Government employee at the time of his appointment. The fraud played by the respondent relating to the entry of his date of birth in the service book vitiates the entry. Fraud, as is well-known, vitiates all solemn acts (See *Ram Chandra Singh v. Savitri Devi* (2003) 8 SCC 319. *State of Chhattisgarh v. Dhirio Kumar Sengar* AIR *2009* SC 2568). In such cases, the petitioners are not debarred under Fundamental Rule 56 Note 6 in correcting the date of birth. In *Mahendra Kumar Soni* (Supra) a Division Bench of this High Court had also taken a similar view while interpreting an identical Rule 84 of the Madhya Pradesh Financial Code.

9. For these reasons, we allow the petition and quash the order dated 10.9.2009 passed by the Tribunal in Original Application No.693/2008.

Petition allowed

I.L.R. [2012] M.P., 458

WRIT PETITION

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

W.P.No. 8283/2009 (Jabalpur) decided on 12 January, 2012

PICHADA AVAM DALIT WARG SANGH (M.P.) ...Petitioner

Vs.

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

***Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P. (21 of 1994), Sections* 2(b), 4 – *Reservation of Posts – Anganwadi Workers* – Post of Anganwadi Workers and Helpers are not statutory posts and have been created in terms of Scheme – Since Anganwadi Workers and helpers are not holders of any posts, therefore, provisions of Adhiniyam, 1994 are not applicable – Petition dismissed.** (Para 8)

लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) अधिनियम, एम.पी. (1994 का 21), धाराएँ 2(बी), 4 – पदों का आरक्षण – आँगनबाड़ी कार्यकर्ता – आँगनबाड़ी कार्यकर्ता और सहायक के पद कानूनी पद नहीं हैं और योजना की शर्तों से सृजित किये गये हैं – चूंकि आँगनबाड़ी कार्यकर्ता और सहायक किसी पद को धारण नहीं करते हैं, इसलिए अधिनियम 1994 के उपबंध लागू नहीं होते – याचिका खारिज।

Cases referred :

(2007) 11 SCC 681.

Vishal Dhagat, for the petitioner.

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

ORDER

The order of the court was delivered by :

AJIT SINGH, J. :- The petitioner is a society registered under the Madhya Pradesh Society Registrikaran Adhiniyam, 1973. Its one of the objects is to uplift the members of Scheduled Castes, Scheduled Tribes and other Backward Classes. By this petition, filed as public interest litigation, it has prayed that the respondents be directed to implement the provisions of the Madhya Pradesh Lok Sewa (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon

Ke Liye Arakshan) Adhiniyam, 1994 (in short, "the Adhiniyam, 1994) in the appointments of Anganwadi workers and helpers.

2. On 3.8.2009, Department of Women and Child Development of the State Government published an advertisement for filling up the vacancies in different districts of Anganwadi workers and helpers. The grievance of petitioner is that, except for providing provision for giving additional marks to the candidates of Scheduled Castes and Scheduled Tribes, no provision for the reservation of vacancies for them has been made which is illegal and contrary to the Adhiniyam, 1994.

3. In reply, the State Government has justified its action of not providing reservation for the vacancies in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes and other Backward Classes on the ground that the Anganwadi workers and helpers are not holders of posts. The State Government has also placed reliance on the decision of the Supreme Court rendered in *State of Karnataka v. Ameerbi* (2007) 11 SCC 681.

4. The Adhiniyam 1994 has been enacted by the State Government. Its long title states that it is an Act to provide for the reservation of vacancies in public services and posts in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens and for matters connected therewith or incidental thereto. Section 3 of the Adhiniyam makes it applicable to the establishment as defined therein. Establishment is defined in section 2(b) which reads as under:

> "2(b) "*Establishment*" means any office of the State Government or of a local authority or statutory authority constituted under any Act of the State for the time being in force, or a University or a company, corporation or a co-operative society in which not less than fifty-one percent of the paid up share capital is held by the State Government or the institutions receiving grant-in-aid or any cash grant from the State Government and includes a work charge or contingency paid establishments and such establishments in which casual appointments are made but does not include the establishments covered under Article 30 of the Constitution."

5. Section 4 of the Adhiniyam 1994 provides for the fixation of percentage

for reservation of posts and standard of evaluation. The relevant extract of the section reads as under:

"4. Fixation of percentage for reservation of posts and standard of evaluation.- (1) Unless otherwise provided by or under this Act, the posts reserved for the members of Scheduled Castes or Scheduled Tribes or other Backward Classes shall not be filled by the members who do not belong to such castes or tribes or classes, as the case may be.

(2) Subject to other provisions of this Act there shall be reservation for the persons belonging to the Scheduled Castes, Scheduled Tribes and other Backward Classes, at the stage of direct recruitment in public services and posts.

(i) at the State level, the following percentage of vacancies arising in a recruitment year, in Classes I, II, III and IV posts-

(a) In Class I and Class II posts-

Scheduled Castes	16 percent
Scheduled Tribes	20 percent
Other Backward Classes	14 percent

(b) Class III and Class IV posts-

Scheduled Castes	16 percent
Scheduled Tribes	20 percent
Other Backward Classes	14 percent

(ii) in an establishment at the Divisional or District level the percentage of vacancies arising in a Recruitment Year in such categories of Class III and Class IV posts, as may be notified by the State Government in this behalf.

(iii) the appointments to vacancies as aforesaid in (i) and (ii), shall be made in accordance with a roster as may be prescribed:

Provided that the aforesaid reservation shall not apply to such categories of persons belonging to the other Backward Classes

as are notified by the State Government as belonging to the creamy layer from time to time.".

6. In the year 1975 the Central Government floated an Integrated Child Development Services (ICDS) Scheme. The object of the scheme is mainly to provide pre-school education and also to improve the nutritional and health status of children in the age group 0-6 years. The scheme is centrally sponsored and is being implemented through the states on a cost-sharing basis in the ratio of 50:50 for supplementary nutrition and 90:10 for other components. Anganwadi workers and helpers are the front line functionaries at the Anganwadi Centres who render services as "honorary workers". They are not appointed on a pay scale and are paid honorarium. There is no fixed criteria as regards honorarium. Some States pay honorarium as fixed by the Central Government and some pay additional honorarium from their own resources for additional functions assigned under other schemes.

7. The question which calls for our consideration is whether provisions of the Adhiniyam 1994 are applicable for filling up the vacancies of Anganwadi workers and helpers.

8. For the purposes of reservation, the definition of establishment quoted above is not to be read alone. It is to be read along with section 4 of the Adhiniyam which too has been quoted in para 5 of this order. Section 4 provides for reservation for the persons belonging to the Scheduled Castes, Scheduled Tribes and other Backward Classes at the stage of direct recruitment in public services and posts. There cannot be any public service without post. Thus, if there are no posts in an establishment there cannot be any reservation. In *State of Karnataka v. Ameerbi* (Supra) the Supreme Court has held that the posts of Anganwadi workers and helpers are not statutory posts and that they have been created in terms of the scheme. The Supreme Court has also held that they do not carry any function of the State nor they hold post under a statute. Therefore, since the Anganwadi workers and helpers are not holders of any posts, our answer is that the provisions of the Adhiniyam 1994 are not applicable to them.

9. In the result, we find no merit in the petition. It is accordingly dismissed.

Petition dismissed

I.L.R. [2012] M.P., 462
WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav
W.P.No. 12977/2009 (Jabalpur) decided on 12 January, 2012

SUKHIYA LODHI ...Petitioner.
Vs.
STATE OF M.P. & ors. ...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 17 – Reservation of Seats **– Reservation of seat of Sarpanch for Scheduled Tribe challenged on the ground that there are only two persons i.e, husband and wife and therefore, population of S.T. ought to have been declared as no population – Held- No Population do not cover a case where husband and wife belonging to S.T. live in same Gram Panchayat – Voters have choice either to elect husband or wife – Reservation of seat can not be held to be farce – Petition dismissed.** (Para 6)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 17 – पदों का आरक्षण – अनुसूचित जनजाति के लिए आरक्षित सरपंच के पद को इस आधार पर चुनौती दी गई कि केवल दो व्यक्ति अर्थात पति और पत्नि हैं इसलिए, अनुसूचित जनजाति की जनसंख्या को कोई जनसंख्या नहीं घोषित की जाना चाहिये थी – अभिनिर्धारित – जनसंख्या नहीं होने का मामला ऐसे मामले को आच्छादित नहीं करता जहाँ अनुसूचित जनजाति के पति और पत्नि एक ही ग्राम पंचायत में निवासरत हों – मतदाताओं के पास पति या पत्नि में से किसी एक को निर्वाचित करने का विकल्प है – पद के आरक्षण को प्रहसन होना निर्धारित नहीं किया जा सकता – याचिका खारिज।

Sanjay Agrawal, for the petitioner.
S.S. Bisen, G.A. for the respondents No.1 to 3/State.
A.K. Pandey, for the respondents No. 4 & 5.

ORDER

The order of the court was delivered by :
AJIT SINGH, J. :- The petitioner is a resident of Village Kota-I, Tahsil Nowgaon, District Satna. Earlier he was Sarpanch of Gram Panchayat Kota-I. He, by this petition filed as a public interest litigation, has challenged the reservation of the post of Sarpanch of Gram Panchayat, Kota-I for scheduled tribes.

2. The State of Madhya Pradesh has enacted the Madhya Pradesh (Panchayat Raj Avam Gram Swaraj) Adhiniyam, 1993 (in short, "the Adhiniyam"). Its section 10 provides for the establishment of gram panchayat, janpad panchayat and zila panchayat and section 17 deals with the election of Sarpanch and Up-Sarpanch in every gram panchayats. Section 17 also provides for the reservation of seats of Sarpanchas of gram panchayats for scheduled castes and scheduled tribes by rotation in the prescribed manner.

3. Sub-section (4) of section 17 of the Adhiniyam, which is relevant for the decision of this petition, reads as under:

> "17. Election of Sarpanch and Up-Sarpanch.-
>
> (4) The seats reserved under this section shall be allotted by the prescribed authority in the Gram Panchayat within the block by rotation in the prescribed manner:
>
> Provided that the Gram Panchayat which has no population of Scheduled Castes or Scheduled Tribes or other Backward Classes, shall be excluded for allotment of seat reserved for Scheduled Castes, Scheduled Tribes or other Backward Classes, as the case may be."

4. Relying upon the above quoted proviso to sub-section (4) of section 17 it is submitted by the petitioner that since the population of scheduled tribe in Gram Panchayat Kota-I is only two, the reservation of the seat of Sarpanch for scheduled tribes is illegal. According to the petitioner, only respondent no.4 Amarnath Kol and his wife respondent no.5 Rani are members of the scheduled tribe in the village and this being the situation, the population of scheduled tribes in Gram Panchayat Kota-I ought to have been treated as "no population" because the election of respondent no.5 as Sarpanch was in reality no election and the post of Sarpanch has been virtually gifted to her.

5. The State, in its return, has justified the reservation of the post of Sarpanch of Gram Panchayat Kota-I for scheduled tribes and also the election of respondent no.4 as Sarpanch. The State Government has also submitted that the population of two persons of scheduled tribe in a gram panchayat cannot be treated as no population of scheduled tribes.

6. The expression "no population" in the proviso to sub-section (4) of section 17 of the Adhiniyam does not cover a case where husband and wife belonging to scheduled tribe live in the same gram panchayat. Husband and

wife constitute two persons residing in the gram panchayat and the possibility of both contesting for the post of Sarpanch cannot be ruled out. The voters are the villagers residing in the gram panchayat and in case of both husband and wife contesting the election, they can vote either. Therefore, the reservation under challenge as well as the election of respondent no.5 cannot be held to be farce and was justified under the law.

7. We find no merit in the petition. It is accordingly dismissed but without any order as to costs.

Petition dismissed

I.L.R. [2012] M.P., 464

ELECTION PETITION

Before Mr. Justice R.C. Mishra

E.P. No. 9/2009 (Jabalpur) decided on 10 December, 2011

SHRINIWAS TIWARI ...Petitioner

Vs.

RAJKUMAR URMALIA & ors. ...Respondents

Representation of the People Act (43 of 1951), Section 100(1)(d)(iii)(iv), Civil Procedure Code (5 of 1908), Order 13 Rule 10, Civil Court Rules (M.P.) 1961, Rule 105 – Inspection/production of Ballot Papers **– Inspection of ballot papers can not be granted to support vague pleas – Mere allegation of suspicion or belief that there has been improper reception, refusal or rejection of votes will not be sufficient – No pleading of material facts such as serial number of postal ballot papers alleged not to have been opened and objection if any raised by agent – Not a fit case for ordering production or inspection of postal ballot papers.** (Paras 10, 11 & 13)

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100(1)(डी)(iii)(iv), सिविल प्रक्रिया संहिता (1908 का 5) आदेश 13 नियम 10, सिविल न्यायालय नियम (म.प्र.) 1961, नियम 105 – मतपत्रों का निरीक्षण/पेश करना – अस्पष्ट अभिवचन के समर्थन के लिए मत पत्रों के निरीक्षण की अनुमति प्रदान नहीं की जा सकती – मात्र संदेह का अभिवचन या यह विश्वास करना कि मत पत्रों को अनुचित रुप से ग्रहण या अस्वीकार किया गया पर्याप्त नहीं होगा – तात्विक तथ्यों के संबंध में कोई अभिवचन नहीं जैसे कि डाक मतपत्रों की क्रम संख्या जिसे नहीं खोला जाना अभिकथित किया गया है और आक्षेप यदि कोई हो, जिसे एजेन्ट द्वारा उठाया गया – डाक मतपत्रों के निरीक्षण या पेश करने के लिये आदेश देने के लिये उपयुक्त प्रकरण नहीं।

Cases referred :

AIR 2009 SC 2352, AIR 2003 SC 2271, AIR 2006 SC 2050, (1978) 1 SCC 405, AIR 2009 SC 2247, AIR 1964 SC 1249, AIR 1966 SC 773, AIR 1993 H.P. 84.

Sanjay K. Agrawal, for the petitioner.
Dilip Pandey, for the respondent No.1.
Neeraj Singh, for the respondent No.2.
None for the respondent Nos. 3 to 25 though served.

ORDER

R.C. MISHRA, J. :- This order shall govern disposal of I.A. No.27/10, which is an application, under Order XIII Rule 10 of the Code of Civil Procedure (hereinafter referred to as 'the Code') read with Rule 105 of the Madhya Pradesh Civil Court Rules, 1961, moved by the petitioner for production of postal ballot papers.

2. In this petition, election of the returned candidate *viz.* the respondent no.1 from M.P. Legislative Assembly Constituency Sirmour No.68, has been called in question on the grounds mentioned in sub-clauses (iii) and (iv) of Section 100(1)(d) of the Representation of People Act, 1951 (for brevity 'the Act'). The petitioner has sought the following reliefs –

(i) an order for re-inspection/re-count of the votes polled in the constituency and on the basis of such re-inspection/re-count of votes, a declaration that the election of respondent no.1 is void.

(ii) a declaration that he himself has been duly elected from the Constituency.

3. As per the petitioner, the postal ballot papers are public documents but there is no provision for issuance of certified copies thereof. He has also highlighted the fact that upon his pleadings that out of 365 postal ballot papers, only 60 were opened for counting, a specific issue has been framed as to whether the result of the election in so far as it concerns respondent no.1 was materially affected by improper rejection of any vote.

4. Opposing the application, respondent no.1 has submitted that provisions mentioned therein are not applicable to postal ballot papers as they are not public documents. According to him, all 365 postal ballot papers

were opened by Returning Officer in presence of petitioner's counting agent and 305 ballots were found to be invalid but the agent neither raised any objection during the process of counting nor made any request for re-counting of the ballots.

5. Learned counsel for the petitioner, while placing reliance on decision of the Supreme Court in *Lakshmi v. Chinnammal @ Rayyamal* AIR 2009 SC 2352, has contended that Order XIII Rule 10 of the Code empowers the Court to call for record of any proceedings whether judicial or otherwise. Reference has also been made to the following observations made by the Supreme Court in Para 27 of the decision in *T.A. Ahammed Kabeer v. A.A. Azeez* AIR 2003 SC 2271 -

> "Nevertheless, the power to direct inspection of ballot papers is there and ought to be exercised if, based on precise allegations of material facts, also substantiated, a case for permitting inspection is made out as is necessary to determine the issue arising for decision in the case and in the interest of justice. As held by the Constitution Bench in *Ram Sewak Yadav v. Hussain Kamil Kidwai* (1964) 6 SCR 238, an Election Tribunal has undoubtedly the power to direct discovery and inspection of documents within the narrow limits of Order XI of Code of Civil Procedure. Inspection of documents under Rule 15 of Order XI of Code of Civil Procedure may be ordered of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party, and under Rule 18(2) of other documents in the possession or power of the other party. The returning officer is not a party to an election petition and an order for production of the ballot papers cannot be made under Order XI of Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the returning officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers which power is clearly implicit in Sections 100(1)(d)(iii), 101, 102 and Rule 93 of the Conduct of Election Rules 1961. This power to order inspection of the ballot papers which is apart from Order XI Code of Civil Procedure may

be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by Sections 94 and 128(1). However, the Constitution Bench has cautioned, by the mere production of the sealed boxes of ballot papers before the Election Tribunal pursuant to its order the ballot papers do not become part of the record and they are not liable to be inspected unless the Tribunal is satisfied that such inspection is in the circumstances of the case necessary in the interests of justice."

6. To strengthen the submission that the bar of Rule 94 of the Conduct of Election Rules, 1961 (for short "the Election Rules") would not be attracted as this Court has jurisdiction even to issue summons to a voter, though he cannot be compelled to state for whom he had voted, learned counsel for the petitioner has referred to the decision of the Apex Court in *Navini Narsimha Reddy v. K. Laxman* AIR 2006 SC 2050. According to him, there is no legal impediment to even issuance of a direction for re-poll of postal ballots. For this, attention has been drawn to following observations made by the Constitution Bench in Para 91 of the pronouncement in *Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi* (1978) 1 SCC 405) -

"Having regard to statutory setting and comprehensive jurisdiction of the Election Court we are satisfied that it is within its powers to direct a re-poll particular polling stations to be conducted by the specialised agency under the Election Commission and report the results and ballots to the Court. Even a re-poll of postal ballots, since those names are known can be ordered taking care to preserve the secrecy of the vote."

7. In reply, learned counsel for respondent no.1 has pointed out that the I.A. has been moved for production of the postal ballot papers and not for inspection thereof. According to him, the prayer made in the I.A. is not covered by Order XIII Rule 10 and ought to have been made under Rule 93 of the Election Rules after making out a clear case for ordering the production and inspection of election papers. For this, primal reliance has been placed on the principle enunciated by the Apex Court in *Fulena Singh v. Vijay Kumar Sinha* AIR 2009 SC 2247. He is further of the view that that even if for the sake of arguments it is assumed that 305 postal ballot papers were not opened, it would not affect the result of the election as the respondent no.1 had won by a margin of 309 votes and there were as many as 26 candidates in the fray.

Attention has also been invited to the fact that the petitioner has not preferred to summon the Returning Officer to prove the corresponding pleadings in Paragraphs 15 to 17 of the petition or to summon relevant account of votes recorded by the counting supervisor in Form 17-C, which is a public document signed by the candidates or their representatives.

8. The I.A. under consideration was moved as early as on 17/8/10 and, vide order-dated 25/8/10, consideration thereon was deferred till recording of petitioner's evidence that was completed on 21/9/10 only. Thereafter, as many as five other witnesses on behalf of the petitioner including his election agent Rama Shankar Mishra (PW6) and five witnesses on behalf of respondent no. 1 including himself and the District Election Officer have been examined. The I.A. has been pressed at this stage when the trial is posted for recording of evidence of returning officer namely Mohd. Fahatullah Khan as DW6. As pointed out already, inspection of the votes is one of the reliefs prayed for in the petition. The obvious purpose of the prayer for production of postal ballot papers is nothing but to inspect the same. However, while considering the prayer, it would not be desirable to appraise the evidence brought on record as such an exercise may cause an unintended prejudice to either of the parties to the election dispute, trial of which is nearing completion.

9. The pronouncement of the Constitution Bench of the Apex Court in *Ram Sewak Yadav v. Hussain Kamil Kidwai* AIR 1964 SC 1249 has been consistently followed in all subsequent decisions on the point including *Jagjit Singh, Dr. v. Giani Kartar Singh* AIR 1966 SC 773 and *T.A. Ahammed Kabeer*'s case (above). It is relevant to note here that by virtue of S.41 of the Act 47 of 1966, Ss. 86 and 87 of the Act were substituted for Ss.86 to 92. Under the erstwhile Section 92 of the Act, the tribunal was given the powers which are vested in a court under the Code of Civil Procedure, when trying a suit, in respect of (a) discovery and inspection; (b) enforcing the attendance of witnesses, and requiring the deposits of their expenses; (c) compelling the production of documents; (d) examining witnesses on oath; (e) granting adjournments; (f) reception of evidence taken on affidavit; and (g) issuing commissions for the examination of witnesses. Scope of the power conferred on the tribunal under clause (a) was explained by a three Judge Bench in *Jagjit Singh*'s case in these terms -

> "Section 92 of the Act, which defines the powers of the Tribunal, in terms, confers on it, by Cl. (a), the powers which are vested in a Court under the Code of Civil Procedure

when trying a suit, inter alia, in respect of discovery and inspection. Therefore, in a proper case, the Tribunal can order the inspection of the ballot boxes and may proceed to examine the objections raised by the parties in relation to the improper acceptance or rejection of the voting papers. But in exercising this power, the Tribunal has to bear in mind certain important considerations. Section 83 (1) (a) of the Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies; and in every case, where a prayer is made by a petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which S. 83(1)(a) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting. It may be that in some cases, the ends of justice would make it necessary for the Tribunal to allow a party to inspect the ballot boxes and consider his objections about the improper acceptance or improper rejection of votes tendered by voters at any given election; but in considering the requirements of justice, care must be taken to see that election petitioners do not get a chance to make a roving or fishing enquiry in the ballot boxes so as to justify their claim that the returned candidate's election is void".

10. Rule 54A of the Election Rules prescribes the procedure for counting of votes received by post. Sub-Rule (1) mandates that the returning officer shall first deal with the postal ballot papers. Sub-rules (2) to (10), which provide for scrutiny and rejection of the postal ballot papers, also contemplate

reasonably sufficient opportunity to the candidates to inspect the ballot papers sought to be rejected by the returning officer. Sub-Rule (11) requires that the returning officer (a) shall count all the valid votes given by postal ballot papers in favour of each candidate (b) record the total thereof in the result-sheet in Form-20 and (c) announce the same. Scheme of these rules reflects that every candidate has opportunity to examine the voting papers before they are counted, and in case the objections raised by him or his election agent have been improperly over-ruled, he knows precisely the nature of the objections raised by him and the voting papers to which those objections related.

11. Adverting to the pleadings referred to in the I.A., it may be observed that in paragraphs 15, 16 and 17 of the petition wherein averments pertaining to so-called improper rejection of 305 postal ballot papers have been made, material facts such as serial numbers of the postal ballot papers not opened and the precise objection with regard to each of such ballot papers, if any, raised by the counting agent, have not been stated. In absence of such an information, which the petitioner alone should have known or should be deemed to know, any inspection of the ballot paper would amount to a roving and fishing inquiry (See. *Narain Chand Prashar v. Prem Kumar Dhumal* AIR 1993 H.P. 84).

12. In the light of the guidelines laid down in *Ram Sewak*'s (supra), an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not substantiated by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.

13. Moreover, it is well-settled that inspection of election papers mentioned in detail in Rule 93 (a) to (e) is not a matter of course. Inspection of those papers cannot be ordered and parties cannot be permitted to inspect the same for the purposes of making a roving enquiry in order to fish out the materials and to derive support to one's own case. A clear case is, therefore, required to be made out for ordering the production and inspection of election papers by the parties [See. *Fulena Singh*'s case (supra)].

14. This apart, as crystallized in clause (3) of summing up of the law, finding place in Para 33 of the judgment in *T.A. Ahammed Kabeer*'s case (*ibid*) –

> "For the purpose of enabling an enquiry that any votes have been improperly cast in favour of any candidate other than the returned candidate or any votes have been improperly refused or rejected in regard to the returned candidate the election Court shall acquire jurisdiction to do so only on the two condition being satisfied: (i) the election petition seeks a declaration that any candidate other than returned candidate has been duly elected over and above the declaration that the election of the returned candidate is void; and (ii) the recrimination petition under Section 97(1) is filed".

15. Thus, viewed from any angle, the prayer for production of postal ballot papers does not deserve acceptance.

16. The I.A. is, accordingly, dismissed.

Order accordingly

I.L.R. [2012] M.P., 471
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 495/1994 (Jabalpur) decided on 15 September, 2011

INDRAKALI (SMT.) & ors. ...Appellants
Vs.
RAVI BHAN PRASAD & anr. ...Respondents

*A. **Hindu Law – Para 126 – Nature of Property – Ancestral or Stridhan*** - **Property acquired by a daughter by way of gift from her father cannot be treated as an ancestral property and would be her stridhan.** (Paras 16 to 19)

क. हिन्दू विधि – पैरा 126 – सम्पत्ति का स्वरुप – पैतृक अथवा स्त्रीधन – पुत्री द्वारा अपने पिता से भेंट के रुप में अर्जित की गई सम्पत्ति पैतृक सम्पत्ति की तरह नहीं मानी जा सकती और वह उसका स्त्रीधन होगा।

*B. **Criminal Procedure Code, 1973 (2 of 1974), Section 145 – Possession of Supurdgidar*** - **Possession of Supurdgidar in proceedings under Section 145 shall be deemed to be of the person for whom he is**

possessing the attached property. (Para 20)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 145 – सुपुर्दगीदार का कब्जा – धारा 145 की कार्यवाही के अंतर्गत सुपुर्दगीदार का कब्जा, उस व्यक्ति का समझा जायेगा जिसके लिये वह कुर्क सम्पत्ति का कब्जाधारक है।

Cases referred :

AIR 1961 SC 1268, AIR 1977 SC 2230, AIR 1957 SC 314.

K.S. Jha, for the appellants.
K.P. Mishra with *Amresh Mishra* for the respondent No.1.
Akhilesh Singh, P.L. for the respondent No.2/State.

JUDGMENT

A.K. SHRIVASTAVA, J.:- This second appeal has been filed at the instance of defendant against the judgment of reversal. Learned Trial Court dismissed the suit of the plaintiff and the first appeal which was filed by him has been allowed by the impugned judgment and decree by decreeing the suit.

2. The facts necessary for disposal of this second appeal are that a suit for declaration and injunction and for delivery of possession of Khasra No.1349 area 4.09 decimal and survey No.1350 area 2.20 decimal be delivered to the plaintiff Ravibhan Prasad (respondent No.1 herein). According to the plaintiff defendant No.1 Indrabhan is his real brother and they were also having one elder broth namely Suryabhan, who had died in the year 1946. Further the case of the plaintiff is that the suit property (survey No.1349 and 1350) was owned by the father-in-law of their elder brother Suryabhan namely Ramsanehi. According to the plaintiff, Ramsanehi gave the suit property to his daughter (wife of Suryabhan). After the death Suryabhan in the year 1946, the defendant No.1 being the elder brother got the suit property mutated in his name, although both of them were having possession on it. Apart from the suit property certain other ancestral property was also there. Further it has been pleaded that the ancestral property as well as suit property was partitioned between the plaintiff and defendant in the year 1964. The property which fell in the share of plaintiff has been described in para 6(A) while the property which fell in the share of defendant Indrabhan has been described in Pra 6(B) and since then both the parties are possessing their respective share which they obtained in partition. According to plaintiff the suit property fell in his share in partition and he was accordingly possessing the same.

3. It is further the case of the plaintiff that in the year 1988 defendant-Indrabhan forcibly dispossessed him from the suit property as a result of which he assembled a Panchayat and on being pacified by Panchs to defendant Indrabhan, the possession of suit property was delivered to the plaintiff back. However again defendant Indrabhan took illegal possession of the suit property by ousting the plaintiff. Hence a suit for declaration and possession has been filed by the plaintiff on 03.11.1988.

4. The defendant Indrabhan denied the plaint averments by filing the written statement and pleaded that suit property is not owned by the plaintiff and the same was given to him and it was never partitioned. He also setup a plea of adverse possession on the suit property and also pleaded that the suit is barred by time.

5. Learned Trial Court framed necessary issues and after recording the evidence of the parties dismissed it on merits as well as on the ground of limitation holding that suit was time barred and further came to hold that the defendant had acquired *bhumiswami* right by adverse possession on the suit property.

6. The first appeal which was filed by the plaintiff has been allowed by the impugned judgment and decreed his suit.

7. In this manner this second appeal has been filed by the defendant Indrabhan in this Court.

8. During the pendency of this second appeal, the defendant-Indrabhan died and his LRs who are present appellants were brought on record.

9. This Court on 21.01.2011 admitted the appeal on the following substantial questions of law :-

> 1."Whether the property acquired by a daughter by way of gift from her father in view of para 126 of Hindu Law, can be treated to be an ancestral property ?"
>
> 2. Whether the suit filed by the plaintiff is within limitation ?"

10. Shri Jha, learned counsel for the appellants submitted that it is plaintiff's own case that the suit property was owned by the wife of eldest brother of plaintiff and defendant namely Suryabhan. It is also the case of the plaintiff that it has not been disputed by defendant that eldest brother Suryabhan had

died in the year 1946 and after his death wife of Suryabhan had also died and they died issueless. Further it has been submitted by learned Counsel that since it is plaintiff's own case that the suit property was given by Ramsanehi to his daughter who was the wife of Suryabhan in gift and because Suryabhan and his wife died issueless, the property in dispute would devolve in the male members of her husband's family. Learned counsel submits that the property in dispute cannot be said to be an ancestral property and in this context he has invited my attention to Article 221 of Mulla's Hindu Law (21st edition). By inviting my attention to Article 221(3) of the said book it has been put-forth by learned counsel that the property inherited by a person from collaterals such as brother, uncle etc. or property inherited by him from a female e.g. his mother will be his separate property, which cannot be said to be ancestral property.

11. Learned counsel also invited my attention to Article 126 of Mulla's Hindu Law (21st edition) and submits that this Article speaks about the Will and bequests from relations and if the property is given in gift to a female by her parents it will be her *stridhan* and thus said property cannot be blended in the ancestral property. Learned counsel by inviting my attention to Article 225 and also Sub-Article (2a) has contended that doctrine of co-parcenery cannot be applied to a case of Hindu female who has acquired immovable property from her father because she is not a co-parcener. In this context learned counsel has invited my attention on two decisions of Supreme Court *Mallesappa Bandeppa Desai and another v. Desai Mullappa alias Mallesappa and another*, AIR 1961 SC 1268 and *Smt. Pushpa Devi v. The Commissioner of Income-tax, New Delhi* AIR 1977 SC 2230. Hence, it has been put-forth by learned counsel that the plea setup by plaintiff that property of daughter of Ramsanehi who was wife of plaintiff's and defendant's eldest brother Suryabahan could not be blended with the ancestral property and therefore it could not be partitioned.

12. By addressing on substantial question of law No.2 it has been canvassed by learned counsel that the suit was filed on 03.11.1988 which was *ex facie* barred by time because 12 years prior to the date of filing of the suit, the plaintiff was not in possession of the suit property and therefore learned First Appellate Court erred in law in holding the suit to be within limitation. Learned counsel submits that learned Trial Court while deciding the issue No.6 has categorically found that suit is barred by time. Hence, it has been prayed by learned counsel that by setting aside the impugned judgment passed

by learned First Appellate Court, the judgment and decree passed and Trial Court be restored.

13. On the other hand Shri K.P. Mishra, learned Senior Counsel argued in support of impugned judgment and submitted that defendant Indrabhan himself admitted in the written statement filed by him in an earlier suit C.S. No.83-A/1980 (Jageshwar Prasad v. Ravibhan and Indranbhan) and in this suit disputed property of present suit (survey No.1349 and 1350) was also the subject matter alongwith with other immovable properties. According to learned Senior Counsel present defendant Indrabhan by filing his written-statement in that suit admitted that the suit property of this suit was blended with the ancestral property and thereafter the same was partitioned between Indrabhan and Ravibhan (defendant and plaintiff respectively of the present suit) and in the said partition the suit property fell in the share of plaintiff Ravibhan Prasad and therefore the defendant cannot turn back from his own admission which he made earlier in his written statement filed in that suit. Hence the contention of learned Senior counsel is that whether the said property could be blended in the pool of ancestral property or not, since it has already been put to rest in the earlier round of litigation, therefore, now it cannot be re-adjudicated.

14. By addressing on the point of limitation that suit is barred by time it has been submitted by learned Senior Counsel that finding of learned First Appellate Court holding the suit to be within time is not perverse and in this regard he has invited my attention to findings of learned First Appellate Court from para 16A onwards and put emphasis on para 21 of the impugned judgment and submitted that the plaintiff's witnesses have categorically proved that the plaintiff was possessing the suit property from the year 1964 to 1988 and therefore the suit which was filed on 03.11.1988 cannot be said to be barred by time. Hence, it has been prayed that this appeal be dismissed.

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

Regarding substantial question of law No.1 :

16. Before dealing with the contention of learned counsel for appellants on this substantial question of law I would like to consider the contention of learned Senior Counsel for respondent No.1 that in the earlier round of litigation in Civil Suit No.83-A/1981 filed by Jageshwar Prasad against Ravibhan (present plaintiff) and Indrabhan (present defendant), the present defendant Indrabhan who was arrayed as defendant No.2 in that suit admitted

in his written statement of that suit that in the year 1964 the partition took place between the two brothers and suit property (survey No.1349 and 1350) after blending it with the ancestral property it was partitioned and the suit property fell in the share of present plaintiff Ravibhan. I do not find any merits in this contention for the simple reason that on bare perusal of the written-statement filed by Indrabhan who was arrayed as defendant No.2 in that suit, nowhere it has been admitted by him that suit property after it was blended alongwith the ancestral property, in partition it fell in the share of plaintiff. He did not even plead that suit property of the present suit was also the subject matter of the earlier suit. On bare perusal of the plaint of the earlier suit (83-A/1981) this Court finds that the present disputed property (survey No.1349 and 1350) was not the subject matter of that suit. Earlier suit was filed by one Jageshwar Prasad but lateron he died and his LRs Mst. Devi and 7 others were brought on record as plaintiffs. Since the present disputed property was not the subject matter of earlier suit, the contention of learned senior counsel cannot be accepted that there is an admission of defendant Indrabhan that the suit property fell in the share of plaintiff in the partition which took place in the year 1964 after blending it with the ancestral property.

17. Now I shall consider the contention of learned counsel for appellants as to whether the suit property which was of the wife of Suryabahan could be blended alongwith the ancestral property or not. Admittedly Suryabhan was the eldest brother of plaintiff and defendant. The plaintiff's own case is that the suit property was owned by father of Suryabhan's wife who gifted it to his daughter (wife of Suryabhan). Said Suryabhan died in the year 1946 and his wife also lateron died and both of them died issueless. Since the property in dispute was of father of Suryabhan's wife and it was gifted to her, the same would become her *stridhan* in view of Article 126 of the Mulla's Hindu Law (21st edition). Hence for all practical purpose, it is hereby held that suit property was the *stridhan* of Suryabhan's wife and if that would be the position it cannot be said to be the ancestral property of plaintiff and defendant because the ancestral property means all property inherited by male Hindu from his father, father's father or father's father's father (see Article 221 of Mulla's Hindu Law). The property inherited from collaterals and property inherited from female would be excluded from the ancestral property. In this context Article 221 (3) of Mulla's Hindu Law is quite clear, which reads thus:

> **221(3)** Property inherited from collaterals – property inherited from females- Excluding the case of property inherited from a

> maternal grandfather, it may be said that the only property that can be called ancestral property, is property inherited by a person from his father, father's father, father's, father's father . Property inherited by a person from any other relation is his separate property, and his male issues do not take any interest in it by birth. Thus, property inherited by a person from collaterals, such as a brother, uncle etc. or property inherited by him from a female, eg. His mother, is his separate property.
>
> (emphasis supplied)

By analyzing the aforesaid provisions of Hindu Law it emerges that the property of Suryabhan's wife which was given to her by her father was her *stridhan* and it cannot be said to be an ancestral property and if that would be the position, I am of the view that the said property cannot be blended with the ancestral property. In this regard Article 225 and particularly Sub-Article (2a) of Mulla's Hindu Law 21st Edition may be seen and I would like to quote Article 225(1) and (2a) as under :-

> **225. Property thrown into common stock.-** (1) Property which was originally the separate or self acquired property of a member (coparcener) of a joint family may, by operation of the doctrine of blending, become joint family property, if it, has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established. It will neither be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself nor from the fact that the income of the separate property was used to support a son, or from the mere failure of a member to keep separate accounts of his earnings. So also acts of generosity or kindness should not be construed as admissions of legal obligation. A permissive use of separately acquired property by coparceners cannot raise a presumption that the property belongs to the joint family unless the acquirer throws such property into common stock. Separate property thrown into the common stock is subject to all the incidents of joint family property.
>
> (2) xxx xxx

(2a) The basis of the doctrine is the existence of coparcenary and coparcenary property, as well as the existence of the separate property of a coparcener. The doctrine cannot be applied to the case of a Hindu female, who has acquired immovable property from her father, for she is not a coparcener.

A Hindu female cannot be a coparcener and the doctrine of blending cannot apply to her. This was re-affirmed by the Supreme Court.

18. Thus, since a Hindu female cannot be a coparcener and the doctrine of blending of her own property cannot apply to her, therefore, the property in dispute could not be blended with the ancestral property, the same could not be partitioned. In this context the decision of Supreme Court *Mallesappa Bandeppa Desai* (supra) para 11 may be taken into consideration wherein it has been held that doctrine of co-parcenery cannot be invoked to a female as her *stridhan* and similar view has been again taken by the Supreme Court in *Smt. Pushpa Devi* (supra), wherein, the Apex Court placed reliance its earlier decision of *Mallesappa Bandeppa Desai* (supra). Hence because the suit property was the *stridhan* of Suryabhan's wife, the same could not be blended with the ancestral property and could not be partitioned which took place in the year 1964 between the plaintiff and defendant. I have already held hereinabove that in earlier round of litigation there is no such admission of defendant that suit property was firstly blended with ancestral property and thereafter it was partitioned between him and his brother Ravibhan.

19. The substantial question of law No.1 is thus answered that the property acquired by Suryabhan's wife who was the daughter of Ramsanehi cannot be treated to be an ancestral property of plaintiff and defendant since it was given to her by her father by way of gift and was her *stridhan*..

Regarding substantial question of law No.2 :

20. The learned Trial Court while deciding issue No.6 has categorically held that the suit of the plaintiff is barred by time holding that he is not possessing the suit property for 12 years from the date of filing of the suit and by that time the defendant already perfected his title by adverse possession. Further it has been held by that Court that indeed defendant is possessing suit property since 1958. The finding of learned Trial Court is based on revenue record. Shri Mishra, learned senior counsel by inviting my attention to the findings of learned First Appellate Court para 16(A) onwards has submitted that learned

First Appellate Court after appreciating the oral and documentary evidence categorically came to hold in para 21 that the order passed by SDM in the proceeding of Section 145 CrPC dated 03.11.1966 (Ex.D/7) and the order of Revisional Court dated 8.4.1977 (Ex.D/8) is wiped out from the statement of plaintiff's witnesses. I cannot accept such contention. If against a judicial order the witnesses of plaintiff are deposing contrary to it, the credential value of their testimony cannot override the order passed on judicial side by the SDM which has been affirmed by the Revisional Court. On bare perusal of order of SDM dated 03.11.1976 in the proceedings of 145 CrPC, this Court finds that it was categorically held that defendant Indrabhan (appellant of this appeal) was in possession of the suit property two months prior to date of attachment which was 16.11.1973. This finding has been affirmed by learned Sessions Judge in revision on 08.04.1977 (Ex.D/8). Therefore, even if the finding of learned Trial Court holding that defendant-appellant is possessing the suit property since 1958 is ignored, this has been proved by these two documents that defendant is possessing the suit property since September, 1973 and if this plea is taken to be starting point of limitation, the suit which was filed on 3.11.1988 was *ex facie* barred by time. On going through the order of SDM (Ex.D/7) this Court finds that it was specifically directed to *Supurdgidar* to deliver the possession of suit property to defendant. It is well settled in law that possession of *Supurdgidar* in the proceedings under Section 145 CrPC shall be deemed to be of the person for whom he is possessing the property attached and therefore for all practical purpose it would be deemed that he (*supurdgidar*) was possessing the suit property for defendant. In this regard the decision of *P. Lakshmi Reddy v. L. Lakshmi Reddy* AIR 1957 SC 314 placed reliance by learned counsel for appellants throws sufficient light on this point.

21. The substantial question of law No.2 is thus answered that plaintiff's suit was time barred.

22. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree of learned First Appellate Court is set aside and the judgment and decree passed by learned Trial Court is restored.

23. Looking to the facts and circumstances, parties are directed to bear their own costs. Counsel fee according to the schedule, if precertified.

Appeal allowed

I.L.R. [2012] M.P., 480

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 262/1998 (Indore) decided on 20 September, 2011

BABULAL ...Appellant

Vs.

HIRALAL ...Respondent

A. Specific Relief Act (47 of 1963), Sections 16 & 20, Land Revenue Code, M.P. (20 of 1959), Section 165(6) – Specific Performance of Contract – **No pleading by the Defendant that he belongs to aboriginal tribe – Bar as contained under Section 165(6) of Code, 1959 does not apply – Appellate Court can not make out a case which was not pleaded in written statement – Appellant entitled for decree of specific performance of Contract.** (Para 15)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धाराएँ 16 व 20, भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) – संविदा का विनिर्दिष्ट अनुपालन – प्रतिवादी द्वारा कोई अभिवचन नहीं किया गया कि वह आदिवासी जनजाति का है – संहिता 1959 की धारा 165(6) में अन्तर्विष्ट वर्जन लागू नहीं होता – अपीलीय न्यायालय ऐसा प्रकरण नहीं बना सकती, जो लिखित कथन में अभिकथित नहीं किया गया – अपीलार्थी संविदा की विनिर्दिष्ट अनुपालन की डिक्री पाने का हकदार।

B. Land Revenue Code, M.P. (20 of 1959), Section 165(6) – Non-agricultural property – **Suit property not a agricultural land – Section 165(6) is not having any applicability on it.** (Para 16)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 165(6) – अकृषि सम्पत्ति – वाद सम्पत्ति कृषि भूमि नहीं – धारा 165(6) की इस पर कोई प्रयोज्यता नहीं।

C. Specific Relief Act, (47 of 1963), Section 16 – Specific Performance of Contract – Ready and Willingness – **Unless and until there is a finding that the plaintiff is not ready and willing to purchase suit property, decree of specific performance of Contract normally should not be denied.** (Para 18)

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट अनुपालन – तैयार व रजामंदी – जब तक यह निष्कर्ष नहीं होता कि वादी वाद सम्पत्ति को खरीदने के लिये तैयार व रजामंद नहीं है, संविदा के

विनिर्दिष्ट अनुपालन की डिक्री सामान्यतः अस्वीकृत नहीं की जानी चाहिये।

Cases referred :

AIR 1970 SC 839, AIR 1977 SC 890.

Kriti Joshi, for the appellant.
P.K. Sharma, for the respondent.

ORDER

A.K. SHRIVASTAVA, J. :-Plaintiff has assailed the judgment and decree passed by learned two Courts below, denying to grant decree of specific performance of contract.

2. In brief the suit of plaintiff is that the defendant Hiralal entered into an agreement of sale with plaintiff to sell his house, the description whereof is mentioned in para -1 of the plaint and which is the subject matter of the suit for a consideration of Rs. 12,000/- on 12.6.1988. On this date an amount of Rs.6,000/- was obtained by him as advance money. Further it has been pleaded in paras 2 and 3 of the plaint that by the end of 9th November, 1986, the plaintiff shall pay the entire balance amount or it may be paid in installments. Eventually, on 15.7.1986, 22.8.1986 and on 5.10.1986, the plaintiff paid sum of Rs.1000/-, 1000/- and Rs. 2000/ respectively to the defendant. Thus, out of entire consideration of Rs.12,000/- he had already paid a sum of Rs.10,000/- to him and only an amount of Rs.2000/- is required to be paid.

3. Further the case of the plaintiff is that he was always ready and willing to pay a sum of Rs.2000/- to defendant and even today (on the date of the filing of the suit) he is ready to pay the said balance amount of Rs.2000/-. But the defendant is not willing to execute the sale deed in his favour. Resultantly, he sent notices by registered post to defendant on 20.10.1986, 3:11.1986, 6.12.1986, 15.1.1987 and 4.2.1987, but the defendant is not agreeing to execute the sale deed. Hence, a suit for specific performance of the contract has been filed by him.

4. .The defendant denied the plaint averments by filing written statement and denied the execution of document of agreement of sale and it has been pleaded by him that he never entered into an agreement of sale with the plaintiff. The factum of receiving any amount in advance or any further payment made by plaintiff on different dates towards sale consideration has also been denied by him.

5. In special plea it has been pleaded by the defendant that the suit is not maintainable because it is barred by Anusuchit Jati Tatha Anusuchit Jan Jati Rini Sahayata Adhiniyam, 1967 enacted by the State of Madhya Pradesh.

6. The learned Trial Court on the basis of averments made in the plaint and denial in the written statement framed necessary issues and the parties thereafter adduced their evidence. The learned Trial Court at the time of passing of judgment came to hold that the execution of the document is proved and factum of receiving of sum of Rs. 10,000/- by the defendant from plaintiff is also proved, but did not grant a decree of specific performance of contract although a decree to return sum of Rs. 8000/- has been passed. Accordingly, suit of the plaintiff was partially decreed.

7. Against the judgment and decree passed by the learned Trial Court for not grating the decree for specific performance of contract the plaintiff filed first appeal. However, the defendant did not file any cross appeal assailing the judgment and decree of learned Trial Court passing a money decree against him nor filed any cross objections challenging the execution of agreement of sale which was found to be proven by the learned Trial Court. Hence, the said finding of learned trial Court became final.

8. The learned first appellate Court dismissed the appeal of the plaintiff and in this manner this second appeal has been filed by him before this Court.

9. This Court on 7.10.1998 admitted this second appeal on the following substantial question of law:

> "Whether the appellate Court erred in law in holding that the agreement for sale of the suit house was void being in contravention to sub-section (6) of Section 165 of the Madhya Pradesh Land Revenue Code, 1959 even when the property in suit was not an agriculture land and the defendant was not a member of an aboriginal tribe ?

10. Today one more substantial question of law has been framed which reads thus:

> "Whether the learned first appellate Court was obliged to give finding as to whether plaintiff was ready and willing to purchase the suit property ?"

Learned counsel for the parties are heard on both substantial question of law.

11. By putting deep dent on the finding of the learned first appellate Court, Ku. Kriti Joshi, learned counsel appearing for the plaintiff–appellant submits that the decree of specific performance of contract has been denied by the learned first appellate Court on the ground that the defendant is a member of schedule cast community and, therefore, in view of Sub section (6) of Section 165 of Madhya Pradesh Land Revenue Code, 1959 (herein after the Act), the agreement of sale is null and void. According to her if sub Section (6) to Section 165 is considered in its true spirit, it would become luminously clear that this provision is applicable only to aboriginal tribe declared by the State Government by notification. Hence, it has been put forth by the learned counsel that since there is no material on record in order to hold that the defendant is a member of aboriginal tribe, which has been notified by the State Government, the finding recorded by the learned first appellate Court applying this provision for defendant is wholly unwarranted under the law.

12. By canvassing the substantial question of law No.2, it has been put forth by her that no finding has been recorded by the learned first appellate Court that the plaintiff was not ready and willing to purchase the suit property. According to learned counsel, the total sale price agreed between the parties is Rs.12,000/- and near about 80% of the sale price Rs.10,000/- has already been paid by the plaintiff to the defendant and if that would be the position, according to her, by no stretch of imagination, this can be said that the plaintiff was not ready and willing to purchase the suit property. Hence it has been prayed by her that by allowing this appeal, a decree for specific performance of contract be passed since plaintiff is ready and willing to purchase the suit property throughout and even today.

13. Combating the aforesaid submissions put forth by the learned counsel for the appellant, Shri P.K. Sharma, learned counsel for the respondent, argued in support of the impugned judgment and submits that looking to the bar envisaged under sub Section (6) to Section 165 of the Code it was not necessary for the first appellate Court to decide the question of readiness and willingness. Further it has been submitted by him that looking to the condition embodied in the document that before 9th November 1986, the entire consideration was to be paid and because as per plaintiff's own showing that

an amount of Rs.2000/- is still required to be paid, rightly a decree of specific performance of contract was not passed. Hence, it has been prayed by the learned counsel for the respondent that this appeal is devoid of substance and the same be dismissed.

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

Regarding substantial question of law No.1.

15. On bare perusal of the written statement, nowhere it is gathered that the defendant is a member of aboriginal tribe, which has been notified by the State Government. Since, there is no pleading of defendant to this effect, applicability of bar as envisaged under sub section (6) to Section 165 does not arise. Since there is no pleading to this effect and no issue has been framed in that regard, and further when it was not the case of the defendant, according to me the learned first appellate Court cannot make out a case which was not pleaded in the written statement. In this context, I am profitable placed reliance on two decisions of the Supreme Court, they are *C. Mackertich Vs. Steuart & Co., Ltd. A.I.R. 1970 S.C. 839 and Siddu Venkappa Devadiga Vs. Smt. Rangu S Devadiga and others A.I.R. 1977 S.C. 890.* Since, it is not the case of the defendant that he is member of aboriginal tribe, I am of the view that the learned First Appellate Court erred in law in dismissing plaintiff's appeal.

16. On bare perusal of the pleadings of the parties and particularly, the pleadings of the defendant, no where it is gathered that the suit property is agriculture land. There is no evidence to this effect of either of the parties that the suit property is agriculture land. On the other hand, it is borne out from the pleadings as well as from evidence placed on record, that the suit property is situated in the vicinity of Municipal Corporation of Indore and because it is not agriculture land, section 165 (6) of the Code is not having any applicability on it.

17. Substantial question No.1 is thus answered that since it is not the case of the defendant that he is a member of aboriginal tribe and further the suit property is not an agriculture land and is a house the said provision would not apply and the bar of Section 165 (6) of the Code is not applicable and, therefore, the agreement of sale of the house was not void.

Regarding substantial question No.2

18. On bare perusal of the impugned judgment, it is gathered that the factum of readiness and willingness of plaintiff was not taken into account while deciding the appeal by the learned First Appellate Court. According to me, in a suit for specific performance of contract unless and until there is a finding of Court that the plaintiff is not ready and willing to purchase the suit property, the decree of specific performance of contract normally should not be denied. Having failed to give any finding on this point, the judgment of the learned first appellate Court in dismissing the appeal cannot be sustained.

19. It is pertinent to mention here that against the judgment of learned Trial Court holding that the execution of document has been proved and part consideration has also been received by the defendant, no cross-objections were filed by the defendant and, therefore, finding of the learned trial Court on those issues became final.

20. The substantial question No. 2 is thus answered that the learned first appellate Court erred in substantial error of law in not giving any finding about the readiness and willingness of the plaintiff to purchase the suit property while dismissing the appeal.

21. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by learned First Appellate Court is set aside and the case is sent back to the learned first Appellate Court to pass a fresh decision in the appeal in terms of directions given herein above in this order.

22. Parties are directed to appear before the learned first appellate Court on 21st November, 2011. No fresh notice shall be issued to either of the parties for this date. The learned first appellate Court shall pass a fresh judgment after hearing the parties. This Court hopes and trusts that before commencement of the winter vacation of this year, the learned First Appellate Court shall decide the appeal.

23. Since the judgment of the first appellate Court is being set aside and matter is remanded back Court fee be refunded to appellant in terms of Section 15 of the Court Fee Act.

24. This appeal is accordingly allowed with no order as to costs.

Appeal allowed

I.L.R. [2012] M.P., 486
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
F.A. No. 295/1995 (Jabalpur) decided on 28 September, 2011

ROOPLAL ...Appellant
Vs.
RAMESH PRASAD ...Respondent

Civil Procedure Code (5 of 1908), Section 100 – Substantial Question of Law **– Question of law framed can not be said to be a substantial question of law because in order to answer the said question, the entire plaint, written statement, evidence and documents will be required to be reconsidered – After considering the Substantial Question of law it can not be said that any important piece of evidence which goes to the root of question was not considered or evaluated – As question framed is not a substantial question of law and no other substantial question of law arises in the appeal therefore, Second appeal is dismissed.**
(Para 11)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का सारवान प्रश्न – विरचित किये गये विधि के प्रश्न को विधि का सारवान प्रश्न होना नहीं कहा जा सकता क्योंकि उक्त प्रश्न का उत्तर देने के लिये संपूर्ण वाद पत्र, लिखित कथन, साक्ष्य एवं दस्तावेजों पर पुनर्विचार करना अपेक्षित है – विधि के सारवान प्रश्न पर विचारोपरांत यह नहीं कहा जा सकता कि किसी महत्वपूर्ण साक्ष्य जो प्रश्न की जड़ तक जाती हो का विचार या मूल्यांकन नहीं किया गया – चूंकि विरचित प्रश्न, विधि का सारवान प्रश्न नहीं है और अपील मे विधि का कोई अन्य सारवान प्रश्न उत्पन्न नहीं होता, इसलिए द्वितीय अपील खारिज की गई।

Case referred:

AIR 2001 SC 965.

Hemant Kumar Chouhan, for the appellant.
Respondent absent.

निर्णय

ऐ.के.श्रीवास्तव, जे. :–विद्वान अधीनस्थ न्यायालयों में से असफल प्रतिवादी ने

धारा 100 व्यवहार प्रक्रिया संहिता का सहारा लेते हुए इस न्यायालय की शरण लेकर प्रार्थना की है कि यह अपील स्वीकार करते हुए वादी का वाद निरस्त करें तथा दोनों विद्वान अधीनस्थ न्यायालयों के निर्णय एवं जयपत्र को निरस्त करें ।

2. इस न्यायालय ने विधि का जो सारवान प्रश्न निर्मित किया है उसे दृष्टिगत रखते हुए प्रकरण के तथ्यों को विस्तार में लिखने की आवश्यकता नहीं है। जो तथ्य इस अपील के निराकरण हेतु सुसंगत है, वे इस प्रकार है :–

(अ) वादी –प्रत्यर्थी ने विद्वान न्यायाधीश वर्ग एक, लखनादौन के न्यायालय में रू. 12000/– की धन वसूली का वाद अपीलार्थी–प्रतिवादी के विरूद्ध दिनांक 26.4.1989 को प्रस्तुत किया।

(ब) वादी के अनुसार अपीलार्थी–प्रतिवादी ने दिनांक 14.05.1983 को एक टपरा, जिसका वर्णन वाद पत्र के पद क्रमांक 01 में दिया है, को वादी के पक्ष में विक्रय करने हेतु एक लिखित अनुबन्ध पत्र रूपये 3000/– प्रतिफल में करते हुए इस टपरे का आधिपत्य वादी को सौंपा एवं प्रतिफल की सम्पूर्ण धन राशि दिनांक 14.3.1983 को प्राप्त कर ली थी। परन्तु प्रतिवादी विक्रय पत्र सम्पादित करने में आनाकानी करने लगा, जिसके फलस्वरूप कोई अन्य उपचार न होने से वादी ने एक व्यवहार वाद क्र. 14–ए/1985, व्यवहार न्यायाधीश वर्ग एक, लखनादौन की न्यायालय में संविदा के विनिर्दिष्ट पालन हेतु प्रतिवादी के विरूद्ध प्रस्तुत किया । जो कि निर्णीत होकर वादी–प्रत्यर्थी के पक्ष में संविदा के विनिर्दिष्ट पालन का जयपत्र पारित किया गया एवं जो अब अंतिम हो चुका है।

(स) प्रतिवादी–अपीलार्थी ने उक्त अनुबंध में वर्णित अचल सम्पत्ति का आधिपत्य वादी को सौंप दिया था, किन्तु फिर भी असद्भावनापूर्ण एक प्रकरण उसने वादी–प्रत्यर्थी के विरूद्ध प्रस्तुत कर स्थगन आदेश नायब तहसीलदार की न्यायालय से मिथ्या तथ्यों के आधार पर प्राप्त किया कि वादी अनुबंध में वर्णित टपरे की मरम्मत आदि न करावे । उस स्थगन आदेश के फलस्वरूप वादी ने टपरे को जो कि पूर्णतः जीर्ण शीर्ण अवस्था में था, के मरम्मत का कार्य रोक दिया, जिसके फलस्वरूप टपरा और अधिक क्षतिग्रस्त हो गया और वादी को रू. 6000/– की हानि हुई।

(द) संविदा के विनिर्दिष्ट पालन की डिक्री दिनांक 30.11.1987 के पारित हो जाने के पश्चात भी अपीलार्थी–प्रतिवादी ने विक्रय पत्र सम्पादित करते हुए उसकी रजिस्ट्री नहीं करायी, जिसके फलस्वरूप वादी प्रतिवादी से रू. 5000/– क्षतिपूर्ति प्राप्त करने का अधिकारी है तथा वादी को व्यर्थ में ही और अधिक समय गंवाना पड़ा। अतः वादी रू. 1000/– क्षतिपूर्ति का प्राप्त करने का अधिकारी है। इस तरह वाद का मूल्यांकन रू. 12000/– करते हुए, वादी–प्रत्यर्थी के विरूद्ध यह वाद प्रस्तुत किया एवं

प्रार्थना की कि वादी के पक्ष में प्रतिवादी के विरूद्ध रू. 12000/– को प्राप्त करने का जयपत्र पारित किया जावे।

(क) प्रतिवादी ने प्रतिवाद पत्र प्रस्तुत करते हुए यह स्वीकार किया कि टपरे का आधिपतय वादी को उसने सौंप दिया था। किन्तु वादी किसी भी क्षतिपूर्ति की धनराशि प्रतिवादी से प्राप्त करने का अधिकारी नहीं है और प्रार्थना की कि वादी का वाद व्यय सहित निरस्त किया जावे।

3. प्रकरण में अभिवचनों के आधार पर विद्वान विचारण न्यायालय में वाद प्रश्नों की रचना की एवं तदुपरान्त पक्षकारों की साक्ष्य लेकर वादी के वाद को मात्र रू. 1000/– की सीमा तक सिद्ध मानते हुए रू. 1000/– का जयपत्र वादी के पक्ष में एवं प्रतिवादी के विरूद्ध पारित किया।

4. विद्वान विचारण न्यायालय के निर्णय एवं जयपत्र से दुखित होकर वादी–प्रत्यर्थी ने प्रथम अपील विद्वान प्रथम अपील न्यायालय में प्रस्तुत करते हुए निवेदन किया कि उसके पक्ष में रू. 6000/– की और वसूली हेतु (कुल रू.7000/–) का वाद जयपत्रित किया जावे।

5. विद्वान प्रथम अपील न्यायालय ने वादी –प्रत्यर्थी की अपील स्वीकार करते हुए यह निर्णीत किया कि वादी–प्रत्यर्थी रू. 6000/– क्षति धन के रूप में और प्राप्त करने का अधिकारी है, तदनुसार जयपत्र पारित किया कि प्रतिवादी से वादी कुल रू. 7000/– वसूलने का अधिकारी है।

6. विद्वान दोनों अधीनस्थ न्यायालयों के निर्णय एवं जयपत्रों से दुःखी होकर प्रतिवादी ने यह द्वितीय अपील इस न्यायालय में प्रस्तुत की है।

7. दिनांक 16.04.1996 को इस न्यायालय ने निम्नलिखित सारवान विधि प्रश्न निर्मित करते हुए यह अपील विचारार्थ स्वीकार की–

"Whether the Respondent was entitled to any damage on the basis of suit filed by him ?"

8. मैंने अपीलार्थी के विद्वान अभिभाषक श्री हेमन्त कुमार चौहान के तर्क सुने। उनके अनुसार प्रत्यर्थी– वादी किसी भी प्रकार की क्षतिपूर्ति प्राप्त करने का अधिकारी नहीं है।

9. इस अपील में प्रत्यर्थी की ओर से कोई उपस्थित नहीं हुआ है।

10. मैंने विद्वान अपीलार्थी के अभिभाषक के तर्कों पर विचार करते हुए एवं अभिलेख का अवलोकन किया । मेरे मत में यह अपील निरस्त किये जाने योग्य हैं।

सारवान विधि प्रश्न जो निर्मित हुआ है के विषयक

11. सारवान विधि प्रश्न जो निर्मित हुआ है उसे देखते हुए यह नहीं कहा जा सकता है कि उक्त प्रश्न सारवान विधि प्रश्न है, क्योंकि निर्मित प्रश्न का यदि मनन किया जावे

तो उसका उत्तर देने के लिये सम्पूर्ण वाद पत्र, प्रतिवाद पत्र, समस्त गवाहों के कथन, समस्त दस्तावेजों का पुनः अवलोकन करने के पश्चात यह तय करना होगा कि क्या प्रत्यर्थी क्षतिपूर्ति पाने का अधिकारी है। उच्चतम न्यायालय ने ***सन्तोष हजारी विरूद्ध पुरूषोत्तम तिवारी,*** **ए.आई.आर. 2001, सुप्रीम कोर्ट 965** के प्रकरण में व्यवहार प्रक्रिया संहिता की धारा 100 की प्रत्येक उपधाराओं का विश्लेषण करते हुए पद क्रमांक 10 में यह अभिनिर्धारित किया है कि प्रत्यर्थी द्वितीय अपील की सुनवाई करते समय यह तर्क कर सकता है कि जो प्रश्न निर्मित किया गया है वह सारवान विधि प्रश्न नहीं है । इस प्रकरण में प्रत्यर्थी की ओर से कोई अभिभाषक उपस्थित नहीं हुआ है, किन्तु इसका तात्पर्य यह नहीं है कि यह न्यायालय यह नहीं देख सकती है कि सारवान विधि प्रश्न जो निर्मित हुआ है, वास्तव में सारवान विधि प्रश्न है भी या नहीं। ऊपर वर्णित प्रश्न को यदि देख जावे तो उसके मनन करने से यह नहीं कहा जा सकता कि बिना साक्ष्य के आधार पर, अथवा किसी महत्वपूर्ण साक्ष्य जो कि प्रश्न के जड़ तक जाती हो, का मूल्यांकन विधि अनुसार नहीं किया गया है अथवा उसे पढ़ा नहीं गया हो । निर्मित प्रश्न से यह भी परिलक्षित नहीं होता है कि किसी महत्वपूर्ण दस्तावेज को दृष्टि ओझल किया गया है अथवा अग्राहय साक्ष्य के आधार पर निर्णय पारित किया गया है । आलोच्य निर्णय से यह भी परिलक्षित नहीं होता है कि ये विधि में वर्णित ग्राह्य साक्ष्य को अग्राहय किया गया हो। आलोच्य निर्णय से यह भी प्रतीत नहीं होता है कि बिना किसी साक्ष्य के आधार पर प्रत्यर्थी–वादी की अपील स्वीकार की गई हो । इस कारण से मेरे मत से जो सारवान विधि प्रश्न निर्मित किया गया है वह वास्तव में सारवान विधि प्रश्न नहीं है फलतः चूंकि प्रकरण में कोई सारवान विधि प्रश्न ही नहीं है, आलोच्य निर्णय को निरस्त करने की आवश्यकता प्रतीत नहीं होती है।

12. यदि तर्क के लिए यह मान भी लिया जाये कि जो प्रश्न निर्मित किया गया है वह सारवान विधि प्रश्न है तो भी ऐसी स्थिति में अपीलार्थी के विद्वान अभिभाषक यह बताने में असफल रहे हैं कि किसी कारण से वादी–प्रत्यर्थी क्षतिपूर्ति धन प्रतिवादी से प्राप्त करने का अधिकारी नहीं है। विद्वान प्रथम अपील न्यायालय के प्रश्नगत निर्णय में जो कारण रूपये 6000/– क्षतिपूर्ति दिलाये जाने के विषयक लिखे हैं वे प्रकरण में प्रस्तुत साक्ष्य के आधार पर दिये गये हैं । किसी भी कोण से जो कारण अपील स्वीकार करने के लिए प्रथम अपील न्यायालय ने दर्शाए है वे विकृत प्रकृति से प्रतीत नहीं होते हैं। अतः विक्षन प्रथम अपील न्यायालय द्वारा पारित आलोच्य निर्णय एवं जयपत्र की पुष्टि की जाती है।

13. जो सारवान विधि प्रश्न निर्मित किया गया है उसका उत्तर इस प्रकार से दिया जाता है कि प्रत्यर्थी–वादी अपने क्षतिपूर्ति के दावे के आधार पर प्रतिवादी–अपीलार्थी से क्षतिपूर्ति प्राप्त करने का अधिकारी है।

14. परिणामस्वरूप यह अपील विफल होने से निरस्त की जाती है। चूंकि प्रत्यर्थी इस अपील में उपस्थित नहीं हुआ है, अतः प्रत्यर्थी इस अपील के व्यय प्राप्त करने का अधिकारी नहीं है।

अपील निरस्त

I.L.R. [2012] M.P., 490
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 368/1998 (Indore) decided on 11 October, 2011

GANGABAI ...Appellant
Vs.
DEVI SINGH & anr. ...Respondents

***Specific Relief Act (47 of 1963)*, Sections 34 & 38, *Criminal Procedure Code, 1973 (2 of 1974)*, *Section 145 – Possession of Receiver – Permanent Injunction* – Possession of property taken from plaintiff and given to Supurdgidar under Section 145 of Code – It shall be deemed that plaintiff was in possession of suit property because supurdgidar holds possession for the person who is actually entitled to obtain the possession – Plaintiff not required to seek the relief of possession.**

(Para 14)

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धाराएँ 34 व 38, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 145 – प्रापक का कब्जा – स्थाई व्यादेश – वादी से संहिता की धारा 145 के अंतर्गत सम्पत्ति का कब्जा लिया गया व सुपुर्दगीदार को दिया गया – यह समझा जावेगा कि वाद सम्पत्ति वादी के कब्जे में थी, क्योंकि सुपुर्दगीदार उस व्यक्ति के लिये कब्जा रखता है, जो वास्तव में कब्जा अभिप्राप्त करने का हकदार है – वादी को कब्जे का अनुतोष चाहने की आवश्यकता नहीं।

Case referred :

AIR 1966 SC 359.

Bhagwan Singh, for the appellant.
A.S. Kutumbale with *B.S. Gandhi* for the respondent No.1.
Pramod Mitha, G.A. for the respondent No. 2/State.

J U D G M E N T

A.K. SHRIVASTAVA, J.:- This appeal has been filed at the instance of defendant assailing the impugned judgment and decree passed by learned First Appellate Court partly decreeing the plaintiffs suit by reversing the judgment and decree passed by learned Trial Court dismissing the suit.

2. Looking to the substantial question of law which has been framed the facts necessary for the disposal of this second appeal lie in a narrow compass. The plaintiff filed suit for declaration of Bhumiswami right and permanent injunction in respect of certain agricultural land, the description whereof is mentioned in the plaint and which is subject matter of the suit.

3. According to the plaintiff he is possessing the suit property for last 15 years prior to the date of filing of the suit which was filed on 3.6.1982. The defendant was in need of money to pay the debt of one Chheetarlal, resultantly, he (defendant Puralal) obtained a sum of Rs. 16,000/- from plaintiff and orally sold the land in question to him. The possession of the suit property was also handed over to the plaintiff. Since then, the plaintiff is possessing the suit property as owner in the knowledge of the defendant continuously without any interruption and hence he has acquired Bhumiswami right by adverse possession. Further it has been pleaded by the plaintiff that defendant was convicted in a murder case and he was sentenced to suffer life imprisonment. But the suit property throughout remained in possession of the plaintiff. After serving out the entire sentence, the defendant came out from the jail but with an intention to take possession by illegal means. He tried to dispossess the plaintiff. Hence, the present suit has been filed for declaration of Bhumiswami right and injunction.

4. The defendant by filing written statement refuted the plaint averments and denied the factum of selling the suit property by an oral sale for a consideration of Rs. 16,000/- in favour of plaintiff. It has also been emphatically denied that plaintiff has perfected his Bhumiswami right by adverse possession on the suit property. According to the defendant although he is possessing suit property, but, the plaintiff in collusion with the Police personnel got the suit property attached in the proceeding under Section 145 Cr.P.C. and the possession was given to receiver Premsingh who is his relative. Not only this, the plaintiff in collusion with the Patwari got his name endorsed in the column of the possession in the revenue record. Hence, it has been prayed by the defendant that the suit be dismissed.

5. The learned Trial Court on the basis of averments made in the plaint and the denial in the written statement framed necessary issues and after recording the evidence of the parties, dismissed the suit by holding that plaintiff has not perfected his Bhumiswami right by adverse possession.

6. The first appeal was filed by plaintiff has been partly allowed by the learned First Appellate Court and decreed his suit in part by passing a decree of permanent injunction.

7. In this manner, this second appeal has been filed by the defendant assailing the judgment and decree passed by learned First Appellate Court.

8. This Court on 23.9.1998 admitted the second appeal on the following substantial question of law:

> "Whether the appellate Court below erred in law in granting decree for permanent injunction even when as per plaintiff's own showing the land is in possession of the receiver appointed in pursuance of an order passed by the S.D.M. U/s. 146 of Cr.P.C."?

9. The contention of Shri Bhagwansingh, learned Counsel for the appellant-defendant is that learned First Appellate Court erred in substantial error of law in passing the decree of injunction in favour of plaintiff. According to learned Counsel the suit property was in possession of the receiver in a proceedings under Section 145 Cr.P.C. and if that would be the position, in absence of seeking relief of possession the suit cannot be decreed since it is hit by Section 34 of the Specific Relief Act and further because plaintiff was not in possession of the suit property, therefore, passing of a decree of permanent injunction does not arise.

10. On the other hand, Shri Kutumbale, learned Senior Counsel for respondent argued in support of the impugned judgment and submitted that looking to the admission of defendant in cross-examination that for last 20 years, the plaintiff is in possession of the suit property, the learned First Appellate Court did not err in passing the decree of injunction in his favour. Hence, it has been submitted by him that this appeal be dismissed.

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

REGARDING SUBSTANTIAL QUESTION OF LAW FRAMED

12. Before answering the substantial question of law which has been framed I would like to mention here that learned First Appellate Court concurred

with the view of the learned Trial Court holding that plaintiff did not perfect his Bhumiswami right by adverse possession. Indeed, learned Trial Court dismissed the suit of plaintiff in *toto*. The first appeal of plaintiff has been partly allowed to the extent of granting a decree of injunction only. However, learned First Appellate Court affirmed the judgment and decree passed by learned Trial Court dismissing his suit in respect of acquiring Bhumiswami right by adverse possession. No cross-objections have been filed by the plaintiffs in this Court, hence, the finding against the judgment and decree passed by learned two Courts below holding that plaintiff did not perfect his Bhumiswami right by adverse possession had attained finality.

13. I shall now deal the substantial question of law which has been framed. On bare perusal of the cross-examination of the defendant Roopsingh (who was brought on record as L.R. of deceased defendant) I find that their is an admission of the defendant in his testimony that after the deceased defendant Pura was convicted, the plaintiff took possession of the suit property illegally and since then, the parties are quarreling with each other on the point of possession. After completing the entire jail sentence of 20 years when the defendant came out from the jail his father (deceased defendant) tried to take possession of the suit property from plaintiff against which plaintiff submitted a report in the Police Station. Further defendant has admitted that the Sub-Divisional Officer by attaching the suit property gave it in the *supardagi* of *supurdgidar* Premsingh. However, the order of attachment was assailed by plaintiff in Sessions Court which was decided in his favour and the possession of the suit property was delivered to him back from receiver Premsingh. Thereafter the order of Sessions Court was assailed in this Court by the defendant which was passed in his favour and again the suit property was attached and the possession was obtained back from the plaintiff and again it was given in the *supardagi* but this time to another *supurdgidar* Bhanwarlal. According to me this material piece of evidence and the admission of defendant if considered in proper perspective, it will be a determining factor to justify the impugned judgement of learned First appellate Court.

14. On going through the admission of the defendant, this Court finds that before filing of the suit, the suit property was being possessed by plaintiff for last several years and the defendant tried to take possession of the suit property which culminated into the proceedings under section 145 Cr.P.C. The land in dispute was attached and its possession was taken from the plaintiff and was given to the *supurdgidar*. What ultimately happened in 145Cr.P.C. proceedings

there is no order on record. But looking to the admission of the defendant that suit property was being possessed by plaintiff for last several years before filing of the suit, and further admitting that in the proceedings under section 145Cr.P.C. the possession of the suit property was taken from the plaintiff and was given to the *supurdgidar*, according to me in the eye of law it shall be deemed that the plaintiff was in possession of the suit property because a *supurdgidar* holds the possession for the person who is actually entitled to obtain the possession and, therefore, the plaintiff was not required to seek the relief of possession. In this context I may profitably place reliance on the decision of Supreme Court *Deo Kuer and another v. Sheo Prasad Singh and others* AIR 1966 Supreme Court 359 wherein it has been categorically held by the Apex Court that if the defendant is not in possession of property and is not able to deliver possession as for example when the property is attached by a criminal Court, in the proceedings of 145 Cr.P.C., it was not necessary for plaintiff to ask for relief of possession in a suit for declaration. By placing reliance on this decision for all practical purpose it is hereby held that plaintiff was possessing the suit property though it was in the *supurdagi* of the *supurdgidar* who was only a *custodia legis* and was holding the possession of the suit property for the plaintiff.

15. Unless and until, the actual possession of the land in dispute had taken away from the agency of the Court and the defendant is placed in actual possession of the same by the agency of the court, he cannot resist the right of plaintiff to retain the possession of the suit property. The order of attachment under Section 146 Cr.P.C. Is always subject to the decision of the civil Court. In the instant case, the possession of plaintiff has been found by the First Appellate Court and, therefore, rightly a decree of injunction has been granted in his favour.

16. The substantial question of law is thus, answered that learned First Appellate Court did not commit any error in granting decree of permanent injunction even though the possession of the suit property was with the receiver appointed in pursuance of an order passed by the S.D.M. under Section 146 Cr.P.C.

17. Resultantly, this appeal fails and is, hereby, dismissed with no order as to costs.

Appeal dismissed

I.L.R. [2012] M.P., 495

APPELLATE CIVIL

Before Mr. Justice K.K. Trivedi

S.A. No. 1128/2009 (Jabalpur) decided on 10 December, 2011

DEV PRAKASH GULATI & ors. ...Appellants

Vs.

NAND KUMAR & ors. ...Respondents

A. *Transfer of Property Act (4 of 1882), Sections 54 & 55– Sale-Title*–**No title is transferred to the purchaser on the basis of a sale deed if the seller is not having any title to transfer the land.** (Para 5)

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धाराएँ 54 व 55 – विक्रय – हक – विक्रय विलेख के आधार पर क्रेता को कोई हक अंतरित नहीं होता यदि विक्रेता के पास भूमि अंतरित करने का कोई हक नहीं है।

B. *Civil Procedure Code (5 of 1908), Order 41 Rule 27 – Additional Evidence at appellate stage – Plea of Adverse Possession* – **Appellants purchased the suit property from a person whose name was recorded in revenue records – Revenue Entries were challenged by the respondents alleging that the property belongs to their predecessor and the name of seller and appellants were wrongly recorded – Correction of revenue record in favour of predecessor of respondents was affirmed by Board of Revenue and writ petition was withdrawn – Appellants pleaded that the seller had perfected his title by adverse possession – Held - Plea of adverse possession could be raised only by those, who were claiming such perfection of title – Those persons were also not made party nor have come forward claiming such rights – Plea was not raised in appropriate manner in plaint – Appellants were also required to demonstrate from which date it became hostile, within the meaning of bringing it in the notice of original owner – When the original owner came to know about the recording of names of predecessor-in-title of appellants, he filed the revenue case for correction of revenue entries – Application under O. 41 Rule 27 C.P.C. was rightly rejected by First Appellate Court.** (Paras 8 & 9)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 – अपीलीय प्रक्रम पर अतिरिक्त साक्ष्य – प्रतिकूल कब्जे का अभिवाक् – अपीलार्थीगण ने उस व्यक्ति से वाद सम्पत्ति क्रय की जिसका नाम राजस्व अभिलेखों में दर्ज था

– प्रत्यर्थीगण द्वारा इस अभिवचन के साथ राजस्व प्रविष्टियों को चुनौती दी गई कि सम्पत्ति उनके पूर्वज की है और विक्रेता एवं अपीलार्थीगण का नाम अनुचित रुप से अभिलिखित किया गया – प्रत्यर्थीगण के पूर्वज के पक्ष में राजस्व अभिलेख में सुधार की राजस्व मंडल द्वारा पुष्टि की गई और रिट याचिका को वापिस लिया गया – अपीलार्थीगण ने अभिवाक् किया कि विक्रेता ने प्रतिकूल कब्जे द्वारा हक पूर्ण कर लिया – अभिनिर्धारित – प्रतिकूल कब्जे का अभिवाक् केवल उनके द्वारा उठाया जा सकता है जो ऐसा हक पूर्ण होने का दावा कर रहे थे – वे व्यक्ति पक्षकार भी नहीं बनाए गए न ही ऐसे अधिकारों का दावा करते हुए वे सामने आये हैं – वादपत्र में समुचित ढंग से अभिवाक् नहीं किया गया – मूल स्वामी की जानकारी में लाये जाने के अर्थान्तर्गत वह किस तिथि से प्रतिकूल हो गया यह दर्शाना भी अपीलार्थीगण से अपेक्षित था – जब मूल स्वामी को अपीलार्थीगण के पूर्वज के नाम से हक अभिलिखित किये जाने के बारे में पता चला तो उसने राजस्व प्रविष्टि में सुधार हेतु रेवेन्यू केस प्रस्तुत किया – आदेश 41 नियम 27 सि.प्र.सं. के अंतर्गत आवेदन प्रथम अपीली न्यायालय द्वारा उचित रुप से अस्वीकार किया गया।

C. ***Civil Procedure Code (5 of 1908), Section 100 - Substantial Question of Law*** – **High Court can not interfere with concurrent findings of facts until and unless the same are perverse or contrary to material on record.** (Para 12)

ग. *सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का सारवान प्रश्न* – उच्च न्यायालय तथ्यों के समवर्ती निष्कर्षों में हस्तक्षेप नहीं कर सकता जब तक कि वे अनुचित नहीं हैं या अभिलेख पर उपलब्ध सामग्री के विपरीत नहीं हैं।

Cases referred :

(1997) 1 SCC 734, (1996) 5 SCC 618, (2006) 11 SCC 587, (2007) 1 SCC 546, (2004) 5 SCC 140, (2009) 5 SCC 264, (2000) 7 SCC 409, (1999) 3 SCC 722, (2002) 1 SCC 134, AIR 1989 SC 1809.

S.K. Gupta, for the appellants.
Satish Singh Thakur, for the respondent No.1.

ORDER

K.K. TRIVEDI, J.:- Learned Counsel for the appellants is heard on the question of admission.

This second appeal under Section 100 of the Code of Civil Procedure has been filed against the judgment and decree dated 27.07.2009 passed in regular Civil Appeal No.128-A/2009 by the X Additional District Judge, Bhopal, whereby the judgment and decree dated 30.04.2009 passed in Civil

Suit No.300-A/2005 by the XII Civil Judge, Class-II, Bhopal has been affirmed.

2. The appellants/plaintiffs filed a civil suit for declaration of their title and permanent injunction alleging that the lands bearing Khasra No.250/1/2, 250/1/3 and 250/1/4 of village Bishankhedi, Patwari Circle No.34, Tahsil Hujur, District Bhopal was purchased by them from Shivcharan, Badami Lal and Phool Singh, who have executed sale-deed in their favour on 22.08.1995. It was contended that the aforesaid persons were title holder of the land as they have inherited the said land from their father Khushilal. After the purchase, the land was recorded in the names of the appellants/plaintiffs and they were put in possession of the land. However, an objection was raised by the legal heir of late Padam Singh and since the revenue courts ordered for mutation of the name of legal heir of Padam Singh, which order was affirmed up to the Board of Revenue, therefore, a dispute was raised and for declaration of title, permanent injunction and restraining the respondent No. 1/defendant to interfere in possession of the appellants over the suit land, the suit was required to be filed.

3. The claim of the appellants/plaintiffs was contested by the respondent No.1 and a written statement was filed. It was said that the name of one Khushilal was recorded over the land in suit in the revenue records illegally whereas same was owned by late Padam Singh, the father of respondent No.1. When the respondent No.1 came to know about such a fact, he filed an application for correction of the revenue entries. After enquiry, the name of respondent No.1 was recorded by removing the name of Khushilal, in respect of the suit land by the orders of the Revenue Court. Such an order was challenged in appeal and revision and up to the Board of Revenue, the order passed by the revenue authorities for correction of the revenue entries was maintained. Ultimately, the order of the Board of Revenue was challenged in the writ petition before this High Court but the said writ petition was withdrawn. It was, thus, contended that in fact the appellants have obtained no title over the suit land as the said suit land was never owned by the persons who have transferred the said land to the appellants. It was contended that because of such fraudulent act of the persons who have executed the sale-deed in favour of the appellants/plaintiffs, no title is conferred on the appellants and, therefore, the entire suit was liable to be dismissed.

4. The Trial Court framed the issues and recorded the evidence. The appellants examined their witnesses, who deposed about the execution of the

sale-deed. The appellant No.2 was also examined as a witness by the appellants/plaintiffs. It was said that the land was purchased by the appellants but none of them were residing at Bhopal. The land was not cultivated by the appellants themselves but an attorney was appointed by the appellants to look after the land. She was unable to admit her signature on the plaint. She admitted that signatures were made by Vikesh, appellant/plaintiff No.1, when he was a minor. She also stated in her statement that she was having some knowledge about the dispute and the names of those, who have transferred the land to the appellants, were recorded in the revenue records. She admitted that such persons who have transferred the land were not made party in the suit. In paragraph 22 of her cross-examination, she admitted the fact that Exhibit P-7, notice, was sent by the appellants/plaintiffs through Advocate to the respondent No.1 and the facts mentioned in the said notice were well within the knowledge of the said witness right from the year 1995.

5. The Trial Court specifically considered the fact that the appellants have not been able to establish that they have purchased the land under the sale-deed from a person, who was having title to transfer such land to the appellants. The Trial Court categorically considered this aspect in paragraph 14 and 15. The Trial Court further considered the statement of other witnesses of the appellants/plaintiffs and in view of the specific admission made by such witnesses, as have been referred in paragraphs 16 and 17 of the judgment of the Trial Court, reached to the conclusion that in fact there was no material available to hold that the appellants have purchased the land from a person, who was having title to transfer the land. Only because the revenue entries were produced before the Trial Court that too from the year 1977, and such entries were corrected by subsequent orders which had attained the finality, the Trial Court rightly reached to the conclusion that in view of the law laid-down by the Apex Court in case of *State of U.P. vs. Amar Singh & others*, (1997) 1 SCC 734 and further in view of the law laid-down by the Apex Court in case of *Durga Das vs. Collector & others*, (1996) 5 SCC 618, no title was transferred to the appellants on the basis of sale-deed, executed in respect of the suit property as the predecessor in title of the appellants/plaintiffs were having no title to transfer the land to the appellants/plaintiffs. However, the Trial Court did not examine the fact with respect to the filing of suit within limitation but holding that appellants have failed to prove their claim, dismissed the suit.

6. The appellants have preferred the first appeal before the learned lower

Appellate Court and have also made applications for amendment in the plaint as also for taking certain additional evidence on record, under Order 6 Rule 17 and under Order 41 Rule 27 of the Code of Civil Procedure, respectively. The learned lower Appellate Court firstly examined the admissibility of the aforesaid interlocutory applications at appellate stage. On detailed consideration by the lower Appellate Court, it reached to the conclusion that such applications filed by the appellants were not maintainable at the stage when applications were filed and secondly the entire claim of the appellants was to be considered in view of the admitted documents and on the basis of evidence adduced by the parties. Even if the additional evidence is accepted, that would not have made any change in the consideration as the documentary evidence was either produced or was admitted to some extent before the Trial Court. It was further found that those entries, which were sought to be produced by making application under Order 41 Rule 27 of the Code of Civil Procedure before the learned lower Appellate Court would not have made any change in findings as those revenue entries were not relating to the period of which the claim was made by the appellants. On the other hand, the relevancy of those revenue entries have come to an end soon after passing of the order by the competent revenue authorities for correction of the names in the revenue entries and the said order was affirmed up to the Board of Revenue and the writ petition filed before the High Court was withdrawn without any liberty. Thus, the lower Appellate Court dismissed such applications of the appellants and proceeded to decide the appeal of the appellants on the basis of evidence available on record.

7. Such an objection is raised in this second appeal that rejection of the applications by the lower Appellate Court was not right. This aspect is considered. The fact remains that the appellants have now started claiming that the title on the suit land by the predecessor in title of the appellants was perfected by virtue of adverse possession over the suit land. It is further contended by the learned Counsel for the appellants that since the M.P. Land Revenue Code (herein after referred to as 'Code') became applicable in Madhya Pradesh with effect from 1959, the previous rights over the land were protected under Section 158 of the Code and, therefore, by virtue of operation of law, the predecessors in title of the appellants have become the Bhumiswami and their names could not have been removed from the revenue entries. Learned Counsel for the appellants has stated that provisions of sub-section [1](c) of Section 158 of the Code specifically provide that every person

in respect of land held by him in the Bhopal region as an occupant as defined in the Bhopal State Land Revenue Act, 1932, became a Bhumiswami after coming into force of the Code. According to the learned Counsel for the appellants, the predecessors in title of the appellants were occupants of the land before coming into force of the Code and, therefore, by operation of law, they became the Bhumiswami of the land. Learned Counsel for the appellants further drawn attention of this Court to the provisions of Section 168 of the Code saying that if it is held that such persons were *Maurusi Krishak* even then them become entitle to conferral of right as Bhumiswami on coming into force of the Code and, therefore, such documents to indicate possession over the suit land were required to be filed. Since such documents were not earlier available, could not be produced, therefore, the learned lower Appellate Court was not correct in rejecting the application of the appellants in accepting the additional evidence produced by the appellants.

8. Such argument of the learned Counsel for the appellants is devoid of any merit. First of all the plea of perfection of title by adverse possession over the suit land could have been raised only by those, who were claiming such perfection of title. Admittedly those persons were not impleaded as party nor have they come forward claiming such rights in the Court. Secondly, this plea was not raised in appropriate manner in the plaint. If it was the case of the appellants that their predecessors in title have perfected their title over the suit property on the basis of adverse possession, they were required to demonstrate from which date their predecessors in title were in possession and from which date it became hostile, within the meaning of bringing it in the notice of the original owner of the land and how much period have elapsed thereafter so as to make application of principle of adverse possession. On the contrary, the documentary evidence shows that the moment the original owner came to know about recording of the names of predecessors in title of the appellants in the revenue records over the suit land, he filed the revenue case for correction of revenue entries and that revenue entries were thereafter corrected. Such orders of revenue authorities have already attained finality. None of the documents produced by the appellants along with the applications under Order 41 Rule 27 of the Code of Civil Procedure were indicative of any such fact that the names of the predecessors in title of the appellants were recorded in the revenue records as occupant in terms of the provisions of Bhopal State Land Revenue Act, 1932 and the said position remained continue till coming into force of the Code. When specifically asked, learned Counsel

for the appellants was unable to demonstrate that any such document was available or could be produced.

9. In view of the aforesaid, if the lower Appellate Court reached to the conclusion that the documentary evidence, which is being produced along with the application under Order 41 Rule 27 of the Code of Civil Procedure, was either available to some extent in the records of the Trial Court or such documents were already admitted, therefore, the learned lower Appellate Court was absolutely right in rejecting the application of the appellants. The same thing has been done before this Court also and some documents have been filed along with an application under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure, being I.A. No.6391/2011. In the considered opinion of this Court, neither this application is maintainable or acceptable nor the application filed by the appellants before the lower Appellate Court was acceptable and, therefore, such application was rightly rejected. Accordingly, I.A. No.6391/2011 is also rejected.

10. The other I.A.s filed by the appellants before the lower Appellate Court were rejected because of the fact that addition of such a fact and a prayer in the plaint was found to be irrelevant as necessary documents with respect to making of such claim were not sought to be added in the plaint. Since such a plea was never raised earlier, there was no such description of claim in the plaint. Therefore, there was no error in rejecting the application under Order 6 Rule 17 of the Code of Civil Procedure also.

11. After dealing with the applications filed by the appellants before the lower Appellate Court, the lower Appellate Court considered the merits of the claim made by the appellants. The lower Appellate Court not only examined the entire evidence but also examined the findings of the Trial Court. The lower Appellate Court reached to the definite finding that the finding recorded by the Trial Court on appreciation of evidence was just and proper. No perversity was found by the lower Appellate Court.

12. The most important aspect is that the entire claim of the appellants is rest on the title of the predecessor in title of the suit land so purchased by the appellants. It is no where pointed out as to how the claim of title by the predecessor in title of the appellants was perfected by application of principle of adverse possession. As has been discussed herein above, the pleas with respect to the adverse possession is not only to be raised specifically but is required to be proved. Further, this Court cannot interfere with the concurrent

findings of facts until and unless the same are perverse or contrary to the material on record. The law in this respect is well settled in case of *Sugani (mst.) vs. Rameshwar Das & another*, (2006) 11 SCC 587, *Gurdev Kaur vs. Kaki*, (2007) 1 SCC 546, *Prakash Kumar vs. State of Gujarat*, (2004) 5 SCC 140 *and Narayanan Rajendran and another vs. Lekshmy Sarojini and others*, (2009) 5 SCC 264. It is equally well settled that this Court in exercise of powers under Section 100 of the Code of Civil Procedure cannot reappreciate the evidence (*Thimmaiah and others vs. Ningamma and another*, (2000) 7 SCC 409). It is also equally well settled that where on appreciation of evidence even if two views are possible, this Court in exercise of powers under Section 100 of the Code of Civil Procedure would not interfere (*Kondiba Dagadu Kadam vs. Savitribai Sopal Guzar and others*, (1999) 3 SCC 722, *Veerayee Ammal vs.Seeni Ammal*, (2002) 1 SCC 134).

13. Though this Court is not required to examine or appreciate the evidence of the parties in case of concurrent findings of two courts below but to remove any doubt, this Court has also examined the evidence. The two Courts below have rightly reached to the conclusion with respect to the claim made by the appellants on appreciation of evidence. As has been mentioned herein above, the Trial Court has minutely examined the evidence produced by the appellants and has taken into consideration each and every statement of the witnesses examined by the appellants. The entire claim of the appellants is found to be unsustainable in view of the fact that the land in suit was transferred by persons, who were not having title to transfer such land to the appellants. Further it is found that the Trial Court has not considered the aspect of limitation, whether the suit was within time or was barred by limitation. This aspect is considered by the lower Appellate Court on the cross-objection filed by the respondent No. 1. On due appreciation of the facts as have come on record and admitted position that while sending the notice the dispute with respect to the suit property was within the knowledge of the appellants and that the notice Exhibit P-7 though was sent in the year 2005 but in these facts were mentioned, therefore, the dispute was well within the knowledge of the appellants right from the year 1995, as has been admitted by PW-1 in paragraph 22 of her cross-examination, the lower Appellate Court has rightly held that the suit filed in the year 2005 was barred by limitation and was thus liable to be dismissed on this count as well.

14. As has been stated herein above, the entire claim is made by the appellants only and only on the basis of revenue records. The two Courts

below have rightly interpreted the revenue records. Not only the revenue entries have been corrected, their impact has also been considered by the two Courts below. The Apex Court in case of *Corporation of the City of Bangalore vs. M. Papaiah & another* (AIR 1989 SC 1809), has categorically held that interpretation of revenue record is not a question of law. If the finding is recorded by the two Courts below on interpretation of revenue records, the High Courts cannot consider the same to be a question of law and cannot interfere in the findings recorded by the Courts below. The Apex Court has categorically held that it is firmly established that the revenue records are not the documents of title and question of interpretation of document not being a document of title, is not a question of law.

15. On due appreciation of evidence as also minute examination of findings recorded by the two Courts below, this Court is of the considered opinion that the findings recorded by the two Courts below are not perverse or without any evidence available on record. No fault is found in appreciation of the evidence by the two Courts below. No substantial error of law is found in recording the findings by the two Courts below.

16. Consequently, there is no substance in this appeal, the same is dismissed.

Appeal dismissed

I.L.R. [2012] M.P., 503
APPELLATE CIVIL
Before Mr. Justice Sheel Nagu
M.A.No. 1275/2006 (Gwalior) decided on 14 December, 2011

UNION OF INDIA & anr. ...Appellants
Vs.
BHAGRI & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 166 – Accident – Arising out of use of Motor Vehicle **– Bomb was planted under the bridge over which the truck passed at the time when the said bomb blew up – Bomb was planted under the bridge could not have possibly come to the knowledge of the owner/driver despite exercise of due care and diligence by them – Accident which occasioned the death of the deceased was not caused due to the use of the motor vehicle.**

Claimants can very well seek the remedy available to them before the Civil Court by filing a civil suit or by seeking their claim

under the Workman Compensation Act if the provisions of the said enactment applies to them. (Paras 10, 12 & 15)

मोटर यान अधिनियम (1988 का 59), धारा 166 – दुर्घटना – मोटर यान के उपयोग से उत्पन्न हुई – पुल के नीचे बम लगाया गया जिसके ऊपर से ट्रक उस समय गुजरा, जब उक्त बम फूटा – बम को पुल के नीचे लगाया गया था, जो मालिक/ड्रायवर के ज्ञान में आना संभव नहीं हो सका उनके द्वारा सावधानी व सतर्कता बरतने के बावजूद – दुर्घटना जिससे मृतक की मृत्यु हुई, वह मोटरयान के उपयोग के कारण कारित नहीं हुई।

आवेदकगण उनके पास उपलब्ध उपचार का उपयोग करके सिविल न्यायालय में वाद प्रस्तुत कर सकते हैं या कर्मकार प्रतिकर अधिनियम के अंतर्गत दावा कर सकते हैं, यदि उक्त अधिनियम के उपबंध उन पर लागू होते हैं।

Cases referred :

1998(7) SUPREME 66, AIR 1993 ORRISA 89.

Yogesh Singhal, for the appellants.
Balwant Singh, for the respondents.

ORDER

SHEEL NAGU, J.:- This order will also govern the M.A. No. 39/07 which arise out of the common award as the factual matrix and the legal points involved are common to all.

2. These miscellaneous appeals assail the common award dated 05.8.2006 passed in three motor vehicles claims cases including motor vehicles claim case No. 115/05, filed for claiming appropriate compensation for the death of Kamal Kishore which occurred on 23.05. 2011 when the said deceased while traveling in a BSF truck which was returning from Shrinagar to Jammu, was blown up by a bomb explosion at about 10 am killing majority of persons traveling in it including respondent.

3. These appeals have been filed by Union of India primarily on the ground that in the absence of proof of negligence on the part of the driver/owner of the said truck belonging to the BSF, the liability of paying compensation can not be fastened upon the Union of India and also that the accident did not arise out of the use of motor vehicle.

4. The counsel for the appellant has placed reliance on a decision of the Apex Court in the case of *Samir Chanda Vs. Managing Dirctor, Assam State Transport Corporation* reported in 1998 (7) Supreme 66. In the said case, the

Apex Court while setting aside the single Bench decision of the High Court of Guhati has held that in a situation where the bomb was planted inside the truck and the truck was blown up leading to the death of several persons traveling in the truck, the owner and driver cannot be absolved of their liability to compensation since they failed to ensure that there was no bomb inside the truck especially when truck was plied in area of high security alert. In these facts, the Apex Court rendered its findings in favour of dependents of the deceased dying in the bomb explosion.

5. The counsel for the appellants further places reliance on a single Bench decision of the Orrisa High Court reported in AIR 1993 Orrisa 89 where in the labourer while loading the logs on a stationary truck died on being crushed by the logs which rolled down for not being properly fastened to the truck. In this factual background, the Orrisa High Court held that the accident leading to the death of worker did not arise out of the use of motor vehicle.

6. In the instant appeals, it is not in dispute that the bomb was not planted inside the truck. It is further not disputed that the bomb was planted under the bridge over which the truck passed at the time when the said bomb blew up. Evidently, the material that has come on record clearly indicates that the fact that the bomb was planted under the bridge could not have possibly come to the knowledge of the owner/driver despite exercise of due care and diligence by them.

7. The further contention of learned Counsel for the respondents is that the claim before the tribunal was under Section 163A of the Motor Vehicles Act 1988 and not under Section 166 and, therefore, when the award was based on no fault liability then the question of the owner/driver being negligent or not does not arise.

8. In the backdrop of above said factual matrix, perusal of Section 165(I) (explanation) indicates that the claims under Section 165/166 include the claims for compensation under Section 163A. For convenience Section 165(I) is reproduced below:

> 165. Claims Tribunals(1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon, claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.

Explanation.

For the removal of doubts, it is hereby declared that the expression "claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles" includes claims for compensation under section 140 1[and section 163A].

9. Plain reading of Section 165 elicits that even for nofault liability claims U/s 163A, the factum of occurrence of accident arising out of use of motor vehicle is required to be proved.

10. In the instant appeals, it is not in dispute that the bomb was not planted inside the truck. It is further not disputed that the bomb was planted under the bridge over which the truck passed at the time when the said bomb blew up. Evidently, the material that has come on record clearly indicates that the fact that the bomb was planted under the bridge could not have possibly come to the knowledge of the owner/driver despite exercise of due care and diligence by them.

11. The tribunal while rendering the impugned award has moved on the assumption that the accident has occurred due to the negligence of the driver of the vehicle without considering the aspect as to whether in the given facts and circumstances, death could be said to have been caused by an accident arising out of the use of motor vehicle.

12. From the analysis of the factual matrix and the judicial precedents on the point, this Court is of the considered view that the accident which occasioned the death of the deceased was not caused due to the use of the motor vehicle but was caused due to the reason of explosion of the bomb which did not have the slightest of connection with the use of the motor vehicle.

13. From the law laid down by the Apex Court in case of *Sameer Chanda Vs. Managing Director Assam State Transport Corporation*, it becomes clear that in case before the Apex Court, the bomb which was planted inside the truck that impelled the Apex Court to held that since the owner of the driver was duty bound to ensure that their vehicle was bomb free, the duty which they failed to perform, the accident arising out of the explosion which lead to blowing up of the bomb can be inside the vehicle arise out the use of motor vehicle. The distinguishing feature in this case is that the bomb was not inside the vehicle but was placed under the bridge over which the truck passed at the time of explosion. The owner/

driver cannot by any stretch of imagination can be held responsible for planting of bomb under a bridge or cannot be also held responsible for ensuring that the road/ bridge is free of any bomb for the simple reason that the owner and driver of the truck do not have any control over the construction and maintenance of the bridge and the road.

14. Therefore, the inference of owner/driver being negligent as drawn by the tribunal in the impugned award is untenable, rendering the award to be unsustainable in the eyes of law.

15. Before parting, this court may hasten to add that the claimants cannot be said to be remedy less as they can very well seek the remedy available to them before the Civil Court by filing a civil suit or by seeking their claim under the Workman Compensation Act if the provisions of the said enactment applies to them.

16. Consequently, these miscellaneous appeals are allowed. Impugned Order of the Tribunal dated 05.08. 2006 passed in Motor Vehicles Claim Case Nos. 114/05, 115/05 and 11/06 is set aside.

Appeal allowed.

I.L.R. [2012] M.P., 507

APPELLATE CIVIL

Before Mr. Justice K.K. Trivedi

S.A. No. 1669/2007(Jabalpur) decided on 16 December, 2011

SHRI PRATAP RAGHAV JI BHAGWAN ...Appellant

Vs.

SMT. KRISHNA & ors. ...Respondents

A. Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(a), 12(3) – Protection to tenant – **Civil suit for eviction on the ground of arrears of rent was dismissed after extending the benefit of protection under Section 12(3) – Tenant again committed default in payment of rent – Second Civil suit filed for eviction on the ground of arrears of rent – Held – Benefit of protection under Section 12(3) of the Act can be extended only for once – Decree on the ground of arrears of rent was rightly granted by Trial Court.** (Para 14)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ए), 12(3) – किरायेदार को संरक्षण – किराये के बकाया के आधार पर बेदखली का

सिविल वाद धारा 12(3) के अंतर्गत संरक्षण का लाभ देने के बाद खारिज किया गया – किरायेदार ने किराये के भुगतान में पुनः व्यतिक्रम कारित किया – बेदखली के लिये किराये के बकाये के आधार पर द्वितीय सिविल वाद प्रस्तुत किया गया – अभिनिर्धारित – अधिनियम की धारा 12(3) के अंतर्गत संरक्षण का लाभ केवल एक बार दिया जा सकता है – विचारण न्यायालय द्वारा किराये के बकाये के आधार पर डिक्री उचित रुप से प्रदान की गई।

B. Accommodation Control Act, M.P. (41 of 1961), Sections 12(3), 13(1) – Protection – **Protection of Section 12(3) is available only when the provisions of Section 13(1) of the Act are complied with – In case of three consecutive defaults, the protection is automatically gone and the proceedings can be done under Section 13(6) or under Section 12(1)(a) of Act.** (Para 15)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(3), 13(1) – संरक्षण – धारा 12(3) का संरक्षण केवल तब उपलब्ध होता है जब अधिनियम की धारा 13(1) के उपबंधों का अनुपालन किया गया हो – लगातार तीन व्यतिक्रम की स्थिति में संरक्षण स्वतः चला जाता है और अधिनियम की धारा 13(6) या धारा 12(1)(ए) के अंतर्गत कार्यवाही की जा सकती हैं।

Cases referred :

1992 MPLJ 90, 1978 JLJ 326, AIR 2008 SC 1519, AIR 1993 MP 17, AIR 1976 MP 8, AIR 1981 MP 76.

Ravish Agrawal with *K.S. Jha*, for the appellant.
Vikalp Soni, for the respondents.

JUDGMENT

K.K. TRIVEDI. J.:- By this second appeal, the appellant/plaintiff has challenged the part of judgment and decree dated 31.7.2007, passed in Civil Appeal No.37-A/2006, by the District Judge Tikamgarh, by which the judgment and decree dated 31.7.2006 passed in Civil Suit No.29-A/2006, by the Additional Judge to the Court of Civil Judge, Class-I, Tikamgarh, has been set aside to the effect that the decree of eviction granted by the trial Court under the provisions of Section 12(1)(a) of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as the Act for brevity), has been set aside.

2 : While admitting this appeal, this Court has framed the following substantial question of law :-

"Whether the appellate Court in the available set of evidence has erred in setting aside the decree of the trial Court passed on the grounds enumerated under Section 12(1) (a) of the M.P. Accommodation Control Act, 1961 ?"

3 : Brief facts for consideration in the appeal are that the appellant/plaintiff filed a suit in the year 1988, being Civil Suit No.90-A/1988, against the original respondent/ defendant, the tenant, for his eviction on the ground of arrears of rent. The said suit was decreed by the trial Court and a decree of recovery of rent only was granted in favour of the appellant/ plaintiff. The trial Court categorically held that the appellant/ plaintiff was not entitled to get the decree of eviction of the tenant on the ground of Section 12(1)(a) of the Act. The appeal was preferred against the said judgment and decree, but the same was dismissed. The judgment and decree have been placed on record as Ex.P/6 and Ex.P/7. The judgment of the appellate Court in the said case, is placed on record as Ex.P/8.

4 : The tenant-original respondent/defendant, did not pay the rent of demise premises for the period after the date of above said judgment and decree, therefore, the appellant/plaintiff was required to issue a notice of demand by registered A.D. post on 17.11.1998 Ex.P/1. In the notice in paragraph 6, it was categorically said by the appellant/plaintiff that the arrears of rent after the judgment and decree passed by the trial Court in the first suit i.e. 1.8.1988 was not paid as there was arrears of rent with effect from August 1988 to June 1996, though the said amount was said to be deposited in the C.C.D., which was not received by the appellant/plaintiff. In paragraph 7 of the notice, it was categorically said that rent with effect from July 1996 to October 1998 was not paid and, therefore, the original respondent/defendant was liable to pay the said amount or else a suit would be filed against the original respondent/ defendant. It is the case of the appellant/plaintiff that after the notice, amount was paid by a money order which was received on 21.1.1999, in which it was said that the rent for the month of August 1996 to January 1999 is being paid. An amount of Rs.1200/- was sent by the said money order. However, on the date of suit which was filed on 20.9.1999, there was still arrears of rent against the respondents/defendants and, therefore, a decree of eviction on the ground of Section 12(1)(a) of the Act was also claimed. Another ground for eviction of the tenant-respondent/defendant was raised in the plaint that the appellant/plaintiff was in need of the demise premises for the purposes of reconstruction of the building for which the sanction was

obtained from the Municipal Council, plan and estimate was prepared, but unless the tenant is evicted, it will not be possible for appellant to reconstruct the building.

5 : The original respondent died during pendency of the suit. His legal representatives, the present respondents herein, were substituted in the suit. A written statement was filed by the original respondent/defendant denying the allegations and contending that decree of eviction as claimed was not to be granted by the trial Court. The trial Court framed the issues, recorded the evidence of parties and after categorically holding that the appellants have made out a case for grant of decree on both the counts, decreed the suit by judgment and decree dated 31.7.2006. The respondents/defendants preferred an appeal against the said judgment and decree before the learned lower appellate Court and the lower appellate Court while affirming the judgment and decree granted by the trial Court, under the provisions of Section 12 (1)(h) of the Act, set aside the decree of the trial Court granted under Section 12(1)(a) of the Act. Hence, this appeal is preferred by the appellant/plaintiff.

6 : Learned senior counsel ably assisted by his colleague, has pointed out that the trial Court has very categorically given its finding in paragraph 12 onwards wherein all the circumstances were considered. It is pointed out that the earlier suit of the appellant/plaintiff for eviction of the tenant was only on the ground of Section 12(1)(a) of the Act and while granting the benefit of protection available under the provisions of Section 12(3) of the Act, the Court on first occasion has refused to grant the decree of eviction. However, as provided in the proviso to sub-section (3) of Section 12 of the Act, the tenant shall be entitled to such a benefit only once in respect of any accommodation and, if, he again makes a default in the payment of rent of that accommodation for three consecutive months, he will not be entitled to the benefit of protection of sub-section (3) of Section 12 of the Act. Taking this Court to the specific circumstances, it has been pointed out by the learned senior counsel for the appellant/ plaintiff that even after the demand, the payment of rent was not made by the respondents/tenant and on their own, they moved the application for condoning the delay in making the payment of rent, which was rejected by the trial Court by its order dated 16.2.2006, as a result, it was to be held by learned lower appellate Court that there was a default of making payment of rent for the three consecutive months and, therefore, there was no occasion for setting aside the well reasoned findings recorded by the trial Court and refusing to affirm the decree granted under Section 12(1)(a)

of the Act. Taking this Court to such an interlocutory application made by the respondents/ defendants on 29.11.2004, it is contended by the learned senior counsel for the appellant/plaintiff that on their own, the respondents/ defendants have admitted the fact that they have not paid the amount of rent regularly as per the provisions of Section 13(1) of the Act. Once such a default is found, there was no scope left for interfering in the findings of the trial Court by the learned lower appellate Court. Taking this Court to the order dated 16.2.2006, passed in the Civil Suit, learned senior counsel for the appellant/plaintiff has pointed out that the amount as demanded by notice was said to be sent on 21.1.1999. The reply to this notice was given by the respondents/defendants on 30.1.1999 Ex.D/1. It was incumbent on the respondents to make payment of rent for the month of February 1999 by 15.2.1999, but again no payment whatsoever was made in this respect. Similarly, for the month of March 1999, no payment was made upto 15th of March 1999. Again the rent for the month of April 1999 was not paid upto 15th of April and, lastly, the rent for the month of May 1999 was not paid upto 15th of May 1999. On the other hand, a money order in respect of rent for five months i.e. with effect from January 1999 to May 1999 was sent only on 28.5.1999. Again for the month of June, July and August of 1999, no payment of rent was made. Ultimately, the suit was filed on 20.9.1999 by the appellant/plaintiff, claiming a decree under Section 12(1)(a) of the Act also.

7. When the writ of summons of the suit was served on the respondents/ defendants, they obtained a permission from the Court on 17.1.2000 and deposited the rent from the month of June 1999 to December 1999 in the Civil Court. Written statement was filed on 14.2.2000, but again the rent for the month of January and February 2000 was not paid upto 15th of those months. On the other hand, the application was made on 29.11.2004 for condoning the delay in making the deposit of the rent in which it was categorically said that the rent for the month of July 1999 to January 2000 was paid on 27.1.2000. The rent for the month of February 2000 to November 2000 was paid on 18.8.2000. The rent for the month of December 2000 to May 2001 was paid on 8.12.2001. The rent for the month of June 2001 to October 2001 was paid on 16.10.2001 and again the rent for the month of November 2001 to March 2002 was paid on 22.1.2002. Likewise, it was said that the rent for the month of April to June 2002 was paid on 30.4.2002. The rent for the month of July 2002 to December 2002 was paid on 13.8.2002. The rent for the month of June 2003 to May 2003 was paid on 13.5.2003.

Likewise, the rent for the month of June 2004 to May 2004 was paid on 20.1.2004. The rent for the month of June 2004 to December 2004 was paid on 30.4.2004.

8 : From these facts as have been mentioned by the original respondent/ defendant in his own application, learned senior counsel for the appellant contends that admittedly there was sheer non-compliance of sub-section (1) of Section 13 of the Act, and, therefore, the protection under Section 12(3) of the Act was not available to the respondents. These aspects were considered by the learned trial Court and a decree under Section 12(1)(a) of the Act, was granted in favour of the appellant/ plaintiff. However, while reversing the judgment and decree of the trial Court, the reasons assigned by the learned lower appellate Court were, as given in paragraph 13, only this much that the rent with effect from July 1996 to October 1998 was already paid even before filing of the suit, by sending a money order by the tenant/respondents, therefore, there was no cause of action available to the appellant/plaintiff to file a sit under Section 12(1)(a) of the Act. The other reason assigned was that in case the rent during the pendency of the suit was not paid or that there was any default on the part of the tenant/respondent, course open to the trial Court was to proceed under Section 13(6) of the Act, but no decree under Section 12(1)(a) of the Act could have been granted. The other reason assigned was that the findings as have been given by the trial Court with respect to the payment of arrears of rent which was subject matter of earlier suit, could not have been treated as a default enough for grant of a decree under Section 12(1)(a) of the Act. The reason assigned by the learned lower appellate Court was that for recovery of such an arrears, the execution proceedings could have been done pursuance to the earlier decree granted, but no decree under Section 12(1)(a) of the Act could have been granted to the appellant/ plaintiff. It was further held that because of the typographical error in the earlier judgment of the trial Court since there was a full decree granted for the recovery of sum towards the rent in favour of the appellant/plaintiff, this could not have been made a ground for grant of a decree of eviction under Section 12(1)(a) of the Act.

9 : Learned senior counsel for the appellant/plaintiff has contended that this was not at all the case of the appellant/ plaintiff as set-forth in the plaint. Categorically it was said that after giving notice to the respondents/defendants, the amount was paid by the tenant through money order. Since the amount of rent was due with effect from July 1996, the amount sent by the respondents/

defendants by money order was adjusted towards the rent which was after the passing of the judgment and decree in the earlier suit of the appellant/ plaintiff and since thereafter there were default on the part of the respondents/ defendants to make payment of rent regularly, the tenant was liable to be evicted from the suit premises on the ground of Section 12(1)(a) of the Act. It is further contended by the learned senior counsel that though such an aspect was replied by the respondents/defendants, but nothing was said about the specific pleadings which the appellant/plaintiff has made in plaint paragraph 6. It is contended by the learned senior counsel for the appellant/ plaintiff that if such was the situation, specific reply of the allegations was required to be given by the respondents/ defendants or else the same was to be treated to be admitted in terms of the provisions of Order 8 Rule 5 (3) of C.P.C.. Even in the special pleadings, nothing was said in this respect as to how the rent was regularly paid and whether the respondents/ defendants was in arrears of rent or not. Thus, it is contended that if these facts are taken into consideration, the findings of the learned trial Court were just and proper and were not to be interfered in the manner, the same have been interfered with by the learned lower appellate Court.

10 : Placing reliance in the decision of this Court in the case of *Satish Chandra Vs. Janki Prasad* (1992 MPLJ 90), it is contended by the learned senior counsel for the appellant that the protection of sub-section (3) of Section 12 of the Act is available only when the compliance of provisions of Section 13 of the Act is done. Since there was sheer non- compliance of the provisions of Section 13 of the Act, admitted default of the respondent/tenant were there, therefore, there was no question of giving any benefit of the said provision. It is contended by the learned senior counsel that as per the law laid down by the Full Bench of this Court in the case of *Mankuwarbai Vs. Sunderlal Jain* (1978 JLJ 326), this Court has already reached to the conclusion in case of *Satish Chandra* (supra) that if in an earlier suit there was some arrears of rent and for that a decree of recovery of rent only was granted and, if, that rent was not paid, the same is to be treated as a default and protection under Section 12(3) of the Act, is not available. Learned senior counsel further relied on a decision of Apex Court in the case of *Sobhagyamal and another Vs. Gopal Das Nikhra* (AIR 2008 SC 1519), and has drawn the attention of this Court to the specific law laid down by the Apex Court in paragraphs 9 and 10 of report, which reads thus :-

"9. From the aforesaid, it is clear that Section 12(3) of the

Act provides for an exception to the general rule contained in Section 12(1)(a) that in the event tenant becomes a defaulter, he is liable to be evicted. From the proviso to section 12(3) of the Act, it is clear that the protection given to the tenant is only one time protection. Proviso appended to Section 12(3) controls the main provisions. The exemption contained in Section 12(3), thus, is not extended to the tenant who becomes a defaulter for more than once. In view of the aforesaid, we are of the opinion that once the tenant had availed the benefit of the proviso to Section 12(3) of the Act, the said benefit was not available to the tenant in committing a further default in payment of rent for three consecutive months.

10. The tenant can only be protected against ejectment on the ground of arrears of rent in the subsequent proceedings if he deposits the rent in the Court or pay it to the landlord during the pendency of the proceedings in the Court or pay it to the landlord after the suit is decided by the Court. If there is a default for three consecutive months in the payment of rent and the rent has not been tendered within two months of the service of notice by the landlord for payment of arrears, a cause of action accrued in favour of the landlord to initiate proceedings for ejectment of the tenant by filing a suit under Section 12(1)(a) of the Act and thereafter Section 12(3) or Section 13(5) would not be attracted."

11 : Thus, it is contended by the learned senior counsel that if this was the situation, learned trial Court was right in granting a decree under Section 12(1)(a) of the Act to the appellant/ plaintiff and the reasons on the basis of which such a finding of the trial Court is reversed by the learned lower appellate Court are unfounded and misconceived.

12 : Learned counsel for the respondents/defendants contended in reply that such was not the situation. Since in earlier case, the decision was rendered against the respondents/defendants only with respect to the payment of rent, the same came to an end after decision by the First Appellate Court. It is further contended that the provisions of Section 12(3) of the Act are attracted moment the suit is filed and what is required to be seen, is whether from the date of demand the arrears of rent is paid or not. Since the previous arrears were not to be calculated and computed in the arrears for which the demand

was made, the respondent/tenant was right in complying with the provisions of Section 13 of the Act. Once the provision of Section 13 of the Act are complied with the protection under sub-section (3) of Section 12 becomes automatically available and, therefore, there was no occasion to grant a decree of eviction under Section 12(1)(a) of the Act. It is further contended that there was no cause of action available to the appellant/plaintiff to file a suit claiming a decree under Section 12(1)(a) of the Act, inasmuch as, the demand as made by the notice was complied with. For the said purposes, learned counsel for respondents has relied on a decision of this Court in *Lachoo Ram Vs. Bipin Kumar* (AIR 1993 MP 17) and has drawn the attention of this Court to the specific findings of this Court in the said case in paragraphs 8,11 and 12. It is contended by the learned counsel for respondents/defendants that this Court has very categorically said that it is candidly clear that proviso to sub-section (3) of Section 12 of the Act, debars such tenant to get the benefit even on deposit of arrears of rent in accordance with Section 13 of the Act, who could not avoid his ejectment on the ground under Section 12(1)(a) of the Act. But for seeking a decree for eviction on the ground of Clause (a) of Section 12(1) of the Act, a landlord, in subsequent suit claiming eviction on the ground of default in payment of arrears of rent must disclose the ground as contemplated by Clause (a) of sub-section (1) of Section 12 of the Act and for that purpose, it is essential to disclose that despite service of notice of demand for arrears of rent due, the tenant failed to pay or tender the amount of arrears of rent within two months from the date of service of such notice.

13 : It is, thus, contended by learned counsel for respondents/defendants that since the rent as demanded was already paid by sending a money order well within the time of the period of notice which fact has been admitted by PW/1, in his statement, if the trial Court has wrongly granted the decree for eviction under Section 12(1)(a) of the Act, learned lower Appellate Court was just and proper in reversing such a finding of the trial Court. It is further contended by learned counsel for respondents/defendants that in view of the law laid down by this Court in case of *Bachchoobhai Vs. Premanand Bhiogadhe* (AIR 1976 MP 8) in such circumstances, the course open to the learned trial Court was to proceed under sub-section (6) of Section 13 of the Act and strike off the defence of respondents/defendants, but not to grant a decree under Section 12(1)(a) of the Act for eviction. Similarly, it is said that since service of notice on the respondents/defendants, was not proved, by making application of M.P. General Clauses Act, it is deemed that the notice is served within a month from the date of dispatch and within two months from

the date of receipt of such notice, if the arrears of rent as demanded is paid, a suit for eviction under Section 12(1)(a) of the Act, could not have been filed. For the said purposes, learned counsel for respondents/ defendants has relied on decision of this Court in *Budha and others Vs. Bedariya* (AIR 1981 MP 76). Thus, it is contended by learned counsel for respondents/ defendants that the suit as filed under Section 12(1) (a) of the Act for eviction of the tenant was not maintainable, but the learned trial Court has not considered these aspects and has wrongly granted a decree under Section 12(1) (a) of the Act for eviction of the tenant. Such findings of the trial Court were rightly interfered with by the learned lower appellate Court and, therefore, there is no substance in this appeal and the same is liable to be dismissed.

14 : After hearing learned counsel for the parties at length, this Court is of the considered opinion that there was a folly on the part of the lower appellate Court in partly allowing the appeal of the respondents/defendants. Firstly, it was to be seen that the earlier suit was for eviction under Section 12(1)(a) of the Act, on the ground of non-payment of arrears of rent. The trial Court in the first suit granted the protection available under Section 12(3) of the Act to the respondents/defendants and instead of granting a decree of eviction which was specifically refused, the decree for recovery of rent was granted. Had it not been extension of the protection to a tenant against the eviction as provided under sub-section (3) of Section 12 of the Act, the decree of eviction would have been passed in the earlier suit because admittedly there was default of payment of rent of demise premises on the part of tenant. The law has been well settled now by the Apex Court in the case of *Sobhagyamal and another (supra)* where the Apex Court has categorically held that this protection is available once only. If even for the recovery of the rent for which the decree was granted, a demand is made and the said demand is not fulfilled within the stipulated period, a tenant has no say to claim the protection under sub-section (3) of Section 12 of the Act. If such is allowed to continue like this that on every occasion and in every suit, the protection is available to the tenant, the insertion of the proviso under sub-section (3) of Section 12 of the Act by the legislature would render redundant and meaningless. This being so, such a claim made by the respondents/ defendants that the earlier rent for which the decree was granted, was not to be computed as arrears of rent and no fresh demand could be made, cannot be accepted. Secondly, the protection of sub-section (3) of Section 12 of the Act is available only when the provisions of sub-section (1) of Section 13 of the Act are complied with. Section 13(1) of the Act reads thus :-

"13(1). On a suit or any other proceeding being instituted by a landlord on any of the grounds referred to in Section 12, or in any appeal or any other proceeding by a tenant against any decree or order for his eviction, the tenant shall, within one month of the service of writ of summons or notice of appeal or of any other proceeding, or within one month of institution of appeal or any other proceeding, by the tenant, as the case may be, or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court or pay to the landlord, an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default including the period subsequent thereto upto to the end of the month previous to that in which the deposit or payment is made; and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate till the decision of the suit, appeal or proceeding, as the case may be."

15. A bare reading of this provision makes it clear that not only the rent is required to be deposited by the tenant within one month from the receipt of the notice of appeal or suit, but he/she is further required to deposit the rent on each and every succeeding month on or before 15th of that month. On one default, the requirement of law is to seek condonation of the same because the Court has been given the power to condone such a default as is contemplated in this sub-section. Proviso to sub-section (3) of Section 12 of the Act talks about three consecutive defaults. That makes it clear that even for one and two default, no ground is available for granting a decree under Section 12(1)(a) of the Act, but in case of three consecutive defaults, the protection is automatically gone and the proceedings can be done under Section 13(6) of the Act or to grant a decree under Section 12(1)(a) of the Act. As has been pointed out, the original respondent on his own had moved an application pointing out the default committed by him in making the deposit of the rent after institution of the suit. For the said purposes, the application was considered and rejected by the trial Court vide order dated 16.2.2006. The said order was never called in question anywhere and it had become final. If the Court has refused to condone the default of payment of rent, that itself was enough to grant a decree under Section 12(1) (a) of the Act. The trial Court could have proceeded to strike off the defence of the respondents/ defendants, but since the entire evidence was recorded by that time, the case

was closed for arguments, the trial Court did consider it proper and appropriate to decide the issue in the suit itself and not to strike off the defence of the respondents/defendants. If that was so, the trial Court was just and proper in granting the decree of eviction against the respondents/defendants under Section 12(1)(a) of the Act. The striking off defence at such a stage was not appropriate action to be taken as that would have debarred the respondent to participate in the proceedings. The proceedings being culminated in full except the hearing of the arguments of the counsel, it was not necessary to exercise the power under sub-section (6) of Section 13 of the Act. Keeping in view such a situation, the trial Court was just and proper in granting a decree under Section 12(1)(a) of the Act also. The cases cited by the learned counsel for the respondents, therefore, are distinguishable and in view of the law laid down by the Apex Court in case of *Sobhagyamal and another* (supra) are not applicable in the present case.

16 : Now coming to the consideration of such an aspect by the learned lower appellate Court. As has been pointed out, the learned lower appellate Court has completely misread the provisions of Section 12(3) of the Act and the proviso read with Section 13(1) of the Act and has misconstrued in holding that there was no power left with the trial Court to grant a decree for eviction under Section 12(1)(a) to the appellant/plaintiff. Further, the learned lower appellate Court has considered that since the arrears of rent was for the claim which was subject matter of earlier suit, both could not have been clubbed together and no decree could have been granted for eviction of the tenant for non-payment of such arrears of rent. The learned lower appellate Court further misread the provisions of law and totally failed to understand that in fact such a tenant was not entitled to any sympathetic consideration nor was entitled to be given the protection under sub-section (3) of Section 12 of the Act as the said protection was earlier granted in earlier suit which was only for eviction on the ground of non-payment of arrears of rent. Thus, the finding of the learned lower appellate Court cannot be affirmed.

17 : Consequently, answering the question of law framed in affirmative, this appeal is allowed. The judgment and decree of the learned lower appellate Court whereby the decree granted by the trial Court under Section 12(1)(a) of the Act is set aside, is hereby, set aside. The decree of eviction granted by the learned trial Court against the respondents/ defendants under Section 12(1)(a) of the Act is affirmed. Looking to the facts in the present case, the parties to the appeal will bear their own costs.

Appeal allowed

I.L.R. [2012] M.P., 519
APPELLATE CIVIL
Before Mr. Justice Sheel Nagu
F.A.No. 214/1997 (Gwalior) decided on 20 December, 2011

SUDHA VERMA (SMT.) & ors. ...Appellants
Vs.
RADHAVALLABH SHARMA ...Respondent

***Civil Procedure Code (5 of 1908), Order XX Rule 12 – Mesne Profit* – Plaint is bereft of any pleadings in respect of mesne profit – Appellants are not entitled to any mesne profit.** (Paras 8 & 12)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश XX नियम 12 – अंतः कालीन लाभ – वाद अंतः कालीन लाभ के संबंध में बिना किसी अभिवचन के है – अपीलार्थीगण किसी अंतः कालीन लाभ के हकदार नहीं।

Cases referred :

2007 (8) SCC 600, 2011(3) SCC 436.

B.K. Agrawal, for the appellants.
D.K. Agrawal, for the respondent.

J U D G M E N T

Sheel Nagu, J.:- The sole question that arises for consideration before this court is as to whether the direction for grant of mesne profit can be extended in favour of the appellants in the absence of any pleading and prayer made by the plaintiff.

2. Before deciding the above said question, it is appropriate to detail the series of litigation which this case has gone through.

3. This first appeal was filed assailing the judgment and decree dated 12/09/1997 in Civil Suit No. 3A/ 1988 and Civil Suit 4A/ 1988 whereby the Additional District Judge, Shivpuri while decreeing the civil suit No. 3A/1988 of the respondent No. 1/ plaintiff dismissed the Civil Suit No. 4A/1988 for declaration of title, possession and permanent injunction filed by the appellants against the respondent No. 1.

4. The instant two civil appeals namely F.A. No.213/1997 and F.A. No.

214/1997 were filed before this Court assailing above said common judgment and decree dated 12/09/1997.

5. This court by judgment dated 26/10/2007 passed in F.A. No. 213/1997 and F.A. No. 214/1997 setting aside the impugned judgment and decree by the ADJ, Shivpuri in civil suit No. 4A/ 1988 and decreed the civil suit in favour of the appellants/ plaintiffs declaring that the appellants are owner of the suit property and were forcefully dispossessed on 15/02/1988, thereby directing respondent No. 1 to hand over the possession of the suit land by removing all the construction within a period of two months from today, failing which the appellants were directed to take possession of the suit property by initiating execution proceedings. Lastly, this court further directed grant of mesne profit @ Rs. 5,000/per annum to the appellants from 1988 till possession of the suit land is handed over to them.

6. The matter thereafter travelled to the Supreme Court which vide its final order dated 13/11/2009 in civil appeal No. 75827583/2009 while disposing of the said appeals and upholding the judgment of this court dated 26/10/2007 remanded the case to this Court only on the question of mesne profit by holding that the High Court has not dealt with the issue of mesne profit with good reason.

7. Therefore, the only issue that is required to be considered is that the mesne profit can be granted to the appellants or not ?.

8. Order XX Rule 12 of CPC relates to the decree for possession and mesne profit. This provision contemplates that whether a suit is for recovery of possession of immovable property and for rent or for mesne profit, the Court may pass the decree inter alia for mesne profit or direct for an inquiry to be held as to such mesne profits. A plain reading of said statutory provision indicates that the very first prerequisite for entitlement of mesne profit is institution of a suit inter alia for mesne profit, meaning thereby that the pleadings in the plaint ought to contain necessary material facts and consequential relief to entitle the plaintiffs for mesne profit.

9. In this respect the decision of the Apex Court in the case of *Shiv Kumar Sharma Vs. Santosh Kumari*, reported in 2007(8) SCC 600 elucidates importance of existence of pleadings as a prerequisite for grant of relief of mesne profit under Order XX Rule 12 CPC. The Apex Court in fact

holds that the suit for mesne profit involves different cause of action which is required to be pleaded in specific in categorical terms as it involves disputed question of fact and the court is not only required to adjudicate the entitlement of mesne profit but also the quantum which necessarily entails the payment of court fee.

10. This court further draws support and inspiration to emphasis the importance of existence of pleadings in a trial as contained in paragraph No. 55 of the decision of the Supreme Court in the case of *State of Orissa And Another Versus Mamata Mohanty* reported in 2011 (3) SCC 436, which is quoted below for convenience.

> "55. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ".

11. On the anvil of the above said legal position, the facts available in this case are required to be decided. A bare perusal of the plaint in civil suit No. 4A/ 1988 indicates that the plaintiffs/ appellants did not make any averments regarding the factum of entitlement of mesne profit to the appellants. Further, the relief clause in the plaint also does not contain any prayer for mesne profit.

12. In view of the above undisputed facutal position that the plaint is bereft of any pleadings in respect of mesne profit, this court is compelled to hold that the appellants are not entitled to any mesne profit.

13. Consequently, both these first appeals are dismissed in regard to the claim of the appellants for mesne profit.

14. No order as to costs.

Appeal dismissed

I.L.R. [2012] M.P., 522
APPELLATE CIVIL
Before Mr. Justice S.N. Aggarwal
S.A. No. 435/2008 (Gwalior) decided on 5 January, 2012

LAXMAN DAS ...Appellant
Vs.
PURSHOTTAM DAS ...Respondent

***Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) – Bonafide Need – Bonafide Requirement of a firm owned by son and wife of plaintiff* – A landlord can claim eviction on the ground of bonafide need of commercial premises if the premises is required by him either for his own business or for the purpose of business by any of his major son or unmarried daughter or any other member of his family for whose benefit the premises is held.** (Para 2)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वादी की पत्नि व पुत्र के स्वामित्व की फर्म की वास्तविक आवश्यकता – भूमिस्वामी वाणिज्यक स्थान की वास्तविक आवश्यकता के आधार पर बेदखली का दावा कर सकता है, यदि उसे उस स्थान की आवश्यकता या तो उसके स्वयं के कारोबार के लिये है या उसके किसी वयस्क पुत्र या अविवाहित पुत्री या परिवार के किसी अन्य सदस्य द्वारा कारोबार के प्रयोजन हेतु जिसका लाभार्थ उस स्थान में निहित है।

V.K. Bharadwaj with *Anand Bharadwaj*, for the the appellant.
Sarvesh Sharma, for the respondent.

ORDER

S.N. AGGARWAL, J. :- This Second Appeal is by the tenant aggrieved by his ejectment under Section 12 (1)(f) of M.P. Accomodation Control Act, 1961. There are concurrent findings of the two courts below against the appellant that the suit shop is required bonafidely by the respondent for the auto business of his son and wife running in the name and style of M/s Seth and Sons. The finding as to bona fide requirement is a finding of fact and can not be interfered with in the present appeal unless the appeal raises a substantial question of law within the meaning of Section 100 of Code of Civil Procedure 1908.

2. Shri V.K.Bhardwaj, learned senior counsel appearing on behalf of the

appellant/tenant has argued that Section 12 (1)(f) of M.P. Accommodation Control Act, 1961 does not visualise bona fide need of a firm or of the wife of the landlord/owner of the property. It is submitted by the learned senior counsel that in the present case, the respondent being the landlord of the appellant had claimed ejectment of the appellant for the bona fide need of a firm M/s Seth and sons, which was owned by his son and the wife. The contention is that the firm for whom ejectment was sought by the respondent does not come within the ambit of Section 12 (1)(f) of M.P. Accommodation Control Act, 1961. This argument in the opinion of this court is completely devoid of any merit. For a proper appreciation of the contention of the learned senior counsel appearing on behalf of the appellant, it would be necessary to refer to the pleadings of the respondent contained in his ejectment petition, wherein he has set out his bona fide requirement of the suit shop and the same is extracted below :-

> "यह कि वादी की पत्नि श्रीमति राममूर्ति देवी एवं दत्तक पुत्र विनितकुमार का भागीदारी व्यवसाय मेंसर्स सेठ एंन्ड संस अशोकनगर के नाम से होता है पूर्व में उक्त व्यवसाय में गुना में हीरो एक्टिव की दो पहिया वाहनों व फ़ोर्ट ट्रेक्टर की एजेन्सी गुना जिले के लिये ले रखी है जिसका "शो–रूम" आगरा–बम्बई रोड गुना में मय वर्क शॉप इत्यादि सहित सुचारू रूप से चल रहा है अभी विगत अभी विगत तीन वर्ष पूर्व हीरो ऐक्टिव स्कूटर व मोटर साईकिल विक्रय हेतु अशोकनगर शहर में पृथक एजेन्सी भी मेसर्स सेठ एंड संस को प्राप्त हुई है उन्होंने अपा उक्त व्यवसाय– फिलहाल वाद पत्र से संलग्न मानचित्र में अक्षर जे.एल.के.डी. से दर्शित पिछले भाग जो कि विवेक टाकीज के पीछे वाली मात्र करीबन 8 फुट चौड़ी गली की ओर हैं में प्रारंभ कर दिया है उक्त व्यवसाय हेतु वाद पत्र में मानचित्र में अक्षर के.एल.ओ.पी. से दर्शित भाग कम्प्रेशर कक्ष एवं ओ.पी.क्यू.आर. से दर्शित भाग वॉशिंग कक्ष के रूप में प्रयोग करते हैं शेष मानचित्र में अक्षर–क्यू.आर.एल.टी. से दर्शित कमरे वादी के सिनेमा व्यवसाय के जेनरेटर रूम व अक्षर एस.टी.व्ही.यू. से दर्शित कमरा स्टोर रूम के रूप में प्रयुक्त होते हैं।"

It shall also be significant to refer to the provisions of Section 12 (1)(f) of M.P. Accommodation Control Act, 1961 under which eviction was claimed by the respondent against the appellant and the same is extracted below :-

> "that the accommodation let for non-residential purposes is required bona fide by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters if he is the owner thereof or for any person

for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned."

A plain reading of the statutory provisions contained in Section 12 (a)(f) of M.P. Accommodation Control Act, 1961 makes it abundantly clear that a landlord can claim eviction of his tenant on the ground of bona fide need of commercial premises if the same is required either for his own business or for the purpose of any of his major son or unmarried daughter or any other member of his family for whose benefit the premises is held. A reference to the pleadings of the respondent in the ejectment petition extracted hereinabove would show that respondent had made out a bona fide need of the suit shop for the business of his major adopted son Vinit Kumar run by him under the name and style of M/s Seth and sons. The fact that the wife of the respondent was also a partner in the business of his son makes no difference as far as bona fide need of major son is concerned. If a reference is made to the pleadings of the respondent contained in his ejectment petition, it can not be said that the claim for bona fide need made by the respondent against the appellant was for a firm as sought to be contended by the learned senior counsel appearing on behalf of the appellant. In law a person doing business is entitled to induct as many persons as he likes as partners in his business. Merely because there are partners in the business of the son of the landlord, it does not preclude him from seeking eviction against his tenant, if he otherwise needs the suit premises bonafidely. Hence, I do not find any merit in the present second appeal, which is completely devoid of any merit and is, therefore, dismissed summarily with no order as to costs.

3. At this stage, learned counsel appearing on behalf of the appellant submits that the appellant does not intend to go any further in appeal against the order of this court and wants to finish the matter once for all. He, therefore, makes an oral request for grant of two years' time to the appellant for vacating the suit accommodation so that he may arrange for an alternative accommodation for earning his livelihood.

4. The counsel for the parties have been heard on the question of grant of time to the appellant for vacating the suit accommodation. The time for two years prayed for by the learned senior counsel appearing on behalf of the appellant for vacating the suit shop has been strongly opposed by Shri Sarvesh

Sharma, learned counsel appearing on behalf of the respondent. The appellant is stated to be in possession of the suit shop since 1974. Having regard to the fact that the appellant is in possession of the suit shop for last more than 35 years, this court considers it in the interest of justice to grant him one year's time for vacating the suit shop on the same terms and conditions of tenancy as on date subject to his filing an undertaking in this court in the form of his affidavit within 10 days from today undertaking to vacate the suit accommodation latest by 3Pt December 2012. A copy of the said undertaking should also be filed by the appellant before the executing court within the same time period of 10 days. In case the appellant fails to file the requisite undertaking within 10 days from today, then the respondent shall be entitled to execute the ejectment decree against him forthwith.

Appeal dismissed

I.L.R. [2012] M.P., 525
APPELLATE CRIMINAL

Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava

Cr.A. No.1066/2001 (Indore) decided on 26 July, 2011

PRAKASH & anr. ...Appellants.

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 – Murder – New Story – **Introduction of new story during trial adversely affects the prosecution case – It creates doubt with regard to the part of the prosecution version, and also occasions doubt about the motive, entitling the accused to the benefit of doubt.** (Para 13)

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – नई कहानी – विचारण के दौरान नई कहानी का प्रस्तुतीकरण अभियोजन प्रकरण में विपरीत प्रभाव डालता है – यह अभियोजन की कहानी के भाग के संबंध में संदेह पैदा करता है, और हेतु के बारे में भी संदेह का कारण बनता है जिससे अभियुक्त संदेह का लाभ पाने का हकदार।

Case referred :

AIR 2003 SC 2748.

R.K. Trivedi & V.K. Gangwal for the appellants.

Girish Desai, Dy. A.G. for the respondent/State.

JUDGMENT

The Judgment of the court was delivered by : **I.S. SHRIVASTAVA, J. :-** These appeals have been preferred by the appellants being aggrieved by the judgment dated 30/08/2001 passed by the Court of Shri Anil Kumar Shrivastava, 3rd Additional Sessions Judge, Ratlam in S.T. no. 124/2000, by which the appellants have been convicted under sections 302 & 323 of the IPC and sentenced them to undergo life imprisonment with fine of Rs.500/- each and one year rigorous imprisonment with fine of Rs.200/- each respectively.

2. According to the prosecution story, on 19/07/2000, Prakash, nephew of Belji had gone to Mahi river for fishing and one fish came in his grip, which was snatched by accused Prakash S/o Badiya and his brother Kailash. Hence there had altercation on this point in between them. On 21/07/2000, when Prakash S/o Gautam went for bath at Mahi river, then accused Prakash and Kailash quarreled and assaulted him. Thereafter, accused Prakash returned to home. At about 4 pm, complainant Belji, his wife Ramibai, his brother Madan were working in the field, at that time, accused Prakash, Kailash and Bodar, from the side of village, came to the house of Gautam. Accused Kailash was having a lathi in the hand. They started beating Gautam and Prakash, hence complainant Belji along with his brother rushed to the house of Gautam and tried to pacify the matter and said that why they were quarreling for one fish. On this, accused Prakash and Bodar, with intention to kill, pelted stones on Belji and his brother. Accused Kailash assaulted by lathi on the head of Belji, which caused him bleeding injury. Thereafter, all the three accused persons chased them and assaulted by stones and wooden rod. They were crying for their safety. Belji being injured fell down on the earth and all the accused persons assaulted Madan by stones and lathi. When he fell down, they continued to assault him. When Hukya, Sohanbai, Torniya and other villagers came to save them, then all the accused persons ran away towards the village. Belji sustained injuries in the head, back side of both the ears, back side of the stomach and the legs. He was brought to hospital by villagers. Madan was lying on the spot in unconscious condition. The accused persons Prakash, Kailash and Bodar assaulted the complainant with intention to kill them. The report of this fact was lodged by Belji, which was registered as Dehati Nalish; on the basis of which, FIR at crime no. 65/2000 under section 307/34 of the IPC was registered. Madan was found dead, hence offence

under section 302 of the IPC was added to it. After investigation, challan was filed and after trial, the appellants have been convicted and sentenced as mentioned herein above.

3. It has been argued by the appellants' counsel that the appellants have been falsely implicated in this case. The FIR was not proved by the evidence. The prosecution witnesses did not support the prosecution case. They have given different story from the FIR, hence their evidence is not reliable. There are serious contradictions and omissions in the prosecution evidence, which has not been appreciated in proper perspective, hence these appeals be allowed.

4. It has been argued by the respondent's counsel that the case was proved on the basis of the evidence produced by the prosecution witnesses. The appeals being devoid of merit, be dismissed.

5. Considered the arguments and record of the trial Court perused.

6. According to the prosecution case, Dehati Nalish Ex.-P/12 was lodged by complainant Belji PW-3. As regard the FIR, he deposed that he was sleeping at his home and he was informed by small children that Madan has been assaulted by someone at the river. Hence, he went to the spot, where he was also assaulted with stones by someone and he became unconscious. Thereafter, he was brought to hospital by someone. He does not remember that he lodged the report at police station. He has no information about lodging of the information. He does not know that how Dehati Nalishi PW-12 was lodged. He does not know, whether he put thumb impression on it. In this way, he has not confirmed the fact that Dehati Nalishi PW-12 was lodged by him. FIR Ex.-P/13 was registered at crime no. 65/2000 on the basis of Dehti Nalishi report. About it, Harigyansingh PW-12 has deposed that head constable Shri Tiwari brought Dehati Nalishi report to the police station, on the basis of which, he registered FIR Ex.-P/13. In cross-examination, he has admitted that Dehati Nalishi was lodged by Belji, but in it, it has not been mentioned that at which place, it was written. Therefore, on the basis of the above evidence, it was not proved that Dehati Nalishi was lodged by Belji.

7. Surendranath Tiwari, ASI PW-13 in cross-examination has deposed that he recorded Dehati Nalishi in hospital on personal instruction of Belj, but he did not obtained any certificate from doctor whether he is fit for statement?,

but in Dehati Nalishi, he has not mentioned that it was recorded in hospital, where Belji was admitted. Punja PW-1, father of the deceased in his report has deposed that Shankar and Roopji lodged report at police station. In cross-examination, he deposed that Belji was also brought by police to police station with Madan and they remained there for whole of the night. Then it was very natural that report would have been lodged by Belji at police station and there was no need to lodged the report from hospital. Under these circumstances, it was not proved that Belji lodged the report.

8. As regard the incident, Belji PW-3 turned hostile. According to him, at about 5 pm, he was at his field alongwith his wife Ramibai and brother Madan and Prakash; they were working in the field, at that time, accused Prakash and Kailash came and pelted stones and when he said to them why they were pelting stones, then they continued pelting stones. Stones hit Madan and him also. In cross-examination, he has deposed that he was at his home and was sleeping, at that time, he was informed by small children that Madan has been assaulted by someone at the river, hence he went there. He was also assaulted with stones by someone there. Again he has stated that he was assaulted by someone. Again he has confirmed that he was at his home. He has contradicted his police statement portion A to A, B to B and he deposed that he did not give this information to police station. He has admitted that he does not know anything about the incident and nothing happened before him In this way, he did not support the prosecution story and gave a new story.

9. Lalibai PW-2 in this respect has deposed that she was working in his field with her husband and Gautam and Prakash, at that time, stones were being pelted on them. Accused Prakash was saying *" this is my land "*. Thereafter they proceeded from there. Accused Prakash assaulted Madan by stones. Thereafter, they ran away. On the cries of Madan, they started running. Then Kailash pelted stones, which caused injury to Belji. Accused Kailash also assaulted Belji by lathi in the head; due to which, he sustained injuries in the head. In this way, this witness also does not support the fact that accused persons went to the house of Gautam and assaulted Gautam and Prakash there. Thereafter, Belji along with his brother went to the house of Gautam and they tried to pacify the matter and said " why they are quarreling for one fish". Lalibai was confronted from her police statement Ex.-P/1, in which she deposed that she did not give information of the portion A to A, B to B and C to C to police. In this way, this witness does not confirm the

prosecution story and gave a new story about the cause of the incident. She has deposed that accused Prakash was saying *" this land belongs to him "*, but this fact has not been mentioned in her police statement.

10. Ramibai PW-4 give different story. According to her, she was working in her field along with her husband Belji and Madan. At about 4 pm, accused Prakash came and assaulted by stones. One stone hit Madan at the back side of the head; due to which, he fell down. Her husband also sustained injuries by stone. Then Kailash came there and said to kill them and he assaulted Madan by lathi. Improving it, she further deposed that he assaulted Belji by lathi and Bodar said to kill them. When Madan fell down, accused Prakash assaulted him by stone. Thereafter, she ran away from that place. Madan fell down and died. No one came there and thereafter, police came and took Madan and Belji to hospital. In cross-examination, she deposed that in her police statement, Ex.-D/2, she did not give information of the portion A to A to police. In this way, this witness did not confirm the prosecution story.

11. Prakash PW-5 deposed that at the time of the incident, he was at his field along with his father Gautam and Ramibai, Belji and Madan. Accused Prakash came and pelted stones. When Gautam protested, then he started assaulting Gautam. Thereafter, Belji came and said that why he was assaulting, then he assaulted him by stone and then Bodar said to kill them. Thereafter, accused Prakash came there and assaulted Madan; due to which he sustained injuries in the back side of the head; he fell down. Thereafter, accused Prakash threw big stone; due to which he sustained injury. Accused Kailash came there and assaulted Belji by lathi and they all ran away. In this way, he has not confirmed the prosecution case and gave different story. The fact that he was working in the field with his father Gautam, mother Lalibai, Belji and Madan, at that time, Prakash and Kailash came there and assaulted, has not been mentioned in his police statement Ex.-D/3. All the facts which have been mentioned by him in examination-in-chief are omissions and they have not been recorded in police statement Ex.-D/3. In this way, the statements of all these witnesses are not believable.

12. Punja PW-1 is the father of deceased Madan. He deposed that when he returned to his village from village Ambapada, he was informed that Madan has been murdered and was lying in the field. Accused Kailash assaulted him by lathi; accused Prakash by stone and faliya. Thereafter, he, Gautam and Belji took Madan to police station and report was lodged by Shankar and

Roopji. He was assaulted on a dispute of land. In crossexamination, again he has explained that that time of the incident, he was not on the spot and he gathered the information from the villagers that the incident took place on the dispute of land. Injured Gautam has not been examined hence, it was not proved that he sustained injuries in this incident.

13. In this way, all the witnesses Punja PW-1, Lalibai PW-2, Belji PW-3, Ramibai PW-4, Prakash PW-5 gave different story from the FIR Ex.-P/13 and they did not support the fact of FIR that Belji, his wife Ramibai, Madan were working at his field and at that time, accused Prakash, Kailash and Bodar went to the house of Gautam and they assaulted Gautam and Prakash. Thereafter, Belji and his brother went to the house of Gautam and gave understanding to accused Prakash and Kailash that why they were assaulting on the dispute of one fish only and thereafter, accused Prakash and Bodar assaulted Belji and his brother. In this way, the prosecution story was not confirmed by any of the witness, but all the witnesses gave a different story. In the case of *Ram Narayan Poply Vs. State* [AIR 2003 SC 2748], it has been held that "*introduction of new story during trial would adversely affect the prosecution case. It does not only create doubt with regard to the part of the prosecution version, but also occasions doubt about the motive, entitling the accused to the benefit of doubt*".

14. It has been argued by the appellants' counsel that they have been falsely implicated in this case. Land of Punja PW-1 was mortgaged with Badiya who is the father of accused Kailash and Prakash, due to this dispute, they have been falsely implicated in this case. There are stones in Mahi river and if someone fall on the stones, then he can sustain such injury. In cross-examination, Dr. V. S. Ranawat PW-7 has also admitted the fact that the injuries found on the injured person may be caused by fall on the stone or fall of stone on the injured person. He has also admitted the fact that Mahi river flows into the mountains and its area is stony and village – Madhodiya is situated at the bank of this river. Patwari Mangilal PW-8 has also admitted that from the south side of the field of Punja and from east to west, there are stone and Nala. Therefore, this possibility cannot be denied that the injured person sustained injury in the river and Madan died by fall in the river and due to enmity, the appellants have been falsely implicated in this case. It has also been argued that during investigation, no stone was seized by the investigating officer, while immediately after the incident, the police reached the spot and

found dead body of Madan from there. Due this enmity, they have been falsely implicated in this case.

15. Considered the arguments. Dr. V. S. Ranawat, PW-7 has admitted the fact that the injuries caused to Belji , Prakash, Gautam and Madan may be caused by falling on stone or falling of stone on injured persons. He has also continued the fact that village –Madhodiya is situated at the bank of Mahi river and it is the river which flows in between the mountains and whole area of the river is full of stones. Punja PW-1 has admitted in cross-examination that his land is mortgaged for Rs.2000/- to Badiya and he is not redeeming it. Accused Kailash and Prakash are the son of Badiya. Lalibai PW-2 has also admitted this fact that her father-in-law has kept his land as mortgage to Badiya. Under these circumstances, it cannot be denied that there is suspicion that due to this enmity, the appellants have been falsely implicated in this case, otherwise, there would not have been such type of discrepancies in the evidence of the prosecution witnesses.

16. On the basis of the above discussion, we are of the conclusion that the prosecution case was not proved on the basis of the evidence of the prosecution witnesses. Dehati Nalishi report Ex.-P/12 was not proved from the statement of Belji. The prosecution story was not supported by the prosecution witnesses. They gave different story about the incident. Prakash PW-5 did not confirm the fact that one day before the date of the incident, he had a dispute with accused Kailash and Prakash on fishing and due to which, he was assaulted on the date of the incident. There were serious contradictions and omissions in the statements of the witnesses which makes them unreliable. No independent evidence was produced to support the prosecution case. It is alleged that deceased Madan was assaulted by stone, but no stones were seized during investigation. Under these circumstances, the appellants were not liable to be convicted, therefore, this appeal deserves to be allowed.

17. On the basis of above discussions, this appeal is allowed and the appellants are acquitted from the charges under sections 302 and 323/34 of the IPC. Appellant Prakash is in jail, hence he be released, if not required in any other offence. Other accused persons are on bail; their bail bonds are discharged. Accordingly, these appeals are disposed of.

Appeal allowed

I.L.R. [2012] M.P., 532
APPELLATE CRIMINAL
Before Mr. Justice I.S. Shrivastava
Cr. A. No.592/1997 (Indore) decided on 9 August, 2011

ATIK ....Appellant
Vs.
STATE OF M.P. ...Respondent

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985),* Section 8(c)/18 – *Possession of opium* – 260 gms. of opium is alleged to have been seized but only 240 gms of opium was deposited in malkhana after separating a sample of 10 gms – Arrest memo, seizure memo and panchnama of sample appears to be tampered documents as they bear F.I.R. number whereas F.I.R. was lodged much thereafter – F.S.L. not readable hence no opinion can be drawn – Appellant liable to be acquitted – Appeal allowed.** (Paras 9 to 13)

स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8(सी)/18 – अफीम का कब्जा – 260 ग्रा. अफीम जब्त होना अभिकथित किया गया लेकिन 10 ग्रा. सेम्पल अलग करने के बाद केवल 240 ग्रा. अफीम ही मालखाने में जमा की गई – गिरफ्तारी पत्रक, जब्ती पत्रक और नमूने का पंचनामा छेड़छाड़ किये गये दस्तावेज प्रतीत होते हैं, क्योंकि उनमें एफ.आई.आर. नम्बर दिया गया है, जबकि एफ.आई.आर. इसके बहुत बाद में दर्ज कराई गई – एफ.एस.एल. प्रतिवेदन पठनीय नहीं है, अतः कोई राय नहीं बनायी जा सकती – अपीलार्थी दोषमुक्त किये जाने योग्य – अपील मंजूर।

Z.A. Warsi, for the appellant.
C.R. Karnik, G.A. for the respondent/State.

JUDGMENT

I.S. SHRIVASTAVA, J. :- This appeal has been preferred by the appellant Atik being aggrieved by the judgment dated 30th June, 1997 passed by the Court of Shri S. N. Sharma, Sessions Judge, Shajapur in S.T. no. 492/1992, by which the appellant has been convicted under section 8(c) / 18 of the NDPS Act and sentenced to rigorous imprisonment of ten years along with fine of Rs.1,00,000/-

2. According to the prosecution story, in the night of 21/04/1991, PSI Prakash Batham along with constables Rajaram, Bhanusingh, Harishchandra, Mangilal during petrolling stopped a truck bearing registration no. CPM- 8423 and brought it to the police station, in which 43 cows and oxen were packed for slaughtering at Maharashtra, hence crime no. 105/1991 was registered. Driver of the truck was Samiullha and the businessmen of the cows and oxen were Atik, Farukh. On search of the truck before the witnesses Rajendra Desai and Radheshyam, from the black coloured bag of Atik, 260 grams opium was found in a polythene bag, which was identified as opium. The samples of 10 grams was taken out and sealed. Accused Atik informed that Samiullha, Farukh are taking the cows for slaughtering and the opium as a sample to Bombay, hence crime no. 106/1991 was registered against accused persons. After investigation, challan was filed against the accused Samiullha, Atik, Farukh and Ataullha Khan. Vide the impugned judgment, accused Shamiullha, Farukh and Ataullha Khan have been acquitted and the appellant Atik has been convicted as mentioned herein above. Hence the present appeal has been filed.

3. It has been argued by the appellant's counsel that the appellant has been falsely implicated in this case. All the documents were tampered and not reliable. The appellant was not identified during trial and on the basis of the identification marks, he was identified by the investigating officer. The diary and the bag which were found with the appellant was not produced before the Court. The quantity of the opium was changed. After taking out the samples of 10 grams, the remaining quantity would have been 250 grams, but only 240 grams opium was produced before the Trial Court. The independent witnesses were hostile and they did not support the prosecution story. The original FSL report was not produced before the Trial Court; its attested copy was filed as Ex.-P/32 which is not readable document and on the basis of which, its result cannot be seen. It was not legally proved. Hence the appeal should be allowed.

4. It has been argued by the respondent's counsel that the case was proved against the appellant on the basis of evidence produced before the Trial Court. The appellant was identified by the Investigating Officer in the Court. Hence, the appeal, being devoid of merits, be dismissed.

5. Considered the arguments and record of the Trial Court perused.

6. Rajesh Kumar PW-1 and Ramprasad PW-2 were the independent witnesses of seizure memo Ex.-P/1 and the seizure memo of the sample Ex.-

P/2,. Both these witnesses were declared hostile. According to the Rajesh Kumar PW-1, the accused persons were arrested before him. The seizure memo Ex.-P/1, panchanama of sample Ex.-P/2 and arrest memo Ex.-P3 bear his signatures, but before him, the opium was not seized from the truck and sample was not taken out before him and it was not sealed before him; the bag was not found before him. In cross-examination, he deposed that the proceedings were taken up at the afternoon while according to *panchanama* Ex.-P/1 & Ex. P/2, it was prepared at 3.20 am.

Ramprasad PW-2 deposed that before him, the truck was searched and the opium was not found and it was not seized and sealed before him. In cross-examination, he has deposed that he was told by the police officer that they were seizing cows, hence he should sign, therefore he signed. Both these witnesses have denied with their respective police statements Ex.-P/5 and Ex-P/6. In this way, these proceedings were not supported by the independent witnesses.

7. Harisingh PW-3 who is the independent witness of memo Ex.-P/4 and Ex.-P/8, search of the house of accused Atik, but he has turned hostile and he has not supported the prosecution case. He deposed that before him, the bag was not seized and not searched. He did not give the statement Ex.-P/9 to police.

Prakash Batham PW-4 who during city petrolling brought the truck to police station, has deposed that the accused persons present in court were brought by him to the police station. Their names were Samiullha etc. He does not remember the names of other accused persons. The cows and oxen were taken out from the truck and the accused persons were searched, during which, 260 grams opium was seized from the person to whom he cannot identify today. The whole of the proceedings were completed by the station house officer Harveer Singh PW-6. In this way, this witness has failed to identify the appellant.

Harveersingh PW-6 deposed in this respect that the truck was brought by sub-inspector Prakash Batham to the police station, in which cows and oxen were packed very cruelly, which were being carried for slaughtering. Hence he took out the cows from the truck. Three persons were in the truck and he does not know their names. Seeing the accused persons in the court, he said that these four persons were in the truck, against which, offence under

the Pashu Atyachar Niwaran Adhiniyam was registered. During search of the truck, he found a bag in the cabin of the truck, in which 260 grams opium was found. This bag was of accused Atik. The opium was tested and smelled and was identified as opium. In the bag, clothes, diary and undergarments, watch were found and which were seized. The diary was in the name of accused Atik. He seized all these documents and prepared panchanama Ex.-P/1, which bears his signature. He took out10 grams of opium as sample and it was seized by panchanama Ex.-P/2. Thereafter, he registered the crime by FIR Ex.-P/14 and arrested the accused persons by arrest memo Ex.-P/3. Thereafter, he deposited the opium and sample in sealed condition in Malkhana and handed over it to head constable. On 17/05/1991, he sent the seized property to FSL by Ex.-P/10. Article-A is the packet, which is produced in the Court in which he sealed the opium and the chit pasted on it signed by him and the witnesses.

8. It has been argued by the appellant's counsel in this respect that after deducting 10 grams opium as sample out of 260 grams opium, the remaining quantity should be 250 grams while in packet Article-A, the quantity of opium was mentioned as 240 grams. This shows that the sample was defective and was prepared arbitrarily.

9. Considered the arguments. According to Ex.-P/1 & Ex.-P/2, 10 grams opium was taken out for sample, hence the remaining quantity of opium should be 250 grams, but it has been observed by the Court that in property deposit memo, it has been mentioned that 240 grams opium has been deposited in the malkhana. This shows that the remaining 250 grams opium was not deposited in the Court and the Investigating Officer Harveersingh PW-6 has not given any statement about the difference of 10 grams opium and he has not given any explanation of it, which creates doubt about the actual quantity of the opium and the quantity deposited in the Court.

10. As regard to panchanma Ex.-P/1 about the seizure of the opium and panchanama Ex.-P/2 of 10 grams opium as sample and arrest memo Ex.-P/3, it has been argued by the learned counsel for the appellant that these documents are tampered documents. Ex.-P/1 and Ex.-P/2 bear the same time as 3.20 am and arrest memo Ex.-P/3 and FIR Ex.-P/14 bear the same time. Ex.-P/1, Ex-P/2 & Ex.-P/3 bear the crime number while they were prepared before reaching at police station and registration of FIR and hence they are tampered documents

11. Considered the arguments. According to the statement of Harveersingh PW-6, he registered the crime by FIR Ex.-P/14 and thereafter, arrested the accused persons. From the FIR, it reveals that it was registered at 3.25 am in the night and arrest memo Ex.-P/3 was prepared at 3.25 am in the night, hence both these documents were prepared at the same time. Similarly, seizure memo Ex.-P/1 and panchanama of sample Ex.-P/2, both bear the crime no.106/1991 while up till that time, FIR was not registered. Both these documents bear the time of preparation of the documents as 3.20 which is not possible. This shows that Ex.-P/1, Ex.-P/2 and Ex.-P/3 are tampered documents, hence they are not reliable.

12. In this case, at the time of the trial, original FSL report was not produced. It was missing, therefore, attested copy of Ex.-P/32 of the FSL report was produced in evidence. From perusal of this report, it reveals that it is not readable copy and no opinion can be drawn from it, therefore, it cannot be said that in FSL, the substance which was sent for analysis was found to be opium.

13. Therefore, on the basis of the above discussions, I conclude that the appellant was not liable to be convicted because the seizure memo Ex.-P/1 and Ex.-P/2 were tampered documents. It was bearing crime number and both these documents were having same time of preparation of the documents and they were not supported by the independent witnesses. The sample produced before the Trial Court which contained 240 grams opium was doubtful because the remaining quantity of the opium was 250 grams, which should be deposited in the Malkhana and produced in the Court. The arrest memo Ex.-P/3 was not also reliable because the time of the arrest memo and the FIR was same i.e. 3.25 am, which is not possible. Harveersingh PW-6 was unable to identify the appellant. After preparing the arrest memo on the basis of the identification mark, he identified the appellant. FSL report was not readable and no conclusion can be drawn from it. Hence this appeal deserves to be allowed.

14. Therefore, on the basis of the above discussions, this appeal is allowed and the appellant is acquitted from the charges under section 8(c)/18 of the NDPS Act. The fine, if deposited be returned to him. His bail bonds are discharged. He be released, if not required in any other offence.

Appeal allowed.

I.L.R. [2012] M.P., 537
APPELLATE CRIMINAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava
Cr. A. No.605/2001 (Indore) decided on 16 August, 2011

KESHULAL ...Appellant
Vs.
STATE OF M.P. ....Respondent

Penal Code (45 of 1860), Section 302 – Murder – Circumstantial Evidence **– Wife left her husband/appellant and 3 years old daughter in house – Deceased daughter was found in company of the appellant at about 12 P.M. –Explanation given by appellant that he left house at 7 am not plausible – Conduct of appellant after incident was suspicious –He was not available after incident but was arrested after 7 days of incident– Deceased was found lying on the bed covered with blanket in the room with 22 injures on her body and cause of death was asphyxia as a result of smothering–Motive for killing 3 years old daughter also established–Chain of circumstances lead to only conclusion that appellant had killed his 3 years old daughter – Appeal dismissed.** (Para 14)

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – पत्नी अपने पति/अपीलार्थी तथा 3 वर्षीय पुत्री को घर में छोड़कर गई – करीब 12 बजे दोपहर में मृतक पुत्री अपीलार्थी के साथ पाई गई थी – अपीलार्थी द्वारा दिया गया स्पष्टीकरण कि उसने सुबह 7 बजे घर छोड़ा, विश्वसनीय नहीं – घटना के बाद अपीलार्थी का आचरण संदेहास्पद था – वह घटना के पश्चात उपलब्ध नहीं था बल्कि उसे घटना के 7 दिन पश्चात गिरफ्तार किया गया – मृतिका कंबल से ढकी हुई कमरे में बिस्तर पर पाई गई उसके शरीर पर 22 क्षतियाँ थीं और मृत्यु का कारण गला घोंटने के परिणाम स्वरुप श्वांसावरोध था – 3 वर्षीय पुत्री को जान से मारने का हेतु भी स्थापित किया गया – परिस्थितियों की श्रृंखला केवल इस निष्कर्ष की ओर ले जाती है कि अपीलार्थी ने अपनी 3 वर्षीय पुत्री की हत्या की – अपील खारिज।

Cases referred :

1993 JLJ 200, (1992) 3 SCC 106, (1992) 3 SCC 300.

Sonali Gupta, for the appellant.
C.R. Karnik, G.A. for the respondent/State.

JUDGMENT

The Judgment of the court was delivered by:
I.S. SHRIVASTAVA, J. :- This Appeal has been preferred by the appellant Keshulal being aggrieved by the judgment dated 03/04/2001 passed by the Court of Shri N.S. Azad, Sessions Judge, Indore in S.T. no. 744/2000, by which the appellant has been convicted under section 302 of the IPC and sentenced with life imprisonment.

2. According to the prosecution story, on 26/07/2000, complainant Laximibai lodged a report at police station –Aerodrome, Indore that in the morning at about 8 am, she went for labourship leaving her daughter Kavita aged 3 years and her husband Keshulal at home. At about 7 pm, when she returned to home, she found that her house was locked from the outside and her mother, father and maternal aunt were sitting at the outside of the house. They told her that they received news of the death of Kavita on telephone, hence they came there. Thereafter, complainant Laximabai took out a key of the lock from the usual place where it was kept by her husband and after opening the lock, she saw inside the house that Kavita was lying on the bed covered with blanket. After lefting the blanket, she found Kavita dead and she was having blackish marks at different places of the body. On inquiry, neighbour told that they saw at about 2 pm that Keshulal, after locking the room from the outside, was going and Kavita was not with him. Her husband Keshulal had murdered Kavita by assaulting and pressing her mouth. Earlier two times, he assaulted Kavita as she did not talk with him and after tiding her hands and legs, he also hanged her upside down. Hence on report, Crime no. 224/2000 was lodged at police station – Aerodrome, Indore and after investigation, challan was filed against the appellant Keshulal and after trial, he has been convicted and sentenced as mentioned herein above.

3. It has been argued by the appellant's counsel that the appellant has been falsely implicated in this case. There was no motive that why the appellant shall murder his daughter of tender age. There was no evidence that how the parents and maternal aunt of the complainant received the massage of death of Kavita by telephone. The details about the death of Kavita was not given. The person who received the telephone call was not examined. As per medical report, the cause of death of Kavita was asphyxia as a result of smothering, but there is no evidence in this regard that the appellant is responsible for the death of Kavita or he pressed the neck of his daughter Kavita, hence the trial

Court has wrongly believed in that appellant Keshulal gave massage to his mother-inlaw and father-in-law about the death of Kavita. The above witnesses did not inform the police immediately about the death of Kavita. The trial Court has wrongly believed in the statements of the witnesses that Kavita was under the impression of obsession and due to which, the accused/ appellant committed murder of Kavita. In the FIR and before the death of Kavita, this fact was not disclosed by complainant Laxmibai to anyone. But the trial Court believed it that the person who believes in ghosts to get rid of it shall beat the affected person, hence the appellant has murdered his daughter Kavita. The appellant has been convicted on the basis of the evidence of last seen. There was no evidence to convict the appellant, hence the appeal be allowed.

4. It has been argued by the respondent's counsel that the appellant has been rightly convicted and sentenced, because he was with the deceased Kavita on the date of the incident and Kavita was found dead and she was having nearabout 22 injuries on her body, due to which she died. There is ample evidence that earlier to this incident, the appellant was having suspicion that deceased Kavita was under the impression and control of some ghost, therefore, he used to beat her and told this fact to others. The behavour of the appellant was suspicious and leaving the dead body of Kavita in the room, he ran away after locking the door of the house. His conduct was also suspicious in this regard as he was missing for seven days after the incident and he was arrested after seven days. All these circumstances lead to the guilt of the appellant, hence this appeal being devoid of merits, be dismissed.

5. Considered the arguments and record of the Trial Court perused.

6. From the statement of Laxmibai PW-4, it reveals that on the date of the incident at about 8 am, she went for labourship in village – Rijlaye leaving her daughter Kavita and accused /appellant Keshulal at home. In the evening at about 7 pm, when she returned, she found her mother, father and maternal aunt at the house. On inquiry by her that how they come there, they asked " *where is Kavita; they have received the massage that Kavita died".* Thereafter, she opened the lock of the room and saw that Kavita was sleeping below the blanket. After removing the blanket, she saw her dead. Kavita was having marks of beating on her body. Thereafter, she lodged the report Ex.-P/ 1 at the police station. Ramcharan PW-1 has confirmed that on the date of the incident at about 12 pm, accused Keshulal came his shop with Kavita aged

three years and he gave a banana to Kavita. The accused stopped there for half an hour and thereafter, the accused returned to the home with Kavita. He came to know the fact of death of Kavita at about 6 pm i.e. after the death of Kavita. This shows that Kavita was in the custody of the accused Keshulal on the date of the incident.

7. As regard to motive of murder, Ramcharan PW-1 has deposed that accused Keshulal used to come to him and told that his daughter Kavita was under the influence and control of ghost and in dream, she threatens him. Kalabai PW-3, mother of the complainant Laxmibai deposed that Keshulal used to beat Kavita and her daughter and threatened them. Bapu PW-2, father of the complainant Laxmibai deposed that her daughter was married with appellant Keshulal. Deceased Kavita used to fear with Keshulal, because he used to beat her. This fact was told to him by Kavita. His daughter complainant Laxmibai told him that when Keshulal came in the house, then Kavita seeing him, hided herself. Laxmibai PW-4 in this respect has told that Keshulal was drug addict and used to beat Kavita; due to which, Kavita was not talking with him due to fear. Therefore, Keshulal used to beat Kavita. Whenever Laxmibai saved Kavita, accused Keshulal also beat her. Once, the accused after beating, hanged Kavita upside down by tiding her hands and legs. On her interruption. he released Kavita. In cross-examination, she deposed that 3 - 4 times in the village, Keshulal assaulted Kavita. She complained about this to her parents; they advised her to leave the house of Keshulal, but she did not follow their advice saying that Keshulal is her husband.

8. From this fact, motive of the murder of Kavita is established that as the appellant was having suspicion that Kavita was under influence of ghost, therefore, this was the reason, due to which, he murdered his daughter Kavita. The observation of the Court in this regard is not irrelevant, because normally, those persons who are under influence of ghost etc; they are beaten for their treatment. Therefore, if the appellant has assaulted his daughter Kavita, then it is not a irrelevant factor, therefore the motive is established.

9. It has been argued by the appellant's counsel that this fact has not been narrated in police statements of the witnesses.

10. Considered the arguments. From the police statement Ex.-D/1 of Ramcharan, it reveals that on the date of the incident, appellant Keshulal came to his pan shop. He gave a banana to Kavita and thereafter, Keshulal returned

with his daughter Kavita. In the evening, he came to know about the death of Kavita. Keshulal told him that Kavita feared from him and did not talk with him. Keshulal also told him that he used to assault Kavita. Keshulal was very much superstitious. From the police statements of Bapu & Kalabai Ex.-D/2 & Ex.-D/3 respectively, it reveals that Keshulal used to beat Kavita, due to which, she did not talk to him. From the police statement of Laxmibai Ex.-D/4, it reveals that Keshulal used to beat her daughter Kavita, because she did not talk to him and feared from him. Once, Keshulal hanged Kavita upside down after tiding her hands and legs. She also deposed that on consumption of cannabis, Keshulal used to beat Kavita. Though all these witnesses have not deposed in their police statements that Keshulal had suspicion that Kavita was under the influence of some ghost, but if this fact is not relied, even then this fact is confirmed by the police statement that Keshulal used to beat her daughter Kavita on the point of not talking her with him. She feared from him. Therefore, the argument in this respect is not acceptable.

11. From the statement of Dr. Surendra Dubey PW-5 who conducted postmortem of Kavita and gave postmortem report Ex.- P/2 & Ex.-P/2-A, it is clear that the deceased Kavita was having 22 injuries on her body which were fresh and within 24 hours and ante-mortem in nature. The cause of death was asphyxia as a result of smothering. Smothering means to suffocate. This shows that the murder of Kavita was brutal. She was not only beaten, but suffocated also.

12. The appellant has not given any plausible explanation about the death of his daughter while it was expected from him. In reply to question-15 that his wife left him with deceased Kavita at about 8 am while she went to labourship in the village, the appellant/ accused has replied that he left the house at 7 am in the morning, but from the statement of Ramcharan PW-1, it was proved that the appellant at about 12 am, went to his pan shop with deceased Kavita where he gave banana to Kavita and after half an hour, the accused returned to the home, therefore, the explanation given by the appellant in statement of accused under section 313 of the Cr.P.C is not reliable and satisfactory. The conduct of the appellant was suspicious after the incident. He was not available just after the incident, but he was arrested on 01/08/2000 vide arrest memo Ex.-P/4. He was not present at the time of panchanama of dead body Ex.-P/10 and other proceedings. This shows the guiltiness of mind of the appellant.

13. In the case of *Phundi Vs. State of M.P.* [1993 JLJ, 200], it has been held that ;

> " accused is supposed to give plausible explanation of cause of death, failure may be treated the circumstances against him".
>
> In the case of *Dineshilal Vs. State of Maharashtra* [(1992) 3 SCC 106], it has been held that ;
>
> "when death caused while deceased is in the custody of the accused, accused is obliged to give a plausible explanation for the cause of death in his statement under section 313 of the Cr.P.C. "
>
> In the case of *U.P. Vs. Dr. Ravindra Prakash Mittal* [(1992) 3 SCC 300], it has been held that ;
>
> "presence of accused/ husband in the company of the deceased/ wife in the room on the previous night as well as presence of accused in the room next morning, proved motive of murder, shown false pleading of alibi taken by accused instead of giving any plausible explanation for the custodial death, traditional external visible features of strangulation and other internal injuries found, held, chain of circumstances lead to the only conclusion of the commission of the offence by the accused ".

14. In this case, it is proved that the deceased Kavita was in the custody of the appellant at the time of the incident. His conduct was suspicious because he ran away after locking the room from the outside. Dead body of deceased Kavita was found lying on the bed covered with blanket in the room; there were 22 injuries on her body and the cause of death was asphyxia as a result of smothering. The appellant failed to give plausible explanation in the statement under section 313 of the Cr.P.C. the motive was proved. Therefore, all the circumstances lead to the conclusion that the appellant committed murder of deceased Kavita, therefore, chain of circumstances lead to the only conclusion of the commission of murder of Kavita by the accused / appellant. Under these circumstances, the appellant was rightly convicted by the trial Court.

Accordingly, this appeal being devoid of merit is dismissed.

Appeal dismissed

I.L.R. [2012] M.P., 543
APPELLATE CRIMINAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava
Cr. A. No.1159/2000 (Indore) decided on 17 August, 2011

YASIN & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 302 – Murder* – Accused Shakil was not identified by complainant in Test Identification Parade–Role of firing and driving motor cycle was attributed to other accused persons in T. I. Parade-Evidence that accused Shakil had fired and his identification in Court not reliable– Appeal allowed.** (Paras 14 &15)

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अभियुक्त शाकिल को शिकायतकर्ता द्वारा शिनाख्त परेड में पहचाना नहीं गया – शिनाख्त परेड में, फायरिंग व मोटर साईकिल ड्राईविंग की भूमिका अन्य अभियुक्तगण पर उपरोपित की गई – साक्ष्य कि अभियुक्त शाकिल ने फायर किया और उसकी न्यायालय में शिनाख्त, विश्वसनीय नहीं – अपील मंजूर।

K.R. Dilliwale, for the appellants.
Deepak Rawal, G.A. for the respondent/State.

J U D G M E N T

The Judgment of the court was delivered by: **I.S. Shrivastava, J. :-** This appeal has been preferred being aggrieved by the judgment dated 21/08/2000 passed by the Court of Shri Devendrasingh Solanki, 8th A.S.J., Indore in S.T. no. 129/1998, by which appellants Yasin and Shakil have been convicted under sections 302 read with section 120-B of the IPC with life imprisonment along with fine of Rs.10,000/- and under sections 307 read with section 120-B of the IPC with rigorous imprisonment of ten years with fine of Rs. 5,000/- and under sections 394 read with 120-B of the IPC with rigorous imprisonment of ten years with fine of Rs.5,000/- as well as accused Adnan & Vinod @ Binnani have been convicted under sections 302/34 read with section 120-B of the IPC with life imprisonment along with fine of Rs.10,000/-; and under sections 307/34 read with section 120-B of the IPC with rigorous imprisonment of ten years along with fine of Rs. 5000/- and under sections 394/34 read with section 120-B of the IPC with rigorous imprisonment of ten years with fine of Rs.5,000/-.

2. According to the prosecution case, on 27/01/1997 at about 10.45 am, complainant Indarsingh along with Mohanlal went to Dena Bank for depositing a cash amount of Rs. 1.5 lacs from petrol pump. As soon as they reached before the bank, two gun shots were fired from the left side. He saw that near the scooter stand, one person aged 30-32 years was standing with small gun in his hand. He tried to snatched the bag from Mohanlal, but Mohanlal did not allow him, then he fired on his neck, due to which Mohanlal fell down and he snatched the bag. At that time, one suzuki motorcycle came there, on which the person who snatched the bag and his companion ran away. Complainant Indarsingh pelted 2-3 stones at him and cried. At the same time, one Pappu Sardar chased the accused persons by his scooter and as soon as they reached before the Central Bank, Pappu Sardar tried to catch them, then accused person sitting as pillion rider fired on him and ran away towards Janki Nagar. Gun shot injured Pappu Sardar in the stomach. Then Pappu Sardar and Mohanlal were rushed to hospital by Rajendra etc. This incident was witnessed by Ashok who was the peon of the bank, Anil Tentwale, Sonu of STD and others. The complainant will identify the assailants. One assailant who fired with gun was aged 30-32 years with 5 ft. 10-11 inch hight, slim in structure. Other accused was nearabout 25 years of age; he was wearing jurkin and the accused who was driving motorcycle was nearabout 25 years with 5 ft 8 inch hight and was having light beard. The cash bag was of black canvas in which cash detail slips of notes and diary of pump were kept. The complainant will identify them. This report was lodged as dehati nalishi report of police station – Bhanwarkua, Indore, on the basis of which, FIR Ex.-P/25 at crime no. 33/1997 was registered at police station – Bhanwarkua, Indore under sections 394, 397, 307 of the IPC and section 25 of the Arms Act against unknown persons. During investigation, it was found that accused Yasin, Vinod, Adnan and Kazi Durrej were involved in this offence. Kazi Durrej became approver during investigation. Hence after completion of the investigation, challan was filed against four accused persons. After trial, the accused / appellants have been convicted and sentenced as mentioned hereinabove, hence this appeal.

3. During pendency of the appeal, appellants Yasin and Vinod died in encounter in Delhi on 12/06/2011 and appellant Adnan died on 16/06/2004 in police encounter in Mumbai. Hence the appeal abated against appellants Yasin, Vinod and Adnan.

4. It has been argued by the appellants' counsel on behalf of accused / appellant Shakil that there is no evidence against him. None of the prosecution witnesses identified and implicated him. He has been falsely implicated in this case. Only Indarsingh PW-6 named him, but his identification was not reliable. The report was lodged against unknown persons and he deposed that earlier he saw the accused persons in police station and on the basis of which, he identified them in jail. Hence this appeal be allowed.

5. It has been argued by the respondent's counsel that on the basis of the evidence produced before the Trial Court, the appellant was rightly convicted. He has been identified by the witnesses, hence this appeal being devoid of merits be dismissed accordingly.

6. Considered the circumstances and record of the trial Court perused.

7. Indarsingh PW-6 lodged Dehati Nalishi Ex.-P/11, on the basis of which, FIR Ex.-P/25 was registered. In this case, the FIR was lodged against unknown persons. Co-accused Kazi Durrez became approver; his statement was recorded. Thereafter, he was examined as prosecution witness no.5, but he became hostile and did not support the prosecution case.

8. Sajjan Kumar Joshi PW-1 has given details of prosecution case, but in court statement, he identified accused Adnan only. He confirmed the fact that during identification in jail, he identified Adnan, but in cross-examination, he admitted that earlier he saw him at police station. Rajkumar Mishra PW-4 who was the receptionist of the Hotel Samrat, did not identify any person in the Court and about identification in jail, he has not confirmed it and said that he is unable to say that to whom, he identified in jail; he does not know their names. He could not identify the accused persons present in Court that whether they were the accused persons.

9. Dinesh PW-7 who was the manager of the Hotel Samrat deposed that he does not remember that the accused persons stayed in his hotel or not on 24/01/1997. He does not remember that he told the police about their stay. He did not see them earlier. Shahid Anwar stayed in the hotel, but he is unable to speak about his identification. About identification in jail, he said that he does not remember that he identified five persons during identification parade in jail. He was said to identify three persons, hence he identified three persons, hence he put his hand on their head, but he was not knowing any person. Due to lapse of time, he is unable to say that he identified the persons present in

Court. In para 7, he deposed that he is unable to give identification of Shahid Anwar who stayed in the hotel on 24/01/1997. Further, he has deposed that he does not remember that in jail he identified accused Kazi Durrez, Yasin, Vinod and Adnan by putting his hand on their heads. It is wrong to say that after their identification, he signed the identification memos Ex.-P/1 & Ex.- P/2. Further he has deposed that he was told to identify three persons. Before this identification parade, he did not see the accused persons anywhere. In this way, he has not confirmed the identification parade and he has been unable to identify the accused persons present in Court.

10. Anil PW-10 has deposed that at the time of the incident, accused Vinod snatched the bag from Mohanlal and accused Adnan was having pistol in the hand. He identified both of them, but both these accused persons are dead. He has not deposed anything about the presence of accused Shakil and his identification. Dadusingh PW-12 was the security guard at Hotel Samrat. He has deposed that he does not know about the incident and he did not identify any person. About his signature on identification memo Ex.- P/2, he said that they are like his signature, hence he was declared hostile. He further stated that on 03/05/1997, he went to jail for identification, but he does not remember that there he identified accused Vinod and Adnan. About identification of accused Shakil, he did not depose anything. Yogendra Sharma PW-13 was having a pan shop at the place of the incident. He identified only accused Adnan and Vinod present in the Court. He also said that one person was also identified by him in jail, but he is not present today, but from his statement, it is not clear that who was the third person. In this way, he has not implicated the accused Shakil.

Bholanath PW-17 who is the witness of seizure of the bag, has said that accused Yasin and Adnan were brought on the spot from where the bag was seized. He has not deposed anything about the involvement of the accused Shakil in this case. Ashok PW- 24 has deposed that after the incident, he reached on the spot. Ahsan PW-25 was hostile and he said that he does not know any accused person. Pankaj PW-27 was also hostile; he was working at the photo copy shop and he has not identified any accused person. Vijay Sahgal PW-44 who was having STD PCO shop, but he did not identify the person who made phone calls from the shop. In this way, all these witnesses have not confirmed the fact that accused Shakil was involved in the incident and they have not identified the accused Shakil.

11. Complainant Indarsingh PW-6 deposed that on the date of the incident, with Mohanlal he went to Dena Bank to deposit the amount of Rs.1.5 lacs at about 10.30 am. When they reached near the courtyard of the bank, he heard noise of gun shot fire. Someone caught him; he does not know him, but can identify; they were two persons present in the Court, they were accused Shakil and Adnan. Accused Shakil fired and snatched the bag and other accused persons took the bag in his hand and ran way by vehicle. At that time, by gun shot Mohanlal sustained injury in the neck and bag was snatched from the hand of Mohanlal. He cried to catch them and chased them for some distance. Thereafter, one Sardarji came by scooter and chased them, then accused Shakil fired on him; due to which he fell down and sustained injury in the stomach . Thereafter, accused persons ran away. Mohanlal was rushed to hospital by him and he was also with him. He told the incident to his master Sampat Kumar Ramchandra Nehati and lodge report Ex.-P/11 to police. He has further deposed that in jail, he attended the identification parade and identified accused Shakil & Adnan during identification. The identification memo Ex.-P/2 bears his signature.

12. In this respect, it has been argued by the learned counsel for the appellants that Indarsingh PW-6 was not knowing any accused person by name, hence in Dehati Nalishi Ex.-P/11, no accused person has been named and it was against the unknown persons. In jail this witness has deposed that he identified accused Shakil and Adnan, but in this respect in cross-examination, he has deposed that he saw these persons in police station earlier to identification parade and on the basis of which he identified them in jail, therefore, this identification is not reliable and cannot be used against the appellants.

13. In reply, it has been argued by the respondent's counsel that this witness Indarsingh was present at the time of the incident with Mohanlal and he saw the whole of the incident, hence his statement about identification is reliable.

14. Considered the arguments.

From the Dehati Nalishi Ex.-P/11, it reveals that it was lodged against unknown persons, on the basis of which,FIR Ex.-P/25 was registered against unknown persons. Name of the accused persons was not mentioned in the FIR. According to the identification memo Ex.-P/1 & Ex.-P/2 which was conducted by Nayab Tehsildar Dr. D. S. Sharma PW-32. Accused Kazi Durrez

and Shakil were identified in identification parade and identification memo Ex.-P/1 was prepared and accused Yasin, Vinod and Adnan were identified in identification parade and identification memo Ex.-P/2 was prepared. From identification memo Ex.-P/2, it reveals that accused Yasin was identified as a person who was having revolver in his hand and accused Vinod was identified as a person who snatched the bad. Accused Adnan was identified as a person who was having pistole before the bank. Accused Vinod snatched the bag and Adnan fired by pistol. They were also identified as the person who stayed in the Hotel Samrat. Indarsingh PW-6, during identification has deposed that accused Adnan is the person who fired by pistol and accused Vinod snatched the bag, but in court statement, Indarsingh has not supported this fact and has deposed that accused Shakil fired by pistol and snatched the bag. In this way, he has not supported the identification memo Ex.-P/2. In identification parade, accused Shakil was identified by identification memo Ex.-P/1, of which Indarsingh was also a witness and he identified accused Kazi Durrez as a person who was on motorcycle, but he did not identified accused Shakil by this identification memo. In this way, the statement of Indarsingh PW-6 that at the time of the incident, accused Shakil fired by pistol is not reliable. Further in cross-examination, Indarsingh PW-6 has deposed in para-16 that after the incident, he went to police station three times and saw the accused persons in police station, on the basis of which, he identified them. In paragraph-12, he has deposed that he saw four persons in police station and then saw them in jail. He says that the accused persons were shown to the witness at the police station before his identification parade and thereafter, identification parade was held, in which the accused persons were identifed, but from the identification parade, identification memo Ex.-P/1, it reveals that Indarsingh did not identify accused Shakil during identification parade. As regard to Ex.-P/2, it reveals that in this identification parade, accused Shakil was not put in identification, therefore, the statement of Indarsingh that he identified accused Shakil in identification parade is not reliable and the fact that at the time of the incident, accused Shakil fired by pistol and snatched the bag is also not reliable. There is not other evidence as regard the identification of the accused Shakil.

15. Therefore, on the basis of the above discussions that there was no evidence to prove the fact that accused Shkil was present at the time of the incident and he fired on Mohanlal and snatched the bag from him and after chasing by Sardarji @ Pappu, he fired on him, due to which he died.

Hukumsingh Yadav PW-47, the investigating officer deposed that

during investigation, he collected the sample of hand writing and signature of accused Shakil and Kazi Durrez and they were sent to hand writing expert for examination. Samples of accused Shakil are Ex.-P/59 to Ex.-P/64 and sent them for examination. According to Rajendra Verma PW-45, the hand writing expert, after examination of the samples of hand writing and signature, he gave report Ex.-P/71 and Ex.-P/72 and found that the person, who wrote the red enclosed writings stamped and marked S/1 to S/2, also wrote red enclosed writings similarly stamped and marked Q/1 and the person, who wrote the red enclosed signatures stamped and marked A/1 to A/6, also write the red enclosed signatures similarly stamped and marked Q/2 and Q/3. Hukumsingh Yadav PW-47 has deposed that by letter Ex.-P/77 of S.P. Indore, signatures of accused Adnan, Kazi Durrez and Shakil were sent for examination. By these documents it is not proved that the accused Shakil had stayed in Hotel Samrat because Dinesh PW-7, the manager of the Hotel Samrat and Rajkumar PW-15 waiter of hotel Samrat have not identified the accused Shakil that he was staying in Hotel Samrat. Bills of the Hotel Samrat were prepared in the name of Shakil Anwar, but Dinesh PW-7 has not identified any of the accused as Shakil Anwar who stayed in the hotel. Waiter of the hotel Rajkumar PW-15 has not identified any of the accused in this respect that he stayed in the hotel. There is no evidence that Shakil was present at the time of the incident, when the bag containing the amount of Rs.1.5 lacs was snatched from Mohanlal and Pappu Sardar was murdered by one of the accused person. There is no evidence that Shakil was the person, who fired on Mohanlal and Pappu Sardarji.

16. Therefore, on the basis of the above discussions, we are of the view that in this case, from the prosecution evidence, it was not proved that the accused Shakil was involved in this incident and he was present at the time of the incident and he fired on Mohanlal and snatched the bag containing the amount of Rs.1.5 lacs from him and thereafter, fired on Pappu Sardarji and murdered him. Therefore, appellant / accused Shakil was not liable to be convicted, hence the appeal filed by the appellant Shakil deserves to be allowed.

17. Therefore, on the basis of the above discussions, this appeal is allowed and the appellant Shakil is acquitted from the charges under sections 302 read with section 120-B, 307 read with section 120-B and 394 read with section 120-B of the IPC. He is in jail; he be released immediately, if not required in any other offence. Hence ordered accordingly.

Appeal allowed

I.L.R. [2012] M.P., 550
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
Cr. A. No.1554/1995 (Jabalpur) decided on 21 November, 2011

RAMESH ALIAS GUDDU SAPERA ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Sections 304 Part II, 394 – Circumstantial Evidence – Recovery of Dead body – Absence of evidence as to motive* – Mere recovery of dead body on information given by accused not a conclusive circumstance – It merely raises strong suspicion – Only concealment of the dead body is proved – No conclusive proof that murder was committed by him – Held – Conviction under Section 304 Part II converted into Section 201 of IPC, sentence of 5 years RI reduced to 3 years RI.** (Para 16)

दण्ड संहिता (1860 का 45), धाराएँ 304 भाग II, 394 – परिस्थितिजन्य साक्ष्य – लाश की बरामदगी – हेतु के बारे में साक्ष्य की अनुपस्थिति – अभियुक्त द्वारा दी गई सूचना के आधार मात्र पर लाश की बरामदगी निश्चयात्मक परिस्थिति नहीं – यह मात्र प्रबल संदेह उत्पन्न करता है – केवल लाश का छिपाव साबित किया गया – कोई निश्चयात्मक सबूत नहीं कि उसके द्वारा हत्या कारित की गई – अभिनिर्धारित – दोषसिद्धि भा.द.सं. की धारा 304 भाग II से धारा 201 में परिवर्तित की गई, 5 वर्ष के सश्रम कारावास को घटाकर 3 वर्ष सश्रम कारावास किया गया।

Cases referred :

AIR 1971 SC 2016, 1999 SCC (Cri) 461.

G.P. Patel with *Pushpendra Dubey*, for the appellant.
Amit Kumar Sharma, P.L. for the respondent/State.

JUDGMENT

R.C. MISHRA, J.:- This appeal has been preferred against the judgment dated 6/11/95 passed by First Additional Sessions Judge, Raisen, in S.T.No.109/94, whereby the appellant was convicted and sentenced as under -

Convicted under Section	Sentenced to
304 Part II of the IPC	undergo R.I. for 5 years and to pay a fine of Rs.500/-, in default to suffer R.I. for 3 months
394 of the IPC	undergo R.I. for 3 years and to pay a fine of Rs.500/-, in default to suffer R.I. for 3 months

with the direction that the jail sentences run shall concurrently

2. Prosecution case may briefly be stated thus:

(i) Naval Singh (since deceased and hereinafter referred as 'Naval'), met with homicidal death at the age of 8 years. He was the son of Ghisilal (PW2) and Janki Bai (PW8). At the relevant point of time, they were residing in Village Mahuakhedi in the close vicinity of Bhagwanpur, the native place of the appellant.

(ii) On 6.6.94, at about 3 p.m., Naval had left his house to graze as many as 11 goats in the nearby Jungle of Chhatarpur. Soon thereafter, the appellant had arrived at Ghisilal's house to know whereabouts of Naval and was apprised by Janki Bai that he had gone to the Jungle. As Naval did not return home, Ghisilal, after making an intensive search, informed the police on the following day at 6.30 p.m. accordingly. Scribing the information at S.No.144 in the Roznamacha, Head Constable Mansingh (PW6) registered a missing case. The inquiry revealed that on 6/6/94, at about 6 in the evening, Ramesh (PW4) and Jamna Prasad had seen the appellant while returning from the Jungle and driving 10 goats towards Gohadi.

(iii) On 10/6/94, at the appellant's instance, dead body of Naval was recovered from the Jungle wherein it was lying beneath a Pharni tree in a decomposed stage and covered by stones excavated from a nearby place. After inquest proceedings, the dead body was sent to hospital for post-mortem examination. Autopsy Surgeon Dr. C.S.Jain (PW1) opined that Naval's death was caused due to strangulation and was homicidal in nature.

(iv) On 14/6/94, upon information given by appellant, ASI

Jamunalal Sunder (PW10) was able to recover 6 goats from the possession of Sheikh Kammu, a resident of Jinsi (Bhopal), who had purchased 6 goats along with 2 kids from the appellant at Ramleela Evam Basanti Mela, organized at Bhanpur, Chhola Road, Bhopal on 7/6/94.

(v) In the light of the findings of inquiry, a case under Sections 302 and 394 of the IPC was registered by M.L. Chouhan (PW12), the SHO, by scribing FIR (Ex.P/12).

3. The appellant pleaded false implication due to animosity. In the examination, under Section 313 of the Code of Criminal Procedure, he further asserted that his relations with Ghisilal were strained in view of dispute as to land. He also raised a plea of alibi and examined Madanlal (DW1) to show that, during the relevant period, he had been working at a dairy located in Anand Nagar at Bhopal.

4. Upon consideration of the entire evidence on record, learned trial Judge, for the reasons assigned in the impugned judgment, proceeded to conclude that although, complicity of the appellant in robbery as well as in causing death of Naval was proved beyond a reasonable doubt yet, the offence of murder was not made out from the evidence and instead, he was liable to be convicted for the offence of culpable homicide punishable under Section 304 Part II of the IPC.

5. Legality and propriety of the convictions have been challenged on the following grounds:

(i) Confessional part of the statement leading to discovery of the dead body, said to have been made by the appellant and recorded under Section 27 of the Evidence Act in memorandum (Ex.P/10), was not admissible in evidence.

(ii) Non-examination of Sheikh Kammu as well as non-identification of goats as subject matter of offence of robbery was sufficient to record finding of not guilty in respect of the offence under Section 394 of the IPC.

In response, learned Panel Lawyer, while making reference to the incriminating pieces of evidence, submitted that the convictions are well founded.

6. Before entering into merits of the rival contentions, it would be necessary to first advert to the medical evidence.

7. Relevant extracts of the post mortem report (Ex.P/1) authored by Dr. C.S. Jain (PW1) may be reproduced as under:-

> "Dead body of an average built male child .....is in decomposition stage, but face can be identified..... scalp hairs 3-5 cm long, black, straight, loosely adherent .....Flesh from medial aspect of right forearm, right leg, pelvic region, left thigh region is almost missing. Right foot is missing.
>
> Ped ki chhal (Bark of tree) like material which is in the shape of 2 cm broad belt is used to ligate the neck. Knot is fixed type.
>
> On cutting turns given in loop.
>
> Ligature mark present around neck. Skin is hard, depressed 2 cm broad , neighbouring skin is soft and peeling at places. On anterior aspect mark is 5 cm below chin, 1 cm below angle of mandibles both side, on lateral aspect mark is two cm below middle of mandible ramus, posterior mark is 4.5 cm below external occipital protuberance, mark is continuous throughout the neck. Underneath to mark, ecchymosis can be appreciated. ..... "

He was emphatic in opining that the death was homicidal in nature as the signs of ante mortem strangulation were found. No dispute was raised as to the nature of Naval's death.

8. However, there was no direct evidence to connect the appellant with the offences and the prosecution case was based on the following circumstances -

(a) On 6/6/94, the appellant had come to the house of Ghisilal to inquire about Naval and was informed by Janki Bai that he had taken the goats to Jungle for grazing.

(b) On 6/6/94, at about 6 in the evening, the appellant was seen

by Ramesh and Jamna Prasad, while coming from the side of Jungle and driving 10 goats towards village Gohadi.

(c) On 10/6/94, at the instance of the appellant only, dead body of Naval was recovered from the Jungle.

(d) On 14/6/94, upon information given by the appellant, as many as 6 goats forming part of the herd taken by Naval to the Jungle were recovered from the possession of Sheikh Kammu.

9. The prosecution was not able to prove circumstance (b) [above] as one of the witnesses viz. Ramesh (PW4) turned hostile and did not state any incriminating fact against the appellant, whereas Jamna Prasad was not examined. Circumstance (d) could also not be established in view of these lacunae and infirmities in the prosecution case: -

(i) non-examination of Sheikh Kammu and Bhagwan Singh, the Secretary of Gram Panchayat before whom Ghisilal had identified six amongst the seized goats as belonging to him only.

(ii) admission made by ASI Jamunalal (PW10) that only Kamal Singh and Motilal accompanied him to the house of Sheikh Kammu.

(iii) admission made by Ghisilal that out of 6 goats handed over to him by police, only two belonged to him.

10. In such a situation, charge of robbery could not be held to be established against the appellant.

11. Evidence concerning remaining circumstances, as highlighted by the prosecution and found proved by learned trial Judge, may be re-appreciated in the light of the rival contentions in the following manner -

Cirumstance (a) :-

12. It is true that the entry (Ex.P/4) recorded in the Roznamacha by Head Constable Mansingh Tomar (PW6) upon intimation given by Ghisilal did not contain the fact that the appellant had come to his house to know location of Naval yet, his wife Janki Bai (PW8) was emphatic in stating that it was the appellant only who had come to inquire about Naval immediately after his departure to Jungle for grazing cattle. Nothing could be elicited in her cross-examination so as to suggest that she was interested in securing conviction of

the appellant on false grounds. Her testimony drew ample support from the statement of her husband Ghisilal (PW2). As parents, they were not expected to leave any person involved in the killing of their son while evidence of Madanlal (DW1), who was called to prove the plea of alibi, was apparently vague inasmuch as he failed to mention the date on which the appellant was apprehended by the police.

13. Thus, on one hand, there was overwhelming evidence on record to prove complicity of the appellant in the matter and on the other, probability of the defence of being elsewhere was also not established. In such a situation, the evidence brought on record was rightly considered as sufficient to prove circumstance (a) [supra].

Cirumstance (c) :-

14. Mangilal Chouhan (PW12), the SHO, clearly asserted that upon the information given by the appellant, he was able to recover dead body of Naval from the Jungle. Corresponding memorandum (Ex.P/10), recovery panchnama (Ex.P/5), spot map (Ex.P/7) & memo pertaining to seizure of shoes belonging to deceased were tendered in evidence. Motilal (PW3) and Parasram (PW11), the Panch witnesses to memorandum (Ex.P/5) substantiated the fact that information relating to Naval's dead body was received from the appellant only. Moreover, Kamal Singh (PW7), one of the panch witnesses to the recovery memo (Ex.P/5), spot map (Ex.P/7) and seizure memo (Ex.P/9) also supported the factum of (a) recovery of the dead body at the instance of appellant from the place reflected in the spot map and (b) seizure of shoes therefrom. The defence did not prefer to cross-examine Parasram whereas no dispute as to factum of discovery of the dead body was raised in the cross-examination of Kamal Singh and Ramlal, who claimed to have accompanied the police party to the place of its concealment.

15. In the light of the overwhelming evidence on record, it was rightly held that the circumstance (c) [ibid] relating to recovery of Naval's dead body at the instance of the appellant was clearly established. However, learned trial Judge fell into error in taking into account part of the statement said to have been made by the appellant before Motilal (PW3) to the effect that he had strangulated Naval, who was following the goats being taken away by him, to death as it was clearly inadmissible for these reasons -

(i) it was made in presence of the police officer and

(ii) it did not relate to the discovery of the dead body.

16. Further, in absence of evidence as to particular motive, mere recovery of dead body upon information given by the accused was not a conclusive circumstance as to his complicity in the homicide but it merely raised strong suspicion against him *(Bakshish Singh Vs. State of Punjab* (AIR 1971 SC 2016) referred to). Moreover, the fact that dead body was found partly covered by the stones, was only sufficient to prove, that he had concealed the dead body knowing fully well that offence of murder was committed and, in absence of any other material conclusive proof, not that the murder was committed by him only *(Chhotu Singh Vs. State of Rajasthan* (1999 SCC (Cri) 461) relied on). Accordingly, the conviction under Section 304 Part II deserves to be converted to one under Section 201 of the IPC.

17. Coming to the question of sentence, while submitting that the appellant has already suffered imprisonment of nearly 1 year and 8 months, learned counsel for the appellant has submitted that reduction of the term of custodial sentence to the period already undergone would be sufficient to serve the ends of justice. However, taking into consideration the social impact of the crime and other relevant circumstances of the case, the prayer is not acceptable. Nevertheless, interests of justice would be met if the term of custodial sentence is reduced to 3 years.

18. Consequently, the appeal is allowed in part. In the result -

(i) Conviction of the appellant under Section 394 of the IPC and consequent sentences are set aside. Instead, he is acquitted of the offence.

(ii) Appellant's conviction under Section 304 Part II is converted into one under Section 201 of the IPC and, instead of 5 years' R.I., he is sentenced to undergo R.I. for 3 years and to pay fine of Rs.1000/- and in default to suffer R.I. for 3 months.

19. Appellant is on bail. He is directed to surrender to his bail bonds before the trial Court on or before 21/2/12 for being committed to the custody for undergoing remaining part of the sentence.

Appeal allowed in part.

Appeal partly allowed.

I.L.R. [2012] M.P., 557
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena
Cr. A. No. 748/1996 (Jabalpur) decided on 10 December, 2011

PANDIT @ SAMPOORNANAND ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 304-I – Culpable Homicide not amounting to Murder – **Deceased and his sons were removing stones kept adjacent to the wall of their house and were making embankment – Accused party asked them not to do so – Appellant took out knife and stabbed him on left side of chest – Incident occurred on the spur of moment without any premeditation – Appellant did not repeat assault – Appellant assaulted deceased with knife with the knowledge that it was likely to cause death or to cause such bodily injury as was likely to cause his death – Conviction of appellant under Section 304-I of IPC is modified under Section 304-II of the IPC – Appeal partly allowed.** (Paras 15 to 18)

दण्ड संहिता (1860 का 45), धारा 304-I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक और उसके पुत्र अपने घर की दीवाल के पास से पत्थर हटा रहे थे और बाँध बना रहे थे – अभियुक्त पक्षकार ने उनसे ऐसा नहीं करने को कहा – अपीलार्थी ने चाकू निकाला और उसकी छाती के बायें भाग में भोंक दिया – घटना उत्तेजक क्षण में बिना कोई पूर्व चिंतन के घटित हुई – अपीलार्थी ने दुबारा हमला नहीं किया – अपीलार्थी ने मृतक पर चाकू से हमला इस ज्ञान के साथ किया कि उससे उसकी मृत्यु कारित हो सकने की संभावना थी या इस तरह की शारीरिक क्षति उसकी संभावित मृत्यु कारित कर सकती थी – अभियुक्त की दोषसिद्धि भा.द.सं. की धारा **304-I** से भा.द.सं. की धारा **304-II** में परिवर्तित – अपील अंशतः मंजूर।

Case referred :

AIR 1984 SC 759.

Satish Chaturvedi, for the appellant.
R.S. Shukla, P.L. for the respondent/State.

J U D G M E N T

Rakesh Saksena, J.:- Appellant has filed this appeal against the

judgment dated 27.3.1996 passed by Fifth Additional Sessions Judge, Rewa in Sessions Trial No. 142/1993, convicting the appellant under Section 304-I of the Indian Penal Code and sentencing him to rigorous imprisonment for seven years with fine of Rs. 500/-. In default of payment of fine, further rigorous imprisonment for three months.

2. In short, facts of the case are that on 20.5.1993, in the evening when Mahendra Prasad (deceased) and his sons Shashi Kumar (PW1) and Santosh Kumar (PW7) were removing stones kept adjacent to the wall of their house and were making an embankment, Kashi Prasad asked them not to do so. Despite that, Mahendra Prasad picked up stones and threw away. It is said that other accused persons viz. Raja @ Shivendra Kumar, Indradatt, Muniraj, Ashwani Kumar and appellant reached there. Shivendra and Indradatt caught hold of the hands of Mahendra, appellant took out a knife from his pocket and stabbed him on the left side of the chest. Mahendra fell down. He was taken to hospital, but he died. None lodged formal report about the occurrence, but when a report was received from Control Room, a merg was registered. Dead body of Mahendra Prasad was sent for postmortem examination and a Dehati Nalishi report under Section 302/34 of the Indian Penal Code was recorded.

3. Dr. S.K.Pathak (PW8), C.M.O. in G.M.H. Hospital, Rewa conducted the autopsy and found a stab wound on the left side of the chest of deceased. As a result of injury, pericardium and heart of the deceased was cut. He died due to failure of the heart because of excessive bleeding. After investigation, charge sheet was filed against six accused persons including the appellant and the case was committed for trial.

4. Charges under Sections 302/149 and 147 of the Indian Penal Code were framed against all the accused persons. Appellant was also charged under Sections 302 and 148 of the Indian Penal code. All the accused persons abjured their guilt. According to them, deceased and the members of the complainant party were forcibly removing stones from the land which belonged to them. When they objected to it, Shashi, the son of deceased assaulted appellant with a Danda and deceased took out a knife and grappled with him. In the quarrel, deceased fell down and suffered injury by his own knife.

5. With a view to substantiate its case, prosecution examined 10 witnesses. In his defence, appellant also examined 3 witnesses namely Dr. S.C. Sinha (DW1), Dr. A.A.Siddiqui (DW2) and Rajwa (DW3). Appellant

also exhibited documents Ex. D/5 to Ex. D/8 to prove his injuries. Learned trial Court after appreciating the evidence on record held other accused persons not guilty, however, convicted and sentenced appellant as mentioned above.

6. Aggrieved by the impugned judgment of his conviction and sentence, appellant has filed this appeal.

7. Shri Satish Chaturvedi, learned counsel for the appellant did not assail the finding of guilt of the appellant recorded by the trial Court, he, however submitted that the trial Court committed error in holding the appellant guilty under Section 304-I of the Indian Penal Code. According to him, appellant could have been held liable only under Section 304-II of the Indian Penal Code. On the other hand, Shri R.S.Shukla, learned Panel Lawyer for the State supported and justified the conviction of appellant under Section 304-I of the Indian Penal Code.

8. I have heard the learned counsel of the parties and perused the impugned judgment and evidence on record.

9. Shashi Kumar Mishra (PW1), Mahendra Pratap (PW2), Shobha (PW3), Surya Prakash Mishra (PW5) and Santosh Kumar Mishra (PW7) were examined as eye witnesses of the occurrence. Since Mahendra Pratap (PW2) and Surya Prakash Mishra (PW5) gave a different story at trial then as given by them during investigation, they were declared hostile. Shashi, Santosh and Shobha are respectively the sons and daughter of deceased Mahendra Prasad. From the evidence of these witnesses, it is apparent that the deceased and the appellant had common ancestors. Deceased was uncle of the appellant and both resided in the neighbourhood. None of the witnesses said that there was past enmity between the two parties. According to them, stones of accused Kashi, the uncle of appellant were kept by the side of the wall of the house of deceased. Deceased asked accused persons to remove stones as they obstructed the flow of water from their house, but accused Kashi refused for the same. When deceased removed stones from the site, a quarrel ensued, in the course of which, accused Raja caught hold of deceased, other accused caught Shashi Kumar and appellant whipped out a knife and stabbed on the chest of deceased. Though, there appeared some inconsistency between the evidence of aforesaid eye witnesses as to who caught the hands of the deceased and what was the genesis of the occurrence, yet it appeared clear that the incident occurred all of a sudden and without premeditation.

10. Learned counsel for the appellant submitted that in the same incident appellant also suffered injuries which were reported to police and were also examined by doctor. Since none of the eye witnesses explained the injuries of appellant, their version about the genesis of the incident was not reliable. It could not be inferred that appellant knowingly or intentionally caused the injury on the chest of deceased. Learned counsel drew my attention to the evidence of Shashi Kumar (PW1), who in paragraph-4 of his statement disclosed that the land on which they were constructing embankment by removing stones, was being used by accused Kashi since last two years for tying his cattle. The incident occurred soon after the construction of embankment. Shashi Kumar (PW1) also admitted that when he was removing stones appellant asked them not to do that, but they did not yield to his request and continued to remove stones. Shobha (PW3), in her chief examination, stated that when she heard commotion she came out of her house and saw that accused dealt a knife blow to her father and ran away. She admitted that by erecting wall at the place where stones were kept, the passage of accused persons was narrowed down.

11. None of the aforesaid witnesses, including Santosh Kumar (PW7), disclosed as to how appellant suffered injury. When specifically asked, Santosh denied to have seen any injury on the body of appellant. He, however, admitted that on third day of the incident, he came to know that appellant was also admitted in the hospital.

12. Mahendra Pratap (PW2) an independent witnesses, though declared hostile, disclosed that there had been an altercation between Mahendra Prasad and appellant. Sons of Mahendra Prasad were removing stones from the place of occurrence. Appellant asked them not to remove stones as they were kept by him, but they did not yield to his request and deceased grappled with him. According to this witness, Shashi (PW1) dealt a blow with Danda on the head of appellant due to which deceased and appellant both fell down and deceased contracted injury by knife. Since the versions given by Mahendra Pratap (PW2) and Surya Prakash Mishra (PW5) were against their police statements, they were declared hostile and trial Court did not place reliance on their evidence.

13. In the statement of appellant recorded under Section 313 of the Code of Criminal Procedure, he stated that deceased and his sons were forcibly constructing embankment on the land which belonged to them. When he

asked them not to erect wall, Shashi assaulted him with a Danda and deceased assaulted him with a Knife. In scuffle, deceased fell down and suffered injury.

14. Trial Court after appreciating all the above evidence came to conclusion that the right of private defence as claimed by the appellant was not established. However, trial Court found that the incident occurred in a sudden quarrel without any premeditation. Appellant had no intention to commit murder of deceased, but since he caused such injury to deceased from which probability of his death was imminent, he was liable to be punished under Section 304-I of the Indian Penal Code.

15. Learned counsel for the appellant drew my attention to the evidence of Dr. A.A. Siddiqui (DW2), who proved the injuries of appellant. Dr. Siddiqui deposed that on 22.5.1993, he examined the injuries of appellant. He found (i) lacerated wound 3 cm x 1/2cm x 1/2cm on the left parietal region of the skull, (ii) an abrasion 5 cm. long on the left forearm and (iii) an abrasion 4 cm. long on the left side of the back. These injuries were simple in nature. It was found by the trial Court that these injuries were received by the appellant in the same incident. It is true that it is not necessary for the prosecution to explain the injuries of accused in all the circumstances, but presence of injuries on the body of accused may some times furnish material to test the veracity of the prosecution version. Trial Court, in the instant case found participation of other accused persons doubtful and acquitted them.

16. The version of the eye witnesses in this case remained that appellant suddenly dealt a blow on the chest of deceased and ran away. He did not repeat the assault. From the evidence on record, it also appeared that appellant too was assaulted. This all occurred on the spur of moment without any premeditation. In these circumstances, in my opinion, appellant could be attributed with the knowledge that he was likely to cause an injury to deceased which was likely to cause death. In case of *Tholan Vs. State of Tamil Nadu*- AIR 1984 SC 759, where accused, on a sudden altercation took out a knife from his waist and stabbed deceased on his chest and went away, Apex Court held him guilty under Section 304-II of the Indian Penal Code. The circumstances of the present case appear similar. Therefore, in the present circumstances, it cannot be held that appellant dealt single knife blow to deceased with the intention of causing death or causing such bodily injury as was likely to cause death. It can, however, be safely held that he assaulted deceased with knife with the knowledge that it was likely to cause death or to cause such bodily injury as was likely to cause his death.

17. Accordingly, the conviction of appellant under Section 304-I of the Indian Penal Code is modified to one under Section 304-II of the Indian Penal Code and his sentence is reduced to the rigorous imprisonment for four years, though with enhancement of fine. Appellant is ordered to pay a fine of Rs. 7,000/-. This amount shall be deposited in the trial Court within a period of three months from today. The amount of fine already deposited by the appellant shall be adjusted in the computation of total amount of fine. In default of payment of fine, he shall suffer further rigorous imprisonment for a period of one year. Bail bond and surety bond of appellant are cancelled. He is directed to surrender forthwith to serve out remaining part of the sentence.

18. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2012] M.P., 562

CIVIL REVISION

Before Mr. Justice U.C. Maheshwari

C.R. No. 350/2009 (Jabalpur) decided on 18 November, 2011

SHRI JAGAT GURU SHANKRACHARIYA SWAMI SWAROOPANAND SARASWATI ...Applicant

Vs.

SIDDHU ENGINEERING WORKS ...Non-applicant

Civil Procedure Code (5 of 1908), Order 9 Rule 13 – Setting aside ex-parte decree – **Written statement was filed by defendant beyond the period of 90 days – Rent was deposited within time and defence was struck off – Adjournment was taken for cross examination of Plaintiff – Thereafter the defendant was proceeded ex-parte and decree was passed – Application for setting aside ex-parte decree was filed after 30 days – No application for condonation of delay was filed – Only reason assigned in the application was the time required for obtaining certified copy of decree – Provisions of Section 12 of Limitation Act does not apply to proceedings under Order 9 Rule 13 – Conduct of respondent in original suit in adopting the delaying tactics does not entitle him for condonation of delay - Order of appellate Court setting aside ex-parte decree set aside.** (Paras 6, 11, 12, 16, 25 & 26)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – एकपक्षीय डिक्री का अपास्त किया जाना – प्रतिवादी द्वारा 90 दिनों की अवधि के पश्चात लिखित कथन प्रस्तुत किया गया – समय के भीतर भाड़ा जमा किया गया और बचाव को निकाल दिया गया – वादी के प्रतिपरीक्षण हेतु समय लिया गया – तत्पश्चात् प्रतिवादी पर एकपक्षीय कार्यवाही की गई और डिक्री पारित की गई – एकपक्षीय डिक्री को अपास्त किये जाने हेतु आवेदन 30 दिनों के पश्चात प्रस्तुत किया गया – विलंब के लिए माफी हेतु कोई आवेदन प्रस्तुत नहीं किया गया – आवेदन में डिक्री की प्रमाणित प्रति अभिप्राप्त करने के लिये लगे समय का एकमात्र कारण दिया गया – आदेश 9 नियम 13 के अंतर्गत कार्यवाही में परिसीमा अधिनियम की धारा 12 के उपबंध लागू नहीं होते – मूल वाद में विलंब के दांव पेंच अंगीकृत करने के प्रत्यर्थी के आचरण से वह विलंब के लिये माफी हेतु हकदार नहीं – अपीली न्यायालय का एकपक्षीय डिक्री अपास्त करने का आदेश अपास्त।

Cases referred:

1996 MPLJ 330, 2006(I) MPJR 410, AIR 2002 SC 1201, (2000) 4 SCC 380, AIR 1928 PC 103, AIR 1966 SC 1713, AIR 1961 SC 832, AIR 1970 Allahabad 652, AIR 1985 Patna 148, AIR 1977 All. 551, 2003 (3) MPLJ 414, AIR 2010 SC 2291.

Neelam Goyal, for the applicant.
R.K. Verma, for the non-applicant.

ORDER

U.C. MAHESHWARI, J. :-The applicant/ plaintiff/ decree holder has directed this revision under Section 115 of CPC being aggrieved by the order dated 15.5.2007 passed by the District Judge, Jabalpur in Misc. Appeal No.15/ 2007 whereby allowing the appeal of the respondent and reversing the order dated 23.4.2007 passed by 3rd Civil Judge Class-II, Jabalpur in M. J. C. No.57/06 dismissing the respondent's application filed under Order 9 Rule 13 of CPC for setting aside the ex-parte judgment and decree dated 12.9.2006 passed in Civil Original Suit No.44-A/03 holding the same to be barred by limitation, the case has been remitted back to the trial Court with a direction to decide the aforesaid application of Order 9 Rule 13 of CPC on merits.

2. The facts given rise to this revision in short are that the applicant herein filed the eviction suit against the respondent/ defendant in respect of non-residential accommodation described in the plaint situated at Plot No.12/1 and 12/2 Block No.83, Jaiprakash Nagar (East) Marhatal, Civic Centre, Jabalpur. The summons of aforesaid civil suit was duly served on the

respondent, pursuant to that he appeared through counsel and also filed his written statement. As the rent of accommodation was neither pad nor deposited by the applicant for a longer period, on which an application under Section 13 (6) of M. P. Accommodation Control Act 1963 (In short "the Act"), was filed on behalf of the applicant. On consideration in presence of both the parties vide order dated 14.10.2005 the defence of the respondent was struck of. Thereafter, the case was posted for recording the evidence, pursuant to that on 2.3.2006 the applicant had filed the in-chief of his witness under the provision of Order 18 Rule 4 of CPC instead to cross examine such witness an adjournment was sought by the respondent's counsel in this regard, on which in presence of the respondent's counsel the case was posted on 8.4.2006 for cross-examination of said witness. But on such date no one was appeared on behalf of the respondent to defend the suit. On which the case was proceeded ex-party against the respondent. The applicant has closed his evidence and case was posted for final argument. In pendency of the suit for final argument an application under Order 9 Rule 7 of CPC was filed on behalf of the respondent on 18.5.2006. On consideration the same was dismissed on merits vide order dated 26.8.2006 and aforesaid suit of the applicant was decreed ex-parte vide judgment dated 12.9.2006. Subsequent to such decree, beyond the period of limitation i. e. 30 days on behalf of the respondent, the impugned application under Order 9 Rule 13 of CPC for setting aside the ex-parte judgment and decree, was filed. The same was seriously opposed by the applicant on the ground of limitation, as the same was filed beyond the limitation of 30 days prescribed under Article 123 of Limitation Act 1963 without filing any application under Section 5 of Limitation Act for condoning the delay in filing the same. Considering such objection of the applicant the aforesaid application of the respondent filed for setting aside the ex-parte decree was dismissed by the trial Court holding the same is filed barred by the prescribed limitation. It is noted that as per case of the respondent he spent some period in obtaining the certified copies of the aforesaid ex-party judgment and decree and as per provision of Section 12 of Limitation Act, such period spent in obtaining the aforesaid certified copies deserves to be excluded from the period of limitation in filing such application. While such case of the respondent was opposed by the applicant on the ground that as per provision of Section 12 (1) of Limitation Act the period spent in obtaining the certified copy of the judgment and decree could not be excluded as certified copy of the judgment and decree was not required to file the

aforesaid application and as per Article 123 of Limitation Act period of 30 days from the date of ex-parte judgment and decree was available to the respondent to file the aforesaid application and not beyond that because the copy of the original suit was dully served on him and in such premises the period of limitation could not be counted from the date of knowledge of aforesaid ex-parte decree.

3. After dismissal of such application by the trial Court, the respondent had approached the subordinate appellate Court where on consideration by holding the period spent by the respondent in obtaining the certified copy of ex-parte judgment and decree deserves to be excluded and pursuant to that by allowing the appeal the application of the respondent filed under Order 9 Rule 13 of CPC was held within time and by setting aside the order of the trial Court the case was remitted back to such Court with a direction to decide the same on merits. On which the applicant has come to this Court with this revision with a prayer to restore the order of the trial Court by setting aside the impugned order of the appellate Court.

4. On earlier occasion after hearing the parties instead to decide the case on merits vide order dated 26.3.2010 the Coordinate Bench of this Court (which is not available now at Jabalpur), in view of some earlier conflicting decisions of this Court formulated the following question under Rule 3, Chapter IV of Madhya Pradesh High Court Rules, 2008 :

> "Whether the view of the learned Single Bench of this Court in the matter of *Mohan @ Munna Pachari Vs. Jagdish Chandra Duybey* passed in W. P. No.15147 of 2006, that the period spent for obtaining the certified copy of ex-parte decree cannot be excluded for calculating the limitation under Article 123 of the Limitation Act is the correct view or the earlier contrary view of the Single Bench of this Court in the matter of *Shakuntala Singh Vs. Basant Kumar Thakur & others* reported in (2003 (3) MPLJ 414) is correct ?"

After framing aforesaid question the concerning Bench directed the office to place this matter before Hon'ble the Chief Justice for referring the matter to the Larger Bench for settling the aforesaid controversy, on which the case was referred to the Hon'ble Division Bench. After hearing the parties Hon'ble Division Bench vide order dated 13.8.2010 has answered the aforesaid question in the following verdict :

"18. In view of the aforesaid discussion our answer to the question referred is that the view expressed in *Mohan @ Munna Pachauri* (supra) that the period spent for obtaining certified copy of the ex-parte decree cannot be excluded for calculating the limitation under Article 123 of Limitation Act is correct view. In case summons were served limitation to file applicable under Order 9 Rule 13 is 30 days from the date of decree. In our opinion, in *Shakuntala Singh* (supra) also this Court has correctly opined that certified copy is not necessary to be filed along with application under Order 9 Rule 13. The decision with respect to condonation of delay depends upon the facts of each case. In *Shakuntala Singh* (supra) very service of summon was disputed, decision has to be read in that context. In our opinion, period spent for obtaining certified copy of the ex-parte decree cannot be excluded under Section 12 of the Limitation Act for the purpose of filing application under Order 9 Rule 13 of CPC. Section 12 of the Limitation Act has no application to the proceedings under Order 9 Rule 13 of CPC.

19. In view of the aforesaid answer to the question, let matter be placed before the Single Bench for deciding the case in accordance with law.

5. In view of aforesaid direction of the Hon'ble Division Bench this case was placed before this Bench to adjudicate the same on merits.

6. Learned counsel of the applicant Ku. Neelam Goel, after taking me through the pleading of the parties, the order of the trial Court as well as the impugned order of the appellate Court, ex-parte judgment and decree and the proceedings of Civil Original Suit along with the aforesaid order of the Division Bench argued that in view of the provision of Article 123 of Limitation Act on examining the matter, it is apparent that the impugned application of Order 9 Rule 13 of CPC was not filed on behalf of the respondent within thirty days from the date of passing the impugned ex-parte decree. It is also apparent that no application for condoning the delay in filing the aforesaid proceeding has been filed, therefore, firstly in the lack of any application under Section 5 of Limitation Act, the trial Court has rightly dismissed the application of the respondent and in view of aforesaid answer of the Division Bench the

impugned order of the appellate Court deserves to be set aside by restoring the order of the trial Court. She further said that in any case, for the shake of argument if the version of the respondent is taken into consideration for condoning the delay in filing the impugned application of Order 9 Rule 13 of CPC without any separate application under Section 5 of Limitation Act even then there is no sufficient factual matrix pleaded in the application showing the sufficient cause for condoning such delay and in such premises the impugned order of the subordinate appellate Court deserves to be set aside. It was also argued that while considering the present matter the Court has to consider the conduct of the respondent, according to which on service of summons of the suit respondent had given his appearance and filed the written statement in the original suit, on which the issues were framed by the trial court and parties were directed to adduce the evidence. Pursuant to it the applicant placed the in-chief of his witnesses on affidavit as per provision of Order 18 Rule 4 of CPC on such date, the respondent's counsel took the adjournment for cross-examination of such witnesses, on which the case was posted for next date, on such very next date the respondent and his counsel became absent and in such premises the case was proceeded ex-parte against him. Even on filing the application under Order 9 Rule 7 of CPC in pendency of suit the same was dismissed. In such premises, inspite having the knowledge of the date of ex-parte decree the application was not filed within limitation. Besides this from the date of service of summons of the original suit within thirty days as per requirement of Section 13 (1) of the Act the outstanding rent and the recurring regular rent of the disputed accommodation was neither paid nor deposited in the Court, pursuant to that the defence of the respondent was also struck down in the original suit vide order dated 14.10.2005. In all these circumstances, it could not be deemed that the respondent had any sufficient cause for filing the appeal at belated stage and by placing her reliance on some reported decisions prayed for setting aside the impugned order of the appellate Court and restoring the order of the trial Court by allowing this revision.

7. On the other hand responding aforesaid argument Shri R. K. Verma, learned counsel of the respondent by justifying the impugned order of the appellate Court said that in the available factual matrix of the case such order being in-consonance with the existing legal provision and its interpretations, does not require any interference at this stage. In continuation he argued that even after answering the aforesaid question by Hon'ble Division Bench this

Court has to consider the matter by adopting some lenient view to condone the delay in filing the application under Order 9 Rule 13 of CPC even in the absence of any application on his behalf under Section 5 of Limitation Act for condoning the alleged delay. He also said that on the basis of the averments of application under Order 9 Rule 13 of CPC the sufficient cause for condoning the alleged delay is very well made out. He also said that in the trial Court before passing the ex-parte judgment in the original suit on behalf of the respondent an application under Order 9 Rule 7 of CPC was also filed which was dismissed on merits, it shows the bonafide of the respondent to contest the matter. Subsequent to dismissal of such application on passing the impugned ex-parte judgment in the original suit, the respondent has filed an application for obtaining the certified copy of such judgment and bonafidely spent some time in it. therefore such cause should be deemed to be the sufficient cause for condoning the alleged delay. In response of some query of the Court he fairly conceded that on behalf of the respondent no application under Section 5 of Limitation Act has been filed at any point of time in the proceeding of Order 9 Rule 13 of CPC and in this regard on filing the appeal against the order of the trial Court no specific ground or objection was taken or stated in the appeal memo. With these submission by placing his reliance of some reported decisions of the Apex Court as well as of different High Courts he prayed for dismissing this revision.

8. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the entire record of the impugned case of Order 9 Rule 13 of CPC and its appeal, also the record of the impugned suit along with the impugned order and aforesaid ex-party judgment and decree of eviction.

9. Before proceeding further to consider the arguments of the counsel on merits, I would like to reproduce para 17 of the aforesaid order of Hon'ble Division Bench passed in the instant matter on dated 13.8.2010, the same is read as under :

> 17. Coming to the question as to so called conflict in aforesaid decision in *Shakuntala Singh* (supra) and *Mohan @ Munna Pachauri* (supra) whether delay can be condoned or not; in case certified copy has been applied for, in our opinion, various aspects have to be considered including the effect of non filing of the application under Section 5 of Limitation Act seeking

condonation of delay. Overall conduct of the applicant has to be considered during the trial, circumstances in which he was proceeded ex-parte. Mere filing of certified copy is not enough to condone the delay. These aspects on merits have to be considered by the Single Bench.

10. In view of the aforesaid order this Court has to consider the overall conduct of the respondent during trial of the suit in which the case was proceeded ex-parte against him ?

11. It is undisputed fact on record that the impugned application under Order 9 Rule 13 of CPC was filed by the respondent without filing any application under Section 5 of Limitation Act beyond the period of limitation of 30 days provided under Article 123 of Limitation Act. Inspite the aforesaid keeping in view the argument of the respondent's counsel that even in the absence of any application under Section 5 of Limitation Act on the averments of the application under Order 9 Rule 13 of CPC by holding the sufficient cause the alleged delay should be condoned. I have carefully gone through the said application of Order 9 Rule 13 of CPC to find out the averments of sufficient cause for condoning the alleged delay but except the aforesaid ground that on exclusion of period spent by the respondent in obtaining certified copy of the ex-parte judgment and decree the application has been filed in limitation no other grounds with factual matrix explaining the alleged delay in filing such application was found. In the light of the aforesaid order of the Division Bench, in the available factual matrix of the case the aforesaid ground as found in the application could not be held to be sufficient cause for condoning the alleged delay and except this no other explanation or ground are stated in the application. Thus, in the lack of any pleading of sufficient cause supported by affidavit, mere on some oral submission the impugned order could not be sustained. Law is almost settled that in the lack of the pleadings supported by affidavit mere on the basis of the oral arguments of the counsel no question could be decided in favour of such party in the matter.

12. The argument of the respondent's counsel based on the decision of this Court in the matter of *Suresh Kumar & others Vs. Kurban Hussain Taiyab* Ali reported in 1996 MPLJ 330 holding that if any proceeding is filed barred by limitation without filing any application under Section 5 of Limitation Act for condoning the delay, then a formal application would not be required, if the facts presented before the Court satisfy the judicial conscience of the

Court that the applicant before it was prevented for sufficient cause in bringing the proceeding well within limitation and if the Court is of the opinion that in absence of formal application the delay could not be condoned then it is always the duty of the Court to give an opportunity to the applicant before deciding the same to move an application explaining the cause for delay and seek condonation under Section 5 of Limitation Act, so the applicant may get an opportunity to file appropriate application is concerned, in view of the discussion in forgoing paras such argument in the available factual matrix of the case has not appealed me. So for the principle laid down in the aforesaid cited case is concerned, this Court did not have any dispute but such case being distinguishable on facts is not helping to the respondent in the present scenario of the case at hand. It is apparent from para 9 of such cited case that the same was decided on the basis of an affidavit of counsel stating that he came to know for the first time regarding ex-parte judgment and decree dated 30.10.1993 on 7.1.1994. It is apparent in the case at hand that no such affidavit of the respondent or his counsel has been filed. Even otherwise as per discussion in forgoing paras no circumstances or ground was found in existence to condone the delay in filing the application under Order 9 Rule 13 of CPC, which could be considered as sufficient cause even on filing the formal application or in the absence of such application.

13. The identical question involved in the present revision on arising the occasion was answered by this Court in the matter of *Ramdas Vs. Smt. Amrita & Ors* reported in 2006 (I) MPJR 410, in which it was held as under :

> "So far as the second contention of the parties tht the limitation for filing an application under Order 9 Rule 13 of CPC was thirty days from the date of decree as the summons were served in the matter. In this case, it is not in dispute the respondent was duly served and she was represented by a counsel. She filed written statement in the case and when the case was fixed for recording the evidence of the respondent, the counsel for respondent took several adjournments for a considerable long period of near about two years and three months. This shows that the respondent remained negligent in attending the case. In this case, the counsel who was appearing on behalf of respondent was not examined by the respondent in the trial Court who was in a position to explain the circumstances in which the applicant could not be informed,

but in absence of this evidence, it will be presumed that the respondent was having knowledge about the proceedings of the case and the counsel appearing on her behalf was having instructions from respondent to seek adjournments for the evidence. The counsel sought various adjournments on the instructions of the respondent and case remained pending for a considerable long period of near about twenty-seven months for recording evidence on behalf of respondent.

In these circumstances, the limitation for filing application shall be thirty days from the date of ex-parte judgment and decree. If the respondent was having sufficient cause for not filing the application within a period of thirty days, the respondent ought to have filed an application under Section 5 of Limitation Act for explaining the delay for non-filing of the application within the prescribed period of limitation. In the case admittedly no such application was filed by the respondent. The application was apparently barred by time and without condonation of delay such application ought to not have been entertained by the trial Court."

14. Even otherwise in view of the aforesaid direction/ observation of the Division Bench and also in the light of the principle laid down by the Apex Court in the matter of *"Ram Nath Sao v. Gobardhan Sao"* reported in AIR 2002 S.C.1201 on examining the stack of dispute involved in the present case for adopting the lenient view to condone the alleged delay in filing the impugned proceeding, then it is apparent from the record that inspite the service of summons of the original suit filed for eviction on the grounds available under the provision of the Act, within thirty days in compliance of Section 13 (1) of the Act entire arrears of the rent was neither paid nor deposited by the respondent, even in compliance of such provision the recurring rent of the alleged accommodation was also neither paid nor deposited by the respondent. It is needless to say that the same has also not been deposited till today. It is also apparent on the record that due to aforesaid violation of Section 13 (1) of the Act, the defence of the respondent was also struck down by the trial Court vide order dated 14.10.2005. Subsequent to that no step was taken by the respondent for condoning such delay in depositing the arrears of rent.

15. In such premises for a moment if by condoning the alleged delay in the absence of any sufficient cause by allowing the application of Order 9 Rule 13

of CPC the impugned ex-parte decree is set aside even then in the light of the decision of the Apex Court in the matter of *"Jamnalal Vs. Radheshyam"* reported in (2000) 4 S.C.C. 380 holding that on committing default by the tenant in depositing the arrears and regular rent of the disputed accommodation the tenant is liable to be evicted, the respondent cannot be benefited. As such in the light of the aforesaid case of *"Jamnalal"* (Supra) the respondent is bound to face the decree of eviction.

16. It is also apparent from the record of the original suit that initially the written statement was not filed within ninety days from the date of service of summons and when such opportunity was closed by the trial Court then after obtaining the order from the superior Court for its condonation such written statement was filed by the respondent beyond the period of ninety days. Again after framing the issues on filing the in chief of the witnesses on behalf of the applicant/ plaintiff on affidavit as per provision of Order 18 Rule 4 of CPC on dated 2.3.2006, instead to cross-examine such witnesses on such date the respondent's counsel sought an adjournment and thereafter on next date respondent and his counsel both became absent while such date was fixed in presence of the respondent counsel, then only the case was proceeded ex-parte. Thereafter, an application under Order 9 Rule 7 of CPC was filed, the same was considered and dismissed on merits by speaking order and such dismissal does not appear to be contrary to the law in the present scenario of the case. Subsequent to it inspite having the knowledge of aforesaid ex-parte judgment and decree the impugned application under Order 9 Rule 13 of CPC was not filed within the prescribed period of thirty days, the same was filed beyond such period of limitation without filing any application under Section 5 of Limitation Act for condoning the alleged delay in filing the same. Accordingly, the conduct of the respondent is very apparent that at every stage of the original suit he had tried to prolong and delay the trial of the suit and still by way of present proceeding the respondent is trying to prolong the litigation. So in the light of the observation made by the Division Bench in para 17 of above mentioned order the conduct of the respondent discussed above does not make him entitled to grant the relief for condonation of delay in filing the impugned application under Order 9 Rule 13 of CPC even without filing the application under Section 5 of Limitation Act. In these circumstances also I am of the considered view that even on extending the opportunity to the respondent to file the application under Section 5 of Limitation Act no fruitful purpose would be served in the matter.

17. So far other case law cited on behalf of the respondent are concerned in the present scenario, the some of them being either distinguishable on facts with the present matter are not helping to the applicant and some of them have already been taken into consideration by the Division Bench while passing the aforesaid order dated 13.8.2010.

18. The case law cited on behalf of the respondent in the matter of *Jijibhoy N. Surty Vs. T. S. Chettyar* reported in AIR 1928 P. C. 103 and of *Additional Collector of Customs Vs. M/s. Best and Co.* reported in AIR 1966 SC 1713 have already been taken into consideration while passing the aforesaid order dated 13.8.2010 by the Division Bench in the matter, so it does not require any further consideration.

19. So far the case law cited on behalf of the respondent in the matter of *Jagat Dhish Bhargava Vs. Jawahar Lal Bhargava* reported in AIR 1961 SC 832 is concerned, the same was decided in appeal and not in the application or proceeding of Order 9 Rule 13 of CPC and on such very fact the same being distinguishable from the present matter is not giving any support to the case of the respondent.

20. So far the case law cited on behalf of the respondent in the matter of *Bhagwan Swarup Vs. Municipal Board* reported in AIR 1970 Allahabad 652 is concerned, in such case it is held that if the delay in filing the aforesaid proceeding is caused due to bonafide then such ground could be treated to be the sufficient cause for condoning the alleged delay, which is not the situation in the case at hand as per aforesaid discussion no such bonafied on the part of the respondent has been found to be proved by this Court. So this citation is also not helping to the respondent.

21. So far the case law cited on behalf of the respondent in the matter of *Mosmat Ram Kali Kuer Vs Indradeo* reported in AIR 1985 PATNA 148, holding that if the appeal is filed beyond the period of limitation in explainable circumstances without any application for condoning such delay, then the Court should may afford the opportunity to the appellant to file such application is concerned, in the forgoing paras it has already been held that even from the application of Order 9 Rule 13 of CPC no sufficient cause is made out in the present matter in favour of the respondent to condone the alleged delay and even on extending the opportunity to file such application no fruitful purpose may be served as discussed above. In such premises, this citation is also not helping to the applicant.

22. So far the case law cited on behalf of the respondent in the matter of *Smt. Shakuntala Devi Vs. Banwari Lal* reported in AIR 1977 All. 551 is concerned, the same was decided considering the application under Order 22 Rule 9 of CPC filed for setting aside the abatement holding that separate formal application under Section 5 of Limitation Act is not necessary, if the Court think it proper to condone the delay on the facts stated in the affidavit in support of such application filed under Order 22 Rule 9 of CPC, which is also not the situation here. It is apparent fact that in the case at hand that no such affidavit explaining the delay has been placed on behalf of the respondent. Therefore, this case is also not helping to the respondent.

23. So far the case law cited on behalf of the respondent in the matter of *Shakuntala Singh Vs. Basant Kumar Thakur* reported in 2003 (3) MPLJ 414 is concerned, the same was decided taken into consideration the circumstance that summons of the suit was not served on the concerned defendant and service of the notice was not proved by placing any affidavit or recording the statement of process server and in such premises for setting aside the ex-parte decree the limitation for filing the aforesaid proceeding was held to be counted from the date of knowledge of the alleged ex-parte decree, which is not the situation in the case at hand. On the contrary undisputedly the summons of the impugned suit was duly served on the respondent. Thus aforesaid case being distinguishable on facts is not helping to the respondent.

24. So far the case law cited on behalf of the respondent in the matter of *Bhagmal Vs. Kunwar Lal* reported in AIR 2010 S. C. 2291 is concerned, such case was decided on the factual matrix i. e. as alleged some settlement took place out of the Court between the parties, on which the defendant did not appear in the Court and ex-parte decree was passed. In such back ground it was held that the period of limitation should be counted from the date of the knowledge or of receiving the notice of such decree in execution proceeding, which is also not the situation in the case at hand, therefore, this citation is also not helping to the respondent.

25. Apart the above it is also apparent from the record and specifically from the appeal memo filed by the respondent in the appellate Court that the alleged question for condoning the delay in filing the proceeding under Order 9 Rule 13 of CPC even in the absence of the application under Section 5 of Limitation Act inspite the order of the trial Court was neither stated nor raised

before the appellate Court, and no such application was moved before the appellate Court. Therefore, the respondent could not be permitted to raise any new question for the first time in this revision for extending the opportunity to file the application under Section 5 of Limitation Act because as per aforesaid discussion in the light of the case of *"Jamnalal"* (Supra), no fruitful purpose would be served on filing such application.

26. In view of the aforesaid discussion, it is held that the appellate Court has committed grave error, perversity, infirmity and illegality in setting aside the order of the trial Court by allowing the appeal of the respondent and remitting back the case to the trial Court with a direction to decide the same on merits. Therefore, by allowing this revision, the impugned order of the appellate Court is hereby set aside. Pursuant to it, the order of the trial Court dismissing the respondent's application under Order 9 Rule 13 of CPC is hereby restored.

27. In the facts and circumstances of the case there shall be no order as to costs.

28. The revision is allowed as indicated above.

Revision allowed

I.L.R. [2012] M.P., 575
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1528/2011 (Jabalpur) decided on 7 September, 2011

PRADEEP KUNBI ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. ***Penal Code (45 of 1860), Section 354-A – Assault or use criminal force to woman with intent to disrobe her* – Attempt to outrage the modesty of prosecutrix was committed inside the residential house and not at any public place – Trial Court directed to frame charge under Section 354 instead of 354-A of I.P.C.** (Para 7)

क. दण्ड संहिता (1860 का 45), धारा 354–ए – स्त्री को निर्वस्त्र करने के आशय से उस पर हमला या आपराधिक बल का प्रयोग – अभियोक्त्री की लज्जा भंग करने का प्रयत्न रहवासी मकान के भीतर किया गया और न कि किसी लोक स्थान पर – विचारण न्यायालय को भा.द.सं. की धारा 354–ए के स्थान पर धारा 354

के अंतर्गत आरोप विरचित करने के लिये निदेशित किया गया।

B. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) – Offence of atrocities – **Provisions of Section 3(2)(v) can be invoked only when the offence committed is punishable under I.P.C. with imprisonment of ten years or more – As offence punishable under Section 452 and 354 are punishable with 7 years and 2 years respectively therefore, charge under Section 3(2)(v) of Act, 1988 is set aside – Trial Court directed to frame charge under Section 3(1)(iii) and 3(1)(xi) of Act, 1988.** (Para 10)

ख. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) – अत्याचार का अपराध – धारा 3(2)(v) के उपबंध का अवलम्ब तभी लिया जा सकता है जब कारित किया गया अपराध भा.द. सं. के अंतर्गत 10 वर्ष या अधिक के कारावास से दण्डनीय हो – चूंकि धारा 452 और 354 के अंतर्गत दण्डनीय अपराध क्रमशः 7 वर्ष और 2 वर्ष से दण्डनीय है इसलिये, अधिनियम 1988 की धारा 3(2)(v) के अंतर्गत विरचित आरोप अपास्त किये गये – विचारण न्यायालय को अधिनियम 1988 की धारा 3(1)(iii) व 3(1)(xi) के अंतर्गत आरोप विरचित करने के लिये निदेशित किया गया।

Pushpendra Dubey, for the applicant.
Alok Tapikar, P.L. for the non-applicant.

ORDER

U. C. MAHESHWARI, J.:- The applicant/ accused has preferred this revision being aggrieved by the order dated 27.5.2011and 3.8.2011 passed by Special Judge, Betul in Special Case No.44/11, framing the charge against the applicant for the offence under Section 452, 354-A of Indian Penal Code (in short "the Code") and Section 3(2) (v) of S. C. S. T. (Prevention of Atrocities), Act (in short "the Act"), by the aforesaid earlier order, while dismissed his application filed subsequent to framing the charge under Section 216 of Cr. P. C. for modification of such charge by the subsequent order.

2. The facts giving rise to this revision in short are that the Station House Officer P. S. Multai on receiving a report in writing from complainant Ravi Khatrikar belonging to the sweeper community on 15.3.2011, registered a crime on the same day against the applicant for the offence under Section 354 and 456 of IPC. As per contents of FIR, on dated 12.3.2011 at about 2.30 in the noon when he came to his residence from the field to take the bucket,

on opening the door he saw the applicant Pradeep Katare inside his house, who after entering in the house with bad intention had torned all weared cloths of his 20 years dumb sister Kavita and nacked her, as no cloth was present on her person. On seeing him the applicant ran away from such place, inspite making efforts he could not catch him. Subsequent to it at 4.00 O'clock the applicant again came to his residence and by giving the criminal threat to him and his family members said that whatever he (complainant) wants may do but could not damage him in any manner. The reason for giving the report at belated stage was shown to be that his father went to Jabalpur and till the date of report he was waiting for him when he did not come then along with his sister came to lodge the report. After arresting the applicant and holding the investigation the applicant was charge sheeted for the offence of Section 354, 456 of the Code and Section 3(2)(xi) of the Act. Considering the papers of the charge sheet on framing the charge of offence of Section 452, 354-A of Code and Section 3 (2)(v) of the Act; the applicant abjured the guilt and thereafter, filed an application under Section 216 of Cr. P. C. for modification of the charge with the prayer to frame the charge of Section 354 of IPC by modifying the charge framed for the offence of Section 354-A of IPC and Section 3 (2) (v) of the Act, the same was also dismissed, on which the applicant has come forward to this Court with this revision.

3. After taking me through the papers of the charge sheet along with the impugned orders the applicant's counsel Shri Pushpendra Dubey, said that as per case of prosecution the alleged offence was committed by the applicant with the prosecutrix in side of the residential house of her brother the complainant and not at any public place. On the back ground of this factual matrix if the case is examined then in view of the basic provision of Section 354-A of IPC (inserted by amendment by the Legislature of Madhya Pradesh) and Section 354 of IPC then the impugned offence being committed inside of the house, the charge of Section 354-A of IPC could not be framed against the applicant because the charge of such Section could be framed only if the alleged offence of outraging the modesty of a woman is committed by the accused at some public place. In the available circumstances, the trial Court ought to have framed the charge of Section 354 instead the Section 354-A of IPC. In continuation he said that on perusing the entire charge sheet the prima-facie ingredients of offence of Section 3 (2) (v) of the Act are also not established, so the charge of such offence is also not sustainable. In alternate he said that in any case on modification of the charge of Section 354-A to

Section 354 of IPC in which maximum punishment seven years has been provided, the aforesaid charge of the Act is also required modification from Section 3 (2) (v) to Section 3 (1) (iii) and/ or 3 (i) (xi) of the Act. With these submission, he prays to discharge the applicant from the charge of Section 354-A of IPC as well as Section 3 (2)(v) of the Act by allowing this revision.

4. On the other hand by justifying the impugned order framing the charge against the applicant and dismissing his application filed under Section 216 of Cr. P. C. Shri G. S. Thakur, learned P. L. said that such charge being framed inconsonance with the papers of the charge sheet does not require any interference at this stage and prayed for dismissal of this revision.

5. Having heard keeping in view the arguments of the counsel, after perusing the entire charge sheet along with the impugned orders, I am of the considered view that in the available circumstance the trial court has committed grave error in framing the charge of Section 354-A of IPC and Section 3 (2) (v) of the Act instead such charge, the charge of Section 354 of IPC and Section 3 (1) (iii) and 3 (1) (xi) of the Act along with the charge of Section 452 of IPC should have been framed against the applicant. In such premises the charge of Section 452 of IPC does not appear to perverse or contrary to the papers of the charge sheet.

6. Before giving any finding on merit of this revision, I would like to reproduce the provision of Section 354 and 354-A of the Indian Penal Code, the same are as under :

> **354 – Assault or criminal force to woman with intent to outrage her modesty:** Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
>
> **354-A - Assault or use criminal force to woman with intent to disrobe her:** Whoever assaults or uses criminal force to any woman or abets or conspires to assault or uses such criminal force to any woman intending to outrage or knowing it to be likely that by such assault, he will thereby outrage or causes to be outraged the modesty of the woman or disrobing or compel her to be naked on any public place,

shall be punished with imprisonment of either description for a term which may shall not be less than one year but which may extend to ten years and shall also be liable to fine.

7. Mere perusal of aforesaid both the Sections, it is apparent that when the offence of outraging the modesty of any woman is committed by the accused on any public place then only it shall be deemed that such accused has committed the offence of Section 354-A of IPC. Accordingly in order to frame the charge of Section 354-A of IPC there must be prima-facie circumstance showing that such offence was committed by the accused on any public place. It is apparent from the papers of the charge sheet as stated above, the alleged offence outraging the modesty of the prosecutrix was committed by the applicant in side of the residential house of her brother and not at any public place. In such premises the charge framed by the trial Court under Section 354-A of IPC deserves to be and is hereby set aside and instead such charge in the available circumstances, the trial Court is directed to frame the charge of Section 354 of IPC against the applicant as the ingredients of such offence are prima-facie made out from the papers of the charge sheet.

8. In view of the aforesaid direction of modification of the charge from Section 354-A to 354 of IPC the charge of Section 3 (2) (v) of the Act also requires interference at this stage. Before giving any findings in this regard for ready reference I reproduced the provisions of Section 3 (1) (iii), 3 (1) (xi) and 3 (2) (v) of the Act the same are as under :

> 3. **Punishments for offences of atrocities** – (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe -
>
> (iii) forcibly removes clothes from the person of a member of a Scheduled Caste or a Scheduled Tribe or parades him naked or with painted face or body or commits any similar act which is derogatory to human dignity;
>
> (xi) assaults or uses forced to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty.
>
> (2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe-
>
> (v) commits any offence under the Indian Penal Code (45

of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

9. Keeping in view the aforesaid provision of the Act 1after the modification of the charge from Section 354-A of IPC (in which minimum one year and maximum ten years punishment of imprisonment with fine has been provided) to Section 354 of IPC (in which maximum punishment of two years imprisonment or fine or with both has been provided) on examining the case at hand the situation to frame the charge of Section 354 and 452 (in which the maximum punishment of imprisonment for seven years with fine has been provided) remains against the applicant.

10. As per case of the prosecution the applicant being member of OBC community not covered under the S.C.S. T. Act with bad intention to outrage the modesty of the dumb prosecutrix covered under the Scheduled Community of the provisions of the S. C. S. T. Act entered in her residential place and naked her by torning her clothes and thereby committed the alleged offence of outraging her modesty. Accordingly, he has committed the offence made punishable under Section 452 and 354 of IPC, in which less then ten years maximum punishment has been provided under the Law. In such premises on reading the aforesaid provision of Section 3 (2) (v) of the Act, it is apparent that such Section could be invoked only if the offence committed by the accused (who is not covered under the Schedule community of the Act) with a person (covered under the Schedule Community of the Act) is made punishable under the Indian Penal Code with the imprisonment of ten years or more. Thus, in view of the provision of maximum punishment under Section 452 and 354 of IPC seven years and two years respectively as stated above the charge of Section 3 (2) (v) is apparently perverse and same deserves to be and is hereby set aside and instead to such charge in the available circumstances of the case at hand the trial court is directed to frame the charge made punishable under Section 3 (1) (iii) and 3 (1) (xi) of the S. C. S. T. Act.

11. So far the charge of Section 452 of IPC framed by the trial Court against the applicant is concerned, the same being inconsonance with the papers of the charge sheet showing the applicant entered in the house of the prosecutrix with intention to commit the aforesaid alleged cognizable offence does not require any interference at this stage; hence the same is hereby affirmed.

12. In view of aforesaid discussion by allowing this revision in part the impugned charge of Section 354-A of IPC and Section 3 (2) (v) of the S.C.S.T. Act are set aside and the trial Court is directed to frame the charge of Section 354 of IPC at the place of Section 354-A of IPC and Section 3(1) (iii) and 3 (1) (xi) of SCST Act at the place of Section 3 (2) (v) of the Act and thereafter proceed further with the trial in accordance with the prescribed procedure. However, it is made clear that Section 354-A of IPC and Section 3 (2) (v) of the Act being major Section of Section 354 of the Code and 3(1) (iii) and 3 (1) (xi) of SCST Act the re-novo trial even after aforesaid modification of the charge trial shall not be required by the trial Court in the present matter. In such premises, the trial court shall be at liberty to continue and proceed with the trial of the case without recalling those prosecution witnesses, who have already been examined in the trial.

13. Till the aforesaid extent the impugned order framing the charge are modified while other finding of the same are hereby affirmed.

Revision partly allowed.

I.L.R. [2012] M.P., 581
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1342/2011 (Jabalpur) decided on 19 October, 2011

CHHOTELAL & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Sections 300, 307 & 323, Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 – Framing of Charges – Attempt to commit murder **– M.L.C. report shows that the injuries sustained by victim does not come under purview of earlier part of Section 300 of I.P.C. – In order to examine the ingredients of offence under Section 307 of I.P.C., the criteria stated in earlier part of Section 300 of I.P.C. has to be taken into consideration – As the victim did not sustain grievous injury or sufficient to cause death in ordinary course of nature, the case fall only under Section 323 of I.P.C. – Revision allowed.** (Paras 8 & 9)

दण्ड संहिता (1860 का 45), धाराएँ 300, 307 व 323, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 – आरोप विरचित किये जाना – हत्या करने

का प्रयत्न करना – एम.एल.सी. रिपोर्ट दर्शाती है कि पीड़ित को कारित क्षतियां भा.द.सं. की धारा 300 के पूर्व के भाग की परिधि में नहीं आती – भा.द.सं. की धारा 307 के अंतर्गत अपराध के घटकों का परीक्षण किये जाने के लिये भा.द.सं. की धारा 300 के पूर्व भाग में कथित मानदंड को विचार में लिया जाना होता है – चूंकि पीड़ित को गंभीर चोट नहीं आयी अथवा प्रकृति के सामान्य क्रम में मृत्यु कारित करने के लिये पर्याप्त नहीं थी, प्रकरण केवल भा.द.सं. की धारा 323 के अंतर्गत आता है – पुनरीक्षण मंजूर।

Narendra Nikhare, for the applicants.
Smt. Nirmala Nayak, G.A. for the non-applicant/State.

ORDER

U. C. MAHESHWARI, J.:- Having heard on I.A. No. 16138/11, applicants' application by allowing the same the annexed copy of charge-sheet is taken on record.

Heard on the question of admission.

Admit.

State counsel has taken notice of this admission.

As the copy of hte charge-sheet is available on the record thus, looking to the question involved in this revision with the consent of the parties, the same is heard finally.

1. The applicants have directed this revision being aggrieved by the order dated 28.6.2011 passed by IIIrd Additional Sessions Judge (Fast Track Court) Begamganj, District Raisen in Sessions Trial No. 40/11, framing charges against them for the offence under Sections 294, 147, 149, 307/149, 323/149 and 506 of I.P.C.

2. The facts giving rise to this revision in short are that on dated 12.8.2010 at about 9 O' Clock in the night, at the instance of victim Ganesh Singh, a Dehati Nalishi was drawn up by the Assistant Sub-Inspector of Police posted at Police Station Begamganj. According to it, on the aforesaid date at about 7.30 in the morning when the applicant was sitting in front of his house at the same time applicants Chander Singh, Ritesh, Chhotelal and Dinesh Raikwar, came their and asked him why he had taken his tractor from their field, he replied that it is his way also. By that time applicants Ganesh, Dammu, Nitu

@ Nitesh, and Ram Charan also came their and abused him. On asking them not to do such thing, he was subjected to blow of Katarna by Ram Charan, Ganesh and Chotelal with intention to cause his death. Consequently, he sustained the injuries with bleeding. When his father Gopial, Tikam Singh, Govind Singh came to rescue him then, his father was also subjected to the blows of Katarna by the applicants, Ram Charan, Dammu, Chandan Singh with intention to cause his death, consequently his father sustained the injuries on his head. Tikam Singh, Govind and Santosh were also subjected to beating with the blows of sticks by the applicants Dinesh, Ghanshyam, and Nitesh resultantly such victims also sustained some internal injuries. On the basis of aforesaid Dehati Nalishi, after sending the victim to the hospital for medical examination, the original offence was registered at Police Station Begamganuj against the applicants for the offence under Sections 294, 323, 307, 506, 147, 148 and 149 of I.P.C. and on carrying out the medical examination of the abovementioned victims namely; Gopi, Tikam Singh, Govind Singh and Parvesh Singh and Santosh their separate MLC reports were prepared and looking to the nature of the injuries sustained by the Gopi, he was referred to Hamidia Hospital Bhopal, for further management and expert opinion. After conclusion of the investigation, the applicants were charge-sheets for the offence of Section 294, 323, 307, 506 147 read with Section 148 and 149 of I.P.C.

3. After committing the case to the Sessions Court, on evaluation of the charge-sheet, the abovementioned charges were framed against the applicants. They abjured their guilt and thereafter, being dissatisfied with such order has come to this Court with this revision.

4. Shri Narendra Nikhare, learned counsel for the applicants after taking me thorough papers of the charge-sheet along with the aforesaid MLC report of the victims as well as some opinion given by the doctor with respect of some sticks, said that on taking into consideration the face value of the charge-sheet as accepted in it's entirety, even then the ingredients of Section 307 of I.P.C. are not made out against any of the applicants to frame such charge. So far other charges are concerned, he has not made any arguments for setting aside the same. In continuation, he said that looking to the nature of the incident and the injury sustained by the victims including the injury of Gopi, on whose medical report, Section 307 of I.P.C. has been invoked, this is not the case of more than Section 323 of I.P.C., as all the victims have sustained lacerated wound, contusion or guise (abrasion) and in such premises, this is a fit case

for discharging the applicants from the charge of Section 307 read with Section 149 of I.P.C. With these submissions, he prayed for setting aside the impugned order till the aforesaid extent by allowing this revision.

5. On the other hand, responding the aforesaid arguments Smt. Nirmala Nayak, learned Govt. Adv. by justifying the impugned order and the framed charges said that the same is in consonance with the papers of the charge-sheet. At the initial stage in view of the averments of the FIR showing that the alleged assault was made by the applicants on victims with intention to cause death of some victims, the impugned order does not require any interference even for discharging the applicants from the charge of Section 307 of I.P.C. and prayed for dismissal of this revision.

6. Having heard the counsel at length, keeping in view their arguments, after perusing the papers and the copy of the entire charge-sheet placed on the record along with impugned order, I am of the considered view that the charge of Section 307/149 of I.P.C. is not sustainable against any of the applicants.

7. It is settled proposition of law that the accused persons is always charged and convicted for the act which he/they have actually committed and not for that which they could have committed but did not commit. At the time of framing the charge, keeping in view the factual matrix of the incident as stated in the FIR, if the MLC reports of the victims are taken into consideration then, it is apparent that any of the victim has not sustained any grievous injury or the injury which could be said to be sufficient to cause death of a person in ordinary course of the nature. In such premises, on taking into consideration the face value of charge-sheet as accepted in it's entirety even the name of the applicants could not be convicted under Section 307 of I.P.C. So in such circumstances, this Court has to answer the question whether the trial Court has correctly framed the charge of Section 307 of I.P.C. or instead such charge, some other charge ought to have been framed by such Court.

8. Before proceeding further, as ready reference I would like to mention the injuries sustained by the victims and found by the doctor on their medical examination. The same is as under:-

"As per MLC report of Gopi:

"(a)Lacerated wound 1.6 CMx.2 left post parietal.

(b) Lacerated wound 1.9 CMx.1 right post parietal.

(c) Lacerated wound 1.2 CMx.1 left upper occipital.

As per further averments of the MLC report, the alleged injuries were caused by hard and blunt object within 12 hours. Nature can be said after observation. But patient has repeatedly No. of vomiting. He is immediately be referred to Hamidia Hospital Bhopal, for his further management and expert opinion.

AS per MLC report of Tikam Singh:

(d) Lacerated wound 1.6 CMx.2 right post parietal.

As per further averments of the MLC report, the alleged injuries were caused by hard and blunt object, simple within 12 hours.

As per MLC report of Govind Singh:

(e) Swelling 6 Cm x 2.8 CM Left mid forearm.

(f) Lacerated wound with swelling .8 CM x .1 CM x2.6 CM x1.5 CM. mid frontal scalp.

As per further averments of the MLC report, the alleged injuries were caused within 12 hours by hard and blunt object. Nature can be said after observation.

As per MLC report of Pranesh Singh:

(g) Lacerated wound 1.8 CM x 2 CM right post parietal

(h) Lacerated wound 2 Cm x .1 CM left anterior parietal.

(i) A Graze .6cmx3 CM right hands little finger.

As per further averments of the MLC report, the alleged injuries were caused within 12 hours by hard and blunt object. Nature can be said after observation.

As per MLC report of Santosh:

(j) A Graze 1.6 CM x 3 CM left anterior lateral lower part.

(k) Lacerated wound 1.8 CM x.1 CM mid left parietal of scalp."

"As per further averments of the MLC report, the alleged injuries were caused by hard and rough object. All within 12 hours."

9. It is apparent from the aforesaid MLC reports that any of the injury stated in such reports does not come under the purview of earlier part of Section 300 of I.P.C. and in such premises, it could not be said that any of the applicants has committed the offence of Section 307 of I.P.C. In view of settled proposition to examine the ingredients of the offence of Section 307 of I.P.C., the criteria stated in earlier part of Section 300 of I.P.C. is taken into consideration. In the lack of any prima facie evidence that any of the victims sustained grievous injury or sufficient to cause death in ordinary course of the nature, the impugned case is squarely fall only under Section 323 read with Section 149 of I.P.C. in five counts and not under Section 307 of I.P.C.

10. It is also noted that subsequent to referring the victim Gopi, to Hamidia Hospital Bhopal, for further treatment, what opinion regarding nature of his injuries was given by the doctor in this regard, nothing has been placed by the prosecution along with the charge-sheet as apparent from the list of documents mentioned in the police report filed under Section 173 (2) of Cr.P.C. In the lack of such evidence in the charge-sheet, mere on imagination it could not be presumed that victim Gopi has sustained any injury which was sufficient to cause death in ordinary course of nature or was grievous in nature. In this premises, mere on the basis of averments of the FIR, in the lack of any supporting medical evidence, the charge of Section 307 of I.P.C. framed by the trial Court could not be sustained.

11. Therefore, by allowing this revision in part, the charge framed against the applicants under Section 307/149 of I.P.C. is hereby set aside. Instead such charge, the trial Court is directed to frame the charge under Section 323/149 of I.P.C. against each of the applicants, (with respect each of the victims) for five times. Till this extent, the impugned order is modified while, the other part of the same framing the charges of other offences are hereby affirmed.

12. In view of this order, I.A. No. 15133/11, an application for grant of stay, does not require any further consideration hence, the same is hereby dismissed.

13. Revision is allowed in part, as indicated above.

Revision partly allowed.

I.L.R. [2012] M.P., 587
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1389/2011(Jabalpur) decided on 22 November, 2011

RAMNATH @ RAMMU GOND & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 227, 228, Penal Code (45 of 1860), Section 307 or 323 – Attempt to commit murder **– Injured was beaten and blows by rod were given on head, thigh & left leg – No bony injury has found – Held – From evidence on record, it is clear that injured was not beaten with intention to cause his death – Section 300 of IPC is also applicable to consider the scope of 307 – Keeping in view the injuries sustained by victims charge is altered to 323, 341 and 294 IPC – Revision partly allowed.** (Paras 17 & 18)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227, 228, दण्ड संहिता (1860 का 45), धारा 307 या 323 – हत्या करने का प्रयत्न – आहत को पीटा गया तथा सरिये से उसके सिर, जाँघ व बायें पैर पर चोटें पहुंचाई गई – कोई अस्थि चोट नहीं पाई गई – अभिनिर्धारित – साक्ष्य से यह स्पष्ट होता है कि आहत को उसकी मृत्यु कारित करने के उद्देश्य से नहीं पीटा गया – 307 के विषयक्षेत्र को विचार में लेने के लिये भा.द.सं. की धारा 300 भी लागू होती है – आहत को आई चोटों को ध्यान में रखते हुए आरोप भा.द.सं. की धारा 323, 341 व 294 में परिवर्तित किये जाते हैं – पुनरीक्षण अंशतः मंजूर।

R.S. Dubey, for the applicants.
Nirmala Nayak, G.A. for the non-applicant.

ORDER

U. C. MAHESHWARI, J.:- The applicants/ accused have filed this revision being aggrieved by the order dated 25.5.2011 passed by 18th Additional Sessions Judge, Jabalpur framing the charge against each of them under Section 341, 307 in alternate 307/34, 323/34 and 294 of IPC.

2. The facts giving rise to this revision in short are that Jittu @ Jitendra, Upsarpanch resident of Village Bargi had lodged a first information report at Police Station Bargi District Jabalpur contending that at the instance of the village Sarpanch Prema Bai some digging work of foundation to construct the

additional room was started near the school of such village, on which he asked the husband of aforesaid Sarpanch namely Rambharos Gond that before starting such foundation work he should have also been informed so he could have present there on such occasion. In response of it Ram Bharos told him that he will explain in this regard later. On this issue Ram Bharos and Mole Gond came to his residence on the date of incident at about 1.00 O'clock in the noon and called him out side, as soon as he came out, he was taken by them with beating by fists and kicks near some public tap of the village. Where Ram Bharos, Mole, Ramnath and Atthi by abusing him with filthy languages beaten him. In such beating blows of rod were given on his head, thigh and left leg by Atthi. Ram Bharos gave him a blow of stick on his head while Ramnath and Mole initially thrown the stone and subsequently beaten him by fists and kicks, resultantly, he sustained various injuries with bleeding on different parts of his person, when Sevaram father of the victim came to rescue him then he was also beaten by Ram Bharos, resultantly he also sustained the injuries on the thumb of left hand and left leg. On the aforesaid information initially crime No.381/10 was registered against the applicants for the offence of Section 341, 294, 324 and 34 of IPC. Complainant and his father Sevaram were sent to primary health center, Bargi where after carrying out medical examination their MLC reports were prepared and on completion of investigation by invoking the additional offence of Section 307 of IPC the applicants were charge sheeted. After committing the case to the Sessions Court on evaluation of charges sheet the above mentioned charges of Section 307/34 along with other charge were framed against the applicants. They abjured the guilt and being dissatisfied from such order they have come to this court with this revision.

3. The applicants' counsel after taking me through the papers of the charge sheet placed on the record along with the order of framing the charge said that on taking into consideration the face value of the papers of the charge sheet as accepted in it's entirety even then the ingredients of the alleged offence of Section 307 of IPC is not made out for framing the charge. According to his submission, this was not the case of more then Section 323 of IPC but for the reasons best known to the investigation agency they have been charge sheeted for the offence section 307 of IPC under the wrong premises. On evaluation of charge sheet the Sessions Court has also committed error in framing the charge of Section 307 and in alternate 307/34 of IPC. With these submission, he prayed to discharge the applicants from the offence of Section 307 and in alternate 307/34 of IPC with a appropriate direction to the trial

Court to frame the proper charge in the matter by admitting and allowing this revision.

4. On the other hand Smt. Nirmala Nayak, learned G. A. with the assistance of investigation officer present before the Court by justifying the impugned order framing the above mentioned charge against the applicants said that the same is inconsonance with the papers of the charge sheet, showing the prima- facie circumstances of such offence, does not require any interference under the revisional jurisdiction of this Court. In continuation she said that although out of the injuries sustained by the victim/ complainant Jittu no single injury could be said to be sufficient to cause death in ordinary course of nature but looking to the number of injuries sustained by such victim and their consolidated effect, the same are sufficient to cause death of a person like victim Jittu in ordinary course of nature and in such premises also the impugned order does not require any interference and prayed for dismissal of this revision.

5. Having heard the counsel at length keeping in view their argument, I have carefully gone through the papers of the charge sheet and the impugned order of framing the charge.

6. It is apparent from the FIR that initially the case was registered against the applicants for the offence under Section 341, 294, 324 and 34 of IPC. According to its averments no where complainant/ victim Jittu has stated that alleged incident was caused by any of the applicants with intention to cause his death. So firstly from the averments of FIR itself no inference could be drawn that alleged beating of the complainant Jittu was carried out by the applicants with intention to cause his death.

7. Subsequent to lodging the aforesaid report both victims were sent to the hospital where their separate MLC reports were prepared by the doctor.

8. According to MLC report of Jittu, he sustained the following injuries on his person:

1. L.W. 2 x ¼ x ¼ cm over left parietal region of scalp.
2. L.W. 3 x ¼ x ¼ cm over occipital region of scalp.
3. L.W. 4 x ¼ x ¼ cm over right side of occipital region of scalp.
4. L.W. 4 x ¼ x ¼ cm over left side of parietal region of scalp.
5. L.W. 2 x ¼ x ¼ cm behind Rt ear over occipital region of scalp.
6. L.W. 2 x ¼ x ¼ cm over frontal region of scalp.

7. L.W. 2 x ¼ x ¼ cm over left temporal region of scalp.

8. L.W. 2 x ¼ x ¼ cm over right temporal region of scalp two in number.

9. L.W. 2 x ¼ x ¼ cm over left side of face in front of left ear.

Bleeding present from all wounds.

Injuries are caused by hard and blunt object within six hours.

Ref to RSO (surgery) for further management and opinion.

9. According to MLC report of Sevaram he sustained the following injuries on his person.

1. L.W. 3 x ¼ x ¼ cm over posterior aspect of right hand bleeding present.

2. Abrasion 2 x ½ cm over occipital region of scalp.

3. Tenderness present over backbone aspect.

Injuries are caused by hard and blunt object within six hours.

Ref to RSO (surgery) for further management and opinion.

10. On carrying out the x-ray of both the victims as directed by the doctor who prepared their initial MLC report, it is apparent from the x-ray report available in the record that no bony injury was found on any of the victims. Even on going through the case diary statements of the victims as well as other witnesses it could not be inferred that the alleged beating of the victim Jittu was carried out by the applicants or by any of them with intention to cause his death.

11. In view of the nature of the aforesaid injuries and the case diary statements of the witnesses, this Court has to answer the question whether the trial Court has rightly framed the charge of Section 307 in alternate 307/ 34 of IPC besides the other charges or instead such charge some other charge had to be framed against the applicants ?

12. In view of above mentioned facts of the FIR as well as case diary statement no inference could be drawn that the alleged beating of any of the victims was carried out by the applicants with intention to cause their death.

13. Before proceeding further, I would like to mention here that besides the MLC report and x-ray report of Jittu, a report of department of surgery, Medical College, Jabalpur regarding Jittu is also placed on the record. In

such report also no injury has been mentioned as sufficient to cause death in ordinary course of nature. On the contrary the nature of alleged injuries sustained by Jittu/ victim were stated to be simple in nature in such report. Besides this, some C. T. Scan of Jittu was also directed but no such report is placed with the charge sheet.

14. True it is that victim Jittu sustained the maximum injuries stated in the MLC report on different part of his head but all such injuries from number 1 to 9 are stated to be lacerated wound in the MLC as stated above. At the initial stage on preparing the MLC report of Jittu instead to give any opinion about nature of injuries patient was referred to RSO Surgery for further management and opinion and as per report of surgery department such injuries were found to be simple in nature. So mere on the whims of police/ investigation agency, which is not based on any logical back ground, contrary to the nature of injuries sustained by Jittu, this case could not be treated to be the case of Section 307 or 307/34 of IPC even for framing the charge.

15. It is trite law that to examine the availability of ingredients of offence of Section 307 of IPC, the court has to consider the matter taking into consideration the provision of first part of Section 300 of IPC, in which four material ingredients are stated. According to which if culpable homicide defined under Section 299 of IPC, if falling under any category of them, then case could be treated to be the culpable homicide amounting to murder and if the person is not dead then such case be treated to be a case of attempt to murder. Those four ingredients are; (a) if the act by which the death is caused is done with intention of causing death, (b) if it is doen with intention of causing bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, (c) if it is done with intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient to cause death in ordinary course of nature, (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury stated in aforesaid other ingredients.

16. The aforesaid provision of Section 300 of IPC is also applicable to consider the scope of Section 307 of IPC keeping in view of aforesaid ingredients of Section 300 of IPC on examining the case at hand then in the available factual scenario, the impugned case is not falling under any of the aforesaid four ingredients stated in the earlier part of Section 300 of IPC.

Therefore the impugned case could not be treated to be the case of Section 307 of IPC and in such premises the impugned order till the extent of framing the charge of Section 307 in alternate 307/34 of IPC is not sustainable, hence the same is hereby set aside.

17. After setting aside the charge of Section 307 of IPC keeping in view the nature of injuries sustained by the victims this Court has to decide that the charge of which offence at the place of Section 307 or 307/34 of IPC should be framed against the applicants. The victims namely Jittu and Sevaram as per their MLC reports and other medical papers sustained the alleged injuries by means of hard and blunt object and not by hard and sharp object. Beside this, the injuries of Jittu are stated to be lacerated wounds and described the same simple in nature. As per MLC report of Sevaram he sustained one lacerated wound, one abrasion and one tenderness. The same are stated to be simple in nature and caused by hard and blunt object. In such premises, it is apparent that no victim has sustained any of the injury of hard and sharp object. Even otherwise from the FIR it is apparent that any of the applicants was not having any hard and sharp weapon in their hands at the time of the incident. The complainant has made the allegation about rod and stick the hard and blunt object and also of beating by fists and kicks. In such premises, I am of the considered view that the impugned case is not falling under Section 324 of IPC also. Thus in such circumstances, the charge of Section 323 of IPC along with the charge of Section 341, 294 of IPC should be framed against the applicants. As alleged the incident was committed by the applicants in furtherance of their common intention with two victims, therefore, such charge of Section 323 of IPC should be framed with Section 34 of IPC for two times against each of the applicants.

18. In view of the aforesaid discussion by affirming the charge of Section 341, 294 and 323/34 of IPC by allowing this revision in part the charge of Section 307 in alternate 307/34 of IPC is hereby set aside and the trial Court is directed to frame the additional charge of Section 323 in alternate 323/34 of IPC at the place of Section 307 in alternate 307/34 of IPC and proceed with the matter in accordance with the procedure provided for holding the trial of such sections. Till this extent the impugned order is modified while the remaining findings are hereby affirmed.

19. The revision is allowed as indicated above.

Revision allowed.

I.L.R. [2012] M.P., 593
CRIMINAL REVISION
Before Mr. Justice G.D. Saxena
Cr. Rev.No. 299/2007 (Gwalior) decided on 25 November, 2011

DISTRICT CO-OPERATIVE CENTRAL BANK ISAGARH, DISTRICT GUNA (M.P.) ...Applicant
Vs.
LEELADHAN & anr. ...Non-applicants

Penal Code (45 of 1860), Sections 409, 467, Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 55(2) – Guilt to be proved by prosecution **– With the help of evidence – Circumstances must conclude wrongful gain to himself and wrongful loss to another to prove misappropriation – Appellate Court does not normally reappreciate the evidence, unless finding of Court below vitiated by an error of law of procedure, misreading of evidence or is perverse – Held – Prosecution did not prove guilt – Acquitted after appreciation of evidence – Revisional Court should not interfere with sub-ordinate court findings unless gross violation of procedure or perversity in reasoning, resulting miscarriage or total failure of justice – Revision dismissed.** (Paras 16,18,21 & 23)

दण्ड संहिता (1860 का 45), धाराएँ 409 व 467, सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 55(2) – अभियोजन द्वारा अपराध साबित किया जाना चाहिए – साक्ष्य की सहायता से – दुर्विनियोग साबित करने के लिए परिस्थितियों से स्वयं को सदोष अभिलाभ एवं अन्य को सदोष हानि का निष्कर्ष निकलना चाहिए – अपीली न्यायालय सामान्यतः साक्ष्य का पुनः मूल्यांकन नहीं करती जब तक कि निचले न्यायालय का निष्कर्ष विधि की प्रक्रिया में त्रुटि, साक्ष्य को गलत पढ़े जाने से दूषित या विकृत न हो – अभिनिर्धारित – अभियोजन ने अपराध साबित नहीं किया – साक्ष्य के मूल्यांकन पश्चात दोषमुक्त किया गया – पुनरीक्षण न्यायालय को अधिनस्थ न्यायालय के निष्कर्षों में हस्तक्षेप नहीं करना चाहिए जब तक कि प्रक्रिया का घोर उल्लंघन या तर्क में विकृति न हो जिसके परिणामस्वरुप न्याय को हानि या पूर्ण असफलता कारित होगी – पुनरीक्षण खारिज।

Cases referred :
AIR 1977 SC 170, (2003) 12 SCC 670, AIR 2011 SC 1037, (2003) 12 SCC 606, 2007 AIR SCW 1850.

None for the applicant.
Sanjay Behrani, for the Non-applicant No.1.
R.K. Shrivastava, P.L. for the Non-applicant No. 2/State.

ORDER

G.D. SAXENA, J. - This revision petition under Section 397/401 of the Code of Criminal Procedure 1973 preferred by the petitioner/complainant is directed against a Judgment dated 22nd December 2005 in Criminal Case No. 100/96 passed by the Judicial Magistrate First Class, Ashok Nagar (Guna), acquitting thereby the respondent No.1/accused of the charge punishable under Sections 409 and 467 of I.P.C.

2. In brief, the facts just for the decision of this revision petition are that the accused/respondent No.1 was working as regular employee under District Cooperative Bank at Isagarh. At the relevant time, he was on deputation and was posted and working in the Primary Co-operative Society (Sewa Sahakari Samiti) at village Dhakoni. It is alleged that being the In-charge of the System, the articles up to the limit were delivered to the accused. After sale, the sale price was to be deposited in the Co-operative Bank by him, but after sale of the delivered articles, he did not deposit the sale assets for Rs. 76,970/- in the Bank and misappropriated the said amount for which he was duly bound to account for. He also caused forgery in valuable permits issued to him by the authorities. Despite notice to handover the said amount and record, he did not do so. A detailed inquiry was conducted by the Inquiry Officer and Assistant Manager of the Society. After detailed inquiry under the direction of the Superiors, the FIR was lodged at Police Station Isagarh. After investigation, the chargesheet was filed. After trial, the trial Magistrate acquitted him of the charges under Section 409 and Section 467 of I.P.C., hence this revision before this court by the complainant.

3. The grounds taken by the learned counsel for the petitioner/complainant in the memo of revision are that the impugned judgment is illegal, arbitrary and against the evidence as produced, hence, same is liable to be set aside. It is submitted that by the evidence the complainant well proved the charges against the respondent No.1-accused, but the trial Magistrate passed the erroneous judgment of acquittal. Accordingly, it is prayed that by allowing the revision the case be remanded back to the court for fresh decision of the case in accordance with law.

4. The learned counsel for the respondent No.1/accused on the other hand, supported the impugned judgment and prayed for dismissal of the revision.

5. Heard the learned counsel appearing for the respondent No.1/accused and also perused the record of the trial Magistrate containing oral and documentary evidence and the law governing the case.

6. The question for determination in this revision is whether the trial Magistrate was justified in recording the findings of acquittal on the basis of the evidence on record and the same are not suffered from any illegality or perversity ?

7. The charges framed by the trial court against the respondent No.1-Leeladhan are extracted below:-

> "1. कि तुमने दिनांक 18.2.93 से 10.12.95 के दौरान ईसागढ थाना अंतगर्त ग्राम ढाकोनी में समिति प्रबंधक सेवा सहकारी समिति ढाकोनी के पद पर लोकसेवक के नाते पदस्थ रहते हुए सार्वजनिक वितरण प्रणाली की साख सीमा की विकय धनराशि 57 हजार 898 रू. जो कि लोकसेवक के नाते तुम पर नियस्त थी को स्वयं के उपयोग के लिए संपरिवर्तित कर आपराधिक न्यास भंग किया तथा 19 हजार 72 रू. कि साख सीमा का आपराधिक न्यास भंग किया।
>
> 2. उक्त समयावधि में तुमने दि. 15.12.95 के द्वारा जप्त परमिटो कि कूट रचना बैंक को क्षति कारित करने के आशय से की जो मूल्यवान प्रतिभूति की परिधि में है।"

8. On looking to the ocular evidence of witnesses Meharban Singh (PW-2) and Raj Kumar Sharma (PW-3) recorded by the trial court it goes to show that the accused was posted from 18th February 1993 to 10th December 1995 on the post of Secretary in Primary Cooperative Society Dhakoli. Meharban Singh (PW-2) states that being an Observer of the Co-operative Bank Isagarh in the year 1995, he was asked to conduct the inquiry about the transactions made during the service period of accused and after inquiry he found that there was a loss of manure to the Society. He stated that accused Leeladhar objected to the previous inquiry conducted by Narendra Singh Chauhan, the Branch Manager of the Society at preliminary stage. So, again the inquiry was conducted by this witness. On inquiry, he concluded that except some deposits which were not shown in the first inquiry conducted by Narendra Singh Chauhan, there was no change and the conclusions of the first inquiry conducted by Narendra Singh Chauhan were almost found similar by the witness. In cross examination, the relevant procedures regarding conduct of business of sale of manure, food grain and kerosene on control price were

mentioned by him. The witness further makes it clear that in the distribution of manure and seeds for agriculturist, first of all, on the basis of the title of the person concerned, the limit of the seeds and manure was fixed. After allotment of the manure from the Agency authorized by the Manufacture or the State and the manure is received in Society, the Secretary issues the permits to the farmers on previous limits as per area of the land and on the basis of permit the manure is distributed to individual farmer and entry is made in their books of credit. The food grain and kerosene on control rate are distributed to each ration card holders of the village. One Salesman other than Secretary of the Society is also appointed for sale of control items and manures and seeds on cash or credit as the case may be. He deposed that at the relevant time Hari Shankar Sharma and Bhagwant Rao were working as Salesmen in the society. It was admitted that against the arrears of the sale proceeds, the accused deposited Rs. 9050/- on 20th August 1994, Rs. 7240/- on 1st September 1994, Rs. 2200/- on 25th July 1994, Rs. 4100/- on 29th July 1994, Rs 4800/- on 30th July, 1994 and Rs. 35000/- on 10th November, 1994 with the Society.

9. Bhagwant Rao (PW-5) deposed that he was posted as Salesman on the Control shops run by the society at Village Dhakoni and Narsukhedi. He stated that either he or the Secretary, i.e., the accused/respondent No.1 used to deposit the sale proceeds of the Society with the Bank. It is stated that when Leeladhar used to deposit the sale proceeds of the manure and control items on fair deal, the witness usually handed over the amount to accused and got receipt from him. He did not remember how much and when he handed over the amount of the sale proceeds to accused and got receipt from him. He stated that when the Manager of the bank made an inquiry about the deposits of the arrears of the sale proceeds, he replied that he had tendered the amount and had the receipt of the same with him. However, he was declared hostile by the prosecution. He said that he does not remember that on 20th March 1993 he tendered the amount of Rs. 12710/- to the accused as per Receipt No. 13503. So also on 29th March 1993 sale proceeds amount 6 Cri.Revision No.299/07 of Rs. 1030/-, vide Receipt No. 13504, on 12th June 1993 an amount of Rs. 700/- vide Receipt No.13547 and on 16th July 1993 sale proceeds amount of Rs. 17230/- vide Receipt No.6379 were delivered to Liladhar for deposit of the said mounts in the Bank but these amounts were not deposited with Bank. He admitted that daily sale proceeds were entered in stock register and the sale amounts were entered in the ledger

register of the related fair deal control shops of Dhakoni and Narsukhedi. The deposit and arrears were also kept in the account of the Society of the saving/ current account register maintained by the Co-operative Bank Isagarh.

10. Digvijay Singh Bhadoria (PW-13), stated that at the relevant time he was discharging his duty as the Deputy Manager posted in District Co-operative Bank Guna. He stated that after charge-sheet, the detailed inquiry against accused Liladhar was handed over to him. After inquiry he concluded that the sale proceeds of manure and seeds sold to agriculturist and the sale proceeds of sold control items of the society were not deposited with the Co-operative Bank Isagarh. His inquiry report is Ex. P/25. In cross examination he admits that the respondent/accused preferred the legal action against his suspension of termination from the service before the Deputy Registrar Co-operative Registrar Guna and he also participated in the proceedings but he does not know the results of the same. He does not remember that the accused during inquiry deposited the embezzled amount in the Bank. The original inquiry report dated 21st November 1994 and all relied documents were preserved by the Bank.

11. On perusal of the inquiry report prepared by the witness Digvijay Singh Bhadoria (PW-13), it clearly indicates that on inquiry it was found that the accused received Rs. 31,670/- up to 16th July 1993 and Rs.23,140/- was deposited with the bank. Thus, the accused was responsible for an amount of Rs. 8,540/-. Against the said amount he deposited Rs. 7000/- on 7th February 1994 and remaining was deducted from his salary. As per report it also appears that the accused did not inform about the misdeeds of the Salesman. Consequently, no legal action was proposed to be taken against the erring Salesman in time. The explanations of the accused during inquiry were not found satisfactorily. The accused embezzled Rs. 1800/- towards rent of the fair deal shop which was shown paid to the landlord but not paid to him. For the sale proceeds against the sale of manure to the members of agriculturists, it was found that manure valued at Rs. 49,314/- was sold on permit on credit to farmers which on verification comes on record that only eight members have accepted to receive the manure while six members of the Society denied that no manure was sold to them on permit. Thus, the sale credit price was embezzled in the said manner by the accused. While concluding, the accused was finally held responsible for an amount of Rs 9,624.58 and Rs. 57,898/- for PDS sales proceed.

12. It is pertinent to mention here that the original documents such as inquiry reports of various Inquiry Officers and the supportive documents kept in the possession of the District Co-operative Bank Guna/Isagarh were not procured during investigation nor were they produced and proved in trial. It may further be mentioned that the Salesman who is also responsible for shortcomings in stock of PDF items, no prosecution was launched against him alongwith the accused/petitioner.

13. Only witness Milkha Singh (PW-1) states that four years ago the Agent of bank made a demand of price of manure which was never sold to him by the Society and the accused got his signature on permit by deceitful means. In cross-examination, he said that the receipt of manure on credit is entered on his book of debit-credit issued by the bank. Near about 10-12 years ago, he purchased the manure on credit and the relevant entry of purchase of manure was entered in his book of debit credit but he did not submit his book of debit-credit in court, during evidence, which raises suspicion to rely on him.

14. Another witness Ram Chandra Rao (PW-6) states he expressed his desire before accused Leeladhar to become the member of the Society and he told to deposit Rs.11/- but he did not purchase the wheat seeds of Rs. 3500/-. However, he admitted his signatures on the permit (Ex.P/9). Further he stated that he did not remember that on the basis of permit the wheat was delivered to him or not. Witness Bhagwan Singh (PW-7) said that he did not apply for manure or seed from the Society and he can not say whether the permit (Ex.P/12) contained of his signatures or not because his eye sight is weak and he is not able to recognize his signatures on the permit. He is declared hostile by the prosecution. Witness Saudagar Singh (PW-8) states that in the year. 1994 he purchased DPA Manure from the society. He stated that accused did not deceive him. Witness Kabul Singh (PW-11), admitted that he is a member of the Society and he purchased the manure from the society. He is declared hostile by the prosecution and he denied that a forged permit was prepared on his name and the purchase of manure was shown in his account.

15. On the discussions of the aforesaid, it seems that out of six persons, four persons namely, Ram Chandra Rao (PW-6), Bhagwan Singh (PW-7), Saudagar Singh (PW-8), Kabul Singh (PW-11) and Milkha Singh (PW-1) did not deny their signatures on permits (Ex.P/7 to P/12). To prove that the signatures or thumb impression on these permits are forged, no attempt was made to obtain a report from the Handwriting Expert by the prosecution.

Hence, it can not be safely said that the accused/respondent No.1 ever prepared the forged signatures on permits issued by him to farmers for manure or seeds of crop to be sold on credit. No books of debit-credit from the farmers/members of the Society were collected during inquiry conducted by the Bank officers nor were they seized during investigation and further no plausible efforts were made to prove that by deceitful means the signatures of the related farmers were obtained on the permits while no manure or seed were sold to them on permit by the accused/respondent No.1.

16. In a case where entrustment is admitted, it would be for an accused person to account for the money entrusted with him and the prosecution may not be in a position to establish as to how exactly an amount was converted by the accused to his own use, but the evidence and the circumstances of the case must warrant a conclusion that the accused in order to cause wrongful gain to himself or wrongful loss to another, has committed misappropriation of the amounts.

17. In the case of *Rabindra Kumar Dey Vs. State of Orissa* (AIR 1977 SC 170), the Hon. Apex Court held:-

> "Although the onus lies on the prosecution to prove the charge against the accused, yet where the entrustment is proved or admitted it will be difficult for the prosecution to prove the actual mode or manner of misappropriation and in such a case the prosecution would have to rely largely on the truth or the falsity of the explanation given by the accused.
>
> But the question is whether the explanation given by the appellant in this case can be said to be absolutely false? Another question that arises is what are the standards to be employed in order to judge the truth or falsity of the version given by the defence? Should the accused prove his case with the same amount of rigour and certainty, as the prosecution is required, to prove a criminal charge, or it is sufficient if the accused puts forward a probable or reasonable explanation which is sufficient to throw doubt on the prosecution case? In our opinion three cardinal principles of criminal jurisprudence are well-settled, namely :
>
> (1) that the onus lies affirmatively on the prosecution to prove

its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;

(2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

(3) that the onus of the prosecution never shifts. It is true that under Section 105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused, but this section does not at all indicate the nature and standard of proof required. The Evidence act does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. In fact, from the cardinal principles referred to above, it follows that, it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by Section 5 of the Evidence Act as a result of which he succeeds not because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Indian Penal Code on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court."

18. Now coming to the case, it is noted that the witness Digvijay Singh Bhadoria (PW-13) states in cross examination that accused initiated the legal action before the Deputy Registrar Guna against his suspension/removal from service. An un-exhibited copy of the order dated 16th July 2001 passed by the Deputy Registrar Co-operative Societies Guna filed on record shows that under the provisions of Section 55 (2) of the MP Co-operative Societies Act 1961 and the powers conferred under Regulations F/5-1-99/fifteen-1-C dated 26.7.99, issued by the M.P. Co-operative Department accused/respondent

was acquitted from the charges and he was directed to resume his charge without back wages however on the principles of no work no pay and the employer bank was directed to make deposit the embezzled amount as per law and rules from his regular monthly salary with liberty to take legal action by the employer against the accused if he is convicted by the court of law.

19. In the case of *L. Chandraiah v. State of A.P. and Another* [(2003) 12 SCC 670], it was held:

> ".....It may be, and as rightly observed by the courts below, that they acted in a negligent manner and if they had taken due care they would have detected the fraud, but they failed to do so. However, that by itself would not constitute an offence under Section 409 IPC though it may expose the appellants to disciplinary action under the relevant rules. The learned counsel also brought to our notice the fact that in respect of the same sub-post office some vouchers prepared and countersigned by A-3 on the reverse side were sent to the head post office at Mancherial. PW 5, the investigating officer has referred to several such vouchers which were sent to the head post office for payment, and the officers of the head post office also sanctioned payment on the basis of such fabricated vouchers. Obviously, the officers at the head post office were also not very careful, and as a result A-3 succeeded in his evil design to fraudulently withdraw a large sum of money. The learned counsel submitted that on the basis of these facts not only the appellants were cheated by A-3 but even the officers of the head post office were similarly cheated by A-3."

20. Again in a case of *V. S. Achuthanandan Vs. R. Balakrishna Pillai* (AIR 2011 SC 1037), it is held that if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court.

21. The revisional jurisdiction of this court is different from the appellate jurisdiction and the court does not normally re-appreciate the evidence and go to the question of credibility of witnesses, unless the appreciation of evidence and the finding of the courts below is vitiated by an error of law of procedure, misreading of the evidence or is perverse. In the case of *Ramanand Yadav v. Prabhunath Jha*, (2003) 12 SCC 606, this Court observed:-

"There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

22. In the case of *Chandrappa Vs. State of Karnataka* 2007 AIR SCW 1850 the Apex court held:-

"In our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, re appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the

reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

23. On the discussions of the factual and legal aspects of the matter, it appears that the prosecution could not prove the guilt of the accused beyond doubt, Against the dismissal of his service, the accused initiated the proceedings before the Departmental Authority in which it was observed that the department through inquiries could not be able to bring home the delinquent employee within the scope of charges for removal of services and eventually removal of the respondent No. 1/accused was quashed and he was reinstated in service. It is settled principle of law that a court of revision should not interfere with the judgment of subordinate court or the findings arrived at, unless there is gross violation of the procedure or perversity in reasoning resulting in miscarriage or total failure of justice. Further, the revisional powers can be exercised only if there is a flagrant miscarriage of justice in the sense that the findings are against evidence and facts, but where the acquittal is recorded after due appreciation of the evidence on record, interference by the revisional court is not warranted. In that view of the matter, the findings of the learned trial Magistrate recorded after due appreciation of the evidence on record for acquittal of an accused of the charges under Section 409 and 467 of I.P.C. could not be said to be illegal or erroneous.

24. In the result, the revision fails and is dismissed for want of substance.

Revision dismissed.

I.L.R. [2012] M.P., 604
CRIMINAL REVISION
Before Mr. Justice G.D. Saxena
Cr. Rev.No. 554/2011 (Gwalior) decided on 25 November, 2011

HARVEER SINGH & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 216 – Alteration of Charge **– Trial Judge on the basis of medical as well as oral evidence altered the charge from 325/149 to 326/149 – Trial Judge can alter the charge at any stage – Alteration of charge at the end of trial proper – Revision dismissed.** (Paras 11 & 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 216 – आरोप में परिवर्तन – विचारण न्यायाधीश ने चिकित्सीय साक्ष्य और इसके साथ ही मौखिक साक्ष्य के आधार पर आरोप 325/149 से 326/149 में परिवर्तित किये – विचारण न्यायाधीश किसी भी प्रक्रम पर आरोप में परिवर्तन कर सकता है – विचारण के अंत में आरोप में परिवर्तन उचित – पुनरीक्षण खारिज।

Cases referred :

AIR 2006 SC 2747, AIR 1970 SC 359.

Deependra Raghuvanshi, for the applicants.
Pramod Pachori, P.P. for the Non-applicant/State.

ORDER

G.D. SAXENA, J. -This revision petition under Section 397/401 of the Code of Criminal Procedure 1973 preferred by the accused/petitioners is directed against an order dated 29th June 2011 in Criminal Case No. 742/07 passed by the Judicial Magistrate First Class, Kolaras, district Shivpuri (M.P.), framing thereby charges against the accused for commission of offence punishable under Sections 324/149, 326/149, 148 and 294 of I.P.C.

2. The brief facts for decision of this revision petition are that on 16th May 2007 at about 8.00 a.m. on the way in front of the house of the complainant Ram Sewak at village Vinnaya of Police Station Indar, all the accused having armed with Lathis and Farsas reached on the spot where the complainant Ram Sewak and his brother Rajaram were present and due to

previous enmity hurdled abuses to them. When the complainant and his brother tried to raise objection, all the accused caused injuries by means of Lathis, Axe and Farsas on the different parts of their bodies. Seeing the incident, Imarat Singh rushed to the spot but he was also beaten by the accused-persons. On the report of the complainant, an FIR was lodged. Thereafter, the police sent the injured for their medical examination. Except injured Imarat Singh, the injuries on the persons of Ram Sewak and Raja Ram were found to be simple in nature. As per X-ray report, the injury sustained by Imarat Singh on left hand, resulted in fracture of the distal phalanx of little finger with absence of distal fragment. During trial, the learned Trial Judge by exercising the powers under Section 216 of the Code, altered and added the charge for commission of offence under Section 326/149 of I.P.C.

3. The contention of the learned counsel appearing for the petitioners/ accused is that the impugned order passed is against the settled principles of law and without jurisdiction, hence, same is liable to be set aside. It is contended that the trial Magistrate committed the error by amending the charge at the fag end of trial. Despite the X-ray report of the injured Imarat Singh being made available by the Investigation at the time offraming the charge by the trial court, the trial Magistrate did not opt to frame the charges at earlier stage. On the basis of the aforesaid submissions, it is prayed that by allowing the revision, the order of the trial Magistrate for alteration of charge to one under Section 326/149 I.P.C. be set aside.

4. The learned Public Prosecutor for the respondent/State on the other hand, opposed the prayer and prayed for dismissal of the revision being found no substance in it.

5. Heard the learned counsel for the parties and also perused the copies of charge-sheet and court statements of the prosecution witnesses filed alongwith the revision and the law on the point involved.

6. Thus, the sole question that now remains to be answered is whether alteration of charge by the learned Judicial Magistrate after examination of the prosecution witnesses was over is without jurisdiction and not warranted by the provisions of the Code ? It is in this context that the scope of Section 216 Cr.P.C. falls for consideration.

7. At this juncture, it would be relevant to reproduce Section 216 of Cr.P.C.

S.216. (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court to prejudice the accused in his defence or the prosecutor in the conduct of the case the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded

8. The provisions of Section 216, Cr.P.C. invest a comprehensive power to remedy the defects in framing or non-framing of a charge, whether discovered at the initial stage of the trial or at any subsequent stage, prior to judgment. Thus, the application of Section 216 (1), Cr.P.C. cannot be limited for altering or amending a charge only to an offence disclosed by the evidence during trial. On the other hand, even if there is an omission to frame a proper charge at the commencement of the trial which omission is discovered subsequently, the same can be remedied by framing appropriate charge at any time before judgment is pronounced.

9. Further, in the case of *Sabbi Mallesu Vs. State of Andra Pradesh* (AIR 2006 SC 2747), the Hon. Apex court held:-

"The power of the Court to alter the charges is neither in doubt nor in dispute but in terms of Sub-section (2) of Section 216,

Cr.P.C., it was obligatory on the part of the learned Sessions Judge to bring it to the notice of the accused and explain the same to the accused. The same having not been done, it cannot be said that the requirements of Section 216 of the Criminal Procedure Code stood complied with. ".

10. Again, in the case of *Kantilal Chandulal Mehta Vs. State of Maharashtra* (AIR 1970 SC 359), the Hon. Apex court has held :-

"As already pointed out the learned Judge of the High Court did not intend nor did he direct a new trial in the sense that it is contended he had done. There was in fact no retrial directed, but only an opportunity was given to the accused to safeguard himself against any prejudice by giving him an opportunity to recall any witnesses and adduce any evidence on his behalf. The appellant has also understood the order not as a retrial is clear from ground (f) of the Special Leave Petition filed before us. The complainant's Advocate Shri Tarkunde in fact said and even now submits before us that he does not want to lead any evidence and would be satisfied on the same evidence to sustain a conviction on the amended charge, nor does the alternative charge now framed requires him to answer a charge against him of a new offence which would cause prejudice."

11. A mere plain reading of Section 216 indicates that at any stage before the judgment is pronounced, the court is empowered to alter or add to any charge. It is a comprehensive section and includes not only the correction of an error in framing the charge but will also include non-framing of a charge. Hence even though the charges for offences under Sections are made at initial stages, the court has jurisdiction or power to alter that charge and frame a new charge as it has the power to correct the omission.

12. In present case also, on consideration of the court statements of complainant, injured witnesses of the incident, Dr. R.R. Mathur, Dr. M.L.Agrawal, FIR, case diary statements, medical reports available on record of the court of the trial Magistrate, same would clearly indicate that there are grounds available to alter the charges as framed in earlier stage by the trial Magistrate. There were also complainant's as well as other prosecution witnesses's statements thereby disclosing prima facie an offence under Section 326 of I.P.C. but there was initially an omission of not framing the specific

charge under Section 326/149 of I.P.C. with regard to the injuries sustained by Imarat Singh which omission is subsequently discovered during the course of hearing by the learned Magistrate. Hence, after perusing the evidence recorded by the trial Magistrate and material available on record, the learned Judge felt the need for alteration of a charge for the offence under Sections 326/149 instead of 325/149 of I.P.C. Though by this itself it cannot be said that the learned Judge had made up his mind to convict the accused, yet it appears to be reasonable that the case has to be tried in the above circumstances by the trial Magistrate.

13. Since, the correction or the omission to frame a charge is permitted by Section 216, Cr.P.C., it cannot be said that the learned trial Judge acted without jurisdiction in directing to alter charge. The order of altering the charge therefore does not warrant any interference either by exercise of inherent jurisdiction or the revisional jurisdiction.

14. In the light of the aforesaid discussions, this court is of the view that there are no grounds available for setting aside the order passed by the learned trial court. Same hereby stands affirmed.

15. Resultantly, the revision fails and is hereby dismissed.

Revision dismissed.

I.L.R. [2012] M.P., 608
CRIMINAL REVISION
Before Mr. Justice Anil Sharma
Cr. Rev. No. 883/2011(Gwalior) decided on 29 November, 2011

ANITA SHARMA (SMT.) ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401, 407 & 408– Maintainability of Revision – **Application filed under Section 408 for transfer of case rejected – No revision lies against the order – Applicant has remedy of filing application under Section 407 of Cr.P.C. for transfer – Revision dismissed.** (Para 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 401, 407 व 408 – पुनरीक्षण की पोषणीयता – धारा 408 के अंतर्गत प्रकरण के स्थानातंरण हेतु प्रस्तुत आवेदन नामंजूर – आदेश के विरुद्ध कोई पुनरीक्षण नहीं हो सकती – आवेदक के

पास स्थानांतरण के लिये दण्ड प्रक्रिया संहिता की धारा 407 के अंतर्गत आवेदन प्रस्तुत करने का उपचार है – पुनरीक्षण खारिज।

D.K. Katare, for the applicant.
Prabal Solanki, P.P. for the Non-applicant No.1/State.
F.A. Shah, for the Non-applicant No.2.

ORDER

ANIL SHARMA, J. : - The petitioner has preferred this Criminal Revision under Section 397/401 of Cr. P. C. against the order dated 28/09/2011, passed by learned Sessions Judge, Gwalior (MP) in Miscellaneous Criminal Case No.73/2011, rejecting the application filed by the petitioner under Section 408 of Cr. P.C. for transferring of the pending Criminal Case No.11645/2009 from the Court of Judicial Magistrate First Class, Gwalior to another Court.

2. The petitioner is complainant in Criminal Case registered against respondent No.2, which is pending for trial before learned Judicial Magistrate First Class, Gwalior (MP). The petitioner moved an application for transfer of the case on an apprehension that learned trial Court has rejected her application under Section 301 of Cr. P. C. and issued bailable warrants against the witnesses. It is further alleged that the order-sheets have been written after getting signature of the complainant.

3. On perusal of the documents available on record, it is clear that application under Section 301 of Cr. P. C. moved by the petitioner, has been rejected by learned trial Court. The petitioner, who is an Advocate, has already been represented by her counsel, who is assisting Assistant Public Prosecutor and statements of complainant and important witnesses have already been recorded. Hence, her application was rejected by learned trial Court.

4. It is submitted by learned counsel for the respondent No.2. that bailable warrants have been ordered to be issued against the witnesses as they were not present on the Court on the date fixed for hearing as they were bound to appear before the Court on the next date fixed for evidence.

5. Learned counsel for the respondent No.2 has raised an objection that against order dated 28/09/2011 passed on the application under Section 408 of Cr.P.C. revision does not lie. Only course available to the petitioner to file revision under Section 407(2) of Cr. P. C.

6. Learned counsel for the respondent No.2 has drawn attention of this

Court to the provisions of Section 407(2) of Cr. P. C. which run as follows:-

> **"407. Power of High Court to transfer cases and appeals:-** (1) xxxxxxxxxxxxxxxxxxxx
>
> (2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:
>
> Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him."

7. Considering the above said provisions of Section 407(2) of Cr. P. C., it is clear that after dismissal of application under Section 408 of Cr.P.C., an application under Section 407 of Cr.P.C. shall lie. Therefore, revision against the order dated 28/09/2011 passed on the application under Section 408 of Cr.P.C. is impliedly barred. Therefore, this Criminal Revision filed by the petitioner under Section 397/401 of Cr.P.C. is dismissed as not maintainable. The petitioner is at liberty to move an application under Section 407 of Cr.P.C. before the High Court.

Revision dismissed

I.L.R. [2012] M.P., 610
CRIMINAL REVISION
Before Mr. Justice Anil Sharma
Cr. Rev. No. 921/2011 (Gwalior) decided on 9 December, 2011

SUNIL ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 167(2), Dakaiti Aur Vyapharan Prabhavit Ksheshtra Adhiniyam, M.P. (36 of 1981), Section 11/13 – Bail* – Challan not filed within 90 days of arrest of applicant – Proviso to Section 5 of Act, would apply only to those accused who has been in judicial custody for a specified offence as defined in Act – Merely by arresting the applicant under Section 11/13 of Act, the rights of the applicant as provided under Section 167(2) of**

Code can not be curtailed – Applicant granted bail. (para 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167(2), डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11/13 – जमानत – आवेदक की गिरफ्तारी के 90 दिन के भीतर चालान प्रस्तुत नहीं किया गया – अधिनियम की धारा 5 का परंतुक केवल उस अभियुक्त पर लागू होगा जिसे अधिनियम में परिभाषित विनिर्दिष्ट अपराध के लिये न्यायिक अभिरक्षा में रखा गया है – अधिनियम की धारा 11/13 के अंतर्गत अभियुक्त की मात्र गिरफ्तारी से संहिता की धारा 167(2) के अंतर्गत अभियुक्त को प्रदत्त अधिकारों को कम नहीं किया जा सकता – आवेदक को जमानत दी गई।

Cases referred :

2001 SCC(Cri) 760, 1996 CAR 103.

Pradeep Katare, for the applicant.
Prabal Solanki, P.P. for the respondent/State.

ORDER

ANIL SHARMA, J. -Petitioner has filed the present revision petition under Section 397, 401 of Code of Criminal Procedure, 1973 challenging the order dated 12-10-2011 passed by learned Judicial Magistrate First Class, Morena in unregistered case No. /2011 (Crime No.93/11 registered at Police Station Noorabad District Morena) whereby the application filed by the petitioner under Section 167(2) of Cr.P.C. has been dismissed.

2. Petitioner has been arrested in crime No.93/11 registered at Police Station Noorabad District Morena for the offence punishable under Sections 147, 148, 149, 307, 327, 294, 201 and 120-B of IPC, under Section 3(1)(x) and 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and under Section 25, 27 and 30 of Arms Act.

3. Petitioner has been arrested on 07-07-2011 and has been sent in judicial custody on 08-07-2011. When the concerning Police Station did not file the challan within 90 days of sending the petitioner in judicial custody, petitioner has filed a bail application under the provisions of Section 167(2) of Cr.P.C. but the learned trial Court has dismissed the application on the ground that the offence punishable under Sections 11/13 of M.P.D.V.P.K. Act has been added in the crime, therefore, under the provisions of M.P.D.V.P.K. Act challan is to be filed within 120 days.

4. Learned counsel for the petitioner has placed reliance on the decision

of Apex Court in the matter of *Uday Mohanlal Acharya Vs. State of Maharashtra*, 2001 SCC (Cri) 760 in which it has been held that the delay beyond the period specified in clause (a) of the proviso in completion of investigation gives accused an indefeasible right to be released on bail when investigation is not complete within the specified period. In order to avail such right the accused is only required to file an application before the Magistrate seeking release on bail alleging that no challan has been filed within the period prescribed and he is prepared to offer bail on being directed by the Magistrate.

5. Learned counsel for the petitioner has also submitted that the date on which the order has been passed no charge-sheet has been filed, hence the statutory right of bail of the petitioner cannot be defeated by keeping the bail application pending till the charge sheet is submitted. In support of his contention and arguments he has further cited the judgment of Apex Court in the matter of *Mohammed Iqbal Madar Sheikh and others Vs. The State of Maharashtra*, 1996 CAR 103 in which it has been held that the statutory right of bail under Section 167(2) of Cr.P.C. cannot be defeated by keeping the bail application pending till the charge sheet is submitted so that the right which had accrued is extinguished and defeated.

6. Learned Public Prosecutor for the respondent/State has opposed the revision petition filed by the petitioner and submitted that since the offence punishable under Section 11/13 of M.P.D.V.P.K. Act has been added, therefore, the prescribed period for filing of challan shall be deemed to be extended for 120 days.

7. According to proviso 5 of M.P.D.V.P.K. Act no court or Magistrate shall authorise the detention of a person accused of a specified offence in custody during the course of investigation for a period exceeding 120 days and on the expiry of such period accused shall be released forthwith if he is prepared to and does furnish the bail. Therefore, on bare perusal of this proviso, it is clear that this provision applies to the accused who has been detained for a specified offence as defined in M.P.D.V.P.K. Act while petitioner has not been detained in any of the specified offence of M.P.D.V.P.K. Act. Merely by adding the Section 11/13 of M.P.D.V.P.K. Act, the rights of petitioner as provided under Section 167(2) of Cr.P.C. of bail cannot be curtailed as the provisions of M.P.D.V.P.K. Act are applicable only to those accused who have been in judicial custody for a specified offence as defined in M.P.D.V.P.K. Act.

8. In view of the foregoing reasons, learned lower appellate Court has erred in not exercising the jurisdiction vested in it by law, therefore, the revision petition filed by the petitioner is allowed. Petitioner be released on bail on his furnishing personal bond in the sum of **Rs.25,000/- (Rupees Twenty-five thousand only)** with one solvent surety in the like amount to the satisfaction of the concerned Magistrate, on the condition that he shall remain present before the Court concerned during trial and also comply with the conditions enumerated under Section 437(3) of Cr.P.C. Accordingly, the revision petition stands allowed and disposed of.

Revision allowed

I.L.R. [2012] M.P., 613
CRIMINAL REFERENCE
Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui
Cr. Reference No. 3/2010 (Jabalpur) decided on 16 January, 2012

IN REFERENCE ...Applicant
Vs.
GUDDA @ DWARIKENDRA ...Non-applicant

A. ***Penal Code (45 of 1860), Section 120B – Conspiracy – Respondent/wife of appellant alleged to have invited the deceased and his family in the house for lunch – Held – There is no evidence that respondent/wife knew the design or the plan conceived by appellant – It can not be held that respondent conspired with her husband/appellant in commission of offence – Acquittal of respondent by Trial Court proper.***

(Para 36)

क. दण्ड संहिता (1860 का 45), धारा 120बी – षडयंत्र – अपीलार्थी की पत्नि /प्रत्यर्थी द्वारा मृतक व उसके परिवार को घर में दोपहर के भोजन के लिये आमंत्रित किया जाना अभिकथित किया गया – अभिनिर्धारित – इस बात की कोई साक्ष्य नहीं कि प्रत्यर्थी/पत्नि अपीलार्थी द्वारा कल्पित रुपांकन या योजना को जानती थी – यह निर्धारित नहीं किया जा सकता कि अपराध के कारित किये जाने में प्रत्यर्थी ने पति/अपीलार्थी के साथ षडयंत्र रचा – विचारण न्यायालय द्वारा प्रत्यर्थी की दोषमुक्ति उचित।

B. ***Penal Code (45 of 1860), Sections 97 & 99 – Right of Private Defence – Defence taken by appellant that deceased entered in the room of his wife and tried to commit a mischief with her is unnatural, improbable and false as the deceased would not have dared***

to commit such an act in the presence of his wife and child – Otherwise also, appellant had no reason to cause 10 injuries to A and 5 injuries to A's wife and 4 injuries to A's minor son – Number and nature of injuries caused to deceased persons clearly indicate that these injuries could not have been caused in protecting his wife – Adverse inference deserves to be drawn against him for putting false explanation. (Para 37)

ख. दण्ड संहिता (1860 का 45), धाराएँ 97 व 99 – निजी प्रतिरक्षा का अधिकार – अपीलार्थी द्वारा लिया गया बचाव कि मृतक उसकी पत्नि के कमरे में दाखिल हुआ और उसके साथ दुर्व्यहार किया अप्राकृतिक, असंभाव्य व मिथ्या है क्योंकि मृतक अपनी पत्नि और बच्चों की उपस्थिति में ऐसा कृत्य करने का साहस नहीं कर सकता था – अन्यथा भी अपीलार्थी के पास 'ए' को 10 चोटें, 'ए' की पत्नि को 5 चोटें और 'ए' के अवयस्क पुत्र को 4 चोटें कारित करने का कोई कारण नहीं था – मृतक व्यक्तियों को कारित चोटों की संख्या व प्रकृति स्पष्ट रुप से दर्शाती है कि ये चोटें उसकी पत्नि की प्रतिरक्षा करने में कारित नहीं हो सकती थी – मिथ्या स्पष्टीकरण देने के कारण उसके विरुद्ध प्रतिकूल निष्कर्श निकाला जाना चाहिए।

***C. Penal Code (45 of 1860), Section 302 – Death Sentence – Rarest of rare case* – Appellant killed three persons including a pregnant lady and a minor child – Appellant was under no duress or provocation – Conduct of stabbing three persons was so brutal, cruel, grotesque and diabolical and offence was committed in such dastardly manner that he deserves no sympathy, especially in view of the number of injuries to different persons – Reference accepted – Death Sentence affirmed.** (Para 46)

ग. दण्ड संहिता (1860 का 45), धारा 302 – मृत्युदण्ड – विरल से विरलतम मामला – अपीलार्थी ने तीन व्यक्तियों को मारा जिसमें एक गर्भवती स्त्री और एक अवयस्क बच्चा शामिल – अपीलार्थी किसी दबाव या प्रकोपन में नहीं था – तीन व्यक्तियों को छुरा भोंकने का कृत्य नृशंस, क्रूर, घिनौना और पैशाचिक है और अपराध इतने कायरतापूर्ण तरीके से किया गया है कि वह किसी सहानुभूति का पात्र नहीं है विशेषतः विभिन्न व्यक्तियों को पुहंचाई गई चोटों की संख्या को दृष्टिगत रखते हुए – निर्देश स्वीकृत – मृत्यु दण्डादेश की पुष्टि की गई।

Cases referred :

AIR 2011 SC 2689, AIR 1980 SC 898, AIR 1983 SC 957, (2002) 5 SCC 234, AIR 2011 SC 568.

Yogesh Dhande, Dy. G.A. for the applicant.
S.C. Datt with *Siddharth Datt*, for the non-applicants.

JUDGMENT

The Judgment of the court was delivered by,

RAKESH SAKSENA, J.: Since all the above cases arise out of the common impugned judgment passed by the trial Court, this judgment shall govern the disposal of all the three cases.

1. Appellant Gudda @ Dwarikendra has filed Criminal Appeal No.2246/2010 against the judgment dated 7th September 2010, passed by III Additional Sessions Judge, Satna, in Sessions Trial No.257/2007, convicting him under Section 302 of the Indian Penal Code on three counts and sentencing him to death. Since appellant Gudda @ Dwarikendra has been awarded penalty of death sentence, learned Additional Sessions Judge has made reference (Cr.Ref.No.3/2010) for conformation of the death sentence under Section 366(1) of the Code of Criminal Procedure.

2. Being aggrieved by the acquittal of accused/respondent Smt. Geeta Vishwakarma of the charge under Section 302 read with Section 120-B of the Indian Penal Code, State has filed Criminal Appeal No.1870/2011.

3. In short, the prosecution case is that on 28.5.2007 at about 12.20 pm complainant Ramesh Prasad Gupta (PW-4) gave a Dehati Nalishi report to Police Kolgawan, district Satna, that at about 12 Hrs., while he was going to his house from market, near Kandhi street, he saw a mob of people talking that Gudda Vishwakarma, the accused, committed murder of three persons in his rented house. He went in front of the house of Subhadra Jaiswal and saw dead bodies of his nephew Sunil Gupta, daughter-in-law Pushpa Gupta and grand son Gaurav, aged about 5 years, lying in the passage of the house of Subhadra Jaiswal. Subhadra Jaiswal and the people of the neighbourhood informed him that about 45 minutes before Gudda @ Dwarikendra suspecting illicit relations between his wife and Sunil Gupta, killed him, Puspha Gupta and their son Gaurav by a *Katar*. Wife of accused viz. Geeta had also suffered an injury on her leg and that accused had run away on his motorbike. On the basis of this report, investigating officer Vimal Shrivastava (PW-19) recorded *Dehati Nalishi* (Ex.P/10). *Dehati Murg* intimations 1,2 and 3/2007 (Ex.P/9) under Section 174 of the Code of Criminal Procedure were recorded. After *Dehati Nalishi* (Ex.P/10) and *Dehati Murg* ((Ex.P/9) were received at Police Station, Kolgawan, first information report (Ex.P/8) under Section 302 of the Indian Penal Code (on three counts) was recorded by ASI S.P. Shukla (PW-6).

4. During investigation, Investigating Officer Vimal Shrivastava (PW-19) conducted inquest proceedings of the dead bodies and found stab injuries on the bodies of all the three persons. He sent the bodies to District Hospital, Satna, for postmortem examination.

5. Dr. (Smt.) Rekha Tripathi (PW-14) examined the body of deceased Pushpa Gupta and found that she was carrying pregnancy of about 26 weeks and a female foetus of the said duration was present in her uterus.

6. Dr. S.K. Jain (PW-16) conducted postmortem examination of the bodies of Sunil Gupta and Gaurav and vide postmortem examination reports (Ex.P/23 and P/24) found that they died due to syncope because of excessive haemorrhage by *ante-mortem* injuries caused to them.

7. Accused/respondent Geeta was also sent for medical examination. Dr.Alok Khanna (PW-13) vide his report (Ex.P/21) found one incised wound on her leg.

8. During further investigation, blood stained pieces of wall, cement floor etc. were seized from the house of Subhadra Jaiswal. A mobile, Katar and Motorcycle number M.P. 19-F-4928, belonging to deceased Sunil Gupta, was also seized from the spot.

9. On 31.5.2007, accused was arrested and on his information, recorded under Section 27 of the Evidence Act, an iron knife and a motorcycle Hero Honda CD Delux, Reg. Number M.P. 19-MA-1135 were seized from his possession. His full pants and shirt were also seized. A maxi belonging to accused Geeta, having a cut mark on it, was seized from her. Seized properties were sent for examination to FSL, Sagar.

10. After investigation, it was found that accused Gudda @ Dwarikendra suspected that his wife Geeta had illicit relations with deceased Sunil Gupta. Though he asked Sunil Gupta not to meet Geeta, but he used to visit his house. Therefore, he, under a conspiracy with Geeta, invited Sunil Gupta, his wife and son on lunch and in a planned way committed murder of all the three persons.

11. After completion of investigation, police filed charge sheet against accused Gudda @ Dwarikendra and Geeta in the court of Judicial Magistrate First Class, Satna, from where the case was committed to Court of Sessions for trial.

12. During trial, accused Gudda @ Dwarikendra was charged under Section 302 of the Indian Penal Code on three counts, whereas, Smt. Geeta was charged under Section302/120-B of the Indian Penal Code on three counts.

13. Both the accused abjured their guilt and pleaded innocence. The defence of accused Gudda @ Dwarikendra was that on 27.5.2007 in the night when he came back home, his wife informed that Sunil Gupta had called her to school in the morning. Though she refused, but he insisted her to come for doing important work. On the next day morning, she informed that a boy of 8-10 years of age gave message to her that Sunil Gupta had called her in the school, but she had refused. At about 11.30 am, when he came back to his house, he found Sunil's wife and his son sitting on the roof in front of his room. He heard shrieks of his wife. When he entered the room, he saw Sunil Gupta attacking his wife with a knife. His wife suffered an injury by the knife on her knee. When Sunil Gupta wanted to attack him, he caught his hand, snatched the knife and defended himself and his wife. Since deceased Gaurav and Pushpa suddenly came and intervened, accidentally they suffered injuries.

14. Similar plea was put forth by accused Geeta Vishwakarma. According to her, at about 11.15 am, when Sunil Gupta alongwith his wife and son came to her house and was sitting on the open roof in front of her room and she was preparing tea, suddenly Sunil Gupta came inside the room and tried to outrage her modesty by pressing her breasts. When she resisted, he pushed her and took out a knife and intimidated her. An injury was caused on her leg by the knife of Sunil Gupta. When her husband tried to save her, Sunil's wife and son came to intervene and suffered injuries. Her husband protected her life and modesty.

15. To substantiate its case, prosecution examined 19 witnesses.

16. Learned trial judge, relying mainly on the evidence of eyewitnesses Subhadra Jaiswal (PW-5) and Smt. Munni (PW-7) and finding their evidence corroborated by the evidence of Bhuri Bai (PW-8), Lale @ Lal Singh (PW-9), Dinesh Singh (PW-18), Ramesh Prasad Gupta (PW-4) and on the basis of medical evidence of Dr. S.K. Jain (PW-16), Dr. (Smt.) Rekha Tripathi (PW-14) and Dr. Alok Khanna (PW-13), held the accused Gudda @ Dwarikendra guilty and convicted him under Section 302 of the Indian Penal Code on three counts, however, finding the evidence insufficient, acquitted accused/ respondent Geeta Vishwakarma of the charge under Section 302/120-B of

the Indian Penal Code.

17. Since the learned Additional Sessions Judge awarded death penalty to accused Gudda @ Dwarikendra, he referred the proceedings of the court for confirmation.

18. Aggrieved by his conviction, accused Gudda @ Dwarikendra, and aggrieved by the acquittal of Geeta Vishwakarma, the State have filed their respective appeals against the impugned judgment.

19. Shri S.C. Datt, learned senior counsel, submitted that the evidence of eyewitnesses viz. Subhadra Jaiswal (PW-5) and Smt. Munni (PW-7) was not reliable. Trial court committed error in placing reliance on their evidence and convicting accused Gudda @ Dwarikendra. He submitted that the statements of both the accused given under Section 313 of the Code of Criminal Procedure were true and genuine. They revealed that deceased Sunil Gupta attempted to outrage modesty of Geeta, therefore, accused Gudda @ Dwarikendra was entitled to exercise the right of private defence, especially when deceased wielded a knife. He submitted that since there was no evidence in the case about the genesis of the occurrence, the statements of accused persons given by them under Section 313 of the Code of Criminal Procedure had to be relied on. According to him, the injuries to deceased Sunil were caused by the accused in exercise of right of private defence and that the deceased Pushpa Gupta and Gaurav suffered injuries accidentally, when they tried to intervene in the quarrel. He submitted that in the above circumstances, it was, at least, not a case in which accused Gudda could have been awarded penalty of death sentence. The case against him did not fall within the category of 'rarest of rare cases'.

20. Learned Dy. Government Advocate, Shri Yogesh Dhande, on the other hand, submitted that the evidence of prosecution witnesses was reliable. Subhadra Jaiswal (PW-5) and Smt. Munni (PW-7) were the natural witnesses. They had no animus against the accused. The conviction of accused Gudda @ Dwarikendra under Section 302 of the Indian Penal Code (on three counts) was fully justified. He further submitted that from the evidence on record, it was apparent that accused Geeta Vishwakarma conspired by her husband and invited deceased persons to her house with the motive that they be killed. The injury found on the person of Geeta Vishwakarma could have been caused at the hands of her husband when she might have tried to save deceased Sunil

Gupta, who happened to be her colleague. According to him, trial court committed error in acquitting accused/respondent Geeta Vishwakarma for the charge under Section 302/120-B of the Indian Penal Code.

21. We have heard the learned counsel for the parties and carefully perused the evidence on record and the reasonings assigned by the trial court in the impugned judgment.

22. From the evidence of Ramesh Prasad Gupta (PW-4), Subhadra Jaiswal (PW-5), Smt. Munni (PW-7), Lale @ Lal Singh (PW-9), Dinesh Singh (PW-18) and investigating officer Vimal Shrivastava (PW-19) it has been amply established that deceased Sunil Gupta, Pushpa Gupta and their son Gaurav Gupta died a homicidal death. It has not been disputed by the accused also. The investigating officer, Vimal Shrivastava (PW-9) received *Dehati Nalishi* on the basis of information given by Ramesh Prasad Gupta (PW-4) and went at the spot. He conducted inquest proceedings in respect of death of all the three deceased persons and prepared inquest memos (Ex.P/12, P/13 and P/14) in respect of the dead bodies of Gaurav Gupta, Sunil Gupta and Smt. Pushpa Gupta. He found injuries on their bodies. He sent their bodies for postmortem examination. Dr. S.K. Jain (PW-16) conducted the postmortem examination of the bodies of aforesaid deceased persons and found following injuries:

(A) On the body of Smt. Pushpa Gupta, he found:

"1. Incised wound 4 cm x 2 cm x 2 cm on the left side of neck. carotid artery was ruptured and blood had flown out.

2. Incised wound 4 cm x 1 cm x 1 cm on the left side of abdomen.

3. Incised wound 2 cm x 1/6 cm x 1/6 cm on left side of abdomen.

4. Incised wound 4 cm x 1 cm x 1/2 cm on left knee.

5. Incised wound 1 cm x 1/3 cm x 1/3 cm on left thigh.

On internal examination, he found trachea was cut. There was a female foetus of 26 weeks in her uterus. The cause of her death was syncope due to excessive haemorrhage because of cutting of carotid artery. The injuries were *ante-mortem* in nature. Her postmortem report (Ex.P/22) was written and

signed by him."

(B) On the body of Sunil Gupta, he found:

"1. Incised wound 4 cm x 2 cm x 2 cm bone deep oval in shape on right side of chest. Right 8th rib was cut.

2. Incised wound 7 cm x 2 cm x deep up to lung cavity. Oval in shape on left side of chest. 5th left rib was cut.

3. Incised wound 4 cm x 1 cm x 1/2 cm on right side below the ribs.

4. Incised wound 5 cm x 1/2 cm x cavity deep on right side of abdomen above ilium bone.

5. Incised wound 6 cm x 2 cm x cavity deep 6 cm below the left side of ribs on abdomen.

6. Incised wound 1/ 2 cm x 1/4 cm x 1/4 cm on little finger of left hand.

7. Incised wound 2 cm x 1/2 cm x 1/2 cm on the right scapular region.

8. Incised wound 4 cm x 1/2 cm x 1/2 cm on middle of left scapular region.

9. Incised wound 3cm x 1/2 cm x 1/2 cm on left lumber region.

10. Incised wound 1 cm x 1/3 cm x 1/3 cm on back side of right arm.

On internal examination, he found left lung of the deceased cut. Transverse colon of the large intestine was cut in the dimension of 4 cm x 2 cm. Right side of liver was cut and blood was filled in the abdomen. On examining the clothes of deceased, he found number of cuts on them at the places where the wounds were found on the body of deceased. In his opinion, the cause of death of deceased was syncope due to excessive haemorrhage from external and internal injuries. External *ante-mortem injuries* were found on the body of deceased. Postmortem report (Ex.P/23) was written and

signed by him and Dr. Rekha Tripathi."

(C) On the body of Gaurav Gupta, he found:

"1. Incised wound 11 cm x 3 cm x 1/2 cm. oval in shape on the right side of chest.

2. Incised wound 7 cm x 2 cm x cavity deep on right side of chest below clavicle bone. 3rd and 4th ribs were cut and right lung was protruding out.

3. Incised wound 4 cm x 2 cm x cavity deep on the left side of abdomen. Omentum was protruding out of the wound.

4. Incised wound 5 cm x 2 cm x cavity deep on the right side of abdomen. Small intestine was protruding out.

5. Incised wound 1 cm x 1/3 cm x 1/3 cm on left thigh.

On internal examination, right lung of the deceased was found cut. Pleural cavity was found filled with blood. Ascending portion of large intestine was also cut. The clothes of deceased had also cut marks at the place where the wounds were found on the body of deceased. In the opinion of doctor, the cause of death was syncope due to external *ante-mortem* injuries. His postmortem report (Ex.P/24) was written and signed by him and Dr. Rekha Tripathi."

Thus, it was established that all the aforesaid deceased persons died of homicidal death because of injuries received by them.

23. Now the question before us is whether accused viz. Gudda @ Dwarikendra committed murder of deceased persons and whether Smt. Geeta Vishwakarma conspired with him for the commission of the said offence?

24. Prosecution examined Subhadra Jaiswal (PW-5), Smt. Munni (PW-7) and Bhuribai (PW-8) as eyewitnesses of the incident.

25. Subhadra Jaiswal (PW-5) deposed that accused Gudda @ Dwarikendra was tenant in her house. Since deceased Sunil Gupta, his wife Smt. Pushpa Gupta and son Gaurav used to come to the house of accused, she knew them. In the morning, she had gone to fetch vegetables. At about

11 O'clock, when she came back and was sitting in her house, she heard shrieks from the staircase of her house. She rushed to the passage and saw deceased Sunil Gupta coming down from the stairs. Accused Gudda came with a knife in his hand and started assaulting him. She asked Gudda to refrain from assaulting Sunil, but he asked her not to intervene. She remained shouting in the passage and Gudda continued to assault Sunil and his wife with knife. Gudda went near Gaurav, who was standing in the passage, and started assaulting him also with the knife. She made desperate efforts to stop Gudda, but he did not yield to her request and continued to stab Gaurav also. She grabbed Gaurav and ran out of the house. Leaving Gaurav there, she went to the house of mother-in-law of Gudda, who resided in the neighbourhood and informed about the occurrence. Mother-in-law of Gudda also reached at the spot, but by the time Sunil, Pushpa and Gaurav had died. Gudda had run away in his motorcycle. She deposed that Pushpa was carrying pregnancy of about 5-6 months.

26. Smt. Munni (PW-7) was also a tenant in the house of Subhadra Jaiswal (PW-5). According to her, when she was in her house at about 12 O'clock, she heard something falling from the stairs and cries. She went at her door and saw accused Dwarikendra assaulting Sunil Gupta and his wife Puspha Gupta with knife. Thereafter, he also assaulted Gaurav with knife. Though Subhadra tried to save the victims, but accused continued to assault them and went away on his motorcycle. Accused Geeta, at that time, was sitting at the stairs.

27. Another eyewitnesses Bhuribai (PW-8) did not support the prosecution case as an eyewitness, but stated that hearing the hue and cry when she came out of her house, she saw a mob and a Gupta boy lying on the ground. According to her, her neighbour was shouting that he was killed by Gudda.

28. Lale @ Lal Singh (PW-9), who knew the deceased persons, deposed that at the time of incident he had come to visit the house of Tiwari Ji, who resided nearby the place where the incident occurred. At 11.45 am, when he happened to reach near the place of occurrence, he heard Subhadra Jaiswal shouting from her house "*Bachao Bachao Maar Dala*" and dragging out Gaurav in front of the door of her house. As soon as she left the child, he died. When he reached near Gaurav, he saw that there were injuries on his abdomen and his intestines were protruding out. Immediately thereafter,

Gudda came out with a knife in his hand extending threats that if anybody tried to stop him, he would not be spared. He boarded motorcycle and went away. He went inside the passage of Subhadra and saw Sunil and his wife lying dead. At that time accused Geeta was sitting on the stairs. There were injuries on the bodies of deceased persons. He stated that when he asked accused Geeta that she and Sunil were teachers in the same school, then how it happened, Geeta told that Sunil kept her as his wife, but her husband did not like that. She also told that on telephone Sunil with his family was invited for lunch. Thereafter, there occurred quarrel. He further stated that Geeta told to him that her husband killed all the three persons by knife.

29. Similarly, Dinesh Singh (PW-18) deposed that when he and Lale Singh were coming out from the house of Sunil Tiwari, he heard Subhadra shouting. A young boy was lying out side the house of Subhadra. Intestines of boy had come out. In the meantime, accused Gudda came out of his house with a knife and extended threats that nobody should come near him, otherwise he will have the same fate. In the passage of the house of Subhadra, Gupta Ji and his wife were lying dead and there was all blood at the spot. Accused Geeta Vishwakarma was sitting at the stairs of the house and weeping. She told that Gudda killed them.

30. Though the aforesaid witnesses were cross-examined at length, but nothing material could be elicited out, which could have rendered their presence at the spot doubtful. Minor omissions were found in the evidence of Subhadra Jaiswal (PW-5), but they did not go to the extent of affecting her credibility. Her presence at the place of occurrence was natural. She was landlady of the house. Gudda and his wife were residing on the first floor of her house, which consisted of one room. The approach to the room was through the stairs going from the passage (*Galiyara*) of the house of Subhadra Jaiswal. In cross-examination, Subhadra Jaiswal clearly stated that she knew deceased Sunil only since accused Gudda came as a tenant in her house and because Sunil and his wife used to visit his house. Subhadra Deposed that she did not ask Sunil why he used to visit the house of Gudda when Gudda was not there because Sunil used to give tuition to his children. This witness was cross-examined at length on the point that deceased Sunil attempted to outrage modesty of accused Geeta and, therefore, accused Gudda tried to protect his wife, but she expressed ignorance. It appears quite natural because the incident is said to have begun on the first floor while this witness was present in her

house on the ground floor. Learned counsel for the accused drew our attention to paragraph-19 of the cross-examination of Subhadra Jaiswal wherein she admitted that when she first saw, she found sunil and Pushpa lying injured below the stairs, but we find that she remained firm in saying that she saw accused assaulting Sunil and Pushpa with knife. She categorically stated that she caught the hands of injured Gaurav and took him out of the house. Merely on the basis of one stray sentence whole of the evidence of a witness cannot be discarded if it otherwise appears reliable. The evidence of Subhadra Jaiswal (PW-5) finds ample support from the evidence of Smt. Munni (PW-7), who categorically stated that she saw accused assaulting Sunil, his wife Pushpa and son Gaurav with knife and that the landlady Subhadra had come at the spot and tried to snatch knife from Gudda with a view to save Gaurav. She also stated that Gudda ran away on his motorcycle and accused Geeta remained sitting on the stairs. She firmly denied the suggestion that she did not see the *Maar-Peet* of deceased persons and only saw them lying injured. Merely because she did not inform the police, it cannot be said that she was not a reliable witness.

31. Though Smt. Bhuribai (PW-8) did not support the prosecution case, still she admitted that Subhadra went in the passage of her house and loudly shouted "*Gudda Mat Maar-Gudda Mat Maar*".

32. The evidence of Subhadra Jaiswal (PW-5) and Smt. Munni (PW-7) finds further support from the evidence of Lale @ Lale Singh (PW-9) and Dinesh Singh (PW-18), who saw accused Gudda coming out of her house with a knife and running away on a motorcycle extending threats. Lale @ Lal Singh (PW-9) clearly stated that as soon as he reached near the place of incident, he saw Subhadra shouting and dragging Gaurav out of her door. The evidence of Ramesh Prasad Gupta (PW-4) and Narendra Kumar Jaiswal (PW-15), who reached at the place of occurrence immediately after the occurrence, that Subhadra, Munni and other persons at the spot told to them that Gudda Vishwakarma ran away after killing the deceased persons is also relevant under Section 6 of the Evidence Act and gives support to the prosecution version that accused Gudda killed the deceased persons.

33. Apart from the above evidence, the evidence of Subhadra Jaiswal (PW-5) and Smt. Munni (PW-7) was further corroborated from the evidence of Dr.S.K. Jain (PW-16) and Dr. Rekha Tripathi (PW-14), who conducted

the postmortem examination of the bodies of deceased persons. Dr. S.K.Jain (PW-16) found ten incised injuries on the body of Sunil, five incised injuries on the body of Pushpa and four incised injuries on the body of child Gaurav. These injuries could have been caused by a weapon like knife. Investigating officer Vimal Shrivastava (PW-19), when arrested accused Gudda, seized a knife on his information from a pit in sand near the bridge of river. The evidence of Vimal Shrivastava finds support from the evidence of Pushpraj Singh (PW-17), who categorically stated that on the information given by accused a knife was seized hidden in the sand near the bridge of river.

34. On a close scrutiny with care and caution of the testimonies of the aforesaid witnesses, we find it established that it was accused/appellant Gudda @ Dwarikendra, who caused fatal injuries by knife to deceased Sunil Gupta, Smt. Pushpa Gupta and Gaurav, as a result of which they died at the spot.

35. The next question before us would be whether accused Gudda acted in exercise of his right of private defence for saving himself and his wife accused Geeta? Whether deceased Sunil Gupta tried to outrage modesty of accused Geeta? and whether accused Geeta conspired with her husband Gudda @ Dwarikendra to commit murder of deceased persons. The defence version, as appeared from the statements of both the accused, given by them under Section 313 of the Code of Criminal Procedure, was that deceased Sunil Gupta kept an evil eye on Geeta. Sunil and Geeta were working as teachers in Gayatri School. Sunil visited the house of accused in the absence of accused Gudda and asked Geeta to come to school in the morning, though there had been holidays of the school and there was no work. Since he insisted her to come to school, she disclosed this fact to her husband. On the date of occurrence, when accused Gudda was not at the house, Sunil Gupta alongwith his wife and son came to her house and when his wife and son were at the roof, he tried to molest her inside the room. When she resisted, he whipped out a knife and threatened her. In the meanwhile, her husband Gudda reached there. When he tried to catch hold of Sunil, he tried to assault with knife, which hit Geeta at her knee. When Gudda tried to snatch the knife from Sunil, his wife and son came there to intervene and accidentally suffered injuries. According to accused Geeta, had Gudda not come, Sunil would have ravished her or killed her. Her husband Gudda tried to save her, but accidentally Pushpa and Gaurav got injured.

36. The Principal of Gayatri Girls Higher Secondary School Brijmohan Tiwari (PW-11) stated that accused Geeta and deceased were teachers in the school. He denied that Geeta Vishwakarma made complaint that Sunil used to tease her or he ever tried to go to her house in the absence of her husband. On the contrary, Lale @ Lal Singh (PW-9) deposed that when he asked Geeta at the spot as to why the incident occurred, she told that Sunil was keeping her as his wife, which was not liked by her husband and that he asked her to invite Sunil and his family on lunch. Thereafter, the incident occurred and her husband killed all the three persons. In cross examination, this witness clarified that Geeta told that Sunil wanted her to be his wife and it was incorrect that he had kept Geeta as his wife. He was confronted with his police statement (Ex.D/3) wherein he did not say that Sunil had kept her as his wife. It is true that it was not mentioned in the police statement that Sunil kept Geeta as his wife, but it was not an omission that Sunil wished her to be his wife as stated by him in the cross-examination. Complainant Ramesh Prasad Gupta (PW-4) stated that when he asked Subhadra Jaiswal and other persons, they told him that Gudda committed murder because Sunil used to visit his house, but this fact was found missing in *Dehati Nalishi* (Ex.P/10) lodged by him. Though in *Dehati Nalishi*, in the confronted portion B to B, it was mentioned that Subhadra Jaiswal and other neighbours told to him that Gudda @ Dwarikendra committed murders of Sunil, Gaurav and Pushpa, as he suspected illicit relations between Sunil and his wife, but this fact cannot be accepted, as it was not stated by the witness in the court and also by Subhadra Jaiswal (PW-5). From the evidence of Mahesh Gupta (PW-10), the father of deceased Sunil, it is revealed that Sunil told to him that he, his wife and son were going to the house of accused Geeta on her invitation. This witness also reached at the spot as soon as he came to know about the incident, but he did not say that anybody told to him that Sunil was killed because of the suspicion of illicit relations between him and accused Geeta. So far as the fact that deceased Sunil informed him that he was going to the house of accused persons on the invitation of lunch, it does not reveal that accused Geeta called him. There appears absolutely no evidence on record to indicate as to which of the or any of the accused invited deceased persons for lunch. An inference that accused Geeta invited deceased for lunch in conspiracy with accused Gudda cannot be drawn merely on the basis of evidence of Lale @ Lal Singh (PW-9) that Gudda asked her to invite the family of deceased on telephone. Even if this fact is accepted, it cannot be

held with certainty that Geeta knew the design or the plan conceived by accused Gudda. Thus, there appears no sufficient and satisfactory evidence on record to hold that accused Geeta conspired with her husband Gudda Vishwakarma in commission of the offence. **The finding of acquittal of accused Geeta recorded by the trial court suffers with no infirmity and is accordingly affirmed.**

37. As far as the question of exercise of right of private defence of the person of accused Gudda and/or of his wife Geeta is concerned, except the statements of accused persons under Section 313 Cr.P.C., there is no other evidence on record. The contention of the learned counsel for the appellant is that in the absence of any positive evidence by the prosecution, the statement of accused deserves to be accepted, since it is accused only who can reveal the genesis of the occurrence. With due respect to learned counsel for the appellant, we are unable to accept his submission. It is true that the incident began on the first floor of the house where deceased persons and the accused persons only were present, but, in such circumstances, the version put forth by the accused persons has to be tested on the anvil of probabilities and truthfulness. It appears quite unnatural that the deceased Sunil in the presence of his wife and son, in the house of accused, would have dared to enter the room of accused Geeta and commit a mischief with her, who happened to be a teacher in the same school in which he worked. It is quite unnatural that Sunil, a teacher, would be so desperate that he would molest Geeta even at her residence and on the point of knife. According to the statement of accused Gudda, when he came to his house, wife and son of Sunil were sitting on the roof and his wife was crying for help. It was only then he went inside the room and saw Sunil assaulting Geeta with knife. When he tried to intervene, Sunil attempted to attack him with the same knife. According to him, in the meanwhile Sunil's wife and son intervened and tried to push him then he snatched the knife and saved his wife, else Sunil would have ravished her. The version put forth by both the accused persons appears absolutely unnatural, improbable and false. The injury found on the knee of accused Geeta could have been caused to her, when accused Gudda assaulted Sunil. Otherwise also, there appeared absolutely no reason for accused Gudda to have caused ten injuries to Sunil, five injuries to his wife Pushpa and four injuries to child Gaurav. It has been proved by Subhadra (PW-5) and Smt. Munni (PW-7) that Gudda dealt knife blows to Sunil and Pushpa on the stairs and stabbed Gaurav down the stairs despite the requests made by Subhadra Jaiswal to not

to assault Gaurav. The number and nature of injuries found on the body of deceased persons clearly indicate that these injuries could not have been caused by accused in protecting accused Geeta or himself. Since accused Gudda put forth totally a false explanation, adverse inference deserves to be drawn against him. From the statement of accused Gudda, it can, however, be inferred that he was annoyed by the insistence on the part of Sunil that Geeta should go to school in the morning when there were holidays and despite the fact that he told him on telephone that Geeta would not go to school, he alongwith his wife and son went to his house.

38. In the above circumstances, in our considered opinion, the explanation given by accused Gudda was not acceptable and it was proved beyond doubt that for the reasons best known to him he brutally stabbed Sunil, Pushpa and their son Gaurav with intention to cause their death. We thus find that the court below considered the evidence, oral and documentary on record, in proper perspective and rightly recorded the finding of conviction of accused/ appellant Gudda under Section 302 of the Indian Penal Code. **Accordingly, the finding of conviction of appellant Gudda @ Dwarikendra under Section 302 recorded by the trial court is hereby affirmed.**

39. Now the question before us is whether the death sentence awarded to accused/appellant Gudda @ Dwarikendra by the trial court is justified? Learned counsel for the appellant submitted that appellant is a young man of about 35 years of age. He is a first offender. By profession he was an iron grill fabricator. There is nothing on record to indicate that he had a criminal background or he was a menace to society. It cannot be said that he is incapable of being reformed or rehabilitated to be a useful member of society. The incident must have occurred under emotional imbalance, probably suspecting that deceased Sunil had illicit relations with his wife. Probably once he indulged in assault on deceased Sunil, he lost his mental balance and could not control himself and in a rage caused injuries to his wife and son also. Placing reliance on the ratio of *Staste of Maharashtra v. Goraksha Ambaji Adsul*-AIR 2011 SC 2689, he submitted that the death penalty should be awarded only in rarest of rare cases. Mere number of persons killed is not by itself a circumstance justifying the death sentence.

40. On the other hand, learned counsel for the State submitted that the instant case fell within the ambit of rarest of rare cases as the accused for no reason killed an innocent woman and a child of about 5 years of age brutally

in addition to Sunil. As many as ten stab injuries were caused to deceased Sunil, five injuries were caused to his wife Pushpa and four stab injuries were caused to their son Gaurav. Even if there would have been some grievance against the deceased Sunil, appellant Gudda had absolutely no reason to cause death of Pushpa and Gaurav. He was so desperate that despite the requests made by witness Subhadra Jaiswal, he did not spare even a child of 5 years of age. Instead of having any compunction, he put forth a false defence that deceased Sunil attempted to molest his wife.

41. The Constitution Bench judgment of the Apex Court in case of *Bachan Singh v. State of Punjab*-AIR 1980 SC 898 observed that the Court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment..... The death penalty should be imposed in rarest of rare cases and that too for special reasons to be recorded. To put it simply, a death sentence is not a rule but an exception.

42. The Apex court in case of *Machhi Singh v. State of Punjab*-AIR 1983 SC 957 approved the decision of Constitution Bench in the case of *Bachan Singh* (Supra) and stated guidelines while considering the possibility of awarding the sentence of death. It was stated that extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. The circumstances of the 'offencer' be also taken into consideration alongwith the circumstances of the crime. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime. If the offence was committed under the influence of extreme mental or emotional disturbance, there was probability that accused would not constitute a continuing threat to society, there was probability that accused can be reformed and rehabilitated, the accused acted under duress or domination of another person or that the condition of the accused showed that he was mentally defective and the said defect impaired his capacity to appreciate the criminality of his conduct, the death sentence should not be awarded.

43. In case of *Goraksha Ambaji Adsul* (supra), the Apex Court held that the case did not fall in category of 'rarest of rare cases' where motive behind crime was dispute over agricultural land/partition-There were continuous quarrels with regard to division of property.....By the passage of time pressure

had increased and probably the frustration attained limit of commission of a heinous crime by accused. Intensity of bitterness between the members of family had exacerbated the thoughts of revenge and retaliation in the accused. The constant nagging would have have to be taken in mitigating circumstance in commission of crime.

44. The Apex Court in *Devendra Pal Singh vs. State of NCT Delhi*- (2002) 5 SCC 234 culled out the principle that when collective conscience of the community is shocked, the death penalty can be awarded. It was observed that:

> "The community may entertain such sentiment in the following circumstances:
>
> *(1)* When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.
>
> *(2)* When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
>
> *(3)* When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.
>
> *(4)* When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed.
>
> *(5)* When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public

figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed by way of the test for the rarest or rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

45. In case of *Rajbir v. State of Haryana*-AIR 2011 SC 568, the Apex Court mandated that death sentence should be awarded for barbaric crime against women.

46. After a sincere consideration of the factual matrix of the present case in the light of the aforesaid legal propositions laid down by the Apex Court, we find that the appellant Gudda had apparently no reason to commit the murder of three persons especially the murder of a pregnant woman and an innocent child of five years. The appellant was under no duress or was provocated by any visible circumstance. His conduct in stabbing the aforesaid three persons was so brutal, cruel, grotesque and diabolical and the offence was committed in such dastardly manner that he deserved no sympathy, especially in view of the fact that he inflicted ten stab injuries to Sunil, five stab injuries to Pushpa and four stab injuries to child Gaurav. In the facts and circumstances of the case, in our opinion, it would have been failure of justice in case death sentence was not awarded to accused/appellant Gudda @ Dwarikendra as the case undoubtedly fell within the category of rarest of rare cases calling for the death penalty. In our opinion, trial court was justified in awarding death sentence to accused/appellant Gudda @ Dwarikendra.

(i) For the reasons afore-recorded, Criminal Reference No.3/2010 made by the trial court is accepted. The death sentence awarded to accused Gudda @ Dwarikendra is affirmed;

(ii) Criminal Appeal No.2246/2010 filed by the Gudda @ Dwarikendra is dismissed; and

(iii) Criminal Appeal No.1870/2011 filed by the State against the acquittal of accused Smt. Geeta Vishwakarma is dismissed.

Order accordingly.

I.L.R. [2012] M.P., 632

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice J.K. Maheshwari

M.Cr.C. No. 2214/2011 (Jabalpur) decided on 8 August, 2011

SATISH LODHI ...Applicant

Vs.

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

A. Criminal Procedure Code, 1973 (2 of 1974), Section 439 – Grant of bail on repeat application – **After rejection of bail by High Court, the subordinate Court should not oblige to entertain and grant the bail – If it is so, it affects the judicial discipline.** (Para 8)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – दुबारा आवेदन पर जमानत प्रदान की जाना – उच्च न्यायालय द्वारा जमानत नामंजूर किये जाने के पश्चात अधीनस्थ न्यायालय को न तो जमानत आवेदन ग्रहण करना चाहिए और न ही जमानत स्वीकार करना चाहिए – यदि ऐसा हुआ है तब वह न्यायिक अनुशासन को प्रभावित करता है।

B. Contempt of Courts Act (70 of 1971), Section 2(c) (ii) - Criminal Contempt – False Affidavit – **False affidavit filed along with bail application – swearing of false affidavit in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice – Any such attempt to impede or undermine or obstruct the free flow of the unsoiled stream of justice by resorting to filing of false affidavit amounts to criminal contempt of Court and liable to be dealt with in accordance with law.** (Para 17)

ख. न्यायालय अवमान अधिनियम (1971 का 70), धारा 2(सी)(ii) – आपराधिक अवमान – मिथ्या शपथ पत्र – जमानत अर्जी के साथ मिथ्या शपथ पत्र प्रस्तुत किया गया – न्यायिक कार्यवाहियों में मिथ्या शपथ पत्र देने की न केवल न्यायिक कार्यवाहियों के सम्यक् अनुक्रम में अवरोध कारित करने की प्रवृत्ति होती है बल्कि न्याय दान में अड़चन, अवरोध/बाधा एवं हस्तक्षेप करने की भी प्रवृत्ति होती है – मिथ्या शपथ पत्र प्रस्तुत करके न्याय की स्वच्छ धारा के मुक्त प्रवाह को अवरुद्ध या खंडित करने या बाधा डालने का ऐसा कोई प्रयत्न न्यायालय का आपराधिक अवमान की कोटि में आता है और विधिनुसार निपटाये जाने योग्य है।

C. Contempt of Courts Act (70 of 1971), Section 2(c)(ii) – Criminal Contempt – False affidavit – **Affidavit filed in support of the**

incorrect averments made in bail application – Application for grant of bail before Trial Court was filed by suppressing material facts with regard to the dismissal of earlier bail applications by High Court – Such act may fall within the purview of Criminal Contempt.

(Paras 19 to 20)

ग. न्यायालय अवमान अधिनियम (1971 का 70), धारा 2(सी)(ii) – आपराधिक अवमान – मिथ्या शपथ-पत्र – जमानत अर्जी में दिये गये असत्य प्राक्कथनों के समर्थन में शपथ पत्र प्रस्तुत किया गया – विचारण न्यायालय के समक्ष जमानत प्रदान किये जाने का आवेदन, उच्च न्यायालय द्वारा पूर्ववर्ती जमानत आवेदनों की खारिजी के संबंध में तात्विक तथ्यों का छिपाव करके प्रस्तुत किया गया – ऐसा कृत्य आपराधिक अवमान की परिधि के भीतर आ सकता है।

***D. Contempt of Courts Act (70 of 1971), Section 2 (c) (ii) – Criminal Contempt* – Advocate filed repeat application for grant of bail before High Court – Suppressing the fact of pendency of bail application before High Court, filed another application before Trial Court – Such act may come within the purview of criminal contempt.**

(Para 21)

घ. न्यायालय अवमान अधिनियम (1971 का 70), धारा 2(सी)(ii) – आपराधिक अवमान – अधिवक्ता ने उच्च न्यायालय के समक्ष जमानत प्रदान किये जाने के लिए दुबारा आवेदन प्रस्तुत किया – उच्च न्यायालय के समक्ष जमानत आवेदन के लंबित होने के तथ्य का छिपाव करके, विचारण न्यायालय के समक्ष दुबारा आवेदन प्रस्तुत किया – ऐसा कृत्य आपराधिक अवमान की परिधि में आ सकता है।

***E. Contempt of Courts Act (70 of 1971), Section 2(c) (ii) – Criminal Contempt*–Advocate suppressed the rejection of bail application by Hon'ble Court and mentioned that application before High Court has been fixed on 26.11.2010–Said Advocate insisted the Judge to hear the case on the same day without applying for urgent hearing and filing an affidavit for verification to said facts–Bail granted by Trial Court on the ground which was factually incorrect–Such act of Advocate may come within the purview of Criminal Contempt.** (Para 22)

ङ. न्यायालय अवमान अधिनियम (1971 का 70), धारा 2(सी)(ii) – आपराधिक अवमान – अधिवक्ता ने माननीय न्यायालय द्वारा जमानत आवेदन को नामंजूर किये जाने का छिपाव किया और उल्लेख किया कि उच्च न्यायालय के समक्ष आवेदन 26.11.2010 को नियत किया गया है – उक्त अधिवक्ता ने शीघ्र सुनवाई का

आवेदन एवं उक्त तथ्यों के सत्यापन हेतु शपथ पत्र प्रस्तुत किये बिना न्यायाधीश से उसी दिन प्रकरण की सुनवाई का आग्रह किया – विचारण न्यायालय द्वारा उस आधार पर जमानत प्रदान की गई जो तथ्यात्मक रुप से गलत था – अधिवक्ता का ऐसा कृत्य आपराधिक अवमान की परिधि में आ सकता है।

F. ***Criminal Procedure Code, 1973 (2 of 1974), Section 439 – Successive bail applications – Duty of Public Prosecutor*** – **When a bail application is filed, a liberty to object or controvert the facts is available to the prosecutor – It is his duty to bring into the knowledge of the Court that the bail application filed by the accused person has been rejected by High Court and can not be entertained by Subordinate Court.** (Para 23)

च. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – उत्तरोत्तर जमानत अर्जियां – लोक अभियोजक का कर्तव्य* – जब जमानत आवेदन प्रस्तुत किया जाता है, अभियोजक को तथ्यों को आक्षेपित या विवादित करने की स्वतंत्रता उपलब्ध है – यह उसका कर्तव्य है कि वह न्यायालय को ज्ञात कराये कि अभियुक्त व्यक्ति द्वारा प्रस्तुत किया गया जमानत आवेदन उच्च न्यायालय द्वारा नामंजूर किया गया है और अधीनस्थ न्यायालय द्वारा ग्रहण नहीं किया जा सकता।

G. ***Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) – Cancellation of bail*** – **Bail obtained by accused persons from Trial Court after suppressing material fact and submitting false affidavit with regard to rejection of their bail applications by High Court – Such hoodwinking can not be permitted – Bail granted by the Trial Court is cancelled.** (Para 26)

छ. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत का रद्दकरण* – अभियुक्तगण द्वारा तात्विक तथ्य का छिपाव करके तथा उच्च न्यायालय द्वारा उनकी जमानत आवेदनों को नामंजूर किये जाने के संबंध में मिथ्या शपथ पत्र प्रस्तुत करके विचारण न्यायालय से जमानत अभिप्राप्त की गई – ऐसी चालाकी की अनुमति नहीं दी जा सकती – विचारण न्यायालय द्वारा प्रदान की गई जमानत रद्द की गई।

Cases referred :

AIR 1987 SC 1613, 1989 Cr.LR (MP)3, 1989 JLJ 323, (2006) 3 MPHT 36, 1994 Cr.L.J. 638, AIR 1995 SC 1795, (1995) 1 SCC 421, AIR 2003 SC 2723.

Anil Khare with accused *Dr. Jyotsana Pare* and *Dr. Roop Kamal Pare*.

B.R. Koshta, for the accused *Satish Babu Lodhi*.
Accused/ Anil Kumar Gupta present in person.
M.P. Acharya, Adv. present in person.
T.K. Modh with *V.P. Singh* Advocates.
Ghanshyam Pandey, for the non-applicant/State with *S.S. Shukla, Dy.S.P.*

ORDER

J.K. MAHESHWARI, J. - The Police Station Mandan Mahal, Jabalpur registered the offence under Sections 420, 467, 468, 471, 120-B, 406, 409 read with Section 34 of IPC at Crime No.271/2010. On committal it is registered as Sessions Trial No.94/2011 and pending in tne Court of First Additional District & Sessions Judge/Special Judge (Lokayukta), Jabalpur. In the said offence, total number of accused is thirteen, they arc Kshitij Dubey, Amol Sheorey, Vikas Saxena, Firdaus @ Smt. Shikha, Wahid Sicidique, Javed Ahmad Khan, Dr Jyotsana Pare, Anil Kumar Gupta, Ajay Pandey, Satish Babu Lodhi, Azhar Siraj, B.D. Vairagi and Smt. Sarika Naik Dubey. Except Azhar Siraj and Smt. Sarika Naik Dubey, all have been surrendered. The gist of the prosecution story is that on having received information about the clearance of cheque of Rs. 50.00 lacs from Axix Bank, Napier Town, Jabalpur, the income Tax Department conducted a raid. On interception and in preliminary tnvestigation it was found that there is a possibility of misappropriation of the amount of Rs.50.00 crore received by Axis Bank, Jabalpur from Apex Bank, Bhopal. Co-accused Kshitij Dubey, Dy. Manager of the Axis Bank, Napier Town Branch has been alleged as the king-pin of the said incident. The FIR has been lodged by the co-accused Amol Sheorey on 22.8.2010. In the investigation, misappropriation of the huge amount of public money was found with the connivance of the said accused persons, however challan has been filed against them. Some of the persons are under cloud against whom further investigation under Section 173 sub clause (8) of Cr.P.C. is still pending. This case is know as Axis Bank Ghautala case.

2. The bail petitions of nine accused persons, namely, Firdaus @ Smt. Shikha, Amol Sheorey, Dr. Jyotsana Pare, Vikas Saxena, Anil Kumar Gupta, Satish Babu Lodhi, Ajay Pandey, Wahid Siddique and Javed Ahmad Khan were heard by this Court analogously on 26.11.2010. By a detailed order passed on the said date, two accused persons, namely, Amol Sheorey and Vikas Saxena were enlarged on bail, considering the role as assigned to them and in view of the report of Mr. P. Natarajan, Vice President, Internal Audit

Department, Central Office, Mumbai, who reported that their act may be amounting to procedural irregularity. It has been observed by this Court that such irregularity may involve any liability to commit the offence is required to be examined in trial. Those were also not found the beneficiary of the amount so disbursed and no recoveries were made from them. This Court was not inclined to enlarge the remaining accused persons, however on the request of counsel appearing on behalf of the accused persons, Dr. Jyotsana Pare, Satish Babu Lodhi and Anil Kurnar Gupta, their bail petitions were dismissed as not pressed after arguments Being lady in the case of Dr. Jyotsana Pare, it was observed that she may renew the prayer after six months. Thus, while granting bait to co-accused, Amol Sheore, and Vikas Saxena on 26.11.2010, this Court has not found parity in the case of Dr. Jyotsana Pare, Satish Babu Lodhi and Anil Kumar Gupta. These three accused persons have been granted bail by the Trial Court vide orders dated 11.5.2011, 18.5.2011 and 28.2.2011 respectively. Taking cognizance of the aforesaid the comments from the First Additional Sessions Judge/Special Judge (EOW), Jahalpur were sought and on receiving the reply, the action against the Judge by the High Court on administrative side was proposed by the order dated 20.7.2011 Thus it is clear that it is a case wherein after rejection of the bail by High Court, the Trial Court enlarged the three accused persons on bail. However, in furtherance to the order dated 20.7.2011, bailable warrants-cum-notice, for cancellation of bail were issued to three accused persons, namely, Dr. Jyotsana Pare, Satish Babu Lodhi and Anil Kumar Gupta and directed to appear on 2nd August, 2011. On the request made by the Advocates and the accused present in Court, time was allowed up to 8th August, 2011 to file the reply.

3. It is to be further noted here that in the case of accused-Satish Babu Lodhi, Shri V.P.Singh, Advocate has appeared in High Court on behalf of accused. During the pendency of the said bail petition, he has also filed bail petition in trial court and appeared which was allowed. After release of the accused, he has filed application (I.A. No.10860/2011) for withdrawal of the bail petition. Mr. M.P. Acharya, Advocate appeared on behalf of accused-Anil Kumar Gupta and without filing the affidavit in support of the bail petition insisted the Court to take up the case on 28.2.2011 i.e. the date of the filing of the bail petition though it was not the date in trial, without applying for urgent hearing and on the insistence the accused was released on the same date. Dr. Roop Kamal Pare (mother of Dr. Jyotsana Pare) has submitted affidavit in support of the bail petition on behalf of her daughter with incorrect information which was granted by the Trial Court. Brij Kishore Lodhi (father

of accused Satish Babu Lodhi) has also submitted affidavit in support of the bail petition on behalf of accused-Satish Babu Lodhi. Thus on the basis of furnishing wrong information by way of affidavits or otherwise, the action has been proposed against them. By the said order dated 20.7.2011, it was also directed why the contempt proceedings be not initiated against Mr. V.P. Singh, Advocate, Mr. M.P. Acharya, Advocate, Dr. Roop Kamal Pare (mother of the accused-Dr. Jyotsana Pare), Brij Kishore Lodhi (father of the accused-Satish Babu Lodhi). The notice issued to Brij Kishore Lodhi has not been received after service though remaining other persons are present and the reply filed by them has also been received.

4. Prior to dealing with the rival contentions, it is necessary to take guidance on the issue by case laws when the bail petitions were rejected by the High Court but granted by the Sessions Court, and other pivotal guidelines determined for filing the bail petition. Before the Apex Court in the case of *Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and another,* AIR 1987 SC 1613, the issue came up for consideration, when one judge rejected three successive bail petition of an accused involved in a case of murder, the subsequent bail petition filed by the said accused was listed before the vacation Judge of the High Court. The said Judge directed for listing the case before the Judge who has earlier rejected three bail petitions after vacation. Thereafter the same Judge recalling the earlier order entertained the bail petitions and ordered to release the accused, The Apex Court set aside the order and laid down the principle that the long standing convention and judicial discipline required that the bail application of the accused should have been placed before the Same Judge who had earlier passed the order.

5. This Court in various cases laid down the principle of law on the point in context, but borrowing some principles from the judgment of *Shantilal Vs State of M.P.*, 1989 Cr.LR (MP) 3 speaking Hon'hle Shri Justice K.L. Shrivastava said as thus:

> "..... a person accused of non-bailable offence cannot claim bail as of right and the question of grant of bail to such a person is left by the legislature in the court's discretion to be exercised on a consideration of the totality of the facts and circumstances of a given case. The discretion has, of course, to be judicial one *'informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial*

necessity of order in social life."

(Emphasis supplied)

In the case of *Daini alias Raju Vs. State of M.P.*, 1989 JLJ 323, Hon'ble Shri Justice R.C. Lahoti (as His Lordship then was) referring various judgments emphasized the discipline of the system as thus :-

> "(i) in view of the decision of the Apex Court in *Shahzad Hasan Khan* (supra), a subsequent application for bail in the same jurisdiction, must be placed before the same Judge (so long as he is available) before whom had come up the earlier application, with whatever result;
>
> (ii) a subsequent application for bail must mention all the earlier or pending attempts to that and made before the High Court as well as the Court of Session along with their fate;
>
> (iii) while moving an application for bail before the High Court, the application ought ordinarily to be accompanied by the order of the Court of Session rejecting the first prayer for ball and containing reasons, unless dispensed with;
>
> (iv) a bail petition is expected to incorporation a statement as to all facts and circumstances considered relevant by the applicant in support of his prayer so that whatever is put forth before the Court does not vanish in thin air, but is retained in the record, though there is no format prescribed for bail applications; if any statement is likely to be controverted by the opposite party, the party would do well to support its statement by an affidavit or documents, as advised."

(Emphasis supplied)

6. In the matter of an offence under Sections 420, 467, 468 and 471 of IPC, the issue with respect to cancellation of the bail, granted by the Trial Court despite rejection by the High Court has come up for consideration in the case of *State of M.P. Vs. Bardanilal Ahirwar,* 2006 (3) MPHT 36 and the Court referring various judgments held that when the material fact regarding rejection of the bail by the High Court has been meaningfully suppressed then in the interest of justice and to curb the tendency of hoodwinking the Courts, the bail granted to the non-applicant should be cancelled.

7. The Apex Court in the case of *Smt Bimla Devi V. State of Bihar and others,* 1994 CRI.LJ. 638, referring the judgment of *Shahzad Hasan Khan (supra)* has observed that after rejection of the bail petition by the High Court, the Magistrate cannot grant the bail as it affects the principle of judicial discipline and observed as under:-

> "2. In view of the fact that the Judicial Magistrate at a later stage has himself cancelled the bail, it is not necessary for us to pass any order with regard to the petitioner's prayer for cancellation of bail but the disturbing feature of the case is that though two successive applications of the accused for grant of bail were rejected by the High Court yet the learned Magistrate granted provisional bail. The course adopted by the learned Magistrate is not only contrary to settled principles of judicial discipline and propriety but also contrary to the statutory provisions. See in this connection AIR 1987 SC 1613: (1987 Cri LJ 1872). The manner in which the learned Magistrate dealt with the case can give rise to the apprehensions which were expressed by the complainant in her complaint, which was treated by this Court as a writ petition and is being dealt with as such. In the course that we are adopting, we would not like to comment upon the manner in which the learned Magistrate dealt with the case any more at this stage. We in the facts and circumstances stated above, direct that a copy of this order be sent to the Chief Justice of the Patna High Court for taking such action on the administrative side as may be deemed fit by him."

8. In view of the law laid down in the aforesaid judgments, it is apparent that the subsequent bail petition flied before the High Court is required to be placed before the same Judge before whom the earlier bail petition was filed. After rejection of bail by the High Court, the subordinate Court should not oblige to entertain and grant the bail, if it is so it affects the judicial discipline. The subsequent bail petitions must mention all the earlier attempts made either before the subordinate court or before the High Court and their fate. The relevant orders ought to be produced before the Court considering the subsequent bail petitions. The bail petition is expected to incorporation a statement of all facts and circumstances considered relevant by the applicant in support of his prayer to apprise the correct facts. Setting forth such

averments, may likely to give an opportunity to the opposite party to controvert it. In support of the said pleadings, the affidavit or the documents are also advised. The grant of bail in a non-bailable offence is a discretion which can be exercised judiciously based upon the methodized by analogy, disciplined by system and subordinated to the primordial necessity.

9. In the case of Dr. Jyotsana Pare, in reply to the notice for cancellation of bail, it is said that she is not well versed with the provisions of the criminal laws, procedure adopted to be followed in the Courts. It is said that she has acted as per the legal advise and information given and no act done by her with deliberate wrong, knowledge and information. Explaining the period of her custody, it is said that she is engaged in providing vocational training io hearing impaired children and resides with her widow mother after deserted by the husband at Bhopal. It is said that after the arrest, her friend Nidhi Shrivastava assisted bona fide upon the advise of the advocates Shri Sankalp Kochar and Shri Vipin Yadav who have informed that the Court was not inclined to grant the bail, however it was dismissed as not pressed without explaining the time of six months directed for renewal. It is further stated that upon the advise of the advocates, various Vakalatnamas were signed but the results thereto was not communicated to her. Thereafter, on the advise of Shri Maqbool Ahmad, Advocate, second bail petition was filed before the Trial Court attaching the affidavit of the mother who was unaware of the aforesaid facts and the cumbersome procedure and unaware regarding the legal impediments of the orders of the Court. Thus the applicant and her mother have acted with extreme bona fide, honesty and without any ill-will or ulterior motive, therefore the notice for cancellation of the bail may be dropped.

10. Shri Anil Khare, learned counsel representing Dr. Jyotsana Pare and Dr. Roop Kamal Pare contends that Dr. Jyotsana Pare was in custody and not having any contact with her mother Dr. Roop Kamal Pare, however the bail petitions filed before the High Court are directly on the instructions of Dr. Jyotsana Pare which were not in the knowledge of the mother Dr. Roop Kamal Pare. The affidavit filed by Dr. Roop Kamal Pare before the Trial Court is based on the advise of the advocate, and due to age, ill-health and lack of knowledge with bona fides, the information of rejection of other bail petitions by the High Court could not be supplied. It is submitted that after rejection of bail by this Court, charge of the lesser offence was framed by the Trial Court which is not punishable by death or life imprisonment, however enlarged her on bail on parity. Thus looking to the fact that the other accused persons have

been enlarged on bail, the notice for cancellation of bail as well as the notice for initiation of contempt proceedings against his clients may be dropped.

11. After hearing Shri Anil Khare, Advocate and on perusal of the record, it is not in dispute that on 26.11.2010 the bail petition of Dr. Jyotsana Pare was dismissed by this Court after argument as not pressed with the direction to renew the prayer after six months. It is also not in dispute that this Court had not found parity with two accused persons, namely, Amol Sheorey and Vikas Saxena who were enlarged on bail on the same date by separate order. It is also not disputed that Dr. Jyotsana Pare has filed three successive bail petitions before this Court. The second bail petition (M.Cr.C No.1106/2011) was dismissed on 14.2.2011 with an observation that earlier bail petition (M.Cr.C. No.9557/2010) was dismissed as per order dated 26.11.2010 with a liberty to renew the prayer after six months, however it is not entertainable without any changed circumstances prior to the said period. Third bail petition M.Cr.C. No.2514/2011 was dismissed on 7.3.2011 for want of prosecution. The fourth bail petition M.Cr.C. No.3394/2011 was dismissed on 20.4.2011 with the observation that in view of the orders passed in earlier two bail petitions, applicant may file fresh bail petition after 26th of May, 2011. The subsequent three orders of the High Court have not been produced and suppressed before the Trial Court. If the order dated 20.4.2011 of M.Cr.C. No.3394/2011 would have been brought to the notice, that the bail petition of Dr. Jyotsana Pare can only be entertained after 26.5.2011, the Trial Court might have looked into the said fact. Thus without disclosing these facts and orders, the bail has been obtained, prior to 26.5.2011. The observation made by the Trial Court, having parity with Wahid Siddiqui and Firdaus @ Smt. Shikha against whom the charge under Section 420, 120-B and 411 of IPC has been framed similar to the accused, is of no substance as they were granted bail extending the benefit of Section 167 (2) of Cr.P.C. due to non-filing of challan within the specified period and not on merits. Thus grant of bail by the Trial Court after rejection by the High Court is amounting to abuse of the process of Court. In view of the foregoing, the bail granted to accused-Dr. Jyotsana Pare is liable to be cancelled.

12. In reply to notice for cancellation of bail, accused Satish Babu Lodhi states that he is the student of B.Sc. Mathematics passed in the year 2004 and working in Axis Bank. He has good character and record and not made any mischievous effort before the Court during the period of service in the Bank. It is said that due to lack of knowledge of the proceeding before this

Hon'ble Court which was prosecuted by the counsel on the advise of his father Brij Kishore Lodhi, however he has not committed any offence. The bail petitions before this Hon'ble Court as well as before the Trial Court have been filed simultaneously by lack of knowledge with bona fides.

13. Shri B.R.Koshta, Advocate representing Satish Babu Lodhi contends that the applicant was not aware regarding the niceties of the procedure adopted in the courts, therefore application filed by his client under the instructions of his father Brij Kishore Lodhi before the Trial Court during the pendency of the bail petition before this Court is based on the bona fides and lack of knowledge, however the notice for cancellation of the bail may be dropped.

14. After hearing Shri Koshta, counsel appearing on behalf of accused-Satish Babu Lodhi and on perusal of the record, it is not in dispute that the first bail petition (M.Cr.C. No.10417/2010) filed before this Court was dismissed as not pressed after arguments on 26.11.2010, and this Court not found parity with the accused Amol Sheorey and Vikas Saxena. It is also not in dispute that on 21.2.2011 he has filed second bail petition (M.Cr.C. No.2214/2011) which remained pending for one reason or the other. During the pendency of the said bail petition, he has filed another bail petition before the Sessions Court on 16.5.2011 stating the fact in para 3 that it is his second bail application and no application has been decided or pending in the High Court. In fact, his bail petition was already rejected and one application was pending. Thus during the pendency of M.Cr.C. No.2214/2011, he was enlarged on bail on 18.5.2011. The Trial Court allowed the bail on the ground of parity with Wahid Siddiqui and Firdaus @ smt. Shikha against whom the similar charge under Sections 420, 120-B and 411 of IPC has been framed. The parity also do not exist because the said two accused persons were granted bail giving the benefit of Section 167(2) of Cr.P.C. due to non-filing of challan within the specified period. Thus the grant of bail by the Trial Court after rejection and during pendency of bail petition before the High Court is amounting to abuse of the process of Court. In view of the foregoing, the bail granted to accused-Satish Babu Lodhi is liable to be cancelled.

15. In reply filed by accused-Anil Kumar Gupta, it is stated that he is the Doctor in Archeology and Architecture and served as the visiting Professor in Maulana Azad National Institute of Bhopal since 1990. His name was unnecessarily dragged in the police report after eight months of occurrence. The grant of bail to a citizen is a right and refusal is exception. It is said that

pre-trial detention is not favoured and does not command any one. It is said that after rejection of the first bail petition by the IV Additional Sessions Judge, M.Cr.C. No.9772/2010 was dismissed as not pressed by this Court. On filing the challan and framing of charge on 21.2.2011 of a lesser sentence, applicant has filed bail petition on 28.2.2011, which was allowed as the offence was not punishable with death or life imprisonment and also on parity by giving sound reason in support of the bail order. In view of the aforesaid, prayer is made to drop the notice for cancellation of the bail.

16. After hearing the accused- Anil Kumar Gupta and on perusal of the record, it is not in dispute that his bail petition was analogously heard by this Court on 26.11.2010, and no parity was found, however after argument the counsel has not pressed his bail petition, therefore dismissed. On his behalf an application has been filed by the Advocate Mr. M.P. Acharya on 28.2.2011 which was not the date fixed in the Trial Court. The trial was fixed on 21.2.2011 and the next date was 5.3.2011. Along with the bail petition urgent hearing application was also not filed. The bail petition is also not supported by an affidavit. The Judge has granted bail on the same day i.e. 28.2.2011 on the ground of parity with Amol Sheorey and Vikas Saxena. In fact, this Court not found parity in the case of Anil Kumar Gupta with Amol Sheorey and Vikas Saxena while hearing his bail petition analogously, therefore his counsel has not pressed his bail petition on 26.11.2010. Thus, after rejection of the bail by the High Court allowing subsequent bail petition by the Trial Court on the ground of parity is amounting to abuse of the process of the Court. In the application information as supplied by the advocate was also incomplete. In that view of the matter, the bail granted to accused Anil Kumar Gupta is liable to be cancelled.

17. The information supplied before the Sessions Judge on affidavit was incorrect or incomplete, it may amounting to obstruct and interfere in the administration of justice. In this context the Apex Court in the case of *Dhananjay Sharma V. State of Haryana and others*, AIR 1995 SC 1795 observed that the swearing of false affidavit in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice. It has further been observed that the due process of law cannot be permitted to be slighted nor the majesty of law be made a mockery by such acts or conduct on the part of the parties to the litigation or even while appearing as a witness. If such attempt to impede or undermine or

obstruct the free flow of the unsoiled stream of justice by resorting to the filing of false evidence, it commits criminal contempt of the court and liable to be dealt with in accordance with the law.

18. In the case of *Chandra Shashi Vs. Anil Kumar Verma*, (1995) 1 SCC 421, their Lordships of the Apex Court have emphasized that furnishing a forged or fabricated document is amounting to playing fraud with the court with oblique motive of deceiving or defrauding the court. In the case of *U.P. Resi. Emp. Co-op. House B. Society and others Vs. New Okhla Indus. Deve. Authority and another*, AIR 2003 SC 2723 their Lordships of the Apex Court observed that filing of false affidavit in court amounts to contempt of Court. In view of the said legal position, the conduct of the deponent swearing the affidavit and the advocates appeared on behalf of the accused persons is required to be discussed.

19. In the case of Dr. Jyotsana Pare while filing the bail petition before the Sessions Court on 9.5.2011, it is stated that "MCRC No.9557/2010 has been withdrawn with liberty to file after six months and thereafter no application was filed". While mentioning the said, to calculate the period of six months the date of dismissal of bail petition by this Court was not specified. After dismissal of the MCRC No.9557/2010, three successive MCRCs were filed before the High Court which were dismissed, and in the fourth MCRC it was specifically directed that the bail petition can be entertained after 26.5.2011 only. However, intentionally the said orders were not produced otherwise the bail petition of Dr. Jyotsana Pare could not be entertained by the Trial Court prior to 26.5.2011. Thus in the bail petition incorrect facts have been mentioned swearing an affidavit by Dr. Roop Kamal Pare to the contents of the bail petition. The contention of Shri Anil Khare, counsel representing her does not seem to be plausible showing it to be merely a mistake due to age, illness, lack of communication and under the directions of the advocates. If the orders passed by this Court would have been produced or mentioned, the chance to get the bail of her daughter might be more slender. Such an act may fall within the purview of criminal contempt as defined under Section 2(c)(ii) of the Contempt of Courts Act, 1971 for which separate proceedings be drawn.

20. In the case of accused-Satish Babu Lodhi, the second bail petition was filed before the Sessions Judge on 16.5.2011 while his second bail petition (M.Cr.C. No.2214/2011) was pending before the High Court. In para 3 of the said application it was mentioned that "the bail petition is neither decided

nor pending in the High Court". In support of the said contention, affidavit of Brij Kishore Lodhi has been filed stating that the facts stated in the application are true and correct. Such act may fall within the purview of criminal contempt under Section 2(c)(ii) of the Contempt of Courts Act, 1971 for which separate proceedings be drawn. Even after issuance of the notice Brij Kishore Lodhi has not appeared, however notice for his appearance in the separate proceedings be issued by the Registry.

21. In the case of Satish Babu Lodhi, Mr. V.P.Singh, Advocate representing him has filed the bail petition (M.Cr.C. No.2214/2011) before the High Court on 21.2.2011. During the pendency of the said bail petition, he has filed second bail petition on his behalf on 16.5.2011 before the Sessions Court. He has appeared in the Sessions Court without disclosing that the bail petition of Satish Babu Lodhi is pending in the High Court. After allowing bail by the Trial Court on 18.5.2011, Mr. V.P. Singh Advocate has filed I.A. No.10860/2011 seeking withdrawal of the bail petition before this Court on the pretext that on account of change of counsel, he is having no instructions to appear and argue the case. The reply to the notice for initiation of contempt has not been filed but some documents have been filed stating the fact that in the bail petition written by his own hand writing, the fact regarding pendency of the petition before the High Court was written but the typist has not typed. The perusal of the documents in original, it reveals that it has been prepared after issuance of the notice, otherwise the advocate prior to put his signature on bail petition may verify the said facts. Thus the defence as put forth appears to be non-plausible at this stage. In view of the foregoing, the act of Mr. V.P. Singh, Advocate may come within the purview of criminal contempt under Section 2(c)(ii) of the Contempt of Courts Act, 1971 for which separate proceedings be drawn.

22. In the case of Anil Kumar Gupta, the second bail petition has been filed by Mr. M.P. Acharya, Advocate on 28.2.2011 by his own signature. In para 1 very designedly it was mentioned by him that "it is second bail petition before the Hon'ble Session Court and none other is pending before the High Court or other Court". In fact, in the said paragraph it should have been mentioned that first bail petition (MCRC No.9772/2010) was filed before the High Court and it was dismissed after argument as not pressed. In para 6 it has been mentioned that "the challan has been filed on 16.11.2010, earlier application under Section 439 Cr.P.C. was dismissed on 8.9.2010 and bail application before Hon'ble High Court has been fixed on 26.11.2010" Shri

M.P. Acharya, Advocate contends that, in fact it is not the word "fixed" but it is the word "pressed", however there is no concealment. If it is accepted even then he insisted to the Judge to hear the case on the same date without applying for urgent hearing and filing an affidavit for verification to the said facts. Relying upon the statement of the advocate having a long standing regarding parity with Amol Sheorey and Vikas Saxena, the Judge granted bail on the same date, which was factually incorrect. In fact, this was a point of time of mistake, therefore successive bail petitions of the accused Satish Babu Lodhi and Dr. Jyotsana Pare were granted later. This appears to be the turning point, which totally rests upon the conduct of Mr. M.P. Acharya, Advocate. However, such act may fall within the purview of criminal contempt under Section 2(c)(ii) of the Contempt of Courts Act, 1971 for which separate proceedings may be drawn.

23. On going through the complete record of the Sessions Trial, the role of the prosecutor who appeared before the Trial Court is also not very fair. If any bail petition is filed, a liberty to object or controvert the facts is available to the prosecutor, however it is his duty to bring into the knowledge of the Court that the bail petition filed by the accused person has been rejected by the High Court and it cannot be entertained by the subordinate court. Neither the fact of rejection of the bail by the High Court has been brought into the knowledge nor such objection has been raised by him. The officer assisting the prosecutor in trial is equally responsible for not disclosing such facts, however, the Home Department and Law Departnent are required to look into the matter how much effectively their officers are working and assisting the court and if so advised, action may be taken for fair administration of justice and to curb such tendency in future.

24. It is necessary to observe here that after taking a serious note of the conduct of the accused persons, advocates and the Judge, the parties have continued to play fraud with the court which is apparent from the order-sheets of the Trial Court dated 1.8.2011. After issuance of notice for cancellation of bail and to file reply why the contempt proceedings be not initiated, the applications to obtain certified copies were filed before the Trial Court bearing No.14914/2011, 14588/2011, 15495/2011 and 15695/2011 by the accused, Dr. Jyotsana Pare, Anil Kumar Gupta and Satish Babu Lodhi. Accordingly the file was sent to Certified Copy Section. When it was received back by the Reader of the Court, he found that in the bail petition of Satish Babu Lodhi the word "pending" was tried to be scored out. The Judge has called the

Head Copyist and shown it in the Court and thereafter reported the matter to the District & Sessions Judge. In the opinion of this Court, it is a very serious matter and a discrete enquiry is required to be made by the District & Sessions Judge, Jabalpur and to submit a fact finding report to the High Court through the Registrar General.

25. In this era, a tendency has developed in the minds of the citizens to become rich, brushing aside the morals without hard work at the earliest. In the instant case which is known as 'Apex Bank Ghautala case', the king pin co-accused Kshitij Dubey, an officer of the Bank, with the help of other accused persons, the public money of Rs.50.00 crore transmitted from Apex Bank to Axis Bank, for investment has been mis-utilized, committing forgery by creating a company in the name of his wife along with other officers of the Bank who are the Directors. By the indulgence of the Income Tax Department, such forgery could be traced out. How far the prosecution has acted fairly in investigation, assisting to the public prosecutor and the court is a matter of concern for the executives i.e. Home Department and Law Department but how far the accused persons and the advocates assisting them have made an endeavour to play with the judicial system, it is a matter of concern for the High Court. The majesty of the court should remain unimpeached, it may not be allowed to fade adopting the tactics to furnish the incorrect information on an affidavit in judicial proceeding. Such tendency causes obstruction in due course of judicial proceeding and not in fair administration of justice. In the present case, despite issuance of the proposed action of cancellation of bail and initiation of the contempt proceedings, the concerned persons made an endeavour to defraud the court by scoring out the words mentioned in the bail petition for which a serious note has been taken. Thus for upliftment of the system on which the society inspire trust and confidence and looking forward for fair administration of justice, certain directions to wake up the society are necessary which are being issued in succeeding paragraphs.

26. In the foregoing facts, it is apparent that the bail petitions of accused persons, namely, Dr. Jyotsana Pare, Anil Kumar Gupta and Satish Babu Lodhi have been allowed by the Trial Court is amounting to abuse of process of the Court. The said orders are also based upon non-furnishing the relevant orders, supply of incorrect information on the affidavit. Such hoodwinking cannot be permitted on the insistence of the accused persons and by their advocates, therefore the bail granted by the Trial Court to these accused persons vide orders dated 28.2.2011, 11.5.2011 and 18.5.2011 is hereby cancelled. The

accused persons are present in the Court, however the Registrar is directed to take them into police custody for their production before the Trial Court. On production the Trial Court shall send them jail after preparing the jail warrants. It is made clear here thdt the said cancellation would not continue by way of stigma if they renew the prayer after incarceration of further three months and the applicants may be at liberty to file a fresh petition before this Court which may be considered without drawing any adverse inference against them.

27. In view of the discussion made herein above, it is further apparent that Dr. Roop Kamal Pare, Brij Kishore Lodhi and Mr. M.P. Acharya, Advocate have not furnished correct information to the Court as expected and required by law. Similarly in the case of Mr. V.P. Singh, Advocate who has furnished the incorrect information as discussed herein above and appeared before the High Court and Trial Court without disclosing the fact of pendency of the bail petition. Such an act is amounting to criminal contempt under Section. 2(c)(ii) of the Contempt of Courts Act, 1971 for which separate common proceedings be drawn against all the aforesaid four persons. The Principal Registrar (Judicial) shall take steps to register common contempt proceedings separately and shall place the relevant orders, reply and documents filed by the parties in the record of the contempt case. As per provisions contained in Chapter-IV Rule (4) clause(10) of the High Court of Madhya Pradesh Rules, 2008, the criminal contempt is required to be heard by the Division Bench, however, it s referred accordingly.

28. In view of the serious note made by the court regarding manipulation in the record, as discussed in paragraph No.24, it is directed that the District & Sessions Judge, Jabalpur shall hold a discrete enquiry in the matter and the fact finding report regarding the persons who are guilty in scoring out the record of bail petition be submitted through Registrar General to the Division Bench hearing the contempt petition within a period of one month from the date of receipt of certified copy of this order.

29. The Registrar General is requested to send the copy of this order to the Home Department and the Law Department in view of the discussions made in paragraph No.23 and a copy of this order be also sent to the District & Sessions Judge, Jabalpur for further action. A copy of this order be also sent to the Secretary, M.P. State Bar Council in continuation to earlier order dated 20.7.2011.

Order accordingly.

I.L.R. [2012] M.P., 649

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.S. Solanki

M.Cr.C. No. 8819/2011 (Jabalpur) decided on 20 December, 2011

BABITA LILA & anr. ...Applicants

Vs.

UNION OF INDIA ...Non-applicant

A. Income Tax Act (43 of 1961), Sections 132, 132(c), 136, 178(i)(b)(d) – Jurisdiction – **Appellant is resident of Bhopal as well as Aurangabad – IT return filed at Bhopal – Search operation under Section 132 related to undisclosed property related to return filed at Bhopal – Held – CJM, Bhopal has jurisdiction to try case as per Section 178 of the Act.** (Para 6)

क. आयकर अधिनियम (1961 का 43), धाराएँ 132, 132(सी), 136, 178(i)(b)(d) – *क्षेत्राधिकार* – अपीलार्थी भोपाल के साथ ही औरंगाबाद का निवासी है – आई.टी. रिटर्न भोपाल में प्रस्तुत किया गया – भोपाल में फाईल किये गये रिटर्न के संबंध में छुपाई गई सम्पत्ति के संबंध में धारा 132 के अंतर्गत तलाशी कार्यवाही की गई–अभिनिर्धारित – सी.जे.एम. भोपाल को अधिनियम की धारा 178 के अनुसार मामले का विचारण करने की अधिकारिता है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 195 **–Complaint filed by Dy. Director of IT (Investigation) Bhopal – Statement taken by ITO's – Held – Statement taken by ITO's shall be deemed to be a civil Court under Section 136 of IT Act – No case for interference under Section 482 is made out–Petition dismissed.** (Para 8)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 195 – डिप्टी डायरेक्टर, आई.टी. (अन्वेषण), भोपाल द्वारा शिकायत प्रस्तुत की गई – आई.टी.ओ. द्वारा कथन लिये गये – अभिनिर्धारित – आई.टी.ओ. द्वारा लिये गये कथन आई.टी. अधिनियम की धारा 136 के अंतर्गत सिविल न्यायालय द्वारा लिये गये समझे जायेंगे – धारा 482 के अंतर्गत हस्तक्षेप का मामला नहीं बनता – याचिका खारिज।

Ajay Gupta, for the applicants.

Ajay Kakani with *Sanjay Lal*, for the non-applicant.

ORDER

G.S. SOLANKI, J.:-The applicants invoked extraordinary jurisdiction of this Court under section 482 of Cr.P.C. praying for quashment of criminal

proceedings against the applicants in R.T. No.5171/2011 *(Union of India* v. *Smt. Babita Lila and another)* pending before the Chief Judicial Magistrate, Bhopal.

2. The facts, in a nutshell, giving rise to this petition are that a private complaint has been filed on behalf of respondent under section 200 CrPC, against the applicants/ accused persons alleging that the search operation under section 132 of Income Tax Act, 1961, was conducted by the Income Tax Department, Bhopal at the residence of accused persons on 28.10.2010. It was further alleged that during the search, statement of applicants / accused persons were recorded by authorized officer of Income Tax Department at Aurangabad. It is alleged that while making aforesaid statement, applicants/ accused persons had denied having locker in their names. But subsequently, it was found that locker was held in the name of applicants in Apex Bank (formerly known as UTI Bank), Kranti Chowk, Aurangabad. On the basis of allegations, it was alleged that applicants / accused persons have given false statement thereby they committed the offence under sections 109, 191, 193 and 196, 200, 420/34 and 120-B of IPC. Copy of complaint is Annexure P-1.

3. It is submitted on behalf of applicants/ accused persons, that learned CJM registered the case against the applicants vide order dated 09.06.2011 under section 191, 193 and 200 of IPC, without recording the statement under section 202 Cr.PC. It is further submitted that statement was recorded by Income Tax Officers at Aurangabad in Maharashtra, therefore, CJM Bhopal has no jurisdiction to hear the matter. It is further submitted that applicant No.1 was ill. She was hospitalized on 28.10.2010 and was discharged from hospital few days earlier on 22.10.2010. As per allegations, the search team reached at the residence of applicants at "Lila Dham, Bansilal Nagar, Aurangabad at 8.00 a.m. on 28.10.2010. Applicant No.1 became unconscious and she was hospitalized and she remained in hospital under heavy medication and she was discharged on 29.10.2010. Relevant documents are Annexure-P-4. In these circumstances, applicant no.1 was not in a position to give any statement. Further, it is submitted that applicant no.2 was also under tremendous stress and anxiety due to illness of his wife. Therefore, he was not in a position to concentrate on the instructions issued to him. It is further alleged that applicants have no mala fide intention for non-disclosure of locker in their statement. They only operated on 30.10.2010 but to bring certain articles required for some religious rituals in the family. If

they have any malafide intention, then they would have rushed to the bank at the earlier opportunity which was not done by them. Therefore, on the aforesaid submissions, applicants pray for quashment of proceedings pending before CJM, Bhopal.

4. Learned counsel for the applicants further submitted that sections 191, 193 and 200 of IPC are covered by section 195 CrPC which provides in sub-section 1 clause (b)(i) of the Act that no Court shall take cognizance for offence punishable under sections 193 and 200 IPC except any complaint in writing of that Court or by such officer of the Court, as that Court may authorize in writing in this behalf or some other Court to which that Court is subordinate. He further submitted that in this case, the statement was recorded by some other Income Tax Officers at Aurangabad. For the purpose of section 195 CrPC, if at all, the said authority is considered to be the Court, then it could have been Shri A.T.Kapuse, I.T.O. and Smt. Bharti Choudhary, ITO. Complaint is filed by Deputy Director of Income Tax (Investigation)-I Bhopal which is illegal and liable to be quashed. It is further argued that statements were rerecorded at Aurangabad in Maharashtra, therefore, CJM Bhopal has no jurisdiction for taking cognizance on the aforesaid statement.

5. On the other hand, learned counsel for the respondent submitted that any proceedings before I.T.A. shall be deemed to a judicial proceeding under section 136 of I.T.Act, and every Income Tax Authority shall be deemed to be a Civil Court for purposes of section 195 CrPC. It is further submitted that statements were recorded by an authorized officer who has same powers as vested in Court under Civil Procedure Code. Therefore, private complaint filed by Deputy Director of Income Act (Investigation)-I on behalf of Shri A.T.Kapuse and Smt. Bharti Choudhary, Income Tax Officers, who recorded the statement cannot be said to be illegal. He furtherer submitted that since search operation was conducted under section 132 of I.T. Act, and during the search, the applicants/accused persons have not disclosed their locker to the competent officer which amounts to undisclosed property under section 132 (c) of I.T. Act in regard to the property/ income of applicants at Bhopal. Therefore, CJM Bhopal has jurisdiction to try the alleged offence against the applicants/ accused persons.

6. I have perused the impugned order passed by CJM Bhopal and other material on record. The applicants/ accused persons are resident of Bhopal as well as Aurangabad and the income tax return was filed at Bhopal.

Search operation under section 132 of Income Tax Act was conducted simultaneously at Bhopal and Aurangabad by the Income Tax Department, Bhopal in relation to the fact of undisclosed property, for which income tax return was filed at Bhopal. In these circumstance, CJM Bhopal has jurisdiction to try the case as per section 178 (i)(b)(d) of the Act.

7. So far as second contention raised by the learned counsel appearing on behalf of the applicants regarding section 195 CrPC is concerned, in this case, complaint is in writing filed by authorized officer– Smt. Bharti Singh, Deputy Director of Income tax (Investigation)-I, Bhopal (M.P.) who is superior officer to Shri A.T.Kapuse and Smt. Bharti Choudhary, ITOs who recorded the statements of applicants. However, bare reading of section 136 of I.T. Act and Section 195 of CrPC reads as follows :

> 136- Any proceeding under this Act before an income-tax authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purpose of section 196 of the Indian Penal code (45 of 1860), and every income-tax authority shall be deemed to be a Civil Court for the purposes of Section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).
>
> Section 195 of CrPC :
>
> (a) .....
>
> (b)(i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or
>
> (ii).....
>
> (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (I) or sub-clause (ii), [except on the complaint in writing of that Court by such officer of the Court as that Court may authorize in writing in this behalf, or of some other Court to which that Court is subordinate].
>
> 1. Where a complaint has been made by a public servant

under clause (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub-section (1), the term " Court" means a Civil, Revenue of Criminal Court, any includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principle Court having ordinary original jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that -

(a) Where appeals lie to more than one Court, the appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) Where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

8. In this case, statements of applicants were recorded by ITOs who shall be deemed to be a Civil Court and the Deputy Director of Income Tax is the superior officer, who filed complaint case, to whom the appeal from ITOs ordinarily lies.

9. In these circumstance, order passed by the trial Court dated 09.06.2011 cannot be said to be perverse and if the same remains continue, will not amount to abuse of process of the Court.

10. The facts relating to illness of applicant No.1, may the the defence of applicant which could be considered at the time of trial.

11. Thus, no case is made out for interference by this Court exercising extraordinary jurisdiction under section 482 CrPC. Thus, the petition has no substance and is liable to be dismissed, and is hereby dismissed at motion stage.

Petition dismissed.

I.L.R. [2012] M.P., 654
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Gupta

M.Cr.C. No. 2234/2011 (Jabalpur) decided on 6 January, 2012

DINESH VAISHNAV (BAIRAGI) ...Applicant
Vs.
KISHOR KUMAR GUPTA ...Non-applicant

Negotiable Instruments Act (26 of 1881), Section 145 – Affidavit **– Offence under Section 138 of the Act – Complainant submitted affidavit in support of his complaint which contain entire factual position – Held – Proper compliance of Section 200, Cr.P.C. in light of provision of Section 145 of the Act – Registration of complaint on basis of affidavit is legal – Petition dismissed.**
(Para 6)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 145 – शपथपत्र – अधिनियम की धारा 138 के अंतर्गत अपराध – शिकायतकर्ता ने अपनी शिकायत के समर्थन में शपथपत्र प्रस्तुत किया जिसमें संपूर्ण तथ्यात्मक स्थिति अंतर्विष्ट है – अभिनिर्धारित – अधिनियम की धारा 145 के उपबंध के आलोक में दण्ड प्रक्रिया संहिता की धारा 200 का समुचित अनुपालन – शपथपत्र के आधार पर शिकायत को पंजीबद्ध किया जाना विधि संगत है – याचिका खारिज।

Cases referred :

2010(1) MPHT 40, 2011(1) MPHT 191, 2010(2) MPHT 397(SC).
Pradeep Naveriya, for the applicant.
Paritosh Trivedi, for the non-applicant.

ORDER

N.K. GUPTA, J. : The petitioner has preferred this petition under Section

482 of Cr.P.C. for quashing the Complaint Case No.1391/2009 pending before the Judicial Magistrate First Class, Balaghat.

2. The factual aspect of the case is that the respondent has moved a complaint for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for brevity "**Special Act, 1881**") before the Chief Judicial Magistrate, Balaghat, which was duly registered and is pending before the concerned Magistrate.

3. Learned counsel for the applicant has submitted that the trial Court has committed a gross error in not considering the fact that examination of the complainant under Section 200 of the Code of Criminal Procedure, 1973 (for short "**Code, 1973**") was mandatory. In support of his contention, he has placed his reliance on the order of this Court in the case of *"Banshilal Vs. Abdul Munnar"* [2010(1) MPHT 40], in which the examination of the complainant under Section 200 of the Code, 1973 is held mandatory. In such circumstances, the complaint could not be registered, and therefore it is liable to be quashed.

4. On the other hand, learned counsel for the respondent has supported the impugned order. He submits that as per the order passed by this Court in the case of *"M/s Amita Gas Service and another Vs. Raman Gupta"* [2011 (1) MPHT 191] and the judgment of the Hon'ble Apex Court in the case of *"Mandvi Cooperative Bank Limited Vs. Nimesh B. Thakore"* [2010(2) MPHT 397(SC)], it is directed that the evidence under Section 200 and 202 of the Code, 1973 may be given by way of an affidavit, and therefore registration of complaint is valid one.

5. After considering the submissions made by learned counsel for the parties, only one short point is to be considered as to whether the evidence adduced by the complainant by way of an affidavit may be treated as his statement under Section 200 of the Code, 1973. Firstly, the provision of Section 145 of the Special Act, 1881 may be perused, which is as under:-

> "**145. Evidence on affidavit.**— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code".

This provision makes it clear that the complainant may give his statement by submission of an affidavit in any enquiry, trial or other proceeding under the Special Act. The provisions of the Special Act, 1881 would have overriding effect on the general provisions of Section 200 and 202 of the Code, 1973, because the Special Act, 1881 is a special enactment. Secondly, by the provisions of Section 145 of the Special Act, 1881, examination of the complainant under Section 200 of the Code, 1973 may be done by submission of an affidavit relating to the facts of the case. Examination of the complainant under Section 200 of Code, 1973 comes under the category of an enquiry, and therefore provision of Section 145 of the Special Act, 1881 provides for submission of an affidavit for that purpose. If such affidavit is submitted, then according to the said provision, it shall be treated as evidence of the complainant under Section 200 of the Code, 1973.

6. The Hon'ble Apex Court in the case of *"Mandvi Co-operative Bank Limited (supra)* held that the evidence given on affidavit is in the nature of examination-in-chief, so accused can only cross examine the person concerned as to facts stated in the affidavit. It is also held that the evidence given on affidavit must be admissible and it must not include inadmissible materials such as facts not relevant to the issue or any hearsay statements. In case if affidavit of the complainant contains statement, which is not admissible in evidence, then it is always open to the accused to point out the same to the Court and the Court would surely deal with such objection. In the light of the ratio laid down by the Hon'ble Apex Court in the matter of *"Mandvi Co-operative Bank Limited" (supra)*, the observations made by this Court in the case of *"Banshilal" (supra)* are not applicable in the present case. Submission of the evidence by the complainant and his witnesses with the help of their affidavits is a sufficient compliance of the provisions of Section 200 and 202 of the Code, 1973.

7. In such circumstances, where the complainant has submitted an affidavit in support of his complaint which contains the entire factual position, then it is proper compliance of Section 200 of the Code, 1973 in light of the provisions of Section 145 of the Special Act, 1881. Consequently, registration of the complaint on the basis of that affidavit is legal. In such circumstances, no extra ordinary jurisdiction under Section 482 of Cr.P.C. may be invoked. There is no other ground raised by the petitioner. In such circumstances, the present petition is devoid of any merits, and therefore the same deserves to be dismissed.

8. Consequently, the present petition of the petitioner filed under Section 482 of Cr.P.C. is hereby dismissed. The stay order granted by this Court vide order dated 28.2.2011 is vacated.

9. A copy of this order be sent to the Courts below with their records forthwith so that trial may take place as early as possible.

Petition dismissed.

I.L.R. [2012] M.P., 657

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sheel Nagu

M.Cr.C. No. 8997/2011 (Gwalior) decided on 10 January, 2012

ROOPA @ RAMROOP ....Applicant

Vs.

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

***Constitution – Article 21, 22, Criminal Procedure Code, 1973 (2 of 1974), Section 439 – Bail on the ground of delay* – Delay in trial on failure of prosecution to produce prosecution witnesses despite passage of time about six months – Breaches the fundamental right of liberty who has to suffer prolonged incarceration – Delay in trial without any fault on the part of the applicant entitles him to bail.** (Para 9, 10)

संविधान – अनुच्छेद 21, 22, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439 – विलम्ब के आधार पर जमानत – लगभग छः माह का समय बीतने के बाद भी अभियोजन द्वारा अभियोजन साक्षियों को प्रस्तुत करने में असफल रहने के कारण विचारण में विलम्ब – स्वतंत्रता के मूलभूत अधिकार का उल्लघंन करता है, जिसे लंबे समय तक कारावास भुगतना पड़ता है – आवेदक की ओर से किसी त्रुटि के बिना विचारण में विलम्ब उसे जमानत का हकदार बनाती है।

Cases referred :

2001(3) Crimes 410(SC), 2003(II) MPWN SN 83, 2005(2) MPLJ SN 13, 2005(2) MPLJ SN 18, 1987 MPLJ 380.

G.S. Sharma, for the applicant.

Pramod Pachori, P.P. for the non-applicant/State.

ORDER

SHEEL NAGU, J.:- Case Diary is perused.

Learned counsel for the rival parties are heard.

1. This is third application under Section 439 Cr.P.C. by the applicant for grant of bail. Applicant has been arrested in connection with crime No. 170/2010 registered at Police Station Sabalgarh, District Morena (M.P.) u/Ss. 341, 294, 354, 302, 323, 324 & 506-B of IPC and Section 3(1)11, 3(2)(5) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 on 23/07/2010, since when applicant is in judicial custody.

2. The last bail application M. Cr. C. No. 3037/2011 was rejected on 06/09/2011 as having been withdrawn.

3. Learned counsel for applicant has contended that new circumstances arisen in favour of the applicant after rejection of the said application on 06/09/2011 is inordinate and unexplained delay in the criminal trial pending against the applicant for the reasons not attributable to the applicant. Learned counsel for applicant read over the order-sheets dated 04/07/2011, 30/07/2011, 29/08/2011, 01/10/2011, 01/11/2011; 24/11/2011 and 23/12/2011 of the trial court. In all these order-sheets, it is reflected that the applicant has been produced from jail on every occasion but on account of absence of the prosecution witnesses, the court was compelled to adjourn the proceedings.

4. Perusal of the order-sheets indicate that the adjournment of the proceedings before the trial court which has occasioned delay in the trial is for reasons not attributable to the applicant/ accused but appears to be solely attributable to the prosecution for their failure to produce the prosecution witnesses.

5. Learned counsel for applicant has placed reliance on *Bhausaheb Nagu Dhavare Vs. State of Maharashtra & others*, 2001(3) Crimes 410 (SC), *Narayan Yadav Vs. State of M.P.* 2003(11) MPWN SN 83, *Hannu Patel Vs. State of M.P.* 2005(2) MPLJ SN 13 *Ravishankar and others vs. State of M.P.* 2005(2) MPLJ SN 18 & *Mithun @ Shamshad Vs. State of M.P.* 1987MPLJ, 380 to substantiate his contention that delay in trial bestows fresh cause of action upon applicant to seek bail.

6. Learned Public Prosecutor for respondent/ State has opposes the bail application and prays for its rejection.

7. Considering the submissions of learned counsel for rival parties, this court is of the considered view that right of liberty of the applicant is a fundamental right enshrined under Article 21 of the Constitution of India which cannot be curtailed unless otherwise provided by procedure established by law. Conjoint reading of Articles 21 and 22 of Constitution of India discloses the importance of liberty given by the Constitution to the citizens of this Country.

8. Seeking bail u/S 438/439 Cr. P. C. is undoubtedly an important mode of invoking this precious right of liberty.

9. Analyzing the decisions cited by the counsel for applicant, it is seen that the decision of the Apex Court in the case of *Bhausaheb Nagu Dhavare Vs. State of Maharashtra & others*, 2001(3) Crimes 410 (SC), does not lay down any law as regards entitlement of the benefit of bail during pre-trial period and therefore is of no avail to the applicant. Similarly, the decision of this court in the case of *Hannu Patel Vs. State of M.P.* 2005(2) MPLJ SN 13 *Ravishankar and others vs. State of M.P.* 2005(2) MPLJ SN 18 are also not related to proceedings during pre-trial period and in fact relate to the entitlement of bail to an appellant whose appeal against conviction is pending and disposal of appeal will take some time. Thus these two short notes are also of no help to the applicant. Thirdly, the decision of this court in the case of *Narayan Yadav Vs. State of M.P.* 2003 (II) MPWN SN 83 supports the contention of learned counsel for applicant to the extent of extending the benefit of bail to one of the accused during pre-trial stage when 9 prosecution witnesses were yet to be examined and about 4 years of incarceration of the accused had elapsed. Lastly, the case *Mithun @ Shamshad Vs. State of M.P.* 1987MPLJ 380 is closest in terms of facts and circumstances to the case of applicant. In the said case due to failure of the prosecution to produce prosecution witnesses on several occasions during trial delay of about 1½ month had taken place, which compelled single bench to release the accused on bail in connection with offence punishable under Section 307/34 IPC by holding that when the State opposes an application for grant of bail to an under trial prisoner during trial it is the corresponding duty of the State to ensure speedy trial and failure to discharge this duty by the State entitles the pre-trial detenue to the benefit of bail.

10. In the instance case there is no such pleading or material on record to conclude that delay in the trial is occasioned by the applicant! accused and therefore, this court is of the considered view that the applicant is entitled to the benefit of bail solely on account of new circumstance, which has arisen after rejection of last bail application of unexplained and inordinate delay in conducting the trial for the reason attributable to the prosecution alone.

11. Accordingly, without expressing any opinion on merits of the case, the present application is allowed and it is directed that applicant be released on bail on his furnishing a personal bond in the sum of Rs. 1,00.000/- (Rupees one lac only) with two solvent surety each of Rs. 50,000/- to the satisfaction of the Trial Court.

12. This order will remain operative subject to compliance of the following conditions by the applicant.

1. The applicant will comply with all the terms and conditions of the bond executed by him;

2. The applicant will cooperate in the investigation! trial, as the case may be;

3. The applicant will not indulge himself in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police Officer, as the case may be;

4. The applicant shall not commit an offence similar to the offence of which he is accused; and

5. The applicant will not leave India without previous, permission of the trial court. Investigating Officer, as the case may be.

A copy of this order be sent to the Court concerned for compliance.

Certified copy as per rules.

Application allowed.

I.L.R. [2012] M.P., 661

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice N.K. Gupta

M.Cr.C. No. 7307/2011 (Jabalpur) decided on 23 January, 2012

KEWIN B. AJIT ...Applicant

Vs.

STATE OF M.P. & ors. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 154, 156(3) – Defence Evidence – **Where any crime is committed then the prosecution evidence is the preliminary evidence which can be looked into – However, documents submitted in defence may be considered up to the extent they are unimpeachable and relevant with FIR – However, Court should not adopt the approach to further investigate the matter to conclude as to whether any offence as alleged in FIR is made out or not.** (Para 10)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 154, 156(3) – प्रतिरक्षा साक्ष्य – जब कोई अपराध कारित होता है तब, अभियोजन साक्ष्य प्रारंभिक साक्ष्य है जिसका परीक्षण किया जा सकता है – किन्तु बचाव में प्रस्तुत दस्तावेजों को उनके अनाक्षेपनीय होने एवं प्रथम सूचना रिपोर्ट के साथ सुसंगत होने की सीमा तक विचार में लिया जा सकता है – परन्तु यह निष्कर्ष निकालने के लिये कि क्या कोई अपराध जैसा कि प्रथम सूचना रिपोर्ट में अभिकथित है, गठित होता है अथवा नहीं, न्यायालय को मामले की और जांच करने के मार्ग को अंगीकृत नहीं करना चाहिए।

B. Penal Code (45 of 1860), Section 420 – Cheating – **Applicant Bank was to enter into negotiation with lending Bank to resort to one time settlement on behalf of defaulter respondents No. 3 & 4 – Applicant Bank was entitled to succession fees – The OTS amount was payable either by respondents No. 3 & 4 or by applicant Bank on behalf of respondents No. 3 & 4 and NPA account was to be closed – Position of applicant Bank was of agent – Applicant Bank did not secure the interest of respondents No. 3 & 4 even after changing succession fees and got the entire debts transferred to applicant Bank – It can not be said that no offence is made out.** (Para 25)

ख. दण्ड संहिता (1860 का 45), धारा 420 – छल – व्यतिक्रमी प्रत्यर्थी क्रं. 3 व 4 की ओर से आवेदक बैंक पूर्ण समझौता करने के लिये ऋणदाता बैंक के साथ बातचीत आरंभ करने वाली थी – आवेदक बैंक उत्तराधिकार शुल्क की हकदार

थी – ओटीएस रकम या तो प्रत्यर्थी क्रं. 3 व 4 द्वारा अथवा प्रत्यर्थी क्रं. 3 व 4 की ओर से आवेदक बैंक द्वारा देय थी और एनपीए खाता बंद किया जाना था – आवेदक बैंक की स्थिति अभिकर्ता की थी – उत्तराधिकार शुल्क बदलने के पश्चात भी आवेदक बैंक ने प्रत्यर्थी क्रं. 3 व 4 का ब्याज प्रतिभूत नहीं किया और सम्पूर्ण ऋण आवेदक बैंक को अंतरित किया गया – यह नहीं कहा जा सकता कि कोई अपराध गठित नहीं होता।

C. ***Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Sections 2(i)(za), 3,29 – Registration and Penalty*** – **Purchase of financial assets by one financial Company from another financial Company is a process of Securitization – If purchasing Company is not registered with respondent, then such act is punishable – As applicant Bank is not registered with RBI therefore purchase of financial assests from lending Bank is punishable under section 29 of Act.** (Para 26)

ग. *वित्तीय अस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धाराएँ 2(i)(za), 3, 29 – पंजीयन और शास्ति* – एक वित्तीय कम्पनी द्वारा दूसरी वित्तीय कम्पनी से वित्तीय आस्तियों का क्रय प्रतिभूतिकरण की प्रक्रिया है – यदि क्रयकर्ता कम्पनी प्रत्यर्थी के साथ पंजीकृत नहीं तब ऐसा कृत्य दण्डनीय है – चूंकि आवेदक बैंक आरबीआई के साथ पंजीकृत नहीं है इसलिए ऋणदाता बैंक से वित्तीय अस्तियों का क्रय अधिनियम की धारा 29 के अंतर्गत दण्डनीय है।

D. ***Criminal Procedure Code, 1973 (2 of 1974), Section 154 – F.I.R.*** – **If any specific offence is made out from the documents annexed with F.I.R., then still Court can see that whether any prima facie offence is made out or not, although there may not be specified pleadings in that regards.** (Para 27)

घ. *दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना रिपोर्ट* – यदि प्रथम सूचना रिपोर्ट के साथ संलग्न दस्तावेजों से कोई विनिर्दिष्ट अपराध गठित होता है तब भी न्यायालय यह देख सकता है कि क्या प्रथम दृष्ट्या अपराध गठित होता है अथवा नहीं यद्यपि, इस संबंध में कोई विनिर्दिष्ट अभिवाक् न हो।

E. ***Penal Code (45 of 1860), Section 420 – Cheating*** – **Post dated cheques were given for periodical repayment – It is expected from borrower that he will keep amount of installments available in Bank – Applicant instead of submitting post dated cheques periodicaly, retained the same and presented the bundle of post dated cheques in**

one day – Borrower is not expected to have huge amount in his account which is 5-10 times larger than his installments – Such act of applicant Bank was to create a situation where a borrower becomes a defaulter and thereby his assets can be auctioned – It can not be said that no prima facie offence is made out. (Para 28)

ङ. *दण्ड संहिता (1860 का 45), धारा 420 – छल* – (नियमित) सामयिक पुनर्भुगतान हेतु उत्तरतारीख चेक दिये गये थे – ऋणी से अपेक्षित है कि वह बैंक में किश्तों की रकम उपलब्ध रखे – आवेदक ने उत्तरतारीख चेक नियमित रुप से पेश करने की बजाये, रखे रहा और उत्तरतारीख चेक का बंडल एक ही दिन प्रस्तुत किया – ऋणी को अपनी किश्तों से 5–10 गुना से अधिक की बड़ी रकम अपने खाते में रखना अपेक्षित नहीं – आवेदक बैंक की ऐसी कार्यवाही ऐसी स्थिति निर्मित करती जहां ऋणी व्यतिक्रमी हो जाता है और इससे उसकी अस्तियों की नीलामी की जा सकती है – यह नहीं कहा जा सकता कि प्रथम दृष्ट्या कोई अपराध गठित नहीं होता।

F. Companies Act (1 of 1956), Sections 291, 292 – Vicarious liability of Directors & Mangers – **In view of complexity of facts it is not possible for complainant to know the role of each Director and Manager – As investigation is in progress, then the Director or Manager can prove his innocence before the Police.** (Para 32)

च. *कम्पनी अधिनियम (1956 का 1), धाराएँ 291, 292 – निदेशकों एवं प्रबंधकों का प्रतिनिधिक दायित्व* – तथ्यों की जटिलता को दृष्टिगत रखते हुए शिकायतकर्ता के लिये यह संभव नहीं कि उसे प्रत्येक निदेशक एवं प्रबंधक के कार्य की जानकारी हो – चूंकि जांच चल रही है, तब निदेशक या प्रबंधक अपनी निर्दोशिता पुलिस के समक्ष साबित कर सकते हैं।

Cases referred :

AIR 1992 SC 604, (1982) 1 SCC 561, (2010) 10 SCC 798, AIR 2011 SC 2258, (2009) 3 SCC 375, (2000) 2 SCC 636, (2002) 1 SCC 2411, (2009) 8 SCC 751, (2009) 9 SCC 682, (2008) 5 SCC 248, (2010) 10 SCC 1, 1987 (SUPP) SCC 146, (2007) 12 SCC 1, (2008) 5 SCC 662, (2008) 5 SCC 668, (2011) 1 SCC 176, (2010) 11 SCC 203, (2010) 11 SCC 469, (2009) 6 SCC 475, (2010) 10 SCC 479, (2005) 8 SCC 89, (2009) 1 SCC 516, (2010) 8 SCC 206, (2008) 13 SCC 678, (2010) 7 SCC 667, 2005(4) MPLJ 251, AIR 1974 SC 1146, (1994) 2 SCC 277, 2006 SC 2872(1), (1998) 8 SCC 630, AIR 2011 SC 20, (2004) 1 SCC 691, (1996) 1 SCC 542, (1995) 6 SCC 194, AIR 1992 SC 1930, AIR 1963 SC 447, (1994) (2) SCC 277, (1986)(3) SCC 156, AIR 2011 SC 20, 2011(2) SCALE 278.

Anand Mohan Mathur with *Sanjay Agrawal, Abhinav Dhanodkar & Vikram Trivedi* for the applicant.

R.D. Jain, A.G. with *Rohani Prasad Tiwari*, G.A. for the non-applicants No. 1 & 2/State.

S.C. Datt, Kishore Shrivastava with *Kunal Thakre*, Non-applicants No. 3 & 4.

ORDER

N.K. GUPTA, J. : This order shall govern the disposal of above mentioned three petitions, as common question of fact and law is involved in these petitions.

2. The applicants being a Banking-Company and its office bearers including various Vice Presidents, Directors, Managers and Shri Kawin B. Ajit, Head Resolution of Phoenix ARC Pvt. Ltd. have preferred the above mentioned petitions under Section 482 of Cr.P.C. to quash the FIR for the Crime No.58/2011 lodged at Police Station Goharganj (applicants have wrongly mentioned in the cause title, actual Police Station is Umraoganj) District Raisen due to order passed by the Chief Judicial Magistrate, Raisen under Section 156(3) of Cr.P.C.

3. The facts of the case in a nutshell are that the respondents No.3 and 4 are the companies having their business of manufacture of liquor etc. (hereinafter referred to as **"borrower-companies"** On 25.10.2005 applicant Kotak Mahindra Bank Ltd. (hereinafter referred to as **"applicant bank"**) gave an offer to the respondents No.3 and 4 for resolution of their debts with their lenders. Thereafter agreements took place between the applicant bank and the respondents No.3 and 4 that the applicant bank shall participate in negotiations with Bank of India (for short **"BOI"**), Bank of Baroda (for short **"BOB"**) and other banks to resort to one time settlement (for short **"OTS"**) for their outstanding loans which were non-performing assets (for short **"NPA"**) for concerned banks. The applicant bank shall get success fees for such negotiations. A term sheet was also executed between the parties. It was agreed that the applicant bank shall also provide the working capital to the respondents No.3 and 4 and for such financial assistance 14% interest shall be charged from the borrower-companies. Thereafter negotiations took place between the applicant bank and other banks like BOI and BOB. The applicant bank assigned agreement from BOI and BOB in the year 2007 and

thereafter again a fresh agreement with indicative term sheet took place between the parties. The respondents No.3 and 4 have given some post dated cheques for payment of entire loan in installments. After sometime, it was found that some cheques were dishonored and applicant bank could not get the installment from the respondents No.3 and 4. Therefore, in October 2009 a notice of winding up was given to the respondents No.3 and 4. Thereafter the respondents No.3 and 4 submitted an FIR before SHO Police Station Umraoganj, District Raisen for investigation of offence punishable under Sections 409, 420 and 120-B of IPC against the applicant bank and its eleven Directors and eight various Managers. It was mentioned in the FIR that the applicant Shri K.D.Ajit was one of the Managers in the applicant bank. The police obtained a reply from Manilal Kher, Advocate for the applicant bank. Thereafter the respondents No.3 and 4 have filed a complaint before the Chief Judicial Magistrate, Raisen on 5.10.2010 for taking cognizance of offences punishable under Sections 406, 420 and 120-B of IPC committed by the various applicants. The Chief Judicial Magistrate, Raisen forwarded the complaint to the concerned Police Station on the same date for enquiry and thereafter the Chief Judicial Magistrate, Raisen waited for the report to be received from the police. On 1.3.2011 SHO, Police Station Umraoganj District Raisen informed that the applicants were not cooperating in investigation, and therefore it was directed that the complaint that was already sent to the police under Section 156(3) of Cr.P.C. be registered as an FIR and final report as per the provisions of Chapter XII of Cr.P.C. may be submitted including a report under Section 173 of Cr.P.C.

4. Heard the learned counsel for the parties at length. Learned counsel for the parties have addressed for more than twelve hours in three days. Out of that, learned counsel for the applicants addressed for more than nine hours.

5. Learned senior counsel and other counsel appearing on behalf of the applicants have submitted that in the complaint filed by the respondents No.3 and 4, there was no pleading about any crime done either by the applicant bank or other applicants, and therefore the FIR registered by the Police Station Umraoganj District Raisen may be quashed on this count only. In support of this contention, learned counsel for the applicants have placed their reliance on the following judgments and orders of the Hon'ble Apex Court:-

(a) *State of Haryana and others Vs. Ch. Bhajan Lal,* (AIR 1992 SC 604).

(b) *State of West Bengal Vs. Swapan Kumar Guha,* [(1982) 1 SCC 561].

(c) *Subrata Das Vs.State of Jharkhand and another,* [(2010) 10 SCC 798].

(e) *Joseph Salvaraj Vs. State of Gujarat & others,* (AIR 2011 SC 2258).

(f) *Sharon Michael & others Vs. State of Tamil Nadu,* [(2009) 3 SCC 375].

It is also submitted that if prima facie case is not made out from the complaint or FIR, then it is an abuse of process of law and such abuse cannot be permitted. Learned counsel for the applicants have placed their reliance on the following judgments and orders of the Hon'ble Apex Court in this context:-

(a) *G. Sagar Suri & another Vs. State of UP,* [(2000) 2 SCC 636].

(b) *S.W.Palanitkar & others Vs. State of Bihar,* [(2002) 1 SCC 241].

(c) *Mohammed Ibrahim & others Vs. State of Bihar,* [(2009) 8 SCC 751].

(d) *M.N.Ojha & others Vs. Alok Kumar Srivastav,* [(2009) 9 SCC 682].

(e) *Anjani Kumar Vs. State of Bihar & another,* [(2008) 5 SCC 248].

It is also submitted that the entire transaction took place with the consent of respondents No.3 and 4. It was commercial hence a civil transaction. Assets could be transferred from one bank to another bank. On this count, learned counsel for the applicants have placed their reliance on the judgment of the Hon'ble Apex Court in the case of *"ICICI Bank Ltd. Vs. Official Liquidation of APS Star Industries Ltd." [(2010) 10 SCC 1]*. It is also submitted that when notices of dissolution were received by the respondents No.3 and 4, then FIR was sent only to counter blast. Reliance is placed on the following judgments and orders of the Hon'ble Apex Court:-

(a) *Sardool Singh & another Vs. Nasib Kaur (Smt.),* [1987 (Supp) SCC 146].

(b) *Inder Mohan Goswami Vs. State of Uttraranchal,* [(2007) 12 SCC 1].

(c) *Anjani Kumar's case (supra).*

(d) *M.N.Ojha's case* (supra).

Learned counsel for the applicants have submitted that the applicant bank resolved the financial problems of the respondents, but the respondents did not bother for regular payment. When post dated cheques issued by the respondents No.3 and 4 were dishonoured, then to recover the money it was for the applicant bank to send such dissolution notices. Actually a civil suit is pending before the Debts Recovery Tribunal, and therefore there is no need to the applicants to do any other activity. The entire transaction is a civil transaction. The respondents No.3 and 4 moved a petition before the Delhi High Court, thereafter before the Bombay High Court and withdrew both the petitions one by one. The respondents No.3 and 4 moved a civil suit of declaration before the District Court, Bhopal, but it was dismissed at preliminary stage, and therefore the respondents No.3 and 4 filed an FIR and a criminal complaint before the Chief Judicial Magistrate, Raisen only to create pressure upon the applicants. At present a loan of more than Rs.60 crores is pending against the respondents No.3 and 4 and they are not paying the same, therefore the applicants are the victims of cheating done by the respondents

No.3 and 4. Hence, it is prayed that the FIR lodged before the Police Station concerned may be quashed.

6. Learned counsel for the applicants have further submitted that the respondents made all the Directors and so many Managers to be party in the case, whereas entire Directors may not be made party. It is the duty of the Magistrate to scrutinize the matter carefully and to take cognizance against the persons, who were responsible for the alleged crime. If no allegation is made in a complaint about the overt-act of a particular accused, then he could not be made accused in the case. In this context, reliance is placed on the following judgments and orders of the Hon'ble Apex Court and so many cases:-

(a) *S.K.Alagh Vs. State of Uttar Pradesh & others,* [(2008) 5 SCC 662].

(b) *Maksud Saiyed Vs. State of Gujrat & others,* [(2008) 5 SCC 668].

(c) *Pepsico India Holdings Private Limited Vs. Food Inspector & another,* [(2011) 1 SCC 176].

(d) *Central Bank of India Vs. Asian Global Limited & others,* [(2010) 11 SCC 203].

(e) *State of NCT of Delhi Vs. Rajiv Khurana,* [(2010) 11 SCC 469].

(f) *Keki Hormusji Gharda Vs. Mehervan Rustom Irani*, [(2009) 6 SCC 475].

(g) *MSED Company Ltd. Vs. Satar Switchgear Ltd.*, [(2010) 10 SCC 479].

(h) *SMS Pharmaceuticals Ltd. Vs. Neeta Bhalla,* [(2005) 8 SCC 89].

Therefore, it is prayed that all the Directors holding the post of Vice

President etc. may be absolved from the FIR and secondly the FIR may be quashed against those Directors and Managers of the applicant bank.

7. On the other hand, Shri R.D.Jain, learned Advocate General has submitted that at present an FIR is registered as per the order given by the Chief Judicial Magistrate, Raisen and collection of evidence is not complete, therefore at this pre-mature stage, the FIR may not be quashed. All the defence documents cannot be seen at this stage. In support of his contention, learned Advocate General has placed his reliance on the judgment of the Hon'ble Apex Court in the case of *"R. Kalyani Vs. Janak C. Mehta & others"*, [2009(1) SCC 516]. Learned Advocate General has also discussed the scope of Section 482 of Cr.P.C. and referred the judgment of Hon'ble Apex Court in the case of *"Srinivas Gundluri and others Vs. SEPCO Electric Power Construction Corporation and others"* [(2010) 8 SCC 206] and in the case of *"Subrata Das (supra)*.

8. It is also urged that disputed questions cannot be decided at this stage. A criminal proceeding can be prosecuted simultaneously with civil proceeding when some kind of criminal activity is in issue. At present facts are incomplete and hazy. In this regard, reliance is placed in the case of *"Suryalakshmi Cotton Mills Limited Vs. Rajvir Industries Limited & others"*, [(2008) 13 SCC 678] and in the case of *"Preeti Gupta and another Vs. State of Jharkhand"*, [2010(7) SCC 667]. It is further submitted that some misleading statements were given from the side of the applicants. Inducement was made to settle the property, and therefore offence of cheating is made out. It is also submitted that the FIR was a complaint with annexures, and therefore by mere reading of complaint or FIR, it cannot be concluded that no offence is made out. Learned Advocate General has pointed out the various documents of the case diary to show about project blue and the applicant bank purchased the rights relating to NPA from BOI and BOB and it was a matter of cheating.

9. It is also submitted by Shri R.D.Jain, learned Advocate General that vicarious liability will be settled according to the overt-act of various office bearers of the Company. In this context, reliance is placed on the judgment of the Hon'ble Apex Court in the case of *"Set Discovery Pvt. Ltd. and others Vs. Shashikant"* [2005(4) MPLJ 251]. It is further submitted that the applicant

bank was charging interest of 24%, whereas interest of 14% was agreed between the parties, and therefore it is a clear cut case of cheating. Legitimate prosecution may not be quashed, and therefore it is submitted that the investigation may be allowed to be completed and no interference be permitted in the investigation.

10. In rebuttal, learned senior counsel and other counsel appearing on behalf of the respondents No.3 and 4 have submitted that initially an agreement took place for negotiation with the various banks for OTS and for providing working capital and it was agreed that 14% interest will be charged. Therefore, it was for the applicant bank to settle the NPA of various banks. Success fees was to be paid to the applicant bank from the side of the borrower-companies, but the applicant bank after getting advantage of NPA, without consent of the borrower-companies entered into assignment deeds with various banks, and therefore since the agreement was for the redressal of heavy burden of interest and loan, but by assignment, applicant bank being an agent of borrower did not look after the interest of the borrowers, on the contrary new contracts were created in the interest of the applicant bank, therefore interest of the borrower companies was forfeited. This was a cheating done by the applicant bank and its office bearers.

11. Learned counsel for the respondents No.3 and 4 also challenged that various documents filed by the applicant bank cannot be looked into, because they are not proved beyond any doubt. Further agreements took place because of misrepresentation. The respondents No.3 and 4 desired to get rid of those loans having penal interest and by assignment deeds, the respondents No.3 and 4 were burdened to pay the interest @ 30%. It is not only a cheating, but criminal breach of trust done by the applicant bank and its office bearers. No consent of the respondents No.3 and 4 was obtained for execution of the assignment deeds by the applicant bank with BOB and BOI. It is further submitted that the applicant bank took some post dated cheques from the respondents No.3 and 4, but after lapse of some period, those cheques were not submitted to the bank for their encashment. Thereafter so many cheques were submitted to the bank in a single day so that respondents No.3 and 4 could not pay the same in a day, and therefore default interest may be raised and harsh type of recovery proceedings could be initiated. Such type of activity

done by the office bearers of the applicant bank amounts to cheating.

12. Similarly, attention of this Court was invited to the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity **"Special Act, 2002"**). It is submitted that applicant bank worked as securitization company as defined in Section 2(1)(za) of the Special Act, 2002 by which a registration was required to the company under Section 3 of the Special Act, 2002, but no such registration was obtained by the applicant bank, and therefore applicant bank has committed an offence under Section 29 of the Special Act, 2002 and any Judicial Magistrate First Class is competent to take cognizance for that offence as per the provisions of Section 30 of that Act. The respondents No.3 and 4 had every right to move various proceedings before the various authorities. Initially a petition was moved before the Delhi High Court and thereafter it was taken to the Bombay High Court, but it was withdrawn, because a complaint was sent to the Reserve Bank of India (for short ***"RBI"***), and therefore petitions filed before the Delhi High Court and Bombay High Court were not dismissed on merits. Petition before the RBI is still pending and no order has been passed on that petition. Letters were sent by the applicant bank through its office bearers for dissolution of borrower companies. The respondents No.3 and 4 tried to resolve the situation, but every time the office bearers of applicant bank directed to present a proposal according to their wishes with the condition that FIR should be withdrawn. But after submission of that offer, no such agreement took place between the parties and office bearers of applicant bank have been directing to raise rate of interest again and again. Rate of interest was raised from 14% to 15%, 24%, 30% and thereafter 33.5%. Under such circumstances, where the respondents No.3 and 4 were under pressure of office bearers of applicant bank, and therefore when pressure reached to peak, then they could not give a proposal for 33.5% interest, because payment of such interest was impossible. Applicant bank did not give any NOC to take further loan from other financial institutions so that loan amount of the applicant bank could be repaid. In such circumstances, offence done by the applicant bank is very well established.

13. It is also submitted that according to the provisions of Section 291

and 292 of the Companies Act, any company is to be run by the Board of Directors and when the huge money is to be taken and to be recovered from any borrower, then it is for all the Directors to participate in the meeting of Board of Directors to take their decisions. Similarly, decision was to be taken by the Board of Directors of applicant bank for purchase of various debts from BOI and BOB, therefore it is for the Directors to prove that they were not involved in the transaction and no offence has been done by them. If any internal fabrication was there in applicant bank, then it should be shown by the concerned Directors or Managers. Since investigation is pending before the police, then police may delete name of such Directors or Managers, who are not involved in the crime, and therefore name of various applicants cannot be removed from the FIR at this stage as requested by the applicants.

14. It is further submitted that it was not a case of counter blasts, but offence was committed by the applicant bank and its office bearers. At present detailed scrutiny of documents presented by the parties before the Court is not at all required. No appreciation of evidence is required; no final conclusion is required to be drawn. At present it is to be seen that whether any crime is constituted against the applicants by the allegations made by the respondents No.3 and 4 in their complaint. In this context, learned senior advocates for the respondents No.3 and 4 have placed their reliance on the following judgments and orders of the Hon'ble Apex Court:-

(a) *Jahan Singh Vs. Delhi Administration,* (AIR 1974 SC 1146).

(b) *Union of India & others Vs. B.R.Bajaj & others,* [(1994) 2 SCC 277].

(c) *CBI Vs. Ravishankar Shrivastava,* [AIR 2006 SC 2872(1)].

(d) *State of MP Vs. Harsh Gupta,* [(1998) 8 SCC 630)]

(e) *Iridium India Telecom Ltd. Vs. Motorola Incorporated & others,* (AIR 2011 SC 20).

(f) *State of MP Vs. Awadh Kishore Gupta & others,* [(2004) 1 SCC 691].

(g) *State of Maharashtra Vs. Ishwar Piraji Kalpatri and others,* [(1996) 1 SCC 542].

(h) *Deol Bajaj Vs. KPS Gill,* [(1995) 6 SCC 194].

It is also submitted that in a cognizable offence, power of investigation given to the police is an absolute power and no interference can be made in such investigation. Learned senior advocates for respondents No.3 and 4 have placed their reliance in this context on the following judgments and orders of the Hon'ble Apex Court:-

(a) *M/s Jayant Vitamins Ltd. Vs. Chaitanyakumar & another,* (AIR 1992 SC 1930).

(b) *State of W.B. Vs. S.N. Basak,* (AIR 1963 SC 447).

Under these circumstances, it is prayed that the applications filed under Section 482 of Cr.P.C by the applicants may be dismissed.

15. In the light of dictums laid by Hon'ble Apex Court in aforesaid judgments and orders, after considering the submissions made by learned counsel for the parties, following points are to be considered in the present case. *Firstly*, what are the documents that can be considered at this stage? *Secondly*, whether there is any ambiguity in registration of FIR? *Thirdly*, whether the complaint filed by the respondents No.3 and 4 is a counter blast or it indicates any crime committed by the applicant bank? *Fourthly*, that whether all the directors and managers of the applicant bank could not be made party in the case? And *Lastly*, as to whether the FIR may be quashed against the applicant bank or its directors and managers?

16. It is a general rule that if it is to be considered that any crime is committed then the prosecution evidence is the preliminary evidence which can be looked into. However, in exceptional cases, if defence evidence is so

cognate as to indicate that if documents adduced by the defence are considered then, there should be a clear picture that no case is made out from the FIR. Under such circumstances, it would be necessary that the documents produced by the defence should be unimpeachable, acceptable and reliable. In support of this view, the ratio laid by Hon'ble the Apex Court in case of *"M/s Jayant Vitamins Ltd. (supra)* may be perused. Learned counsel for the respondents No.3 and 4 has also invited the attention of this Court to the judgment of Hon'ble the Apex Court in the case of *"Union of India & others Vs.B.R.Bajaj & Others"* [(1994) (2) SCC 277], in which it is laid that records submitted by the applicants may be seen up to the extent that whether any case is made out from the FIR or not. At this point Court should not adopt the approach to further investigate the matter to conclude as to whether any offence as alleged in the FIR is made out or not. Under such circumstances, documents submitted by the applicants may be considered up to the extent where they are unimpeachable and relevant with the FIR. Extra defence cannot be seen because at present this Court is not expected to give a final conclusion in the case.

17. In the present case, the respondents No.3 and 4 sent an FIR to SHO, Police Station Umraoganj, District Raisen on 7.4.2010 but, no case was registered by the police. The police treated that FIR to be a complaint to the police and therefore, some enquiry was initiated. However, a complaint was filed by the respondents No.3 and 4 before Chief Judicial Magistrate, Raisen on 5.10.2010 and on the same very day, learned Chief Judicial Magistrate sent it to SHO, Police Station Umraoganj to submit an enquiry report. If order dated 5.10.2010 passed by learned CJM, Raisen is perused then, it would be clear that learned CJM did not take any cognizance in the case under section 200 or 204 of Cr.P.C. but, copy of the complaint was sent to the police for enquiry. Thereafter, learned CJM fixed various dates for receiving the report. Vide order dated 1.3.2011, learned CJM directed that investigation be made under section 156 (3) of Cr.P.C. and a report be submitted after due investigation according to the provisions of chapter XII of the Cr.P.C. including a report under Section 173 of Cr.P.C. Shri Mathur learned Senior Advocate for the applicant bank has accepted that the first order dated 5.10.2010 was the order passed under section 156 (3) of Cr.P.C. It appears that police

could not understand the directions given by the learned CJM vide order dated 5.10.2010 and therefore, order dated 1.3.2011 passed by the CJM cannot be accepted to be a fresh order under section 156 (3) of Cr.P.C. but, it was a clarification to the original order and therefore, FIR registered by the police in compliance to the order of the Chief Judicial Magistrate, Raisen was correct. No ambiguity is visible in registration of the FIR.

18. In the present case, FIR is registered on the basis of the complaint submitted before the CJM, Raisen and therefore, it should be seen that by pleadings of that complaint, whether any offence is made out against the applicants. Learned counsel for the applicants have read various paras of the complaint to show that by entire pleadings of the complaint, though allegations are made but no specific incident is pleaded to show that alleged offences are made out. Hence, no offence is made out from the complaint filed by the complainants. Learned counsel for the respondents No.3 and 4 has submitted that initially when an FIR was lodged by the respondents No.3 and 4 before concerned Police Station then, some documents were annexed with the FIR. Similarly, some documents were annexed with the complaint also and such documents were the part and parcel of the FIR and the complaint respectively. Therefore, the FIR which was registered on the basis of the complaint may indicate allegations in the pleadings of the complaint but, the document attached to the complaint were the part of that complaint and therefore, documents were the part of the FIR, therefore inference should be drawn from the complaint/FIR inclusive of the documents annexed with it. Contention of learned Senior Advocate for the respondents No.3 and 4 is acceptable because if some documents were referred in the FIR and annexed with the FIR then, certainly pleadings shall be read with reference to documents and therefore, for consideration of that FIR, such documents are required to be considered with it.

19. Learned counsel for the respondents No.3 and 4 have alleged about the crime committed by the applicant bank and remaining applicants in three different parts. Firstly, that being an agent of respondents No.3 and 4, the applicant bank was required to get OTS negotiations with BOB and BOI to provide the advantage of NPA to the borrower-companies and it was agreed that if applicant bank provides working capital borrower-companies, then for

such amount rate of interest would be 14% and thereby it was understood that after completion of the OTS negotiations the applicant bank shall get success fees whereas borrower-companies shall get rid of those debts (NPA) by the payment of settled OTS amount and a fresh transaction of payment of loan will begin with the applicant bank with 14% rate of interest. But after executing such negotiations, the applicant bank purchased various debts from BOI and BOB in favour of the applicant bank and counted penal interest on the amount which was agreed in OTS. That amounts to be a cheating. Secondly, that purchase of assets relating to the respondents No.3 and 4 from various banks was an act of securitization and therefore, such type of act could not be done unless concerned bank or company is registered with the RBI being a securitization company under Section 3 of the Special Act, 2002 and therefore, by flouting the provisions of that act, the applicant bank has committed an offence under section 29 of that Act. Thirdly, the applicant bank took so many post dated cheques for periodical installments from the respondents No.3 and 4 and for few months, no cheque was produced to the bank for its encashment and thereafter, bundle of cheques were produced on a single date for encashment. Such type of act done by the office bearers of applicant bank also amounts to be a cheating and therefore, *prima facie* by pleadings of the respondents No.3 and 4 various offences alleged against the applicant bank are made out.

20. As far as the first allegation is concerned, it would be clear from the document submitted by the applicants that initially a term-sheet of agreement was recorded. In that term-sheet applicant bank was entitled to get success fee, which was dependent upon the success of the negotiations. Thereafter, the applicant bank entered into an assignment agreement with BOB on 9.3.2007 and also with BOI. Thereafter, the agreements with borrower-companies were again modified. Such documents are submitted by the applicants in the case. Learned Senior Advocate for the applicant bank has submitted that after getting assignment deeds from various banks, the applicant bank purchased the previous debts of the respondents No.3 and 4 and therefore, for repayment of such debts a fresh agreement in term-sheet was directed and in continuation with that term-sheet agreement when respondents No.3 and 4 stopped depositing the amount then, notices for recall of financial

facilities granted to the respondents No.3 and 4 were given on 4.5.2009. Thereafter winding up notices were given on 27.10.2009. Each agreement was done by the respondents No.3 and 4 with their free will and therefore, they could not challenge the subsequent term-sheet agreements now. The applicant bank has also filed a civil suit for recovery of amount before Debt Recovery Tribunal.

21. It is also urged that the respondents No.3 and 4 went to various forums against those transactions but, basically it is a transaction of civil nature and therefore, FIR and complaint were the counter blast to the notice for recall of financial facilities given by the applicant bank.

22. Learned Senior Advocate for the respondents No.3 and 4 has invited the attention of this Court to the judgment passed by Hon'ble the Apex Court in the case of *"Central inland water transport corporation Ltd. And others Vs. Barjonath Ganguly and others" & one more case* [(1986) (3) SCC 156] and to show that if any agreement took place due to undue influence then, it cannot be executed. It is further submitted that since the applicant bank has purchased the previous debts of the borrower-companies therefore, they were under undue pressure and that undue influence has been used by the applicant bank. Therefore, subsequent agreements cannot be enforced and looking to the original term-sheet of agreement the applicant bank could not dissolve the borrower-companies. Under such circumstances, by purchasing of assets the applicant bank has committed cheating with the respondent company.

23. In this connection, at present the entire evidence laid by the applicant bank cannot be used as final evidence. In the light of ratio laid by Hon'ble the Apex Court in various cases of *"B.Sudershan Reddy Vs. Surinder Singh Nijjar"* [AIR (2011) SC 20], *"Jehan Singh (supra), B.R.Bajaj (supra), Harsh Gupta (supra), Ravi Shankar Srivastava (supra), Awadh Kishore Gupta (supra) and Ishwar Piraji Kalpatri (supra)*, at present, it is not to be decided that whether by such evidence, conviction may be directed against the applicants or not. No final discussion is required at this stage. It is to be seen that if allegations are taken as such then, whether any prima facie offence is made out against the applicants or not. In this context, para 15 (1)

of the judgment passed by Hon'ble the Apex Court in case of *R.Kalyani (supra)* may be perused which reads as under :-

> *"15(1). The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirely, disclosed no cognizable offence."*

24. It would be clear from the allegations that initially the applicant bank proposed to the borrower-companies about the scheme by which they could get rid of those NPA and the applicant bank had proposed to charge succession fee for negotiations with various banks relating to OTS. Therefore, position of the applicant bank was of an agent of the borrower-companies and thereafter, the negotiations took place. If the applicant bank was an agent of respondents No.3 and 4 therefore, it was for the agent to protect the rights of the respondent-companies. OTS took place with BOB and BOI to close their loan accounts. Such negotiations took place and settlement was done and therefore, BOB and BOI had not exercised their rights to auction the assets and by securitization of the borrower-companies. If payment after one time settlement was to be made, then the intention of the parties at the time of first agreement was that OTS may take place and the amount of OTS might be paid by the new loan transaction between the applicant bank and the borrower-companies in which 14% interest was to be paid. It is argued by learned Senior Advocates for the applicant bank that one financial bank could purchase the assets of the other company and such type of transaction was no where barred. Under such circumstance, for such transaction consent of the borrower-companies was not required. He relied upon the judgment of Hon'ble the Apex Court in the case of *"ICICI bank Vs. Official liquidation" (supra)*, in which it is held that such type of assignment of debts will not be contrary to the public policy and such type of assignment is a routine phenomenon between two banks.

25. It is well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The practice of assignment or 'selling' of debts

to debt collecting agencies and credit factors could hardly be carried out if the law was otherwise but, factual position in the present case is different. Sale of the debt was not initiated by either BOI or BOB. There was a specific agreement between the applicant bank and borrower-companies that negotiations relating to OTS will be done by the applicant bank being an agent of borrower companies and therefore, after settlement of OTS amount, which was payable to BOI and BOB was to be paid by the borrower-companies or applicant bank on behalf of the borrower-companies and the loan account which was NPA in eye of BOB and BOI was to be closed and a sum which was paid by the applicant bank on behalf of borrowers could start a new transaction between the applicant bank and respondents No.3 and 4 and therefore, the respondents No.3 and 4 were liable to pay the simple interest of 14% on the amount, which was settled in negotiations in OTS but, the applicant bank did not start the new transaction with the borrower-companies. Being an agent of borrower-companies, the applicant bank did not secure the interest of the borrowers but, on the contrary the applicant bank itself entered in separate agreements of the assignment with other banks and therefore, it is mentioned in the para 5.4 of the plaint filed before the DRT by the applicant bank that it was standing in the shoes of BOI and BOB, whereas it was in the interest of borrower-companies to close those accounts, after negotiations of OTS, by payment of remaining amount by one time payment and thereafter new transaction could start. Under such circumstances, by not securing the interest of the borrowers where succession fees was charged by the applicant bank which was relating to the negotiations of OTS and got the entire debts transferred in the applicant bank. Prima facie it cannot be said that conduct of the applicant bank was bonafide. It may amount to cheating. At this stage, if averments of the entire complaint with its documents, relating to the first allegation are perused, then it cannot be said that no offence is made out against the applicant bank.

26. Learned counsel for the respondents No.3 & 4 has submitted that the applicant bank has claimed to be a secure creditor as the applicant bank has stepped in the shoes of BOB and BOI. It was quoted in para 5.4 of plaint filed by the applicant bank before the Debt Recovery Tribunal but the assets of a bank relating to the borrower-companies could be purchased within the limits of the provision enumerated in the Special Act 2002. In Section 2(1)(z)

of the Special Act; the definition of word "securitization" is given and in sub-section (za) the definition of "securitization company" is given. Looking to the those definitions; it would be clear that the financial assets are to be purchased from one financial company by another one then it is a process of securitization and, therefore, purchase of assets from BOI & BOB amounts to be a process of securitization but according to the Section 3 of the Special Act 2002, for such activities the concerned company should be a registered company with RBI and if it is not registered then it is a violation of the provisions of Section 3 of the Special Act, 2002 punishable under Section 29 of that Act. Under such circumstances, the purchase of the assets of borrower from BOI & BOB by the applicant bank is an offence under Section 29 of the Special Act 2002.

27. Learned senior counsel for the applicant bank has submitted that such crime was not mentioned in the FIR, which was lodged by way of the complaint and, therefore, it cannot be considered at present. However, such type of arguments cannot be accepted at this stage because at present, it is prayed by the applicant bank that FIR may be quashed because no offence is made out. For example, if a case is registered against the accused for the offence committed under Section 302 of IPC that he killed his own wife and FIR is registered but it was found afterwards that murder was caused because of non-fulfillment of dowry demand etc and, therefore, the offence under Section 304-B of IPC is also made out then FIR cannot be quashed only for offence punishable under Section 302 of IPC. In such a case, where the offence was not visible only by the FIR, but such offence is found constituted from the perusal of the documents annexed with the FIR, though no specific pleading has been made then still the Court can see that *prima facie* whether such offence is made out or not, specially when quashing of an FIR is under consideration. On bare perusal of the documents annexed with the FIR, it cannot be said that no offence under Section 29 of the Special Act, 2002 is made out against the applicant bank.

28. The third allegation lodged by learned counsel for the respondents No.3 & 4 is that post dated cheques were given to the applicant bank for

payment of installments and installments were periodical, therefore, it is expected from the borrower to keep the amount of installments available in his bank account in the period of installments. It is not expected from him that he will keep 4-5 times of amount in his account. Under such circumstances, if the applicant bank did not submit the post dated cheques in the period of installments then the respondents No.3 & 4 could not know that some post dated cheques were detained by the applicant bank and when a bundle of cheques was submitted in one day for their encashment, then the borrower is not expected to have the huge amount in his account, which was 5-10 times larger than his installments. If such type of activity has been done by the lender then certainly it was done to create a situation, where the borrower becomes a defaulter and thereby his assets can be auctioned. Looking to such type of activities, it cannot be said that the applicant bank has not done any cheating.

29. If allegations are considered as such then, it would be clear that post dated cheques were available with the applicant bank then there was no problem to the applicant bank to submit such cheques within the particular interval of the installments. The applicant bank has alleged in the notice of recall that the respondents No.3 & 4 did not pay the installments in time where the cheques were not produced in the bank after appropriate interval of installments, then it cannot be said that the borrower did not pay the installments in time and, if multiple cheques are deposited in the bank in one day for their payment then it is not expected from the borrowers to maintain the huge fund in their account for payment of such multiple cheques. These overt-acts could be done to show the borrower to be the defaulter whereas such type of discretion is not available to the lender, then *prima facie* it cannot be said that by such activities, no crime of cheating was done by the applicant bank with the borrowers.

30. Under such circumstances, where by perusal of the complaint, it cannot be said that by considering the FIR, no offence is constituted against the applicant bank. In this context the observations made by the Hon'ble Apex

Court in case of *"Harshendra Kumar D. Vs. Rebatilata Koley ETC"* [2011(2) SCALE 278] may be perused. The said judgment is submitted by learned senior counsel for the applicant bank and some portion of para 21 of the judgment may be read as under:-

> "It is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents, which are beyond suspicion or doubt placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial Court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage."

But no such factual position is visible in the present case. I have gone through the citations referred by the learned senior Advocate for the applicants, however the present case is distinguishable on the facts, therefore the law laid down, in the aforementioned cases cannot be applied to the facts of the present case.

31. On the contrary, the ratio laid down in case of *R. Kalyani (supra)* as mentioned in para 23 of this order is applied in the present case then certainly FIR, which was lodged at Police Station, Umraoganj against the applicant bank cannot be quashed.

32. As far as the vicarious liability of various office bearers of applicant bank is concerned, it is for the complainant to plead and establish the liability of various persons, who are the Directors and Managers of the applicant bank. But learned counsel for the respondents No.3 & 4 has invited attention of this Court to the provisions of Sections 291 & 292 of the Company Act that against the wishes of the borrower companies, their assets were purchased

from two different banks, then certainly for such a decision, a meeting of all members of the Board of Directors was required and, therefore, by their decisions, such type of assignment could take place. Under such circumstances, if any Director feels that he was not involved in the crime then he can prove his innocence before the concerned police because the matter is under investigation. Similarly, it is argued against various Managers that they participated in the crime. The respondents No.3 & 4 received some letters and documents from the applicant bank sent by some of the Directors and Managers, also various agreements took place between the applicant bank and the borrower-companies and some of the Directors and Managers executed those agreements. Their names are known to the complainants but, the complainants were not aware that out of all the Directors and Managers, who did not participate in the transaction. Under such circumstances, where so many acts have been done for the applicant bank ex-partly against the respondents No.3 & 4, then respondents are not in a position to know the role of each of the Managers in the transaction individually. In case of such activities, the provisions of Section 120-B of IPC may also be applied and, therefore, role of the accused persons will be ascertained during the investigation.

33. Learned senior counsel for the applicant bank has submitted that according to the ratio laid down in various judgments and orders of the Hon'ble Apex Court as cited by him, the overt acts of each and every accused persons is to be pleaded and ascertained. Such type of addition of the names of various Directors and Managers cannot be done in the FIR without any pleadings against them.

34. Looking to the complexity of the case, where *prima facie*, it is alleged in the FIR that the offence of cheating has been done by the applicant bank and the investigation is pending, and at present no sufficient documents are produced by the various applicant bank to show that they were not involved in these transactions. Under such circumstances, it is premature to say anything

about the conduct of the Directors and Managers, who are made party in the case. All the case laws cited by learned counsel for the applicants are binding to this Court but looking to the factual difference, they cannot be applied at present.

35. At present, this Court does not find any basis by which the FIR of cheating may be quashed against any of the applicants including applicant bank because their overt acts are yet to be ascertained during the investigation.

36. On the basis of aforesaid discussion, I am of the view that the applicants could not show that the FIR lodged against them does not constitute any offence against them and, therefore, the inherent powers under Section 482 of Cr.P.C. cannot be invoked at this preliminary stage. Under such circumstances, the FIR lodged by the respondents No.3 & 4 with the help of order of learned Chief Judicial Magistrate under Section 156(3) of Cr.P.C. cannot be quashed at this stage. Under such circumstances, the applications under Section 482 of Cr.P.C. filed by the various applicants and the applicant bank cannot be accepted. Consequently, all the three applications are hereby dismissed.

Application dismissed.