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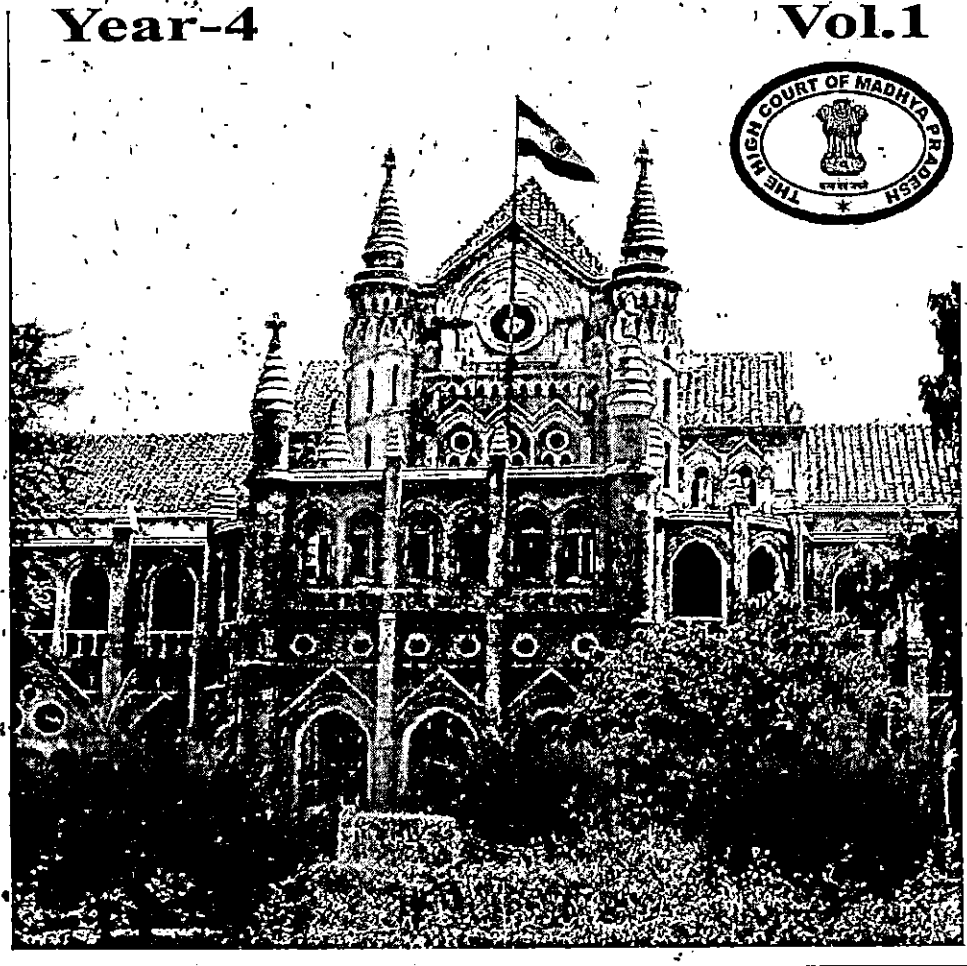

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नही कि दोषमुक्त अभियुक्त व्यक्तियों को पूर्व ज्ञान था कि 'A' अपनी पैंट में चाकू लिये था – इसके सिवाय 'A' द्वारा एकल वार किया गया था – यह धारणा करना कठिन है कि उसके सहयोगी मृतक को मारने के सामान्य आशय में भागी थे। (संतोष राय वि. म.प्र. राज्य) (DB)...*8

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Farewell

Justice I.S. Shrivastava

Born on December 16, 1949 at Bhind, in the family of renowned Advocates. After completing B.Sc. in the year 1971 and LL.B. in the year 1974 from Maharaja Jiwaji Rao Scindia College Bhind, practiced as an Advocate for three and half years. On August 14, 1978 joined Judicial Service as Civil Judge Class II. Promoted as Additional District Judge in the year 1991. Appointed as Registrar, M.P. State Administrative Tribunal (SAT), Jabalpur from April 1997 to September 2004. Was appointed as District and Sessions Judge in the year 2004. Prior to elevation, was working as District Judge (Inspection and Vigilance) Gwalior Zone.

Elevated as Judge of the Madhya Pradesh High Court on August 25, 2009 and demitted Office on 15-12-2011.

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

Hon'ble Shri Justice A.K. Shrivastava, bids farewell to the demitting Judge :-

I feel honour to preside over this farewell ovation being given to Hon'ble Shri Justice I.S. Shrivastava who is demitting the office today after rendering his valuable services to this temple of justice.

My Lord was born on 16th December, 1949 at Bhind in the family of renowned Advocates. His grand father Late Munshi Hubblalji who was being denoted and whose *Takhallus* was *"Raad"* was a very renowned Advocate. His revered father late Shri Harishchandra Shrivastava was a very famous Government Pleader and popular Advocate of District Bar Association Bhind and similarly his uncle Late Shri Krishna Chandji was the stalwart of Bhind Bar Association.

After completing his B.Sc. in the year 1971 and LL.B. in the year 1974 from Maharaja Jiwaji Rao Scindia College Bhind, His Lordship practiced for near about 3½ years at Bhind. On 14th August, 1978 he joined judicial services as Civil Judge Class - II and on account of his hard work, he was promoted to the post of C.J.M., Additional District and Sessions Judge in the year 1991 and ultimately District Judge in September, 2004. My Lord was also sent on deputation on the post of Registrar, M.P. Administrative Tribunal Principal Seat at Jabalpur from April, 1997 to September, 2004. Soon before his elevation My Lord was serving on the post of District Judge (Inspection and Vigilance) Gwalior Zone at Gwalior.

Looking to his hard work and approach to the law in deciding the cases of different fields His Lordship was chosen by the- then Chief Justice Hon'ble Mr. Justice A.K. Patnaik and Collegium members and his name was recommended for elevation and ultimately My Lord adorned the seat of the Judge of the High Court on 25th August, 2009 when he took oath on that day.

His Lordship during his entire judicial career was being identified as top honest Judge who was fully devoted to the judicial work and was faithful to the Institution. Even in difficult situations, My Lord always remained stabled and was discharging his judicial duties like a Yogi Purush as stated by Lord Skrikrishna in Shrimad Bhagavad Gita.

I quote :

समः शत्रौ च मित्रे च तथा मानापमानयोः ।

शीतोष्ण सुखदुःखेषु समः सङ्गविवर्जितः।।

तुल्यनिन्दास्तुतिर्मौनी सन्तुष्टो येन केनचित् ।

अनिकेतः स्थिरमतिर्भक्तिमान्मे प्रियो नरः।।

Unquote.

In *Upnishad* also it is said that; "Those who see all creatures within themselves and themselves in all creatures know no fear. Those who see all creatures in themselves and themselves in all creatures know no grief. How can the multiplicity of life delude the one who sees its unity."

This quality of My Lord I have witnessed on several occasions and is well known to all. Once, the-then Chief Justice My Lord Justice A.K. Patnaik while addressing District Judges and Additional District Judges in JOTRI, at that time My Lord was District Judge (Vigilance) Gwalior. By quoting His Lordship's name the then Chief Justice addressed the audience that an honest and devoted Judge sometimes becomes an eyesore to others, but, the Judge should not get disturbed and should not deviate from his judicial work and without caring those unwanted comments, should discharge his judicial functions like My Lord Justice I.S. Shrivastava discharged. This certificate was openly given to My Lord and, therefore, I say that My Lord is a *Yogi Purursh.*

In Bhagavad Gita Arjun asked Lord Shri Krishna that what are the characteristics of one who is accomplished in meditation and steady in intelligence ? How does such a steady person speak ? How does he sit ? How does he move ?

I quote :

स्थितप्रज्ञस्य का भाषा समाधिस्थस्य केशव ।

स्थितधीः किं प्रभाषेत किमासीत व्रजेत किम् ।।

Lord Shri Krishna *inter alia* answered

I quote :

प्रजहाति यदा कामान् सर्वान् पार्थ मनोगतान् ।

आत्मन्येवात्मना तुष्टः स्थितप्रज्ञस्तदोच्यते ।।

Friends, the secret of His Lordship in achieving target is that he has renounced all desires born of the mind, is satisfied in the Self and by the Self, is said to be one whose insight is steady.

Friends, according to *Rigveda* a dedicated man offers love and respect to the cosmic divinities; but remembers, offering love alone is not enough; constant hard work and diligence are essential for success; then alone the Lord Supreme showers His blessings upon them.

Indeed, all these qualities are inherent in My Lord Justice Shrivastava. After His Lordship took oath as Judge of this Court when I congratulated My Lord, in reply His Lordship said a couplet of his Late grand-father Munshi Hubblalji from his *Diwan* :-

इक वक्त मुकर्रर है हरइक काम का अय दिल।

बेकार तेरी फिक्र है बेकार तेरा सोच।।

A Lawyer is always known and remembered by his able arguments and by citing correct law to the Court. Similarly, a Judge is remembered by his judgment which he decides analyzing the law in order to separate the grains from the chaff. My Lord has delivered several land mark judgements reported in the Law Journals which will always be remembered and they will certainly guide the Bar and the Bench and to the legal fraternity at large.

At the last, I should say that My Lord spent his entire judicial career as Sant Kabirdasji said in a couplet.

कबीरा खड़ा बाजार में मांगे सबकी खैर।

न काहु से दोस्ती न काहु से बैर।।

I myself and on behalf of Hon'ble The Acting Chief Justice as well as on behalf of all the Judges of High Court, congratulate My Lord for the successful judicial career and pray Almighty God that he may live with great joy and enthusiasm.

Shri. Manoj Dwivedi, Addl. Advocate General, bids farewell :-

आज माननीय न्यायमूर्ति श्री ईश्वर सहाय श्रीवास्तव एक न्यायमूर्ति के रूप में अपने स्वर्णिम कार्यकाल को पूर्ण कर रहे हैं। माननीय महोदय आपका कार्यकाल अद्वितीय रहा है। स्वयं माननीय न्यायमूर्ति महोदय भी आज अपने कार्यकाल से पूर्णतः संतुष्ट होंगे।

महोदय, जीवन के 62 बसन्त पूर्ण होना भी एक सोपान है। आज के परिवेश में देखें तो मैं यह महसूस कर रहा हूं कि यह आयु तो सक्रियता की आयु है, यह सेवामुक्ति मात्र अल्पविराम ही है। भरतीय इतिहास में झाँकने से ऐसे अनेक प्रमाण मिलते हैं कि सक्रियता कभी आयुष्य की मोहताज नहीं रही।

माननीय महोदय, ख्यातिलब्ध विधि वेत्ता व उर्दू कवि श्री हुवलालजी 'राड' के प्रतिष्ठित परिवार से आप सम्बद्ध है। आपका परिवार विधि क्षेत्र में प्रतिष्ठित परिवार रहा है। उन्हीं पदचिन्हों पर चलते हुए न्यायिक सेवा में आने से पूर्व आपने कुछ वर्ष अधिवक्ता के रूप में वकालत की थी, अतः आप आम अधिवक्ता की आशाओं, अभिलाषाओं एवं मनोस्थिति से भली–भाँति परिचित रहे है।

आपके द्वारा समक्ष में प्रस्तुत कई प्रकार के मुकदमों में विस्तृत सुनवाई कर त्वरित फैसले दिये गये, जिनकी छाप हम सभी के स्मृति पटल पर सदैव व्याप्त रहेगी।

महोदय, इस संदर्भ में विशेष रूप से फौजदारी प्रकरणों का वर्णन करना आवश्यक समझता हूं, जिनमें पारित निर्णय हम सभी को विधिक ज्ञान व जीवन दर्शन के किसी–न–किसी पहलू का पाठ अवश्य पढ़ाते है।

माननीय महोदय, प्रत्येक व्यक्ति अपने जीवन में पूर्णता का आकलन प्राप्त उपलब्धियों के आधार पर करता है। आपने अपने अथक परिश्रम, विलक्षण प्रतिभा और समर्पित कार्य शैली से न केवल उच्च न्यायालय वरन मध्यप्रदेश के विधि व न्यायिक जगत में विशेष स्थान बना लिया है। इन उपलब्धियों से माननीय महोदय आपकी समग्रता का अहसास होता है। आज इस संक्षिप्त समय में, मैं शायद आपकी उन ऊँचाईयों का वर्णन नहीं कर पाऊँगा, परन्तु यह निर्विवादित है कि आपके सद्व्यवहार से इंदौर खंडपीठ का कोई भी अधिवक्ता अछूता नहीं रहा है।

माननीय माहोदय आपका निष्पक्ष व्यवहार गहन कानूनी ज्ञान, गहरी सूझबूझ, सदैव आपके कार्यकाल की विशेषता रही है तथा मुकदमों की सुनवाई के दौरान अंत में यह कहना कि, "इसमें कुछ नहीं है" सदैव स्मरण कराते रहेंगे ।

पिता परमेश्वर से मैं यह कामना करता हूँ कि सेवानिवृत्ति उपरांत भी आपका सफर स्वर्णिम होगा तथा यह शुभेच्छा करता हूं कि आपकी परिपक्व सोच समाज को नई दिशा सदैव प्रदान करती रहेगी।

जैसा कि मैंने पूर्व में कहा है कि एक कार्यकाल का समापन, दूसरे कार्यकाल के उद्गम का द्योतक होता है तथा यह घड़ी मात्र अल्पविराम ही है। मैं एवं मेरे सभी साथी एवं राज्य शासन की ओर से आपके स्वस्थ, प्रसन्न एवं दीर्घायु जीवन की कामना करते हैं। साथ ही मैं ईश्वर से प्रार्थना करता हूं कि आपकी व आपके परिवार की जीवन में उत्तरोत्तर प्रगति होगी।

Shri Ajay Bagadiya, President, High Court Bar Association, Indore, bids farewell:-

We have gathered today to bid farewell to Hon'ble Justice Shri I.S. Shrivastava, who demit office today. His Lordship was born on 16.12.1949 at Bhind and after completing his studies in science and law, joined the profession and began practice as an advocate in the year 1978. My Lord continued to serve the judicial system till he was elevated to the Hon'ble High Court and sworn in on 26.08.2009. His Lordship has been a District Judge at Indore as well and his tenure as the District Judge is unforgetable. The lawyer community still stands indebted to his Lordship for his intervention at the time when some dispute arose between the lawyers and the administration.

His Lordship was a third generation lawyer. My Lord's grand father Late Shri Hubalalji Shrivastava was a renowned Advocate and famous Urdu Poet. His Lordship's father Late Shri Harishchandra Shrivastava continued the high tradition of the family and eventually his Lordship with his work and demeanour, has further added yet another feather in the cap of the family.

His Lordship has always had great attachment with the lawyers community of Indore and we shall always remember him as a soft spoken, but frank and fearless Judge.

My Lord has a vast experience on the civil as well as Criminal side and I am reminded of what once great jurist Holmes remarked " The Law is not mere Logic, but is also experience". My Lord has always been supportive to the Junior members of the Bar and the juniore advocates always looked forward to appear before him.

The tenure of My Lord as an Hon'ble Judge has been a distinguished and remarkable tenure wherein My Lord has dispensed justice without fear or favour. The order and judgements of My Lord reflect his qualities as they are clear, crisp and precise in nature. My Lord has been perfect combination of knowledge, exemplary behavour, Judicious conscionsness and clarity of thought. Sir, We shall miss you and always remember you for your enviable qualities.

I, on my behalf and on behalf of the Indore High Court Bar Association, offer best wishes for the next part of his life.

Shri Pratap Mehta, Member, State Bar Council, bids farewell :-

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

आप विधि विशेषज्ञों की समर्थ परम्परा के उत्तराधिकारी है। आपके दादाजी श्री हुबलाल राड़ आपके पिताजी श्री हरीशचन्द्र श्रीवास्तव भिंड में अपने समय के प्रसिद्ध विधिवेत्ता रहे हैं। इसी विरासत को आगे बढ़ाते हुए आपके लघु भ्राता व भतीजे वर्तमान में भिंड में विधिक क्षेत्र में उत्कृष्ट सेवाएं दे रहे हैं। आपने भी लगभग साढ़े तीन वर्ष वकालत करने के पश्चात न्यायिक सेवा में पदार्पण किया। आपने न्यायिक सेवा में रहते हुए विभिन्न पदों को सुशोभित किया।

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

इस अवसर पर मैं कहना चाहूंगा कि–

"बस कि दुश्वार हैं हर काम का आसां होना,

हर आदमी को मयस्सर नहीं इंसा होना।"

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

वस्तुतः वर्तमान परिप्रेक्ष्य में नौकरी करना एक साधारण सी बात है। लेकिन अपने सम्मोहनकारी व्यक्तित्व, सद्गुण एवं गंभीरता से अपनी अमिट छाप छोड़ना जिसे लोग वर्षों तक याद रखें यह बहुत कम न्यायमूर्तियों को नसीब होता है।

सेवानिवृति शसकीय प्रक्रिया का एक अंग है। लेकिन एक न्यायधीश के रूप में मैं आपसे यह अपेक्षा करूंगा कि आप हमारी संस्कृति की भावना के अनुकूल जीवेद् शरद् शतम् की तरह सौ वर्षों तक स्वस्थ, निरोग एवं आनंदमय जीवन जीयें। यह प्रार्थना परम परमात्मा श्री महाकालेश्वर से करता हूँ।

हम आपके न्यायिक अवदानों को हमेशा याद रखेंगे। आपके सपरिवार स्वस्थ, दीर्घायु एवं यशस्वी रहने की मैं कामना करता हूँ।

Shri Vivek Sharan, Assistant Solicitor General of India, bids farewell :-

I deem it to be my proud privilege in offering this farewell ovation to Hon'ble Shri Justice I.S. Shrivastavaji.

Lord Denning in his book *"The Road to Justice"* says :

"Justice is difficult to define. It is not something which can be seen. It is eternal, not temporal; for, it is not the product of intellect but of spirit."

My lord, Justice Shrivastava is fortunate to be born in an environment of not merely pursuit of law, so indispensable for a lawyer but of high traditions, and that unwritten code of fairness and courtesy without which the profession would lose much of its value. He hails from the family of lawyers and at present, the fourth generation has also joined the bar. His grandfather Shri Hublalji Shrivastava started practice in the year 1898 at Bhind. My lord's father Shri Harishchandraji Shrivastava was a criminal lawyer and had a distinction of being Govt. Pleader for continuously almost 23 years and was known for impartiality, courage and honesty particularly at that time, decoit trials were the main criminal litigation.

With these conceptions, received in inheritance, it is My Lord's paramount concern that human dignity must reach and inform every inch of judicial activity. For My Lord "A good and faithful judge must strive to determine what is right rather than who is right. Judicial verdicts may not change heart but certainly can prevent people from becoming heartless".

Prior to joining Judicial Service in the year 1978, My lord, Justice Shrivastava started practice in the civil side under the guidance of his tauji Shri Krishnachandraji Shrivastava and in the criminal side, under the guidance of Shri S.S. Mishra. My lord, had been custodian of justice at many places in Madhya Pradesh, being a distinguished Judicial officer and also graced the office of District and Sessions Judge at Indore and Rewa.

He always tried to temper justice with mercy and tamped power with patience during his long career as a Judge, at all levels. As Mr. Justice McCardie said : "It is sense of independence of the Bar that deepens and confirms the instinct for fearless decision in the judge."

With the co-operation at every stage in life, of Late Smt. Vibha

Shrivastava, wife of My Lord, Justice Shrivastavaji and with the blessings of Smt. Jageshwari Devi, mother of Justice Shrivastavaji, My Lord took oath of as a Judge of this Court on 25th August, 2009.

The elevation of Hon'ble Shri Shrivastavaji as Judge of this Court reminds me what my father (Justice Dr. Maithli Sharan) says that a person can reach to the heights only when he has emotions and human values in his heart.

My lord, is a scholar of Hindu Philosophy and Religion and it can unhesitatingly be said for him :

"Dispensation of justice is an attribute of God; Blessed are those on whom that Godly assignment has fallen; Still blessed are those who acquit themselves of the assignment with pride, dignity and honour."

Advocates who appeared before Justice Shrivastavaji, in the High Court as well as in the District Court have all praises for him and would share my feelings : When I say that this High Court is glorified and known by his honesty, integrity and command in every sphere of law.

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

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

Shri P.K. Saxena, representative of Senior Advocates, bids farewell :-

My Lord Justice I.S. Shrivastava today you are demitting office after successful career in the judiciary for more than 35 years. What is expressed at the time of elevation of a Judge is the expectation of the Bar from the Judge as to how he will conduct in his career. Today My Lord is the date of judgement to be passed by the Bar as to how your Lordship is faired on the Bench. I can without fear of contradiction say that your Lordship has fulfilled all the expectations of the Bar which were expressed at the time of your elevation. Your court room was always full of soberity and serenity as is expected of any good Court. Coming from the lawyers' family, you always felt that the

lawyers appearing in your court are your distant cousin and who should be allowed to say in the matter in which they are appearing. Your lordship no lawyer is interested in the final out come of the case because it is the right of the lawyer to address the court only. Judgment is your Lordship's domain and your lordship always delivered the judgment without fear or favour and absolutely in accordance with law.

More than 120 years tradition of law practice is in your family and you with the beginning of your career put great ideals before you in the personality of Shri Jagmohanlal, Judge of the erstwhile High Court of Gwalior and your cousin late Chief Justice Shivdayal. Today both of them must be blessing you from where from they are because you have maintained good tradition which were set by them in the judiciary.

On behalf of Senior Members of the Bar, I wish you good health and a peaceful life hereafter.

Farewell speech delivered, by Hon'ble Shri Justice I.S. Shrivastava :-

I am overwhelmed with the sentiments and kind words spoken to me for which really I do not deserve. It is the expression of your affection for me which has always reminded me to share my responsibility in descharge of my duties as a Judge. The Lawyer and Judges stand together for the noble cause of the justice. The Judges and advocates have total devotion for the cause of justice. They do not work for any gain or loss to any person but they serve the Godess of Justice and they help in dispensation of justice. No one loses or no one gains in this process but the final result is that the justice has been done which is necessary for the peace in the society. The life of a Judge is like a **Saint** who lives in the world as a human being but discharges his duties without any fear and favour with profound courage.

I am fortunate that the Almighty Shri Ram bestowed me with the liability of a Judge. No one knows that what is his destiny but from the very childhood the destiny clears the ways for the achievement of the goal of the life for which we have been born. I am fortunate that I was born with the liabilities for the dispensation of the justice and I became a part of it as a Judge.

Today I want to share some experiences with the junior Advocates.

Life is full of happiness and sorrows. It is an Art to enjoy the life which is only possible with the help of principles of life. Shrimad Bhagwat Gita and Ramayana have always been source of inspiration to me and it always inspired me to lead a life with principles. According to story of Mahabharata when Yudhistir went to collect water from the pond, he saw his brothers lying unconscious and certain questions were put to him by Yaksh without answers of which he was not allowed to take water. One of the questions of Yaksh was to explain "Dharma" in few words where it situates. Ydhistir replied that it is "Dakshta" which means proficiency in all the fields of the life that has been a word of inspiration for me and I tried to follow it in all aspects of my life.

A man lives in different capacities in life at a time for legal profession he is an advocate or judge and in the family he is son of his parents, he is brother of his brothers and sisters, father of his children, friend of friend, husband of a wife and he has to share all his responsibilities with high proficiency every day along with comforts and discomforts and happiness and sorrows which he perceives.

I always remember the lines of an author-

'सुख–दुख जो जीवन में आवे प्रभु इच्छा कहकर लेवें

विश्व मंच पर जीवन नाटक यथा शक्ति उत्तम खेलें।'

So we have to play our roles in the best way at the platform of life and death according to the role of which has been assigned by the **Almighty** to us in the different stages of life.

In the **Shrimad Bhagawad Gita** it has been said that **"Soul lives in the body, it never dies."** It always pinches and condemns the person for the wrongs and mistakes commited by him against moral principles. Therefore, we must think over about the activities of the every day as an independent spectator that how the day was, whether our activities were according to the principles or not and every day we should try to improve ourselves and should take care and not to repeat the mistakes again. I have tried to follow this principle in my life and Almighty has always given me courage to face the situations.

Four things are required for the success in life :

(1) Hard work (2) Study of good books to feed your brain with good ideas (3) To live the life with moral principles and (4) Faith in God that what

is done after your best efforts is for your betterment.

If they are followed then you will be successful in the life.

In the cycle of life and death, I am fortunate that **Almighty** gave me birth in the family of advocates and persons of great ideals and ideas. My grand father Late Shri Munshi Hubblal Raad senior advocate started practice in 1898 at Bhind and since then The **"Mashal"** (torch) of this noble profession of advocacy is continuing in my family with the moral principles. My father Late Shri Harishchandra Shrivastava was the Govt. Pleader and Public Prosecutor at Bhind from 1951 -1974 and he continued on this post till death with out break of singal day and he was famous for his truthfulness and honesty. My uncle Late Shri Krishna Chandra Shrivastava, advocate was the leading Civil Lawyer of Bhind. In his lotus feet I started my practice as an Advocate. He left criminal practice only due to the fact that his young brother has become public prosecutor and he did not want that both the brothers should appear against each other to plead a case. When I started practicing in Jan,1975 then I came to know that he used to return the fees of the case in which he was not successful. On my question he replied that the confidence of success which my client reposed in me,I failed to fulfill it hence I shoud not keep the fees of this client,have faith in **God** and **HE** takes care of every advocate who is in this profession and you will see that he sends the clients to you and never you go to any client to book the cases. This is the principle of the advocacy that the advocate never goes to the office of the client.Later on I came to know that word-to-word which he said, was correct.

I am fortunate today that Shri S.S. Mishra, Advocate of Bhind in whose lotus feet I learnt the principles of criminal practice, is present here to bless me.

I am extremely grateful to all the senior Advocates of this Bar- Shri A.M. Mathur, Shri G.M. Chaphekar, Shri A.K. Chitale, Shri T.N. Singh, Shri PK Saxena,Shri B.L. Pawecha,Shri S.C. Bagdia, Shri M.L. Agrawal, Shri Shekhar Bhargava, Shri C.L. Yadav, Shri D.D. Vyas, Shri Y.I. Mehta, Shri Jaisingh, Shri A.S. Garg, Shri M.L. Dhupad, Shri Z.A. Khan, Shri Ashok Kutumble, Shri Ramanlal Jain, Shri S.K. Vyas, Shri A.K. Sethi, Shri Piyush Mathur, Shri Ashok Shukla, Shri L.N. Soni.Their assistance has always been helpful to me in dispensation of justice and in interpretation of law and legal principles behind it. They are the assets of this Bar Association.

I am grateful for the blessings of my Guruji Swami Shri Satyamitranand Giriji of Haridwar and Swami Shri Akhileshswaranand Giriji of Jabalpur and late Shri Swami Haridas Maharaj and Shri Prem Parmarji, they always showered blessings on me due to which I could raise step-by-step to this august office.

The man alone can not achieve the destination of life but this is the cooperation of all the persons due to which a goal is achieved. I am grateful to all the persons from the beginning of my career and as Civil Judge upto this stage by the cooperation, good wishes of them I could succeeded in fulfillment of my responsibility and achieved the goal of life. One of the important chapter of my life is over today.

I thank to all for their blessings, good wishes and cooperation in this respect.

I am grateful to my family members -brother Shri S.S. Shrivastava, Advocate of Bhind, my sons Raghav and Vaibhav and nephew Shashank and all the relatives and friends who came here. I am grateful to Smt. Vineeta Shrivastava, wife of Justice Shri A.K.Shrivastava who took pains to come here despite her ailing condition. They always gave me moral support for the discharge of my duties honestly with full dedication and they followed all the restrictions imposed on me as a Judge.

Today again I pray and pay regards to my wife late Smt.Vibha Shrivastava who left for her heavenly abode on 21.06.2003 without her prayers and good wishes the achievement of the goal of life was not possible.

I am grateful to my mother Smt. Jageshwari Devi Shrivastava who not only taught me moral principles of life but always blessed me and gave me courage to face all the odd situations of life. My father late Shri Harish Shrivastava expired in September, 1974 just three months before my enrollment as an advocate. He was a strong believer of God and from astrology he was knowing the fact from the last six months of his life that he has to leave for heavenly abode in the month of Sept, 1974 but he did not express this fact to any one and never became impatient in the discharge of all the liabilities of the family and lived in the world in the same way with the trust that care has to be taken by **Almighty** and he is nothing to do in this matter. In reality he was a **Karmyogi.** After his death later on I came to know all this fact from my family **Pandit Shri Kalka Prasadji**. He told me that he was knowing the fact that this is last phase of his life and life will be no more from Sept,74. Today I am extremely grateful to **Almighty** that his belief in God has been proved to

be true in my life and all his children have achieved their goal of life. The lines of Bhagwad Gita "योगक्षेमं वहाम्यंहम्" has been proved to be true. This fact always gave me strength.

I express my gratitude to my colleague Judges for their full cooperation during my tenure as a Judge. I am thankful to all the Advocates, Registrar General, Principle Registrars, staff of the Registry at all the three places. I express my thanks to my personal staff Smt. Bharti Sawe, P.S., Smt. Charulata Gadgil, Reader, Shri Neeraj Sarvate, Shri Amol Mahanag, Stenos, and Jamadar Shri Bindeshwari Prasad, without the help of them I would have been unable to discharge my duties.

I am thankful to Shri Gopilal Vyas Accountant, Protocol Officer and all the A.P.Os. for their assistance in discharge of my duties.

It is matter of pride for me that this ovation is being presided by Justice Shri A.K. Shrivastava. My grand father was very fortunate in this regard that the grand son of his eldest daughter and the son of his youngest son, both are in this Bench and farewell is being given to me by him.

I again bow my head to the **Almighty God** for his kindness.

In the end I express my gratitude to all of you and wish you a very **Happy and Prosperous** life.

Jai Hind.

Short Note (DB)

**(1)*

Before Mr. Justice K. K. Lahoti & Mrs. Justice Vimla Jain

W.A.No.786/2011 (Jabalpur) decided on 18 October, 2011

ARUN KUMAR GUPTA ... Appellant

Vs.

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

A. ***Words and Phrases – Legal Malice*** **– State is under obligation to act fairly without ill will or malice, in fact or in law – It means something done without lawful excuse – It is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite – It is a deliberate act in disregard to the rights of others.**

क. शब्द और वाक्यांश – विधिक दुर्भाव – राज्य बिना वैमनस्य या दुर्भाव के तथ्य में या विधि में समुचित कार्यवाही करने के लिए बाध्य है – इसका अर्थ है, विधिपूर्ण प्रतिहेतु के बिना कुछ करना – यह एक दोषपूर्वक एवं जानबूझकर युक्तियुक्त एवं अधिसंभाव्य कारण के बिना की गई कार्यवाही है और आवश्यक रूप से दुर्भावना एवं द्वेष से की गई कार्यवाही नही – यह अन्य के अधिकारों की अवहेलना में जानबूझकर की गई कार्यवाही है।

B. ***Service Law – Transfer – Administrative Exigency or Punishment*** **– Petitioner posted as Deputy Director of Prosecution – During his tenure of 15 months he has not conducted any trial and has filed only 9 returns and one caveat application before High Court – Show cause notice issued to respondent No.3 is still under consideration – If the cases were not allotted to respondent No.3 then he should have brought this fact to the knowledge of Director of Prosecution – Work performed by respondent No.3 cannot be said to be an efficient work by Deputy Director – Transfer is not only an incident of service but a condition of service as well and is necessary in public interest and efficiency in public administration – Transfer order unless shown to be malafide or in violation of statutory provisions, not open to interference by Court – Whether transfer was in public interest requires adjudication on the basis of facts of each case – Order quashing the transfer of respondent No.3 set aside – Writ appeal allowed.**

ख. सेवा विधि – स्थानांतरण – प्रशासनिक अत्यावश्यकता या शास्ति

– याची उपनिदेशक अभियोजन के रूप में पदस्थ – उसके 15 महीनों के कार्यकाल के दौरान उसने कोई विचारण परिचलित नही किया और उच्च न्यायालय के समक्ष केवल 9 रिटर्न तथा एक केवियट आवेदन प्रस्तुत किया – प्रत्यर्थी क्र. 3 को जारी की गई कारण बताओ नोटिस विचाराधीन है – यदि प्रत्यर्थी क्र. 3 को प्रकरण आवंटित नही किये गये थे तब उसे यह तथ्य निदेशक अभियोजन की जानकारी में लाना चाहिए था – प्रत्यर्थी क्र. 3 द्वारा किया गया कार्य उपनिदेशक का दक्ष कार्य नही कहा जा सकता – स्थानांतरण न केवल सेवा का अनुशंग है बल्कि सेवा की शर्त भी है और लोकहित में एवं लोक प्रशासन मे दक्षता के लिए आवश्यक है – स्थानांतरण आदेश जब तक की दुर्भावनापूर्ण अथवा कानूनी उपबंधो के अतिलंघन मे होना नही दर्शाया जाता, न्यायालय द्वारा हस्तक्षेप के लिए खुला नहीं – क्या स्थानांतरण लोकहित मे था इसका न्यायनिर्णयन प्रत्येक मामले के तथ्यों के आधार पर किया जाना अपेक्षित है – प्रत्यर्थी क्र. 3 का स्थानांतरण अभिखंडित करने का आदेश अपास्त – रिट अपील मंजूर।

The Order of the court was delivered by :
KRISHN KUMAR LAHOTI, J.

Cases referred:

(2010) 9 SCC 437, (2009) 2 SCC 592, (2004) 7 SCC 405, (2004) 4 SCC 245.

A.K.Pathak, for the appellant.

Rahul Jain, Dy.A.G. for the respondent nos.1 & 2.

R.N.Singh with Anshuman Singh, for the respondent no.3.

Short Note

****(2)***

Before Mr. Justice Sujoy Paul

W.P. No.648/2011 (Gwalior) decided on 30 September, 2011

BITANDEVI (Smt.) & ors. ... Petitioners

Vs.

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

*A. **Land Acquisition Act (1 of 1894), Section 5-A – Acquisition of Land – Hearing of Objection*** – **Hearing of objection is not an empty formality – Competent Authority has to assign reasons such as the unsuitability of the alternative land for the said public purpose, the grave hardship that may be caused to owner by such expropriation, etc. – Order overruling objection should be pregnant with reasons – Reasons are heartbeat of conclusion and in absence of reasons, the decision can not stand.**

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 5ए – भूमि का अर्जन – आक्षेप की सुनवाई – आक्षेप को सुना जाना मात्र औपचारिकता नहीं है – सक्षम प्राधिकारी को कारण देने होते हैं जैसे कि कथित लोक प्रयोजन हेतु वैकल्पिक भूमि की अनुपयुक्तता, ऐसे स्वत्वहरण द्वारा स्वामी को जो गंभीर कठिनाईयां कारित हो सकती हैं, इत्यादि–आक्षेप नामंजूर करने का आदेश कारणों के साथ परिपूर्ण होना चाहिए– कारण, निष्कर्ष की आत्मा है और कारणों के अभाव में निर्णय कायम नहीं रह सकता।

***B. Land Acquisition Act (1 of 1894), Sections 4, 5-A – Acquisition of Land* – Procedure prescribed is mandatory in nature – If property belongs to economically disadvantaged segment of Society or people suffering from other handicaps, then the Court is not only entitled but is duty bound to scrutinize the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter.**

ख. भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 4, 5ए – भूमि का अर्जन – विहित प्रक्रिया आज्ञापक स्वरुप की है – यदि सम्पत्ति समाज के आर्थिक रुप से कमजोर वर्ग की है अथवा अन्य अक्षमता से ग्रसित लोगों की है तब न्यायालय का न केवल यह अधिकार है बल्कि वह कर्तव्य बाध्य है कि राज्य की कार्यवाही/निर्णय की अधिक सतर्कता, सावधानी एवं दक्षता से संविक्षा करें, इस तथ्य को दृष्टिगत रखते हुए कि भूमि स्वामी के भूमिहीन होने तथा अपनी आजीविका और /अथवा आश्रय के एकमात्र स्त्रोत से वंचित हो जाने की संभावना हो सकती है।

***C. Interpretation of Statute* – Land Acquisition Act, 1894 is an expropriatory legislation – Provisions of the Statute should be strictly construed as it deprives a person of his land without consent.**

ग. कानून का निर्वचन – भूमि अर्जन अधिनियम, 1894 स्वत्वहरण का विधान है – कानून के उपबंधों का ठीक–ठीक अर्थ लगाना चाहिए क्योंकि यह व्यक्ति को उसकी सहमति के बिना उसकी भूमि से वंचित करता है।

Cases referred:

2010 (1) MPLJ 451, (2005) 7 SCC 627, AIR 2008 SC 261, 2007(3) MPLJ 439, AIR 1993 All 14, (1992) 2 SCC 168, 2006(4) MPHT 494 (DB), 2003(4) MPLJ 577, (2011) 4 SCC 769, (2010) 11 SCC 242, (2011) 5 SCC 553, (2010) 9 SCC 496, 1987 AC 625, (2001) 1 SCC 330.

S.P. Jain, for the petitioner.

M.P.S. Raghuvanshi, Addl.A G. for the respondents No.1 to 3.

Sarvesh Singh Chouhan, for the respondent No.4.

NOTES OF CASES SECTION

Short Note

**(3)*

Before Mr. Justice J.K. Maheshwari

M.A. No. 299/2011 (Jabalpur) decided on 31 October, 2011

DEVI SHAKUNTALA THAKRAL ...Appellant

Vs.

WIG BROTHERS (INDIA) PVT. LTD. & anr. ...Respondents

A. ***Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Encashment of Bank Guarantee*** **– In case of unconditional bank guarantees, interference by the Court is warranted only when there is established fraud and irretrievable damage to the promise – Bank guarantee can not be encashed if it is conditional and for inconsistent purpose.**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2–बैंक गारंटी को भुनाना–बिना शर्त बैंक गारंटी के मामले में न्यायालय का हस्तक्षेप केवल तब आवश्यक है जब कपट स्थापित है और वचन को असाध्य क्षति हुई है–बैंक गारंटी को भुनाया नहीं जा सकता यदि वह सशर्त है और असंगत प्रयोजन हेतु है।

B. ***Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Encashment of Bank Guarantee*** **– Bank Guarantee was for mobilization of advance with a view to secure the said amount – Bank guarantee has been encashed for non-performance of contract – Trial Court rightly restrained defendants from invocation and encashment of Bank Guarantee – Trial Court was also right in directing the defendants to deposit the amount as the bank guarantee was encashed after receiving the notice of the suit.**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – बैंक गारंटी को भुनाना – अग्रिम के संग्रह हेतु, उक्त रकम को प्रतिभूत करने के उद्देश्य से, बैंक गारंटी थी – संविदा के अपालन के कारण बैंक गारंटी भुनाई गयी है – विचारण न्यायालय ने प्रतिवादीगण को बैंक गारंटी का अवलंबन लेने से एवं भुनाने से उचित रुप से अवरुद्ध किया – प्रतिवादीगण को रकम जमा करने का निदेश देने में भी विचारण न्यायालय सही था क्योंकि वाद का नोटिस प्राप्त करने के पश्चात बैंक गारंटी भुनाई गई।

Cases referred:

ILR 2011 MP 1141, (1999) 8 SCC 436, (2006) 13 SCC 599, (2007) 6 SCC 470, (1975) 1 SCC 770, 2002(2) MPLJ 384, 1990 (Supp) SCC 727, (2003) 4 SCC 690.

Brian Da Silva with *Nirnay Gupta*, for the appellant.

Jivesh Nagrath and *R.K. Sanghi*, for the respondent No.1.

NOTES OF CASES SECTION

Short Note

**(4)*

Before Mr. Justice A.K. Shrivastava

S.A. No. 367/1999 (Gwalior) decided on 1 October, 2011

GAJENDRARAO & ors. ...Appellants

Vs.

MURTI SHRI GANPATI JI MAHARAJ & ors. ...Respondents

A. ***Civil Procedure Code (5 of 1908), Order 22 – Legal Representatives*** **– Original plaintiff died during the pendency of civil suit and his legal heirs were brought on record – Defendant filed appeal against decree but 'A' one of the L.R. was not made party – 'A' also filed appeal against part dismissal of suit – Held – As 'A' had also filed cross appeal and other legal representatives were on record, first appeal and second appeal filed by defendant was maintainable and had not abated.**

क. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 22 – विधिक प्रतिनिधिगण* – सिविल वाद के लंबित रहने के दौरान मूल वादी की मृत्यु हो गई और उसके विधिक वारिसों को अभिलेख पर लाया गया – प्रतिवादी ने डिक्री के विरुद्ध अपील प्रस्तुत की परन्तु एल.आर. में से एक 'ए' को पक्षकार नहीं बनाया गया – 'ए' ने भी वाद के भागतः खारिजी के विरुद्ध अपील प्रस्तुत की – अभिनिर्धारित – चूंकि 'ए' ने भी प्रति अपील प्रस्तुत की थी और अन्य विधिक प्रतिनिधिगण अभिलेख पर थे, प्रतिवादी द्वारा प्रस्तुत प्रथम अपील एवं द्वितीय अपील पोषणीय थी और उपशमन नहीं हुआ था।

B. ***Specific Relief Act (47 of 1963), Section 41 – Injunction*** **– No injunction can be granted against any coparcener – Each coparcener is having equal right in the property.**

ख. *विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 41 – व्यादेश* – किसी भी सहदायिक के विरुद्ध कोई व्यादेश प्रदान नहीं किया जा सकता – प्रत्येक सहदायिक सम्पत्ति में समान अधिकार रखते हैं।

Cases referred:

2009 RN 208, AIR 1971 SC 240, (2008) 15 SCC 517, AIR 1967 SC 49, AIR 1979 SC 1393.

H.D. Gupta with *Santosh Agrawal* for the appellants.

V.K. Bhardwaj with *C.S. Agrawal & Raja Sharma*, for the respondents.

NOTES OF CASES SECTION

Short Note

****(5)***

Before Mr. Justice J.K.Maheshwari

M.A.No.1966/2010 (Jabalpur) decided on 20 September, 2011

MADHU & ors ... Appellants

Vs.

STATE OF M.P. & anr. ...Respondents

A. ***Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007), Section 2(0), Civil Procedure Code (5 of 1908), Order 39 Rule 1 and 2 – Other traditional forest dweller*** **– To show that a person belongs to forest dwelling Scheduled Tribe, it is not enough that he should belong to Scheduled Tribe Community – Three generations not less than 25 years of period, who were pastoral living in non-urban area likely to be portraying or expressive of the life of shepherds or country people especially in an idealized and conventionalized manner living or in nomadic having no fixed resident and wandering here and there, may fall within purview of Forest dwelling scheduled tribes – Plaintiffs not entitled for temporary injunction as pleadings do not contain the necessary contents as required under the Act.**

क. अनुसूचित जनजाति और अन्य परम्परागत वन निवासी (वन अधिकारों की मान्यता) अधिनियम, 2006 (2007 का 2), धारा 2(0), सिविल प्रक्रिया संहिता (1908 का 5) आदेश 39 नियम 1 और 2 – अन्य परम्परागत वन निवासी – यह दर्शाने के लिए कि व्यक्ति वन निवासी अनुसूचित जनजाति का है यह पर्याप्त नहीं है कि उसे अनुसूचित जनजाति समाज का होना चाहिए – तीन पीढ़ियां जो कम से कम 25 वर्ष की अवधि से ऐसे गैर नगरीय क्षेत्र में निवास करने वाले चरवाहा थे, जो चरवाहों के जीवन का चित्रण या वर्णन कर सकता हो अथवा अस्थिरवास में या विशिष्ट रुप से कल्पनावादी एवं रुढ़िवादी प्रकार से जीवन जीने वाले ग्रामीण लोग जिनका कोई निश्चित निवास स्थान नहीं और इधर उधर भटक रहे हैं, वन निवासी अनुसूचित जनजाति की परिधि में आ सकते हैं – वादीगण अस्थाई व्यादेश के हकदार नहीं क्योंकि अभिवचनों में अधिनियम के अंतर्गत अपेक्षित आवश्यक विषय वस्तु अंतर्विष्ट नहीं।

B. ***Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007), Sections 2(c), 6 – Forest Dwelling Scheduled Tribes – Circulars*** **– Govt. is required to act as per the object and spirit of the provisions of Act, 2006 – Circulars issued do not disclose the manner and procedure for determination of**

rights of forest dwelling Scheduled Tribes and other traditional forest dwellers – Application of circulars must be refrained unless and until a person falls within the definition of forest dwelling Scheduled Tribes, other traditional forest dwellers or critical wildlife habitat after following procedure as specified under Section 6.

ख. अनुसूचित जनजाति और अन्य परम्परागत वन निवासी (वन अधिकारों की मान्यता) अधिनियम, 2006 (2007 का 2), धाराएँ 2(c),6 – वन निवासी अनुसूचित जन जाति – परिपत्र – सरकार से अधिनियम 2006 के उपबंधों के उद्देश्य एवं भावना के अनुसार कार्यवाही करना अपेक्षित है – जारी किये गये परिपत्र अनुसूचित जनजाति तथा अन्य परम्परागत वन निवासियों के अधिकारों का निर्धारण करने हेतु पद्धति एवं प्रक्रिया प्रकट नही करते – परिपत्रों की प्रयोज्यता से बचना चाहिए जब तक कि व्यक्ति, धारा 6 के अंतर्गत विनिर्दिष्ट प्रक्रिया का पालन करने के पश्चात्, वन निवासी अनुसूचित जनजाति, अन्य परम्परागत वन निवासी या संकटपूर्ण वन्य जीव निवास की परिभाषा के भीतर नही आता।

Greeshm Jain, for the appellants.

Sheetal Dubey, Govt. Adv.for the respondents.

Short Note (DB)

****(6)***

Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava

Cr. A. No. 564/2001 (Indore) decided on 20 September, 2011

MANGUSINGH & anr. ...Appellants

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302, Criminal Procedure Code, 1973 (2 of 1974), Section 157 – Murder – **Postmortem report states that time of death was 136 hours from the date of postmortem – Postmortem was done after 60 hours of incident – There is delay of 24 hours in lodging the F.I.R. – Delay of seven days in sending copy of F.I.R. to Magistrate – Head was chopped from body by causing single blow – Weapon used must have been heavy and such injury could not have been caused by sword which was seized – Sword was also not produced before Court – Recovery of head and body also not reliable – Appellants not guilty – Appeal allowed.**

दण्ड संहिता (1860 का 45), धारा 302, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 157 – हत्या – शव परीक्षण प्रतिवेदन प्रकट करता है कि मृत्यु का समय शव परीक्षण के दिनांक से 136 घंटे का था – शव परीक्षण घटना के 60 घंटों

के पश्चात किया गया – एफ.आई.आर. दर्ज करने में 24 घंटों का विलंब है – एफ. आई.आर. की प्रति मजिस्ट्रेट को भेजने में सात दिनों का विलंब – एक ही आघात द्वारा सिर से धड़ काट दिया गया था – उपयोग किया गया शस्त्र भारी रहा होगा और ऐसी चोट तलवार से कारित नहीं की जा सकती, जिसे जब्त किया गया था – तलवार भी न्यायालय के समक्ष प्रस्तुत नहीं की गई – सिर और शरीर की बरामदगी भी विश्वसनीय नहीं – अपीलार्थी दोषी नही – अपील मंजूर।

The judgment of the court was delivered by : **I.S. SHRIVASTAVA, J.**

Case referred:

1998(1) JLJ 236.

Jai Singh with *Vivek Singh* for the appellants.

Girish Desai, Dy. A.G. for the respondent/State.

Short Note (DB)

****(7)***

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

W.P. No. 5032/2002 (Jabalpur) decided on 21 October, 2011

NAGAR PALIKA PARISHAD ...Petitioner

Vs.

RAJESH KUMAR SAINI ...Respondent

***Consumer Protection Act (68 of 1986), Section 2(b)(c)(d)(q)(o) – Consumer* – Respondent approached Consumer Forum for execution of lease deed in respect of allotted land – Neither council is a service provider nor plot owner is a consumer under the Act – Complaint before Consumer Forum not maintainable – Petition allowed.**

उपभोक्ता संरक्षण अधिनियम (1986 का 68), धारा 2(बी)(सी)(डी)(क्यू)(ओ) – उपभोक्ता – आवंटित भूमि के संबंध में पट्टा विलेख के निष्पादन हेतु प्रत्यर्थी उपभोक्ता फोरम के समक्ष गया – अधिनियम के अंतर्गत न तो परिषद सेवा प्रदायकर्ता है और न ही भूखंड स्वामी उपभोक्ता है – उपभोक्ता फोरम के समक्ष शिकायत पोषणीय नहीं – याचिका मंजूर।

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

Cases referred:

AIR 1954 SCC 340, (2004) 1 SCC 287.

H.R. Upadhyaya, for the petitioner.

N.P. Dubey, for the respondent.

Short Note (DB)

*(8)

Before Mrs. Justice Sushma Shrivastava & Mr. Justice R.C.Mishra

Cr.A.No.1049/1993 (Jabalpur) decided on 10 November, 2011

SANTOSH RAI ... Appellant

Vs.

STATE OF M.P. ... Respondent

A. ***Evidence Act (1 of 1872), Section 32 – Multiple Dying Declarations*** **– In case of multiple dying declarations, Court has to scrutinize all the dying declarations – Court must find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same.**

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – अनेक मृत्युकालिक कथन – अनेक मृत्युकालिक कथनों वाले प्रकरण में न्यायालय को सभी मृत्युकालिक कथनों की संविक्षा करनी होती है – उसे स्वीकार करने एवं उस पर विश्वास करने से पहले न्यायालय को पता लगाना चाहिए कि क्या भिन्न मृत्युकालिक कथन तात्विक विशिष्टियों में एक दूसरे से संगत है अथवा नही।

B. ***Maxim – Falsus in uno falsus in omnibus*** **– False in one thing, false in everything has no application in India.**

ख. सूत्र – एक बात में मिथ्या तो सब मे मिथ्या – एक बात में मिथ्या तो सब में मिथ्या का भारत में कोई उपयोजन नही।

C. ***Penal Code (45 of 1860), Section 304 Part II*** **– Appellant caused single knife injury in abdomen of deceased near umbilicus – None of Doctors opined that injury was sufficient in the ordinary course of nature to cause death – Death occurred nearly 19 days after the incident and was a result of cardio-respiratory failure due to abdominal injury – Medical evidence was silent as to depth of injury – Appellant was rightly held guilty of offence of culpable homicide not amounting to murder.**

ग. दण्ड संहिता (1860 का 45), धारा 304 भाग II – अपीलार्थी ने मृतक को नाभि के पास पेट में एक चाकू की चोट कारित की – किसी चिकित्सक का अभिमत नही कि चोट, प्रकृति के सामान्य कम में मृत्यु कारित करने के लिए पर्याप्त थी – घटना से करीब 19 दिनों के पश्चात् मृत्यु हुई और पेट की चोट के

कारण हृदयाघात के फलस्वरूप हुई थी – चोट की गहराई के बारे में चिकित्सीय साक्ष्य मौन है – अपीलार्थी को उचित रूप से हत्या की कोटी में न आने वाले आपराधिक मानवघ के अपराध के लिए दोषी अभिनिर्धारित किया गया।

D. Penal Code (45 of 1860)– Section 34 – Common Intention **– Nothing on record that acquitted accused persons had prior knowledge that 'A' was having knife in his pant – Moreover, single blow was inflicted by 'A' – Difficult to hold that his companions were sharing a common intention to kill deceased.**

घ. दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – अभिलेख पर कुछ नही कि दोशमुक्त अभियुक्त व्यक्तियों को पूर्व ज्ञान था कि 'A' अपनी पैंट में चाकू लिये था – इसके सिवाय 'A' द्वारा एकल वार किया गया था – यह धारणा करना कठिन है कि उसके सहयोगी मृतक को मारने के सामान्य आशय में भागी थे।

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

Cases referred:

AIR 2003 SC 3617, AIR 1968 SC 1270, (2006) 7 SCC 172, AIR 2002 SC 2973, (1976) 3 SCC 104, (1970) 2 SCC 113, (1993) 2 SCC 684, AIR 1965 SC 460, AIR 1993 SC 973, AIR 1993 SC 2636, AIR 1994 SC 1130, AIR 1940 Nag 340, AIR 1994 SC 1651, AIR 2010 SC 249

Suresh Singh with Shivam Singh, for the appellant.

Umesh Pandey, G.A. for the respondent.

Short Note

****(9)***

Before Mr. Justice A.K. Shrivastava

S.A. No. 271/1997 (Indore) decided on 11 August, 2011

SHANTABAI ....Appellant

Vs.

PUSHKARLAL & anr. ...Respondents

A. Civil Procedure Code (5 of 1908), Section 9 – Civil Suit – Preponderance of Probability **– In Civil cases, the preponderance of probability in the facts and circumstances of that particular case has a vital and important role in order to arrive a correct decision to the case.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 – सिविल वाद – अधिसंभाव्यता की प्रबलता – सिविल प्रकरणों में, मामले के उचित निर्णय पर पहुंचने के लिये उस विशिष्ट प्रकरण के तथ्यों एवं परिस्थितियों में अधिसंभाव्यता की प्रबलता की अत्यावश्यक एवं महत्वपूर्ण भूमिका है।

B. Registration Act (16 of 1908), Section 49 – Non-Registration – Effect **– A document which is compulsorily registerable, if not registered, could be used for proving collateral purposes – Nature of possession can be looked upon and for the purpose of admission of plaintiff that entire money was paid by appellant can be taken into consideration to prove his admission.**

ख. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 49 – अपंजीयन – प्रभाव – दस्तावेज जो अनिवार्य रुप से रजिस्ट्रीकृत किया जाना होता है, यदि रजिस्ट्रीकृत नहीं किया जाता, तब सांपर्श्विक प्रयोजनों को साबित करने हेतु उपयोग किया जा सकता है – कब्जे का स्वरुप देखा जा सकता है और वादी की इस स्वीकृति के प्रयोजन हेतु कि अपीलार्थी द्वारा संपूर्ण रुपये अदा किये गये, को उसकी स्वीकृति साबित करने के लिए विचार में लिया जा सकता है।

C. Benami Transactions (Prohibition) Act, (45 of 1988), Section 4 – Prohibition to held property benami – Guidelines to test benami transaction – discussed.

ग. बेनामी संव्यवहार (प्रतिशेध) अधिनियम (1988 का 45), धारा 4 – बेनामी सम्पत्ति धारण करने पर प्रतिशेध – बेनामी संव्यवहार की जांच के लिये मार्गदर्शक सिद्धांत – विवेचना की गई।

D. Benami Transactions (Prohibition) Act, (45 of 1988), Section 4 – Benami Transaction **– Evidence available on record shows that both the parties were having very sweet and cordial relations, however, it can be inferred from surrounding circumstances that they were living together like husband and wife - Plaintiff admitted that entire consideration amount and cost of construction was borne by defendant although the sale deed was executed in his name – Defendant is in possession of the suit house since the time it was constructed – Defendant is the owner of the property.**

घ. बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 4 – बेनामी संव्यवहार – अभिलेख पर उपलब्ध साक्ष्य दर्शाती है कि दोनों पक्षकारों के मधुर एवं सद्भावपूर्ण संबंध थे, अपितु बाहरी परिस्थतियों से यह निष्कर्ष निकाला जा सकता है कि वे पति पत्नी के समान एक साथ रह रहे थे – वादी ने स्वीकार किया कि संपूर्ण प्रतिफल राशि और विनिर्माण का खर्च प्रतिवादी द्वारा उठाया गया,

यद्यपि विक्रय पत्र उसके नाम से निष्पादित किया गया था – वाद मकान उसे निर्मित किये जाने के समय से प्रतिवादी के कब्जे में है – प्रतिवादी सम्पत्ति का स्वामी है।

E. Civil Procedure Code (5 of 1908), Section 105 – Validity of an order – **Legislature has authorized the person aggrieved by the judgment of the Trial Court to set forth any error, defect or irregularity in any order, affecting the decision of the case, as a ground of objection in the appeal and therefore, the appellate Court ought to have taken into consideration the validity of the order by which application for amendment was rejected by Trial Court.**

ङ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 105 – आदेश की वैधता – विचारण न्यायालय के निर्णय से व्यथित व्यक्ति को विधान मंडल मामले के निर्णय को प्रभावित करने वाले किसी आदेश में किसी त्रुटि, भूल या अनियमितता को अपील में आक्षेप का आधार बनाने के लिये प्राधिकृत करता है और इसलिए, अपीली न्यायालय को उस आदेश की विधि मान्यता को विचार में लेना चाहिए था जिसके द्वारा विचारण न्यायालय ने संशोधन के लिये आवेदन को अस्वीकार किया था।

Cases referred:

AIR 1999 SC 2213, (2011) 4 SCC 567, 1975 JLJ 667, AIR 1974 SC 171, AIR 1980 SC 727.

B.L. Pavecha with *Nitin Phadke*, for the appellant.

S.R. Kochatta, for the respondents.

Short Note

****(10)***

Before Mr. Justice Sujoy Paul

W.P. No. 1096/2009(S) (Gwalior) decided on 10 November, 2011

VIKRAM SHARMA ...Petitioner

Vs.

STATE BANK OF INDORE & ors. ...Respondents

A. Service Law – Departmental Enquiry – Non-supply of documents – **Non supply of documents will not vitiate the enquiry unless and until the relevance and thereafter the prejudice which is caused is proved.**

क. सेवा विधि–विभागीय जाँच–दस्तावेजों का प्रदाय नहीं किया जाना –दस्तावेजों का प्रदाय नहीं किया जाना जांच को दूषित नहीं करेगा जब तक कि सुसंगतता और तत्पश्चात प्रतिकूल प्रभाव जो कारित हुआ है साबित नहीं किया जाता।

B. ***Service Law – Departmental Enquiry – Status of Enquiry Officer*** **– Preliminary Enquiry was conducted by an officer who is superior than main Enquiry Officer – This will not vitiate the enquiry unless it is shown that main enquiry report is either influenced by preliminary enquiry report or is based on mechanical reliance on the preliminary enquiry report.**

ख. *सेवा विधि – विभागीय जाँच – जाँचकर्ता अधिकारी की हैसियत* – प्रारंभिक जाँच उस अधिकारी द्वारा की गई जो मुख्य जाँचकर्ता अधिकारी से वरिष्ठ है – यह जाँच को दूषित नहीं करेगा जब तक कि यह दर्शाया नहीं जाता कि मुख्य जाँच प्रतिवेदन या तो प्रारंभिक जाँच प्रतिवेदन से प्रभावित है अथवा प्रारंभिक जाँच प्रतिवेदन पर यांत्रिक रुप से विश्वास पर आधारित।

C. ***Service Law – Criminal Case – Stay of Departmental Enquiry – Departmental Enquiry based on same charge*** **– Merely because both the proceedings are founded upon same facts departmental enquiry is not required to be kept in abeyance unless charges are complex in nature involving complicated questions of facts and law.**

ग. *सेवा विधि – आपराधिक प्रकरण – विभागीय जाँच पर रोक – विभागीय जाँच उसी आरोप पर आधारित* – मात्र इसलिए कि दोनों कार्यवाहियां समान तथ्यों पर आधारित है, विभागीय जाँच को प्रास्थागित रखना अपेक्षित नहीं जब तक कि आरोप जटिल प्रकृति के न हो जिसमें तथ्यों एवं विधि के जटिल प्रश्न अंतर्ग्रस्त हैं।

D. ***Service Law – Bias of Enquiry Officer – Bias has to be specifically pleaded and proved*** **– Mere allegation of involvement of I.O. in some other criminal case does not show any bias – Procedural irregularity in departmental enquiry does not always lead to presumption of bias.**

घ. *सेवा विधि – जाँचकर्ता अधिकारी का पक्षपात – पक्षपात का विनिर्दिष्ट अभिवचन कर साबित किया जाना होता है* – किसी अन्य आपराधिक प्रकरण में जाँच अधिकारी के अंतर्ग्रस्त होने मात्र का अभिकथन, कोई पक्षपात नहीं दर्शाता – विभागीय जाँच में प्रक्रिया संबंधी अनियमितता, सदैव पक्षपात की उपधारणा की ओर नहीं ले जाती।

E. ***Service Law – Examination of handwriting*** **– Not necessary and in absence of any enabling provisions, enquiry is not vitiated.**

ङ. *सेवा विधि – हस्तलेख का परीक्षण* – आवश्यक नहीं और किसी सामर्थ्यकारी उपबंधों की अनुपस्थिति में जाँच दूषित नहीं होती।

F. Service Law – Examination-in-chief of witnesses without any cross examination **– One witness should be examined and then put to cross examination and then only others will enter the witness box – Enquiry stands vitiated on this ground.**

च. *सेवा विधि – बिना किसी प्रति परीक्षण के साक्षियों का मुख्य परीक्षण* – एक साक्षी का परीक्षण कर उसका प्रतिपरीक्षण किया जाना चाहिए और केवल तब अन्य साक्षी कठघरे में प्रवेश करेंगे – इस आधार पर जाँच दूषित हो जाती है।

G. Service Law – Reason and sufficient opportunity of defence **– Enquiry officer did not give opportunity to defence to lead evidence despite cooperation of defence.**

छ. *सेवा विधि – कारण एवं बचाव का पर्याप्त अवसर* – बचाव पक्ष के सहयोग के बावजूद जाँचकर्ता अधिकारी ने साक्ष्य प्रस्तुत करने हेतु बचाव पक्ष को अवसर नहीं दिया।

H. Service Law – Punishment and Appellate Orders – Non-speaking **– Against I.O.'s report a detailed representation and appeal were preferred – Both were decided by non-speaking order – Orders quashed because of non-application of mind.**

ज. *सेवा विधि – शास्ति और अपीली आदेश – कारण न देते हुए* – जाँचकर्ता अधिकारी के प्रतिवेदन के विरुद्ध विस्तृत अभ्यावेदन और अपील प्रस्तुत की गई – कारण न देते हुए आदेश द्वारा दोनों को निर्णित किया गया – मस्तिष्क का प्रयोग नहीं किये जाने के कारण आदेश अभिखंडित।

Cases referred:

(2005) 6 SCC 725, (2006) 1 SCC 567, (2004) 9 SCC 786, (2000) 5 SCC 531, (2003) 4 SCC 364, 2002 (5) MPLJ 161, (2003) 2 SCC 107, ILR 2008 MP 1683, (2007) 1 SCC 338, 2010(1) MPJR (CG) 126, (2005) 8 SCC 211, (2011) 2 SCC 316, (2001) 2 SCC 330, (2006) 5 SCC 201, (2010) 10 SCC 539, AIR 1988 SC 2118, (1999) 3 SCC 679, (1999) 1 SCC 759, (2009) 8 SCC 310, (1993) 4 SCC 727, (1986) 3 SCC 103, (2006) 11 SCC 147, (2009) 4 SCC 240, (2004) 7 SCC 581, (1996) 9 SCC 322, AIR 1991 SC 1221.

S.K. Singh, for the petitioner.

S.K. Rao with *M.P. Agarwal*, for the respondent/Bank.

I.L.R. [2012] M.P., 1

SUPREME COURT OF INDIA

Before Mr. Justice P. Sathasivam & Mr. Justice Dr. B.S. Chauhan

Criminal Appeal No. 339/2008 decided on 19 September, 2011

RAKESH & anr. ...Appellants

Vs.

STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 302 – Murder – Ocular Evidence and Medical Evidence – **Ocular evidence would have preference over medical evidence unless it is established that ocular evidence is totally irreconcilable with medical evidence.** (Para 9)

क. दण्ड संहिता (1860 का 45), धारा 302 –हत्या –प्रत्यक्ष साक्ष्य व चिकित्सीय साक्ष्य–प्रत्यक्ष साक्ष्य को चिकित्सीय साक्ष्य के ऊपर प्राथमिकता देनी होगी जब तक कि यह साबित नही हो जाता कि *प्रत्यक्ष* साक्ष्य पूरी तरह से चिकित्सीय साक्ष्य से असंगत है।

B. Evidence Act (1 of 1872), Section 3 – Related witness – **Mere relationship does not disqualify a witness – Such evidence is required to be carefully scrutinized and appreciated.** (Para 13)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – नातेदार साक्षी – मात्र संबंध साक्षी को अयोग्य नही बनाता – इस तरह के साक्ष्य की सावधानीपूर्वक संविक्षा व विवेचना करने की आवश्यकता है।

C. Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 3 – Related eye witness – **Deceased and eye witness 'A' were on same road – There was no obstruction in between them – As accused were well known to 'A' therefore discrepancy with regard to distance becomes irrelevant – 'A' immediately lodged F.I.R. mentioning the names and overt acts of accused persons which gives assurance regarding truth of its version – Witness trustworthy – Appeal dismissed.** (Paras 15 and 16)

ग. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 3–नातेदार प्रत्यक्षदर्शी साक्षी – मृतक व प्रत्यक्षदर्शी साक्षी 'ए' एक ही रोड पर थे – उनके बीच कोई अवरोध नही था – चूंकि अभियुक्त 'ए' से अच्छी तरह से परिचित था इसलिए दूरी के संबंध में विसंगति अप्रासंगिक हो जाती है–'ए' ने तुरंत अभियुक्त व्यक्तियों के नाम व प्रत्यक्ष कृत्यों का उल्लेख करते हुए एफ.आई.आर.

दर्ज करायी जो उसके कथन की सत्यता के संबंध में आश्वासन देती है – साक्षी विश्वसनीय – अपील खारिज।

D. Evidence Act (1 of 1872), Section 3–Witness– Minor discrepancies **–Minor discrepancies between narrations of witnesses when they speak on details, should not be used to discard the evidence in its entirety, unless such discrepancies are of material dimensions.** (Para 19)

घ. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – सूक्ष्म विसंगतियां – साक्षियों के वृतांत में सूक्ष्म विसंगतियां जब वे विस्तार से बताते हैं, का उपयोग साक्ष्य को संपूर्णतः अमान्य करने के लिए नही करना चाहिए, जब तक कि ऐसी विसंगतियां तात्विक आयाम की न हो।

Cases referred:

(2009) 13 SCC 542, (2010) 10 SCC 259, (2011) 7 SCC 421, AIR 2005 SC 1912, 2007 SC 1019, (1996) 1 SCC 614, (2011) 2 SCC 36, AIR 2010 SC 3624, (2009) 13 SCC 330, (1999) 9 SCC 525.

JUDGMENT

The Judgment of the court was delivered by, **Dr. B.S. CHAUHAN, J.:** This criminal appeal has been preferred against the judgment and order dated 15.12.2006 passed by the High Court of Judicature at Jabalpur in Criminal Appeal Nos. 518 and 890 of 1997.

2. Facts as explained by the prosecution have been that:

A. On 5.3.1996, on the day of 'Holi' at around 11.30 a.m., one Kailash @ Killu was assaulted by the appellants alongwith another accused in front of the house of one Rama Tailor. Anil (PW.11), nephew of the deceased, who had been following Kailash (deceased), raised an alarm and the assailants were caught at the spot. Various persons gathered at the place of occurrence but the assailants managed to flee. The injured Kailash was taken to the hospital but succumbed to his injuries. In view of the above, an FIR was lodged under Section 302 of Indian Penal Code, 1860 (hereinafter called as 'IPC') and Section 25 of the Arms Act, 1959, within one hour of the incident at 12.30 p.m., wherein both the appellants and other accused were named. In the FIR it was also stated that two policemen, namely, Ramdas Havaldar and Pannalal Sainik came at the scene and got the

accused persons released from the mob and, thus, they succeeded in running away.

B. Dr. R.K. Singhvi (PW.8), conducted the post-mortem on the body of the deceased on the same day. In his opinion, there were three incised wounds found on his body, one on the neck, one on the chest and another in the abdomen. All the injuries had been caused by sharp edged weapons and Kailash had died within three to six hours prior to conducting the post-mortem examination.

C. During the course of investigation, the appellants were arrested and the weapons used in the offence were recovered on their disclosure statements. After concluding the investigation, chargesheet was filed.

D. The case was committed for Sessions trial. The prosecution examined a large number of witnesses in support of its case. One Halle (DW.1) was examined in defence and after conclusion of the trial, all the three accused were convicted for the offence punishable under Section 302 IPC vide judgment and order dated 21.2.1997 and were awarded sentence of rigorous imprisonment for life and a fine of Rs. 2,000/- each, in default thereof, to serve further sentence of one year.

E. Being aggrieved, all the three accused/convicts preferred two appeals i.e. Criminal Appeal Nos. 518 & 890 of 1997 before the High Court of Judicature at Jabalpur, which were decided by judgment and order dated 10.2.2005 in absence of their counsel.

F. Being aggrieved, the present two appellants preferred criminal appeals before this Court i.e. Criminal Appeal Nos. 1463-64 of 2005 which were allowed vide judgment and order dated 20.7.2006 and this Court after setting aside the judgment and order dated 10.2.2005 of theHigh Court of Judicature at Jabalpur, remanded the appeals to be heard by the High Court afresh.

G. In pursuance of the said judgment and order of this Court dated 20.7.2006, the appeals have been heard afresh and dismissed vide judgment and order dated 15.12.2006 by the High Court.

Hence, this appeal.

3. Before proceeding with the case on merit, it may be pertinent to mention here that so far as the case of the appellant Rakesh is concerned, he had

already served the sentence of more than 14 years and has been granted premature release by the State. Appellant Rajesh has served about 7 -1/2 years and is still in jail. The third person Dinesh did not prefer any appeal so we are not concerned with him so far as this appeal is concerned.

4. Shri Siddharth Aggarwal, learned counsel appearing for the appellants, has submitted that the Trial Court had placed very heavy reliance upon the alleged eye-witnesses Khemchand (PW.10) and Anil (PW.11) who, in fact, could not be the eye-witnesses at all. The deposition of other witnesses examined by the prosecution, falsify the prosecution's case in entirety. There have been material inconsistencies in the depositions of Khemchand (PW.10) and Anil (PW.11), and their entire evidence has to be discredited. The High Court after considering the circumstances, did not find the evidence of Khemchand (PW.10) trustworthy, however, failed to appreciate that the evidence of Anil (PW.11) was also liable to be treated similarly. The ocular evidence is contradictory to the medical evidence as the incident had occurred at. 11.30 a.m., FIR had been lodged at 12.30 p.m. The post-mortem examination was conducted at 1.00 p.m. on the same day i.e. 5.3.1996. The Doctor opined that Kailash @ Killu had died within 3 to 6 hours before the post-mortem examination. Anil (PW.11) relied upon by the High Court, is closely related to the deceased Kailash @ Killu and none of the independent witnesses examined by the prosecution supported its case to the extent that Anil (PW.11) could be present on the place of occurrence at the relevant time. Thus, the appeal deserves to be allowed.

5. Per contra, Ms. Vibha Dutta Makhija, learned counsel appearing for the State, has vehemently opposed the appeal contending that there is no rule of law prohibiting reliance upon the evidence of the close relatives of the victims, however, such evidence has to be carefully scrutinised. The medical evidence may not be conclusive regarding the time of death as the physical condition of a body after death depends upon various factors i.e. age, geographical and climatic conditions of the place of occurrence etc. The facts and circumstances of the case do not warrant interference with the concurrent findings of the facts recorded by the courts below. The appeal lacks merit and is liable to be dismissed.

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

7. According to the prosecution case, Rakesh hit on the right side of the

neck with knife, Rajesh on the right portion of the chest by gupti and Dinesh hit by 'Katarna' (Axe having long wooden handle of 42 inches) on the right portion of the stomach of Kailash @ Killu, deceased. This evidence stands duly supported by the medical evidence as Dr. R.K. Singhvi (PW.8), on conducting the post-mortem examination found the following injuries on his person:

i) Incised wound on the right portion of right clerical bone of 1.5x2x5 cms with regular edges. Faciea muscle, blood vessel lungs was torn, blood was deposited in the chest.

ii) Incised wound on the right chest on third inter-coster space of 5 cm x 1.5 cm x 5 cm. Faciea muscle and blood vessels had been cut.

iii) Incised wound in the right chest on ninth intercoster space of 4 cms x 2 cm x 4 cms.

In the opinion of Doctor Singhvi, all the injuries appeared to have been caused within 3 to 6 hours by sharp edged weapons prior to the post-mortem examination.

8. All the weapons used in the crime had been recovered in the disclosure statements made by the appellants and other accused. In the opinion of Dr. R.K. Singhvi (PW.8), injuries nos.1, 2 and 3 could be caused by the weapons used in the offence. The question does arise as to whether there is inconsistency/ contradiction in the medical and ocular evidence. The evidence on record clearly reveal that injuries had been caused to Kailash @ Killu, deceased, on his neck, chest and right portion of the stomach.

9. It is a settled legal proposition that the ocular evidence would have primacy unless it is established that oral evidence is totally irreconcilable with the medical evidence. More so, the ocular testimony of a witness has a greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence if proved, the ocular evidence may be disbelieved. (Vide: *State of U.P. v. Hari Chand,* (2009) 13 SCC 542; *Abdul Sayeed v. State of Madhya Pradesh,* (2010) 10 SCC 259; and *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana,* (2011) 7 SCC 421).

10. So far as the opinion of the doctor that death had occurred within 3 to

6 hours prior to post-mortem examination, does not mean that Dr. R.K. Singhvi (PW.8) was able to fix any exact time of death. The issue raised by the learned counsel for the appellants is no more *res integra*.

In *Mangu Khan & Ors. v. State of Rajasthan,* AIR 2005 SC 1912, this Court examined a similar issue wherein the post-mortem report mentioned that the death had occurred within 24 hours prior to post-mortem examination. In that case, such an opinion did not match with the prosecution case. This Court examined the issue elaborately and held that physical condition of the body after death would depend on a large number of circumstances/factors and nothing can be said with certainty. In determining the issue, various factors such as age and health condition of the deceased, climatic and atmospheric conditions of the place of occurrence and the conditions under which the body is preserved, are required to be considered. There has been no cross-examination of the doctor on the issue as to elicit any of the material fact on which a possible argument could be based in this regard. The acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were made.

11. In *Baso Prasad & Ors. v. State of Bihar*, AIR 2007 SC 1019, while considering a similar issue, this Court held that exact time of death cannot be established scientifically and precisely.

Halle (DW.1), examined by the appellants in their defence, deposed that incident occurred at 11.00 a.m. which is consistent with the prosecution case. Thus, in view of the above, the submission so advanced by the learned counsel for the appellants, is not tenable and thus, does not tilt the balance in favour of the appellants. The argument does not require any further consideration.

12. This Court in *Kartik Malhar v. State of Bihar,* (1996) 1 SCC 614, defined 'interested witness' as:

> "A close relative who is a natural witness cannot be regarded as an interested witness. The term 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some animus or for some other reason."

13. Evidence of related witness can be relied upon provided it is trustworthy. Mere relationship does not disqualify a witness. Witnesses who are related to the victim are as competent to depose the facts as any other

witness. Such evidence is required to be carefully scrutinised and appreciated before reaching to a conclusion on the conviction of the accused in a given case. (See: *Himanshu @ Chintu* v. *State* (NCT of Delhi), (2011) 2 SCC 36; and *Bhajan Singh @ Harbhajan Singh & Ors. (supra).*

14. Anil (PW.11), undoubtedly, has been closely related to the victim being his nephew. His evidence requires a very careful and close scrutiny in the light of the aforesaid settled legal propositions.

15. The main thrust of the argument of the learned counsel for the appellants has been that the statements of Khemchand (PW.10) and Anil (PW.11) have been mutually destructive, thus both are liable to be discarded altogether. The High Court has disbelieved Khemchand (PW.10) to the extent that he was present at the time of incident and thus, could not be an eye-witness. Deposition of Anil (PW.11) clearly reveals that incident occurred at 10.30 a.m. in front of the house of Rama Tailor and the appellants alongwith Dinesh caused injuries to Kailash (deceased) with weapons such as knife, gupti and 'katarna' on the neck, chest and stomach. At the time of incident, Anil (PW.11) had been at a short distance from the victim. Ishwar Nayak (PW.6), Dharmendra (PW.12) and other persons had also gathered there. He also deposed about the motive that Rakesh, accused, wanted utensils from Kailash (deceased), who refused to oblige the accused. Rakesh, accused had threatened Kailash to face dire consequences. In cross examination, he has admitted that at the time of the incident, Ishwar Nayak (PW.6), Dharmendra (PW.12) and Pradeep Pathak (PW.15) etc., were with him. He denied that he reached the place of occurrence on being informed by Halle (DW.1) and further denied the suggestion that he had not seen the quarrel between the accused persons and the deceased. He gave a full account of the overt acts of the accused while causing injuries to Kailash. His evidence has to be examined taking into consideration that the site plan prepared by the Patwari make it clear that the incident occurred on a main road and the victim as well as Anil (PW.11) were on the same road. There was no obstruction in between, thus Anil (PW.11) could clearly view the incident. Though, there has been some dispute regarding the distance between the two, but taking into consideration the fact that the accused had been very well known to the witness being resident of the same village, the distance becomes immaterial for the reason that the witness could recognize him even from that distance. The other eye-witnesses, particularly, Ishwar Nayak (PW.6), Dharmendra (PW.12) and Pradeep Pathak (PW.15) did not support the case of the prosecution appropriately.

Dharmendra (PW.12) stood declared hostile. Deposition of Ishwar Nayak (PW.6) has corroborated the case of the prosecution to the extent that Anil (PW.11) was at the place of occurrence earlier to him. In cross-examination, he deposed as under:

> "Half the boys ran towards the spot of incident immediately. Amongst them was Anil also. I did not go with Anil."

16. In view of the above, it is evident that incident occurred at 11.30 a.m. Kailash, injured was taken to the hospital where he was examined by the doctor and declared dead. Anil (PW.11) went from hospital to police station and lodged the FIR at 12.30 p.m. wherein all the three accused were specifically named. The distance of the police station from the place of occurrence had been only 1 k.m. The overt acts of the accused had been mentioned. The motive was also disclosed. It is improbable that the appellants had been enroped falsely as promptness in lodging the FIR shows that there was no time for *manipulation*. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. Allegations may not be an after-thought or having a colourable version of the incidents. (See: *Kishan Singh* (dead) thr. Lrs. *v. Gurpal Singh & Ors.*, AIR 2010 SC 3624).

It does not appeal to reasons as to why the witness would falsely enrope the appellants and other accused in such a heinous crime and spare the real culprits to go scot-free. In the FIR, Anil (PW.11) has disclosed that his father Khemchand (PW.10), Ishwar Nayak (PW.6) and Dharmendra (PW.12) reached the place of occurrence at a later stage. As the parties were known to each other being the residents of the same village, the identity etc. was not in dispute.

17. The Trial Court had appreciated the evidence on record, and reached the conclusion to the effect that Anil (PW.11) was a trustworthy witness and had been an eye-witness of the incident. He had faced grilling cross- examination. However, no discrepancy or error could be shown in spite of the fact that he was nephew of Kailash (deceased). On careful scrutiny of his deposition, his statement was found trustworthy.

The court further held that even if the other witnesses on the spot had not supported the prosecution case, Anil (PW.11) was a natural witness and had seen the incident. The other circumstances particularly, the statements of B.M. Dubey, Investigating Officer (PW.21) and Balram (PW.9), the arrest of

accused, recovery of weapons on their disclosure statements proved the prosecution case. The depositions of B.M. Dubey (PW.21) had been natural. There was no proof that the I.O. (PW.21) had any animosity or any kind of interest and closeness to the deceased. Therefore, the question of not believing the statement of B.M. Dubey, I.O. (PW.21) does not arise. The High Court in spite of the fact of dis-believing Khemchand (PW.10), found the prosecution case wholly proved on the sole testimony of Anil (PW.11).

18. There are concurrent findings of fact by the two courts below. Unless the findings so recorded are found to be perverse, this Court should not generally interfere. This "Court cannot embark upon fruitless task of determining the issues by re-appreciating the evidence." (See : *Manju Ram Kalita v. State of Assam,* (2009) 13 SCC 330).

19. Even if there are minor discrepancies between the narrations of witnesses when they speak on details, unless such contradictions are of material dimensions, the same should not be used to discard the evidence in its entirety. The trivial discrepancy ought not to obliterate the otherwise acceptable evidence.

20. In *Leela Ram* (Dead) thr. *Duli Chand v. State of Haryana & Anr.,* (1999) 9 SCC 525, this Court observed as under:

> "The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise."

21. In view of the above, we reach the inescapable conclusion that the courts below reached the correct conclusion in accepting the prosecution case. Anil (PW.11) is a natural witness and his testimony inspired confidence and is, thus, worth acceptance.

The facts and circumstances of the instant case do not warrant any interference by this Court. Appeal lacks merit and is, accordingly, dismissed.

Appeal dismissed.

I.L.R.[2012] M.P. 10

WRIT APPEAL

Before Mr. Justice K. K. Lahoti & Mrs. Justice Sushma Shrivastava

W.A. No. 1182/2010 (Jabalpur) decided on 21 October, 2011

NIRMALA PATHAK (SMT.) ...Appellant

Vs.

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

***Municipal Corporation Act, M.P. (23 of 1956), Section 441 – Election Petition – Nirvachan Niyam, Rule 9A* – Name of appellant was deleted from the voter list – Appellant contested the election of Mayor of Municipal Corporation and was elected under the interim order of High Court – Election Petition also filed against her also on the ground of deletion of her name from voter list – Election Petition pending before Tribunal involves the question of correction and deletion of her name in the voter list – The Election Tribunal has to record findings and such findings would supersede the orders passed by Registration Officer – Any order passed in W.A. would adversely effect the proceedings pending before the Election Tribunal – Writ Appeal disposed off with direction that matter be finally adjudicated by Election Tribunal and till that date the order of Registration Officer deleting the name of the Petitioner shall not be given effect and shall be subject to the final decision by the Election Tribunal.** (Para 6)

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 441–निर्वाचन याचिका–निर्वाचन नियम, नियम 9ए–अपीलार्थी का नाम मतदाता सूची से हटाया गया–उच्च न्यायालय के अंतरिम आदेश के अंतर्गत अपीलार्थी ने नगरपालिका के महापौर का चुनाव लड़ा और निर्वाचित हुई–मतदाता सूची से उसका नाम हटाये जाने के आधार पर उसके विरुद्ध निर्वाचन याचिका भी प्रस्तुत की गई–अधिकरण के समक्ष लंबित निर्वाचन याचिका में उसके नाम का मतदाता सूची में सुधार एवं हटाये जाने का प्रश्न अंतर्ग्रस्त है–निर्वाचन अधिकरण को निष्कर्ष अभिलिखित करने होते हैं और ऐसे निष्कर्ष पंजीयन अधिकारी द्वारा पारित आदेशों को अधिक्रांत करेंगे–डब्लू. ए. में पारित किया गया कोई आदेश, निर्वाचन अधिकरण के समक्ष लंबित कार्यवाही को प्रतिकूल रुप से प्रभावित करेगा–इस निदेश के साथ रिट अपील का निपटारा किया गया कि निर्वाचन अधिकरण द्वारा मामला अंतिमतः न्यायनिर्णित किया जाये तथा उस दिनांक तक याची का नाम हटाने के पंजीयन अधिकारी के आदेश को प्रभावी नहीं किया जायेगा और निर्वाचन अधिकरण के अंतिम निर्णय के अध्याधीन होगा।

A.M. Trivedi with *Sampoorn Tiwari,* for the appllant.
R.D. Jain, A.G. with *Rahul Jain,* Dy. A.G. for the respondents No. 1, 3 & 6.
Pankaj Dubey, for the respondent No. 2.
Kishore Shrivastava with *Rakesh Jain,* for the respondent No. 7.

ORDER

The order of the court was delivered by :
KRISHN KUMAR LAHOTI, J.: This appeal is directed against an order dated 26.10.2010 in Writ Petition No.12756/09, under Section 2 of the M.P. Uchcha Nyalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005. By the aforesaid order, learned Single Judge disposed of the writ petition, preferred by the appellant, for pressing remedy of appeal before the appellate authority against the impugned order dated 26.11.2009 Annexure P/12 passed by the Registration Officer, Municipal Corporation (Nirvachan), Katni.

2. By order dated 26.11.2009, the Registration Officer, Municipal Corporation, Katni directed deletion of the name of the appellant from the voter-list. It will be pertinent to mention that the order dated 26.11.2009 Annexure P/12 passed by the Registration Officer, Municipal Corporation (Nirvachan) Katni was stayed by the learned Single Judge and after the interim order passed by the learned Single Judge, the appellant herein contested the election of Mayor of Municipal Corporation, Katni and she defeated her nearest rival Smt.Alka Jain by a margin of votes of 5000.

3. This appeal was filed on 29.10.2010 and was placed before the Division Bench for consideration. On 8.11.2010, a Division Bench of this Court passed an order which reads thus:-

"8.11.2010

Shri A.M.Trivedi, learned senior counsel assisted by Shri Ashish Trivedi, Advocate for the appellant.

Shri Sanjay Dwivedi, learned Government Advocate for respondents No.1 and 3 to 6.

Shri Pankaj Dubey, learned counsel for respondent No.2.

Shri Rakesh Jain, learned counsel for respondent No.7.

When the matter was taken up today, at the outset, Shri A.M.Trivedi, learned senior counsel appearing for the appellant, stated that the appellant has been advised to withdraw appeal preferred under Rule 9A(4) of the Madhya Pradesh Nagar Palika Nirwachan Niyam, 1994 before the Collector. He submitted that since pure question of law is involved in the case and in view of the fact that the appeal is pending before this Court against the order of the learned Single Judge, it is appropriate that the controversy may be decided by this Court.

Learned Government Advocate appearing for the respondents No.1 and 3 to 6 and the learned counsel for respondent No.2 have no objection to the aforesaid prayer made by learned senior counsel appearing for the appellant.

In view of the aforesaid submissions made before us, the appellant may seek leave of the appellate authority to withdraw appeal preferred under Rule 9A(4) of the Madhya Pradesh Nagar Palika Nirwachan Niyam, 1994 and file an application alongwith the order of the appellate authority permitting her to withdraw the appeal.

Looking to the facts of the case and also in view of the interim order dated 26.11.2009 passed in W.P.No.12756/2009, it is directed that the operation of the impugned order dated 26.11.2009 passed by respondent No.4 shall remain stayed till 31st of January, 2011.

List the matter in the second week of January, 2011."

4. Thereafter, matter remained pending and is heard finally by this Court. The learned counsel appearing for the appellant challenged the impugned order dated 26.11.2009 on following grounds:-

(i) That the name of appellant was entered in the voter list of Ward No.31Chhotelal Pathak Ward, Katni. Though there was some error in the name and age of the appellant in the said voter list but it was duly corrected by the Registration Officer under rule 9 of the M.P. Nagar Palika Nirvachan Niyam, 1994 (hereinafter referred to as 'Nirvachan Niyam).

(ii) The appellant belongs to an old tradition congress party family. Her husband was a Cabinet Minister and MLA. Her son is also a sitting MLA. The appellant has made various allegations in respect of influence of another ruling political party. Because of the aforesaid, it had influenced the election officer posted at Katni, resulting an order directing deletion of her name by the election officer on 26.11.2009, the date on which nomination for the office of Mayor, Municipal Corporation, Katni was to be filed. The post of Mayor, Municipal Corporation, Katni was reserved for woman.

(iii) That the name of appellant was included in the voter list of Gram Panchayat Barmani, Legislative Constituency Vijayraghavgarh because appellant was possessing agricultural land and a rural house there, while appellant was not the ordinarily resident of village Barmani and in fact is an ordinarily resident of Ward No.31 of Katni. The appellant was usually visiting village Barmani to take care of her agriculture but since last one year because of heart disease, she was continuously residing at her house situated at Ward No.31 Chhakodilal Pathak Ward of Katni. Late Chhakodilal Pathak happened to be her grand-father-in-law and there is an ancestral house of husband of the appellant at Ward No.31 of the Municipal Corporation, Katni.

(iv) That, on 20.11.2009, the appellant moved an application for deletion of her name from the voter list of Gram Panchayat Barmani on the ground that since about one year, she was continuously residing in Ward No.31 of Katni. The Revenue Inspector recommended for deletion of her name from the voter list of the Gram Panchayat Barmani, but such application was rejected by the Registration Officer-cum-S.D.O., Vijayraghavgarh. Being aggrieved by the aforesaid, appellant had preferred an appeal before the Collector-cum-District Election officer, Panchayat, Katni who remanded the case to the S.D.O. and ultimately by an order dated 8.12.2009, the SDO, Vijayraghavgarh directed for deletion of name of the appellant from the voter-list of Gram Panchayat, Barmani vide order Annexure P/13.

(v) That on 7.7.2009, M.P. State Election Commission had issued an order for appointment of Registration/Assistant Registration Officer for inviting claims and objection for preliminary/draft voter-list of Municipal Corporation, Katni. The last date of such correction was

24.10.2009 and last date of publication of final voter list was 11.11.2009. Appellant had found that particulars of her name were wrongly recorded in Part-3, Ward No.31 Katni at Sr.No.219 as "Nirmala W/o Jitendra Kumar, aged 47 years". Appellant had moved an application for correction in the voter-list under rule 9 of the Nirvachan Niyam for correction of the entry as "Nirmala W/o Satyendra Kumar, aged 58 years". The application was filed on the prescribed format Annexure P/15. An enquiry was made by an authorised officer. He had made recommendation and accordingly, the Registration Officer, on being satisfied from the preliminary enquiry report, on 20.10.2009 directed that the name of appellant be corrected. He ordered thus:-

In place of 'Jitendra Kumar', 'Satyendra Kumar' and in place of age '47' years, age '58' years be corrected.

(vi) That, under rule 6(4) of the Nirvachan Niyam, voter-list so amended was final subject to decision of appeal, if any. Rule 6(5) provides that any person aggrieved by the decision of the Registration Officer may prefer an appeal to the appellate authority within five days of such decision, but no provision is there for filing an appeal after publication of the final voter-list. As no appeal was filed within 5 days against order dated 20.10.2009, order of Registration Officer had attained finality.

(vii) The appellant when inspected the final voter-list published on 11.11.2009 found that her name was not corrected because of some printing error or due to clerical mistake while aforesaid entry was already directed to be corrected by the Registration Officer on 20.10.2009. The appellant under the proviso of rule 9 moved an application to the Registration Officer for correction of such entry and the Registration Officer-cum-SDO, Katni directed correction of error in the name of appellant and the entry was directed to be corrected on 20.11.2009 in the final voter list. Against such an order, no appeal, revision or review is provided under the rules, as such final voter list had attained finality under rule 6(4).

(viii) That, rule 9-A of Nirvachan Niyam provides for deletion of entry in the voter-list in certain exigencies, like a person concerned

is registered in the voter-list of more than one ward of the Municipality concerned or of any other Municipality or of any Panchayat. Section 12 of the M.P. Municipal Corporation Act, 1956 (hereinafter referred to as 'the Act')specifically provides that no person shall be entitled to be registered in the electoral roll of more than one ward in the same city and no person shall be entitled to be registered in the electoral roll for any ward more than once. But registration of a person in any other Panchayat is not a disqualification under Section 13 of the Act. It is stated in para 9 of the memo of appeal that the provision as contained in rule 9-A providing deletion of the name, if registered, in the voter-list of any Panchayat is contrary to section 12 of the Act.

(ix) That, respondent No.7 Kamendra Singh, a worker of rival political party, at the instance of some political leaders of ruling party, filed an appeal on 23.11.2009 directly before the Election Officer-cum-Collector under rule 9, 9-A read with 9-A(4)(5) of the Nirvachan Niyam. The appellate authority directed for issuance of the notice to the appellant on 23.11.2009 directing her appearance on 24.11.2009 at 12 O'clock.

(x) That on 23.11.2009, the appellant was declared as an authorised congress party candidate for the election of office of Mayor and had submitted a nomination as an authorised congress party candidate.

(xi) Respondent No.7 Kamendra Singh raised an objection that name of the appellant was registered in the Panchayat also and her name deserves to be deleted from the voter list of Ward No.31 of Municipal Corporation, Katni.

(xii) That, respondent No.7 erroneously moved an application under rule 9-A before the Registration Officer-cum-SDO on the basis of same set of fact on which he had filed an appeal before the appellate authority -cum-Collector. On this appeal, the appellate authority directed for appearance of the appellant 24.11.2009 at 12 hours. On the application filed by the respondent No.7 under rule 9-A before the Registration Officer-cum-SDO, Katni, the Registration Officer summoned the appellant to appear on 24.11.2009 at 4 p.m.

(xiii) The appellate authority who directed for appearance of the

appellant at 12 O'clock again directed the appellant to appear before him at 5 p.m. Though he was apprised that the Registration Officer had fixed the case under rule 9(A) at 4 p.m. The appellant at 4 p.m. appeared before the Registration Officer. The appellant made an objection before the Registration Officer for supply of documents filed by the respondent No.7 alongwith the application. The Registration Officer fixed the case for 25.11.2009 at 10 a.m. Thereafter, when the appellant reached to the office of appellate authority-cum-Collector at 5.15 p.m., she became aware that the respondent No.7 Kamendra Singh had withdrawn the appeal filed before the District Election Officer.

(xiv) On 25.11.2009, the Registration Officer heard both parties and passed an order at 7 p.m. Some allegations are also made in para 13 of the writ appeal that the leaders of rival ruling party had met with the SDO, Katni and in this regard, a Fax message was also sent to the State Election Commission against the Registration Officer.

(xv) That, 26.11.2009 was the last date for filing nomination paper and to deter the appellant from contesting the election of Mayor, Katni, the Registration Officer-cum-SDO, Katni passed the impugned order on 26.11.2009 at 12 p.m. directing deletion of the name of appellant from the voter-list of Municipal Corporation, Katni on the ground that her name was entered in the voter-list of Gram Panchayat, Barmani. Though it was not a disqualification under Section 12 of the Act.

(xvi) That, an appeal against such an order was filed before the District Election Officer, Katni, but the appeal was not registered by the District Election Officer and the appellant apprehending some bias of the District Election Officer, rushed to the High Court, filed a writ petition before the learned Single Bench on 26.11.2009. The aforesaid writ petition was heard on 26.11.2009 itself and ad interim writ was issued in W.P.No.12756/09. The order reads thus:-

"26.11.2009

It is submitted that petitioner has been declared as a candidate for the office of Mayor for Katni district by the Indian National Congress political party and her name also exists in the voter-list of CLP Ward No.31 Katni, but the respondent No.4 by the impugned order dated 26.11.2009 Annexure P-12, has directed for

the deletion of her name from the voter list. It has also been submitted that if the order dated 26.11.2009 will not be stayed, petitioner will be illegally deprived from contesting the prestigious election of Mayor as the date fixed for scrutiny of nomination papers is tomorrow.

After hearing the learned counsel for petitioner, I deem it proper to stay the operation of impugned order dated 26.11.2009 Annexure P/12, and the operation of the order is accordingly stayed. It is, however, made clear that the election in question of petitioner will be subject to the final decision of this petition."

(xvii) Against the order passed by the learned Single Judge dated 26.11.2009, respondent No.7 Kamendra Singh filed a Writ Appeal No.1142/09 in which on 27.11.2009, a Division Bench of this Court passed an order which reads thus:-

"27.11.2009

Having heard the learned counsel for the parties, we are of the considered opinion that the lis in question does require delineation both on fact and law. What has been canvassed before us from both sides is not such which apparently touches any jurisdictional factor but delving deep into the factual matrix, the provisions in entirety and law in the field. In view of the aforesaid, we are disposed to think that interference at this stage in appeal would not be appropriate especially when the learned single Judge has expressed the view the election in question would be subject to the final decision of the writ petition. However, we may hasten to clarify that we have not expressed any opinion on the merits of the case. Regard being had to the peculiarity of the case we would request the learned single Judge to dispose of the writ petition as expeditiously as possible.

Accordingly, the writ appeal stands disposed of.

(xviii) After ad interim writ issued by the learned Single Judge on 26.11.2009, the appellant contested the election of Mayor of Municipal Corporation, Katni as a candidate of Indian National Congress and defeated her nearest rival Smt.Alka Jain, a candidate of ruling party BJP by a margin of about 5000 votes. It is alleged that after declaration of the result, various appeals were filed before the District Election

Officer which inspite of objection raised by the appellant, were entertained.

(xix) That, Smt.Alka Jain has also filed an election petition against the appellant under Section 441 of the Act on the same grounds, which are raised in this case, which is pending before the Additional District Judge, Katni.

On the aforesaid grounds, this appeal has been filed.

5. Respondents opposed the writ appeal on the following grounds:-

(a) That, the appellant was in fact an ordinarily resident of village Barmani and was not entitled to contest the election of Mayor, Municipal Corporation, Katni.

(b) That, in fact Nirmala W/o Jitendra Kumar is the wife younger brother of husband of appellant, the ordinarily resident of Ward No.31, Municipal Corporation, Katni and taking advantage of the same name, the appellant, just to get the benefit of reservation of seat of Mayor, Katni got the aforesaid manipulation.

(c) That, upto 20.10.2009, no order as is filed as Annexure P/15 was passed, otherwise there was no question of filing another application on 20.10.2009 by the appellant for correction in the entry.

(d) That appellant's application for deleting her name from the voter list of Gram Panchayat Barmani was already rejected, so she was not entitled to contest the election from Ward No.31 for the office of Mayor, Katni.

(e) Against the impugned order dated 26.11.2009, the appellant had already preferred an appeal, so learned Single Judge rightly directed for disposal of the writ petition with liberty to the appellant to press the appeal pending before the District Election Officer.

(f) That, on the date when the impugned order dated 26.11.2009 was passed, her name was appearing in both places namely at Gram Panchayat, Barmani and also at Ward No.31 of Municipal Corporation, Katni, so Registration Officer rightly directed deletion of the name of the appellant from the voter list of Ward No.31 of Katni.

(g) That the appellant was ordinarily resident of village Barmani. By manipulation, she got entered her name in the garb of correction of entry which was not correct. In fact, younger brother of husband of the appellant namely Jitendra Kumar is ordinarily resident of Ward No.31. Other family members' names are also appearing in the voter list, so the Registration Officer rightly passed the order dated 26.11.2009 directing deletion of the name of the appellant from the voter list of Ward No.31 of Katni, in which there is no fault.

(h) The appellant was not entitled to be registered at two places and her application for correction of the entry was not maintainable. It is submitted by the respondents that this appeal may be dismissed.

6. From the perusal of the aforesaid facts, it is apparent that the appellant, after passing of ad interim writ by the learned Single Judge contested the election for the office of Mayor, Municipal Corporation, Katni and she was declared as a returned candidate and at present she is holding the office of Mayor, Katni. It is also not in dispute that the another candidate who was rival contestant of the appellant namely Smt.Alka Jain has filed an election petition against the appellant under Section 441 of the Act which is pending, for adjudication, before the Additional District Judge, Katni who has to look into the matter and after holding a due enquiry, to decide the matter in accordance with law. In this case, various disputed questions of facts are involved namely:-

(a) Whether the appellant was the ordinarily resident of Ward No.31 of Katni or she was ordinarily resident of Gram Panchayat, Barmani ?

(b) Whether Smt.Nirmala W/o Jitendra Kumar was a correct entry in the voter list or it was duly corrected at the instance of the appellant by the Registration Officer ?

(c) Whether the order dated 20.10.2009 was duly passed by the Registration Officer and it was in existence even before passing of the order by the Registration Officer on 11.11.2009 ?

(d) Whether the appellant was an eligible candidate to contest the election of Mayor, Katni.

All these questions are to be examined by the Election Tribunal in the

election petition filed by Smt.Alka Jain. The Election Tribunal while considering the election petition will have to record findings in this regard after receiving the evidence of both parties. The order of Election Tribunal deciding all the issues will supersede the orders passed by the Registration Officer or by the appellate authority in the matter. At this stage, if the matter is remanded back to the appellate authority to decide the appeal, which has already been withdrawn by the appellant will be a futile exercise in the matter. The Division Bench in this matter rightly permitted the appellant to withdraw the aforesaid appeal with liberty to raise all the contentions in this appeal on 8.11.2010. Any decision in this writ appeal will affect the decision of the election petition filed by Smt.Alka Jain who is not party before this Court. In this appeal, the contesting party is respondent No.7 who at present is not party in the election petition. In absence of Smt.Alka Jain, if any finding is recorded by this Court, naturally it will affect Smt.Alka Jain who has not been heard by this Court. In these circumstances, we find it appropriate to dispose of this writ appeal with a direction that matter be finally adjudicated by the Election Tribunal in the election petition filed by Smt.Alka Jain and till the matter is decided by the Election Tribunal, order dated 26.11.2009 passed by the Registration Officer be not given effect to and which shall be made subject to final decision by the Election Tribunal.

7. The matter may be examined from one more angle. If this appeal is dismissed, naturally order passed by the Registration Officer under rule 9-A of the Nirvachan Niyam will come into force and the appellant who has contested the election of Mayor will lose the seat only on the ground that she was not an eligible candidate to contest the election of Mayor on the reserved seat for woman at Municipal Corporation, Katni. If this appeal is allowed and the order passed by the Registration Officer is set aside, this Court has to record various findings which should be recorded only by the Election Tribunal. If those findings are recorded by this Court, naturally it will have an effect on the Election Petition filed by Smt.Alka Jain against the appellant and is still pending before the Election Tribunal, Katni. Article 243ZG of the Constitution of India provides that no election to any municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the legislature of a State. Section 441 of the M.P. Municipal Corporation Act, 1956 provides thus:-

> **441.Election Petition**- (1) No election or nomination under this Act shall be called into question except by a petition

presented in accordance with the provision of this section.

(2) Such petition may be presented on one more of the grounds specified in section 441-B-

(a) by any candidate at such election or nomination; or

(b) (i)in the case of an election of a Councillor, by any voter of the ward concerned;

(ii) in the case of nomination of a Councillor, by any Councillor;

(iii) in the case of election of Mayor, by any voter of the Municipal area to the principal Civil Court of original jurisdictional (hereinafter referred as the Court) within the local limits of whose jurisdictional the election or nomination was held.

(3) No petition presented under sub-section (2) shall be admitted unless-

(i) it is presented within thirty days from the date on which the result of such election or nomination was notified in the Gazette; and

(ii) it is accompanied by a Government Treasury receipt showing a deposit of two hundred and fifty rupees.

(4) A petitioner shall join as respondents to his petition-

(a) where the petitioner, in addition to claiming a declaration that the election or nomination, as the case may be, of all or any of the returned candidate is void, claims a further declaration that he himself or any other candidate has been duly elected or nominated, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates;

(b) any other candidates against whom allegations of any corrupt practices are made in the petition.

(5) An election petition shall-

(a) contain a concise statement of the material facts on which the petitioner relies;

(b) with sufficient particulars, set forth the ground or grounds on which the election or nomination is called in question;

(c) be signed by the petitioner and verified in the manner prescribed in the Code of Civil Procedure, 1908 (V of 1908), for the verification of pleadings.

441-A-Relief that may be claimed by the petitioner.-A petitioner may claim-

(a) a declaration that the election or nomination of all or any of the returned candidates is void; and

(b) in addition thereto, a further declaration that he himself or any other candidate has been duly elected or nominated.

(2) The expression "returned candidate" means a candidate whose name is notified in the Gazette under section 22,

441-B, Grounds for declaring election or nominations to be void.-(1) Subject to the provisions of sub-section (2), if the Court is of the opinion-

(a) that on the date of his election or nomination a returned candidate was not qualified or was disqualified, to be chosen as a Mayor or a Councillor; or

(b) that any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent; or

(c) that any nomination paper has been improperly rejected; or

(d) that the result of the election or nomination, in so far as it concerns a returned candidate has been materially affected-

(i) by the improper acceptance of any nomination; or

(ii) by a corrupt practice having been committed in the interest of the returned candidate by a person other than that candidate or his agent or a person acting with the consent of such candidate or agent; or

(iii) by the improper acceptance or refusal of any vote or reception of any vote which is void; or

(iv) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder save the rules framed under section 14 in so far as they relate to preparation and revision of list of voters, the Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the Court a returned candidate has been guilty by an agent of any corrupt practice, but the Court is satisfied -

(a) that no such corrupt practice was committed at the election or nomination by the candidate, and every such corrupt practice was committed contrary to the instructions, and without the consent of the candidate ;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practices at the election or nomination; and

(c) that in all other respects the election or nomination was free from any corrupt practice on the part of the candidate or any of his agents; then, the Court may decide that the election or nomination of the returned candidate is not void.

441-G. Disqualification arising out of corrupt practices- If any person, after the commencement of this Act, is, upon the trial of an election petition thereunder, found guilty of any corrupt practice, he shall, for a period of five years from the date on which such finding takes effect, be disqualified for voting at any election;

Provided that the State Government may, by notification, remove the disqualification incurred under this section with effect from such date as may be specified therein.

8. Section 441-B(a) specifically provides that the Court can declare election of a returned candidate to be void on the ground that on the date of his election, a returned candidate was not qualified or was disqualified to be chosen as Mayor or any corrupt practice was committed by a returned candidate. Aforesaid provision provides a complete mechanism to consider all these questions which are raised by the parties before this Court. But as we have stated hereinabove, any decision in this appeal would affect the election petition filed by Smt.Alka Jain against the appellant. An election petition challenging the election of the appellant has already been filed before the Election Tribunal, and is pending before the competent Court of jurisdiction. It would not be appropriate for this Court to decide all the aforesaid contentions which are in fact disputed questions of facts and require proper adjudication. In some of the issues, evidence will also be required to be recorded. In these circumstances, it would not be appropriate for this Court to decide the issues which are raised by the parties before this Court and we find it appropriate to the parties to await the verdict of Election Tribunal in this regard.

9 In view of aforesaid, we find it appropriate to dispose of this writ appeal with following directions:-

(i) Order dated 26.11.2009 passed by the Registration Officer directing deletion of name of the appellant from the voter-list of Ward No.31 of Katni shall remain in abeyance till the decision by the Election Tribunal in the election petition filed by Smt.Alka Jain against the appellant challenging her election of Mayor of Municipal Corporation, Katni and shall be subject to final decision by the Election Tribunal.

(ii) The Election Tribunal is directed to decide the election petition preferred by Smt.Alka Jain expeditiously.

(iii) The decision of the Election Tribunal shall be binding on all the parties.

With the aforesaid directions, this writ appeal is finally disposed of with no order as to costs.

Appeal disposed of

I.L.R.[2012] M.P. 25
WRIT APPEAL

Before Mr. Sushil Harkauli, Acting Chief Justice & Mr. Justice Alok Aradhe

W.A.No.902/2011 (Jabalpur) decided on 28 November, 2011

BASANT KUMAR JAIN ...Appellant
Vs.
STATE BANK OF INDIA ...Respondent

Constitution – Article 226 – Writ Petition – Alternative Remedy **— Appellant asserted that no notice under Section 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 was issued whereas counsel for the respondent-Bank has stated that notice under Section 13(2) of the Act was served by affixture and panchnama was prepared – The question whether under Section 13(2) of the Act was served on the appellant or not, is a disputed question of fact which can not be adjudicated in a writ petition – All the grounds with regard to procedural irregularity in taking the measures under Section 13(4) of the Act can very well be agitated and adjudicated in the appeal preferred under Section 17 of the Act – Writ petition on the ground of availability of alternative remedy, can be dismissed – Writ appeal dismissed.** (Para 7)

संविधान – अनुच्छेद 226 – रिट याचिका – वैकल्पिक उपचार – अपीलार्थी ने प्राख्यान किया कि वित्तीय अस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, 2002 की धारा 13(2) के अंतर्गत कोई नोटिस जारी नही किया गया जबकि प्रत्यर्थी बैंक के अधिवक्ता का कहना है कि अधिनियम की धारा 13(2) के अंतर्गत नोटिस चस्पा द्वारा तामील किया गया था और पंचनामा तैयार किया गया था – प्रश्न कि क्या अपीलार्थी को अधिनियम की धारा 13(2) के अंतर्गत नोटिस तामील किया गया था अथवा नही विवादित तथ्य का प्रश्न है जिसे रिट याचिका में न्यायनिर्णित नहीं किया जा सकता– अधिनियम की धारा 13(2) के अंतर्गत उपाय करने में प्रक्रिया के संबंध में अनियमितता से संबंधित सभी आधारों को अधिनियम की धारा 17 के अंतर्गत अपील में भलीभांति उठाया एवं न्यायनिर्णित किया जा सकता है –वैकल्पिक उपचार की उपलब्धता के आधार पर रिट याचिका खारिज की जा सकती है – रिट अपील खारिज।

Cases referred:

(2010) 8 SCC 110, (2008) 1 SCC 125, AIR 2008 PUNJAB &

HARYANA 148, AIR 2008 KARNATAKA 136, AIR 2011 JHARKHAND 68, (2005) 6 SCC 499, (1998) 8 SCC 1, AIR 2005 SC 3454, AIR 1971 SC 33, (2008) 12 SCC 675.

Ashok Lalwani, for the appellant.
Anuj Agrawal, for the respondents.

ORDER

The order of the court was delivered by :
ALOK ARADHE J. : Heard on the question of admission.

In the instant writ petition, the petitioner has challenged the validity of the order dated 25.7.2011 passed by the learned Single Judge by which the writ petition preferred by the appellant has been dismissed. In order to appreciate the appellant's grievance, few facts need mention, which are stated infra.

2. The appellant had obtained financial assistance from the respondent-Bank to the tune of Rs.23.25 lacs for establishment of grossery business. In order to secure the loan, the appellant had mortgaged his property consisting land as well as residential house situate at village Bankhedi, District Hoshangabad. It is the case of the appellant that he sustained losses in the business and thereafter, he shifted to Raipur. A notice dated 21.3.2007 was published in the newspaper in exercise of power under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act'). The appellant thereupon approached this Court by filing a writ petition inter-alia on the ground that neither any notice as envisaged under Section 13(2) of the Act was issued to the appellant nor there was compliance with provisions of Section 13(3-A) of the Act. The writ petition preferred by the appellant was dismissed by the learned Single Judge by placing reliance on the decision of Supreme Court in *United Bank of India Vs. Satyawati Tandon* (2010) 8 SCC 110. The learned Single Judge declined to entertain the writ petition in view of availability of alternative remedy under Section 17 of the Act before the Debts Recovery Tribunal. In the aforesaid factual backdrop, the appellant has filed the instant appeal.

3. Learned counsel for the appellant submitted that the learned Single Judge ought to have appreciated that neither any notice under Section 13(2) of the Act was served on the appellant nor there was compliance with provisions

of Section 13(3-A) of the Act, therefore, the action initiated by the respondent-Bank under Section 13(4) of the Act was *abinitio void*. It was further submitted that alternative remedy is not a bar in entertaining the writ petition. It was also submitted that writ petition was entertained by the learned Single Judge initially and various interim orders were passed and, therefore, the writ petition should not have been dismissed on the ground of availability of alternative remedy. It was urged that the appellant can raise the ground with regard to the validity of the measure taken under Section 13(4) of the Act only in the appeal under Section 17 of the Act. In support of his submissions, learned counsel for the appellant has placed reliance in the cases of *Transcore Vs. Union of India and another*, (2008) 1 SCC 125, *Bhupinder Singh Vs. State Bank of Patiala & Others*, AIR 2008 *Punjab and Haryana*, 148, *M/s. Raja Associates & Ors. Vs. Union of India & Ors.*, AIR 2008 Karnataka 136 and *M/s. Jayant Agencies Vs. Canara Bank & Ors.*, AIR 2011 *Jharkhand* 68.

4. On the other hand, learned counsel for the respondent-Bank submitted that notice under Section 13(2) of the Act dated 20.3.2006 was sent at the address of the appellant, however, the same could not be served. Eventually, the notice was affixed in the premises of the appellant and the *panchnama* was prepared. It was further submitted that notice under Section 13(2) of the Act was also sent to the guarantors which was duly served upon them. The action under Section 13(4) of the Act has been taken by the respondent-Bank in accordance with law which does not call for any interference, as the appellant has an efficacious remedy under Section 17 of the Act where he can agitate all his grievances.

5. We have considered the submissions made on both sides. It is well settled in law that powers conferred on this Court under Article 226 of the Constitution of India are very wide and there is no express limitation on exercise of the power, but at the same time, the rules of self-imposed restraint have been evolved for exercise of powers under Article 226 of the Constitution of India. The doctrine of availability of alternative remedy is a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. There are two well recognized exceptions of doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires and secondly, when the impugned order has been made in violation of the principles of natural

justice. [*See: State of H.P. Vs. Gujarat Ambuja Cement Ltd.*, (2005), 6 SCC 499, and *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others,* (1998) 8 SCC 1]. In *Satyawati Tandon*, supra, the Supreme Court has held that rules of exhaustion of alternative remedy is a rule of discretion and not of compulsion. It has further been held that ordinarily, a writ petition under Article 226 of the Constitution of India should not be entertained if an effective remedy is available to an aggrieved person and this rule applies with greater rigour in the matters involving recovery of taxes, cess, fees and other types of public money and dues of bank and other financial institution. However, it has not been held by the Supreme Court that in no case, a writ petition can be entertained under Article 226 inspite of availability of alternative remedy.

6. Section 13 of the Act deals with enforcement of security interest. Section 13 (2) provides that in case of default in repayment of the loan and the account of the borrower in respect of such a loan is classified as nonperforming asset then secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within 60 days from the date of notice, failing which secured creditor shall be entitled to exercise all or any of rights under section 13 (4) of the Act. Section 13 (3) mandates that notice under Section 13 (2) shall give details of the amount payable by the borrower. Section 13 (3-A) casts a duty on the secured creditor to decide the representation/objection preferred by the borrower on receipt of notice under Section 13 (2) and to communicate the reasons for non-acceptance of the representation/objection within a week. Thereafter the secured creditor can resort to the measures under Section 13 (4) of the Act. Thus, before invoking measures under Section 13(4) the secured creditor is required to comply with the provisions of Sections 13 (2), 13 (3) and 13 (3-A) of the Act. There may be cases where the writ petition can be entertained notwithstanding the remedy of appeal under the Act, such as, a case where admittedly there is no compliance of provisions of Section 13(2) and 13 (3-A) of the Act, which is *sine qua non* for exercise of powers under Section 13(4) of the Act. In such a case, the measure/action taken under Section 13(4) of the Act would be *abinitio void* and in violation of principles of natural justice as incorporated in the Act. Such a case would be covered by the exception to the doctrine of exhaustion of alternative remedy pointed by the Supreme Court in *Whirlpool Corporation* (supra) and *Gujarat Ambuja Cement* (supra) There may also be case where the writ petition is entertained by the

High Court and interim orders are passed and in compliance of interim orders substantial amount of loan is repaid to the financial institution, in such a case, the High Court would not be justified in dismissing the writ petition on the ground of availability of alternative remedy. We may hasten to add here that the aforesaid examples are only illustrative and not exhaustive.

7. On the touchstone of well settled legal position and in the light of decision of the Supreme Court in *Satyawati Tandon*, supra, the facts of the case may be seen. In the instant case, on one hand the appellant has asserted that no notice under Section 13(2) of the Act was issued whereas learned counsel for respondent-Bank has stated that notice under Section 13(2) of the Act was served by affixture and panchnama was prepared. The question whether or not notice under Section 13(2) of the Act was served on the appellant or not, is a disputed question of fact which cannot be adjudicated in a writ petition. It is well settled in law that this Court would not adjudicate the disputed questions of fact in exercise of power under Article 226 of the Constitution of India. See: *Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd.*, AIR 2005 SC 3454. The instant case is not a case where the appellant has paid the substantial amount towards the loan taken by him from the Bank. The contention that in an appeal under Section 17 of the Act, the aggrieved person can only challenge the order passed under Section 13(4) of the Act, also does not deserve acceptance. We have carefully gone through the provisions of Section 17(1) of the Act and we have no manner of doubt that all the grounds with regard to procedural irregularity in taking the measures under Section 13(4) of the Act can very well be agitated and adjudicated in the appeal preferred under Section 17 of the Act. Similarly, the contention that once the writ petition is entertained, this Court cannot dismiss the writ petition on the ground of availability of alternative remedy also cannot be accepted as the ratio of the decision relied upon by learned counsel for the appellant in *L. Hirday Narain Vs. ITO, Bareilly*, AIR 1971 SC 33, has been mellowed down subsequently by the Supreme Court in *State of U.P. and Another v. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti and Others*, (2008) 12 SCC 675 and it has been held – it cannot be laid down as proposition of law that writ petition is admitted it can be dismissed on the ground of availability of alternative remedy.

8. For the aforementioned reasons, we do not find any merit in the appeal. The same fails and is hereby dismissed.

Appeal dismissed.

I.L.R.[2012] M.P. 30
WRIT APPEAL
Before Mr. Justice S.N. Aggarwal & Mr. Justice Brij Kishore Dube

W.A. No. 160/2011 (Gwalior) decided on 9 December, 2011

SURESH PAL SINGH ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

Police Regulations, M.P., Regulation 70-A – Out of Turn Promotion **– Such promotion is not a matter of legal right – It is within the discretion of the competent authority to grant or not to grant out of turn promotion.** (Para 12)

पुलिस विनियमन, म.प्र., विनियमन 70–ए–बिना पारी पदोन्नति –ऐसी पदोन्नति विधिक अधिकार का विषय नही है–बिना पारी पदोन्नति प्रदान करना अथवा प्रदान नहीं करना सक्षम प्राधिकारी के विवेकाधिकार में है।

Prashant Sharma, for the appellant.
Vivek Khedkar, Dy. A.G. for the respondent/State

ORDER

The order of the court was delivered by :
S.N. AGGARWAL, J :- This is an intra-court appeal filed by the appellant aggrieved by the order of learned Single Judge dated 26th October, 2010 in Writ Petition No.3785/09 rejecting his claim for out of turn promotion to the post of inspector from the post of sub inspector.

(2) Briefly stated, facts of the case giving rise to this appeal are as follows:

The appellant, in the night of 16th November,2002 while working as sub inspector at Police Station, Panihar had participated in an encounter in which six dacoits including the gang leader, a known dacoit Pappu Gurjar, were killed on account of exemplary acts of bravery exhibited by the members of the police party that participated in the encounter. In terms of Regulation 70-A of Madhya Pradesh Police Regulations, a police personnel can be considered for out of turn promotion for his act of bravery on the recommendations of the competent authority. The competent authority of the respondents granted out of turn promotion to four police personnel who were 'members of the police party that participated in the encounter. A copy of the

order of their promotion is Annexure P/4 at page 70 of the appeal paper book. The appellant was not granted out of turn promotion. The authorities recommended him for issuance of citation and for cash reward of Rs.5,000/- which he got. Consequent upon recommendations of the competent authorities of the respondents, the appellant was rewarded for the acts of his bravery exhibited by him in the incident in question by award of police medal and cash of Rs.5,000/-. However, he was denied out of turn promotion by the respondents for the following two reasons :

(i) "The act of of bravery of the appellant was distinguishable from the act of bravery of those who were granted out of turn promotion. Reference may be made in this regard to the return of the respondents and the relevant portion of which is at page 73 of the appeal paper book.

(ii) There was no vacancy of inspector in the quota of out of turn promotion at the time he was considered for such promotion."

(3) The appellant was aggrieved by denial of out of turn promotion by the respondents to him and he challenged their administrative decision in this regard by filing a writ petition in which the order impugned in the present appeal has been passed by the learned Single Judge. The learned Single Judge has upheld the administrative decision of the respondents in denying out of turn promotion to the appellant basing his finding on the plea of respondents that the act of the appellant was distinguishable from the acts of those who were granted out of turn promotion. The learned Single Judge did not go into the second reason regarding availability or non-availability of vacancy in the quota of out of turn .promotion, which was also a ground for denial of out of turn promotion to the appellant by the Department.

(4) We have heard Shri Prashant Sharma, learned counsel appearing on behalf of the appellant and Shri Vivek Khedkar, learned Deputy Advocate General appearing on behalf of respondents/State. We have also perused the record and have given our anxious consideration to the rival submissions made by the counsels for parties before us..

(5) The first ground on which the appellant has been denied out of turn promotion which has also been accepted by the learned Single Judge is that his act of bravery in the incident was distinguishable from those who were

granted out of turn promotion vide order Annexure P/4 at page 70 of the appeal paper book. The respondents have pleaded in their return as under:

> "While scrutinizing case of petitioner Screening Committee observed that petitioner has fired on dacoits taking shelter of his colleague B.K.Parashar which was totally against field crafts and tactics. In this manner petitioner has put the life of his colleague in danger and as such committee did not found' work of petitioner distinguishable for grant of out of turn promotion."

With the assistance of the counsels for the parties we have scanned the record in order to find out whether the role of the appellant was actually distinguishable from the role of those who have already been granted out of turn promotion. In this regard, we would like to refer to the contents of the FIR as also the report of Superintendent of Police as both these documents contain the role performed by the appellant in the encounter.

(6) An FIR of the incident in which six dacoits including the gang leader Pappu Gurjar were killed was lodged by Station House Officer Inspector B.K.Parashar. A typed copy of the FIR is Annexure P/2 at pages 48 to 57 of the appeal paper book and the . relevant portion insofar as it deals with the role of the appellant in the incident is extracted herein below:

> "एस पी. ग्वालियर की पार्टी मकान की दीवार से मात्र 5 गज की दूरी पर पोजीशन लिए हुए थी तथा छिपने के लिए पर्याप्त जगह नहीं थी फिर एस. पी.सा. ने अपनी जान जोखिम डालकर गोली की बौछार के बीच उच्च कोटी की वीरता प्रदर्शित कर कर्तव्यपरायणता का पचिय देते हुए अदम्य वीरता से अपनी पार्टी के अन्य अधिकारी एवं कर्मचारी के साथ मैदान में लेट कर व आगे बढ़ते हुए फोर्स का मनोबल बढ़ाते रहे एवं आत्म रक्षार्थ फायर करने के आदेश दिये पुलिस अधि. ने इस बीच आत्म रक्षार्थ फायर कर डकैतों को पुनः आत्म समर्पण के लिए ललकारा इसी बीच में एकड कैट ने दरवाजे के पास ओट लेकर आर. विनोद पर जानलेवा फायर करने के लिए निशाना साधा कि पास में मौजूद मुझ एस.ओ.वी.के. पाराशर ने आत्मरक्षार्थ अपनी जान जोखिम में डाल कर उच्च कोटि की कर्तव्य परायणता का परिचय देते हुए अदम्य साहस के साथ अपने मार्क 3 रायफल के साथ हमलावर हो रहे डकैत को फायर कर धरासाई कर दिया यदि मेरे द्वारा तत्काल डकैत पर फायर नहीं किया जाता तो आर.विनोद का जीवन खतरे में हो जाता मारे गये डकैत की बाद में पहचान सुरेश गुर्जर के रूप में हुई ।.डकैत सुरेश को धरासाई होते देख उसके पास मौजूद दूसरे डकैत ने एकदम आक्रामक होकर मुझ एस.ओ. बी .के. पाराशर

को जान से मारने की गरज से तेजी से फायर झौंक दिया इस बीच मेरे साथ मेरी टीम के सदस्य उप निरीक्षक एस.पी. सिंह, एस.ओ. पनिहार में अदम्य साहस एवं वीरता का परिचय देकर अपने जान की परवाह न करके मुझ एस. ओ. बी. के पाराशर को ओट में लेते हुए हमलावार डकैत पर आत्म रक्षार्थ फायर कर धरासाई कर दिया जिसकी शिनाख्त डकैत रामवरन सिंह गूर्जर के रूप में हुई यदि एस.आई. एस.पी.सिंह उस समय उच्च कोटि एवं कर्तव्यपरायणता का परिचय न देकर फायर नहीं करते तो मुझ एस.ओ. की जान खतरे में पड़ सकती थी।"

(7) The Superintendent of Police had recommended the case of the appellant alongwith others for their out of turn promotion vide document which is at page 60 of the appeal paper book and the relevant portion thereof is extracted herein below:

" .....लगातार डकैतों की फोर्स द्वारा घेरा बंदी एवं मुखबिर सूचना से दिनांक 16/12/2002 को जानकारी मिली की कुख्यात डकैत पप्पू गुर्जर गैंग अपहृत दीपक शर्मा के साथ अनंतपुरा पाली के हार में दुलीराम की मडैया में छिपा हुआ है। इस सूचना पर पप्पु गुर्जर गैंग को पकड़ने एवं अपहृत दीपक शर्मा को सकुशल छुड़ाने की दृष्टि से मेरे द्वारा तीन पार्टियों का गठन किया गया । मेरी अटैक पार्टी नं. 1 में उप निरीक्षक एस.पी.सिंह शामिल था । मुठभेड़ स्थल दुल्लीराम कुश्वाह की मडैया की घेराबंदी के पश्चात उप निरीक्षक सुरेश पाल सिंह ने अदम्य साहस एवं अत्यंत बहादुरी का परिचय देते हुए अपनी पुलिस पार्टी के साथ मडैया की दीवार के पास जाकर पोजीशन ली जिसके भीतर डकैत गैंग एवं अपहृत व्यक्ति दीपक शर्मा डिप्टी रेंजर मौजूद थे तथा दुल्लीराम के लड़के से पूछताछ की और मडैया में डकैतों की होने पुष्ट हुई। उसके बाद मैंने डकैतों को हथियार डालकर मडैया से बाहर निकलने एवं अपहृत को पुलिस को सौंपने हेतु ललकारा परन्तु डकैतों ने गालियां बकते हुए पुलिस पर जानलेवा फायर शुरू कर दिये और दरवाजे के सामने पोजीशन लिये हुये निरीक्षक अशोक सिंह भदौरिया की पार्टी पर जब डकैतों ने जानलेवा हमला किया उस समय उप निरीक्षक एस.पी.सिंह ने डकैतों को ललकारते हुए मडैया से मात्र 10 फुट दूर खुले खेत में लेटकर मडैया के दरवाजे तथा खिड़कियों से जहां से डकैत फायर कर रहे थे पर लगातार फायरिंग की । निरीक्षक अशोक सिंह भदौरिया जब डकैतों की गोली लगने से घायल हो गये तो उन्हें शिफ्ट करवाने में उप निरीक्षक एस.पी.सिंह ने बहुत सराहनीय भूमिका अदा की, जिस समय बचाव पार्टी श्री भदौरिया को खींचकर ले जा रही थी उस समय उप निरीक्षक एस.पी.सिंह लगातार कवर फायर देते रहे जिससे डकैतों को अशोक सिंह भदौरिया की पार्टी पर फायर करने का मौका नहीं मिला साथ ही जिस समय उप निरीक्षक वी.के. पाराशर निरीक्षक अशोक सिंह भदौरिया को

शिफ्ट कर रहे थे उस समय एक डकैत ने वीके पाराशर के उपर निशाना लगाया ही था कि एकदम से साहस और वीरता का परिचय देते हुए उप निरीक्षक एस.पी.सिंह द्वारा डकैत पर तत्काल कारगर फायर किया जिससे उक्त डकैत वहीं धराशाही हो गया यदि पर निरीक्षक एस.पी.सिंह फुर्ती से ये कारगार फायर नहीं करते तो वी.के. पाराशर की जान जा सकती थी ।"

(8) A bare reference to the role of the appellant contained in the FIR and the recommendation letter of Superintendent of Police would amplify the act of his bravery and would negate the first reason 'given by the respondents for denying out of turn promotion to him. Rather the role of the appellant as contained in the above documents tends to show that he had exhibited an exemplary act of bravery in the encounter for which he was eligible to be considered for his out of turn promotion in terms of Regulation 70-A of Madhya Pradesh Police Regulations. The appellant, in fact, stand already by the Department for his act of bravery by issuance of a citation and giving him cash reward of Rs.5,000/-. It was on the recommendations of the Department that the appellant got President Medal for the act of bravery exhibited by him in the incident of encounter on 16th November,2002.

(9) The next question that now stares at us craving for an answer is whether the appellant was also entitled for out of turn promotion as a matter of right in terms of Regulation 70-A of Madhya Pradesh Police Regulations. A perusal of the order dated 27th October, 2008 (Annexure P/1 at page 38 of the appeal paper book) would show that the appellant was denied out of turn promotion also for the reason that there was no vacancy available for him at the relevant time when he was considered for out of turn promotion. The relevant portion of the order by which he was denied out of turn promotion is extracted herein below:

"यह भी उल्लेखनीय है कि मध्यप्रदेश पुलिस में वर्तमान में निरीक्षक के कुल स्वीकृत 1014 पदों में से अनारक्षित वर्ग के लिए चिन्हित 649 पदों पर वर्तमान में अनारक्षित वर्गों के कुल 95 निरीक्षक क्रम से पूर्व पदोन्नति प्राप्त निरीक्षक है । शासन के परिपत्र क्र–2 (अ) 516/85/बी–4/दो दि. 10/6/87 के अनुसार क्रम से पूर्व पदोन्नति हेतु 10 प्रतिशत का कोटा निर्धारित किया गया है। इसी प्रकार कुल 1014 स्वीकृत पदों के विरूद्ध वर्तमान में कार्यरत सभी वर्गों के 921 निरीक्षकों में सभी वर्गों के 100 से अधिक निरीक्षक क्रम से पूर्व पदोन्नति वाले हे । इस प्रकार कोटे से अधिक पदोन्नति दे देने से सामान्य पदोन्नति के अवसर चेनल प्रभावित होते हैं, जिससे दिन–रात बेहतर काम करने वाले अधिकारियों/कर्मचारियों के मनोबल पर विपरीत प्रभाव पड़ता है,

जबकि किसी एक घटना विशेष में अच्छे कार्य के आधार पर कुछ लोग क्रम पूर्व पदोन्नति पाकर अपने सहकर्मियों से कई–कई वर्ष अधिक वरिष्ठ हो जाते हैं। इससे सम्पूर्ण फोर्स के मनोबल एवं उनके कार्य प्रदर्शन पर विपरीत असर पड़ता है और पुलिस फोर्स का समग्र परफारमेंस दुष्प्रभावित होता है। इस प्रक्रिया में सर्वाधिक नुकसान एस.सी./एस.टी. कोटे के अधिकारियों का होता है क्योंकि जैसा कि सांख्यकीय से प्रकट है कि आरक्षित वर्ग के विन्हित पदों पर अभी भी सामान्य वर्गों के कम से कम 30 निरीक्षक क्रम से पूर्व पदोन्नति प्राप्त कर पद भरे हुए हैं। इस प्रकार भी सामान्य वर्गों के लिए क्रम पूर्व पदोन्नति के कोई पद ही उपलब नहीं है और इस प्रकार शासन के आरक्षण अधिनियमों का पूर्णतः पालन करने को कठिनाई होती है।

(10) The respondents in their return to the writ petition filed by the appellant have reiterated their stand that there was no vacancy available for the appellant to grant him out of turn promotion. The relevant portion of the return of the respondents in regard to vacancy position which is there at page 71 of the appeal paper book is extracted herein below:

> "Beside all the above it is further to be submitted that presently there are total 1014 sanctioned post of Inspector in Police force against which 649 posts are allocated for unresered category. Out of 649 unreserved category posts 95 Inspectors are holding such post on the. basis of out of turn promotion. The State Government by order dated 10.6.87 has fixed criteria of 10% posts and as against total sanctioned post of 1014 posts 921 Inspectors are in existence and out of them 100 Inspectors from all category is holding post of Inspector on the basis of out of turn promotion. In this way out of turn promotion has been given in excess to fixed quota which adversely affect on career of general promotion channel employee. In this manner no post for grant of out of turn promotion is presently available. "

(11) The aforementioned facts pleaded by the respondents in the order by which the appellant was denied out of turn promotion as also in their return regarding vacancy position do not depict whether the vacancy position disclosed by them was of a time when he was considered for out of turn promotion in regard to his act of bravery in the encounter of 2002. Though, the appellant has not pleaded either in the writ petition or in the appeal that the respondents had granted out of turn promotion to any of his juniors, but

for the first time, the learned counsel appearing on his behalf has orally submitted before us that the respondents have granted out of turn promotion to the persons junior to him. The learned Deputy Advocate General, appearing on behalf of the respondents/State says that he can neither admit nor deny the statement of the appellant in regard to grant of out of turn promotion to any junior of the appellant as he had no opportunity to take instructions in this regard from his client.

(12) We are of the view that out of turn promotion in terms of Regulation 70-A of Madhya Pradesh Police Regulations is not a matter of legal right. It is within the discretion of the competent authority of the respondents to grant or not to grant out of turn promotion. But exercise of administrative discretion by the Department must not be vitiated by any unreasonableness, irrationality, prejudice or any bias. Since a plea has been taken on behalf of the appellant that the Department has granted out of turn promotion to his juniors in regard to the same act of bravery, we deem it appropriate that ends of justice shall be adequately met in case the case of the appellant for his out of turn promotion is considered by the Department once again limiting only on the point whether any person junior to him has been granted out of turn promotion with regard to the same act of bravery in the incident of encounter that took place on 16th November, 2002. In case, upon such consideration, it is found by the Department that any person junior to the appellant has been granted out of turn promotion, then they should also consider the claim of appellant for his out of turn promotion taking into account the role played by him in the encounter which we have already extracted herein above, but that should again be dependant upon availability of vacancy in the quota of out of turn' promotion at the relevant time and, of course, the relevant time is the date when encounter in which the appellant had participated had taken place.

(13) In view of the foregoing, we find it difficult to sustain the impugned order of the learned Single Judge which is hereby set aside. This appeal is partly allowed to the extent already mentioned herein above. The respondents are directed to pass a speaking order in the light of our observations within four weeks of receipt of certified copy of this order under intimation to the appellant. The parties are left to bear their own costs.

Appeal partly allowed

I.L.R.[2012]M.P. 37
WRIT PETITION
Before Mr. Justice K. K. Lahoti & Mrs. Justice Vimla Jain

W.P.No. 911/2004 (Jabalpur) decided on 27 August, 2011

ANKIT LIME & MINERALS (M/S) ... Petitioner
Vs.
ASSTT. COMMERCIAL TAX OFFICER & ors. ... Respondents

Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, M.P (52 of 1976), Section 69 – Imposition of Penalty – **Petitioner declared entire purchases and claimed exemption – Exemption was refused and penalty was imposed – Held – Revisional Authority is required to record the grounds of its satisfaction that the petitioner had concealed the aggregate amount of purchase price or furnished false particulars thereof in the return – There was no concealment of purchases or furnishing of false particulars by petitioner–Taking a legal plea that goods are not taxable would not make the return a false return – Penalty cannot be imposed by condemning the return as a false return.** (Para 9)

स्थानीय क्षेत्र में माल के प्रवेश पर कर अधिनियम, म.प्र. (1976 का 52), धारा 69–दंड का अधिरोपण–याची ने संपूर्ण क्रय घोषित किया और छूट का दावा किया–छूट अस्वीकार की गई और दंड अधिरोपित किया गया–अभिनिर्धारित–पुनरीक्षण प्राधिकारी को अपने समाधान के आधारों को अभिलिखित करना अपेक्षित है कि याची ने क्रय कीमत की संकलित रकम का छिपाव किया अथवा रिटर्न में उसकी मिथ्या विशिष्टियां दी–याची द्वारा क्रय का कोई छिपाव नही किया गया एवं मिथ्या विशिष्टियां नही दी गई–विधिक तर्क लेते हुए कि माल कर योग्य नही, रिटर्न को मिथ्या रिटर्न नहीं बनायेगा–रिटर्न को मिथ्या रिटर्न के रूप में अनुपयोगी बताकर दंड अधिरोपित नही किया जा सकता।

Cases referred:

(1970) 25 STC 211(SC), (1983) 16 VKN 44.

Mukesh Agrawal, for the petitioner.

Vivek Agrawal, G.A. for the respondent/State.

ORDER

The order of the court was delivered by : **VIMLA JAIN, J. :-** The petitioner, being aggrieved by order dated 9.9.2003 (Annexure P-7) passed in revision by respondent No.2 Divisional Deputy Commissioner, M.P. Commercial Tax, Jabalpur, confirming the penalty of Rs.65,500/-, arising out of the order dated 16.1.2003 (Annexure P-4) under Section 13 of the M.P Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (52 of 1976) (hereinafter referred to as the Act) read with Section 69(1) of the M.P. Vanijyik Kar Adhiniyam, 1994 (5 of 1995) passed by respondent No.1 Assistant Commercial Tax Officer, Katni, has come to this Court by filing a writ petition under Articles 226 and 227 of the Constitution of India.

2. Briefly stated the facts of the case are that the petitioner–M/s.Ankit Lime & Minerals a manufacturer of limestone was assessed for tax by respondent No.1 for the period 1.4.1999 to 31.3.2000 by assessment order dated 28.11.2002. The tax of Rs.16,125/- with interest of Rs.11,610/- was assessed under Section 26(4)(a) of the Act and total demand of Rs.27,735/- was raised. The penalty proceedings were also initiated. During the course of penalty proceedings, the entire purchases of Rs.17,02,880/- disclosed by the petitioner; books of accounts, bills of sales and purchases were accepted by respondent No.1. But the Assessing Officer treated these purchases as taxable purchases, levied penalty of Rs.65500 and refuted the submission of the petitioner that the penalty could not be imposed because there was no fraud or concealment of any transaction in the return. The revision was preferred by the petitioner against the penalty order but it was dismissed by respondent No.2. The petitioner being dissatisfied with the revision order has filed the present writ petition.

3. The short question involved in this petition is, whether a case for imposition of penalty for the assessment year 1.4.1999 to 31.3.2000 is made out against the petitioner or not.

4. It was submitted that the petitioner had declared entire purchases and claimed exemption under Section 3 of the Act. The Assessing Officer had accepted its books of accounts and sale vouchers but issued a notice to impose the penalty. The petitioner had replied to the notice that it has correctly disclosed all the facts and put its legal claim regarding tax exemption.

5. The explanation of the petitioner was not accepted by both the authorities and penalty of Rs.65,000/- was imposed on the petitioner on the ground that it had submitted the false return and concealed the amount of purchases for the period 1.4.1999 to 31.3.2000, and thus it had not deposited the required tax in time.

6. We have heard learned counsel for the parties.

7. It is not the case of respondents that the petitioner had submitted the false particulars in its return. On the other hand, it is clear from the impugned order that the petitioner had submitted required details and claimed exemption by raising a legal plea. The authorities imposed the penalty on the ground that it claimed exemption which amounts to deliberate non-payment of the tax and filing false return. We have perused the record and penalty order dated 9.9.2003 passed in revision by the respondent No.2 confirming the penalty.

8. To appreciate rival contentions of the parties, it will be necessary to look into the relevant provisions, Section 13 of the Act and Section 69 of the M.P. Vanijyik Kar Adhiniyam, 1994 read thus:-

> **''SECTION 13 CERTAIN PROVISIONS OF ''VANIJYIK KAR ADHINIYAM'' TO APPLY:-** Subject to provisions of this Act and the rules made there under, sections 3, 11, 26, 27, 28, 29, 30, 31, 32, 33, 36, 38, 39, 40, 41, 42, 43, 45, 46, 47, 49, 52, 54, 55, 56, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 and 80 of the ''Vanijyik Kar Adhiniyam'' and notifications issued thereunder shall *mutatis mutandis* apply to a dealer or person in respect of the entry tax levied and payable under this Act as if these sections were *mutatis mutandis* incorporated in this Act and the rules, orders and notifications issued under those sections were *mutatis mutandis* or issued under the relevant sections as so incorporated in this Act.''
>
> **69. Power of Commissioner or appellate or revisional authority to impose penalty in certain circumstances–** (1) If the Commissioner or the appellate or revisional authority, in the course of any proceedings under this Act is satisfied that a dealer has concealed his turnover or the aggregate amount of purchase prices in respect of any goods or has

furnished false particulars of his sales or purchases, as the case may be, in his return or returns for any year or part thereof or has furnished a false return or returns for such period, the Commissioner or the appellate or the revisional authority as the case may be, may initiate proceeding separately for imposition of penalty under this Section.

(2) The proceeding under sub-section (1) shall be initiated by the Commissioner or the appellate or revisional authority as the case may be, by issue of a notice in the prescribed form for giving the dealer an opportunity of being heard. On hearing the dealer, the Commissioner or the appellate or the revisional authority as the case may be, shall pass an order not later than one calendar year from the date of initiation of such proceeding or within such further time as allowed by the State Government, directing the dealer that, he shall in addition to the tax payable by him pay by way of penalty a sum which shall be five times of the amount of tax evaded.

(3) If the total Tax shown as payable according to the return or returns and paid by a dealer for any period or part thereof is less than eighty per cent of the total tax assessed under Section 27 such dealer shall be deemed to have concealed his turnover or aggregate of his purchase prices or to have furnished false particulars of his sales or purchases in his return or returns or to have furnished a false return or returns for the purpose of sub-section (1) unless he proves to the satisfaction of the Commissioner or the appellate or the revisional authority, as the case may be, that the concealment of the said turnover or the aggregate of purchase prices or furnishing of particulars of sales or purchases or furnishing of the false return or returns was not due to any fraud or gross negligence on his part."

9. In order to attract imposition of penalty under Section 69, the revisional authority is required to record the grounds of its satisfaction that the petitioner has concealed the aggregate amount of purchase price or furnished false particulars thereof in the return. On going through the impugned order, we do not find any concealment of purchases or furnishing of false particulars by the

petitioner. The petitioner had not attempted to do so. On the other hand, it had raised a legal plea seeking exemption of tax on the goods. Taking a legal plea that the goods are not taxable would not make the return a false return. It appears that the petitioner had not submitted the return with guilty mind because it had the bonafide belief that the entire goods were not taxable. Therefore, the penalty cannot be imposed by condemning the return as a false return. In the case of *Hindustan Steel Limited v State of Orissa (1970) 25 STC 211 (SC),* the Supreme Court has held that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation.

10. A Division Bench of this Court in *Govindram Chatramal, Gwalior Vs Commissioner of Sales Tax (1983) 16 VKN 44* held that failure to disclose purchases in quarterly returns will not amount to impose penalty. To fall within the ambit of section of penalty, it must be accompanied with *mens rea*. When there is a bonafide doubt about the fact that the purchases are taxable or not, it cannot be said that there was any *mens rea* of the Assessee in deliberately non-payment of the tax. The Division Bench held that in such circumstances, the Assessee was not liable for penalty. In the present case, the Assessee disclosed all the transactions and complete return was filed but the Assessee contended before the authority that the aforesaid transactions were not taxable. It appears that it was a bonafide plea of the Assessee, which was not upheld by the authorities but on this ground, the petitioner was not liable for penalty.

11. In view of the aforesaid discussion, we do not find that the petitioner with guilty mind had concealed purchases or had submitted false returns to invite the penalty.

12. Accordingly, the petition deserves to be and is hereby allowed. The impugned order dated 9.9.2003 (Annexure P-7) passed by the Divisional Deputy Commissioner, Jabalpur is hereby quashed. No order as to costs.

Petition allowed

I.L.R.[2012]M.P. 42
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 13087/2003 (Jabalpur) decided on 22 September, 2011

G.R. DHUPAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law – Compulsory Retirement* – Only for three annual confidential reports of the year 1976, 1977 and 1983 as also a punishment awarded in a departmental enquiry, the petitioner was said to be found fit for compulsory retirement in the year 1998 – Recent record of the service of the petitioner was not examined – Held – Order (of compulsory retirement) quashed.** (Paras 6 &7)

सेवा विधि – अनिवार्य सेवानिवृत्ति – केवल वर्ष 1976, 1977 व 1983 की तीन वार्षिक गोपनीय प्रतिवेदन एवं विभागीय जाँच में पारित शास्ति के आधार पर, वर्ष 1998 में याची को अनिवार्य सेवानिवृत्ति के लिये उपयुक्त पाया गया–याची का वर्तमान सेवा अभिलेख परीक्षित नहीं किया गया–अभिनिर्धारित–आदेश (अनिवार्य सेवानिवृत्ति का) अभिखंडित।

Case referred:
(2001) 3 SCC 314.
Rajesh Maindiratta, for the petitioner.
Kumaresh Pathak, Dy. A.G. for the respondent/State.

O R D E R

K.K. Trivedi, J. :- This petition was originally filed as Original Application No. 3079/1998 before the M.P. Administrative Tribunal and has been transmitted to this Court after closer of the Tribunal, and is renumbered as W.P. No. 13087/2003. The petitioner, who was at the relevant time working as Principal Class-I in the Industrial Training Institute, Khandwa, was aggrieved with an order of compulsory retirement issued on 18th February, 1998 (Annexure A-4) and after making of representation, approached the M.P. Administrative Tribunal challenging the said order on various grounds.

2. It was contended by the petitioner that he has unblemished service record to his credit and could not have been compulsorily retired treating him

as a dead wood in view of the fact that the petitioner after grant of promotion as Principal was made to work on the post of Apprentice Advisor, which was equivalent to the post of Deputy Director and was also made to officiate on the post of Joint Director w.e.f. 06.11.1994 to 11.10.1995. It is contended by the petitioner that had he been so bad in his service performance he would not have given the benefit of higher post than the substantive rank of the petitioner and therefore, it is contended that the order of compulsory retirement is unsustainable in the eye of law.

3. The respondents in their return have contended that there were adverse entries in the confidential report of the petitioner for the year 1996, 1997 and 1983. There was one more fact that the departmental enquiry was initiated against the petitioner and the order of recovery was issued against him on 26.06.1997. It is contended by the respondents that taking into consideration of these facts, the petitioner was found to be fit for compulsory retirement in exercise of power under Fundamental Rule 56 (3) and therefore, the order of compulsory retirement was issued.

4. The petitioner by way of filing rejoinder has controverted such facts and has categorically stated that he was not served with the adverse entries of confidential report as mentioned in the return of the respondents and was denied any opportunity to explain his conduct, seeking expunging of the adverse part from the confidential report. Since he was given the posting on higher posts thereafter, the effect of adverse entries was wiped out. It is also contended that once charge sheet was issued, enquiry is conducted and the penalty is imposed the petitioner could not have been compulsorily retired taking into account such facts of the departmental enquiry. The respondents have tried to make out the case by filing an additional return.

5. Heard the learned counsel for the parties. The law of compulsory retirement is already settled by the Apex Court in the case of *State of Gujrat Vs. Umed Bhai Patel, (2001) 3 SCC 314*, wherein it has been categorically held by the Apex Court that there are settled parameters on account of which the cases for compulsory retirement are required to be considered. This has been categorically held by the Apex Court that compulsory retirement cannot be based on a finding recorded in a departmental enquiry on account of which the punishment is already issued to the delinquent employee. It has been held categorically by the Apex Court that overall service record is required to be

considered and for one or few stale confidential reports, communicated or un-communicated, an employee/ officer is not to be adjudged as a dead wood, unfit to remain in service in the public interest and is not required to be compulsorily retired.

6. This Court vide order dated 30th November, 2010 directed the respondents /State to produce the screening Committee record for perusal of this Court. Time and again adjournment was sought and despite specific order the said record was not produced. However, from the facts as have been stated in the return, it is clear that only for the aforesaid three annual confidential reports of the year 1976, 1977 and 1983 as also a punishment awarded in a departmental enquiry, the petitioner was said to be found fit for compulsory retirement in the year 1998. Such a conduct of the respondents cannot be accepted. The recent record of the service of the petitioner was not examined and only for the aforesaid three confidential reports, he has been declared unfit to continue in the employment.

7. In view of this, the order impugned dated 18.02.1998 is not sustainable and is hereby quashed. Since the petitioner has attained the age of superannuation, it will be deemed, as if, he has continued in the service till he actually attained the age of his superannuation and he will be entitled to the salary for the said period. It is further directed that the recommendation made with respect to the promotion of the petitioner, kept in the sealed cover during the period he was facing the departmental enquiry and was later on compulsory retired, will be looked into and the respondents will take a fresh decision whether to grant promotion to the petitioner or not. The arrears of the salary be paid to the petitioner for the period of compulsory retirement and his claim for promotion be finalized within a period of four months from the date of communication of this order.

8. The petition succeeds and allowed to the extent indicated herein above. There shall be no order as to cost.

Petition allowed

I.L.R.[2012]M.P. 45
WRIT PETITION

Before Mr. Justice Sanjay Yadav & Mr. Justice T.K. Kaushal
W.P. No. 10471/2010(S) (Jabalpur) decided on 28 September, 2011

UNION OF INDIA & ors. ...Petitioners
Vs.
M.L. KHARE ...Respondent

***Central Civil Services (Classification, Control & Appeal) Rules, 1965 – Rule 11(iii)* – Personal gain of a Government servant is not the condition precedent for effecting a recovery once it is proved that the loss is attributed to the negligence.** (Para 16)

केन्द्रीय सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम 1965 – नियम 11(iii) –सरकारी कर्मचारी का व्यक्तिगत लाभ, वसूली को प्रभावी करने हेतु पुरोभावी शर्त नहीं है जब एक बार यह साबित किया जाता है कि उपेक्षा के कारण हानि हुई है।

Cases referred :

(2010) 5 SCC 775, (2011) 7 SCC 325, (2006) 10 SCC 388.

S.A. Dharmadhikari, for the petitioners.
Vijay Tripathi, for the respondent.

ORDER

The order of the court was delivered by : **SANJAY YADAV, J.** :-With consent, the petition is heard finally.

This order shall also govern the disposal of Writ Petitions No. 10512 of 2010(s), 10584 of 2010(s), 10665 of 2010(s) and 10754 of 2010(s) as the issue involved in these petitions is identical. The petitions were, therefore, analogously heard and are decided by this common order.

2. For the sake of order facts are taken from Writ Petition No. 10471/ 2010. The Central Administrative Tribunal, Jabalpur Bench, Jabalpur, while upholding the charge of misconduct levelled against the respondent (Applicant before the Tribunal) has interfered with the punishment of recovery.

3. Respondent while working as Supervisor in SBCO, Head Post Office, Balaghat, was charge- sheeted under Rule 16 of Central Civil Services (Classification, Control & Appeal) Rules, 1965 (hereinafter referred to as

'Rules of 1965') on 18-08-2002.

4. Charges levelled against him were that while working as Supervisor with effect from 18-02-2002 he derelicted in discharge of his duty as Supervisor as a result whereof one Shri Mahesh Padwar, Sub Post Master, Bisra Sub Office made bogus withdrawals from different saving Bank, Recurring Deposit, Term Deposit and Monthly Income Scheme accounts and did not account for the same in respective accounts, resulting in bogus withdrawals and loss to the Government to the tune of Rs. 29,21,222/-. It was alleged that charge sheeted employee failed to ensure proper voucher checking of SB/RD/TD/MIS etc. of Bisra Sub Post Office as required under the S.B. Control Procedure and thereby violated the instructions contained in Government of India Ministry of Communication, Department of Posts, No. 113-1/2002 SB, dated 05-05-2003 and SB Order No. 33/2002 dated 13-12-2002, violating Rules 3(1)(ii) and 3 (2) (I) of CCS (conduct) Rules, 1964.

5. Denial of charges led to initiation of departmental proceedings which culminated into the order dated 20-06-2008; whereby, the punishment of recovery of Rs. 1,00,000/- from the pay of the respondent at the rate of Rs. 3,000/- per month was ordered.

6. Aggrieved, the respondent filed O.A. No. 191 of 2009 before the Tribunal.

7. The Tribunal while upholding the finding of misconduct recorded by the disciplinary authority, however, interfered with the quantum of punishment and accordingly quashed the impugned order of recovery. The Tribunal observed that the respondent- management failed to establish a direct link between the defaults by the applicant and the loss suffered by the Government. Tribunal relied upon the paragraph 106 and 107 of the Post Office Manual Volume III.

8. The Tribnunal held in paragraph 14 :

> "14. Usually, the disciplinary authority is the best judge in respect of punishment to be awarded to any Government servant. But if there is any basic legal shortcoming in the view taken by the disciplinary authority, the court can certainly interfere in the matter. A perusal of the disciplinary authority's order and the order of the appellate authority clearly shows that they have established he default of the applicant in not

complying with various rules and in not discharging his duties in a proper manner. At the same time, they have failed to establish a direct link between the defaults of the applicant and the loss suffered by the Government. Looking to Rules 106 and 107 of the Post Office Manual, Volume III, quoted above, and also the authorities cited by the learned counsel for the applicant, I consider it proper to set aside the punishment awarded to the applicant, because in this case it has not been established that the applicant was directly responsible for the loss suffered by the Government, without disturbing the finding that the applicant was guilty of the charges levelled against him. In other words, upholding the orders of the disciplinary authority as well as the appellate authority except for the actual punishment awarded to the applicant, the matter of punishment to be awarded to the applicant is remitted back to the appellate authority who shall re-decide the issue within six months of the receipt of this order after giving a proper opportunity of hearing to the applicant. As per rules, the following minor penalties can be imposed on a Government servant :

(i) censure;

(ii) withholding of his promotion;

(iii) recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders;

(iv) withholding of increments of pay.

The disciplinary authority, in this case, imposed penalty no. (iii) which was not justified in the facts of the case as the same is legally untenable. Therefore, the appellate authority shall be free to consider the facts of the case, and after hearing the applicant, may impose any one of the above minor penalties on the applicant, except penalty no. (iii). As a logical corollary, it is also ordered that the Respondents shall refund the amount already recovered from the applicant, if any. The amount already recovered should be refunded to the applicant within

two months of the receipt of this order and the matter of punishment should be re-decided by the appellate authority, after hearing the applicant, within six months of the receipt of this order."

9. It is the said order which is being challenged in this petition.

10. It is urged that the Tribunal fell into patent error in exonerating the respondent from recovery of pecuniary loss caused to the Government due to negligence. It is contended that it was beyond the powers of the Tribunal to have set aside the recovery more particularly when the charges of misconduct were proved and upheld by the Tribunal. It is contended that Tribunal misconstrued not only Rule 11 (iii) of the Rules of 1965 but also paragraph 106 and 107 of the Post Office Manual Vol. III. It is contended that upon true construction of the provision it would borne out therefrom that it is not a condition precedent for recovery of loss to the revenue that a person at whose instance the loss is incurred has personally gained from it. It is urged that the Tribunal has wrongly interfered with the punishment.

11. The respondent on his turn supports the order passed by the Tribunal.

12. The question for consideration is whether when the charge of negligence resulting in pecuniary loss to the Government having been proved in a departmental enquiry and upheld by the Tribunal, the Tribunal was justified in interfering with the punishment of recovery.

13. Trite it is that punishment is the discretion of the disciplinary authority and the Court will not substitute its own judgment *[Administrator, Union Territory of Dadar and Nagar Haveli v. Gulabhia M. Lad* : (2010) 5 SCC 775, paragraph 14, *State Bank of Mysore and others v. M. C. Krishnappa* :(2011) 7 SCC 325, Paragraph 8], unless the punishment shocks the conscience (*Union of India v. Dwarka Prasad Tiwari* : (2006) 10 SCC 388 Paragraph 10 & 15). Even in such cases it is held that, it should ordinarily remit the matter to disciplinary authority for reconsideration of punishment.

14. Rule 11 of Rules of 1965 lays down different penalties which can be imposed on a Central Govt. Servant found guilty of charges either under Rule 14 or 16, as the case may be. Clauses (i) and (iv) of Rule 11 lay down minor penalties. Clauses (v) to (ix) lay down major penalties. An exception vide explanation is carved out, as the instances given thereunder are not construed as penalties.

15. We are concerned with clause (iii) of Rule 11 which stipulates that on found guilty of the charges and for good and sufficient reasons penalty of "recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders" can be imposed.

16. In other words if due to negligence of Govt. servant there is pecuniary loss caused to the Government, the discretion lies with the disciplinary authority to recover from the pay of Government servant either the whole or part of such loss. Personal gain of a Government servant is not the condition precedent for effecting a recovery once it is proved that the loss is attributed to the negligence.

17. In the case at hand the loss to the Government ascertained is Rs. 29,21,222/-. The respondent though is not held guilty of charge of embezzlement but is found negligent in supervising which led to siphoning of colossis amount of money by a co-accused. In other words had the respondent be good at supervision, the attempt by co-employee in retrieving the money could have been checked. The Tribunal in our considered opinion is not justified in holding that unless there is personal gain mere negligence and the loss occasioned thereon will not be sufficient a ground to effect recovery of whole or part of such loss.

18. We accordingly set aside the order passed by the Tribunal and dismiss the Original Application filed by the respondent herein.

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

20. A copy of this order be kept in Writ Petitions No. 10512 of 2010(s), 10584 of 2010(s), 10665 of 2010(s) and 10754 of 2010(s).

Petition Allowed

I.L.R.[2012] M.P. 49
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No.5432/2011 (Gwalior) decided on 20 October, 2011

GAURAV ENTERPRISES (M/S) ... Petitioner
Vs.
STATE BANK OF INDIA & ors. ... Respondents

A. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002), Section 13(8), –

Phrase – Before the date fixed for sale or transfer **– The words have definite meaning and connotation – Intention of legislature while using the said language is regarding date fixed for sale and not the actual sale or transfer – Once a sale certificate is issued to the purchaser, sale becomes absolute – Sale certificate is the evidence of title – Bank can not accept the amount from the borrower after the sale is confirmed nor can return auction amount to the auction purchaser – Section 60 of Transfer of Property Act has no application.** (Para 13)

क. वित्तीय आस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन अधिनियम (2002 का 54), धारा 13 (8), – वाक्यांश – विक्रय अथवा अंतरण हेतु नियत तिथि से पूर्व – इन शब्दों का निश्चित अर्थ एवं बोध है – उक्त भाषा का उपयोग करते समय विधायिका का आशय विक्रय हेतु नियत तिथि के संबंध में है और न कि वास्तविक विक्रय अथवा अंतरण के संबंध में – एक बार जब क्रेता को विक्रय प्रमाण पत्र जारी किया जाता है तब विक्रय पूर्ण हो जाता है – विक्रय प्रमाण पत्र स्वत्व का सबूत है – विक्रय की पुष्टि के पश्चात बैंक, उधार लेने वाले से रकम स्वीकार नहीं कर सकती न ही नीलामी राशि नीलाम क्रेता को वापस कर सकती है – सम्पत्ति अंतरण अधिनियम की धारा 60 लागू नहीं होती।

B. Settlement before Court – Settlement is binding between the parties inter se **– Settlement arrived at between the bank and the borrower will not bind the auction purchaser – Auction purchaser is free to assail the action of the bank in a separate proceedings.** (Para 15)

ख. न्यायालय के समक्ष समझौता – समझौता पक्षकारों पर पारस्परिक बंधनकारी है – बैंक और उधारकर्ता के बीच का समझौता, नीलाम क्रेता पर बंधनकारी नहीं होगा – नीलाम क्रेता, बैंक की कार्यवाही का पृथक कार्यवाही में विरोध करने के लिये स्वतंत्र है।

Cases referred :

AIR 2011 SC 2060, (2007) 5 SCC 745, AIR 2008 MADRAS 108.

Arvind Dudawat, for the petitioner.
Raju Sharma, for the respondents No.1 & 2.
N.K.Gupta, for the respondents No.3, 4 & 5.

ORDER

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

Earlier the borrowers, i.e., respondents No.3,4 and 5 herein, filed a writ petition before this Court, which was registered as Writ Petition No.4898/2011. The said writ petition was filed on 23.7.2011. On 28.7.2011 the parties to the said litigation produced a settlement, which was entered into between them before the court and court passed the order in terms of settlement. The terms of settlement are as under:-

> "(1) That, the present petition has been filed challenging the auction proceedings initiated by the State Bank of India under SARFAESI Act, 2002.
>
> (2) That, as on date an amount of Rs.1,05,36,058/- (Rupees One Crore Five Lakh Thirty Six Thousand and Fifty Eight Only) is due against the petitioner. The property has already been auctioned on 26.07.2011.
>
> (3) That, the petitioners are ready to deposit the aforesaid amount of Rs.1,05,36,058/- on or before 05.08.2011 in full and final settlement. If the aforesaid amount is deposited by the petitioners on or before 05.08.2011, in that case, the respondent Bank shall not finalize the auction held on 26.07.2011 in regard to the petitioner's property and the loan account shall be closed.
>
> (4) That, if the petitioners' fails to deposit the aforesaid amount up to 05.08.2011 in that case, the said proposal shall come to an end and respondent State Bank of India shall finalize the auctions proceedings held on 26.07.2011 and shall proceed further against the petitioners for remaining dues."

This court disposed of the said petition with the observation that since the parties have entered into a settlement, the petition is disposed of in terms of the settlement. It is further observed that settlement shall bind the parties.

2. This petition is filed by the auction-purchaser submitting that the action of the bank runs contrary to the mandate of *Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* (for short 'the SARFAESI Act') and also against the settlement arrived at between the parties. To elaborate, Shri Dudawat, learned counsel for the present petitioner submits that as per the settlement the petitioner was required to pay the amount positively by 5th August, 2011. Interestingly, the settlement

provides the consequence of not depositing of said amount by 5th August, 2011 in Clause 4, whereby it is mentioned that the proposal will come to an end and respondent-State Bank of India shall finalise the auction proceedings held on 26.7.2011 and shall proceed further against the petitioner for remaining dues. He vehemently argued that the amount was in fact realised on 10th August, 2011.

3. Learned counsel for the petitioner further submits that the action of the bank is contrary to the provision of Section 13 of the SARFAESI Act. Learned counsel by placing reliance on the documents filed by the bank submits that the cheque which was deposited on 6.8.2011 was realised on 10.8.2011 and the documents further show that on 6.8.2011 the requisite amount was not in the account of M/s. Agri Commex Warehousing & Logistics Pvt. Ltd.

4. *Per Contra,* Shri Raju Sharma, learned counsel for the bank and Shri N.K.Gupta, learned counsel for the borrowers, submit that the amount was admittedly required to be deposited as per the settlement on 5.8.2011 but on 5.8.2011 there was an All India Strike of employees of State Bank of India and, therefore, on that date the amount could not be deposited. However, on 6.8.2011 an amount of Rs.1,36,058/- was deposited by way of transfer and an amount of Rs. 1,04,00,000/- was deposited by way of cheques. They submit that the delay was unavoidable, inevitable and beyond the control of the parties because on 5.8.2011 there was an All India Strike. They further submit that there is no illegality in the action of the bank. Heavy reliance is placed on Section 13(8) of the SARFAESI Act, which reads as under:-

> "13(8).—If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset."

5. Shri N.K.Gupta appearing for the borrower further submits that Section 2(2) of the SARFAESI Act provides that words and expressions used and not defined in this Act but defined in the Indian Contract Act, 1872 or the Transfer of Property Act, 1882 or the Companies Act, 1956 or the Security and Exchange Board of India Act, 1992 shall have the same meanings respectively assigned to them in those Acts. Shri Gupta submits that words "*transfer*" and "*sale*" are not defined in the SARFAESI Act and, therefore,

to see the actual meaning of these words one has to revert to the Transfer of Property Act. Shri Gupta placed reliance on the definition of *'transfer'* and 'sale' in Sections 5 and 54 of the *Transfer of Property Act, 1882 (herein after called as 'TP Act')*.

The said definitions are reproduced here as under:-

"5. "Transfer of property" defined.—In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, and one or more other living persons; and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

54. "Sale" defined.—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.

Sale how made.—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.— A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

6. It is the further stand of the learned counsel for the respondents that as per Section 13(8) of the SARFAESI Act, the actual sale or transfer never took place. On the contrary, by document dated 10.8.2011 the present petitioner was informed that as per Section 13(8) of the SARFAESI Act, the sale could not take place and therefore the amount deposited by present petitioner was returned to him. In the light of aforesaid, the stand of the respondents is that there is one day's delay in depositing the amount as per the order dated 28.7.2011 passed by this Court and that delay is because of unavoidable circumstances, i.e., All India Strike.

7. Reliance is further placed on the *Security Interest (Enforcement) Rules, 2002* (hereinafter called as "*2002 Rules*"). By placing reliance on Rules, 9(1), 9(4) and 9(7), learned counsel for the respondents submits that unless an actual transfer or sale takes place, no right is created in favour of the present petitioner and bank was well within its jurisdiction to cancel the same and since amount in question was realised from the borrowers, there is no illegality in the action of the bank. Shri Raju Sharma also relied on *AIR 2011 SC 2060 (M/s L.K.Trust v. EDC Ltd. & others)* to submit that in absence of execution of a sale deed, right of borrower to redeem property is not lost.

8. Shri Dudawat has placed heavy reliance on the language of Section 13(8) of the SARFAESI Act, wherein the words used are *"before the date fixed for sale or transfer"* (emphasis supplied). In explicit, Shri Dudawat submits that the intention of legislature is not actual sale or transfer which is required to take place but is a date fixed for sale or transfer. Meaning thereby the date which is fixed for auction which is an exercise for sale in favour of the auction purchaser. He submits that admittedly the date of auction was 26.7.2011, on which date even a certificate was given to the petitioner, which is Annexure P/ 2. In Annexure P/2 it is made clear that the sale is confirmed in favour of the petitioner. He submits that the sale was confirmed and confirmation letter Annexure P/2 was issued in favour of the present petitioner and, therefore, after this neither under the garb of the settlement arrived at before this court nor as per Section 13(8) of the SARFAESI Act the bank could have taken 'U' turn and accommodated the borrowers.

9. Learned counsel for the respondents have taken a specific stand that a combined reading of Rules 9(1), 9(4), 9(6) and 9(7) of 2002 Rules clearly shows that there is a specific method prescribed for the sale of the property and merely because an auction has taken place, that does not mean that any

legal right to enjoy the property is accrued in favour of the petitioner. Reliance is also placed on Conditions No.9 and 10 of Annexure P/1, which prescribe that the Specified Officer has a power to cancel the auction without assigning any reason and the said officer is not compelled to accept the amount from the auction purchaser. Shri Gupta submits that merely because some amount was deposited by the present petitioner, it will not bestow any right to the petitioner to enjoy the property and bank has acted strictly in consonance with the provisions of the SARFAESI Act and the rules made thereunder.

10. In the opinion of this Court, the attack on the action of the respondents is of two folds. Shri Dudawat firstly submitted that the amount was not deposited as per the settlement entered into and recorded by this Court. Secondly, he submits that as per Section 13(8) of the SARFAESI Act, after confirmation of sale, there was no occasion for the bank to accommodate the borrower.

11. The certificate Annexure P/2 shows that on deposition of an amount of Rs.25,05,500/- by the petitioner, the sale of the petitioner was certified and confirmed. Shri Raju Sharma heavily relied on the judgment of Apex Court in M/s. L.K. Trust (supra). The said case deals with Section 60 of TP Act. The case in hand is regarding Section 13(8) of the SARFAESI Act. This is settled in law that the judgments of Supreme Court are not Euclid's Theorum. The ratio *decidendi* of the Supreme Court judgments depends on the fact situation of the particular case and the Statute which was under consideration before the court. This is also settled in law that even a single fact may change texture of a ratio. Thus, examining Section 60 of TP Act in juxtaposition with Section 13(8) of SARFAESI Act shows that both the Statutes are not *pari materia* and are worded in a different language. Thus, the intention of the Legislature appears to be different in enacting the aforesaid provisions. However, the Apex Court in *(2007) 5 SCC 745 (B. Arvind Kumar vs. Govt. of India and others*) held as under:-

> "12..... When a property is sold by public auction in pursuance of an order of the court and the bid is accepted and the sale is confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. A sale certificate is issued to the purchaser only when the sale becomes absolute. The sale certificate is merely the evidence of such title. It is well settled that when an auctionpurchaser derives

title on confirmation of sale in his favour, and the sale certificate is issued evidencing such sale and title, no further deed of transfer from the court is contemplated or required. In this case, the sale certificate itself was registered, though such a sale certificate issued by a court or an officer authorised by the court, does not require registration. Section 17(2) (xii) of the Registration Act, 1908 specifically provides that a certificate of sale granted to any purchaser of any property sold by a public auction by a civil or revenue officer does not fall under the category of nontestamentary documents which require registration under sub-sections (b) and (c) of section 17 (1) of the said Act. We therefore hold that the High Court committed a serious error in holding that the sale certificate did not convey any right, title or interest to plaintiff's father for want of a registered deed of transfer."

(emphasis supplied).

12. This issue came up for consideration before a Division Bench of Madras High Court in a case reported in *AIR 2008 MADRAS 108 (K.Chidambara Manickam vs. Shakeena and others)*. The Madras High Court framed a question which reads as under:-

"(i) Whether the sale of the secured asset in public auction as per Section 13(4) of SARFAESI Act, which ended in issuance of a sale certificate as per Rule 9(7) of the Security Interest (Enforcement) Rules, 2002 (in short "the Rules") is a complete and absolute sale for the purpose of SARFAESI Act or whether the sale would become final only on the registration of the sale certificate?"

This question is answered by Madras High Court as under:-

"In our considered view, the borrowers should have approached the secured creditor or the authorised officer before the date fixed for sale and not after the sale, as provided under Sub-section (8) of Section 13 of the SARFAESI Act. As discussed earlier, only if the borrowers approach the secured creditor or the authorised officer before the date fixed for sale or transfer and tender or pay all the dues to the secured creditor, the

Section creates a bar on the secured creditor or authorised officer to proceed further with the proposed sale or transfer. In this case, admittedly, the date fixed for the sale was 19-12-2005. But, even according to the version of the borrowers, they approached the secured creditor only on 2-1-2006. In such circumstances, the contention of the learned Counsel for the borrowers is without any basis and contrary to the provisions contained in Sub-section (8) of Section 13 of the Act."

The crux of contention before the Single Judge of Madras High Court by the borrower was that even after issuance of sale certificate the right of redemption under Section 60 of TP Act is available. Learned Single Judge of Madras High Court agreed with the argument advanced by the borrower that the right of redemption which is embodied in Section 60 of TP Act is available to the mortgagor unless it has been extinguished by the act of parties and until the sale is completed by registration, and that the mortgagor does not lose his right of redemption, came to conclusion that the sale takes complete shape only after it gets registered and it does not come to an end by issuance of a sale certificate.

The Division Bench did not approve the said finding of the Single Judge and allowed the appeals and dismissed the writ petitions.

13. In the present case also, the stand of respondents is that mere issuance of sale certificate will not bestow any right in favour of the auction-purchaser and unless actual sale deed is executed, there is no "sale" in the eyes of law and power of redemption can be exercised by the bank. In the opinion of this Court, this argument is liable to be rejected. The language of Section 13(8) of SARFAESI Act is very clear, which contains the words *"before the date fixed for sale or transfer"*. The intention of the Legislature appears to be the date fixed for sale and not the actual sale. The Statute is accordingly designed and worded. Thus, before date fixed for sale, the borrower could have exercised the same and Section 13(8) permits the bank to do the same. In other words, Section 13(8) even prohibits the bank to transfer or sell the secured assets before the date fixed for sale and gives an opportunity to the borrower to repay all dues, costs, charges and expenses incurred by the bank. However, once sale certificate is issued, the bank cannot invoke Section 13(8) of SARFAESI Act and Section 60 of TP Act has no application. Accordingly,

the judgment cited by Shri Raju Sharma in *M/s. L.K.Trust* (supra) has no application in the fact situation of this case.

14. The respondents have also relied on conditions No. 4,9 and 10 of Annexure P/1. Conditions No.9 and 10 are of no assistance to the respondents. Condition No.9 deals with power of the bank to postpone or cancel the auction. In the present case, auction has already taken place and auction-purchaser has been given a sale certificate. Thus, Condition No.9 has no relevance. Condition No.10 deals with the power of Specified Officer to not to accept the auction amount and reject the same. In the present case, the said amount has already been accepted and a sale certificate is issued. Thus, Condition No.10 also has no relevance.

15. Sub-Rule (4), (6) and (7) of Rule 9 of 2002 Rules are of no assistance to the respondents. Reading these rules with section 13 (8) of the SARFAESI Act shows that the intention of law-makers is that till the date fixed for sale and not after the sale if borrower tenders all dues to the secured creditor, the section prohibits the secured creditor or authorised officer to proceed further with proposed sale or transfer. In this case, admittedly, the date fixed for sale was 26.7.2011. This is also admitted position between the parties that no payment was made before 6.8.2011. Accordingly, the action of the bank cannot be said to be in consonance with section 13(8) of the SARFAESI Act. After the date of sale aforesaid, it was not open for the bank to accept the amount from the borrower and return the amount to the auctionpurchaser. This action runs contrary to the scheme of the SARFAESI Act and the rules made thereunder. I also find force in the argument of learned counsel for the petitioner that the settlement arrived at between the borrower and the bank will not bind the present petitioner, who was not a party in the said settlement. Thus, examining it from any angle, either as per Section 13(8) of SARFAESI Act or from the angle of implementation of the settlement, the action of the bank cannot be upheld.

16. The bank in order dated 10.8.2011 has solely relied on Section 13(8) of SARFAESI Act. As analyzed above, Section 13(8) does not permit the bank to accept the amount from the borrower after sale is confirmed. Thus, for the aforesaid reasons, the action of the bank cannot be approved.

17. Consequently, petition is allowed. The respondent-bank is directed to handover possession of the property to the petitioner. However, the bank is

at liberty to do necessary formalities in accordance with the SARFAESI Act and rules made thereunder for doing the same. No costs.

Petition allowed

I.L.R.[2012]M.P. 59
WRIT PETITION

Before Mr. Justice Sanjay Yadav & Mr. Justice T.K. Kaushal
W.P. No. 3806/2009 (Jabalpur) decided on 21 October, 2011

S.K. GAUR ...Petitioner
Vs.
DENA BANK, BHOPAL ...Respondent

Industrial Disputes Act (14 of 1947), Section 33A – Scope – **Petitioner, initially appointed as a Clerk (workman) was promoted to Junior Manager in 2002 – In 2005, he was charge sheeted and ultimately punished with punishment by compulsory retirement – Held – The petitioner was not a workman, thus, the Tribunal (C.G.I.T.) was not justified in entertaining the application under Section 33A at the instance of the employee who was not a workman.** (Para 23)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33ए – विषयक्षेत्र – आरंभ में लिपिक/कर्मकार के रूप में नियुक्त याची को सन् 2002 में कनिष्ठ पबंधक के पद पर पदोन्नत किया गया – सन् 2005 में उसे आरोपित किया गया और अंत में अनिवार्य सेवानिवृत्ति की शास्ति से दण्डित किया गया–अभिनिर्धारित– याची कर्मकार नही था अतएव कर्मचारी जो कर्मकार नही था उसके निवेदन पर धारा 33ए के अंतर्गत आवेदन ग्रहण करना अधिकरण (सीजीआईटी) के लिए न्यायोचित नही था।

Case referred :

AIR 1966 MP 60.

N.S. Ruprah, for the petitioner.
Anoop Nair, for the respondent.

ORDER

The order of the court was delivered by :

SANJAY YADAV, J :- This order shall govern the final disposal of Writ Petition No. 15017/2008 (Dena Bank, Bhopal v. S. K. Gaur) and Writ Petition No. 3806/2009 (S. K. Gaur v. Dena Bank, Bhopal) as both these writ petitions

under Article 227 of the Constitution of India are directed against the Award passed by the Central Government Industrial Tribunal-cum-Labour Court on 01-02-2008.

2. Relevant facts are carved out from Writ Petition No. 15017/2008. Respondent (hereinafter referred to as 'employee') while appointed as Cashier-cum-Clerk with the petitioner-Bank (hereinafter referred to as 'employer') in June, 1978 was proceeded against and by order dated 26-09-1978 his services were terminated while he was on probation for the irregularities committed by him. Later on keeping in view the undertaking given by the employee of future good conduct, he was reappointed on 29-11-1979.

3. The employee was charge sheeted on 21-12-1982 which culminated into punishment of stoppage of one increment with cumulative effect.

4. Another charge sheet was issued to the petitioner on 20-09-1985 which resulted in stoppage of increment with cumulative effect and one increment with noncumulative effect and debarring him from appearing in promotion test for a period of three years. Against this order, the employee raise an industrial dispute forming subject matter of case No. CGIT/LC/R/247/97 before Central Government Industrial Tribunal-cum-Labour Court.

5. That the employee later on was promoted as an Officer in Junior Manager Grade I (JMG-I) in the year 2002.

6. That on 26-11-2005 employee was charge sheeted with the charges that he (a) failed to maintain utmost devotion, diligence and honesty while discharging his duty to take requisite steps to protect the interest of the Bank; (b) committed fraud on the Bank by claiming HRA/TA claim submitting fake and fabricated hotel bills; (c) lack of honesty and integrity and (d) doing acts unbecoming of an Officer-employee.

7. In the departmental enquiry all the charges levelled against the employee were proved which led to his dismissal from service by order dated 30-08-2006. In an appeal the order of dismissal was converted to compulsory retirement by order dated 28-02-2007 by the Appellate Authority.

8. Since the reference Case No. CGIT/LC/R/247/97 was pending on 30-08-2006 when the employee was dismissed from service, he filed an application under section 33A of the Industrial Disputes Act, 1947 (herein after referred to as 'the Act of 1947').

9. Section 33A provides that when an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation offer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal as the case may be, an employee aggrieved by such contravention, may make a complaint in writing to such authority/Labour Court/Tribunal as the case may be. On such complaint the authority/Labour Court/Tribunal as the case may be shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, and shall submit its award in accordance with the provisions of the Act of 1947.

10. Sub-section (1) of Section 33 of the Act of 1947, which is relevant in the context, provides that :-

> "33. Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.
>
> (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall-
>
> (a) In regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or
>
> (b) For any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending."

11. The employee also questioned the order of punishment on the ground that he was not afforded proper opportunity of hearing.

12. Employers on their turn besides raising an objection as to maintainability of an application under section 33A on the ground that the employee being an officer in Junior Manager Grade-I, was not a workman under section 2(s) of the Act of 1947, justified punishment for the reasons that same was inflicted after affording due opportunity of hearing.

13. The Tribunal while deciding both the issues against the employer,

directed the reinstatement of employee, without back wages.

14. Whereas the employer calls in question the entire Award. Grievance raise by employee is against nongrant of back wages.

15. While rejecting the plea as to maintainability of an application under section 33A for want of his being a workman under section 2(s), the Tribunal observes :

> "9. ...., the non-applicant could not succeed to prove by the reliable documentary evidence that the disciplinary action was initiated against the complainant, who was not covered by the definition of "workman" given in Sec-2 of the I.D.Act. The solitary oral evidence deposed during the cross-examination of non-applicant's witness Shri R. D. Negi is not at all sufficient to prove that the job of the complainant was of supervisory or managerial nature, in the absence of documentary evidence in that regard. Thus the non-applicant has failed to prove that the complainant was not a 'workman" as defined under Sec-2(b) [sic (s)] of the I.D.Act when the Disciplinary Action was initiated against him. It means that the non-applicant has failed to prove that this court has no jurisdiction to try this case."

16. Whether an employee is a workman or comes within the exception (iii) or (iv) of Section 2 (s) depends on exact nature of his work and not designation. The nature of work can be determined from the letter of appointment/promotion, the nature of duties and other attending factors. It is the predominant duties which an employee is required to do are the factors to determine his status whether he is workman or discharging supervisory, managerial or an administrative functions. The determining factor can be gathered only on the basis of evidence.

17. In the case at hand the employee was promoted as Officer in Junior Manager Grade-I (JMG-I) in the year 2002. He was charge sheeted on 26-11-2005 while posted as an Officer in Freeganj Branch, Ujjain. In his cross-examination the employer's witness Shri R. D. Negi deposed :

> ".....Applicant Junior Management grade-I ke pad par the'. Inka Nature of work supervisory tha. Supervisory Nature mein D.D. Sign karna] cheque pass karna, miscellaneous vouchers ko Authorise karna, ledger posting ko Authorise karna aate

hein. Applicant ka Job Administrative Capacity ka tha. Inko Power of Attorney di gayee thi. Power of Attorney pesh nahin kiya hai parantu kar sakta hoon."

18. The employee was also examined. In his cross examination he stated "1985 *mein hamari* service condition Desai Award *tatha* Shastri Award *se* Govern hoti thin mujhe nahin malum ki promotion rules alag se lagu hote hein athwa nahin. Officer ke promotion hetu pariksha mein baithne hetu mujhe 3 varsh ke liye Debar kiya gaya tha. Us aadesh ke viruddha prakaran Lekha R/ 247/97 is Nyayadhikaran mein lambit hai. Mujhe 2001 mein officer ke pad par pronnati ki gayee thi. Promotion par meri posting Ujjain mein hui 2002 se 2006 tak meine officer ke pad par karya kiya. Mujhe nahin malum ki jab mein officer posted tha hamari service condition kis Rule ke tahat Govern hoti thi. *Clerical staff* ke liye sewa shartein award ke tahat hein. Officer hetu sewa shartein alag hein."

19. Admittedly, the employee was holding a post of Officer when he was served with the charge sheet on 26-11-2005. The service conditions as per his own admission were not governed by either Sastri Award or Desai Award.

20. Clerical Staff, ordinarily understood does, a ministerial work which are routine in nature and does not involve any control or supervision. The expression 'clerk' is a noun and "is a person who works in an office, bank, or law court and whose job is to look after the records, accounts, etc. (See : Collins Cobuild English Language Dictionary Second impression Edn. 1992). On the other hand a manger, supervisor or an administrative officer is required to take decision by exercising the discretion vested into him either by appointment or promotion.

21. In the present case an officer in Junior Manager Grade-I is required to sign the Demand Draft, pass cheques, to authorize miscellaneous vouchers, to authorize ledger posting. These duties being discharged in an administrative capacity are not shown to be performed by the clerical staff. An incidental work of a clerk, i.e., written work done by an officer in JMG-I will not transform him into the status of a clerk, which can be termed as a workman.

22. In *Harris Mineral Supply Co., Jaitwara and others v. Salim M. Merchani and others* : AIR 1966 M.P. 60, it is observed : -

"7.....In determining whether an employee is or is not a

manager, excluded from the definition of 'workman' given in section 2(s), what is decisive is not his designation but the nature of the work done by him. In order to come within the category of a person "who is employed mainly in a managerial or administrative capacity" excluded from the definition of 'workman', it is essential that the predominant feature of the duties of the person employed as manager must consist in directing and controlling other employees or in discharging functions mainly of a managerial nature."

23. In view of above analysis and given facts of present case we are of the considered opinion that the Tribunal was not justified in entertaining the application under section 33A at the instance of the employee who was not a workman. The same ought to have been rejected. As the employee being not a workman, the provisions of section 33 (1) of the Act of 1947 are not attracted. The Award dated 01-08-2008 is hereby quashed.

24. In view of above, the issue as to whether the Tribunal was under obligation to have afforded an opportunity to the employer to prove the misconduct as the disciplinary enquiry was held vitiated, is not gone into.

26. In the result Writ Petition No. 3806/2009 by the employee directed against non-granting back wages is dismissed. Whereas Writ Petition No. 15017/2008 is allowed to the extent above. No costs.

order accordingly

I.L.R.[2012]M.P. 64
WRIT PETITION
Before Mr. Justice Sujoy Paul

W.P.No.6621/2010 (Gwalior) decided on 21 October, 2011

Y.P.SINGH (PROF.) ... Petitioner
Vs.
STATE OF M.P.& ors. ... Respondents

A. ***Grant-in-Aid Rules, M.P. for Non-Governmental Institutions (Technical)*- Aided institutions are bound to follow the orders and rules made by the State Govt. – Employees of aided institutions are entitled to receive similar benefits which are applicable to the employees of Govt. Institutions.** (Para 12)

क. अशासकीय संस्थानों के लिए सहायता अनुदान नियम, म.प्र. (तकनीकी) – सहायता प्राप्त संस्थान, राज्य सरकार द्वारा बनाये गये नियम एवं आदेशों का पालन करने के लिए बाध्य है–सहायता प्राप्त संस्थान के कर्मचारी, शासकीय संस्थानों के कर्मचारियों को लागू होने वाले समानांतर लाभ अभिप्राप्त करने के लिए हकदार हैं।

B. Age of Superannuation–Teachers in technical aided institutions **- State Govt. has accepted the AICTE Regulations prescribing the age of retirement for teachers as 65 years and issued the orders – Same is binding on technical institutions receiving grant-in-aid from the Govt.** (Para 14)

ख. अधिवर्षिता वय – तकनीकी सहायता प्राप्त संस्थानों में अध्यापक – राज्य सरकार ने अध्यापकों हेतु निवृत्ति वय 65 वर्ष विहित करने वाले ए.आई.सी.टी.ई. विनियमन स्वीकार किये और आदेश जारी किये – वे सरकार से सहायता अनुदान प्राप्त करने वाली तकनीकी संस्थानों पर बाध्यकर है।

Cases referred :

1992 (SUPP) SCC 191, (2007) 11 SCC 58, (2000) 10 SCC 527, (2004) 1 SCC 592, (1997) 3 SCC 571, (2011) 7 SCC 172, W.P. No. 13449/2011.

D.K.Katare, for the petitioner.
Praveen Newaskar, Dy.G.A. for the respondent//State.
K.N. Gupta with Anmol Khedkar, for the respondents No.3 & 4.

ORDER

SUJOY PAUL, J :- Since these three matters are inter connected, with the consent of parties, the matters are analogously heard and decided by this common order.

W.P.No.6621/10 is taken as a leading matter. Brief facts necessary for adjudication of these matters are as under:-

The petitioners are Teachers in technical institutions. The institutions in which the petitioners are working are admittedly getting the grant-in-aid from the State Government. This is also admitted between the parties that the All India Council for Technical Education Act, 1987 is applicable to the technical institutions in which petitioners are working.

2. The case of the petitioners is that AICTE issued a regulation which is published on 5.3.2010 in the Gazette of India which is known as All India

Technical Education Council (Technical Institutions (Diploma) for Teachers and other Teaching Staff Pay Scale, Service Conditions and Eligibility) Regulations, 2010. These regulations are hereinafter referred as "2010 Regulations". A copy of regulations is placed as Annexure P-6 in W.P.No.2371/11. By way of aforesaid regulations, the AICTE revised the pay scales and other service conditions of the teaching staff. The age of superannuation is mentioned in internal page 11 of the said Gazette notification. A perusal thereof shows that the UGC circular dated 23.3.2007 is borrowed for the purpose of fixing the age of superannuation of teaching staff. The said circular dated 23.3.2007 is filed as Annexure P-5 with W.P.No. 2371/11. In Clause 2(i) it is mentioned that the age of superannuation of only teaching staff working on regular basis against sanctions post as on 15.3.2007 in any of the centrally funded higher and technical educations under the Ministry shall be increased from 62 to 65 years. Consequently, by AICTE regulations, the said provision is borrowed.

3. Shri D.K.Katare, Shri D.S.Raghuvanshi and Shri Vivek Jain, learned counsel' appearing for the petitioners submit that in obedience of the said 2010 Regulations, the State Government has issued the order dated 19.10.2010. In the order itself it is made clear that it is issued by following the 2010 Regulations and it shall be applicable to all Government, Autonomous and Aided Polytechnic Institutions. Thus, the stand of the petitioners is that the 2010 Regulations have a binding force and it is not voluntary either for the State Government or for the institutions to follow or not to follow it. To elaborate, the counsel submit that once 2010 Regulations are implemented and the order dated 19.10.2010 is issued by the State Government making it applicable to all Government, Autonomous and Aided institutions, it is no more open for the aided institutions to decline enhancement of age for retirement from 62 to 65 years.

4. Shri D.S.Raghuvanshi relied on Grant-in-Aid Rules for Non-Government institutions (Technical) in Madhya Pradesh. These rules are filed as Annexure P-6 with W.P.No.4532/11. The learned counsel submits that the institutions are getting the Grant-in-Aid from the State Government and, therefore, are bound by the decision and conditions passed by the State Government. By relying on these rules, the learned counsel submits that it is not open to the aided institutions to say that these rules have no application. In nutshell, the singular question before this Court is whether it is open for the aided institutions to decline implementation of State Government order dated

19.10.2010 and whether such institutions can deny the benefit of extension of age of retirement to its teachers?

5. Shri K.N.Gupta, learned Senior Advocate, on the other side, submits that the AICTE Act and regulations made thereunder are applicable only to the extent the Act permits. He submits that this Act and regulations makes it clear that it basically deals with the standard of education and not with the service conditions of the employees of the technical institutions. He further submits that neither under the AICTE Act nor under the UGC Act, any service conditions of employees are laid down. He also relied on various Supreme Court judgments.

6. In the opinion of this Court, this is a peculiar case where the 2010 Regulations were accepted by the State Government and a consequential order dated 19.10.2010 is already issued. In the order dated 19.10.2010 it is made clear that it will have an application on Government, Autonomous and Aided institutions. Shri K.N.Gupta, learned Senior Advocate has placed reliance on *1992 Supp (3) SCC 191 (T.P.George and Others Vs. State of Kerala and Others)* to submit that it is for the State Government to implement the scheme in a modified form and aggrieved teachers of private institutions cannot claim as a right that after accepting major portion of the scheme, State Govt. is bound to accept the age of retirement as well. I have considered the said submission. This judgment has no application in the facts situation of the present case. The scheme which was considered by the Kerala High Court in W.A.No.223/91 and in turn by the Supreme Court in the said matter itself provides that this is a voluntary scheme and has no binding on the State Government. This judgment has no application because in the present case the State Government has already accepted 2010 Regulations and passed a consequential order. Shri Gupta, learned senior counsel, then relied on *(2007)11 SCC 58 (B.Bharat Kumar and others Vs. Osmania University and Others).* In page 61 it is mentioned as under:-

> "The factual situation in this case is almost identical with that in T.P.George's case, 1992 Supp (3) SCC 191 where the issue was whether the retirement age stood raised to 60 years. The very language of the letter dated 27.7.1998 suggests that the scheme is voluntary and not binding at all. It is specified in the judgment of the Kerala High Court that the teachers had no right to claim a specific age because it was suggested in the

scheme which itself was voluntary and not binding. The Court clearly observed that "the appellant cannot claim that major portion of the scheme having been accepted by the Government, they have no right not to accept the clause relating to fixation of higher age of superannuation". The Court therein observed that it was a matter between the State Government on the one hand and the University Grants Commission on the other and it would be for the University Grants Commission to extend the benefit of the scheme or not to extend the same depending upon its satisfaction about the attitude taken by the State Government in the matter of implementing the scheme. It was also clearly observed that as long as the State Government has not accepted UGC's recommendations to fix the age of superannuation at 60 years, teachers cannot claim as a matter of right that they were entitled to retire on attaining the age of 60 years".

7. The Apex Court has followed T.P.George in this matter. The aforesaid re-produced paragraph makes it clear that it was for the State Government to accept the UGC recommendation or not. This judgment also has no application because in the present case the State Government has already accepted the recommendation and enhanced the age of retirement to 65 years.

8. Shri Gaupta has also relied on *(2000) 10 SCC 527 (State of Bihar and Another Vs. Teachers' Association of Govt. Engineering College and Others.)*. This judgment is of no assistance to the institutions because in that case the teachers of Government colleges were claiming parity in the age of retirement with teachers of Patna University. In this case, the State Government has already treated them at par and passed the order dated 19.10.2010 commanding the Government, Autonomous and Aided institutions to enhance the age upto 65 years. Shri Gupta also relied on *(2004) 1 SCC 592 (Suresh Chandra Singh and Others Vs. Fertilizer Corpn. Of India Ltd. And Others)*. This judgment will also not cut any ice because in this case the employees of Public Sector Units were claiming parity in the matter of age of retirement with Central Government employees. In the present case, this parity is already recognized and established because the State Government has already passed the order dated 19.10.2010. For the same reason, *(1997) 3 SCC 571 (K.Krishnamacharyulu and Others Vs. Sri Venkateshwara Hindu*

College of Engineering and Another) cited by Shri Gupta has no application. Lastly, Shri Gupta relied on *(2011) 7 SCC 172 (Khandesh College Education Society, Jalgaon and others Vs. Arjun Hari Narkhede and others)* to submit that teachers of aided institutions are not Government servants. This is nobody's case, nor the petitioners are claiming the State Government employees status. Hence, the judgment cannot be pressed into service.

9. Reverting back to the order dated 19.10.2010 which will show that in Clause 3 the State Government has followed and accepted the regulations and enhanced the age of teachers from 62 to 65 years.

10. Shri Gupta submits that the document dated 21.4.2011 (Annexure R/2-2) filed with W.P.No.2371/11 shows that the order of Government dated 16.4.2010 has no application for teachers of aided institutions. This argument deserves rejection. The petitioners are neither seeking enforcement of order dated 16.4.2010 nor order dated 21.4.2011 issued for the petitioners who were working in technical institutions. The said order is issued by Higher Education Department and, admittedly, technical institutions are not working under the Higher Education Department. The next reliance of Shri Gupta is on document dated 14.10.2010 (Annexure R/2-6 filed with W.P.No.2371/11 whereby it is mentioned that as per memorandum and article of association of the society, governing body/managing committee has power to extend the service of an employees.

11. In the opinion of this Court, this order is also of no help to the respondents. The petitioners are not seeking any extension of service. They are claiming that their age of retirement has already been enhanced by the State Government and it should be implemented.

12. Reverting back to the Grant-in-Aid rules would show that these rules are binding on the aided institutions. The institutions which are taking grant-in-aid from the State Government are bound by the orders of the State Government. Following portion of these rules are reproduced:-

> "The staffing pattern of the institution for teaching staff, supporting staff and other staff would be as per pattern approved by the Government of India and the all India Council of Technical Education and agreed to by the State Government in case of Engineering Colleges, Polytechnics and professional/ vocational institutions receiving grant-in-aid from the Government.

The employees of grantee institutions shall be entitled to scales of pay, allowances dearness allowance and such other allowances/benefits which are applicable to the employees of Government institutions.

All orders issued and embargoes imposed by the State Government to tide over financial stringencies shall be applicable to grantee institutions also."

13. The Karnataka High Court in the case of Dr. *R.Halesha and others Vs. State of Karnataka and others (W.P.No.13449/2011)* and other connected matters has allowed the petition. In the said case, the Kanataka High Court relied on the UGC regulations and held that those regulations are binding on the respondents.

14. In the light of aforesaid, it is clear that the aided institutions are bound to follow the orders and rules made by the State Government. Once the State Government has passed the oder dated 19.10.2010, its not open to the institutions to keep the age of retirement of teachers as 62 years. They are bound to follow the order dated 19.10.2010.

15. Result is inevitable. The orders in different petitions prematurely retiring the petitioners at the age of 62 years are quashed and set aside. The age of retirement of the petitioners shall be 65 years. The respondents are bound to implement the order of the State Government dated 19.10.2010. The petitions are allowed to the extent indicated above.

Petition allowed

I.L.R.[2012] M.P. 70
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 18045/2011 (Jabalpur) decided on 24 October, 2011

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

Constitution, Article 226, Urban Land (Ceiling and Regulation) Act, (33 of 1976), Sections 5(1)(3), 6, 9, 10(1)(3)(4) – Transfer of Land **– Transfer of excess land through sale deed after draft statement and notification is void ab initio and does not create any right – Any such**

transfer shall be deemed to be null and void – Petition dismissed.

(Para 10)

संविधान, अनुच्छेद 226, नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, (1976 का 33), धाराएँ 5(1)(3), 6, 9, 10(1)(3)(4) – भूमि का अंतरण – प्रारुप कथन एवं अधिसूचना के पश्चात विक्रय पत्र द्वारा अतिरिक्त भूमि का अंतरण प्रारंभ में ही शून्य है और कोई अधिकार निर्मित नहीं करता – ऐसे किसी अंतरण को अकृत और शून्य माना जायेगा – याचिका खारिज।

Cases referred:

(2010) 8 SCC 467, (2010) 10 SCC 677.

N.P. Pandey, for the petitioner.

ORDER

SANJAY YADAV, J :- Heard.

Order dated 15.9.11 passed by the Additional Collector, Jabalpur is being challenged in this writ petition under Article 226/227 of the Constitution of India.

2. By said order petitioners request for recording him as owner of land admeasuring 0.983 hectare Khasra No.19, S.N. 664 P.C. No.20/17 Village Maharajpur has been declined on the ground that the same vests in the Government and is recorded as Government land after being declared surplus in a proceeding under Urban Land (Ceiling and Regulation) Act 1976 and taken possession of.

3. The land in question originally belonged to one Anandilal Dubey who owned the entire Khasra No.19. In a proceedings under the Act of 1976 forming subject matter of case No.308 अ-90 (ब-9)/1981-82, land admeasuring 9831.17 sq.mts. was declared surplus. Possession of said land was handed over to the State on 27.2.92 as is apparent from the possession letter on record. The possession was given by one Shankar Prasad Tiwari, son-in-law of said Anandilal Dubey in presence of two independent witnesses Santlal and Arjun Prasad.

4. It appears that after the land in question has been declared surplus, said Anandilal through power of Attorney Holder Shri Anand Giri s/o Shri Sewak Giri Goswami sold the part of surplus land (i.e. the land in question) to

one Kasturi Devi vide sale deed dated 26.3.90. Name of Kasturi Devi on the basis of sale deed was got recorded in panchshala Khasra.

5. Said Smt. Kasturi Devi expired on 19.11.93. The petitioner on the basis 6of the will dated 30.5.86 claimed himself to be the owner of the property and through one Power of Attorney Shri Vinay Kumar Khanna applied for mutation on the ground that with the repeal of Act of 1976 by Urban Land (Ceiling and Regulation) Repeal Act 1999, the land in question reverted in favour of erstwhile owner.

6. The Claim of the petitioner has been negativ by the impugned order on the ground that having been vested with the State Government after being declared surplus and taken possession of, the Act of 1999, will not effect the vesting.

7 Rightly so, as only those proceedings under 1999 Act stand abated where possession has not been taken (Please See: *Sulochana Chandrakant Galande v. Pune Municipal Transport:* (2010) 8 SCC 467), In the case at hand, the possession of land in question in pursuance to the declaration of it being surplus was handed over on 27.2.92. Though the petitioner questions the manner in which possession of land is taken.

8. It is urged that the Shakarlal Tiwari, (son-in-law of Anandilal) had no authority to hand over the possession. Even if the submission is presumed to be correct, the fact remains that neither Shankarlal Tiwari nor said Anandilal ever came forward to question the vesting of surplus land.

9. Even otherwise (though the petitioner has not declared the relevant dates as to when the statement under Section 6 of the Act of 1976 was filed by the said Anandilal and the date of notification under Section 9 and Section 10 (1) of the 1976 Act) the title of the case wherein the land in question was declared surplus discloses it to be of the year 1981-82 i.e. much before the execution of said sale deed dated 26.3.90. Sub-Section (1) of Section 5 of 1976 Act stipulates that where any person commencing on the appointed day and ending with the commencement of the Act of 197 6 has transferred such land or part thereof, by way of sale, mortgage, gift, lease or otherwise, the extent of the land so transferred shall also be taken into account in calculating the extent of vacant land held by such person and the excess vacant land in relation to such person shall be selected out of the vacant land held him. Clause

(i) of sub-Section (4) of Section 10 of the Act of 1976 stipulates that no person shall transfer by way of sale, mortgage, gift lease or otherwise any excess vacant land (including any part thereof) specified in the notification under sub-Section (1) or sub-Section (3) of Section 10 and any such transfer made in contravention of the provision shall be deemed to be null and void. (Similar situation arises when transfer is before the statement filed under Section 6 and the publication under Section 10 (1) as per Section 5 (3) such transaction is deemed to be null and void under Section 5(3) of 197 6 Act: Please see *Ritesh Tewari and another v. State of Uttar Pradesh and others*: (2010) 10 SCC 677).

10. In the case at hand the said transfer of excess land by virtue of sale deed dated 26.3.90 being after the draft statement filed under Section 6 and the notification under Section 10(1) of 1976 Act, is void ab initio, and does not create any right in favour of the petitioner. In *Ritesh Tewari* (supra) it is observed-

> "32- It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits.
>
> 35- In the instant case, as we have observed that the alleged sale deed dated 20.4.82 in favour of Mayur Sahkari Awas Samiti has been a void transaction, all subsequent transactions have merely to be ignored."

11. In view of above the impugned order negativing the claim of the petitioner for recording him owner of the property in question cannot be faulted with.

12. In the result, petition fails and is hereby dismissed.

Petition dismissed

I.L.R.[2012]M.P. 74
WRIT PETITION

Before Mr. Justice Rajendra Menon & Mr.Justice Alok Aradhe
W.P. No. 6532/2000 (Jabalpur) decided on 18 November, 2011

G.S.THAKUR ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law – Departmental Enquiry – No Evidence – **Petitioner who was working as A.D.J. was terminated from service on the ground that he had hatched conspiracy with 'A' to cause injuries to another A.D.J. so that bail application of father of 'A' will come to his board – Complainant did not disclose the source of such information – During departmental enquiry, complainant disclosed that he was informed by 'B' who in his turn was informed by two students about conspiracy – Neither 'B' nor students examined – 'C' and 'D' who had given affidavits in support of complainant also did not support in departmental enquiry and alleged that affidavits were obtained by getting their signatures on blank paper – Complainant did not disclose the source of his information for near about 4 years – Reliance of inquiry officer on the affidavits of 'C' and 'D' not proper – Findings given by enquiry officer are perverse – Order of termination quashed – As Petitioner has already attained the age of superannuation, he should be treated to be is service till the attainment of age of superannuation and will be entitled for all benefits of service – Petition allowed.** (Para 13 to 17)

सेवा विधि – विभागीय जांच – कोई साक्ष्य नहीं – याची जो ए.डी.जे. के रूप में पदस्थ था, की सेवा इस आधार पर समाप्त की गई कि उसने अन्य ए.डी.जे. को क्षतियां कारित करने के लिए 'ए' के साथ षाड्यंत्र रचा ताकि 'ए' के पिता की जमानत अर्जी उसके बोर्ड पर आ जाएगी – शिकायतकर्ता ने ऐसी जानकारी का स्त्रोत प्रकट नही किया – विभागीय जांच के दौरान शिकायतकर्ता ने प्रगट किया कि उसे षड्यंत्र के बारे में सूचना 'बी' द्वारा दी गई जिसे यह सूचना दो विद्यार्थियों से प्राप्त हुई थी – न तो 'बी' और न ही विद्यार्थियों का परीक्षण किया गया – 'सी' व 'डी' जिन्होनें शिकायतकर्ता के समर्थन में शपथपत्र दिया था, ने भी विभागीय जांच में समर्थन नही किया और अभिकथन किया कि कोरे कागज पर उनके हस्ताक्षर लेकर शपथपत्र अभिप्राप्त किये गये – शिकायतकर्ता ने करीब 4 वर्षों तक उसकी जानकारी का स्त्रोत प्रकट नही किया – 'सी' व 'डी' के शपथपत्रों पर जांचकर्ता अधिकारी द्वारा विश्वास किया जाना उचित नहीं – जांचकर्ता अधिकारी द्वारा दिये

गये निष्कर्ष अनुचित – सेवा समाप्ति का आदेश अभिखंडित – चूंकि याची ने पहले ही सेवा निवृत्ति का वय प्राप्त कर लिया है, उसे सेवा निवृत्ति का वय प्राप्त करने तक सेवा में माना जाना चाहिए और सेवा के सभी लाभों के लिए हकदार होगा – याचिका मंजूर।

Cases referred:

2009(2) SCC 570, AIR 2002 SC 3030, AIR 1998 SC 3038, (1995) 1 SCC 404, (2006) 4 SCC 713, W.P. No. 5400/2000 decided on 23-8-2011, (2006) 7 SCC 180, (1991) 2 SCC 716, (2010) 5 SCC 349, AIR 1996 SC 1669, AIR 1985 SC 1121, (1966) 1 SCR 466=AIR 1966 SC 671, (1971) 1 SCR 201=AIR 1970 SC 1302

Manoj Sharma, for the petitioner.
Kumaresh Pathak, Dy.Adv.Gen, for the respondent no.1.
V.S.Shroti with Ashish Shroti, for the respondent no.2.

ORDER

The order of the court was delivered by : **RAJENDRA MENON, J** :- The petitioner who was a judicial officer has filed this writ petition challenging the order Annexure P-1, dated 29-08-2000, by which he has been punished after a departmental inquiry and his services have been terminated. Challenge is also made to the order Annexure P-14 dated 19-03-2002, by which the appeal filed by the petitioner has been dismissed by the appellate authority, namely, the Governor.

2. The petitioner had joined the State Judicial service as a Class-II Civil Judge after he was appointed on 26-10-1975 vide order Annexure P-2. He was promoted to the higher judicial service on 15-09-1989 vide Annexure P-3. According to the petitioner, right from the date of his appointment in the year 1975 till the impugned action was taken in the year 2000, he had a unblemished service career of more than 25 years. It is his case that during this long period of 25 years, no action was taken against him, he was never warned , reprimanded, nor any charge sheet issued to him or any adverse remark communicated, accordingly, it is his case that he had a unblemished service record.

3. In the year 1995, the petitioner was posted as Additional District & Sessions Judge, Bhind, one Shri A.K.Jain was also posted in the same capacity in District Bhind. It is seen from the record that Shri A.K.Jain made a

complaint to the effect that one Anil Kumar Sharma with an ulterior motive has conspired with the present petitioner to cause injuries to him, so that Shri A.K.Jain is unable to perform his duties between 13-06-1995 to 16-06-1995. It is stated by Shri A.K.Jain in his complaint that in pursuance to the aforesaid conspiracy, Shri Anil Kumar Sharma came with his Scooter from behind on 13-06-1995 when Shri A.K.Jain was coming to the court in the early morning, dashed against the Scooter in which Shri A.K.Jain, was going to the court, as a result he sustained certain injuries. It is stated in the complaint that father of Anil Kumar Sharma, one Shri Rishab Dev Sharma was implicated in Crime No.374/94, a criminal case was registered against him for offence under section 307 of IPC, by Police Station Dehat Bhind, Shri Rishab Dev Sharma was absconding and to facilitate grant of bail to Shri Rishab Dev Sharma, the entire conspiracy has hatched to enable the petitioner to hear the bail application in the absence of the complainant Shri A.K.Jain.

4. On the basis of the complaint of Shri A.K.Jain, it is seen that a preliminary inquiry was ordered by the High Court. District Judge (Vigilance), was directed to conduct an inquiry into the matter. Finding a prima facie case made out on the basis of the preliminary inquiry conducted by the District Judge(Vigilance), a charge sheet dated 30-12-1997 was issued to the petitioner. The petitioner submitted his reply to the charge sheet vide Annexure P-5 dated 04-05-1998. It is stated that before submitting the reply, vide Annexure P-6 dated 09-01-1998, the petitioner sought for supplying various documents and report of the preliminary inquiry. This was refused by the High Court on 28-03-1998 vide Annexure P-7 and therefore without the documents being made available, petitioner submitted his reply to the charge sheet vide Annexure P-5. Finding the reply to the charge sheet to be unsatisfactory, departmental inquiry was ordered. One Shri S.K.Sharma, District Judge(Vigilance) Gwalior Zone was appointed as Inquiry Officer. In the inquiry, statements of 8 witnesses were examined on behalf of the prosecution, they are Annexures P-9(A) to P-9(H). On the basis of the material that came on record, the Inquiry Officer submitted his report on 18-02-1999. The report of the Inquiry Officer was served on the petitioner alongwith a show cause notice Annexure P-11 dated 07-04-1999. The petitioner submitted his reply to the same vide Annexure P-12 and on the basis of the resolution, which was passed by the Full Court on 08-07-2000 (Annexure R-5), the impugned action was taken. The appeal filed by the

petitioner vide Annexure P-13 having been rejected by the Governor vide Annexure P-14, the petitioner has filed the present writ petition.

5. Shri Manoj Sharma, learned counsel for the petitioner took us through the allegations levelled against the petitioner in the charge sheet and argued that the solitary charge against the petitioner in the charge sheet was that he had hatched a conspiracy with Anil Kumar Sharma, caused injuries to Shri A.K.Jain the complainant with an ulterior motive to ensure that Shri Jain did not perform court work from 13-06-1995 till 16-05-1995, which was the summer vacation period in the court and as only two Additional District Judges were available for the vacation. If Shri A.K.Jain who was to discharge vacation duties was on leave, the bail application of Shri Rishab Dev Sharma would come for hearing before the petitioner and bail would be granted. Shri Manoj Sharma, learned counsel for the petitioner argued that to substantiate the aforesaid allegation, 8 witnesses have been examined and after taking us through the statements of these witnesses, the complaint of Shri A.K.Jain and the findings recorded by the Inquiry Officer, learned counsel emphasized that the allegations levelled against the petitioner are not at all proved. The circumstances that have come on record in the inquiry do not substantiate the allegation in the charge levelled against the petitioner and the Inquiry Officer and the Disciplinary Authority on the basis of presumption and assumption have taken action against the petitioner. Contending that without there being sufficient evidence to implicate the petitioner with the offence or the act in question, in a arbitrary and illegal manner, the impugned action is taken. Emphasizing that the finding recorded by the Inquiry Officer is wholly perverse, contrary to the evidence available on record, the appreciation of evidence done by the Inquiry Officer is wholly illegal. Shri Manoj Sharma submitted that on the following grounds the action taken against the petitioner is unsustainable. The grounds canvassed by Shri Manoj Sharma can be categorized as under :

(i) It was submitted by learned counsel for the petitioner that when the charge sheet was issued, the petitioner sought for various documents vide his application Annexure P-6 dated 09-01-1998, the documents included the statements of witnesses recorded in the preliminary inquiry, inquiry report, these documents were never supplied to the petitioner instead the High Court vide order dated 28-03-1998 (Annexure P-7) rejected the request of the petitioner. It is stated that the petitioner was handicapped due to non supply of

these vital documents and was compelled to submit his reply to the charge sheet without these material documents, accordingly the first ground canvassed is that the entire proceedings stands vitiated on the aforesaid ground.

(ii) The second ground canvassed was that the witnesses who were examined in the preliminary inquiry were also examined in the departmental inquiry and the statements of all these witnesses recorded in the preliminary inquiry were supplied to the petitioner only on 16-09-1998 i.e. on the day when the witnesses were being examined. Accordingly, it is stated that as the statements were not supplied in advance, the petitioner was handicapped in effectively cross examining the witnesses, accordingly it is emphasized that the same amounts to breach of the principle of natural justice and therefore, the entire inquiry is vitiated.

(iii) The third ground canvassed was that the findings of the Inquiry Officer are perverse and the Inquiry Officer has not given any reason for disbelieving the statements of some of the witnesses recorded in the inquiry particularly the statements of PW-6 Ramvir Singh Yadav and PW-8 Udaivir Singh. It was stated that these witnesses were declared hostile in the inquiry and by referring to certain affidavits given by them to the petition which formed part of the complaint, the petitioner is held guilty and in doing so, no cogent or justifiable reason is given as to why the statements recorded in the inquiry is being discarded in comparison to the statements recorded in the preliminary inquiry or the affidavit submitted. That apart taking us through the entire evidence of all the 8 prosecution witnesses, the finding and reason given by the Inquiry Officer and the appreciation of evidence done, Shri Manoj Sharma, learned counsel for the petitioner argued that the findings are perverse. The allegations levelled against the petitioner are not proved and the circumstances brought on record in the inquiry is not such on the basis of which the guilt of the petitioner can be said to be conclusively proved.

(iv) the next contention urged was that after the inquiry was concluded i.e. after statements of prosecution witnesses were recorded and after defence witnesses of the petitioner were also examined, general examination of the petitioner by the Inquiry Officer as

contemplated under Rule 14(18) of M.P. Civil Services (Classification Control & Appeal) Rules, 1966 was not undertaken and as this mandatory provision is not followed, it is stated that the entire inquiry stands vitiated.

(v) finally the last submission made by Shri Manoj Sharma was to the effect that even if the allegations levelled against the petitioner are held to be proved, it was submitted by him that the punishment imposed is too harsh and disproportionate and therefore, the same cannot be upheld.

In support of the aforesaid contentions, Shri Manoj Sharma invited our attention to the following judgments:

2009(2)SCC 570 (Roop Singh Negi Vs. Punjab National Bank and others)

AIR 2002 SC 3030 (Sher Bahadur Vs. Union of India and others)

to canvass his contention that the evidence adduced in the inquiry do not establish the guilt against the petitioner and the oral and documentary evidence are not sufficient to hold the petitioner guilty for the misconduct alleged.

AIR 1998 (SC) 3038 (State of U.P. Vs. Shatrughan Lal and another)

(1995) 1 SCC 404 (Committee of Management, Kisan Degree College Vs. Shambhu Saran Pandey and others)

(2006) 4 SCC 713 (Narinder Mohan Arya Vs. United India Insurance Co.Ltd. and others)

in support of the contention that there is procedural irregularity in the conduct of the inquiry, non supply of documents and breach of the provisions contained in Rule 14(18) vitiates the entire inquiry, accordingly on the basis of the aforesaid Shri Manoj Sharma argued that the impugned action is liable to be quashed.

6. Shri V.S.Shroti, learned Senior counsel, assisted by Shri Ashish Shroti, learned counsel for respondent no.2 and Shri Kumaresh Pathak, learned Deputy Advocate General, for respondent no.1 refuted the aforesaid contentions and argued that as far as procedural irregularity pointed out by the petitioner is concerned, the same is not correct. It was emphasized that

all the necessary documents were given to the petitioner alongwith the charge sheet and the statements of the witnesses recorded in the preliminary inquiry were also given to the petitioner at the time of departmental enquiry and on the basis of the same, the petitioner having elaborately cross examined each of the witnesses, it is stated that no prejudice has been caused to the petitioner and therefore, on the ground of procedural irregularity, no case for interference is made out, particularly when the petitioner is unable to demonstrate before this court the prejudice caused to him due to non supply of the documents.

7. Further taking us through the statement of the witnesses and the reasons given by the Inquiry Officer in his report Annexure P-12 Shri Shroti argued that a reasonable finding has been recorded by the Inquiry Officer after due appreciating the evidence and material that came on record and this court cannot now go into the question of sufficiency of evidence or otherwise and exonerate the petitioner. Inviting our attention to certain principles laid down by the Division Bench of this court in W.P.No.5400/2000 *(S.B. Bhargave Vs. State of Madhya Pradesh and another)* decided on 23-08-2011 Shri Shroti contends that the scope of judicial review available under Article 226 of the Constitution of India does not permit this court to re-appreciate the entire evidence as canvassed by Shri Manoj Sharma and come to a conclusion different from the one recorded by the Inquiry Officer. It was emphasized that the evidence on record do indicate that the petitioner has committed the misconduct, the conspiracy and the guilt of the petitioner and therefore, this court cannot now sit over the finding of the Inquiry Officer by exercising further appellate jurisdiction, accordingly, Shri Shroti argued that a reasonable finding recorded by the Inquiry Officer on due appreciation of evidence and material that came on record does not warrant any further consideration or interference now in these proceedings under Article 226 of the Constitution of India.. Finally with regard to non compliance of provisions of Rule 14(18) of M.P. Civil Services (Classification Control & Appeal)Rules, Shri Shroti argued that after the prosecution witnesses were examined the petitioner was given opportunity to examine his defence witnesses. The petitioner examined two witnesses and thereafter the petitioner was given an opportunity to record his defence statement, the petitioner refused to give his own defence statement and having done so, he cannot now complain about breach of rule 14(18). Finally Shri Shroti argued that the punishment imposed being in accordance to law this court cannot interfere with the quantum of punishment in these proceedings under Article 226 of the

Constitution of India. Apart from placing reliance on the judgment in the case of *S.B. Bhargave (supra)*, in support of his contention Shri Shroti placed reliance on the following judgments :

(2006) 7 SCC 180 (UP SRTC Vs. Mitthu Singh)

(1991) 2 SCC 716 (Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S.Gandhi and others)

(2010) 5 SCC 349 (Alok Kumar Vs. Union of India and others)

8. Having heard the learned counsel for the parties and after going through the record, we are of the considered with that the following questions arise for consideration in this writ petition :

(i) Whether non supply of the documents of the preliminary inquiry as claimed for by the petitioner vitiates the entire proceedings ?

(ii) Whether in the facts and circumstances of the case and the material adduced in the departmental inquiry, the allegation against the petitioner can be said to have been conclusively proved or is the evidence enough to make out a case of conspiracy warranting action to be taken against the petitioner ?

(iii) Whether the proceedings stand vitiated due to non compliance with the provisions of Rule 14(18) of M.P. Civil Services (Classification Control & Appeal) Rules, 1966 ?

(iv) Whether the punishment imposed is too harsh and disproportionate to the allegations levelled against the petitioner ?

9. Before adverting to consider the rival contentions for determining the aforesaid questions, it is thought appropriate to take note of the factual aspect of the matter. From the allegations levelled against the petitioner in the charge sheet it is seen that in district Bhind at the relevant time i.e. in June 1995 the summer vacation of the courts were in progress, as such regular court working was not going on and Shri A.J.Jain, Additional District & Sessions Judge was dealing with the bail matters and urgent criminal cases during the vacation period as three of the judges were on summer vacation and petitioner Shri G.S.Thakur even though was available in the headquarters was under orders of transfer and was to be relieved on 16-06-1995. Shri Anil Kumar who is said to have caused the accident by dashing into the

scooter of complainant A.K. Jain is son of one Shri Rishab Dev Sharma against whom an offence under section 307 of the IPC was registered and it is the case of complainant A.K.Jain that the bail application of Shri Rishab Dev Sharma who was absconding was to come up for hearing before him on 13-06-1995. It is stated by Shri A.K. Jain that Shri Anil Kumar Sharma went to the house of Shri G.S.Thakur, (petitioner), and the delinquent employee on 13-06-1995 and the petitioner is said to have informed Shri Anil Kumar Sharma that the bail application will come before Shri A.K.Jain and if Shri A.K.Jain some how takes leave on 13-06-1995 and does not come to the court, the bail application will be heard by the petitioner, in which event bail can be granted to the father of Shri Anil Sharma. It is the case of the complainant that the petitioner had advised Shri Anil Kumar Sharma to cause the accident so that Shri A.K.Jain gets injured and does not come to the court. Shri A.K.Jain in his complaint has stated that the aforesaid information was received by him through some reliable sources and subsequently after a period of more than 15 days, he submitted a written complaint to the High Court alongwith affidavits of two persons namely PW-6 Ramvir Singh Yadav and PW-8 Udaivir Singh. It was stated in this written complaint by Shri A.K.Jain that Ramvir Singh Yadav and Udaivir Singh were passing through a road, near the house of the petitioner when they saw Anil Sharma talking to an old person about the entire conspiracy, accordingly Shri A.K.Jain, the complainant had implicated the petitioner in his complaint by contending that in the affidavits of Ramvir Singh Yadav and Udaivir Singh have implicated the petitioner as the person who is behind the entire episode. To prove this allegation in the charge sheet, 8 witnesses were examined in the departmental inquiry, they are A.K.Jain, the complainant himself (PW-1), Gangaram Solanki, a peon as (PW-2), another peon Ram Bahadur Singh (PW-3), Stenographer of petitioner G.S.Thakur Ramesh Kumar Shrivastava (PW-4), PW-5 Anil Kumar Singh Tomar, PW-6 Ramvir Singh Yadav, PW-7 Inder Singh Chouhan, Court Moharrir in the court of Shri A.K.Jain, PW-8 Udaivir Singh. On behalf of the petitioner, two defence witneses DW-1 and DW-2 namely Man Bahadur Singh Bhadoria and Vishwa Bandhu Sharma have been examined. Certain documents were brought on record they are mainly affidavits submitted by Udaivir and Raghuvir, the complaint of Shri A.K.Jain and the court documents showing filing of the bail application on behalf of Rishabh Dev Sharma and the orders passed in the same.

10. It may also be taken note of that on 13-06-1995 Shri A.K.Jain did

not attend the court because of the accident, the bail application of Shri Rishabh Dev Sharma came up for hearing before petitioner G.S.Thakur and in the said case the petitioner called for the case diary and adjourned the matter for 14-06-1995, on which date the application came up for hearing before Shri A.K.Jain and it was adjourned for 16-06-1995 and on 16-06-1995 it was withdrawn.

11. Before referring to the statements of witnesses and the material adduced in the inquiry and before analyzing the report of the Inquiry Officer with regard to the main contention of Shri Manoj Sharma with regard to the allegations not being proved, it is thought appropriate to consider the first ground urged by Shri Manoj Sharma with regard to procedural irregularity in the inquiry.

12. The procedural irregularity pointed out by Shri Manoj Sharma is to the effect that at the time of filing reply to the charge sheet and thereafter during the course of inquiry, report of the preliminary inquiry and the statements of the witnesses recorded in the preliminary inquiry were not supplied to the petitioner in time to enable him to submit his reply to the charge sheet or well before commencement of inquiry, even though the High Court vide Annexure P-7 dated 26-03-1998 rejected the prayer of the petitioner for supplying the documents at the time of filing reply to the charge sheet. Records indicate that the statements of all the witnesses recorded in the inquiry were supplied to the petitioner on 16-09-1998 i.e. at the time of examination of the witnesses in the departmental inquiry. A perusal of the proceedings of the inquiry indicate that all the witnesses produced in the inquiry were effectively cross examined by the petitioner and except for contending that the documents were not supplied to him in time. The petitioner has not indicated as to what is the prejudice caused to the petitioner due to non supply of the documents. If the record of the inquiry is taken note of, it is clear that the petitioner has elaborately cross examined the witnesses and at the time of hearing of this petitioner he is unable to demonstrate the prejudice caused to him and is also unable to say so as to how and in what manner the finding of the Inquiry Officer would be materially affected due to non grant of opportunity. Under such circumstances in the absence of prejudice being caused to the petitioner and keeping in view the law laid down by the Supreme Court in the case of *State Bank of Patiala and others Vs. S.K.Sharma, AIR 1996 SC 1669,* we do not see any ground to hold the inquiry to be vitiated merely because the

statements of some of the witnesses were not given to the petitioner before commencement of the inquiry. The petitioner having effectively cross examined the witnesses and having failed to demonstrate the prejudice caused before us and in the absence of any statutory provisions being shown to be violated in this regard, the aforesaid ground with regard to procedural irregularity in the matter is found to be unsustainable and is accordingly rejected. Having held so it is now proper to consider the second question with regard to misconduct being proved in the inquiry and perversity if any in the findings.

13. We are conscious of the limitation imposed under law and the fact that we are not to sit over the finding of the Inquiry Officer or the disciplinary authority as if we are exercising the powers of a appellate authority. The judgment relied upon by Shri V.S.Shroti in the case of *S.B.Bhargava(supra),* which is a judgment rendered by this Bench has to be taken note of the settled principle of law and keeping in view the aforesaid principle the question of interference into the finding of the Inquiry Officer is to be considered . In the case of *Sher Bahadur (supra*) relied upon by Shri Manoj Sharma in para-7, the Hon'ble Supreme Court has laid down the principle with regard to meaning of the expression " sufficiency of evidence ". Similar principle with regard to interference into the matter of judicial review are laid down in the case of *Narendra Mohan Arya (supra)* relied upon by Shri Manoj Sharma, it has been held that despite limited jurisdiction available, this court is entitled to interfere into the matter if the report of the Inquiry Officer is based on no evidence or if it amounts to recording a finding so perverse in nature that no prudent man would arrive at such conclusion . It is in the backdrop of the aforesaid settled principles that we are proceedings to analyze the inquiry record to find out as to whether the second ground canvassed by Shri Manoj Sharma can be said to be sufficient enough warranting interference. In this regard we may also take note of the principles laid down by the Supreme Court in the case of *Anil Kumar Vs. Presiding Officer and others AIR 1985 SC 1121.* In the aforesaid case the principles with regard to duties and functions of the Inquiry Officer and the question of appreciation of evidence by the Inquiry Officer and the application of mind by the Inquiry Officer are taken note of and the principle is crystallized :

> "It is well-settled that a disciplinary enquiry has to be a quasi-judicial enquiry held according to the principles of natural justice and the Enquiry Officer has a duty to act judicially. The Enquiry Officer did

not apply his mind to the evidence. Save setting out the names of the witnesses, he did not discuss the evidence. He merely recorded his ipse dixit that the charges are proved. He did not assign a single reason why the evidence produced by the appellant did not appeal to him or was considered not credit-worthy. He did not permit a peep into his mind as to why the evidence produced by the management appealed to him in preference to the evidence produced by the appellant. An enquiry report in a quasi-judicial enquiry must show the reasons for the conclusion. It cannot be an ipse dixit of the Enquiry Officer. It has to be a speaking order in the sense that the conclusion is supported by reasons. This is too well-settled to be supported by a precedent. In *Madhya Pradesh Industries Ltd. V. Union of India* (1966) 1 SCR 466: (AIR 1966 SC 671), this Court observed that a speaking order will at best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard. Similarly in *Mahabir Prasad V.State of Uttar Pradesh* (1971) 1 SCR 201 : (AIR 1970 SC 1302), this court reiterated that satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appealed to the authority. It should all the more so where the quasi-judicial enquiry may result in deprivation of livelihood or attach a stigma to the character. In this case the enquiry report is an order-sheet which merely produces the stage through which the enquiry passed. It clearly disclosed a total non-application of mind and it is this report on which the General Manager acted in terminating the service of the appellant. There could not have been a gross case of non application of mind and it is such an eqnuiry which has found favour with the Labour Court and the High Court.

6. Where a disciplinary enquiry affects the livelihood and is likely to cast a stigma and it has to be held in accordance with the principles of natural justice, the minimum expectation is that the report must be a reasoned one. The Court then may not enter into the adequacy or sufficiency of evidence. But where the evidence is annexed to an order sheet and no correlation is established between the two showing application of mind, we are constrained to observe that it is not an enquiry report at all. Therefore, there was no enquiry in this case worth the name and the order of termination based on such proceeding

disclosing non-application of mind would be unsustainable."

(Emphasis supplied)

14. There is no direct evidence to implicate the petitioner with the accident which was executed by Anil Kumar Sharma. A perusal of the report of the Inquiry Officer indicates that the Inquiry Officer after taking note of statements of various witnesses in para 37 has discussed the evidence of PW-6 Shri Ranvir Singh Yadav and Shri Udayvir Singh, PW-8 and has held that even though these two persons who are alleged to have heard Anil Kumar Sharma disclosing the conspiracy to his grand father have retracted from their statement in the departmental inquiry but after giving due credence to their affidavits Ex. P_10 and P-12 available in the inquiry record a finding of guilt is recorded. The Inquiry Officer has held the petitioner guilt of the charge, mainly on the basis of circumstances and the affidavits of these two witnesses given to the complaint and the oral statement of Shri A.K.Jain, the complainant. In the statement A.K.Jain, PW-1, complainant has narrated the fact about vacation in the court, orders passed by the District Judge authorizing him to hear the bail application and the manner in which the accident took place. In para 8 of his examination in chief he comes out with a case that he had learned from the reliable sources that the entire accident took place because of the conspiracy hatched between Anil Kumar Sharma and G.S.Thakur. In para-8 of his evidence he says that he has promised to keep the name of the person who disclosed these facts confidential, accordingly he has not disclosing the name of the person through whom he got all these informations, he thereafter says that it was this person who told him about PW-6 and P-8 Ramvir Singh Yadav and Udaivir Singh over hearing the conversion between Anil Kumar and his grand father. Even in his complaint to the High Court Ex.P-7(22-07-1995) available in the record of inquiry Shri A.K.Jain does not disclose the source from which he acquired the knowledge about the conspiracy, it is an admitted position, he did not acquire the information from his personal knowledge. His statement is based totally on some information received by him from a un known person as is made out from his examination in chief. However, in his cross examination in para-29 for the first time on 16-09-1998 i.e. after more than 4 years of the incident he came out with the name of one Shri Radhe Shyam Agrawal, Professor (Geography) in M.G.S.College, Bhind as the person who disclosed the details of the conspiracy hatched by Anil Kumar Sharma and the petitioner. From para 29 onwards it

is stated by him that two students who were studying in M.G.S.College informed Radhe Shyam Agrawal about Ramvir Singh Yadav and Udaivir Singh over hearing the conversation between Anil Kumar Sharma and his grand father and the students told Shri Radhe Shyam Agrawal about this who in turn informed the petitioner. But even though the story is unfolded in this manner, exact date when Radhe Shyam Agrtawal informed about the conspiracy to the petitioner and further the exact date and time when the two students informed Radhe Shyam Agrawal are not available on record. Even the particulars and names of the two students are not available and it is not known as to how these two students came to know Ramvir Singh Yadav and Udaivir Singh and as to what was the circustances under which PW-6 and PW-8 narrated the facts to the two students and when a question is put to complainant Shri A.K.Jain, as to why he did not disclose about all these facts to the High Court in his complaint, he simply says that he has promised Shri Radhe Shyam Agrawal that his name will not be disclosed. Therefore, the story that is now unfolded from the cross examination of PW-1 A.K. Jain is to the effect that one Shri Radhe Shyam Agrawal who is professor in a local college in Bhind was informed by two of his students that Ramvir Singh Yadav and Udaivir Singh have told them(the two students) about hatching of conspiracy which was being disclosed in a open road and therefore, the same was conveyed to the petitioner. The story is lacking in material particulars as indicated hereinabove and seems to be total unconvincing and unbelievable.

15. Apart from the fact that neither Radhe Shyam Agrawal is examined in the departmental inquiry nor his statement is recoded. Even the so called two witnesses i. e. the students who have informed the fact to Radhe Shyam are not available and the entire link about the conspiracy is very weak and is not reasonable established by the prosecution. That apart the incident is said to have taken place on 13-06-1995, according to the complainant he immediately got information with regard to the conspiracy in question involving the petitioner on the very next day I.e. 14-06-1995. Even then till 16-09-1998 i.e. for 4 years he did not disclose the manner in which the conspiracy came to his notice, it was for the first time as indicated hereinabove on 16-09-98 that the story of Radhe Shyam Agrawal informing the petitioner about all these facts as indicated. In his complaint to the Registrar of High Court made on 22-07-1995 i.e. one month after the incident which is available in the original inquiry filed as Annexure P-7 the complainant

does not say anything about the incident being narrated to him by Radhe Shyam Agrawal, he only says that from reliable sources it has been informed to him. Thereafter alongwith this complaint dated 22-07-1995 the petitioner has submitted two affidavits Ex. P-12 of Udaivir Singh and PW-8 and Ex.P-10 of Ramvir Singh Yadav PW-6. The affidavits Ex.P-10 is dated 21-07-1995 i.e. the day before the complaint was made to the High Court vide Annexure P-7 and the affidavit of Ex.P-12 of Udaivir Singh Yadav is dated 06-07-1995. In these affidavits also Udaivir Singh Yadav and Ramvir Singh did not say anything about their disclosing the conspiracy to the two students as narrated by the petitioner. It is surprising that the incident took place on 13-06-1995, all the persons who came to know about the conspiracy like Udavir Singh and Ramvir Singh and Radhe Shyam Agrawal were aware of the incident on 13-06-1995 but they chose to remain quite and it is only after more than one month that these facts came to be put on record in writing by the petitioner. That apart the conduct of complainant A.K.Jain in directly obtaining the affidavits from Udaivir Singh Yadav and Ramvir Singh on 06-07-98 and 21-07-1998 castes a cloud of suspicion over the entire incident. If Shri A.K.Jain came to know about the conspiracy he should have taken the two witnesses PW-6 Ramvir Singh and PW-8 Udaivir Singh to the District Judge or Registrar of the High Court and it was for these authorities concerned to take steps in the matter. The manner in which the affidavits are obtained by the complainant and sent to the High Court after more than one month of the incident and the conduct of the complainant in not disclosing the fact about Shri Radhe Shyam Agrawal telling him about the conspiracy and not making any written complaint on 14-06-1995 makes the entire incident of conspiracy suspicious. If the statement of PW-1 complainant PW-1 Shri A.K.jain and the facts stated by him in the cross examination are scrutinized, he does not give any explanation as to why in the complaint Annexure P-7 even to the High Court he did not disclose the name of Radhe Shyam Agrawal is the person, who informed him about the incident. In para-33 of the cross examination the complainant discloses some relationship between him and Radhshyam. That apart in the cross examination certain questions are put to the complainant about the relation ship between the petitioner and professor Radhe Shyam Agrawal, which the complainant admits, the petitioner does not explain as to why he kept quite from 13-06-1995 upto 21-07-95 and obtained affidavits only on 06-07-1995 and 21-07-1995 respectively. In para 34 of his cross examination Shri A.K.Jain admits that immediately on the next day of the incident i.e. 14-05-1995, he came to know about the conspiracy and the story narrated

by Ramvir Singh and Udaivir Singh, still he does not give any satisfactory explanation as to why on 14-05-1995 itself all these facts were not reported to the High Court or the District Judge and why he had to wait for more than one month to obtain affidavits and file a written complaint. Even in the FIR fled by the complainant no such story is narrated. He only explains the delay by stating that he had promised Radhe Shyam Agrawal that everything would be kept a secret. That apart from the cross examination of this witness Shri A.K.Jain, it transpires that PW-8 Udaivir Singh is related to a Accountant working in the court of Shri A.K.Jain and certain suggestions have been put to him as to why these affidavits have been obtained accordingly. If the entire evidence of Shri A.K.Jain is scanned , there are many crucial questions , which remained unexplained, particularly his conduct in not disclosing the entire facts in its totality with particulars of the persons who told him about the conspiracy either to the District Judge or to the High Court immediately on 14-05-1995 or within a reasonable time.

16. In the defence of the petitioner certain material has come on record to indicate that in the District Court at Bhind there was some difference amongst the judicial officers, two groups were functioning, there was infighting. Due to this groupism if the conduct of complainant Shri A.K.Jain is examined in the backdrop of these facts, the story put forth by the complainant become suspicious and the benefit of this suspicion has to go to the petitioner. That apart in the finding recorded by the Inquiry Officer all these vital aspects have been ignored and is given a go by. The Inquiry Officer has accepted the statement of Shri A.K.Jain in its totality and has treated it to be a gospel truth without carrying to take note of certain vital aspect of the evidence as is analysed by us hereinabove. If the entire inquiry report is scanned it would be seen that the Inquiry Officer has held the petitioner guilty of the charge only on the basis of the statement of Shri A.K.Jain PW-1 complainant and the two affidavits Ex.P-10 and Ex.P-12 submitted by Shri Ramvir Singh Yadav and Udayvir Singh before the High Court alongwith the complaint of A.K.Jain Ex.P-7.

17. After the statements of PW-6 Ramvir Singh and P-8 Udaivir Singh were recorded in the inquiry is taken note of, they have not supported the case of the prosecution. They have stated that the affidavits were obtained by them illegally, they were made to sign in blank paper by police personnel and the court officials and they did not know anything about the

incident. Inspite of this the Inquiry Officer has chosen to ignore their statements given in the inquiry, declared them as hostile and recorded a finding that they are not stating the correct facts before the Inquiry Officer and placed reliance on their affidavits Ex.P-10 and Ex.P-12 and held the petitioner guilty of charge leveled against him. It is therefore a case where the petitioner is held guilty on the basis of two affidavits Ex.P10 and Ex.P-12 and the solitary statement of Shri A.K.Jain, PW-1, the statements of other witnesses do not throw any light on the conspiracy theory, PW-2 Gangaram Solanki a peon says he does not know anything about the incident, he only says that nobody came to the house of the petitioner on the date of accident and he heard about the accident from Shri A.K.Jain. Similar is the statement of PW-3 Ram Bahadur Singh, who is also a peon and even though this witness is declared hostile, his evidence does not support the conspiracy theory. PW-4 Ramesh Kumar Shrivastava is Stenographer to the petitioner and he only says that after the order of transfer was received, the petitioner had not discharged any judicial function and did not pass any order. 5th witness is Anil Kumar Singh Tomar, who is a clerk in the court and his evidence is also not connected with the conspiracy theory . 6th witness is PW-6 Ramvir Singh Yadav, 7th witness is constable Indel Singh Chouhan who is an eye witness to the accident. Accordingly in its totality the conspiracy theory between the petitioner and Anil Sharma is held to be proved by the Inquiry Officer on the basis of statements of Shri A.K.Jain. PW-1, the affidavits of PW-6 Ramvir Singh and P-8 Udaivir Singh and if the affidavits and the statement of Shri A.K.Jain are scrutinized in the backdrop of the reasons given by us in the preceding paragraphs, we are of the considered view that it is not valid piece of legal evidence to hold the conspiracy theory as established, it is very suspicious and weak piece of evidence, lacking in material particular and various vital links are missing. Accordingly on the basis of such a loose and weak nature of evidence the petitioner cannot be held guilty of the charge leveled against him. If the evidence as indicated hereinabove is scrutinized in the backdrop of the principles laid down in the case of *Sher Bahadur (supra) Narendra Mohan Arya (supra)* and further in the case of Anil Kumar(supra), we are of the considered view that the same is not enough to prove the charge or the misconduct alleged, hence the benefit of this has to go to the petitioner.

18. Even though we have undertaken a detailed analysis of the material as indicated hereinabove, we have only indicated the correct facts as they are available on record and the same will not fall in the category of judicial

review amounting to re-appreciation of the entire evidence, we are of the considered view that if the entire fact is taken on its face value, a prudent man will think hundred times before he records a finding to the effect that the petitioner is guilty of conspiracy as alleged by complainant Shri A.K.Jain. It is not a case where the evidence on the face of it suggests that the conspiracy as put forth by Shri A.K.Jain is established. On the contrary, the evidence led in the matter is weak and doubtful in nature, the same is not sufficient enough to establish the guilt of the petitioner. Even though it is settled principle of law that in the departmental inquiry preponderance of evidence is sufficient to bring home the guilt on delinquent employee. In the case of *Anil Kumar (Supra),* it has been held that if the evidence on record has no co-relation with the incident and does not establish the guilt of the accused person, it is a perverse finding. That apart if the findings of the Inquiry Officer in the present case are scrutinized in the backdrop of principles laid down in the case of *Anil Kumar(Supra)* it would be seen that the Inquiry Officer has not given any cogent reason as to why the evidence adduced before him in the departmental inquiry is being rejected, particularly the statements of PW-6 Ramvir Singh and PW-8 Udaivir Singh and why he has chosen to place reliance of their affidavits given to the complainant. No reason is given for discarding the evidence which came in the departmental inquiry in preference to the evidence that was collected by the complainant himself. It is therefore, a case which shows total non application of mind by the Inquiry Officer. The Inquiry Officer was discharging quasi judicial function and no justification is given by the Inquiry Officer for accepting the evidence which was collected by the complainant in the form of affidavits and rejecting the statements of PW-6 Ramvir Singh Yadav and PW-8 Udaivir Singh in the inquiry. In fact the Inquiry Officer has not given any cogent reason for doing so. It is a case where if a prudent man approach is applied, or if the conclusion arrived at by the Inquiry Officer and the finding recorded is scrutinized on the basis of a reasonable approach theory the same can only be termed as perverse.

19. Thus the finding to the contrary recorded by the Inquiry Officer on the basis of the evidence available on record is nothing but a perverse finding and the action taken on the basis of such a finding cannot be permitted to form the basis for taking disciplinary action and dismissing a Senior Judicial Officer with 25 years of unblemished service and visiting him with a punishment of removal from service. The evidence to prove such a misconduct

and for imposing such a punishment should be of such nature that it is convincing enough and a prudent man approach, if adopted would lead only to one conclusion i.e.. the guilt of the delinquent employee. Otherwise, the benefit of doubt has to be given to the delinquent employee, as the evidence in such cases would fall in the category of insufficient evidence and the findings based thereon a perverse finding. Accordingly after detailed analysis of the evidence we are convinced that the that the conspiracy theory putforth by Shri A.K.Jain for implicating the petitioner is nothing but a very weak and unconvincing story which cannot be accepted.

20. The Inquiry Officer accepting the version of Shri A.K.Jain has held that the petitioner visited A.K.Jain in the evening on 13-05 -1995 and advised him not to go to the court upto 16-05-97, on the basis of this advise, presumption is drawn that it was part of the conspiracy to ensure that Shri A.K.Jain does not go to the court upto 16-05-1997 so that the bail application can be heard by the petitioner. There is no basis for drawing such a presumption and in the backdrop of the reasons given by us hereinabove, we are of the considered view that such approach cannot be adopted. In the facts and circumstance of the present case, we are of the considered view that even under the limited jurisdiction, if the material in its totality is found to be not convincing enough to hold the delinquent guilty the same can always be classified as a weak and insufficient piece of evidence, not enough to record a finding of guilt and the finding recoded otherwise by the Inquiry Officer, a perverse finding. Accordingly, the second ground canvassed by Shri Manoj Sharma is found to be substantiated from the material available on record and we have no hesitation in accepting the same.

21. As far as the ground with regard to non compliance with the provisions of Rule 14(18) is concerned, on going through the original inquiry file we find that this assertion of Shri Manoj Sharma cannot be accepted. In the original inquiry file it is seen that after the defence witnesses were examined, the Inquiry Officer has undertaken the procedure for generally examining the petitioner .DW-1 defence witness Man Bahadur Singh Bhadoria is examined on 03-12-1998 and DW-2 Vishwa Bandhu Sharma is also examined on 03-12-1998 from pages 78 onwards upto page 88 the statement of the petitioner is recorded on 25-01-1998, wherein the Inquiry Officer has put 42 questions to the complainant, they are the questions, general in nature with regard to the circumstances appearing against the petitioner and this is

nothing but compliance with the provision of Rule 14(18) therefore, Shri Manoj Sharma is incorrect in contending that the statutory requirement of Rule 14(18) has not been complied with. To that effect contention advanced has to be rejected. Finally in view of the finding recorded by us to the effect that the charges levelled against the petitioner are not proved and the finding of the Inquiry Officer is noting but a perverse and illegal finding. It is not necessary now by us to go into the question of propriety of the punishment imposed. Once it is found that the finding recorded by the Inquiry Officer are perverse and the allegations levelled in the charge sheet and the misconduct are not proved then the charge has to be quashed.

22. We have also taken note of the fact that apart from the incident as is made out against the petitioner in the charge sheet, nothing is brought to the notice of this court with regard to the conduct, integrity etc. of the petitioner during his judicial career of more than 25 years to suggest that the petitioner is a judicial officer with any adverse remarks conduct or material in his service record. It seems to be a case where the petitioner, a judicial officer having put more than 25 years of unblemished service is proceeded against on the basis of so called conspiracy and the extreme punishment of dismissal from service imposed upon him, in the opinion of this court the same is wholly unsustainable and cannot be permitted to stand .

23. In view of the above, this petition is allowed. Order impugned Annexure P-1 dated 29-08-2000 and the appellate order are quashed. The petitioner has already attained the age of superannuation and therefore, the reinstatement of the petitioner may not be possible, However, in view of the quashment of the punishment order, it is directed that the petitioner be deemed to have been in service from the date of termination till the date of his attaining the age of superannuation and treating him to have retired on attaining the age of superannuation all benefits of service including arrears of salary, pay fixation, revision of pay etc. be granted to the petitioner and after the date of superannuation all consequential benefits on pension and post retrial benefits be granted to the petitioner . The entire monetary benefits accruing to the petitioner by virtue of this order be extended to him within a period of 3 months from the date of receipt of the certified copy of this order.

24. With the aforesaid, the petition stands allowed and disposed of.

Petition Allowed

I.L.R.[2012]M.P. 94
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 14511/2011 (Jabalpur) decided on 24 November, 2011

NITESH SINGH PAWAR ...Petitioner
Vs.
SAINIK SCHOOLS SOCIETY & anr. ...Respondents

Service Law – Termination **– Petitioner working as a librarian in the establishment of the respondent-school on probation for a period of one year extendable by two years – Petitioner's performance during the period of probation was not found to be satisfactory and in spite of issuing letters of counselling he did not show any improvement – A charge sheet was issued to the petitioner, the authorities on their own accord did not proceed any further in the enquiry – Respondent issued the order of termination in view of terms of appointment letter – Held – No fault can be found in the action of authorities – Impugned order of discontinuance amounts to termination simplicitor and is neither punitive nor does it cast any stigma upon the petitioner.** (Paras 11 & 16)

सेवा विधि – सेवा समाप्ति – याची ग्रंथपाल के रूप में प्रत्यर्थी–शाला की स्थापना में एक वर्ष की अवधि के लिए परिवीक्षा पर कार्यरत था जो दो वर्ष तक बढ़ायी जा सकती थी – परिवीक्षा अवधि के दौरान याची का कार्य संतोषजनक नहीं पाया गया और परामर्श के पत्र जारी किये जाने के बावजूद उसने कोई सुधार नहीं दर्शाया – याची को आरोप पत्र जारी किया गया, प्राधिकारियों ने स्वयं ही जांच में और आगे कोई कार्यवाही नहीं की – प्रत्यर्थी ने नियुक्ति पत्र की शर्तों को दृष्टिगत रखते हुए सेवा समाप्ति का आदेश जारी किया – अभिनिर्धारित – प्राधिकारियों की कार्रवाई में कोई दोष नही पाया जा सकता – हटाये जाने का आपेक्षित आदेश केवल सेवा समाप्ति की कोटी में आता है और न तो शास्ति है और न ही याची पर कोई कलंक लगाता है।

Cases referred:

2004 AIR SCW 5248, AIR 2005 SC 2960, (2010) 12 SCC 783, (1999) 2 SCC 21, (2002) 1 SCC 520.

Gautam Prasad, for the petitioner.
Rohit Sohgaura, for the respondents.

ORDER

R.S. JHA , J :- The petitioner has filed this petition being aggrieved by the order of termination dated 1-8-2011 by which his services, as a Librarian, under the establishment of the respondent-school have been dispensed with.

2. The brief facts leading to the filing of the present petition are that the respondent-Sainik School is managed by a Society registered under the provisions of the Societies Registration Act, 1860. It is submitted by the learned counsel for the petitioner that the petitioner was appointed as a Librarian at Sainik School, Rewa in accordance with the Sainik Schools Society Rules & Regulations 1997 (hereinafter referred to as the "Rules") by order dated 12-6-2010. The petitioner accepted the terms of appointment and submitted his written acceptance to the terms thereof vide his letter dated 1-7-2010. The appointment of the petitioner was on probation for a period of one year extendable by two years in accordance with the Rules. The respondents issued a letter of performance counselling to the petitioner on 17-3-2010 informing him that his work during the period of probation was not found satisfactory and that he should show substantial improvement in his performance. The petitioner filed a reply to the letter of performance counselling on 28-3-2011 giving explanations for the shortcomings found by the authority in his performance. On 15-4-2011 the respondents again called for an explanation of the petitioner regarding delay in preparation of the result sheet of one of the students to which the petitioner submitted his reply on 25-4-2011.

3. Thereafter, the respondents served the petitioner with a charge sheet on 3-6-2011 alleging that the petitioner had been negligent in the performance of the duties as a result of which certain important parts of the computer were stolen from the library resulting in the loss of property worth Rs.11,900/- and, therefore, his conduct was in violations of Rules 9.01(e) and 9.01(o) of the Rules. Immediately on receipt of the charge sheet the petitioner submitted a detailed reply on 26-6-2011 wherein the petitioner while giving his explanation also brought on record the fact that the loss of computer parts was on account of theft by one of the students, namely Abhishek Kumar Mishra, who had confessed his guilt and had also informed as to how the ram/ hard disc of the computer was sold in the market.

4. On 29-7-2011 the probation period of the petitioner was extended

by two months up to 31-8-2011. On 1-8-2011 the respondents issued the impugned order of termination of the petitioner in view of paragraph 3(a) of the terms of appointment enshrined in the letter of appointment dated 12-6-2010 informing the petitioner that his services would stand terminated with effect from 31-8-2011, being aggrieved by which the petitioner has filed the present petition.

5. It is submitted by the learned counsel appearing for the petitioner that the impugned order of termination is in fact punitive, stigmatic and malafide and has been passed without following the procedure prescribed for conducting a full fledged departmental enquiry and, therefore, the same deserves to be quashed. It is submitted that the foundation for issuance of the order is the impugned charge sheet against the petitioner alleging theft of computer parts and, therefore, the petitioner's service could not have been terminated without conducting a full fledged enquiry as prescribed by Rule 10 of the Regulations. It is further stated that as the student who had stolen the computer parts had confessed, apparently and admittedly no misconduct has been committed by the petitioner and in such circumstances the impugned order deserves to be quashed.

6. Per contra, the learned counsel appearing for the respondents submitted that the petitioner was appointed on probation for a period of one year extendable by two years. During the initial period of probation his work was not found satisfactory and therefore a letter specifically directing the petitioner to substantially improve his performance was issued on 17-3-2011. The petitioner was again informed to improve his performance by letter dated 15-4-2011 but the petitioner failed to do so. It is specifically stated by the respondents in the return that in respect of an incident of theft of computer parts the petitioner being the librarian was served with a charge sheet on 3-6-2011 to which he filed a detailed reply along with the confessional statement of a student to the effect that he had stolen the computer parts and had sold them in the open market and, therefore, no further steps were taken in the enquiry by either appointing an enquiry officer or recording the statement of any witness etc. in respect of the alleged charges, however, at the end of the initial period of probation the petitioner's work was again reassessed and the Registrar as well as the Head Master of the school found several deficiencies and shortcomings in the functioning of the petitioner in spite of which they gave him a chance by recommending his case for extention of the period of

probation and accordingly by order dated 29-7-2011 the period of probation of the petitioner was extended by two months up to 31-8-2011 with a view to give the petitioner a chance to improve his performance.

7. It is submitted that as the petitioner failed to do so, the Head Master and the Registrar again minutely assessed the petitioner's performance and recommended not to extend his probation beyond 31-8-2011, on 30-7-2011 which was duly accepted by the competent authority and accordingly, the impugned order dated 1-8-2011 has been issued terminating the petitioner from services during his period of probation. The learned counsel for the respondents has filed the relevant order sheets and note sheets wherein the petitioner's case was considered by the concerned authority for extention and discontinuance as Annexures R-2-3 and R-2-4 along with the return.

8. It is further submitted that a full fledged enquiry was not conducted against the petitioner and the matter was closed as the reply to the charge sheet issued to him on 3-6-2011 was found to be satisfactory and, therefore, the contention of the petitioner that the respondents have terminated the petitioner's services without conducting a full fledged departmental enquiry is not factually correct. The learned counsel for the respondents has relied on the decisions of the Supreme Court in the cases of : State of *Punjab and others v. Balbir Singh*, 2004 AIR SCW 5248, *State of Punjab and others v. Sukhwinder Singh,* AIR 2005 SC 2960 and *Rajesh Kohli v. High Court of Jammu and Kashmir and another,* (2010) 12 SCC 783 in support of his submissions.

9. On the basis of the aforesaid the learned counsel for the respondents submits that the petitioner has been terminated during the period of probation on account of unsatisfactory service on his part which did not show any improvement in spite of repeated letters of counselling issued to him and in such circumstances no case is made out for interference by this Court.

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

11. From a perusal of the documents on record it is clear that the petitioner was working as a librarian in the establishment of the respondent-school on probation for a period of one year extendable by two years. It is also clear from the initial order of probation that the respondent/authorities issued two letters of performance counselling to the petitioner on 17-3-2011 and

15-4-2011 in spite of which it is stated that the petitioner did not show any improvement. It is also apparent that the charge sheet was issued to the petitioner on 3-6-2011 in respect of the theft relating to certain parts of the computer in the library to which the petitioner filed the reply, however, thereafter no further steps in the said enquiry were taken by the respondents and in fact, the respondents in paragraph 6 of the return filed by them have specifically stated that :-

> "However, since the cost of the stores lost was recovered from the culprits students who exploited the opportunity created due to dereliction of duty performed by petitioner, the authority was magnanimous to give petitioner yet another chance to improve his performance without reducing the same to writing."

It is, therefore, clear that the petitioner's performance during the period of probation was not found to be satisfactory by the respondent/authorities and in spite of issuing letters of counselling he did not show any improvement in his performance. It is also clear that while a charge sheet was issued to the petitioner the authorities on their own accord did not proceed any further in the enquiry as stated by them in paragraph 6 of the return.

12. From a perusal of Annexure R-2-3 filed by the respondents along with the return, which is a note sheet dated 27-6-2011 prepared by the authorities concerned while scrutinizing the petitioner's service during probation for the purposes of recommending extention, that the authorities have recorded that the petitioner's performance was inadequate, that he did not adhere to the laid down Code of Conduct and that he needed improvement, while recommending his case for extention of probation. Ex.P-2-4 filed by the respondents which is the note sheet wherein the petitioner's case was not recommended for extention of probation beyond 31-8-2011, indicates that the Head Master has given as many as 8 reasons for not recommending his case clearly recording therein that the performance of the petitioner as probationer was found deficient and inadequate and he did not show any improvement in spite of giving him many chances. The same has also been reiterated by the Registrar. It is clear from a perusal of the aforesaid note sheets that the reason for not recommending the extention of the petitioner's probation is not the initiation of the departmental proceedings against the petitioner vide issuance of charge sheet dated 3-6-2011 or the theft of computer parts, as alleged by the petitioner but is in fact the deficient, unsatisfactory

and inadequate performance of the petitioner which did not show any improvement in spite of being informed in writing by the authorities to do so by performance counselling letters issued on 17-3-2011 and 15-4-2011.

13. In the circumstances, the issue that requires adjudication by this Court is as to whether the impugned order is stigmatic or punitive as it has been issued after issuance of the charge sheet or an order of termination simplicitor and as to whether a full fledged enquiry was required to be conducted by the respondents before terminating the services of the probationer-petitioner.

14. To determine the aforesaid issue it would be appropriate to take into consideration the law laid down by the Supreme Court on this issue. In the case of *Radhey Shyam Gupta v. U.P. State Agro Industries Corporation, Ltd. and another,* (1999) 2 SCC 21 the Supreme Court has analysed the entire case law relating to the aforesaid issue in paragraphs 30 to 34 in the following terms :-

> "30. We shall now refer to a different type of cases where a departmental inquiry was started, then dropped and a simple order of termination was passed. *In State of Punjab vs. Sukh Raj Bahadur [1968] INSC 45; [1968 (3) SCR 234],* the charge memo was served, reply given and at that stage itself, the proceedings were dropped and a termination order was passed. The High Court felt that the 'object of departmental inquiry, being to punish the employee, the order of termination must be treated as punitive. This was not accepted by a three Judge Bench consisting of Justice Shah (as he then was) who had laid down in *Madan Gopal's* case [1962] INSC 239; (AIR 1963 SC 531) the principle of 'object of the inquiry'. This court reversed the High Court Judgment and held that neither *Madan Gopal's* case nor *Jagdish Mitter's case* (AIR 1964 SC 449) applied. This was because in the case before them the inquiry did not go beyond the stage of the explanation. No findings were given and no inquiry report was submitted as in the above two cases. In that case (i.e.Sukh Raj Bahadur) this Court felt that the decision in *A.G Benjamin vs. Union of India* (Civil Appeal No (341 of 1966 dated 13.12.1966) (SC) was more direct. In *Benjamin's case,* a charge memo was issued, explanation was received and an Enquiry Officer was also appointed but before the inquiry could be completed, the proceedings were

dropped stating that: 'departmental proceedings will take a much longer time and we are not sure whether after going through all the formalities, we will be able to deal with the accused in the way he deserves." There also, the order was held not to be punitive. Following the above case, this court in *Sukh Raj Bahadur's* case stated that the position before them was similar to what happened in Benjamin's case and concluded as follows:

> "the departmental inquiry did not proceed beyond the stage of submission of a chargesheet followed by the respondent's explanation thereto. The inquiry was not preceded with, there were no sittings of any inquiry officer, no evidence recorded and no conclusion arrived at in the inquiry."

31. The italicised words are very important and demarcate the line of distinction. If the inquiry officer held no sittings, did not take evidence nor record any conclusions and if at that stage the inquiry was dropped and a simple order of termination was, passed, the same would not be punitive.

32. In *Nepali Singh vs. State of U.P.* (1988 (3) SCC 370) a three Judge Bench held the order to be punitive as it was passed after issuing a charge memo, a reply received, even though no evidence was adduced and no findings were given.But in a latter three Judge Bench case in *State of U.P. vs.Kaushal Kishore Shukla,* [1991 (1) SCC 691], *Nepali Singh's* case was not followed as being a judgment rendered per incuriam as it did not consider *Champak Lal's* case [1963] INSC 211; (AIR 1964 SC 1854). Of course, the above case, i.e. *Kaushal Kishore Shukla's* case was one where there was an adverse entry and only a preliminary report and then a simple order of termination was issued. That order was upheld. Similarly, in *Commission of Food & Civil Supply vs. P.C. Saxena* [1994] INSC 293; [1994 (5) SCC 177]. the facts were that the departmental inquiry was started and dropped and this Court held the order not to be punitive.

33. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work

is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the Officer, as stated by Shah, J. (as he then was) in *Ram Narayan Das's* case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary inquiry is held because the purpose of a preliminary inquiry is to find out if there is prima facie evidence or material to initiate a regular departmental inquiry. It has been so decided in *Champaklal's case*. The purpose of the preliminary inquiry is not to find out misconduct on the part of the Officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular departmental inquiry is started, a charge memo issued, reply obtained, and an enquiry Officer is appointed - if at that point of time, the inquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry Officer has not recorded evidence nor given any findings on the charges. That is what is held in *Sukh Raj Bahadur's* case and in Benjamin's case. In the latter case, the departmental inquiry was stopped because the employer was not sure of establishing the quilt of the employee. In all these cases the allegations against the employee merely raised a cloud on his conduct and as pointed by *Krishna Iyer, J. in Gujrat Steel Tubes case*, the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer, by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples where the allegations whose truth has not been found, and were merely the motive.

34. But in cases where the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the Officer and where on the basis of such a report, the termination order is issued, such an order

will be violative of principles of natural justice inasmuch as the purpose of the inquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental inquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employees conduct but are cases where the employer has virtually accepted the definitive and clear findings of the Inquiry Officer, which are all arrived at behind the back of the employee - even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive, in such cases.

The view taken by the Supreme Court in the aforesaid case has been affirmed and reiterated in the case relied upon by the respondents i.e. *State of Punjab and others v. Balbir Singh,* 2004 AIR SCW 5248 (supra) in paragraph 6 wherein paragraphs 34 and 35 of the judgment in the case of *Radhey Shyam Gupta* (supra) have been reproduced and reaffirmed. Similar view has again been taken by the Supreme Court in a decision rendered in the case of *State of Punjab and others v. Sukhwinder Singh,* AIR 2005 SC 2960 (supra) relying upon a decision in the case of *Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and another,* (2002) 1 SCC 520 wherein the Supreme Coourt has held as under :-

"One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct (c) which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

Generally speaking when a probationers appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order

of termination of a probationers appointment, is also not stigmatic. The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

The decision of the Supreme Court rendered in the case of *Rajesh Kohli (supra)* relied upon by the learned counsel for the respondents is also in the similar terms.

15. In the instant case, it is an admitted fact that the petitioner who was under suspension was served with a charge sheet on 3-6-2011, that he submitted his reply thereto and thereafter no further proceedings in the enquiry took place and the respondents in the return have stated that they dropped the enquiry. It is also undisputed that the petitioner's performance as probationer was assessed and extended by two months and thereafter it was again reassessed and the impugned order of termination was issued.

16. In view of the aforesaid as it is clear from the facts of the present case that after issuance of charge sheet and submission of reply thereto, no further proceedings were taken up i.e. enquiry officer has not been appointed, evidence of witnesses has not been recorded, no enquiry report is submitted and without taking any steps in the enquiry, the authorities on the basis of the assessment of the service record of the petitioner decided to terminate the services of the petitioner and not to extend the period of his probation, no fault can be found in the action of the authorities. It is also clear that the impugned order of discontinuance amounts to termination simplicitor and is neither punitive nor does it cast any stigma upon the petitioner as has been held by the Supreme Court in the aforesaid cases. In the facts and circumstances of the case the contention of the petitioner that a full fledged departmental enquiry should have been conducted by the respondents is also rejected.

17. In view of the aforesaid, I do not find any infirmity in the impugned order of termination dated 1-8-2011 which is accordingly upheld. The petition being meritless stands dismissed.

18. In the facts and circumstances of the case there shall be no order as to costs.

Petition Dismissed

I.L.R.[2012]M.P. 104
WRIT PETITION

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

W.P. No. 3798/2004 (Jabalpur) decided on 1 December, 2011

SHRI RAM TRADERS (M/S) & anr. ...Petitioners
Vs.
THE DIVISIONAL DY. COMMISSIONER & anr. ...Respondents

Commercial Tax Act, M.P. 1994 (5 of 1995), Section 69(2) – Penalty – **Penalty was imposed by Assessing officer on the ground that the assessee furnished incorrect return of the sales tax, evaded the tax – Held – No finding was recorded that there was deliberate concealment of sale or the assessees were guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation – Order imposing penalty can not be sustained.** (Para 10)

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धारा 69(2) – अर्थदण्ड – निर्धारण अधिकारी द्वारा इस आधार पर अर्थदण्ड अधिरोपित किया गया कि निर्धारिती ने विक्रय कर की गलत विवरणी देकर कर बचाया – अभिनिर्धारित – कोई निष्कर्ष अभिलिखित नही किया गया कि विक्रय का जानबूझकर छिपाव किया गया था या निर्धारिती दुष्टतापूर्ण या बेईमानीपूर्ण आचरण के दोषी थे अथवा अपने दायित्व की जानबूझकर अवहेलना की – अर्थदण्ड अधिरोपित करने का आदेश कायम नहीं रखा जा सकता।

Cases referred:

(1070) 25 STC 211, (1969) 2 SCC 627, 1980 SUPP SCC 13, 1970 (76) ITR 696, (2004) 2 SCC 783, (2008) 11 SCC 617.

H.S. Shrivastava with *Sandesh Jain*, for the petitioners.
Vivek Agrawal, G.A. for the respondents.

ORDER

The order of the court was delivered by :
K.K. Lahoti, J :- This order shall decide **W.P. No.3798 of 2004** (M/s Shri Ram Traders and another vs. The Divisional Dy. Commissioner, Commercial Tax & another), **W.P. No.3783 of 2004** (M/s Shri Ram Traders and another vs. The Divisional Dy. Commissioner, Commercial Tax & another) and **W.P. No. 3785 of 2004** (Ghanshyam Das through LRs vs. The Divisional Dy.

Commissioner, Commercial Tax & another), involving similar legal issues based on similar set of facts. For the convenience, facts are taken from **W.P. No.3798/2004**.

2. Petitioner No.1 M/s Shri Ram Traders is a registered firm, registered under the provisions of Commercial Tax Act and co-petitioner Suresh Rai is the partner of the firm. Petitioners have assailed order Annexure P-2 dated 19.7.2003 passed by the Commercial Tax Department, Narsinghpur by which a penalty of Rs.2,10,000/- was imposed upon the petitioners under Section 69(2) of the M.P. Commercial Tax Act, 1994 (hereinafter referred as the **Act**) and order Annexure P-6 dated 17.8.2004 passed by the Additional Dy. Commissioner, Commercial Tax, Jabalpur in appeal by which the order Annexure P-2 was modified and penalty was reduced to Rs.1,25,000/-.

3. Facts of the case are that the petitioners were assessed for the assessment year 1.4.1999 to 31.3.2000 in which the Assessing Officer found that on 10.8.2000 an inspection was carried out in the premises of the petitioners and certain account books and loose papers were found and seized. As per the enquiry report the matter was referred to Assistant Commissioner,Commercial Tax, Jabalpur by the Dy. Commissioner, Commercial Tax, Jabalpur on 30.4.2001. The account books and the papers which were seized were not tallying with the account books earlier produced by the assessee, so assessment was not possible on such account book and treating that the assessee had evaded the tax, best judgment assessment order was passed. The assessing Officer had also found that certain entries in the account books and loose papers were not explained by the assessee and the assessment order was framed against the petitioners by which the sale was enhanced, assessed at Rs.3,45,829/- and commercial tax was imposed. Against the order Annexure P-1, an appeal was preferred by the assessee which was decided vide order Annexure P-4 dated 25.6.2004. The appeal allowed partly and by reducing the tax of Rs.4658/-, the assessment order was modified. It is stated at the Bar that the order Annexure P-4 has attained finality.

4. As there was evasion of tax, a notice under Section 69 of the Act was issued to the petitioners for extending the petitioner an opportunity to explain why penalty be not imposed. The assessee had not cared to give response to the notice, so an ex parte penalty order Annexure P-2 was passed by which a penalty of Rs.2,10,000/- was imposed on the petitioners. Against

this order the petitioners had preferred a revision which was partly allowed vide order Annexure P-6 dated 17.8.2004 (supra). These orders are challenged in this petition.

5. Learned counsel appearing for the petitioners submitted that before imposition of penalty the officer ought to have recorded independent findings that the petitioners had acted deliberately in defiance of law or were guilty of conduct contumacious or dishonest, or acted in conscious disregard of their obligation. The penalty cannot be imposed merely on the ground that in the assessment year the sale was enhanced or some concealment was found. An independent finding is required to be recorded by the assessing officer while imposing the penalty. Reliance is placed to the Apex Court judgment in *Hindustan Steel Ltd. vs. State of Orissa* [(1070) 25 STC 211] (1969) 2 SCC 627 and *M/s Anantharam Veerasinghaiah & Co. Vs. CIT, Andhra Pradesh* [1980 Supp SCC 13] and submitted that the aforesaid penalty orders may be quashed, as the authorities had failed to record the aforesaid finding. That the petitioners were dealing mostly in the tax paid goods and in this regard he has referred various orders in which it was held that the petitioners were dealing with the tax paid goods and the taxable goods were of very small amount.

6. Shri Vivek Agrawal, learned G.A. appearing submitted that in view of the specific provision as contained in Sec.69(2) of the Act, the assessing officer rightly initiated the proceedings for imposition of penalty after issuing a notice and extending an opportunity of being heard. The petitioners had willfully remained absent in response to the notice so the penalty order was passed which is in accordance with law, needs no interference of this Court. It was further submitted that it is a case in which tax was evaded so the petitioners were rightly imposed penalty by the assessing officer.

7. To appreciate the rival contentions of the parties, it would be appropriate if relevant provision is quoted. Section 69(2) of the act reads thus:-

> 69(2):The proceeding under sub-section (1) shall be initiated by the Commissioner or the appellate or revisional authority as the case may be, by issue of a notice in the prescribed form for giving the dealer an opportunity of being heard. On hearing the dealer, the Commissioner or the appellate or the revisional authority as the case may be, shall pass an order not later than one calendar year from the

date of initiation of such proceeding or within such further time as allowed by the State Government, directing the dealer that (he shall in addition to the tax payable by him pay by way of penalty as sum which shall not be less than three times but shall not exceed five times of the amount of tax evaded].

8. The aforesaid provision specifically provides that if the assessing officer finds that tax was evaded then the assessing officer can initiate proceeding under sub section (1) by issuing a notice in the prescribed form for giving the dealer an opportunity of being heard. After hearing the dealer the authority can pass an order within one calendar year from the date of initiation of such proceeding or within such further time as allowed by the State Government, directing the dealer that in addition to the tax payable by him, pay by way of penalty a sum which shall not be less than three times but shall not exceed five times of the amount of tax evaded. The Apex Court in *Hindustan Steel Ltd.* considering the question of imposition of the penalty held that an order imposing penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. A penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances.

9. The Apex Court in *Anantaram (supra)* considering the question held that in the penalty proceedings the taxing authority is bound to consider the matter afresh on the material before it and the burden to prove rest on the Revenue. No doubt the fact that the assessment order contains a finding that the disputed amount represent income constitute good evidence in the penalty proceedings but the finding in the assessment proceeding cannot be regarded as conclusive for the purposes of the penalty proceeding. The Apex Court further held that before a penalty can be imposed the entirety of circumstances must be taken into account and the order must point to the conclusion that the disputed amount represent income and the assessee has consciously concealed particulars of his income or deliberately furnished inaccurate particulars. In respect of falsity of the explanation if given by the assessee it was observed that it was insufficient without there being in addition cogent material or evidence from which the necessary conclusion attracting a penalty could be

shown. Reliance was placed by the Apex Court to *Anwar Ali* [1970 (76) ITR 696].

10. Now in the light of the law laiddown by the Apex Court in *Hindustan Steel and Anantharam* (supra), the orders passed by the authorities may be looked into. By order Annexure P-2, the assessing officer found that the assessee furnished incorrect return of the sales tax, evaded the tax on the basis of which assessing officer assessed for the additional tax and on this ground the penalty was imposed, and except this, no finding was recorded even by the revisional authority that there was deliberate concealment of sale or the assessees were guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation, failing which the aforesaid order imposing penalty cannot be sustained.

11. An Administrative order imposing a penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct, or acted in conscious disregard of its obligation. A penalty will not also be imposed merely because it is lawful to do so. Inspite of a minimum penalty prescribed, the authority competent to impose the penalty may refuse to impose the penalty if the breach complained of was a technical or venial breach, flew from a bona fide though mistaken belief. See *Karnataka Rare Earth & anr. vs. Senior Geologist, Department of Mines & Geology* [(2004) 2 SCC 783] and *Bharjatya Steel Industries vs. Commissioner, Sales Tax, UP.* [(2008) 11 SCC 617]

12. In view of the aforesaid, we find that the orders passed by the authorities imposing penalty on the petitioners are not in accordance with the law laid down by the Apex Court in *Hindustan Steel Ltd.* and *Anantharam* (supra) and accordingly both the orders are not sustainable under the law and are quashed. The matter is remanded back to the assessing officer to decide the matter afresh after following the law laid down by the Apex Court in Hindustan Steel and Anantharam (supra). As the matters are old one , the authority is expected to decide the matter expeditiously, as far as possible within a period of six months from the date of communication of this order.

13. Before passing the order of penalty, the assessing officer shall issue a fresh notice to the petitioners by extending an opportunity of hearing. While dealing the matter, the assessing officer shall also consider the fact that whether

the petitioners were dealing in the tax paid goods and the taxable goods were of small amount and the amount of penalty can be based on the aforesaid facts also . Any amount deposited by the petitioners in compliance of the penalty order shall be subject to final decision of the assessing officer.

No order as to costs.

Order Accordingly

I.L.R.[2012] M.P. 109
WRIT PETITION
Before Mr. Sushil Harkauli, Acting Chief Justice
& Mr. Justice Alok Aradhe
W.P. No. 3487/2010 (Jabalpur) decided on 16 December, 2011

SAI KRIPA GRAMIN PRATHMIK SAHAKARI UPBHOKTA BHANDAR MARYADIT, NAINPUR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Constitution – Article 14*** **– Article 14 of the Constitution of India forbids class legislation but does not forbid reasonable classification – The classification in order to be reasonable must be founded on intelligible differentia and that differentia must have rational relation to the object sought to be achieved.** (Para 8)

क. *संविधान – अनुच्छेद 14* – भारत के संविधान का अनुच्छेद 14 वर्ग विधायन को निषिद्ध करता है परन्तु युक्तियुक्त वर्गीकरण को निषिद्ध नहीं करता – युक्तियुक्त होने के लिये वर्गीकरण बोधगम्य असमानता पर आधारित होना चाहिये और उस असमानता का चाहे गये उद्देश्य की पूर्ति के लिये युक्तिसंगत संबंध होना चाहिए।

B. ***Public Distribution System (Control Order), M.P. 2009 – Clause (4) of the Annexure–II*** **– It has a reasonable nexus with the object sought to be achieved i.e. timely distribution of essential commodities to the card holders – Clause (4) can not be said to be either arbitrary or discriminatory – It appears to have been enacted in the interest of public in general.** (Para 9)

ख. *लोक वितरण प्रणाली (नियंत्रण आदेश), म.प्र. 2009 – परिशिष्ट–II का खंड 4* – इसका चाहे गये उद्देश्य की पूर्ति के साथ युक्तियुक्त संबंध है अर्थात कार्ड धारकों को आवश्यक वस्तुओं का समय पर वितरण – खंड (4) को

मनमाना या विभेदकारी नहीं कहा जा सकता – यह सामान्य जनता के हित में अधिनियमित किया जाना प्रतीत होता है।

C. Public Distribution System (Control Order), M.P. 2009 – Clause 5(3) and clause 2(j) **– Considering the nature of work to be performed by the lead society – Clause 5(3) provides that in rural area, marketing societies or primary agricultural cooperative societies shall be appointed as lead societies – The constitution and functioning of Primary Agricultural Credit Facilities Societies is different from other societies – Therefore, challenge to clause 5(3) must fail.** (Para 10)

ग. लोक वितरण प्रणाली (नियंत्रण आदेश), म.प्र. 2009 – खंड 5(3) व खंड 2 (जे) – लीड सोसायटी द्वारा संपादन किये जाने वाले कार्य के स्वरुप को विचार में लेते हुए – खंड 5(3) उपबंध करता है कि ग्रामीण क्षेत्रों में, विपणन सोसायटी या प्राथमिक कृषि सहकारिता सोसायटी लीड सोसायटी के रुप में नियुक्त की जायेगी – प्राथमिक कृषि ऋण सुविधा सोसायटीयों का गठन एवं कार्य अन्य सोसायटीयों से भिन्न है – इसलिए, खंड 5(3) को चुनौती असफल होगी।

D. Public Distribution System (Control Order), M.P. 2009 – Clause 6 of Annexure-II – Whether arbitrary or discriminatory **– Classification of the cooperative societies for the purpose of running fair price shops in rural areas is based on intelligible differentia and has a reasonable nexus with the object i.e. availability of essential commodities at controlled prices to public in general – Thus, the provisions of clause (6) can neither be said to be arbitrary nor discriminatory.**

(Paras 11 & 12)

घ. लोक वितरण प्रणाली (नियंत्रण आदेश), म.प्र. 2009 – परिशिष्ट–II का खंड 6 – क्या मनमाना अथवा विभेदकारी है – ग्रामीण क्षेत्रों में उचित मूल्य की दुकानें चलाने के प्रयोजन हेतु सहकारी सोसायटी का वर्गीकरण बोधगम्य असमानता पर आधारित है और उद्देश्य अर्थात सामान्य जन को नियंत्रित मूल्य पर आवश्यक वस्तुओं की उपलब्धता के साथ इसका युक्तियुक्त संबंध है–अतः खंड (6) के उपबंधों को न तो मनमाना और न ही विभेदकारी माना जा सकता है।

Cases referred:

(1989) 3 SCC 115,(1990) 1 SCC 176, AIR 2006 CHHATTISGARH 107, AIR 1958 SC 958, AIR 1981 SC 2001, 1981 MPLJ 528, (2008) 14 SCC 228.

N.S.Ruprah, Sanjay Patel, Atulanand Awasthy, Shashank Shekhar, R.S. Maindirreta for the petitioners.

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

ORDER

The order of the court was delivered by :

ALOK ARADHE, J. :- In this petition the petitioner has challenged the validity of clauses 4, 5(3) and 6 of Annexure-II appended to Madhya Pradesh Public Distribution System (Control) Order, 2009 (hereinafter referred to as the "Control Order 2009"). In order to appreciate the petitioners' challenge to the aforesaid clauses of the Control Order 2009, reference to few facts need mention.

2. The petitioner is a Cooperative Society registered under the provisions of M.P. Cooperative Societies Act, 1960 (for short '1960 Act'). The petitioner is classified under section 10 of the 1960 Act as consumer society. The petitioner is engaged in the business of distribution of food stuff under the Public Distribution System. The petitioner has been granted licence to run the fair price shops in urban as well as rural areas. In exercise of powers under Section 3 read with Section 5 of the Essential Commodities Act, 1955 the State Government has framed M.P. Public Distribution System (Control) Order, 2009. Clause 4 of the aforesaid Control Order 2009 provides that in urban areas no cooperative society shall be allotted more than one fair price shop. Clause 5(3) thereof provides that in rural area marketing societies or the primary agricultural cooperative societies shall be appointed as the leading societies. Clause 6 of the Control Order 2009 provide that fair price shops in rural areas shall be allotted to primary agricultural cooperative societies and Laghu Vanopaj Sahakari Samiti, a society registered under the provisions of 1960 Act.

3. Learned counsel for the petitioners submitted that the action of the State Government in grouping the societies, namely, Primary Agricultural Cooperative Societies and Laghu Vanopaj Sahakari Samiti together to exclusion of other societies for running the fair price shops in the rural areas is arbitrary and discriminatory. The classification has no reasonable nexus with the object which is sought to be achieved. The exclusion of other cooperative societies to run fair price shops in rural areas offends constitutional guarantee contained in Articles 14 and 19(1)(g) of the Constitution of India. The validity of the impugned clauses of the Control Order 2009 has also been assailed on the ground that same are in direct conflict with the Public Distribution System, 2001 framed by the Central Government. It is urged that action of the State

Government in discontinuing the fair price shops which are being run by the societies for past several years is not justified. It is further urged that acting on the assurance given by the State Government the petitioners got themselves registered as cooperative societies. The State Government is bound by the doctrine of estoppel. Our attention has been invited to the order passed by this Court in W.P. No.8810/2005. In support of aforesaid submissions reliance has been placed on the cases of *Vij Resins Pvt. Ltd. v. State of J and K,* (1989) 3 SCC 115 and *State of Madhya Pradesh and Others v. Orient Paper Mills Ltd.,* (1990) 1 SCC 176

4. On the other hand learned counsel for the respondents has submitted that the State Government is under a constitutional obligation to protect the poor persons against malnutrition and hunger. In the light of orders passed by the Supreme Court in Writ Civil Case No.196/2001 dated 28.11.2001, 08.5.2002 and 02.5.2003 and to ensure compliance of Directive Principles of State Policy, the State Government has framed Control Order 2009. The classification of the societies to run the fair price shops is valid classification and the same is based on intelligible differentia. It cannot be termed either arbitrary or discriminatory. In fact, the classification of the societies to run the fair price shops in rural areas has been done in public interest. It is further submitted that primary agriculture cooperative societies and Laghu Vanopaj Sahkari Societies are the cooperative societies which are basically controlled and operated through organized structure and they have sufficient financial viability to ensure compliance of the Control Order, 2009. The petitioners are not registered merely for the purposes of running fair price shops and are registered for many other objects and the petitioners are at liberty to pursue other objects for which it have been constituted. The provisions of Control Order 2009 do not contravene the provisions of Public Distribution System Control Order, 2001 framed by the Central Government in any manner. In support of his submissions learned counsel for the respondents has placed reliance in the case of *Ambika Prasad Rajwade and Others v. State of Chhattisgarh and Others,* AIR 2006 Chhattisgarh 107.

5. We have considered the submissions made on both sides. The Central Government in exercise of powers under Section 3 of the Essential Commodities Act, 1955 (for brevity '1955 Act') has framed Public Distribution System (Control), 2001. Clause 2(k) defines the expressions "fair price shop owner" to mean a person and includes a Co-operative society or a a Corporation or a Company of a State Government or a Gram Panchayat or

any other body in whose name a shop has been licencsed to distribute essential commodities under the Public Distribution System. Clause 7 of the Order provides that the procedure for issue of licences or authorization to the fair price shops for distribution of essential commodities under the public distribution system and duties and responsibility of fair price shop owners shall be as per paragraph 5 of the annexe to the Order. Paragraph 5 of the annexe to the Order provides that the State Government shall issue an order under Section 3 of the Act for regulating the sale and distribution of the essential commodities and licence to the fair price shop owners shall be issued under the said Order. Such licence shall lay down the duties and responsibilities of fair price shop owners. Thus, from perusal of provisions of the Public Distribution System (Control) Order 2001 the Central Government has left it to the State Government to make an order under Section 3 of the Act for regulating the sale and distribution of essential commodities through public distribution system to vulnerable section of the society and to provide the issue of licence under such Order made under Section 3 of the Act to the persons. The Central Government left it to the State Government to decide as to persons in whose the licence is to be issued to run the fair price shop.

6. The State Government in exercise of powers conferred by Sections 3 read with Section 5 of the 1955 Act has framed the Order for control of Public Distribution System in the State of Madhya Pradesh, namely, M.P. Public Distribution System (Control) Order, 2009. The aforesaid Control Order has been framed with an object to secure availability of essential commodities at the controlled price to the ration card holders of the State of Madhya Pradesh. Clause 3 of the Order deals with issuance of ration card. The basic entitlement of issuance of ration cards has been prescribed in such manner so as to ensure that members of Below Poverty Line family, Above Poverty families and Antodaya Families get the ration cards. Clause 4 of the Order provides that the establishment of fair price shops, allotment thereof, issuance of authority letter for operationalization of fair price shops and suspension/ cancellation thereof as per Annexure-II appended to this Order. Annexure-II of the Order makes it clear that total number of fair price shops and their location in the district shall be decided by the Collector of the concerned district. Clause 2 of Annexure-II of the Order provides that Collector in so far as it is possible shall bear in mind while deciding the location and number of fair price shops in each district, that there shall be one fair price shop for population of 5000 members in urban areas. The fair price shops are set up at

a place which is convenient to the card holders. Clause 2 of Annexure-II further provides that the Collector shall ensure that there should be one fair price shop for every Gram Panchayat. Proviso to Clause 2 of Annexure-II provides that there shall be minimum of 200 ration cards of Below Poverty Line and Antyodaya Anna Yojna categories in a fair price shop. Clause 5 of Annexure-II provides that Cooperative Society identity for fair price shop shall have a credit margin of 200% of the amount required to purchase the monthly allocation i.e. food grain, kerosene, sugar, etc. under this Order and shall have sufficient storage space and computer for date entry and accounting purposes. Clause (7) of Annexure-II empowers the State Government to utilize the fair price shop for installing computer with Bio-metric facilities and other electronic identification equipment. Thus, from perusal of various clauses of Annexure-II it is apparent that various provisions have been made to make available the essential commodities at a controlled price on ration card issued to card holders of the State of Madhya Pradesh.

7. After having noticed the relevant provisions of Control Order 2009, at this stage we may reproduce the clauses which have been impugned in the instant writ petition which read as under:-

> "(4) In the urban area, no co-operative society shall be allotted more than one fair price shop.
>
> 5(3) In rural areas, marketing societies or primary agricultural co-operative societies shall be appointed as lead societies in case of more than one application received from the societies, the lead society shall be appointed on the basis of recommendation made by District Registrar Co-operation Society and District Supply Controller/District Supply Officer and the identified lead society shall make arrangement in Information Technology enabled devices like computers and electronic data base management.
>
> (6) Fair price shops in rural areas shall be allotted to primary agricultural cooperative societies and laghu vanopaj sahakari societies registered under the Madhya Pradesh Co-operative Societies Act, 1960. The societies should have a credit limit amounting to 2002% more than purchasing amount or credit needed for monthly allocation (foodgrain, kerosene, sugar) alongwith sufficient storage space and computer for data entry

and accounting purposes. The societies shall run the shops themselves and not operate through any agent or any private person."

8. It is well settled in law that Article 14 of the Constitution of India forbids class legislation but does not forbid reasonable classification. The classification in order to be reasonable must be founded on intelligible differentia and that differentia must have rational relation to the object sought to be achieved. [See: AIR 1958 SC 958] The wider concept of equality before the law and equal protection of law is that there shall be equality amongst equals. Even amongst equal there can be unequal treatment based on intelligible differentia having rational relation to the object sought to be achieved. *[M.P. Ration Vikreta Sangh Society v. State of M.P.*, AIR 1981 SC 2001] The Division Bench of this Court in *M.P. Ration Vikreta Sangh Society v. State of M.P.*, 1981 MPLJ 528 while dealing with the nature of right to run the fair price shops has held that fair price shops are established by the Government. The Government can operate them by appointing their own agents. No person has fundamental right to be appointed as agent of the Government for running fair price shop. It is open to the Government to devise the reasonable policy for appointment of agent. It is only necessary that in making the appointment of agents there should be no discrimination or violation of Article 14 of the Constitution. The aforesaid decision of the Division Bench of this Court was upheld by the Supreme Court in *M.P. Ration Vikreta Sangh Society v. State of M.P.*, AIR 1981 SC 2001 (supra)]

9. In the context of aforesaid well settled legal principles so far as challenge to Clause (4) of the Control Order 2009 is concerned it is worth mentioning that under Control Order 2009 strictly requires advance lifting of the commodities and 200% of credit margin of the amount required to purchase monthly allocation. The distribution of food stuff in time can better be ensured through different societies in urban areas. The time availability of food stuff to card holders appears to be the primary object of Control Order 2009. The object of clause 4 is to ensure that essential commodities are distributed to public in general by a fair price shop and the economic restraint and financial condition of the society does not become the impediment in timely distribution of the fair price shops. Thus, clause (4) of Annexure-II has a reasonable nexus with the object sought to be achieved i.e. timely distribution of essential commodities to the card holders. Thus, clause (4) cannot be said to be either arbitrary or discriminatory. Clause (4) appears to have been enacted in the

interest of public in general.

10. The petitioners have assailed the validity of clause 5(3) of the Control Order 2009 as discriminatory and arbitrary. From perusal of clause 5(3) and clause 2(j) of Control Order 2009 it is apparent that the work of lead society is to lift and transport the controlled essential commodities from the issue centre to the designated fair price shop. In other words the distribution of controlled essential commodities from issue centre to fair price shop is to be regulated by the lead society. The State Government purchases various commodities on storage prices and makes provision for its storage at the godowns owned by the agencies of the State Government or acquired by the State Government for the purpose of storage of the said commodities. From godowns, the distribution takes place as per the demand of essential commodities and the distribution is essentially required to be controlled and regulated by the lead society. Considering the nature of work to be performed by the lead society, clause 5(3) of the Control Order 2009 provides that in rural area, marketing societies or primary agricultural cooperative societies shall be appointed as lead societies. The constitution and functioning of Primary Agricultural Credit Facilities Societies and is different from other societies. Besides that, in the instant writ petitions the petitioners do not have any locus to assail the validity of clause 5(3) of the Control Order 2009 as none of them is running the lead society and none of them have been entrusted with the functioning of operating as lead society. Therefore, challenge to clause 5(3) of the Control Order 2009 must fail.

11. We may now deal with the challenge to clause 6 of Annexure-II of the Control Order 2009. The Primary Agricultural Cooperative Society and Laghu Vanopaj Sahakari Societies registered under the 1960 Act are the cooperative societies which are basically controlled and operated through the organized structure and they have sufficient financial viability so as to ensure full compliance of the provisions of Control Order 2009. A chart has been mentioned in paragraph 25 of the return to show that Primary Agricultural Cooperative Societies and Laghu Vanopaj Cooperative Societies are different classes of the Societies than the societies which have been excluded from the purview of Clause (6) of Annexure-II are different kind of societies and, therefore, they form a separate classes. The Primary Agricultural Cooperative Societies are the members of District Central Cooperative Banks. Similarly, Laghu Vanopaj Sahakari Samiti are the members of Jila Vanopaj Sahakari Sangh. The Primary Agricultural Cooperative Societies and Laghu Vanopaj Sahakari Samiti

are functioning in rural and forest villages. The aforesaid societies have better financial viability and organized structure in rural areas and, therefore, the have been chosen for allotment of fair price shops in comparison to other societies in rural areas. The chart is reproduced here for facility of reference:

Features with regard to financial viability

S. No.	Pacs (Primary Agriculture Co-Operative Societies	Laghu Vanopaj Sahkari Samiti	Other Socieites
1.	Compulsory membership of District Central Cooperative Bank.	Compulsory membership of Jila Vanopaj Sahkari Sangh	Membership of other societies is not mandatory.
2.	Cash Credit Limit is obtained bythem from DCCB and DCCB in turn get from Apex Bank.	Financial assistance from Jila Vanopaj Sahkari Sangh and from Rajya Vanopaj Sangh.	No facility of cash credit limit is available.
3.	Control of D.CCB over the PACS and control over the DCCB by Apex Bank.	Laghu Vanopaj Sahkari Samiti are controlled by Jila Vanopaj-Sahkari Sangh and Jila Vanopaj Sahkari Sangh are controlled by Rajya Vanopaj Sangh.	No direct control of any other Apex Societies.
4.	Compensation in lieu of losses incurred in PDS services to the FPS as well as to lead societies.	Financial assistance by the District and State level Society.	No compulsory compensation or financial assistance from any District and State agency or from any other society.

5.	Multipurpose work like credit, extension of loan for various purposes like for fertilizer, seeds, pesticides, etc. Income of interest which is a significant mode of revenue generation.	Multipurpose function like collection and sale of forest produce and its sale, like Tendupatta, Aawla, Chironji, Mahuya, etc.	No multipurpose function but only to run PDS shops, however, various other objects are included in by-laws.
6.	Saving Movability Scheme in the name of 'Bachat Bank'.	Nil	Nil

Features with regard to organized structure

S. No.	Pacs (Primary Agriculture Co-Operative Societies	Laghu Vanopaj Sahkari Samiti	Other Socieites
1.	3 Tier Structure a. PACS at Primary leval b.District Central Cooperative Bank at District level c. Apex Bank of State level	3 Tier Structure a. Laghu Vanopaj Sahkari Samiti at Primary level b. Jila Sahkari Samiti at District level c. Rajya Vanopaj Sangh at State level	No such organised structure
2.	Situated at Villate/ Panchayat level number of PACS 4526, 99 percent PACS are situated in Rural areas.	Exclusively situated in Rural and forest are number of societies is 1066	Maximum society situated in Urban area. Number of societies including Mahila Bahu Udasye and

			Prathmik Upbhokta Bhandar are 5116 and 97 percent are situated in Urban areas.
3.	Society Manager are the employees of DCCB	Society Manager are the employees of Jila Sahkari Sangh.	Self employed.
4.	Administrative and Disciplinary control by DCCB	Administrative and Disciplinary control by Jila Vanopaj Sahkari Sangh and Forest department.	No administrative and Disciplinary control. Self run society.
5.	Availability of godown for the food grain storage no. of available godown is 5442	Availability of godown for the food grain storage 353 and 232 with Laghu Vanopaj Sangh total 353+232=585	Not necessary. Few societies, have their private godown.
6.	Availability of man-power Sahayak Samiti Prabhandhak and Salesman total No. are 13932	Availability of manpower. Manager, total no. are 1066	Self appointed employees.

12. Thus, the classification of the cooperative societies for the purpose of running fair price shops in rural areas is based on intelligible differentia and has a reasonable nexus with the object i.e. availability of essential commodities at controlled prices to public in general. Thus, the provisions of clause (6) can neither be said to be arbitrary nor discriminatory.

13. So far the submission made on behalf of the petitioners that the rule of estoppel would bind the State Government, as the petitioners acting on the representation made by the State Government have formed the cooperative

societies, is concerned the same need mention only to be rejected. It is well settled in law that principle of estopple does not operate against the law. [See: (2008) 14 SCC 228] The reliance placed by learned counsel for the petitioners on the decision of the Supreme Court in *Vij Resins Pvt. Ltd (supra)* is of no assistance to the petitioners as in that case the impugned Act was struck down on the ground that the same was hit by Article 31(2) of the Constitution of India as it took away the right to hold the property which is not the case here. Similarly the case of *Orient Paper Mills Ltd.* (supra) is also distinguishable. Under an executive order the State Government had granted assurance that industries would be granted exemption from payment of electricity duty. In the aforesaid context, it was held by the Supreme Court that the State Government is bound by the doctrine of promissory estoppel. Besides that no assurance was given by the State Government to the petitioners that the policy of allotment of fair price shops would never be changed.

14. So far as the submission made by the learned counsel for the petitioners that the provisions of Control Order 2009 are in contravention of the Order framed by the Central Government is concerned, it is clear from perusal of the provision of Public Distribution System (Control) Order, 2001 that the Central Government has left it to the State Government to decide the person in whose favour the licence should be issued to run fair price shops and it is for the State Government to decide as to who should be granted the licence to run fair price shop. There is no provision in Public Distribution System (Control) Order 2001 directing that a particular individual or a cooperative society has to be granted licence to distribute the essential commodities through fair price shop. Therefore, the submission that the provisions of Control Order 2009 are in contravention of the Control Order 2001 does not deserve acceptance and accordingly, the same is rejected.

15. In view of the preceding analysis the impugned provisions of the Control Order 2009 neither offend Article 14 nor Article 19(1)(g) of the Constitution of India. However, in the cases where the petitioners have challenged the order of cancellation of licence of fair price shops on merits, such petitioners would be at liberty to challenge the order of cancellation of licence of fair price shop in accordance with law. In the result, we do not find any merit in the writ petitions. The same are accordingly dismissed.

Petition Dismissed

I.L.R.[2012] M.P. 121

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 583/1994 (Jabalpur) decided on 13 September, 2011

RAMU SINGH & ors. ...Appellants

Vs.

SMT. BANDIBAI & ors. ...Respondents

A. ***Evidence Act (1 of 1872), Section 90–Presumption*–Period of 30 years has to be calculated from the date on which the document is tendered in evidence and not from the date of filing of the suit.** (Para 13)

क. *साक्ष्य अधिनियम (1872 का 1), धारा 90 – उपधारणा* –30 वर्ष की अवधि की संगणना दस्तावेज को साक्ष्य में प्रस्तुत करने के दिनांक से की जानी होगी और न कि वाद प्रस्तुत करने के दिनांक से।

***B.* *Transfer of Property Act (4 of 1882), Sections 3, 123 – Registration of will* – For a valid gift of immovable property, transfer must be affected by a registered instrument signed by or on behalf of donor and attested by at-least two witnesses.** (Para 14)

ख. *सम्पत्ति अन्तरण अधिनियम (1882 का 4), धाराएँ 3, 123 – वसीयत का रजिस्ट्रेशन* – अचल सम्पत्ति के वैध दान के लिए अंतरण को दाता द्वारा अथवा उसकी ओर से हस्ताक्षरित तथा कम से कम दो साक्षियों द्वारा अनुप्रमाणित रजिस्ट्रीकृत लिखत द्वारा प्रभावी किया जाना चाहिए।

***C.* *Evidence Act (1 of 1872), Section 90 – Presumption – Rebuttable* – Presumption under Section 90 is rebuttable – Once, the execution of the gift deed was denied by the defendants, then it was obligatory on the part of the plaintiff to prove the gift deed in accordance with the provisions of 68/69 of the Act.** (Para 14)

ग. *साक्ष्य अधिनियम (1872 का 1), धारा 90 – उपधारणा–खण्डन योग्य* – धारा 90 के अंतर्गत उपधारणा का खण्डन किया जा सकता है – एक बार जब प्रतिवादीगण द्वारा दान पत्र के निष्पादन को अस्वीकार किया गया, तब वादी के लिये अधिनियम के 68/69 के उपबंधों के अनुसार दान पत्र साबित करना बाध्यकारी था।

***D.* *Transfer of Property Act (4 of 1882), Section 123 – Gift* – Receiver should also prove that donor was the absolute owner of the property – Donor died prior to coming into force of Act, 1956, therefore**

she was having limited interest in the suit property and was not competent to give the suit property to plaintiffs in gift even though registered gift deed has been executed by her in their favour. (Para 15)

घ. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 123 – दान – प्रापक को यह भी साबित करना चाहिए कि दाता सम्पत्ति का आत्यांतिक स्वामी था – अधिनियम 1956 के प्रवर्तन से पूर्व दाता की मृत्यु हो गई, इसलिए वाद सम्पत्ति में उसका सीमित हित था और वाद सम्पत्ति वादीगण को दान करने के लिए वह सक्षम नही थी, यद्यपि उसके द्वारा उनके पक्ष में रजिस्ट्रीकृत दान पत्र निष्पादित किया गया है।

***E. Custom* – Custom is not only required to be pleaded but also to be proved by leading evidence – Where a caste is admittedly governed by Hindu law but it is asserted that there exists a special custom in derogation of that law, the onus rests upon those who assert the custom to make it out.** (Para 18)

ङ. रुढ़ि – रुढ़ि का केवल अभिवाक् करना अपेक्षित नही बल्कि साक्ष्य प्रस्तुत कर साबित भी करना होता है – जब स्वीकृत रूप से जाति हिन्दू विधि द्वारा शासित होती है, परंतु यह प्राख्यान किया गया कि उस विधि के अल्पीकरण में विशेष रुढ़ि विद्यमान है, उस रुढ़ि को साबित करने का भार उन पर होगा जो ऐसी रुढ़ि का प्राख्यान करते हैं।

Cases referred:

AIR (31) 1944 Nagpur 62, 1972 MPLJ 95, S.A. NO. 464/1979 decided on 08.02.1985, AIR 2002 MP 112, AIR 1975 SC 733, (1997)11 SCC 310.

Pranay Verma, for the appellants.
Janvi Pandit, for the respondents No. 1 & 2/Plaintiffs.
Akhilesh Singh, PL for the respondent No.3/State.

JUDGMENT

A.K. SHRIVASTAVA J :- This is defendants' second appeal, who have lost from both the Courts below. The suit of the plaintiffs has been decreed by learned Trial Court and the first appeal which was preferred has been dismissed by the impugned judgment and decree.

2. The facts necessary for the disposal of this Second Appeal lie in narrow compass. Suffice it to say that a suit for possession on the basis of title and for injunction was filed by the plaintiffs (respondent No.1 and 2) 31 years ago

on 28.11.1980 against the defendants in respect of certain agricultural land, which is the subject matter of the suit and description whereof has been mentioned in the plaint. In the suit the State of M.P. was impleaded by way of amendment as defendant No.7 according to the M.P. State Amendment under Order I Rule 3(B) of CPC.

3. The plain and simple case of the plaintiffs is that the suit property was owned by their mother namely Chamelibai, who gifted the same to them by a registered gift deed dated 18.02.1953 and accordingly the defendants came into the possession of the suit property. Further their case is that after the death of donor Chamelibai, the plaintiff No.1 went to another village and from time to time she was coming back in the village where disputed property is situated and both the plaintiffs were cultivating the land in question. The plaintiffs being the ladies, the defendants by taking undue advantage of their weakness took illegal possession of the suit property and did not permit them to sow the crop. The defendants do not have any right title and interest in the suit property and they are possessing the suit property by using their muscle power. Hence, the suit for possession on the basis of title (registered gift deed) has been filed by the plaintiffs praying that their possession be restored and further prayed to grant a decree of injunction restraining the plaintiffs not to interfere in their possession.

4. The defendants filed their joint written statement and denied the plaint averments. They also denied the title of the plaintiffs and further denied that any gift deed was executed by donor (Chameli bai) in their favour. By amending the written statement it has been further pleaded that the parties belong to Gond community and according to their custom which is a recognized custom, a daughter loses all interest in the property of her father after her marriage and the property remains in the family only, and further there is a custom in their community that a widow cannot gift the property left by her deceased husband and therefore even if Chamelibai has gifted the suit property by registered gift deed, since she was not having any right in the property of her deceased husband, she was not competent to gift it to the plaintiffs. On these pleadings, it has been prayed by the defendants that suit be dismissed.

5. The learned Trial Court framed necessary issues and specifically framed issue No.1 as to that whether the plaintiffs became owner of the suit property by virtue of gift deed dated 18.02.1953. The parties thereafter led their evidence and after recording the evidence, learned Trial Court found the suit

of the plaintiffs to be proved and eventually decreed the same. The first appeal which was filed by the defendants has been dismissed by the impugned judgment and decree.

6. In this manner, this second appeal has been preferred by the defendants.

7. This Court on 19.10.1994 admitted the appeal on the following substantial questions of law :-

(1) Whether due execution, attestation and validity of gift-deed Ex.P/1 has been made out under section 90 of the Evidence Act?

(2) Whether, the donee, the plaintiffs are debarred from acquiring absolute interest under section 14(1) of the Hindu Succession Act, 1956?

By pressing substantial question of law No.(2) Shri Pranay Verma, learned counsel for appellants submits that as per the case of plaintiffs Chamelibai wd/o. Ramlal and mother of plaintiffs, gifted the suit property on 18.02.1953 vide gift deed (Ex.P/1). By inviting my attention to the testimony of plaintiff No.1 Bandibai it has been put-forth by learned counsel that after the death of Ramlal, his widow Chamelibai also died within three years of his death and further he argued that after execution of the gift deed Chamelibai was alive for two years only. Hence according to learned counsel somewhere in the year 1952 Ramlal died and thereafter in the year 1955 Chamelibai had died and thus it is proved from the testimony of plaintiff No.1 herself that Chamelibai died earlier to coming into force of Hindu Succession Act, 1956 (in short "Act of 1956") which came into force w.e.f. 17.06.1956, therefore the donor (Chamelibai) who was having only limited interest of maintenance in the suit property being widow of Ramlal (who was owner of the property) would not become absolute owner of the suit property on coming into force of the Act of 1956, therefore, the gift deed (Ex.P/1) which was executed by her in favour of plaintiffs would not convey a valid title in the plaintiffs for the simple reason that she was not owner of the suit property and she was having only limited right of maintenance and therefore on account of death of Chamelibai in the year 1955 the disputed property devolved in the defendants, who are the revisioners. Learned counsel further submits that Hindu law is applicable on the Gond community.

8. Learned counsel for appellants further submits that there is no pleading

of plaintiffs that in the Gond community to which the parties belong, there is a valid custom that on account of death of husband, his widow will become absolute owner and in absence of pleading of valid and recognized custom which was alleged to be prevailing and without proving the same, although the parties are of Gond community the provision of Hindu law will be applicable on them and therefore Chamelibai was having limited right in terms of Section 3 of the Hindu Women's Rights to Property Act, XVIII of 1937 (in short "Act of 1937"). Learned counsel submits that having failed to plead and prove the custom that widow who was having limited interest under the Act of 1937 would become absolute owner of the property left by her husband in absence of male issue and further she was having any right to give the property in gift, it cannot be said that the gift deed (Ex.P/1) is a valid deed of conveyance. In support of his contention, learned counsel has placed heavy reliance on the decision of Division Bench of this Court in *Shamlal Shrikisan Mahesari v. Mt. Jiyabai w/o. Shrikisan and others* AIR (31) 1944 Nagpur 62. He has also placed reliance on *Sukhsen and another v. Shravan Kumar,* 1972 MPLJ 95, an unreported judgment of this Court in S.A. No.464/1979 *(Rupatiya Bai v. Sona Bai and another)* decided on 08.02.1985 and *Kailash Singh v. Mewalal Singh Gond* AIR 2002 Madhya Pradesh 112. These decisions pertain to Gond community only. Learned counsel has also placed heavy reliance on the decision of Supreme Court in *Harihar Prasad Singh and others v. Balmiki Prasad Singh and others* AIR 1975 SC 733 and submitted that a custom is required to be pleaded and proved and burden of proof lies on the existence of such a custom on a person who pleads it.

9. By pressing the substantial question of law No.(1) it has been canvassed by learned counsel for appellants that in the present case, no attesting witness to the gift deed has been examined and if that would be the position, the gift deed which is a document of title of the plaintiffs is not proved and plaintiffs stand nowhere.

10. On the other hand Smt. Janvi Pandit, learned counsel for respondents No.1 and 2 argued in support of the impugned judgment passed by learned two Courts below and submitted that since Chamelibai gifted the disputed property to plaintiffs vide registered gift deed dated 18.02.1953, the plaintiffs on coming into the force of Act of 1956 became absolute owner because under section 14(1) of the Act of 1956, a widow will become absolute owner irrespective of fact whether she had acquired property prior to coming into force of the said Act or thereafter and if that would be the position learned

counsel submits that plaintiffs acquired a valid title in them by virtue of gift-deed Ex.P/1 dated 18.02.1953 executed by their mother in their favour. In support of her contention, learned counsel has placed heavy reliance on the decision of Supreme Court *Surjit Kaur (Mst.) and others v. Arjan Singh and others (1997) 11 SCC 310.*

11. By putting a deep dent on the submission of learned counsel for appellants, it has been put-forth by Smt. Pandit that this second appeal has been admitted only on the aforesaid two substantial questions of law and no other question has been framed. Learned counsel has invited my attention to para 10 of the impugned judgment and submitted that prior to filing of the suit, the plaintiffs were in possession and for the cogent reasons First Appellate Court decreed the suit of restoration of possession and because no substantial question of law has been framed on this point, even if both the substantial questions of law are answered in favour of appellants, the suit of the respondents would not fail. By putting a hammer on the submission of learned counsel for appellants, it has been put-forth by Smt. Pandit that if Section 90 of the Evidence Act, 1872 (in short "Evidence Act") is considered in its true perspective because the document (Ex.P/1) is 30 years old when the suit was filed there is a valid presumption of its attestation and execution. Hence, it has been prayed by her that this appeal be dismissed.

12. 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) :

13. The contention of learned counsel for respondents that where a document purporting or proved to be 30 years old is produced from any custody, the Court may presume that the signature and every other part of the document which purports to be hand-writing of any particular person is that person's hand-writing and in case the document executed or attested that it was duly executed or attested by the person by whom it purports to be executed and attested. Thus, it is proved that gift deed (Ex.P/1) dated 18.02.1953 which is a 30 years old document, therefore section 90 of the Evidence Act is attracted. The suit was filed on 18.11.1980 and therefore on the date of filing of the suit 30 years were not completed. But, according to me, the date of filing of the suit is not the determining date to compute period of 30 years and indeed this period should be computed when the document was tendered in the evidence. On bare perusal of the gift deed Ex.P/1 dated 18.2.1953 this

Court finds that same was tendered in the evidence of plaintiff Bandibai on 18.02.1983 when she was examined as PW1 and therefore on the date when this document was tendered 30 years were already completed. In this regard Law of Evidence by Sarkar 17th Edition Page 1653 may be seen. But, section 90 of the Evidence Act speaks about presumptive value of 30 years old document and nothing more. This presumption is a rebuttal presumption and once the execution of the document of gift is denied by the defendants specifically in their written statement by taking a firm stand that it was never executed. The revenue record which has been filed by defendants it raises a doubt about the execution of this document. Hence it was incumbent upon the plaintiffs not only to prove the execution of the document of gift but the attestation was also required to be proved.

14. Under Section 123 of Transfer of Property Act, 1882 (in short "T.P. Act") which is in respect to the gift, it is clear that for a valid gift of immovable property, the transfer must be affected by a registered instrument signed by or on behalf of donor and attested by at-least two witnesses. The term "attested" is also interpreted in Section 3 of the T.P. Act and it would be condign to quote the said provision which reads thus;

> "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed t he instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Thus, according to me, the attestation of the gift deed was required to be proved according to the definition of the word 'Attested' in Section 3 of the T.P. Act. At this juncture, Section 68 of the Evidence Act is required to be taken into account which speaks about the proof of execution of a document required by law to be attested and as per this section if a document is required by law to be attested, it shall not be used as evidence until one attesting

witness atleast has been called for the purpose of proving its execution. Needless to say that a gift deed is required to be attested atleast by two witnesses and therefore attestation is required to be proved by examining atleast one attesting witness. It is not the case of the plaintiffs that attesting witnesses are not alive. Even if they are not alive, the legislature has taken note of this situation and has enacted Section 69 in the Evidence Act which pertains to proof where no attesting witness is found. Thus, I am of the view that since plaintiffs are basing their case and title on the basis of the registered gift deed (Ex.P/1) dated 18.02.1953, they were duty bound to examine at-least one attesting witness in order to prove the attestation of the gift deed and the plaintiffs cannot take aid of Section 90 of the Evidence Act.

15. Even if the presumption under Section 90 of the Evidence Act is drawn in favour of the plaintiffs, until and unless it is proved by the plaintiffs that Chamelibai who gifted the suit property to them on 18.02.1953 (Ex.P/1) was the absolute owner of the suit property on that date it cannot be said that plaintiffs acquired a valid title in them by the said gift deed. Hence, it is to be seen whether Chamelibai after the death of her husband would become the absolute owner of the suit property or not. Admittedly the property was of her husband Ramlal who died somewhere in the year 1952 and after his death Chamelibai was having only limited interest of maintenance in the suit property under the Act of 1937. Had she been alive on coming into force of the Act of 1956, certainly she would have become absolute owner of the suit property under Section 14(1) of the Act of 1956. But, since she died much prior to coming into force of the Act of 1956 and was having only limited interest in the suit property, she was not competent to give the suit property to plaintiffs in gift even though registered gift deed has been executed by her in their favour.

16. The substantial question of law No.1 is thus answered that attestation and validity of gift deed (Ex.P/1) is not proved because the attesting witnesses have not been examined and Section 90 of the Evidence Act is having only presumptive value and nothing more.

Regarding substantial question of law No.(2)

17. On going through the judgment of learned two Courts below and particularly the impugned judgment passed by learned First Appellate Court para 6 this Court finds that a finding has been arrived at by the said Court that on account of the death of Ramlal who was of Gond community, his entire right in the suit property devolved upon his widow Chamelibai and this is a

valid custom in the Gond community and therefore Chamelibai has rightly gifted the suit property to plaintiffs by registered gift deed (Ex.P/1). However, on bare perusal of the plaint nowhere it is gathered that any such custom has been pleaded by the plaintiffs and it has also not been proved by plaintiff (PW1) in her testimony. The plain and simple case of the plaintiffs is that by virtue of gift deed dated 18.02.1953 executed by their mother Chamelibai, they became the owner of the suit property. According to me, if a particular valid custom is prevailing in Gond community, it should have not only been pleaded but it was also required to be proved. In absence of any such pleading no conclusion can be arrived at that a particular custom is prevailing in that community.

18. In the present case, the factual position which has been carved out from the evidence of plaintiff No.1 herself is that somewhere in the year 1952 the husband of Chamelibai namely Ramlal had died and three years thereafter i.e. in the year 1955, Chamelibai also died. Thus, admittedly Ramlal and his widow died prior to coming into force of Act of 1956. I do not find any merits in the contention of learned counsel for respondents that the burden of proof was on the defendants to prove that a particular custom is prevailing in Gond community that on account of death of a husband the entire property would not devolve in his widow. According to me, if a particular party is pleading a particular custom in that situation that party is required to prove that custom. In the present case neither any such custom has been pleaded by the plaintiffs nor has it been proved by them. According to me, in absence of proving any custom to the contrary that provisions of Hindu law are not applicable in the Gond community, it would be deemed that Hindu law is applicable even on Gond community. The Division Bench of this Court in *Shamlal Shrikisan* (supra) has laid down the law that where a caste is admittedly governed by Hindu law but it is asserted that there exists a special custom in derogation of that law the onus rests upon those who assert the custom to make it out. The same view was taken by learned Single Bench of this Court in *Sukhsen* (supra), wherein, it has been held that although Gond community is not Hindu, but presumption is that they are governed by Hindu law unless the contrary is shown. The Single Bench of this Court in S.A.No.464/1979 *(Rupatiya Bai v. Sona Bai and another decided on 08.02.1985)* has also laid down the same principle of law and I apt to quote para 4 of the said judgment:-

"4. It cannot be counted, in view of the decision of this

Court in *Sukhsen* v. *Shravan Kumar,* 1972 M.P.L.J. 95, that there is a presumption that Gonds are governed by Hindu law, unless the contrary is shown. Accordingly, it was for the defendant to prove the contrary, which has not been done and the presumption of applicability of Hindu law to the parties is clearly available. The contrary conclusion reached by the first appellate Court was, therefore, clearly erroneous."

19. In an another decision of learned Single Bench in *Kailash Singh* (supra) it has been held that there should be a proper pleading and proof of such custom and because there is no pleading in that regard, therefore, this Court held that the provision of Hindu law would be applicable. Above all, the Supreme Court also in *Harihar Prasad Singh* (supra) has held that in the first instance it is for the plaintiffs to prove the existence of a particular custom and if they failed to prove it, they cannot succeed. Thus, in the present case it was for the plaintiffs to plead and prove the custom. Even if the custom which the defendants have pleaded by amending their written statement, has not been proved by them, it would not strengthen the case of the plaintiffs because first of all it was for the plaintiffs to prove the custom and then only the burden would shift on the defendants to plead the custom which they pleaded. Since plaintiffs have failed to prove the custom prevailing in Gond community, the provision of Hindu Law would be applicable.

20. I do not find any merits in the contention of learned counsel for respondents that under Section 14(1) of the Act of 1956 plaintiffs became absolute owner of the suit property for the simple reason that when this Act came into force on 17.06.1956 the donor Chamelibai had already died and therefore when the donor did not perfect any absolute title under Section 14(1), the plaintiffs who are stepping into the shoes of their donor Chamelibai would also not become absolute owner. The decision of *Surjit Kaur* (supra) placed reliance by respondents is not applicable because in the said decision the widow was alive when the Act of 1956 came into force. However, the situation in the present case is otherwise.

21. I also do not find any merits in the contention of learned counsel for respondents that plaintiffs' possession was found immediately before filing of the suit and therefore their suit has been rightly decreed and because no substantial question of law has been framed on this point, even if both the substantial questions of law are answered in favour of appellants, the suit of

plaintiffs would not be dismissed. The simple reason is that under Article 64 of the Limitation Act a suit for possession would lie on account of previous possession which is not based upon the title and in that suit only the previous possession of plaintiffs before filing of the suit is to be seen. But in the present case, the suit has not been filed on the basis of previous possession, on the contrary, it has been filed for possession on the basis of title and in this regard para 1 of the plaint is quite clear.

22. The substantial question of law No.2 is thus answered that donee-plaintiffs are debarred from acquiring absolute interest under section 14(1) of Act of 1956.

23. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree of learned two courts below are hereby set aside and the suit of the plaintiffs is dismissed with no orders as to costs.

Appeal allowed

I.L.R.[2012]M.P. 131
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava

S.A. No. 144/1998 (Indore) decided on 21 September, 2011

RATANLAL ...Appellant
Vs.
KISHANLAL & ors. ...Respondents

A. Evidence Act (1 of 1872), Section 90 – 30 years old document – **Presumption envisaged under Section 90 is applicable to the document and not for its photocopy.** (Para 11)

क. साक्ष्य अधिनियम (1872 का 1), धारा 90 – 30 वर्ष पुराना दस्तावेज–धारा 90 के अंतर्गत परिकल्पित उपधारणा दस्तावेज के लिए लागू होगी और न कि उसकी प्रतिलिपि के लिए।

B. Evidence Act (1 of 1872), Section 65 – Secondary Evidence – **Photocopy of a will is neither a primary evidence nor secondary evidence – Further more, the plaintiff is required to examine the person who took out the photocopy of the original – As only photocopy of the will was filed therefore, it is not proved.** (Para 12)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 65 – द्वितीयक साक्ष्य –

वसीयत की प्रतिलिपि न तो प्राथमिक साक्ष्य है और न ही द्वितीयक साक्ष्य – आगे और, वादी को उस व्यक्ति का परीक्षण करना अपेक्षित है जिसने मूल की प्रतिलिपि निकाली है – चूंकि वसीयत की केवल प्रतिलिपि प्रस्तुत की गई है, इसलिए वह साबित नही है।

C. Adverse Possession **– There are sufficient pleadings in the written statement with regard to adverse possession – Further the defendants have filed revenue records to show their possession–One of the Defendant's witnesses has admitted that plaintiff is possessing the suit property as bataidar – His possession would be for the defendants.** (Para 14)

ग. प्रतिकूल कब्जा – लिखित साक्ष्य में प्रतिकूल कब्जे के संबंध में पर्याप्त अभिवचन है – इसके अतिरिक्त प्रतिवादियों ने अपना कब्जा दर्शाने के लिए राजस्व अभिलेख प्रस्तुत किए हैं – प्रतिवादी साक्षियों में से एक ने स्वीकार किया है कि वादी बटाईदार के रूप में वाद सम्पत्ति का भोगी है – उसका कब्जा प्रतिवादीगण के लिए होगा।

Case referred :

AIR 1998 MP 46.

O.P. Solanki, for the appellant.
S.K. Shastri, for the respondents No.1 & 2.
Pramod Mitha, G.A. for the respondent No.3/State.

JUDGMENT

A.K. Shrivastava , J. :- This second appeal has been filed at the instance of plaintiff against the judgment of reversal. The Trial Court decreed the suit but in appeal the same has been reversed.

2. The facts necessary for the disposal of this second appeal lie in a narrow compass. Suffice it to say that a suit for declaration of bhumiswami right and injunction has been filed by the plaintiff in respect to certain agricultural lands, the description whereof is mentioned in the plaint and which is the subject matter of the suit. According to the plaintiff, the suit property was owned by one Chunnilal and having bequeathed the same by will dated 19.3.1961 in favour of plaintiff, after his death he became bhumiswami of the suit property and eventually he submitted an application for his mutation in the revenue record which was ordered to be mutated. According to the plaintiff he is

possessing the suit property as bhumiswami and further because defendants 1 and 2 are trying to interfere in his possession hence, a suit for declaration and injunction was filed by him on 21.6.1983.

3. The defendants 1 and 2 denied the plaint averments by filing a joint written statement and also filed counter claim praying to declare them as bhumiswami of the suit property on account of adverse possession and further the order of mutation dated 9.7.1982 be set-aside.

4. The learned Trial Court framed necessary issues and after recording the evidence the parties decreed the suit.

5. The First Appeal which was filed by defendants has been allowed by the impugned judgment and decree. In this manner this second appeal has been filed by plaintiff.

6. This Court on 10.8.1998 admitted the second appeal on the following substantial questions of law:-

> 1. "Whether the finding of the first appellate Court below regarding Will is perverse being contrary to the evidence on record ? and
>
> 2. "Whether the appellate Court below erred in law in decreeing counter claim of the respondent Nos. 1 and 2 on the basis of adverse possession when as per their own showing they were in possession of the suit property in pursuance of an agreement of sale?

7. The contention of Shri O.P. Solanki learned Counsel for the appellant is that having admitted the photocopy of the will in evidence by learned Trial Court, the learned First Appellate Court erred in substantial error of law in holding that Will is not proved. According to learned Counsel the copy of the Will Ex. P/1 is dated 19.3.1961 and is a 30 year old document and, therefore, under Section 90 of the Indian Evidence Act it shall be presumed that not only it was executed but the same was also duly attested, therefore, it was not incumbent upon the plaintiff to get the attesting witnesses examined to prove the execution and the attestation of the Will.

8. By addressing substantial question of law No.2 it has been contended by learned Counsel for appellant that defendants have not perfected their bhumiswami right by adverse possession for two reasons, firstly there is no

proper pleadings of defendants in that regard in their counter claim and secondly the plea has not been proved by placing cogent evidence on record. On these premised submissions it has been put forth by learned Counsel for the appellant that this appeal be allowed and by setting-aside the impugned judgment and decree passed by learned First Appellate Court judgment and decree passed by learned Trial Court be restored.

9. Combating the aforesaid submissions put forth by learned Counsel for the appellant Shri Shastri, learned Counsel appearing for the respondent submits that cogent reasons have been assigned by learned First Appellate Court holding that the Will is not proved and further defendants have perfected their title on the suit property by adverse possession.

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

Regarding substantial question of law No.1.

11. The contention of learned Counsel for the appellant is that because a copy of the document of Will Ex.P/1 dated 19.3.1961 was tendered in evidence of plaintiff on 4.1.1995, therefore, 30 years were completed and hence from the date when the copy of the document Ex.P/1 was tendered in evidence the period of limitation of 30 years should be computed. The arguments so advanced by learned Counsel for the appellant at the first blush appears to be quite attractive, however, on being scrutinized at length the same is found to be devoid of any substance. Indeed, the presumption envisaged under Section 90 of the Evidence Act would be applicable to the document itself and not for its copy. Since the document itself was not tendered in the evidence, there cannot be any presumption for a copy of the document.

12. According to me the photocopy is neither a primary nor secondary evidence and in this regard decision of this Court *Ramesh Verma and others etc. v. Smt. Lajesh Saxena and others* etc. AIR 1998 M.P. 46 may be seen. Apart from this even if it is stretched to the extent to bring the photocopy of Will Ex.P/1 within the sphere of secondary evidence, the plaintiff was required to satisfy the ingredients to Section 65 of the Evidence Act which speaks about the secondary evidence. The plaintiff was further required to examine the person who took out the photocopy of the original. This is very much essential because, it is a matter of common knowledge that by putting another writing written on a separate paper if that paper is kept upon the

original document and photocopy is taken out, the said photo copy cannot be said to be a true photocopy of the original document. Further it cannot be said that Ex.P/1 is the photocopy of the original Will because it is very easy to take out a photocopy from a document which itself was a photocopy. Therefore, if the person who took out the photocopy Ex.P/1 would have been examined, it could have been ascertained whether he took out the photocopy Ex.P/1 from the original document, or Ex. P/1 is the photocopy of the document which itself was a photocopy and further whether the document of which the photocopy Ex.P/1 was taken out was not at all tampered. Hence, I am of the view that in absence of tendering in the evidence a document of Will itself, a photocopy Ex.P/1 cannot take place of the original document and, therefore, Section 90 is not applicable and the finding of learned First Appellate Court in that regard is, hereby, affirmed.

13. The substantial question of law No.1 is thus, answered that Will on the basis which the plaintiff is claiming bhumiswami right is not at all proved and the finding of learned First Appellate Court in regard to the Will is not perverse.

Regarding substantial question of law No.2.

14. On going through the written statement of the defendants this Court finds that they have also claimed the counter claim in respect to the suit property pleading therein that they have acquired bhumiswami right by way of adverse possession on the suit property because they are possessing the suit property for last 35 years from the time of their predecessors as owner and in the knowledge of plaintiff, and hence they have perfected their bhumiswami right by adverse possession. In this regard para 5 of the pleading of the counter claim which is on page No.4 of the written statement may be seen. The written statement in which counter claim has been claimed was filed on 23.8.1984 and if the period of 35 years is computed it comes to year 1949. True the defendants have not filed revenue record from the year 1949 but certainly they have filed revenue record w.e.f. 1969-70 to 1983-84. In the revenue record Ex. D/1, D/2 and D/9 the possession of defendants' predecessor Mangilal is mentioned and thereafter defendant's possession has been mentioned. The evidence of defendants is also that they are possessing the suit property for more than 12 years. I do not find any merit in the contention of learned Counsel for the plaintiff-appellant that defendant's witness Yakub Khan says that he is possessing the suit property since 1968-69. On bare perusal of his statement this Court finds that he is the *'bataidar'* of the

defendants and, therefore, his possession would be for the defendants.

15. I have gone through the reasonings arrived at by learned First Appellate Court holding that defendants 1 and 2 have perfected their bhumiswami right by adverse possession on the suit property. The findings are based on correct appreciation of oral and documentary evidence on record and are pure finding of fact which cannot be interferred in this appeal.

16. The substantial question of law No.2 is thus answered that learned First Appellate Court did not err in law in decreeing counter claim of respondents 1 and 2 on the basis of adverse possession although they have shown that they were in possession of the suit property in pursuance to the agreement of sale.

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

Appeal dismissed

I.L.R.[2012] M.P. 136
APPELLATE CIVIL
Before Mr. Justice J.K. Maheshwari

M.A. No. 3800/2006 (Jabalpur) decided on 18 October, 2011

STATE OF M.P. & ors. ...Appellants
Vs.
DINESH SINGH ... Respondent

A. Civil Procedure Code (5 of 1908) – Order 39 Rule 1 and 2 – Temporary Injunction **– Temporary Injunction granted in a suit ceases its effect after the dismissal of the suit – Appellate Court is required to pass an order of injunction applying the same principle – After remand by Appellate Court, order of revival of injunction must be passed during the pendency of the suit otherwise, on dismissal of suit, the said order ceases its effect.** (Para 8)

क. सिविल प्रक्रिया संहिता (1908 का 5) – आदेश 39 नियम 1 व 2 – अस्थायी व्यादेश – वाद में प्रदत्त अस्थायी व्यादेश का प्रभाव वाद की खारिजी के पश्चात् समाप्त हो जाता है–इसी सिद्धांत को लागू करके व्यादेश का आदेश पारित करना अपीली न्यायालय से अपेक्षित है–अपीली न्यायालय द्वारा प्रतिप्रेषण के पश्चात्, व्यादेश के पुनः प्रवर्तन का आदेश वाद लंबित रहने के दौरान पारित किया जाना

चाहिए अन्यथा वाद खारिज होने पर, उक्त आदेश का प्रभाव समाप्त हो जाता है।

B. Civil Procedure Code (5 of 1908) – Order 39 Rule 2A – Breach of Injunction **– Suit was dismissed by order dated 6-1-1992 refusing leave to entertain the suit for granting interim injunction under Section 80(2) - Revisional Court passed an interim order and subsequently disposed off revision with liberty to file regular suit with further observation that the interim order passed by revisional court shall continue to remain in force till application for temporary injunction is decided by Trial Court - Suit filed by plaintiff was dismissed by order dated 11-2-1992 – Appellate Court allowed the appeal and remanded the case back to decide the suit afresh by order dated 25-3-1992 – Appellate Court did not pass any order of revival of injunction which was ceased on dismissal of suit – Trial Court granted temporary injunction on 14-10-1998 whereas the wall was demolished on 10-6-1997 – As no injunction was on force on 10-6-1997 therefore, appellants no. 2 to 5 have not committed breach of injunction.** (Para 10)

ख. सिविल प्रक्रिया संहिता (1908 का 5)–आदेश 39 नियम 2 ए–व्यादेश का भंग–धारा 80 (2) के अंतर्गत अंतरिम व्यादेश प्रदान करने हेतु वाद ग्रहण करने की अनुमति अस्वीकार करते हुए आदेश दि. 06.01.1992 द्वारा वाद खारिज किया गया–पुनरीक्षण न्यायालय ने अंतरिम आदेश पारित किया और बाद में इस अतिरिक्त संप्रेक्षण के साथ नियमित वाद प्रस्तुत करने की स्वतंत्रता के साथ पुनरीक्षण का निपटारा किया कि पुनरीक्षण न्यायालय द्वारा पारित अंतरिम आदेश तब तक प्रवर्तनीय रहेगा जब तक विचारण न्यायालय द्वारा अस्थायी व्यादेश के आवेदन को निर्णित नही किया जाता–वादी द्वारा प्रस्तुत वाद दि. 11.02.1992 के आदेश द्वारा खारिज किया गया–अपीली न्यायालय ने अपील मंजूर की और आदेश दि.25.03.1992 द्वारा प्रकरण को पुनः निर्णित करने के लिए प्रतिप्रेषित किया–अपीली न्यायालय ने व्यादेश के पुनः प्रवर्तन का कोई आदेश पारित नही किया, जो वाद खारिज हो जाने पर समाप्त किया गया–विचारण न्यायालय ने 14.10.1998 को अस्थायी व्यादेश प्रदान किया जबकि दीवार 10.06.1997 को ढहाई गई थी–चूंकि दि. 10.06.1997 को कोई व्यादेश प्रभावी नही था इसलिए अपीलार्थी क्र. 2 से 5 ने व्यादेश का भंग नही किया है।

Cases referred:

AIR 1963 MP 329, AIR 1935 Madras 365, AIR 1955 Mysore 91, AIR 1952 Trav-C 414, AIR 1958 AP 216, AIR 1930 Mad 514, AIR 1973 All 67, AIR 1976 All 264, AIR 2005 Gauhati 1, ILR 10 All. 506, (1887) All WN 297, AIR 1934 All 165, AIR 1937 All 682, AIR 1931 Rang 281, AIR 1918 Cal 39, AIR 1939 Mad 167, AIR 1921 Cal 101

Sarvashri R.D.Jain, A.G., Purushendra Kaurav, Dy.A.G. & Sanjay K.Agrawal, for the appellants.
Manish Datt, for the respondent.

ORDER

J.K. MAHESHWARI , J. :- The State Government along with their officers have preferred this appeal under Order 43 Rule 1(r) of the Code of Civil Procedure, 1908 challenging the order dated 8.9.2006 passed by IV Additional District Judge, Rewa in MJC No. 25/1997 allowing the application under Order 39 Rule 2A of CPC and for the breach of injunction, appeallant No. 2 has been directed to undergo civil imprisonment for one month while appellants No.3, 4 and 5 for 15 days.

2. The relevant facts of the case are that respondent instituted a suit in the Court of II Civil Judge Class-I Rewa on 6.1.1992 contending that he is the owner of the land bearing Khasra No. 236/1 and constructed a house and boundary wall theron. It was alleged that Tehsildar, Nazul, Rewa is trying to demolish the boundary wall constructed by him. The application seeking leave to entertain the suit and to grant the urgent interim relief was also filed under Section 80 (2) of the CPC which was rejected as per order dated 6.1.1992. Feeling aggrieved by the said order, a revision was preferred before the Additional District Judge, Rewa which was registered as Civil Revision No. 3/92 and on the same day an exparte interim order was passed directing that the boundary wall situated in Khasra No. 236/1 shall not be demolished and it be allowed to remain in the same position. The said revision was disposed of vide order dated 29.1.1992 with the observation that the respondent may institute a regular suit in the competent civil court along with an application for grant of temporary injunction, however it was observed that the interim order dated 6.1.1992 shall continue to remain in force till the application for temporary injunction is decided by the Trial Court. The respondent instituted a regular suit in the court of II Civil Judge Class- I Rewa which was registered as Civil suit No, 9-A/92. On filing an application under Order 7 Rule 11 of CPC by the other side, the suit was dismissed as per order dated 11.2.1992 with an observation that no orders are necessary on the application for temporary injunction. Feeling aggrieved by the said order, a regular Civil Appeal No. 13-A/92 was preferred which was allowed vide judgment and decree dated 25.3.1992 setting aside the order of the Trial Court and the matter was remanded back to decide the same afresh in accordance with law . After

remand, the application for temporary injunction was decided vide order dated 14.10.1998 restraining defendants from demolishing the boundary wall or to take any action in furtherance thereto. In the application under order 39 Rule 2A, it is stated that the boundary wall has been demolished on 10.6.1997 by the appellants, at that time the order passed by the Additional District Judge, Rewa dated 6.1.1992 was in existence, therefore the appellants No.2 to 5 have committed the breach of injunction for which they are liable to be punished.

3. The appellants in reply contended that the boundary wall of the respondent was demolished on 6.1.1992 even prior to passing of interim order by the District Judge, Rewa, however under the garb of injunction order the respondent has again constructed boundary wall obstructing a public way connecting the village Padra and Dheka. It is stated that the residents of these two villages were using the said way, however by constructing a boundary wall the right to use of the said passage of the villagers was being obstructed by respondent, therefore the order under Section 133 of the Cr.P.C. was passed by the Sub Divisional Magistrate, Tehsil Huzur District Rewa in the proceedings instituted on 24.12.1991 much before filing of the suit. The obstruction by the said boundary wall was causing nuisance to the public at large, however the SDM passed an order on 5.5.1997 in exercise of powers conferred under Section 142 of Cr.P.C. directing the police personnel to remove the obstruction, therefore the boundary wall was removed on 10.6.1997 and the thorough fair was made available for the residents of the villages Padra and Dheka. It was not disputed that appellant No. 2 was posted as Sub Divisional Magistrate while the appellants No. 3 to 5 were the police personnel posted at the relevant point of time. It is said that on the date of demolition i.e. 10.6.1997 the order of injuntion was not in existence, however question of breach of injunction do not arise. It is said that the suit itself was decreed directing payment of compensation in favour of respondent and in furtherance there to the State Government has compensated the respondent by making such payment. In such a circumstances, the order of punishment passed by the Trial Court for breach of injunction is liable to be set aside.

4. Shri. R. D. Jain, learned Advocate General for the appellants contends that the effect of order dated 29.1.1992 passed in Civil Revision No.3/92 has ceased on 11.2.1992, on account of dismissal of the suit itself. Against the said order an appeal was preferred which was decided on 25.3.1992 setting aside the order of dismissal of the suit and to decide it in accordance

with law. While passing such order, the appellate court has not revived the order of injunction. In absence of any order of revival, the injunction order was not in existence on the date of alleged breach. The trial Court passed an order of injunction on 14.10.1998 allowing the application for temporary injunction. Thus as per the allegations alleged in the application for committing the breach on 10.6.1997, the order of injunction was not in operation however the punishment as directed for the breach of injunction is liable to be set aside. Learned Advocate General has placed reliance on the Division Bench judgment of this Court in the case of *Madanlal Chhotelal and others Vs. Ramprakash Ghasiram,* AIR 1963 M.P. 329 wherein it was held that if the suit is dismissed and an appeal is preferred then the suit would be at the stage of the appeal, however unsuccessful plaintiff is required to invoke the power for revival of the order of injunction which ceases its effect on dismissal of the suit. While dealing with the said issue, the full Bench decision of the Madras High Court in the case of *Tavvala Veeraswami Vs. Pulim Ramanna and otehrs,* AIR 1935 Madras 365 has been distinguished and relying upon the Full Bench judgment of Mysore High Court in the case of *Gangappa V. Boregowda and others,* AIR 1955 Mysore 91 dissenting from the Full Bench decision of Travancore-Cochin High Court in the case of *Muhammad Abdul Khadir Vs. Padmanabha Pillai,* AIR 1952 Trav-C 414 (C) and relying upon the Division Bench judgment of Andhra Pradesh High Court in the case of *Kumaji Sare Mal Firm V. Kalwa Devadattam,* AIR 1958 A.P. 216 upholding the another Full Bench Judgment of Madras High Court in the case of *Balaraju Chettiar V. Masilamani Pillai,* AIR 1930 Mad. 514, propounded that on dismissal of the suit the interim order ceases its effect, and on filing the appeal it would not automatically revive. It is submitted that the Full Bench of Allahabad High Court in the case of *Abdul Hamid V. Karim Bux and others,* AIR 1973 Allahabad 67 have taken the same view, and also relied upon the judgment of Madhya Pradesh HIgh Court on the said issue. Subsequently the Single Bench of Allahabad High Court in the case of *Nagar Mahapalika Vs. Ved Prakash,* AIR 1976 Allahabad 264 has taken the same view. The Gauhati High Court in the case of *Smt Usha Rani . Banik Vs. Haridas Das and others,* AIR 2005 Gauhati 1 has also approved the same principle. Considering the views taken by various High Courts, it is apparent that the order of injunction ceases its effect on dismissal of the suit. On filing the appeal, if the appellate court has directed for remand, the order of injunction would not automatically revive unless and until the order of revival of injunction is passed. In the present case, while directing remand the order of revival of injunction was not passed

and in the suit injunction was granted on 14.10.1998 prior to the same the boundary wall was demolished on 10.6.1997, therefore there is no breach of the order of injunction by the appellants, however prayed that the order of punishment may be set aside.

5. Per contra Shri Manish Datt, learned counsel appearing on behalf of the respondent placing reliance on the Full Berch decision of Madras High Court in the case of *Tavvala Veeraswami (supra)* contended that on restoration of the suit the ancillary orders automatically revived. In the present case, after dismissing the suit as not maintainable and on filing the revision the revisional court first directed that the fresh suit may be filed by plaintiff and the order of injunction. shall remain in operation till the decision on application for temporary injunction. On filing a fresh suit, it was dismissed in second round, but after passing an order of remand by the appellate court, the order of injunction would revive automatically, however on the date i.e. 10.6.1997 the boundary wall was demolished in breach of the order of temporary injunction, therefore the appeallants No. 2 to 5 have rightly been punished by the Trial Court by passing the order impugned. In view of the foregoing, the prayer is made to dismiss the appeal.

6. After having heard learned counsel appearing on behalf of the parties and to decide the issue whether on the date of breach i.e. 10.6.1997 the order of temporary injunction passed by the revisional court would automatically revive on passing the order of remand at a subsequent stage and for the alleged breach to demolish the boudnary wall appellants may be punished ?

7. In facts of the present case and to deal with the said issue, the judgments so relied upon and other judgment on the issue is required to be seen. Allahabad High Court in the case of *Ram Chand V. Pitam Mal,* ILR 10 All. 506 laid down that on an attachment before judgment like a temporary injunction becomes functus officio as soon as the suit terminated. The observations of Hon'ble Mahmood, J. were based on an earlier Division Bench case of the Allahabad High Court in *Chunni Kuar V. Dwarka Prasad, (1887)* ALL WN 297. In the case of *Balaraju Chettiar (supra)* the Full Bench of Madras High Court followed the view taken by the Allahabad High Court and further by the Allahabad High Court in the case of *Dular Singh Vs. Ram Chander,* AIR 1934 All 165 and in *Ghulam Dastgir V. Mohammad Amin*, AIR 1937 All 682 reiterated the same principle. The Division Bench of the

Andhra Pradesh High Court in the case of *Kumaji Sare Mal Firm* (supra) dissenting with the Full Bench of Travancore- Cochin's view held that once attachment is ceased as a result of the dismissal of the suit by the trial Court it would not get automatically revive when the suit is decreed in appeal. The full Bench of Mysore High Court in the case of *Gangappa* (supra) while dissenting from the Travancore- Cochin High Court have laid down as under :

> "(10) An attachment before judgment is in the nature of an interlocutory order. It is an extraordinary relief granted to a plaintiff even before his claim is adjudicated upon and found to be true and if a suit is dismissed either for default or on its merits by the trial Court and the attachment before judgment has therefore to cease, he can certainly have not as much grievance as a person who has obtained a decree and attached property of the judgment-debtor whose right to attached property has been questioned and decided in summary proceedings and which are made expressly subject to a decision in a regular suit. Moreover it cannot also be urged that all interlocutory orders like say those passed on applications for temporary injunction the operation of which would have to cease on the dismissal of a suit, would automatically be revived or can be deemed to be in force without any further orders by an appellate Court or by the same Court after the suit is dismissed. To hold so would lead to obvious and real difficulties. It is not also as though the plaintiff in such a case has no remedy. He could always apply to the same Court if a suit which has been dismissed for default is restored to file or to an appellate Court which has also ample powers to grant an order of attachment before judgment under the provisions of S.107(2), Civil P.C. In any event the possibility of hardship cannot warrant the ignoring of the express provisions of 0.38, R.9 by which it is specifically laid down that an attachment before judgment shall cease by the dismissal of a suit. As observed by Mahmood, J. in 10 All 506 (E), all interim orders cannot survive the pendency of the main litigation."

8. The Division Bench of M.P. Hgh Court in the case of *Madanlal Chhotelal (supra)* has considered the Full Bench judgment of Madras High

Court in the case of *Balaraju Cheettiar (supra).* The learned Judges first examined the question whether the attachment before judgment would terminate, even though no formal order of withdrawal was passed by the trial court while dismissing the suit. According to them, such a formal order would not be ncessary and the attachment would terminate no sooner the suit is dismissed by the trial Court. The learned Judges thought that it would be too wide a proposition to say that an appellate decree per se would restore all the interlocutory orders passed in the original suit, as, in their opinion, the object of attachment being merely to satisfy any decree which may be passed in the suit. After reading the language of the Rules 5 and 6 to answer the issue said that the attachment contemplated relates to a decree passed in the suit by the trial Court alone and the appellate court, therefore opined that the attachment evidently is for a purpose which depends on the decree of the trial Court. If the trial dismisses a suit, attachment ceases, although no formal order of withdrawal is required. The appellate court might have decreed the suit, the order of attachment so terminated on dismissal of the suit would not be revived. Further referring the judgment in the case of *Pindi v. U. Thama,* AIR 1931 Rang 281, *Abdur Rahman V. Amir Sharif,* AIR 1918 Cal 39, held that the attachment before judgment terminates with the dismissal of a suit and the attachment itself did not survive after the dismissal of the suit. Further referring the judgment of *Dular Singh Vs. Ramchander (supra)* held on the analogy that the attachment before judgment terminated with the dismissal of the suit, any transfer effected by the judgment-debtor subsequent to the dismissal of the suit and before the passing of a reversing appellate decree, it would not be void. In *Ghulam Dastgir V. Mohammad Amin (supra)* the view taken by the Allahabad High Court in the case of *Ram Chand V. Pitam Mal (supra*) by Mr. Mahmood, J and also referring the another judgment of the Madras High Court in *Jali Basappa V. Heerada Rudrappa,* AIR 1939 Mad 167 and also of the calcutta High Court in the case of *Protap Chandra v. Saratchandra, AIR 1921 Cal 101* the same view was propounded. Thus considering various judgments of Madras High Court, Allahabad High Court, Andhra Pradesh High Court, Calcutta High Court, Full Bench judgment of Mysore High Court in the case of *Gangappa* (supra) accepted those views dissenting from the full Bench view of the Travancore Cochin High Court and the Madras High Court in the case of *Tavvala Veeraswami (supra).* The Judges of this court have reached on the same conclusion applying the different analogy. Mr. Tare, J relying upon the principle of stare decisis approved the views of various High Courts as referred

herein above and Mr. Newaskar, J held that the view taken by the Madras High Court in the case of *Balaraju Chettiar* (supra) and the Mysore High Court in the case of *Gangappa* (supra) is the only logical view on the question under consideration. Thereafter, the Single Bench of the Allahabad High Court has followed the same view in the case of Nagar *Mahapalika Vs. Ved Prakash* (supra) and the Gauhati High Court in the case of *Smt Usha Rani Banik* (supra) has also propounded the same view on the issue holding that the order of temporary injunction would be operative only till disposal of the suit, it ceases its effect on dismissal of suit, the order of remand passed in appeal would not be automatic revival of injunction order. Rule 1 of Order 39 of CPC makes it clear that the temporary injunction may be granted in any suit where the facts have been proved by the affidavit or otherwise showing that the property in dispute is being wasted or alienated by the defendant or by any party. It has further been clarified that the court may pass an order restraining such party until disposal of the 'suit' or until further orders. Thus Rule 2 of Order 39 deals with the injunction to restrain repetition or continuance of breach in a suit. In view of the language of Order 39 Rule 1 and 2 of CPC, the court may pass an order until further orders as it things fit or until the disposal of the suit. Thus, the word 'suit' enumerated in Rule 1 and 2 of Order 39 of CPC would not be read as 'appeal' for grant of injunction, until specifically directed. Thus after dismissal of suit the appellate court is required to pass an order of injunction applying the same principle. After remand by appellate court, order of revival of injunction must be passed during the pendency of suit otherwise on dismissal of suit the said order ceases its effect.

9. In view of the foregoing discussion, this Court is bound by the view taken by the Division Bench in the case of *Madanlal Chhotelal* (supra) and in full agreement to the reasoning given by the Full bench of Mysore High Court in the case of *Gangappa* (supra) and the Full bench judgment of the Allahabad High Court in the case of *Abdul Hamid* (supra) and in my opinion if an order of temporary injunction is passed in civil suit, it ceases its effect on dismissal of the suit. On filing an appeal and on allowing the same by setting aside the said order of dismissal of the suit by an order of remand the effect of order of injunction would not automatically revive. The appellate court on remand ought to have passed the order of revival of temporary injunction during the pendency of a suit. If the order of revival has not been passed, on the allegation of demolition of the boundary wall for the breach of injunction, punishment cannot be directed as per the language of Order 39 Rule 1 and 2

of CPC, however such language is not required to be used in a directory manner particularly in a case of breach of injunction when the consequence is of punishment of individual persons by sending them into the custody or for civil prison.

10. In view of the aforesaid legal position, the facts of the present case are required to be analyzed. The suit filed by respondent was instituted on 6.1.1992, which was dismissed refusing leave to entertain the suit for granting interim injunction. On filing revision, the revisional court in the first round granted injunction on 6.1.1992 in Civil Revision No. 3/1992 restraining the appellants to not to demolish the boundary wall. The said revision was disposed of vide order dated 29.1.1992 with a liberty to the respondent to institute a regular suit in the competent civil court directing that the interlocutory order shall continue till the decision on the application for temporary injunction in the suit. Thereafter, a Regular Civil Suit No. 9-A/92 was filed which was dismissed by allowing the application under Order 7 Rule 11 of CPC vide order dated 11.2.1992 and it was observed that as the suit itself is dismissed, however the order on the application for temporary injunction is not necessary. On filing an appeal, it was allowed as per order dated 25.3.1992 and the Trial Court was directed to decide the suit afresh in accordance with law.' While passing the said order of remand, the appellate court has not passed any order of revival of the injunction which was ceased on dismissal of civil suit. Admittedly, on the application for temporary injunction the trial Court granted injunction on 14.10.1998 while breach of injunction by demolition of boundary wall as alleged on 10.6.1997 during such period the appellate court or trial court has not passed any order for revival of the injunction order of its continuation. Thus the Trial Court was not justified to record the finding of breach of injunction for an act committed on 10.6.1997, however the finding of guilt for the said breach and to direct the punishment of appellants No.2 to 5 is wholly unsustainable in law.

11. In view of the foregoing discussions, the appeal filed by the appellants is hereby allowed. The order dated 8.9.2006 passed by IV Additional District Judge, Rewa in MJC No.25/97 holding the appellants No.2 to 5 guilty and to direct to undergo the sentence, is hereby set aside. In the facts and circumstances of the case, the parties are directed to bear their own costs.

Appeal allowed.

I.L.R.[2012]M.P. 146
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe

S.A. No. 278/1995 (Jabalpur) decided on 10 November, 2011

KULWANT KAUR (SMT.) & anr. ...Appellants
Vs.
SUKHRAJE & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 4 – Pleadings – Suit for cancellation of Sale deed – **Where it is pleaded by the plaintiff that sale deed was executed by way of security for the loan and was nominal in nature and was not intended to be acted upon, the Courts below have not committed any error in decreeing the suit filed by the plaintiff.** (Para 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 4 – अभिवचन – विक्रय विलेख के निरस्तीकरण के लिए वाद – जब वादी द्वारा अभिवाक् किया गया है कि विक्रय पत्र को ऋण के लिए प्रतिभूति के रूप में निष्पादित किया गया और नाममात्र प्रकृति का था तथा उस पर कार्यवाही किये जाने के आशय से नही था, वादी द्वारा प्रस्तुत वाद डिक्रीत करने में निचले न्यायालयों ने कोई भूल कारित नही की है।

Cases referred:

AIR 1936 PC 70, (1980) 1 MPWN 38, AIR 1978 SC 484, (1999) 1 SCC 47, (2010) 4 SCC 518, AIR 1977 SC 1158, (2007) 5 SCC 614, AIR 1976 SC 461, (1999) 6 SCC 337, AIR 1987 SC 1242, (2005) 12 SCC 121, (2011) 7 SCC 639,

Ravish Agrawal with *Abhishek Singh*, for the appellants.
R.P. Agrawal with *Anuj Agrawal*, for the respondents.

ORDER

ALOK ARADHE, J. :- This appeal has been preferred by the defendants who have lost in both the courts. This Court vide order dated 08.8.1995 while admitting the appeal had framed the following substantial question of law:-

"Whether in absence of plea that the sale Ex.D.1 dated

25.1.1983 was executed as a collateral security for repayment of loan raised earlier by the plaintiff a decree for cancellation of sale-deed on such a finding could be passed?"

2. The facts, giving rise to filing the appeal, briefly stated, are that the original plaintiff Late Kripal Verma filed the suit on the ground that the original plaintiff was the owner of the suit house. The original plaintiff and defendant No.2 were neighbours and friends. The original plaintiff used to take loan from defendant No.2 from time to time. On 25.1.1983 the defendant No.2 informed the Original Plaintiff that he has to repay a sum of Rs.5000/- to defendant No.2 on account of loan taken by him and he should acknowledge the same in writing. The plaintiff agreed to acknowledge the debt. It was further averred that defendant No.2 got the original plaintiff drunk and obtained his signature on certain stamp papers, in the state of intoxication. However, in pursuance of alleged sale deed possession of the house was never delivered to defendants and the plaintiff continues to be in possession of the suit house. Later on, original plaintiff learnt that infact by misrepresentation the defendant No.2 got the sale-deed executed in respect of suit house from him on 25.1.1983 in favour of his wife, namely, defendant No.1 which does not convey any title. Accordingly, the relief of cancellation of the sale deed dated 25.1.1983 as well as permanent injunction was sought restraining defendants from interfering with his possession over the suit house.

3. The defendants filed the written statement in which, *inter alia*, it was pleaded that there was no loan transaction between the original plaintiff and the defendants. The plaintiff after obtaining the sale consideration of Rs.5,000/- had executed the sale deed in favour of the defendant No.1. The defendants are in possession of the suit house. However, the plaintiff was permitted to occupy the suit house as tenant as he had no alternative accommodation. It was further pleaded that the plaintiff had paid the rent upto June, 1983. Thereafter he has stopped paying rent. An objection with regard to valuation of the relief claimed in the suit was also taken on behalf of the defendants.

4. The trial Court after recording the evidence of the parties, by judgment and decree dated 07.10.1988 decreed the suit preferred by the plaintiff. The trial Court on the basis of the meticulous appreciation of evidence on record, *inter alia*, held that the relationship of landlord and tenant does not exist between the parties to the suit. It was further held that the sale deed was executed as a security for loan taken by the original plaintiff which was nominal

and was not intended to be acted upon. Being aggrieved by the aforesaid judgment and decree, the defendants preferred an appeal. The appellate Court vide judgment and decree dated 05.1.1995 has affirmed the findings recorded by the trial Court.

5. Mr.Ravish Agrawal, learned senior counsel for the appellants submitted that there is no plea in the plaint that the sale in question is nominal and the sale deed was executed to secure the loan which was allegedly advanced to the original plaintiff. In the absence of any plea in this regard the courts below have committed an error of law in decreeing the suit of the plaintiff. It was further submitted that the trial Court did not frame any issue with regard to character of the document in question, namely, the sale deed dated 25.1.1983, Exhibit-D-1 being nominal. It was also submitted by learned senior counsel that the judgment and decree passed by the trial Court as well as the appellate Court are patently erroneous and illegal.

6. On the other hand, Shri R.P.Agrawal, learned senior counsel for the respondents while drawing attention of this Court to the averments made in paragraphs 3 to 13 of the plaint submitted that if the averments made in the plaint are read as a whole, it is apparent that the plaintiff had taken loan from the defendants from time to time and with a view to secure the loan he had executed the document in question. It was further submitted that the plaintiff had executed the document in question as he wanted to acknowledge the debt in writing however, there was misrepresentation on behalf of the defendants with regard to nature of the document in question. Learned senior counsel for the respondent while referring to finding of the trial Court as well as the appellate Court submitted that the findings recorded by the trial Court as well as the appellate Court are based on meticulous appreciation of evidence on record. In support of his submissions learned senior counsel for respondent has placed reliance on the decisions in the cases of *Tyagaraja Mudaliyar and another vs. Vedathanni*, AIR 1936 PC 70 and *Bundabai vs. Rama*, (1980) 1 MPWN 38.

7. I have considered the submissions made on both sides. The object of the pleadings is generally to see that each side is made aware to the questions in issue in order to enable them to bring forward their proper defence. The object relating to pleadings in civil cases are intended to give the intimation to each side of the case of other, so that it may meet the case set up by the other side and to enable the Court to determine what is real issue between the

parties. [See *Ganesh Trading Company vs. Moji Ram*, AIR 1978 SC 484, *Virendra Kashinath Ravat and another vs. Vinayak N. Joshi and others*, (1999) 1 SCC 47 and *State of Maharashtra vs. Hindustan Construction Company Limited*, 2010) 4 SCC 518]. The pleadings have to be interpreted not with formalistic rigor but with latitude or awareness of low literacy of poor people. [See: *Manjushri Vs. B.L.Gupta*, AIR 1977 SC 1158 and *Hardesh Ores (P) Ltd. vs. Hede and Company*, (2007) 5 SCC 614]. Even if the pleadings are loosely drafted the Court should not scrutinize the pleadings with such meticulous care so as to result in genuine claim being defeated on trivial grounds. [See: *Madan Vs. Mamraj*, AIR 1976 SC 461]. The Court has to look into the pleadings with a view to do essential justice in the case and to read the pleadings as a whole to ascertain its true import. The substance of the pleadings has to be seen and the intention of the parties is to be gathered primarily from the tenor and the terms of the pleadings taken as a whole. In *Syed Dastagir vs. T.R.Gopalakrishna Setty*, (1999) 6 SCC 337 it has been held by the Apex Court in construing a plea in any pleading courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. To gather true spirit behind a plea it should be read as a whole. In *Ram Sarup Gupta (dead) by L.Rs. vs. Bishnu Narain Inter College and others*, AIR 1987 SC 1242 it has been that whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that inspite of deficiency in the pleadings parties knew the case and they proceed to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. [See also: *Ram Bhual vs. Ambika Singh*, (2005) 12 SCC 121 and *State of Madhya Pradesh vs. Narmada Bachao Andolan and another*, (2011) 7 SCC 639]

8. In order to answer the substantial question of law framed by this Court, the averments made in the plaint are required to be carefully scrutinized in the context of well settled legal position with regard to pleadings. In paragraph 3 of the plaint, the plaintiff has stated that he and defendant No.2 are neighbors and friends. The plaintiff from time to time used to take loan from defendant No.2. In paragraph 4 of the plaint the plaintiff has stated that he is low paid employee and only knows to put his signature. In paragraph 5 of the plaint it is averred that on 25.1.1983 the defendant No.2 informed him that plaintiff has to pay a sum of Rs.5000/- on account of loan taken by him and, therefore,

he should acknowledge the debt in writing. Thereupon, the plaintiff agreed to acknowledge the debt in writing on stamp paper. In paragraph 6 of the plaint it is stated that on 25.1.1983 the defendant No.2 took him to liquor shop and got him drunk. In paragraph 7 of the plaint it is pleaded that defendant No.2 and another person took the plaintiff to the Court where he was made to sign on certain blank stamp papers. It is also averred that contents of the document were not read over to him and the plaintiff was only informed that his signatures have been obtained on the stamp papers with regard to the loan taken by him. In paragraph 8 the plaintiff has stated that he was thereafter taken to the office of Sub Registrar where the query was put to him only about receipt of Rs.5,000/-. Since the plaintiff was in state of intoxication, therefore, he answered the query in the affirmative. In paragraph 9 the plaintiff has stated that he is in possession of the suit house as the owner. On 18.5.1985 when the plaintiff stored material for construction of the boundary wall, the defendant No.2 prevented the plaintiff from raising construction and informed the plaintiff that he has already purchased the suit house. In paragraph 12 of the plaint it is stated that thereupon the plaintiff made enquiries and learnt that document No.2 has got the sale deed executed in favour of defendant No.1 in lieu of loan taken by the plaintiff by playing fraud. It is further stated in paragraph 12 of the plaint that, in fact, the plaintiff has never sold his house to the defendants and defendant No.1, in fact, never visited the office of Sub Registrar. In paragraph 14 of the plaint it is pleaded that the plaintiff is in possession of the suit house and the possession of the same was never delivered to the defendants No.1 & 2. The original sale deed is in possession of the plaintiff and the value of the suit house is more than rupees thirty-thirty five thousand.

9. If the averments made in paragraphs 3 to 14 of the plaint are read in entirety it is apparent that, as per the case setforth in the plaint, the plaintiff was not only kept under misrepresentation as to character of the document but as well as to its contents. The sum and substance of the pleadings of the plaintiff is that the plaintiff has not sold the suit house to defendants. However, by keeping him in dark about the nature of document as well as its contents, the sale-deed was got executed and the plaintiff was made to understand that he is acknowledging his liability to pay the debt. The sale-deed was not acted upon as the plaintiff continued to be in possession. Thus, the sale-deed was nominal and was not intended to be acted upon. The parties knew the case and they proceeded to trial by producing the evidence. It is pertinent to mention that in the first appeal the plea with regard to deficiency in the pleadings was

not taken by the defendants. For the aforementioned reasons it is held that it is pleaded by the plaintiff that sale deed was executed by way of security for the loan and was nominal in nature and was not intended to be acted upon. Therefore, the Courts below have not committed any error in decreeing the suit filed by the plaintiff. The substantial question of law is answered accordingly.

10. In the result, the appeal fails and is hereby dismissed with costs.

Appeal dismissed

I.L.R.[2012]M.P. 151
APPELLATE CIVIL
Before Mr. Justice K.K.Trivedi

S.A. No. 242/1995 (Jabalpur) decided on 17 November, 2011

LILAWATI (DECEASED) THROUGH LR's ...Appellant
Vs.
VISHRAM & ors. ...Respondents

A. Limitation Act (36 of 1963) – Article 65 – Suit for possession – When may be found beyond limitation **– Plaintiff failed to prove that suit land was mortgaged by her with the defendant and the finding of trial Court was not challenged by her in First Appellate Court – Plaintiff could not point out from which date the suit land was taken in possession by defendant – Defendant claimed that he is in possession of the suit land right from 1961-62 on basis of unregistered sale deed (Ex. D/4) – Held – Finding of First Appellate Court that suit was barred by limitation and that no decree of possession could be granted, do not find any error – Appeal dismissed.** (Para 9,11)

क. परिसीमा अधिनियम (1963 का 36) – अनुच्छेद 65 – कब्जे के लिए वाद – कब परिसीमा से परे पाया जा सकता है – वादी साबित करने में असफल रही कि वाद सम्पत्ति उसके द्वारा प्रतिवादी के पास बंधक दी गयी थी और प्रथम अपीली न्यायालय में उसके द्वारा विचारण न्यायालय के निष्कर्ष को चुनौती नही दी गई– वादी यह नहीं दर्शा पाई कि प्रतिवादी द्वारा वाद भूमि का कब्जा किस दिनांक से लिया गया–प्रतिवादी ने दावा किया कि अरजिस्ट्रीकृत विक्रय पत्र (प्र.डी.4) के आधार पर सन् 1961–62 से वाद भूमि उसके कब्जे में है – अभिनिर्धारित – प्रथम अपीली न्यायालय का निष्कर्ष कि वाद परिसीमा से वर्जित था और कब्जे की कोई डिक्री प्रदान नही की जा सकती, में कोई त्रुटि नही पाई जाती – अपील खारिज।

B. Registration Act (16 of 1908), Section 49 – Unregistered

sale deed **– Unregistered document not relied for settlement of a claim, of the defendant/respondent by the lower appellate Court – There was no question of making application of the bar of Section 49.** (Para 9)

ख. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 49 – अरजिस्ट्रीकृत विक्रय पत्र – निचले अपीली न्यायालय द्वारा प्रतिवादी/प्रत्यर्थी के दावे का निपटारा करने के लिए अरजिस्ट्रीकृत दस्तावेज पर विश्वास नही किया गया – धारा 49 के वर्जन को लागू करने का कोई प्रश्न नही था।

Cases referred:

2009 (4) MPLJ 315, 2010(1) MPHT 265, 2009 (1) MPLJ 176.

P.S. Gaharwar, for the appellant.
Imtiaz Hussain, for the respondents.

JUDGMENT

K.K. Trivedi , J. :- This Second Appeal under Section 100 of the Code of Civil Procedure is by plaintiff against the reversing judgment and decree passed by the First Appellate Court. The appellant/plaintiff filed a suit for possession of land bearing Khasra No. 95 Area 2.14 Dismil of village Sonaura, Tehsil Rampur Baghelan District Satna against the respondents alleging that in fact the aforesaid land was mortgaged with the respondent No.1 and when the appellant tried to get the said mortgage redeemed, the respondents refused to deliver the possession therefore, the suit was required to be filed. It was contended that the respondents have started saying that the suit land was purchased and, therefore, there was no requirement of returning the possession after redemption of mortgage. It was further alleged that the respondent No.1 was trying to grab the land of the appellant therefore, suit was required to be filed.

2. The respondents/defendants contested the suit categorically contending that the suit land was in fact given in partition and the said land was purchased by respondent No.1 by un-registered sale deed for an amount of Rs.225/-. From the date of purchase the respondent No.1 was continuously in possession of the said suit land and was cultivating the same. There was no question of any acquisition of right by inheritance in favour of the appellant/plaintiff as the suit land was already sold by the mother of the original appellant/plaintiff and this fact was well within the knowledge of the appellant. Since the suit land was purchased from the member of the family mutation of the land was not got done in the revenue papers. When the emergency was enforced in the

country and instructions were issued by the Revenue Authorities, the respondent No.1 got his name mutated over the land in suit in the revenue records. It was categorically denied that the suit land was ever mortgaged with the respondent No. 1. A plea of adverse possession was also raised.

3. The trial Court after framing of the issues recorded the evidence of the parties. The definite finding was given by the learned trial Court with respect to the plea of mortgage raised by the appellant as issue No.2 was specifically framed in the following manner :-

> "2(a) Whether the plaintiff has mortgaged the suit land with respondent No.1 ?
>
> (b) Whether the plaintiff is entitled to get the said mortgage redeemed?"

4. The trial Court after recording the evidence categorically held that this issue was not proved by the appellant/plaintiff. Admittedly no appeal was filed against such finding of the learned trial Court by the appellant/plaintiff. Such a finding is therefore final and binding on the appellant and she could not travel beyond the same.

5. If the plea of mortgage raised by the appellant/plaintiff was not proved, whether the suit for simplicitor possession was well within time or not, this particular aspect was not examined by the trial Court. The appellant/plaintiff has never disputed that the suit land was transferred by an un-registered sale deed dated 09.03.1962 (Exhb. D-4). Though the same was not a registered document but this has been used only for the purposes of demonstrating as to how the respondent No.1 came in possession of the land in suit. This particular aspect was also not disputed by the appellant/plaintiff that the suit land was in possession of the respondent No.1. However, no definite date could be given by the appellant in her entire plaint, indicating as to how and when the appellant was dispossessed from the land. Her plea was only this much that the land was mortgaged with the respondent No.1 in the year 1973-74 and this particular fact was not found proved by the trial Court. According to plaintiff, respondents were in possession of the said land for a long time which according to her were in fact '*tisovarsh*'. This itself is enough to demonstrate that in fact deliberately the appellant/plaintiff has not given definite date on which the respondent No.1 had taken possession of the suit land. Admittedly, the suit was filed on 01.11.1980. If the plea that the suit land was purchased by respondent No.1 is to be accepted then the possession of respondent No.1

on the suit land would be right from the year 1962. The law of limitation prescribes limitation for filing of suit for possession which is 12 years. From 1962 till 1980, no litigation was brought by the appellant/plaintiff and therefore, the suit as filed by the appellant was barred by limitation. This particular aspect was not examined by the trial Court and the suit for possession was decreed in favour of the appellant, though a categorical finding was given that the suit land was not mortgage by the appellant with the respondent No.1.

6. Finding recorded by the trial Court in paragraph 20 and 21 in its judgment categorically show that marshalling of evidence of the appellant/ plaintiff was rightly done. It was found that the appellant/plaintiff was though stating to have best evidence available but failed to produce such evidence in proof of the fact that the land in suit was ever mortgaged by her with the respondent No.1. As has been mentioned hereinabove, the appellant/plaintiff has not challenged such findings of the trial Court in the appeal and as such it is not open to examine the validity of such findings of the trial Court.

7. As the suit was partially decreed by the trial Court in favour of the appellant/plaintiff only with respect to the possession of the suit land, a regular First Appeal was filed by the respondent No.1 before the lower Appellate Court. Learned lower Appellate Court examined the entire evidence of the parties and reached to the definite conclusion that the learned trial Court erred in decreeing the suit in favour of the appellant/plaintiff for grant of possession when the claim relating to mortgage of the suit land made by the appellant/ plaintiff was not found proved. The learned lower Appellate Court went to examine as to whether the suit land was taken in possession by the respondents /defendants in the year 1974-75 or prior to that. The lower appellate Court reached to the conclusion that as per the document available on record it was to be held that the respondent No. 1 was put in possession of suit land some time in the year 1961-62 and since the suit was filed in the year 1980 that is after a period of 12 years, the suit itself was barred by limitation. Learned lower Court thus reached to the conclusion that the finding recorded by the learned Civil Court with respect to the issues No. 1,5,7 and 8 were not correct and the said findings were set aside.

8. Learned counsel for the appellant/plaintiff has contended that the entire findings have been given by the learned lower Appellate Court only on the basis of one un-registered document (Exb.D-4) which is said to be a sale deed for the suit land executed by the mother of the appellant. It is contended by the learned counsel for the appellant that as per the provisions of Section

17 of the Indian Registration Act, 1908, a document of transfer could not have been treated to be valid document of transfer unless it is registered. It is contended that the value of the suit property was said to be Rs.225/- on the date of sale which is more than Rs.100/- and, therefore, the registration of a document was necessary. It is further contended by the learned counsel for the appellant that as per Section 49 of the Registration Act, such a document could not have been read in evidence at all. Learned counsel for the appellant has put his reliance heavily on a decision rendered by the Apex Court in the case of *Suraj Lamp and Industries Private Limited through Directors Vs. State of Haryana and another* 2009 (4) MPLJ 315. Learned counsel for the appellant has contended that in view of the specific law laid down by the Apex Court in paragraph 8 of the report, the registration of such a document of transfer was must.

9. True it is that registration of a document was necessary. However, only a defence plea was raised by defendant No. 1 that the land in suit was purchased by him and it was not mortgage by appellant/plaintiff as claimed. He was not asking for any other thing except indicating that he was in possession of the land in suit from the date the said document was executed. Thus, if the appellant was of the view that such a document was not to be accepted at all or that such was not a valid document, it was necessary for the appellant to make amendment in the plaint and challenge the validity of such document. This was not done. On the other hand, the appellant utterly failed to prove the fact with respect to the mortgage of the suit land. The learned lower Appellate Court has considered only one aspect whether the suit filed by the appellant was within limitation, for the purposes of grant of decree of possession, as was granted by the trial Court or whether the suit was liable to be dismissed on this count. Factum of delivery of possession to the respondent No.1 was not categorically proved by the appellant/plaintiff. On the other hand, the respondent No.1 firstly claimed that he took possession of the land in suit when the un-registered sale deed (Exhibit D-4) was executed in his favour and there was no question of any mortgage of the suit land by the appellant/plaintiff with the respondent No.1. In alternate, the respondent No.1 claimed that since he is in possession of the suit land right from the year 1961-62, this fact was well within the knowledge of appellant/plaintiff and more than 12 years of period has expired therefore, he has perfected his title over the land in suit by adverse possession. This particular aspect was examined by the learned lower Appellate Court and it has been said that, if the appellant was not in possession of the suit land as she herself was asking for decree of

possession of the suit land, she could not point out from which date the land in suit was taken in possession by the respondent No.1, it is to be inferred on the basis of evidence of the parties that the respondent No.1 was in possession of the land from the date when he alleges that the land was purchased by him through Exhibit D-4. That being so, in the opinion of this Court un-registered document Exhibit D-4 was not relied for settlement of a claim of the respondent No.1 by the lower Appellate Court. Therefore, there was no question of making application of the bar of Section 49 of the Registration Act for reaching to this particular finding with respect to the possession of the suit land by respondent No.1. The law laid down by the Apex Court as relied by the learned counsel for the appellant does not help the appellant.

10. Learned counsel for the appellant has further relied on the decision of this Court in the case of *Natthu Khan Vs. Komal and others* 2010 (1) MPHT 265. It is contended that the Court below was required to decide the admissibility of the document (Exhibit D-4) in terms of the provisions of Section 17 and 49 of the Registration Act and then only to record any finding. As has been discussed hereinabove the Courts below were not relying on such a document to grant any benefit to respondent No.1 on the strength of such a document. Therefore, it would not require to conduct an enquiry whether the registration of such a document was necessary or not and whether such a document was admissible in evidence or not ? The next contention of the learned counsel for the appellant is that unless the duty is paid on such a instrument it is not to be admitted in the evidence. For the said purposes the learned counsel for the appellant has relied upon the decision of this Court in the case of *Narbada Prasad Agrawal Vs. Tarun Bhawasar* 2009 (1) MPLJ 176. In view of the aforesaid discussion, the law laid down by this Court as relied by the learned counsel for the appellant is not helpful to him.

11. The learned Lower Appellate Court has very categorically examined the statement of witnesses and has reached to the definite finding that the suit of the appellant was barred by limitation and that no decree of possession could have been granted to the appellant. In view of the specific finding reached by the learned Lower Appellate Court, this Court do not find any error in appreciation of the evidence of the parties and provisions of law by the learned Lower Appellate Court. Resultantly, the appeal fails and is hereby dismissed but with no order as to costs.

Appeal dismissed

I.L.R.[2012]M.P. 157
APPELLATE CIVIL
Before Mr. Justice K.K.Trivedi

S.A. No. 1574/2009 (Jabalpur) decided on 23 November, 2011

SALIKRAM & ors. ...Appellants
Vs.
KESHAV & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 41, Rule 3-A, Limitation Act (36 of 1963), Section 5 – Condonation of delay in filing appeal – **Application on ground that the appellants were rustic village people and were having no knowledge of the fate of the civil suit in which they were the defendants – It was contended in the application that the appellant could know about the passing of the judgment and decree in the civil suit only when the proceedings were initiated against them in the Revenue Court – Appellate Court has not accepted such a plea of the appellants on the ground that they were being represented by the Counsel and if they have not verified the fact about the suit from their counsel, it could not be treated to be sufficient explanation of delay – Held – Appeal should not be dismissed merely on technical ground of delay – In a tribal District, a lenient view was possible.**

(Paras 1, 2 & 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 3–ए, परिसीमा अधिनियम (1963 का 36), धारा 5 – अपील प्रस्तुत करने में विलंब के लिए माफी – इस आधार पर आवेदन कि अपीलार्थीगण गांव के देहाती लोग थे और सिविल वाद जिसमें वे प्रतिवादी थे के अंतिम परिणाम से अनभिज्ञ थे – आवेदन में यह तर्क किया गया कि अपीलार्थी को सिविल वाद में निर्णय एवं डिक्री पारित किये जाने की जानकारी केवल तब हो पाई जब उनके विरूद्ध राजस्व न्यायालय में कार्यवाही आरंभ हुई – अपीली न्यायालय ने अपीलार्थीगण के उक्त अभिवाक् को इस आधार पर अस्वीकार किया कि अधिवक्ता द्वारा उनका प्रतिनिधित्व किया जा रहा था और यदि उन्होने अपने अधिवक्ता से वाद के बारे में तथ्य सत्यापित नही किये, उसे विलंब का पर्याप्त स्पष्टीकरण नही माना जा सकता – अभिनिर्धारित – मात्र तकनीकी आधार पर अपील खारिज नही की जानी चाहिए – जनजातीय जिले में उदार दृष्टिकोण संभव था।

Case referred:

(2009) 9 SCC 94.

Ashok Chakraworty, for the appellants.

Pradeep Naveriya, for the respondents No. 1 & 2.

Mukesh Tiwari, P.L. for the respondent No.3/State.

JUDGMENT

K.K. TRIVEDI, J. :- This appeal under Section 100 of the Code of Civil Procedure has been filed against the order dated 01.03.2008 passed in First Appeal No.1/2007. The said appeal has been dismissed by the impugned order holding that the same was barred by limitation. The appellants in fact filed the first appeal against the judgment and decree dated 14.08.2006 passed in Civil Suit No.380-A/2004 passed by the Civil Judge, Class-II, Sausar, District Chhindwara, before the II Additional District Judge, Chhindwara. Since the appeal was barred by limitation, an application under Section 5 of the Limitation Act was also filed for condoning the delay. It was contended in the application that the appellants were rustic village people and were having no knowledge of the fate of the civil suit in which they were the defendants. It was contended in the application that the appellants could know about the passing of the judgment and decree in the civil suit only when the proceedings were initiated against them in the Revenue Court. Thereafter, on verification of the facts when they came to know that civil suit has already been decreed against them, they obtained certified copy and filed the first appeal expeditiously.

2. The lower Appellate Court has not accepted such a plea of the appellants only on the ground that they were being represented by the Counsel and if they have not verified the fact about the suit from their counsel, it could not be treated to be sufficient explanation of delay. It was further held that there was nothing produced to indicate that the appellants could know about the passing of impugned judgment and decree in the civil suit only when the proceedings under Section 110 of the M.P. Land Revenue Code were initiated against them. The lower Appellate Court has recorded the fact that the information with respect to passing of the impugned judgment and decree came to the notice of the appellants on 08.11.2008 on which date they appeared before the Tahsildar where proceedings were initiated against them by the respondents. Even after this, immediately no action was taken for obtaining certified copy, which was ready on 08.12.2006 but was received only on

22.12.2006. It is also recorded by the lower Appellate Court that the appeal was filed on 04.01.2007 and, therefore, the Court below was of the opinion that there was no sufficient bonafide reason mentioned for the delay caused in filing the appeal.

3. It is contended by the learned Counsel for the appellants that since the appellants were residing in different villages, they were not informed by their Counsel about obtaining of certified copy of the impugned judgment and decree and this fact has been categorically mentioned in the application so filed before the Court below. It is contended that the lower Appellate Court should have taken a lenient view and instead of dismissing the appeal as barred by limitation, the first appeal of the appellants should have been heard and decided on merits. Learned Counsel for the appellants has relied on the case of *State of Bihar vs. Kameshwar Prasad Singh,* (2009) 9 SCC 94 and has contended that as per the law laid-down by the Apex Court, a lenient view should have been taken by the learned lower Appellate Court.

4. Per contra it is contended by the learned Counsel for the respondents No.1 and 2 that the appellants were grossly negligent in prosecuting their claim. They have not taken any proper care to attend the case when the trial was going on. It is further contended by the learned Counsel for the respondents No.1 and 2 that the learned lower Appellate Court has not committed any error in law in rejecting the application of the appellants under Section 5 of the Limitation Act and consequently dismissing the first appeal as barred by limitation.

5. Learned Counsel for the respondent No.3/State has also supported the order passed by the Court below.

6. In the considered opinion of this Court, looking to the circumstances as are available in a tribal district, a lenient view was possible. Even otherwise the first appeals are to be filed as of right provided under the Code of Civil Procedure and merely on technical ground of delay, the appeal should not have been dismissed. The law has been well explained by the Apex Court in the case of *Kameshwar Prasad Singh (supra)* where it has been said that if some cause is shown for the delay, the Court should accept the same and merely because of delay or on technicalities the appeal should not be dismissed.

7. In view of the aforesaid, this appeal is allowed. The impugned order is set aside. The case is remitted back to the lower Appellate Court with a

direction to treat the first appeal of the appellants as within limitation and to hear and decide the same, preferably within a period of 6 months. Parties are since represented before this Court, they are directed to remain present before the lower Appellate Court on 12th December, 2011 along with a certified copy of the order passed today.

8. The Registry is directed to send back the records of the Court below immediately to the lower Appellate Court for the purposes of hearing of the first appeal.

9. With the aforesaid, the appeal is allowed and finally disposed of.

Appeal allowed

I.L.R.[2012]M.P. 160
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe

S.A. No. 829/1996 (Jabalpur) decided on 7 December, 2011

SHAKUNTALA TIWARI (SMT.) ...Appellant
Vs.
MOHAMMAD RAMJAN ...Respondent

A. ***Transfer of Property Act (4 of 1882), Section 54 – Sale – Plea of want of consideration*** **–Recital contained in the registered sale deed dated 02.03.1987 shows the receipt of consideration as well as delivery of possession – The sale deed shows that the sale is complete – Merely because the sale price is not paid, the sale deed can not be held to be invalid – At the most, if the seller who has sold the property and has not received the sale consideration, may sue for recovery of the sale consideration.** (Para 9)

क. *सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 – विक्रय – प्रतिफल के अभाव का अभिवाक्* – रजिस्ट्रीकृत विक्रय पत्र दि. 02.03.1987 में अंतर्विष्ट कथन, प्रतिफल की प्राप्ति के साथ ही कब्जे का परिदान भी दर्शाता है – विक्रय पत्र दर्शाता है कि विकय पूर्ण है – मात्र इसलिए कि विक्रय मूल्य अदा नही किया गया विक्रय पत्र अवैध होने की धारणा नही की जा सकती – ज्यादा से ज्यादा, यदि विक्रेता जिसने सम्पत्ति का विकय किया है और विक्रय प्रतिफल प्राप्त नही किया है, वह विक्रय प्रतिफल की वसूली हेतु मुकदमा कर सकता है।

B. ***Registered sale deed – Presumption as to*** **– Registered sale deed**

has been executed by defendant No. 2 in favour of defendant No. 1, which is prima-facie valid and, therefore, a presumption arises with regard to its genuineness – Even assuming that the sale deed was executed without payment of any consideration and the defendant No. 2 was not in a fit physical and mental condition at the time of execution of the sale deed, the same would be binding on defendant No. 2 and would be voidable document – Since defendant No. 2 has not challenged the same, it would bind her and it would be invalid only to the extent of the share of the plaintiff. (Para 9)

ख. रजिस्ट्रीकृत विक्रय विलेख – के होने की उपधारणा – प्रतिवादी क्र. 2 द्वारा प्रतिवादी क्र.1 के पक्ष में रजिस्ट्रीकृत विक्रय पत्र निष्पादित किया गया है, जो प्रथम दृष्ट्या वैध है और इसलिए उसकी विशुद्धता के संबंध में उपधारणा उत्पन्न होती है – यदि यह अवधारणा भी की जाए कि विक्रय पत्र को किसी प्रतिफल के भुगतान के बिना निष्पादित किया गया था और विक्रय पत्र के निष्पादन के समय प्रतिवादी क्र. 2 स्वस्थ शारीरिक एवं मानसिक स्थिति में नहीं थी, वह प्रतिवादी क्र. 2 पर बाध्यकारी होगा और शून्यकरणीय दस्तावेज होगा – चूंकि प्रतिवादी क्र. 2 ने उसे चुनौती नही दी है, वह उससे बाध्य रहेगी और वह केवल वादी के अंश की सीमा तक अवैध होगा।

Cases referred:

AIR 1956 MB 117, AIR 1956 MB 118, AIR 1961 MP 348, 1978 MPLJ 500, 2001(1) MPLJ 248, AIR 1971 SC 1028, AIR 1982 SC 84, (1993) 4 SCC 38, ILR (2008) MP 3183, 2009(4) MPLJ 35, 2007 (2) MPHT 145, (2011) 6 SCC 555, (2009) 7 SCC 444, (1999) 3 SCC 573, (2006) 5 SCC 353.

Amresh Mishra, for the appellant.
Atulanand Awasthy, for the respondent.

JUDGMENT

ALOK ARADHE, J :- This appeal has been preferred by the plaintiff. This Court vide order dated 13.4.1998 while admitting the appeal had formulated the following substantial questions of law:-

> "A. Whether the lower appellate Court was right in reversing the judgment and decree of the trial Court on the ground that the appellant was not entitled to a decree of entire house even though the sale deed was found to be totally illegal

and without consideration ?

B. Whether the joint decree between the appellant and the respondent No.2 could be granted ?

2. Facts giving rise to filing of the appeal briefly stated are that the plaintiff filed a suit inter-alia on the ground that suit house was constructed by her father late Madan Mohan approximately thirty years ago. Admittedly, the defendant No.2 is the mother of the plaintiff. It was pleaded in the plaint that plaintiff and defendant No.2 have equal share in the suit house, therefore, defendant No.2 alone had no authority to alienate the suit house. It was also pleaded that defendant No.2 was not in a fit mental condition after the death of her husband and son and defendant No.1 taking advantage of the situation, got the sale deed executed in his favour on 2.3.1987 without payment of any consideration. Since the sale consideration was not paid, a mortgage deed on the same day was executed in favour of defendant No.2. It was also pleaded that on 1.3.1987, the defendant No.1 forcibly took possession of the part of the suit house and on 5.5.1987 threatened the plaintiff with dispossession. Accordingly, the plaintiff filed the suit seeking the relief of declaration that she is owner of the suit house and the sale deed dated 2.3.1987 executed by defendant No.2 in favour of defendant No.1 is null and void. The plaintiff sought a decree for possession as well as permanent injunction restraining the defendant No.1 from interfering with her possession over the suit house.

3. The defendant No.1 filed the written statement in which inter-alia it was pleaded that defendant No.2 was the owner of the suit house and she had the authority to sell the suit house. The defendant No.2 was in a fit physical and mental condition to execute the sale deed. The sale deed had been executed by her voluntarily on receipt of consideration. It was also pleaded that defendant No.2 placed defendant No.1 in possession of part of the suit house and assured him that possession of the remaining portion shall also be handed over to him. The defendant No.2 did not file any written statement and was proceeded ex-parte.

4. The trial Court vide judgment and decree dated 29.3.1993 decreed the suit preferred by the plaintiff. The trial Court on the basis of documentary evidence on record namely Ex.P/2, P/3 and D/1 as well as the statement of defendant's witness namely Gulam Hussain DW-4 held that suit house was constructed by father of the plaintiff. It was further held that plaintiff and

defendant No.2 are the co-owners and were in possession of the suit house being the legal representatives of late Madan Mohan. The trial Court on the basis of the statement of plaintiff namely PW-1 as well as Krishna Kumar PW-2 and Praveen Kumar PW-3 held that sale consideration was not paid to defendant No.2 as witnesses to the sale deed have stated in their statement that the sale consideration was not paid to the defendant No.2. The trial Court further held that there is inconsistency and contradiction in the statements of DW-1 Mohd. Ramjan, DW-2 Ansarul Haq, DW-3 Ramesh Prasad, DW-4 Gulam Hussain and DW-5 Babu with regard to payment of sale consideration. It was also held by the trial Court that defendant No.1 executed the mortgage deed Ex.P/3 on the same day in favour of defendant No.2 as the sale consideration was not paid to her. It was further held by the trial Court that defendant No.1 has not been able to prove that the suit house was sold for legal necessity. It was also held that defendant No.2's son had died on 4.1.1987 and immediately thereafter, the sale deed dated 2.3.1987 was executed. Accordingly, it was held that defendant No.2 was not in a fit mental condition to execute the sale deed. Accordingly the suit was decreed.

5. Being aggrieved by the aforesaid decree, the defendant No.1 preferred an appeal. The appellate Court vide judgment and decree 9.9.1996 modified the decree passed by the trial Court. The appellate Court held that since the plaintiff was not a party to the sale deed dated 2.3.1987, therefore, she can challenge the sale to the extent of her share only. The defendant No.2 who had executed the sale deed has not challenged the sale deed. Accordingly, it was held that sale deed is valid to the extent of share of defendant No.2. It was further held that since the sale deed executed in favour of defendant No.1 is valid to the extent of share of defendant No.2, therefore, it cannot be said that defendant No.1 is in unauthorised possession of the suit house. Accordingly, the decree passed by the trial Court was modified and the sale deed was declared void to the extent of plaintiff's share in the suit house. The appellate Court set aside the decree of the trial Court in so far as it granted the decree for possession and permanent injunction in favour of plaintiff.

6. Learned counsel for the appellant submitted that the Courts below have found that the sale deed was executed without any consideration. Therefore, the appellate Court erred in reversing the judgment and decree of the trial Court and in holding that the sale deed is void only to the extent of plaintiff's share. It was also submitted that the sale deed ought to have been

declared void in its entirety. In support of his submissions, learned counsel for the appellant has placed reliance on *Badriprasad Vs. Bhagwandas*, AIR 1956 MB 117, *Ehsanali Vs. Kikabhai*, AIR 1956 MB 118, *Puny Kalu and another Vs. Sankar Kalu*, AIR 1961 MP 348, *Ramkrishna Maniram Lende and others Vs. Vithalrao alias Baboo and others*, [1978 MPLJ 500] and *Bhagwandas Vs. State of M.P. and another*, 2001 (1) MPLJ 248.

7. On the other hand, learned counsel for respondent No.1 submitted that respondent No.1 has filed the cross-objection in which the finding recorded by the appellate Court that sale deed is void to the extent of share of the plaintiff has been challenged. It was further submitted that the sale deed was executed for legal necessity and the finding that the sale deed was executed without any consideration has been set aside in appeal by the appellate Court. Therefore, the appellate Court ought to have allowed the appeal in its entirety. In support of his contention, learned counsel for respondent No.1 has placed reliance on the decisions in *Smt. Rani and another Vs. Smt. Santa Bala Debnath and others*, AIR 1971 SC 1028, *Prasad and others Vs. Govidaswami Mudaliar and others*, AIR 1982 SC 84, *Pannilal Vs. Rajinder Singh and another*, (1993) 4 SCC 38, *Shivcharan Vs. Mohanlal and another*, I.L.R. (2008) MP 3183, *Vimal Chand Ghevarchand Jain and others Vs. Ramakant Eknath Jadoo*, 2009(4) M.P.L.J. 35 and *Baba Saheb Nimalkar Vs. Laxmi Bai (dead) others*, 2007 (2) M.P.H.T. 145.

8. I have considered the submissions made on both sides and have perused the records. The recital in the sale deed about transfer of title, receipt of consideration and delivery of possession are normally evidence of such acts and event. On execution and registration of the sale deed, the sale is normally complete even if sale price was not paid. *See: Janak Dulari Devi and another Vs. Kapildeo Rai and another*, (2011) 6 SCC 555. In the case of *Ramdas Vs. Sita Bai* (2009) 7 SCC 444, the Supreme Court has held that if a co-owner executes a sale deed in respect of the entire property and hands over the possession to the third party, the sale deed would be invalid to the extent of the share of the other co-owner without whose consent and knowledge the property was sold, and who was party to the sale deed. Actual payment of the price at the time of execution of the sale deed is not *sine-qua-non* for completion of the sale. The real test of sale is the intention of the parties. *See: Vidhyadhar Vs. Manikrao and another*, (1999) 3 SCC 573.

9. In the context of aforesaid well settled legal position, facts of the case may be seen. The recital contained in the registered sale deed dated 2.3.1987 (Ex.P/1) shows the receipt of consideration as well as delivery of possession. The sale deed Ex.P/1 shows that the sale is complete. Merely because the sale price is not paid, the sale deed cannot be held to be invalid. At the most, if the seller who has sold the property and has not received the sale consideration, may sue for recovery of the sale consideration. In the case of *Prem Singh Vs. Birbal,* (2006) 5 SCC 353, it has been held by the Supreme Court that there is a presumption that registered document is validly executed. A registered document therefore prima-facie would be valid in law. A voidable document is required to be avoided whereas a void document is not required to be avoided. In the instant case, the registered sale deed Ex.P/1 has been executed by defendant No.2 in favour of defendant No.1, which is prima-faice valid and, therefore, a presumption arises with regard to its genuineness. Even assuming that the sale deed was executed without payment of any consideration and the defendant No.2 was not in a fit physical and mental condition at the time of execution of the sale deed, the same would be binding on defendant No.2 and would be voidable document. Since, defendant No.2 has not challenged the same, it would bind her and it would be invalid only to the extent of the share of the plaintiff, in view of the law laid down by the Supreme Court in *Ramdas Vs. Sita Bai*, supra.

10. For the aforementioned reasons, the first substantial question of law is answered in the affirmative and against the appellant. From perusal of the decree passed by the appellate Court, it does not appear that any joint decree has been passed in favour of the appellant and the respondent No.2. Therefore, the second substantial question of law framed by this Court infact does not arise in the facts and circumstances of the case.

11. In the result, the appeal as well as the cross-objection fail and are hereby dismissed.

Appeal dismissed

I.L.R.[2012]M.P. 166
APPELLATE CRIMINAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava

Cr. A. No. 220/2000 (Indore) decided on 4 August, 2011

SHIVRAM ...Appellant
Vs.
STATE OF M.P. ...Respondent

Prevention of Corruption Act (49 of 1988), Sections 7, 13(1-d), 13(2) – Illegal gratification **– Appellant as Head Constable demanded bribe for release of seized tractor – Currency notes given in bribe were not treated with Phenolphthalein powder – Appellant alleged to have taken out money from the back pocket of pant – Pant which was seized and produced before Court did not have back pocket – Giving and recovery of money not reliable –Evidence shows that spot map was prepared on the spot and FIR was lodged after returning to Police Station, however both the documents bear same time – Evidence also disclosed that documents were tampered by I.O. – Appellant acquitted – Appeal allowed.** (Para 16)

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1डी), 13(2) – अवैध परितोषण – प्रधान आरक्षक के रुप में अपीलार्थी ने जब्तशुदा ट्रेक्टर को छोड़ने के लिए रिश्वत की मांग की – रिश्वत में दिये गये करेंसी नोट पर फिनॉल्फथलीन पाउडर नहीं लगाया गया था – अपीलार्थी ने अभिकथित रुप से पेंट की पिछली जेब से रुपये निकाले – पेंट जिसे जब्त किया गया और न्यायालय के समक्ष प्रस्तुत किया गया उसमें पीछे की जेब नहीं है – रुपये देना और उसकी बरामदगी विश्वसनीय नहीं – साक्ष्य दर्शाता है कि घटना स्थल नक्शा, घटना स्थल पर तैयार किया गया और पुलिस थाना लौटने के पश्चात एफ.आई.आर. दर्ज की गई, किन्तु दोनों दस्तावेज में एक ही समय दर्शाया गया है – साक्ष्य यह भी प्रकट करता है कि आई.ओ. द्वारा दस्तावेजों के साथ छेड़छाड़ की गई थी – अपीलार्थी दोषमुक्त – अपील मंजूर।

Cases referred:

AIR 1976 SC 91, 1993 JLJ 109.

S.K. Vyas with *Harshwardhan Pathak,* for the appellant.
Girish Desai, Dy. A.G. for the respondent.

JUDGMENT

The judgment of the court was delivered by : **I.S. SHRIVASTAVA, J.** :-This appeal has been preferred by the appellant being aggrieved by the judgement dated 31.01.2005 passed by the Court of Shri S.D.Ojha in Special Case No.3/99, by which the appellant Shivram has been convicted under Section 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and sentenced to rigorous imprisonment of three years along with fine of Rs.3,000/-.

2. According to the prosecution story, a report was made by Baliram to Superintendent of Police, Khargone that on 18.04.1999 the Tractor No.M10-8970 which was having a blasting machine was seized by the Police Oon through Head Constable Shivram from his Driver Shobharam and a case was registered. On receiving the information of this fact complainant Baliram went to Police Station Oon where he met with Shivram, Head Constable and he asked him that when his Tractor will be released then accused Shivram said that if he will give him Rs.10,000/- as bribe then he will not beat his Tractor Driver and will release the Tractor earlier. Hence, on this demand he gave Rs.5,000/- to Shivram and promised to pay Rs.5,000/- on the next day in the Khargone Court. On 19.04.1999 the complainant went to Superintendent of Police, Khargone for complaint that he has brought Rs.1,000/- to pay accused Shivram as bribe but he does not want to give him bribe but want to trap him, hence suitable action be taken.

3. On receipt of this complaint the Superintendent of Police, Khargone prepared a panchnama (Ex.P/4) of this report before the independent witnesses Shri K.S.Solanki, Nayab Tehsildar and Shri Sumersingh Mujalda, Nayab Tehsildar and thereafter a panchanama of notes (Ex.P/2) was prepared in which numbers of notes of Rs.100/- each were noted down in the panchanama and on the corners of each note Shri Rathore made his small initials by green ball pen and thereafter, these notes were handed over to Baliram and he was instructed that he should give it to Shivram at the agreed place in the Court, Khargone and thereafter indicate by scratching his head. Thereafter Baliram Patidar gave the above notes to appellant Shivram and indicated as agreed by putting his hand on the head and scratching his head, thereafter Shri Santosh Singh Rathore, S.D.O.P. along with independent witnesses Shri K.S.Solanki and Shri Sumersingh Mujalda reached on the spot and demanded the notes from Shivram which were given to him by Baliram.

Then accused appellant Shivram took out the notes from the pocket of his full pant and gave them to Shri Santosh Singh(PW - 7) and he seized them before the witnesses and prepared the seizure memo Ex.P/5 the dress of the accused was also seized and 39 notes of Rs.100/- and 50 notes of Rs.50/- each were also given by Shivram from the right pocket of his dress which were also scaled separately by the same panchnama. The dress full pant and shirt of full sleeves, was seized and seizure memo Ex.P/6 was prepared. The spot map Ex.P/18 was prepared and the appellant was arrested and arrest memo Ex:P/17 was prepared and thereafter FIR Ex.P/19 at Crime No.134/99 was registered at.Police Station Kotwali, Khargone under Section 7 and 13(1)(d) of Prevention of Corruption Act and challan was filed after obtaining the prosecution sanction Ex.P/7 After trial the appellant has been convicted and sentenced as mentioned above.

4. It has been argued by the learned Counsel for the appellant that the appellant has been falsely implicated in this case. He was not having any domain over the release of the Tractor which was seized in the Police Station because it was seized by the Station Officer and it was to be released from the Court. The investigation was defective. The independent witnesses were not procured but they were Nayab Tehsildars and interested witnesses. There was serious discrepancy in the evidence of the witnesses about the place from where the notes were recovered. The notes given as a bribe were not treated with phenolphthalein powder. The full pant from which the notes are said to have been recovered was not having any side pocket or hip pocket while the witness has deposed that the notes were seized from his hip pocket. The spot map and FIR was tampered as they were having the same time 16.20 p.m. while it was not possible to prepare them at the same time, therefore, the prosecution evidence was not reliable, hence the appeal should be accepted.

5. It has been argued by the Counsel for the respondent that the case was proved from the evidence produced before the Trial Court. The demand and recovery of the notes was proved. The contradictions in the evidence was of minor nature which does not go to the root of the case. The appeal being devoid of merit be dismissed accordingly.

6. Considered the arguments and record of the Trial Court perused. As regard the recovery of the notes from the appellant it reveals from the statement of Baliram (PW -1) that after reaching in the Court he called Shivram and went to the canteen with him. They had a cup of tea 'and thereafter coming

out from the canteen he gave him Rs.1,000/- which were kept by Shivram in his pocket. At that time, Shivram was in his dress. After giving of the notes he indicated by putting his hand on the head, thereafter S.D.O.P. Rathore, Tehsildar and Nayab Tehsildar came to him and they asked to accused that where are the notes of Rs.1,000/- which were given to him, thereafter appellant took out the notes from the back pocket of his pant and gave them to S.D.O.P. Rathore. They were the same notes. They were seized by panchnama (Ex. P/5). During the cross-examination the pant was produced before the witness in the court and he said that the accused was wearing this dress on the date of incident and the accused took out the notes from his back pocket. After seeing the same, the witness accepted this fact that the pant does not have any back pocket. The court also observed that the pant was not having any back pocket. Thereafter in further cross-examination though the complainant Baliram(PW -1) has deposed that he does not remember from where accused took out the notes but in a police statement (Ex.D/l) it has been mentioned that the accused took out the notes from his back pocket. In para 21 of the cross-examination, after observing the pant the witnesses accepted that the pant article D does not contain any side pocket. The witness again admitted in para 22 that there is no side pocket in the pant, hence it is not possible that Rs.1,000/- may be kept in it.

7. In this respect Sumer Singh(PW -6), who is an independent witness deposed that the notes were taken out by S.D.O.P. Shri Rathore from the pocket of the shirt of the uniform of the accused. In further cross-examination in para 16 he has admitted that he does not saw the giving of the notes that to whom they were given. He does not saw the S.D.O.P. while taking out the notes from the pocket. First of all he saw the notes in the hands of the S.D.O.P. but he does not know that from where he received it. In this way, this witness has given a different fact that the notes were recovered from the pocket of the shirt of Shivram. The other independent witness Shri S.S.Mujalda was not examined by the prosecution.

8. Shri Santosh Singh Rathore(PW-7), S.D.O.P., the Investigating Officer in this respect deposed that after the indication of complainant when he reached to the accused and asked him about the notes that first of all he denied and thereafter accepted the receipt of Rs.1,000/- as bribe. He was asked to give the notes which he received then after taking out the notes from the back pocket of his pant gave him the above 10 notes of Rs.1,000/-. The number of

which were tallied with the numbers mentioned in the panchnama, hence the notes were seized and seizure memo Ex.P/5 was prepared. In cross-examination in para 31 he deposed that accused gave him the notes after taking out from the right hip pocket of his full pant. He did not see that where the accused put the notes after their receipt from the complainant. In this way, this witness also confirmed the fact that accused took out the notes from the right hip pocket of the full pant.

9. But it is surprising that full pant article D of the complainant was not having any hip pocket or side pocket. This fact was observed by the Court and also admitted by the complainant Baliram (PW -1), therefore, the evidence of Baliram (PW -1) and Santosh Singh Rathore (PW-7) that the notes were taken out from the hip pocket. of the pant is not believable. Sumersingh (PW -6) in this respect has deposed that S.D.O.P. Rathore took out the notes from the pocket of the shirt of the accused Shivram but this is not the statement of Baliram (PW -1) and Santosh Singh Rathore (PW -7), therefore, the statement of Sumersingh is not believable in this respect. There is no witness of the fact that the notes were given before him, therefore, considering the above evidence this fact was not proved that the notes were recovered from the hip pocket of full pant of the accused.

10. It is surprising that the notes of Rs.1,000/- which were given as bribe to accused were not treated with phenolphthalein powder to prove the fact of receipt of the bribery. This was a major defect in the trap proceeding. In the case of *Raghuveer Singh V/s. State of Punjab* AIR 1976 SC 91. It has been held that,"whether a trap is laid for a public servant, it is desirable that the market currency notes, which are used for the purpose of trap, are treated with phenolphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the Court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of the public servant." In the case of *Balmukund V/s. State of M.P.* 1993 JLJ 109, it has been held that," in the circumstances, ordinarily, in such type of cases powder treatment is made, but the prosecution has not explained or placed any material on record to show why such a process was not followed in the present case, though the trap is said to have been arranged by experienced people like Additional Collector and SDOP. It does not appeal to reason that the officers were not aware of the powder treatment, which is in vogue in the country for

about four decades. If such powder treatment had been made, the passing of the bribe and handling of the notes would not have been difficult to be proved. Therefore, the story about the place and the manner of taking bribe is opposed to natural human conduct. That is what has been said by the Apex Court in case of *Khilli Ram V/s. State of Rajasthan* (AIR 1985 SC 79)."

11. It has also been argued by the appellant Counsel that the independent witnesses were not procured for this trap. Only the interested witness K.S.Solanki, Nayab Tehsildar and Sumersingh Mujalda, Nayab Tehsildar were made the independent witnesses in this case while they were not independent witnesses but were interested witnesses being the Govt. servant.

12. Considered, the arguments. Though only Sumersingh (PW -6) has been examined as independent witness in this case and his evidence is. not reliable to prove the prosecution case because he has deposed that the notes were seized from the pocket of the shirt of the accused which is not the prosecution case but being the Govt. Officers they can not be said to be the independent witnesses.

13. It has been argued by the Counsel for the appellant that the investigation is defective because the spot map and FIR has the same time 16.20 p.m. From the evidence it is clear that the spot map was prepared on the spot and thereafter the FIR was lodged at the Police Station after the return of the trap party, hence the time of both these documents should be different. From the statement of Sumersingh (PW -6) it is clear that he does not sign on the spot map on the spot but signed it in the evening. This shows that the documents were prepared arbitrarily by the Investigating Officer and the documents were tampered because Shri Santosh Singh Rathore(PW -7) has admitted that he mentioned the Crime No. on the spot map later on.

14. Considered the arguments. From the spot map (Ex.P/18) it reveals that it was prepared on the spot on 19.04.1999 which contains the Crime No.134/1999. In this respect Santosh Singh Rathore (PW-7) deposed that he prepared the spot map Ex.P/18 on the spot and thereafter returned to Police Kotwali, Khargone where FIR Ex.P/19 was lodged. In cross-examination he has admitted that before leaving the spot he prepared the spot map Ex.P/18 which does not contain the time but it is wrong to say that he prepared it after registration of the crime. At the time of the preparation of the spot map he was not knowing the crime number, therefore, he left the respective column

blank and, thereafter he entered the crime number in it. This is his working procedure. This shows that the spot map Ex.P/18 was a tampered document. Sumersingh (PW -6) in this respect has deposed that in the evening he was called in the Police Station by S.D.O.P. Shri Rathore and he signed on.the spot map. This shows that the spot map (Ex.P/18) is a tampered document and it was prepared arbitrarily and the signatures of the witness was obtained later on in the evening, hence it is not reliable.

15. The FIR Ex.P/19 bears the time of registration of the it as 16.20 p.m. while the arrest memo Ex.P/17 also bears the time of arrest as 16.20 p.m. Shri Santosh Singh Rathore arrested the accused and registered the FIR, therefore, the time of lodging of the FIR. and arrest could not be the same. Sumersingh(PW -6) in this respect has deposed that the accused was arrested and thereafter Shri Rathore took him to Police Station. Arrest memo Ex.P/17 bears his signature. Santosh Singh Rathore (PW -7) in this respect has deposed that after thc registration of the crime at Police Station he arrested Shivram and prepared arrest memo Ex.P/17. This shows that arrest memo was not prepared at the spot while Sumersingh(PW-6) said that the accused was arrested on the spot. The similarity of time 16.20 p.m. on arrest memo Ex.P/17 and FIR. Ex.P/19 shows that both these documents could not be prepared at the same time and it reveals that they have been prepared arbitrarily at the sweet will of the Investigating Officer, hence these proceedings were not reliable.

16. Therefore, on the basis of the above discussion, we are of the view that the evidence produced by the prosecution before the trial court was not reliable. The notes given in bribe were not treated with the phenolphthalein powder. The evidence about the giving and recovery of notes was not reliable. It was the prosecution story that the notes were recovered from the pocket of the full pant of the accused but the full pant article "D" was not having any side pocket or back pocket, hence the statement of Baliram (PW -1) and Santosh Singh Rathore (PW -7) was not reliable. In this respect Sumersingh (PW -6) deposed that the notes were recovered from the pocket of the shirt, hence this statement was not reliable in this respect. The spot map was a tampered document on which Sumersingh(PW -6) signed in the evening and Santosh Rathore mentioned the Crime No. later on and the FIR and the arrest memo were having the same time 16.20 p.m., hencc it reveals that they were prepared arbitrarily. The evidence about the arrest of the accused was also not reliable

because according to Sumersingh(PW -6) after the arrest the trap party returned to Police Station while according to Arresting Officer, Santosh Singh Rathore (PW - 7) after the registration of the crime he arrested the accused. Therefore, the prosecution evidence was not reliable and the fact of the recovery of the notes from the appellant accused was not proved. Therefore, on the basis of the above discussion, we are of the view that the appellant was not liable to be convicted, hence this appeal deserves to be allowed.

17. Therefore, the appeal is allowed and the appellant is acquitted from the charges under Section 7 and (13)(1)(d) read with Section 13(2) of the Prevention of Corruption Act. His bail bonds are discharged. Fine if deposited be returned.

Appeal allowed

I.L.R.[2012]M.P. 173
APPELLATE CRIMINAL
Before Mr. Justice I.S. Shrivastava

Cr. A. No. 322/1997 (Indore) decided on 10 August, 2011

RAZIYA ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 50 – Search and Seizure*** **– Appellant took out a packet from her kurti and was in her hand when it was seized – Compliance of Section 50 was mandatory – A separate notice should have been given apprising her constitutional rights to be searched before Magistrate or Gazetted Officer or by police.** (Para 6)

क. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 50 – तलाशी एवं जब्ती – अपीलार्थी ने अपनी कुर्ती से एक पैकेट निकाला और वह उसके हाथ में था जब उसे जब्त किया गया – धारा 50 का अनुपालन आज्ञापक था – मजिस्ट्रेट या राजपत्रित अधिकारी के समक्ष या पुलिस द्वारा तलाशी के लिये उसे संवैधानिक अधिकारों से अवगत कराते हुये पृथक नोटिस दिया जाना चाहिए था।

B. ***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 55 – Custody of seized articles*** **– No paging on**

malkhana register – No time of deposit of sealed packet in malkhana register – No mention that impression seal was deposited with articles – No mention that impression seal was sent along with articles to F.S.L. – Provisions of Section 55 not complied. (Para 7)

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 55 – जब्तशुदा वस्तुओं की अभिरक्षा – मालखाना रजिस्टर में पृष्ठांकन नहीं – मालखाना रजिस्टर में मुहरबंद पैकेट के जमा करने का समय नहीं – कोई उल्लेख नहीं कि वस्तुओं के साथ छाप मुहर जमा की गई थी – कोई उल्लेख नहीं कि वस्तुओं के साथ छाप मुहर एफ.एस.एल. को भेजी गई थी – धारा 55 के प्रावधानों का अनुपालन नहीं किया गया।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 27 – Seizure Memo* – Contraband was seized and appellant was arrested on spot and thereafter F.I.R. was lodged after coming back to Police Station – Seizure Memo and Arrest memo bears the crime number – Documents are tampered.** (Paras 8 & 9)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 27 – जब्ती मेमो – विनिषिद्ध पदार्थ जब्त किया और अपीलार्थी को घटनास्थल पर गिरफ्तार किया गया और तत्पश्चात पुलिस थाना लौटने पर एफ.आई.आर. दर्ज की गई – जब्ती मेमो और गिरफ्तारी मेमो पर अपराध क्रमांक मौजूद है – दस्तावेजों के साथ छेड़छाड़ की गई है।

***D. Criminal Procedure Code, 1973 (2 of 1974), Section 21 – Seizure of Smack* – Smack of light yellow colour was seized whereas colour of powder was light grey as per F.S.L. report – Both the colours are different therefore, it is doubtful that powder which was seized was sent for analysis.** (Para 17)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 21 – स्मैक की जब्ती – हल्के पीले रंग की स्मैक जब्त की गई जबकि एफ.एस.एल. रिपोर्ट के अनुसार पाउडर का रंग हल्का भूरा था – दोनों रंग भिन्न है अतएव यह संदेहास्पद है कि पाउडर जिसे जब्त किया गया वही परीक्षण के लिये भेजा गया था।

Cases referred:

ACR –II (2006) 362, AIR 1994 SC 117, (2004) 10 SCC 562.

Sanjay Sharma with *Anil Ojha,* 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 Razia being aggrieved by the judgment dated 21/03/1997 passed by the Court of Shri S. N. Sharma, 2nd Additional Sessions Judge, Neemuch in S.T. no. 140/1995, by which the appellant has been convicted under section 8/21 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, on 03/11/1995, Shri G. S. Parmar, ASI of police station- Neemuch received an information from the informer that accused Raziya is selling small packets of smack for Rs.20/- each near her house and she may be trapped, hence on this information, he prepared a panchanama about the information and sent constable Rajkumar with a note of Rs.20/- having number 77 V 977850 with his signature and prepared panchanama and sent the information under section 42 of the NDPS Act to SDO(P), Neemuch through constable Arjun Soni. Thereafter, Shri G. S. Parmar ASI alongwith constable Baban Mishra Krushnaram and lady constable Kiran Sharma and other articles of investigation and independent witnesses proceeded towards the house of the accused and waited for indication of constable Rajkumar. Constable Rajkumar in civil dress went to the house of Raziya and gave a note of Rs.20/- which she received and took out a yellow colour packet from her kurti and took out a small packet and gave it to Rajkumar. At the same time, Rajkumar indicated by putting the hand on his head. Seeing this, accused Raziya ran towards her house, but she was stopped with the help of police force. Thereafter, in presence of the witnesses and lady constable Kiran Sharma, accused Raziya was informed that she has to be searched on the basis of the information of the informer that she is selling smack. Her consent was obtained and she was apprised with her rights about her search before Magistrate or Gazetted officer and accused Raziya consented for her search before the police. Lady constable Kiran Shrama searched accused Raziya and recovered a plastic bag from the hand of Raziya which contained 46 small packets. On opening of each packet, same type of powder was found, which was collected in a single paper and by smelling testing and burning, it was confirmed as smack prepared from opium. On weightment, its weight found to be 5 grams. It was packed with polythene pack in small cloth packet and sealed by seal of Neemuch Police Station. It was seized and seizure memo was prepared. A chit was applied on it. As the quantity of the smack

was very low, therefore the sample was not taken out from it. A note of Rs.20/- was recovered from accused Raziya, which was also seized and she was arrested. On return to police station, a report was lodged at crime no. 505/1995 and the smack was sent to FSL for its examination and after receipt of the report from FSL and after completion of investigation, challan was filed. After trial, the appellant 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. The investigation was defective. The independent witnesses did not support the face of seizure. The arrest memo and seizure memo were tampered documents, on which crime no. 505/1995 was mentioned while they were porepared before the registration of the crime no. 505/1995. The sample was deposited in the malkhana without impression of seal and it was not sent immediately to FSL as per rules and there is no explanation for this delay. The packet of smack was doubtful because at the time of the seizure, colour of the powder was yellow while in the FSL, the powder which was sent was found to be of light grey colour. The samples were not prepared on the spot, while there is discrepancy of evidence in between the statement of Shri G.S. Parmar PW-3 and Kiran Sharma PW-9 in this respect. The. number of note which was taken out from the packet in the Court was different and it was different with the number of note of the seizure memo, which was given by police to constable Rajkumar. There was non-compliance of section 55 and 50 of the NDPS Act, hence the appellant was not liable to be convicted, hence the appeal be allowed.

4. It has been argued by the respondent's counsel that there was ample evidence before the Trial Court to convict the appellant and he has been rightly convicted, hence the appeal being devoid of merit, be dismissed accordingly.

5. Considered the arguments and record of the trial Coun perused.

6. As regard the compliance of section 50 of the NDPS Act according to the prosecution case, at the time of the raid, accused Raziya took out a packet of smack from her Kurti and it was in her hand, when it was seized from her, therefore, it was necessary for the investigating officer that in compliance of section 50 of the NDPS Act, her consent for search should have been obtained and she should have been apprised with her constitutional rights for search before the Magistrate or Gazetted Officer, but no notice was

given to her. in Panchanama of proceeding Ex.-P/8, it has been, mentioned that she was apprised that she can be searched before Gazetted Officer or Magistrate and she consented for her search before the lady constable Kiran Sharma. In this way, there is non compliance of section 50 of the NDPS Act. A separate notice must have been given to the appellant apprising her constitutional right to be searched before Magistrate or Gazetted Officer and her consent must have been obtained, but no such proceeding was taken up and consent was obtained. On Panchanama Ex.-P/8, nowhere it is mentioned that consent of accused Raziya was obtained for her search to police. Simply mentioning in panchanama proceedings Ex.-P/8 that her consent was obtained; does not fulfill the mandatory requirement of law. Under this circumstance, she was not liable to be convicted.

7. As regard the compliance of section 55 of the NDPS Act, Shri G. S. Parmar PW-3 submitted that on return to police station, he registered the FIR Ex.-P/9 and he deposited the seized property in Malkhana. Khushalsingh PW-8 in this respect deposed that he has brought malkhana register of police station, Neemuch in which it has been mentioned that at serial no. 218, on 03/11/1995, a sealed packet of crime no. 505/1995 has been deposited in the malkhana register Ex.-P/11. It was given by Shri G. S. Parmar to him. It was. sealed with the seal of police station- Neemuch, hence he deposited it in the Malkhana and thereafter, on 08/11/1995, through constable Shersingh sent this packet to FSL, Indore. In cross-examination, he has admitted that there is no paging on the malkhana register and he has not entered any time of deposit of the sealed packet in this register. From perusal of Ex.-P/11, a copy of Malkhana register, it reveals that three packets were deposited in the malkhana; one was sealed packet containing 46 small packets in a yellow polythene bag, in which 5 grams yellow powder is collected in packet which is 5 grams smack and second packet was containing a note of Rs.20/- and third packet was containing notes of Rs.40/-. There is no mention that the impression of seal was deposited with these articles. There is another entry of 8/11/1995 that these packets were sent to FSL through constable Shersingh. In these entries, it is not mentioned that impression of seal was also sent with these packets. There is no evidence that the property, which was deposited in the Malkhana was again sealed at the time of deposit in the Malkhana with the seal of in-charge of the police station, hence there was non-compliance of section 55 of the NDPS Act. By non- depositing of impression of seal and non-sending the impression of seal to FSL, therefore, the procedure was

defective and it shows non-compliance of mandatory provisions.

8. From perusal of the seizure memo Ex.-P/5, it reveals that crime no. 505/1995 has been mentioned on it while it was prepared at 15.55 hours on 03/01/1995. From FIR Ex.-P/9, it reveals that it was registered at 16.40 hours after return of Shri G. S. Parmar to police station, therefore, at the time of seizure of the smack, the offence was not registered at Crime no. 505/1995, hence the seizure must be at zero crime number. Since the seizure memo Ex.-P/5 bears the crime number, this shows that it is tampered document, either the crime was mentioned on it after registration of the crime or seizure memo was prepared after the registration of crime no. 505/1995. In both these situations, the seizure memo is not reliable.

9. From arrest memo Ex.-P/7, it reveals that it bears the crime no. 505/1995 while it was prepared at 16.10 hours. Previously, crime no. 0/1995 was mentioned on it. Later on, crime no. 505/1995 has been entered in the relevant coloum. This shows that crime was mentioned on it by tampering it or it was prepared later on, because till 16.10 hours, FIR was not registered. This also shows arbitrariness of preparation of the papers.

10. As regard the incident, the seizure memo Ex.-P/5 was prepared before the independent witnesses Omprakash PW-6 and Khushal PW-10 . They are also the witnesses of Panchanama Ex.P/3, Ex.-P/4 and Ex.-P/8; they have been declared hostile. According to Omprakash PW-6, he was called at police station by Shri G. S . Parmar, the station officer and he told him that an information, about the sale of smack by a lady has been received, hence he signed on panchanama Ex.-P/3. He does not remember the name of the lady accused. In cross examination he deposed that nothing happened before him. He does not have any information about the accused and he has denied all the prosecution story and said that Ex. -P/3 to Ex. -P/8 bear his signature, but he does not know anything about the incident. He did not go to spot. He has further deposed that at about 8.10 am, he was passing through the police station and on the call of police officer, he signed on it. Kushal PW-10 did not sign before him.

Kushal PW-10, second independent witness of these proceedings, deposed that he does not know the accused. Ex.-P/3 to Ex.-P/8 bear his signatures and he does not know that why he signed on these papers. The police used to call him during preparing challan of Thelewala, hence he signed on these documents at the instance of police. He did not go to Kharikua with

police. On contradiction of facts of the prosecution story, he denied each and every steps of the prosecution story. In cross examination, he deposed that he signed on the blank papers. His hotel is situated near the police station and the police used to call him and get his signatures on the papers. Both these witnesses have denied with their police statement Ex.-P/12 & P/13 respectively. In this way, both the independent witnesses did not support the proceedings taken up by the investigating officer for the seizure of smack and panchanama Ex.-P/3 to Ex.-P/8.

12. Shri G. S. Parmar deposed that on receipt of the information of the informer, he prepared panchanama of this information vide Ex-P/3 and thereafter, he prepared panchanama Ex.P/4 and sent punter constable Rajkumar with a note of Rs.20/- bearing no. 77-V-977850 for purchase of smack from the accused Raziya. Thereafter, he sent the information of this to SDO (P), Neemuch by letter Ex,.-P/l. Thereafter, with police force head constable Baban Mishra, constable Krushnaram and lady constable ,Kiran Sharma and the independent witnesses proceeded to Kharikua, where they sat and waited for indication of the punter. On indication by the punter. they rushed towards the accused Raziya. Seeing the police, accused Raziya tried to run, but she was caught and thereafter, she was apprised with the information of the informer and after her consent for search, she was searched and in search, yellow colour polythene bag was recovered by lady constable Kiran Shrma from her, which contained 46 small packets. On opening, yellow colour powder was found in it, which was collected on a paper. It was tested by the independent witnesses and the police force by testing and burning found it to be smack from opium. Whole of the powder was found to be 5 grams on weightment and it was sealed on the spot. As he was not having his own seal, hence a chit of paper was pasted on it and his own signature and the signature of panch witnesses and the accused were taken on it. On search of the accused, Rs.60/- was found including the note of Rs.20/- of the punter Rajkumar, which was sealed with the seal of the police station, Neemuch. Seizure memo Ex.P/5 was prepared and Ex.-P/6, a proforma of narcotic drugs was prepared and the signature of the witnesses and the accused was obtained on it and the accused was arrested vide arrest memo Ex.P/ 7 and thereafter, panchanama of whole of the proceedings Ex.-P/ 8 was prepared. The impression of the seal was impressed on these panchanamas and the case was registered and the police station officer Shri Jatav was informed. Thereafter, FIR Ex.P/9 was registered which bears his

signatures and the signature of station house officer Shri Jatav. The seized property was deposited in the malkhana and report under section 57 of the NDPS Act Ex.-P/2 was sent to SDO(P).

13. At the time of evidence in the court, packet-k containing the punter's note was opened and number of the note was 77-V-966850 which bear signature of Shri G.S. Parmar. In this respect, it has been argued by the appellant's counsel that this note was different from note, which was given to the punter Rajkumar and seized by seizure memo Ex.-P/5.

14. Considered the arguments. Number of the note which was taken out from the packet in the Court was 77-V-966850 and the number of the note which was seized on the spot was 77-V-977850; the same number was mentioned in punter panchanama Ex.-P/4. This shows that the note which was produced in the court, was not the same, but it was different note having different number. This situation goes in favour of the appellant and it was proved that the note bearing number 77/V-977850 which was sent through punter Rajkumar was not seized from the appellant and was not sealed in packet Article- K.

15. As regard the sample, it has been argued by the appellant's counsel that no sample was prepared on the spot by G. S. Parmar ASI PW-3 and whole of the quantity of the smack was sent to FSL for examination, but constable Kiran Sharma PW-9 deposed that two samples were taken out on the spot. Due this discrepancy, whole of the prosecution story is unreliable.

16. Considered the arguments. Shri G. S. Parmar PW-3 has not deposed that any sample was prepared on the spot, but whole of the quantity was sealed in the packet but from the statement of Kiran Sharma PW-9, it reveals that two samples were prepared from the seized smack, but she could not tell, what was its weight. Again she has replied that after the weightment, sample was prepared. About the weightment, she said that only smack was weighted without paper, while according to G. S. Parmar, weight of the smack with paper was 5 grams and according to panchanama of proceedings Ex.-P/8, no sample was taken out and weight of the smack was 5 grams. Therefore, the statement of Kiran Sharma PW-9 is not reliable to support the prosecution story.

17; It has also been argued by the appellant's counsel that the powder which was recovered from the appellant was of light yellow colour while colour

of the powder was light grey as per FSL report Ex.-P/14. Both these colours are different and hence it is doubtful that the powder which was seized on the spot was sent for anlysis.

18. Considered the arguments. There is lot of difference in the powder of light yellow colour and light grey colour. There is no, explanation that how this colour was different, hence it creates doubt that whether the powder which was seized as smack was the same which was sent for examination for FSL. Secondly, there is no. explanation that as the powder was deposited in the malkhana on 03/11/1995, then why it was sent on 08/11/1995, why it was not sent immediately. No explanation for this delay has been given by the prosecution. Hence under these circumstances, tampering of sample cannot be ruled out.

19. Therefore, on the basis of the above discussions, I conclude that the seizure memo was not reliable; it was tampered document. There was non-compliance of section 50 & 55 of the NDPS Act. The independent witnesses did not support the prosecution case. The impression of the seal was not deposited in the malkhana. Sample was sent to FSL with inordinate delay and for which, no explanation was given. There was difference of colour of the powder, which was seized and sent for FSL, hence it was doubtful that the same powder was sent for analysis. Number of the note which was given to punter Rajkumar, was not the same which was taken out from the packet in the Court. There was difference of statements in between the members of the raid party about preparation of the sample. According to Kiran Sharma, PW-9, two samples were prepared, but according to G. S. Sharma PW-3, no sample was prepared. Therefore, on the basis of the evidence produced before the Trial Court, the appellant was not liable to be convicted as held in the case of *Ritesh Chakarvarti Vs. State of M.P* ACR -II (2006 [362], *Valsala Vs. State of Kerala* (AIR 1994 SC 117) *and Jitendra and another Vs. State of M.P.* 2004(10) SCC 562.Hence, this appeal deserves to be allowed.

20. Therefore, on the basis of the discussions, this appeal is allowed and the appellant Raziya is acquitted from the charges under section 8/21 of the NDPS Act. The appellant is on bail; her bail bonds are discharged. The fine, if deposited be returned to her.

Appeal allowed.

I.L.R.[2012]M.P. 182
APPELLATE CRIMINAL
Before Mr. Justice P.K. Jaiswal & Mr. Justice I.S. Shrivastava
Cr. A. No. 988/2001 (Indore) decided on 16 August, 2011

BARJIYA ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 6 – Relevancy of Facts – Hearsay Evidence*** **– Section 6 is exception to general rule where hearsay evidence becomes admissible – It should be contemporaneous with act and there should not be an interval which allow fabrication.** (Paras 13 &14)

क. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 6 – तथ्यों की सुसंगति – अनुश्रुत साक्ष्य – धारा 6 सामान्य नियम का अपवाद है जहां अनुश्रुत साक्ष्य ग्राह्य हो जाती है – वह कृत्य के समकालीन होनी चाहिए और कोई अंतराल नहीं होना चाहिए जो मिथ्या रचना होने दे।

B. ***Evidence Act (1 of 1872), Section 27 – Seizure of Weapon*** **– When there is a direct evidence, non- seizure of weapon is of no consequence.** (Para 19)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 27 – शस्त्र की जब्ती – जब प्रत्यक्ष साक्ष्य उपलब्ध है, तब शस्त्र की अजब्ती का कोई महत्व नहीं रह जाता।

Cases referred:

1999 SC 3883, AIR 2006 SC 302, 309, AIR 1992 SC 881.

P. Newalkar, 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 being aggrieved by the judgement dated 10.01.2001 passed by the Court of Shri A.R.Dhruv, Additional Sessions Judge, Sendhwa, West Nimad in S.T.No.84/2000, by which the appellant Barjiya has been convicted under Section 302 of the IPC and sentenced to life imprisonment with fine of Rs.1,000/-.

2. According to the prosecution case, on 27.08.1999 Jadiya along with

Sarpanch Pohalsingh and Kalsingh lodged the report that in the night, at about 9.00 p.m., he was sleeping at his house and on hearing the cries of his brother Aapsingh and the children of Barjiya that "*mar diya mar diya*", he reached the house of Aapsingh and found Barjiya was caught hold by Aapsingh. He told him that Barjiya has murdered his wife Kalibai by assaulting with an axe on her head, thigh and hand. The dead body was lying inside the house. Pinta the daughter of Barjiya told that Barjiya assaulted her younger brother, on which her mother objected, on this point accused Barjiya rushed with axe on his mother, then Pinta and her mother ran towards the house of her uncle. There Barjiya assaulted and killed her mother. Thereafter Sarpanch Pohalsingh was called and he was informed with the incident and thereafter the report was lodged. Hence, on report Crime No.122/99 under Section 302 of the IPC was registered at Police Station Pansemal, District Badwani and after investigation challan was filed. After trial the appellant has been convicted as mentioned above.

3. It has been argued by the Counsel for the appellant that he has been falsely implicated in this case. The independent witnesses Jadiya(PW-3), Mohansingh(PW-4) and Bachcha(PW-5) did not support the prosecution case. Aapsingh(PW-1) and Dedubai(PW-6) were not the eye witness but they reached on the spot after hearing the noise but the Trial Court has believed them erroneously. The Court has relied on the statement of Pinta(PW-2) while her statement was not supported by any independent witness. There were serious omissions and contradictions in the prosecution evidence, hence the appeal should be allowed.

4. It has been argued by the Counsel for the respondent that the appellant was rightly convicted by the Trial Court on the basis of the evidence produced by the prosecution. The incident was witnessed by Pinta(PW-2), the daughter of the deceased. The other witnesses Aapsingh(PW-1), Dedubai(PW-6) and Bachcha(PW-5) are the eye witnesses of the incident, hence the case was proved. This appeal should be dismissed being devoid of merit.

5. Considered the circumstances and record of the Trial Court perused. According to Pinta(PW-2) accused is her father and deceased Kalibai was her mother. On the date of incident her father assaulted her mother by axe on her head at the house of Aapsingh. On her cries her *Kaka* Aapsingh reached there and snatched the axe from his hands. Her mother sustained bleeding injury in her head due to which she died. Her father beat Bahaduriya due to which there was a quarrel, due to which the accused assaulted her mother. In

crossexamination, she deposed that the house of her *Kaka Aapsingh* is near to her house. In the morning her father assaulted Bahaduriya. Her mother and father used to quarrel with each other. At the time of the incident her father assaulted her mother at the house of her *Kaka Aapsingh* , at that time she was present there. This incident took place at about 9.00 p.m.

6. Aapsingh(PW-1) supporting the statement of Pinta(PW-2) deposed that accused is his brother and deceased Kalibai was his sister-in- law. On the date of incident he was sleeping in his house. On the cries of Pinta(PW-2) he awoke and saw Kalibai was lying dead in front of his house. Accused Barjiya assaulted his wife with an axe on her head due to which she sustained bleeding injury on her head and due to which she fell down. Jadiya was also there. They caught the accused Barjiya. In cross-examination, he deposed that he snatched the axe from the hands of accused and he handed over the axe to police. Accused was running from there, then he chased him.

7. Jadiya(PW-3) deposed in this respect that accused is his brother and deceased Kalibai was his sister-in-law. On the date of incident, at about 9.00 p.m., he was sleeping at his house and on hearing the cries he reached on the spot and saw the dead body of Kalibai. Kailash, Bachcha, Aapsingh and Pintabai all were present there. Pinta and Aapsingh told that Barjiya has killed Kalibai. In cross-examination, he deposed that the house of Barjiya and Aapsingh are adjacent to each other and Pinta told him the incident. At that time, Mohansingh was also present there. He saw that Aapsingh was standing caught hold of Barjiya. He saw the dead body of deceased Kalibai. Pintabai was crying that her father has killed her mother.

8. Mohansingh(PW-4) deposed in this respect that, at about 9.00 p.m., he was at his field and on the cries of children he reached at the house of Barjiya and then went to the house of Aapsingh. There he saw the dead body of Kalibai. Kailash told him that Barjiya killed his wife. At that time, Barjiya was out of the house.

9. Bachcha(PW-5) son of Aapsingh(PW-1) deposed that on the date of incident accused Barjiya killed his wife Kalibai. On the cries of Pinta he saw the dead body. Though this witness has been declared hostile but he has deposed that on the voice of weeping he awoke and saw the dead body of Kalibai lying near the door. This is correct to say that his father caught Barjiya and snatched the axe from him.

10. Dedubai(PW-6), wife of Aapsingh(PW-1) deposed that accused is his *Jeth* (elder brother of her husband). At the time of incident, she was sleeping. Pinta was also there. Kalibai came there and Barjiya came with axe and he assaulted by axe on the head of Kalibai due to which she sustained bleeding injury and died. Her husband Aapsingh caught Barjiya. In cross-examination, she deposed that there is only one room in her house where they were sleeping. At the time of incident, she was sleeping and on hearing the noise she awoke and saw that Kalibai was lying dead at the door and thereafter she started weeping. On specific question, she deposed that she saw the accused assaulting Kalibai. Accused assaulted Kalibai by axe.

11. It has been argued by the Counsel for the appellant in this respect that all the witnesses are not the eye witnesses because they reached immediately on the spot after the incident and they deposed that they saw Kalibai in dead condition, hence, their evidence is not reliable to the fact that appellant killed Kalibai.

12. Considered the arguments. From the spot map (Ex.P/5) it is clear that the murder took place at the house of Aapsingh(PW-1). Dedubai(PW-6) is his wife and Bachcha(PW-5) in his son and there presence is very natural. Just after the incident Jadiya(PW-3) and Mohansingh(PW-4) reached on the spot and they gathered the information from Pinta and Aapsingh that accused assaulted and murdered Kalibai. Though they are not the eye witnesses of the incident but they reached the spot immediately after the incident and learnt from Pinta and Aapsingh that accused has murdered Kalibai, therefore, the statement of these witnesses is admissible in evidence according to Section 6 of the Evidence Act.

13. The Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of this section, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statement sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter.

14. In the case of *Sukhar V/s. State of Uttar Pradesh* AIR 1999 SC 3883 it was held that,

"Para 6

Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in Wigmore's Evidence Act reads thus :

"Under the present exception (to hearsay) an utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided, it is near enough in time to allow the assumption that the exciting influence continued."

Para 7

Sarkar on Evidence (Fifteenth Edition) summarises the law relating to applicability of Section 6 of the Evidence Act thus :

"1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.

2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.

3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by-standers. In conspiracy, riot & c the declarations of all concerned in the common object are admissible.

4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

Para 8

This Court in *Gentela Vijayavardhan Rao V/s. State of A.P.* (1996) SCC 241 : (1996 AIR SCW 3555 : AIR 1996 SC 2791 : 1996 Cri. L.J. 4151) considering the law embodied in Section 6 of the Evidence Act held thus (Para 15 of AIR SCW, AIR & Cri. LJ) :

"The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, in exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae."

Para 10

Applying the ratio of the aforesaid two cases to the evidence of PW-2, we have no hesitation to come to the conclusion that his statement indicating that the injured told him that his nephew has fired at him, would become admissible under Section 6 of the Evidence Act."

15. In the case of *Bishna alias Bhiswadeb Mahato & ors. V/s. State of West Bengal* AIR 2006 SC 302, 309 it was held that, "where the witnesses came to place of occurrence immediately after the incident had taken place and found the dead body of deceased and other injured victim in unconscious state also found the mother of the deceased weeping as also injured witness present there, they heard about entire incident from injured and other witnesses including role played by each of the accused and others. The evidence of said witnesses corroborate evidence of prosecution witnesses as also allegations made in the FIR, was held to be admissible in evidence in terms of Section 6 of the Evidence Act."

16. Therefore, in this case the evidence of all such above witnesses is

admissible in evidence and therefore, it was proved that accused appellant Barjiya killed his wife Kalibai.

17. Dr. Durgasingh Chouhan(PW-8) conducted the postmortem of deceased Kalibai wife of Barjiya on 28.08.1999 and gave the postmortem report (Ex.P/15). He found incised wound 4"x1" deep upto brain on the mid parietal region on head and one incised wound 3½"x1½" deep upto brain at the left parietal region on head and one incised wound 4"x2"x3" deep oval shaped on right inguinal region on thigh deep to vessels and muscles, deformity in left mid 1/3 forearm, fracture of both radius and ulna bone. According to his opinion the cause of death was, incised wound on the head and right thigh, the injuries were ante-mortem and homicidal in nature, therefore, the statement of witnesses was also supported by the medical evidence.

18. It has been argued by learned Counsel for the appellant that the axe was not produced in evidence, hence it was not proved that the appellant assaulted his wife by the seized axe. In reply it has been argued by the prosecution that there is direct evidence of the incident. The seizure memo was proved from the statement of the Investigating Officer Dharamveer Singh Chouhan(PW-7).

19. Considered the arguments. Dharamveer Singh Chouhan(PW-7), the Investigating Officer has deposed that on the production of axe by Aapsingh he seized it by seizure memo (Ex.P/7). Aapsingh(PW-1) in this respect has deposed that he handed over the axe to police and he put his thumb impression on the seizure memo. In cross-examination, he has deposed that he told the police that by this axe the accused assaulted Kalibai. When police came to his house, he handed over the axe at that time to police. This fact is mentioned in the seizure memo(Ex.P/7) that at the house of Aapsingh he handed over the axe to police which was seized by the police. Therefore, the seizure memo (Ex.P/7) was proved from the prosecution evidence. The fact remains that the axe was not produced at the time of the evidence and its blood grouping was not examined. But in the case of *Pradúmansinh Kalubha V/s. State of Gujrat* AIR 1992 SC 881, it has been held that,"in case where there is direct evidence, the absence of blood on weapon of offence or even the non-seizure of weapon of offence is of no consequence." Therefore, in this case non-production of axe in the evidence is of no value because there is direct and reliable evidence against the appellant.

20. Therefore, on the basis of the above discussion we reached to the

conclusion that it was proved from the evidence produced before the Trial Court that the appellant Barjiya has murdered his wife, hence this appeal is devoid of merit.

21. Therefore, on the basis of the above discussion this appeal is disallowed accordingly.

Appeal disallowed

I.L.R.[2012]M.P. 189
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena

Cr. A. No. 1822/1996 (Jabalpur) decided on 8 November, 2011

CHALANIYA DHEEMAR ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(i)(xi) – Proof of Caste*** **– Neither complainant nor any other witness deposed in the Court that complainant belonged to Scheduled Caste – No Certificate of any competent authority to that effect was produced or proved before the Court – Merely from the fact that in F.I.R., the name of complainant has been mentioned with her caste, it can not be held that she belonged to Scheduled Caste in the absence of legal evidence in Court.** (Para 10)

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(i)(xi) – जाति का प्रमाण – न तो शिकायतकर्ता ने और न ही किसी अन्य साक्षी ने न्यायालय में कथन किया है कि शिकायतकर्ता अनुसूचित जाति की थी – इस आशय का सक्षम अधिकारी का कोई प्रमाण पत्र न्यायालय में प्रस्तुत अथवा प्रमाणित नहीं किया गया – मात्र इस तथ्य से कि प्रथम सूचना रिपोर्ट में शिकायतकर्ता का नाम उसकी जाति के साथ दर्शाया गया है, न्यायालय में वैध साक्ष्य की अनुपस्थिति में यह धारणा नहीं की जा सकती कि वह अनुसूचित जाति की थी।

B ***Criminal Procedure Code, 1973 (2 of 1974), Section 154 – F.I.R.*** **– F.I.R. can not be treated as a part of substantive evidence.** (Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना

रिपोर्ट – प्रथम सूचना रिपोर्ट को सारभूत साक्ष्य के भाग के रुप में नहीं माना जा सकता।

Mohammed Ali with *V.K. Shukla*, for the appellant.
B.P. Pandey, Dy. G.A. for the respondent.

JUDGMENT

RAKESH SAKSENA, J. :- Appellant has filed this appeal against the judgment dated 18th September, 1996 passed by Special Judge (SC & ST Act), Chhatarpur in Special Case No.161/95 convicting him under section 3(i)(xi) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentencing him to rigorous imprisonment for 3 years with fine of Rs.2000/-. In default of payment of fine further rigorous imprisonment for 6 months.

2. In short, the facts of the case are that on 19.12.1995, at about 12 O' clock in the day, when complainant Hiriya was going to fetch grass from her field, on way accused/appellant suddenly came from behind and caught her hand with a view to outrage her modesty. She tried to get her hand released but he did not allow her to do so, therefore, she dealt a blow of sickle to him whereupon he left her. When complainant shouted, Malkhan Singh and Vaishali reached there. On coming back to her house, she narrated the incident to her father-in-law Girdhari. On the same day, her father-in-law went to lodge the report at police outpost, but they asked him to bring the complainant. On the next day, i.e. on 20.12.1995 complainant along with her father-in-law went to police outpost Bachhaun and lodged report Ex.P/1. The said report was then sent to police station,Chandala where the offence under section 354 I.P.C. was registered. After requisite investigation, charge sheet was filed.

3. Learned Special Judge framed the charge under section 3(1)(xi) of SC & ST (Prevention of Atrocities) Act. Accused abjured his guilt and pleaded false implication. According to him, false report was lodged against him because he had lodged a report against the husband and father-in-law of complainant.

4. Before the trial Court, prosecution examined Hiriya (PW-1), Malkhan Singh (PW-2), Vaishali (PW-3) and head constable Devideen (PW-4). Learned trial Judge, upon trial and after appreciation of the evidence, held the appellant guilty and convicted and sentenced him as mentioned above. Aggrieved by his conviction and sentence, appellant has filed this appeal.

5. Learned counsel for the appellant submitted that the evidence of complainant Hiriya (PW-1) was not reliable. It was discrepant and contradictory to the evidence of Malkhan and Vaishali. First Information Report Ex.P/1 was doubtful as complainant mentioned that a written report was given to police. It was not established by the prosecution evidence that complainant was a member of scheduled caste or scheduled tribe. Counsel further submitted that in the facts and circumstances of the case, the conviction under section 3(1)(xi) of the said Act was not permissible. Learned counsel for the State, on the other hand, justified the impugned judgment of conviction and submitted that no interference was called for in the finding of conviction recorded by the trial Court.

6. I have heard the learned counsel for the parties and perused the impugned judgment and evidence on record.

7. Complainant Hiriya (PW-1) categorically stated that while she was going to fetch greenery from her field, as soon as she reached inside the *Nala,* accused came after her running and caught her hand with a view to outrage her modesty. When he did not leave her hand, she assaulted him with a sickle which she had in her hand and also shouted. Hearing her cries, Vaishali and Malkhan reached there. Accused then ran away. She went to her house and narrated the incident to her husband and father-in-law. Her father-in-law went to police chowki Bachhaun to lodge the report, but police people called her. Next day, report Ex.P/1 was recorded and her thumb impression was obtained. Though this witness was subjected to a lengthy cross-examination, but nothing material could be elicited out to indicate that she was not a truthful witness. It is, however, apparent that Hiriya (PW-1) no where stated that she was a member of scheduled caste or scheduled tribe or she belonged to scheduled caste.

8. Evidence of Hiriya (PW-1) finds corroboration from the evidence of Malkhan Singh (PW-2) and Vaishali (PW-3). Malkhan (PW-2) stated that at about 12 o'clock when he was going towards his field, he heard shrieks of Hiriya and saw accused grappling with her in the *Nala.* Looking at him, accused ran away. Hiriya told to him that when accused grappled with her she dealt a blow of sickle to him. He stated that Vaishali was also present there. Similarly Vaishali (PW-3) stated that when he heard cries in the *Nala,* he rushed to that spot. He saw Hiriya shouting in the *Nala* and accused running away from the spot. Hiriya narrated the incident to him. Thus, the evidence of

complainant Hiriya finds corroboration from the evidence of Malkhan Singh (PW-2) and Vaishali (PW-3).

9. Evidence of Hiriya (PW-1) stands further supported by the first information report Ex.P/1 lodged by her at police outpost Bachhaun. It is true that in the first information report Ex.P/1 and Ex.P/2, it was mentioned that a written report was tendered by Hiriya at the police station and the same was not produced before the trial Court with the charge sheet, but merely by its non-production no adverse inference can be drawn since first information report Ex.P/1 was got recorded by Hiriya herself and she had put her thumb impression on it. The said reports Ex.P/1 and Ex.P/2 have been proved by head constable Devideen (PW-4).

10. On a close scrutiny of the evidence of aforesaid witnesses, it is clearly established that accused caught the hand of complainant Hiriya (PW-1) in the *Nala* with a view to outrage her modesty while she was going to fetch greenery. However, on scanning the evidence of all the prosecution witnesses, I find that there is absolutely no legal evidence to establish that complainant Hiriya belonged to scheduled caste or scheduled tribe. No certificate of any competent authority to that effect was produced or proved before the Court. Neither Hiriya (PW-1) nor any other witness including head constable Devideen (PW-4) deposed in the Court that she belonged to scheduled caste. It is true that in the first information report Ex.P/1 and Ex.P/2 the name of complainant has been mentioned as Hiriya Ahirwar, but merely from that it cannot be held that she belonged to scheduled caste in the absence of legal evidence in the Court. First Information Report cannot be treated as a part of substantive evidence. It can be used only for corroboration or contradiction of its maker. It is also important to note that police registered the offence under section 354 of Indian Penal Code only and not under the provisions of SC & ST (Prevention of Atrocities) Act. Trial Court recorded the finding that it was established that accused outraged modesty of the complainant who belonged to scheduled caste but it appears to have been based on no legal and substantive evidence.

11. In view of the above circumstances, I am of the definite view that prosecution failed to establish that complainant Hiriya (PW-1) belonged to scheduled caste, therefore, the conviction of appellant under section 3(1)(xi) of SC & ST (Prevention of Atrocities) Act was not justified, but since it has been established that appellant outraged the modesty of complainant, he is

liable to be convicted under section 354 of the Indian Penal Code by virtue of Section 222 Cr.P.C., which can be said to be a minor offence. The ingredients of offence under section 354 are similar in nature to the offence under section 3(1)(xi) of SC & ST (Prevention of Atrocities) Act, therefore, it cannot be held that any prejudice was caused to appellant.

12. Accordingly, the conviction of accused/appellant under section 3(1)(xi) of SC & ST Act is modified/converted to one under section 354 of the Indian Penal Code. The incident had since occurred in the year 1995 i.e. about 15 years back, his sentence of rigorous imprisonment for 3 years is reduced to a period of rigorous imprisonment for two months. Sentence of fine is affirmed. Appellant who is reported to be on bail shall surrender before the trial Court forthwith to serve out the remaining part of sentence.

13. Appeal partly allowed.

Appeal partly allowed.

I.L.R.[2012]M.P. 193
APPELLATE CRIMINAL
Before Mr. Justice T.K. Kaushal

Cr. A. No. 1975/2001 (Jabalpur) decided on 10 November, 2011

RAMRAJ SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

Evidence Act (1 of 1872), Section 113A – Presumption under – **There should a link and nexus between the act of cruelty and suicide – Law does not give any presumption for continuity of cruelty – It requires definite and convincing evidence to prove the cruelty.**

On the basis of letters Ex.P/1 & Ex. P/2 written 2 ½ years and 6 months prior to the incident, continuity of cruelty can not be presumed.

Not only soon before the incident, but in recent past also no act of cruelty has been proved by the evidence of prosecution by the appellants towards the deceased, hence presumption under Section 113A of the Act is not attracted. (Para 27)

साक्ष्य अधिनियम (1872 का 1), धारा 113 ए – के अंतर्गत उपधारणा –

क्रूरता और आत्महत्या के बीच संबंध एवं संबद्धता होनी चाहिए – क्रूरता जारी रहने के लिए विधि कोई उपधारणा नहीं देती – क्रूरता साबित करने के लिए उसे निश्चित एवं विश्वास उत्पन्न करने वाली साक्ष्य अपेक्षित है।

Case referred:

AIR 2002(1) MPLJ 274

K.K. Pandey, for the appellant.
Vinod Fouzdar, P.L. for the respondent.

JUDGMENT

T.K. KAUSHAL, J :- This judgment shall govern disposal of aforesaid both appeals arose out of common impugned judgment dated 28/11/2001 passed by Additional Session Judge, Amarpatan, District- Satna in ST. no. 140/1994 convicting the appellants under section 306 of IPC for abatement of suicide committed by deceased Saroj Singh and sentenced them to 7 years R.I and with fine of Rs.1000/-, in default 6 months R.I to each.

2. Deceased Saroj Singh was wife of appellant Ramraj Singh, married on 15/02/1989. Deceased died on 02/06/1994 by hanging herself after killing two children, aged 4 years and 10 months. Appellant Raghunandan Singh and appellant Leela Devi Singh are brother and sister-in-law of appellant Ramraj singh. Chandrabhan Singh (PW-1) and Anurudh Singh Hajari (PW-5) are brothers of the deceased. Neeta Singh, wife of Chandrabhan Singh (PW-6) is sister-in-law of the deceased.

3. Facts of the case according to charge sheet, in short, are that at the time of marriage deceased possessed degree of Master of Arts and was resident of Sagar. Appellant Ramraj Singh husband of deceased was only BA pass and was resident of village Chourhata and was posted as Clerk in irrigation department at village-Devlong, District- Shahdol. Appellant Ramraj Singh used to live alone at his place of posting and deceased live in village Chorhata along with co-appellants Jeth-Jethani. Husband and his family members were not happy and satisfied with the items given by brothers of the deceased in marriage. Deceased was constantly subjected to harassment and torture by her husband and his family members. At the time of marriage deceased was assured regarding her service. Deceased was subjected to harassment and torture by co-appellants by finding faults in herself and her daily house hold work and by misbehaving with her. In 5 years married life, deceased gave birth to one daughter and one son. On the date of incident, their age was 4

years and 10 months respectively. On 02/06/1994 in village Chorhata after killing two children, bolted herself in a room in matrimonial house, hung herself by neck through the roof. Raghunandan Singh and appellant Leela Devi Singh came and knocked the door and somehow managed to open the door and found her dead hanging herself from the roof leaving two children dead on the floor.

4. Neighbour Dharamraj Singh (PW-2) informed the incident to police-Amarpatan. Marg Ex.P-4 was registered. Naksha Panchayatnama of dead body Ex.P-6 of the deceased was prepared. Postmortem of deceased was conducted by Dr.P.K Shukla (PW-11).

5. Information of death of deceased was sent by the appellants to her brothers at Sagar by telegram. Telegram was received by brother after two days of the incident i.e on 4th June, 1994. Prior to, they could reach the village to see her dead body, funeral of the deceased was completed by the appellants.

6. On 25/06/1994, Police Amarpatan registered a case at crime no. 82/1994 under section 304B IPC against the appellants. Police statements of brothers of deceased and other witnesses were recorded. Letters written by the deceased to her brothers were seized. For comparison of handwriting of the deceased on letters, college note book Ex.P-18 was also seized. These were sent to handwriting expert for examination of handwriting of the deceased. Visra of deceased was also sent for chemical examination to FSL.

7. After completing investigation, Police Amarpatan, citing 25 witnesses submitted charge sheet against the appellants under section 304B IPC in the court of concerned JMFC. Case was committed to the court of sessions for trial. Trial court framed charges under section 306 and 304B of IPC on the appellants. Appellants abjured guilt. Defence of appellants in the trial court was that of false implication.

8. To substantiate the case of the prosecution, statements of Chandrabhan Singh, brother of deceased (PW-1), Dharamraj Singh, neighbour of deceased (PW-2), Phool Chand Mishra, Head Constable (PW-3), S.P. Chaturvedi, ASI (PW-4), Anurudh Singh Hajari, brother of deceased (PW-5), Neeta Singh, wife of Chandrabhan Singh (PW-6), Mukesh Jain (PW-7), R.P. Suryavanshi (PW-8), Mahendra Singh, Sub Inspector (PW-9), and Sukhilal Vishwakarma, Head Constable (PW-10) and Dr.P.K. Sharma (PW-11) were recorded. To substantiate defence of the appellants, statements of Yogendranath Tiwari (DW-

1) and Rajendra Singh (DW-2) were recorded. Appreciating the aforesaid evidence, trial court acquitted the appellants of the charge under section 304B of IPC. However, convicted them under section 306 IPC and sentenced them as above.

9. These appeals, challenging the findings of conviction and sentence, have been preferred on the grounds that appreciation of evidence is not proper. Statements of prosecution witnesses are suffering from material contradictions and omissions. Prosecution failed to prove any ingredients of abatement. Trial court has disbelieved the witnesses in respect of demand of dowry. Conviction of appellants is bad in law. Sentence is harsh. On the other hand, learned Panel Lawyer supported the findings of conviction and sentence of appellants and opposed the appeals.

10. To bring home the charges under 306 IPC, prosecution must prove the fact of commission of suicide by a person and suicide was the result of abatement committed by the appellants/accused persons.

11. Abatement has been defined under section 107 IPC which reads as below:-

> **Section 107 Abatement of a thing-**A person abets the doing of a thing, who—
>
> First.— Instigates any person to do that thing; or
>
> Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly.— Intentionally aids, by any act or illegal omission, the doing of that thing.

12. Law of Evidence provides certain presumption regarding abatement of suicide committed by a married woman. Section 113A of the Indian Evidence Act, 1872 reads as below:-

> 113 A. *Presumption as to abetment of suicide by a married woman.*- When the question is whether the commission of suicide by a women had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide *within a period of seven years* from the date of her

marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation

For the purposes of this section, "cruelty" shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860).

13. According to Section 498A of IPC cruelty means:-

Explanation

For the purpose of this section, "cruelty" means—

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

14. In view of the evidence of Ex.P-3 Postmortem report, Ex.P-6 Lash Panchnama of the deceased, Ex.P-24 F.S.L report of clothes and visra of the deceased, Ex.P-25 Spot Map, and statement of Dr. P.K. Sharma (PW-11), it remains no longer disputed that death of the deceased was of homicidal nature occurred within period of 7 years of the marriage in his matrimonial house. It further remains undisputed that at the time of the commission of suicide by the deceased, her husband (appellant Ramraj Singh) was not present in the house rather he had gone to his place of posting, which is about 60-70 kms away from the village.

15. Learned counsel for the appellants placing reliance on AIR 2002 (1) MPLJ 274 *(Dwarika Prasad Soni Vs. State of MP)* and submitted that instances of cruel treatment in the long past cannot be treated as abatement and further submitted that no evidence has been produced by prosecution to

prove any act of cruelty whatsoever attributable to the appellants committed by them soon before the suicide or in the recent past of the suicide. In the present case it has to be appreciated whether deceased was subjected to cruelty by the appellants prior to the incident or not.

16. On careful examination of evidence of Chandrabhan Singh, brother of deceased (PW-1), Anurudh Singh Hajari, brother of deceased (PW-5) and Neeta Singh (PW-6) wife of Chandrabhan Singh, it is revealed that deceased sent letter Ex.P-1 on 23/12/1991 narrating the instances of mis-behaviour and ill-treatment of the appellants in respect of her work and method of cooking and other house hold job. In Ex.P-1 there is mention that deceased might think for committing suicide also, but this letter has been written about 2 ½ years prior to the incident.

17. Anurudh Singh Hajari (PW-5), brother of the deceased visited the matrimonial house of deceased 15-20 days prior to the incident. He had gone to take the deceased with him to visit to her parent's house, but she was not permitted to go with him because as per religious perceptions that time was not be fitting to travel in that direction.

18. It has also come in evidence of Chandrabhan Singh, (PW-1), Anurudh Singh Hajari (PW-5) brothers of the deceased that information regarding death of deceased was received by telegram after two days of the incident. Anurudh Singh Hajari (PW-5) stated that he could not see dead body of his sister because appellants have performed the funeral prior to that. Then he reported the matter at police station Amarpatan.

19. Insofar as evidence of letters Ex.P-1 and Ex.P-2 are concerned, it can be understood that it indicates the facts, circumstances and mind set of the deceased on 23/12/1991 and on 02/12/1993 respectively. These letters show frustration of deceased regarding her life in the house of village and her helplessness in respect of not getting proper service. At the same time Ex.D-2 to D-14 letters written by either PW-1 or PW-6 to the appellants before or after aforesaid letters showing everything normal and fine are also on record. Trial court has rightly appreciated the evidence in respect of demands and held evidence to be not sufficient regarding demand of dowry from her soon before the death of the deceased.

20. According to Chandrabhan (PW-1) deceased did not visit her house for last about 1 ½ -2 years from the date of death because appellants used to discourage such meetings. Anurudh Singh Hajari (PW-5) also visited the house

of deceased 15-20 days back of her death, but nothing has been complained by the deceased to him to show whether she was living in adverse or hostile atmosphere.

21. On careful perusal of the evidence of PW-1, PW-5 and PW-6, it is clear that there had been a considerable gap between the mind sets and educational standard of the deceased and her husband appellant Ramraj Singh. Deceased was MA pass and was forced by circumstances to live in the house of village, tolerating regular instructions and criticism of her Jeth and Jethani in respect of daily house hold work. Fact that her husband also does not take interest to keep her with him at his place of posting saying that quarter is small, was another cause of her frustration. Deceased was deprived of due response and status by the appellants as she was expecting in view of her educational and family back ground both. It is true that deceased succeeded to sustain such poor life style and treatment of appellants for a period of 5 years after marriage and in the meantime, she was blessed with two children also, but at last she ended her life in such manner.

22. For rebutting presumption of cruelty, defence and evidence of the appellants in the trial was that deceased was never subjected to any physical torture by them. At the most appellants can be held liable for not arranging service for her despite her educational qualifications. The deceased was not allowed to live with her husband at his place of posting. Such behaviour, attitude and response of the appellants are the acts of cruelty or not has to be decided.

23. The appellant in his statement of accused persons recorded under section 313 of Criminal Procedure Code stated that his house was very small as he was living in rented private house. Whereas, Yogendra (DW-1) stated that appellant Ramraj Singh was living in a government quarter, it was one room quarter only, but any government quarter allotted to a government servant is never so small so that a husband and wife can not live together. It was a decision of the appellant to not to keep the deceased with him at the place of posting. According to DW-2 neighbour of matrimonial house, at the time of the incident appellant Raghunandan Singh and appellant Leela Devi Singh were watching T.V in his house. It was a shock to them also that deceased ended her life like that.

24. In view of the aforesaid it has been revealed that frustration of the deceased began from the date of marriage when a MA pass girl of Sagar

University was sent in a village having no facility of good kitchen and toilet even. Constant instructions and criticism of Jeth and Jethani aggreviated the situation. Even after period of 4-5 years she could not get deserving service, was the breaking point. She did not find appropriate support from her husband to live with him at his place of posting along with two children. Disapproval of quality and style of deceased by Jeth and Jethani and non- appreciation of wish of the deceased by husband to live with her at the place of posting, were the acts of cruelty and harassment as per definition of Section 498A IPC is the main question before this court to be decided. Not to have caring and supportive husband, brother in law and sister in law is a different thing, but subjecting constant harassment and cruelty in matrimonial house is a quite different thing.

25. For present case, necessary element of cruelty is causing physical or mental pain or suffering to any one by showing such conduct which may drive the lady in matrimonial house either to commit suicide or to cause injury or danger to her life, limb or health. No doubt in present unfortunate case after eliminating two children the deceased committed suicide. It is also true that unlikely of dowry deaths it is not necessary for abatement of suicide, that cruelty should have been committed soon before the suicide. But there should be a reasonable link between the act of suicide and act of cruelty committed by the accused. If requirement of "*soon before*" is not expected in case of abatement of suicide then at least a reasonable link between these two should always be there.

26. After happening of this henious and unfortunate incident, to remind each and every past incident or instance, caused inconvenience and trouble to the deceased, for deciding that to be an act of cruelty, is neither a correct preposition of fact nor the intention of the law. Letters Ex.P-1 dated 23/12/1991 and Ex.P-2 dated 2/12/1993, would not be sufficient evidence for presuming the cruelty on the part of the appellants, resulted in suicide of the deceased on 2/06/1994. Trial court acquitted the appellants of the charge under section 304B of IPC, however, convicted them observing continuity of torturous act of the appellants, right from the date of marriage of deceased till the date of suicide.

27. It is true that cruelty will be presumptive for abatement of suicide in such case, but there should a link and nexus between the act of cruelty and suicide. Law does not give any presumption for continuity of cruelty. It requires

Ex.P-1 and Ex.P-2 written 2 ½ years and 6 months prior to the incident, continuity of cruelty cannot be presumed.

28. Fact that information of death of the deceased was sent by the appellants to brothers of the deceased by telegram, is a circumstance showing lack of sincerity of appellants towards the relationship. Fact that funeral was performed without waiting for arrival of brothers of deceased is indicative of guilty mind of appellants, but in view of the fact that brother PW-5 reached the village after two days of the death of deceased, such circumstance alone cannot take a place of proof of act of cruelty.

29. In my considered opinion, trial court has erred to presume the continuity of acts of cruelty for driving the deceased for commission of suicide. Not only soon before the incident, but in recent past also no act of cruelty has been proved by the evidence of prosecution by the appellants towards the deceased, hence presumption under Section 113A of Evidence Act is not attracted. Evidence is not sufficient to hold the appellants guilty of cruelty thereby abatement of suicide. Appellants are entitled for benefit of doubt. Conviction of appellants under Section 306 IPC is not proper and deserves to be set aside.

30. As discussed above, conviction and sentence of the appellants under section 306 IPC is not sustainable and hereby set aside.

Appeals are allowed and appellants are acquitted of the charge.

Appeal allowed

I.L.R.[2012]M.P. 201
APPELLATE CRIMINAL
Before Mr. Justice T.K. Kaushal

Cr. A. No. 1287/2006 (Jabalpur) decided on 10 November, 2011

SHAFAT ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 376 – Rape – Consent under promise to marry*** **– It is not clear whether offer of Nikah was made by the appellant first and then committed intercourse or intercourse committed by first and then as a consolation offer of Nikah was made – It is difficult to understand that intercourse has been**

committed under promise of the Nikah. (Para 12)

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – विवाह के वचन के अंतर्गत सहमति – यह स्पष्ट नही कि क्या अपीलार्थी द्वारा पहले निकाह का प्रस्ताव रखा गया और फिर संभोग कारित किया या पहले संभोग कारित किया गया और फिर सांत्वना के रूप में निकाह का प्रस्ताव रखा गया – यह समझना कठिन है कि निकाह के वचन के अंतर्गत संभोग कारित किया गया है।

***B. Penal Code (45 of 1860), Section 376 – Rape – Proof* – Previous seven statements of prosecutrix, at different point of time make the story of prosecution less reliable – Statement of the prosecutrix does not inspire the confidence and she is not a witness worthy of credence – No conviction can be based on her such testimony – Conviction set aside.** (Para 14)

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – सबूत – भिन्न समय पर दिये गये अभियोक्त्रि के पूर्ववर्ती सात कथन अभियोजन की कहानी को कम विश्वसनीय बनाते हैं – अभियोक्त्रि का कथन विश्वास उत्पन्न नहीं करता और वह विश्वसनीय साक्षी नहीं है – उसकी ऐसी परिसाक्ष्य पर दोषसिद्धि को आधारित नहीं किया जा सकता – दोषसिद्धि अपास्त।

Case referred:

AIR 2007 SC 3059.

S.C.Datt with *G.P. Patel*, for the appellant.
Chandrakant Mishra, G.A. for the respondent.

JUDGMENT

T.K. KAUSHAL, J :- This appeal has been preferred against judgment dated 03.07.2006 passed by 5th Additional Sessions Judge (FTC) Chhatarpur in S.T. No. 49/2004 convicting the appellant under section 376 of IPC for committing rape on prosecutrix aged 28 years (PW-6) and sentenced to 7 years R.I. and with fine of Rs. 1,000/-.

2. Facts of the case, in short, are that on 23.04.2003 at about 10:00 p.m. that appellant called the prosecutrix in his house for searching showing a match for her Nikah. While appellant was going on motorcycle to leave the prosecutrix at her house back, diverting the route, took her in forest and committed rape on her. The appellant was a Police Constable and posted at Police Station Gulganj District Chhatarpur. The prosecutrix was divorced by

her husband 4 years back, after 10 years of marriage.

3. On 24.04.2003 the prosecutrix (PW-6) approached the police next day of the incident along with report in writing. Later on submitted some more such reports. A case was registered on 27.05.2003 against appellant and his brother under section 376 and 506-B of IPC at Crime No. 01/2003 vide FIR Ex.P-6.

4. On 28.05.2003 vide Ex.P-4 case was registered at Crime No. 0/03 at Police Station Gulganj. On 28.05.2003 prosecutrix was sent for her medical examination. Lady doctor prepared slides her vaginal swab Vide Ex. P-7 is her MLC report and was also sent for recording her statement by Sub Divisional Magistrate Bijawar. Slides of vaginal swab of prosecutrix was sent for FSL Sagar for chemical examination, Ex.P-13 is FSL report. Appellant was arrested on 11.06.2003 and was sent for his medical examination Ex. P-14 is his MLC report.

5. Completing the investigation, citing 16 witnesses, police Gulganj submitted a charge-sheet against appellant and his brother Illayas under section 376 and 506-B of IPC in the Court of Judicial Magistrate First Class Bejawar. Case was committed to the Court of Sessions for trial. Trial Court framed charges under section 376 and 506-B of IPC and on his brother Illayas. Appellant along with his brother Illayas abjured guilt. Defence of the accused persons in the trial was that of false implication.

6. To substantiate the case of prosecution statements of Hardayal Chourasia (PW-1), Bhagwati Yadav (PW-2), Tulsi (PW-3), Raghuveer Prasad (PW-4), Lakhan Lal Yadav, Sainik (PW-5), Prosecutrix (PW-6), Ramesh Kumar, A.S.I. (PW-7), Najim Khan (PW-8), Dr. Nidhi Khare (PW-9), R.D. Singh Kushwaha (PW-10) and Tehjeeb Kazi (PW-11) were recorded. To substantiate the defence of appellant statement of Selagram, Aaarakshak (DW-1), Purushotam Das Tiwari, Constable (DW-2) and Anil Tiwari, Head Constable (DW-3) were recorded.

7. Appreciating the aforesaid evidence Trial Court acquitted the appellant and his brother of the charges under section 506-B of IPC, however, convicted the appellant under section 376 of IPC and sentenced as above.

8. Challenging the aforesaid findings of conviction and sentence this appeal has been preferred on the grounds that appreciation of evidence is not proper. The FIR has been lodged with a delay of a month without any

reasonable explanation. Evidence of prosecutrix is self contradictory and is not corroborated by either medical evidence or by any independent evidence. On the other hand, it is submitted by Government Advocate that evidence of prosecutrix is worthy of credence and has been rightly believed by the Trial Court.

9. According to prosecutrix (PW-6) rape was committed on 23.04.2003 in respect of the incident her previous statements are available on record as follows:-

Sr.No.	Date	Ex.	Description
(i)	24.04.03	P-10A	Written typed report addressed to Superintendent of Police Chhatarpur received by police on 02.05.2003. It was not produced along with charge-sheet. In pursuance of order dated 04.02.2005 passed on application of prosecutrix under section 91 of the Code of Criminal Procedure, it was brought on record in Trial Court.
(ii)	12.05.03	D-3	Affidavit brought on record by appellant during cross examination of the prosecutrix.
(iii)	On or before 26.05.03	D-4	Statement recorded by police during enquiry in respect of affidavit Ex.D-3.
(iv)	27.05.03	P-5	Written report addressed to Superintendent of Police on the basis of which Ex. P-6 FIR was recorded.
(v)	28.05.03	P-4	FIR registered at Police Station Gulganj.
(vi)	28.05.03	D-1	Statement of prosecutrix recorded by SDM Bijawar during investigation.
(vii)	29.05.03	D-2	Police statement of prosecutrix recorded by under section 146 of the Code or Criminal Procedure.

10. On careful perusal of statements of prosecutrix recorded on 21.06.2004 in Trial Court along with the aforesaid 7 documents of the prosecutrix it has been revealed that the prosecutrix was a divorcee aged 28 years was left by her husband 4 years prior to the incidence. She used to live alone in her house at Gulganj. Appellant was interested in her. Nikah to be settled with some one. They developed acquaintance for last about a period of one year. Appellant had a background of physical relations with the prosecutrix frequently for last one year. According to the prosecutrix appellant had assured her to have Nikah with her. Rape was committed by the appellant stating that she had become his wife. Since appellant was a Police Constable, the prosecutrix found it difficult to convince the police to take any action against him.

11. In trial the prosecutrix was subjected to a very lengthy cross examination. She had changed many houses to live in Gulganj within a period of 2 years for some or other reasons. Prosecutrix has disowned her previous statement recorded by SDM, Ex. D-1, saying that she had never been a consenting party to physical relationship with the appellant. Initially appellant was helping for her Nikah with some other person. They had been in physical relationship for last about more than one year on regular basis. Later on prosecutrix herself showed undue keen-ness in Nikah with the appellant.

12. Since the case was registered after a period of more than a month hence there remains no significance of medical report and FSL report. These reports do not support the prosecutrix at all. On careful perusal of the whole statement of prosecutrix. It is not clear whether offer of Nikah was made by the appellant first and then committed intercourse or intercourse committed by first and then as a consolation offer of Nikah was made. Considering these facts either way, it is precipitated from the statement that condition of Nikah was introduced later on by the prosecutrix in the relationship. In aforesaid background on the basis of statement of prosecutrix it is difficult to understand that intercourse has been committed under promise of the Nikah by the appellant.

13. Learned counsel for the appellant placed reliance on AIR 2007 SC 3059 *Pradeep Kumar Verma v. State of Bihar and another* and submitted that perception of the prosecutrix that she might have a Nikah with appellant at the time of intercourse will not amount to rape committed by the appellant under promise of the marriage. It has been observed in para 20 and 21:-

"20. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause second. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda's case (supra) which was aprovingly referred to in Uday's case (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end – unless the court can be assured that from the very inception the accused never really intended to marry her. (emphasis supplied). In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case (vide passage "ed supra). By making the solitary observation that a false promise is not a fact within the meaning of the Code, it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no strait-jacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday's case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's

intention to marry cannot be ruled out.

21. These aspects have been elaborately dealt with in Deelip Singh's case (supra). The stage of analyzing the factual materials was yet to be undertaken. But as rightly contended by the appellant if on a bare reading of the FIR, it shows that no offence had been made out for proceeding situation would be different. It would have been proper for the High Court as noted above to deal with the matter elaborately. That apparently has not been done.

14. In view of the totality of facts and circumstances of the case, incident of 23.04.2003 appears not to be an act of rape committed by the appellant on the prosecutrix. Statement of the prosecutrix in this regard does not inspire the confidence. Her previous seven statements at different point of time make the story of prosecution less reliable. Prosecutrix, in present case, is not a witness worthy of credence. No conviction can be based on her such testimony.

15. Conviction of appellant under section 376 of IPC deserves to be and is hereby set aside. Appeal is allowed.

Appeal allowed

I.L.R.[2012]M.P. 207
APPELLATE CRIMINAL

Before Mrs. Justice Sushma Shrivastava & Mr. Justice R.C.Mishra

Cr.A.No.1089/1993 (Jabalpur) decided on 11 November, 2011

RAMDAS KACHHI ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Words and Phrases – Res Gestae*** **– Eye-witness informed 'B' about the incident – Information conveyed by eye-witness to 'B' is admissible as part of res-gestae.** (Para 19)

क. *शब्द एवं वाक्यांश – संबंधित तथ्य और कार्य* – प्रत्यक्षदर्शी साक्षी ने 'B' को घटना के बारे में सूचित किया – प्रत्यक्षदर्शी साक्षी द्वारा 'B' को दी गई सूचना संबंधित तथ्य और कार्य के भाग के रूप में ग्राह्य है।

B. ***Maxim – Falsus in uno, falsus in omnibus*** **– Neither a**

sound rule of law nor a rule of practice (Para 21)

ख. सूत्र–एक बात में मिथ्या तो सब में मिथ्या–न तो विधि का ठोस नियम है न ही पद्धति का नियम।

C. Evidence Act (1 of 1872) Section 3 – Witness – Relative **– No impediment to convict a person on sole testimony of single witness provided he is wholly reliable – Relationship is not a factor to affect the credibility of a witness – Foundation has to be laid if plea of false implication is made.** (Para 22)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – रिश्तेदार – एकमात्र साक्षी की एकमात्र परिसाक्ष्य पर व्यक्ति को दोषसिद्धि करने के लिए कोई अड़चन नहीं परंतु यह तब जबकि वह पूर्णतः विश्वसनीय है – साक्षी की विश्वसनीयता को प्रभावित करने के लिए नातेदारी कारक नही है – आधार प्रस्तुत करना होगा यदि मिथ्या आलिप्त किये जाने का अभिवाक् किया गया है।

D. Criminal Procedure Code, 1973 (2 of 1974), Section 164 – **Statement of a witness cannot be discarded simply because their statements were recorded by the Magistrate under Section 164.** (Para 25)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 164 – साक्षी का कथन अस्वीकार नहीं किया जा सकता मात्र इसलिए कि उनके कथन मजिस्ट्रेट द्वारा धारा 164 के अंतर्गत अभिलिखित किये गये थे।

E. Criminal Procedure Code, 1973 (2 of 1974), Section 378 **– Power of Appellate Court – Law discussed.** (Para 35)

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378 – अपीली न्यायालय की शक्ति – विधि विवेचित।

Cases referred:

(1985) 1 SCC 422, (2010) 10 SCC 123, AIR 1065 SC 277, AIR 1968 SC 1270, AIR 1968 SC 938, (2007) 4 SCC 415

Amit Jain, for the appellant.
R.K. Kesharwani, P.L. for the respondent/ State

JUDGMENT

The judgment of the court was delivered by : **R.C. Mishra, J.** :- These appeals, though arising out of two different trials before the same Judge, relate to the same incident of murder and, therefore,

are interlinked. However, each appeal has to be decided on the evidence led in the corresponding trial.

2. The appeal, registered as Cri. Appeal No.389/1994, is State's appeal against acquittal of seven accused/respondents in respect of the offences punishable under Sections 148 and 302 read with 149 of the IPC and Brij Bhushan (since dead), who was impleaded as respondent no.3. The corresponding judgment was passed by Second ASJ, Tikamgarh on 28.10.1993 in S.T. No.29/88. In that case, cognizance of the offences was taken upon the complaint made by Khunni, the brother of Gantha (since deceased). It was upon the FIR lodged by Khunni only that police registered a case against as many as eight persons viz. all the seven respondents and one Ramdas for the above-mentioned offences yet, after investigation, charge sheet was filed against Ramdas only. After conclusion of the trial, registered as S.T. No.10/87, the same Additional Sessions Judge delivered simultaneously the judgment convicting Ramdas under Section 302 of the IPC and sentencing him to undergo life imprisonment. Against this judgment only, the appeal, numbered as Cri. Appeal no.1089/1993, has been preferred by Ramdas.

3. For the sake of convenience, Session Trial Nos.10/87 and 29/88 shall be referred to as the police case and the complaint case respectively and the witnesses as well as the exhibited documents shall be referred to by placing '/P' or '/C' (as the case may be) after their respective numbers in each case. Further, the accused persons shall be referred to by their respective names.

4. Needless to point out that the State's appeal, so far as it concerns Brij Bhushan, has abated consequent to his death on 03.03.1999.

5. Contents of the FIR (Ex.P-7/P), said to have been lodged by Khunni (PW9/P), at 3.15 p.m. on 8.11.1985 and scribed by Sub-Inspector S.K. Goswami (PW13/P) at Digoda Outpost, may be summarized as under –

(a) On 08.11.1985 at about 9 a.m. in village Bilgaon, Ramdas along with Gorelal, Mulua and Parmanand @ Sukka came to the Well belonging to Gantha and Khunni and persuaded Gantha to move towards their Well which was situated at a short distance. Immediately thereafter, Parwatia and Beti Bai (PW10/P), respectively the mother and wife of Gantha, arrived at his Well to give breakfast. On being informed that Gorelal and his companions had taken Gantha to their Well, Parwatia directed Khunni to bring him back.

(b) As Khunni reached near Gorelal's Well, Munnu and Kalloo, who were standing there, asked him to return, saying that Gantha was not there. At this point of time only, Khunni looked around and noticed that **(i)** Gantha, being overpowered by Gorelal, Parmanand, Mulua, Brij Bhushan, Kailash and Ramdas, was lying on the ground near a *Mahua* tree **(ii)** Kailash, while saying that inspite of an axe blow given by him, Gantha had not died, had exhorted Ramdas to deal yet another blow and **(iii)** Ramdas had then struck a blow with axe on Gantha's neck.

(c) Shouting for help, Khunni started running away towards the village and in the meanwhile, Parwatia and Beti Bai also rushed to the spot but Ramdas and his companions fled away.

(d) On reaching the village, Khunni (PW9/P) informed Swami Prasad (PW6/P), the Chowkidar and co-villagers namely Kuttu Lalla, Sobran Singh, Vishal Singh and Brijbhan Ghosi about the incident. All of them accompanied Khunni upto the spot located in Gorelal's field wherein Gantha was lying dead.

6. As indicated already, upon the FIR, a case under Sections 147, 148 and 302 read with 149 of the IPC was registered against as many as 8 accused persons including Ramdas. After inquest proceedings, dead body of Gantha was sent for post-mortem examination. Autopsy Surgeon Dr. J.K. Jain (PW2) opined that cause of Gantha's death was syncope due to haemorrhage. He also preserved a half shirt and a *dhoti* worn by the deceased for chemical examination.

7. During investigation, S.K. Goswami (PW13) inspected the place of occurrence and seized control and bloodstained soil, axe and bloodstained Safi therefrom. Ramdas surrendered at the police station on 10/11/1985 and from his possession; bloodstained white terry-cot shirt and towel were seized. The investigating officer also seized Mulua's bloodstained shirt, said to have been worn by him at the time of incident. All these articles were forwarded to FSL, Sagar for chemical examination. Corresponding report (Ex.P-23) indicated that except the ordinary soil, all the seized articles contained blood. The Chemical Examiner transmitted the exhibits to Serologist for further examination. However, the Serologist could only determine presence of human blood on the shirts, axe, safi & dhoti and was not able to determine the origin of bloodstains found on the earth and towel.

8. Upon completion of the investigation, charge sheet was submitted on 24.12.1985 against Ramdas only in the Court of JMFC, Jatara, who committed the case to the Court of Session for trial. In that Court only, on 13.12.1985, Khunni filed a complaint arraigning all the eight persons named in the FIR as accused. Complaint contained almost the same allegations as were recorded in the FIR. It was further alleged that in order to save themselves from prosecution, all the co-accused had not only produced Ramdas before the SHO but also persuaded him not to disclose identity of his associates in the murder.

9. After making an inquiry into the complaint, the Magistrate, for the reasons recorded in the order-dated 21.03.1987, proceeded to issue process against all the seven persons impleaded as co-accused and vide order-dated 21.04.1988, committed the case to the Court of Session for trial.

10. Let us first deal with merits of the appeal against conviction in question.

11. On being charged with the murder, appellant Ramdas abjured the guilt and pleaded false implication due to enmity in view of the fact that the complainant party belonged to rival political group in the village. However, no evidence was led in defence. Prosecution sought to prove the charge by examining as many as 13 witnesses including Gorelal (PW1/P) and Mulua (PW7/P), who were named as members of an unlawful assembly having a common object to kill Gantha.

12. Legality and propriety of the impugned conviction have been challenged on the following grounds -

(i) The trial was vitiated due to violation of mandate of Section 210 of the Code of Criminal Procedure (for short 'the Code'), requiring the Judge to club both the cases, though arising out of the police report and the private complaint and hold a common trial.

(ii) Evidence of Gorelal and Mulua, who were prosecuted by Khunni as the persons involved in the murder of his brother Gantha, could not be taken into account for recording the finding of guilty particularly when they had contradicted each other on material points.

(iii) Testimony of Khunni (PW9/P) was not worthy of credence particularly when his presence at the spot, was not accepted by Mulua (PW7/P) and Gorelal (PW1/P) and his version was not corroborated

by Swami Prasad (PW6/P), the Chowkidar.

(iv) Existence of as many as eight incised wounds on Gantha's body supported recitals of the FIR, suggesting involvement of at-least six persons in the murder.

In response, while making reference to the incriminating pieces of evidence on record, learned Panel Lawyer has submitted that the conviction is well founded on merits.

13. At the outset, it may be observed that the objection as to validity of trial is apparently misconceived in view of decision of the Supreme Court in *Harjinder Singh v. State of Punjab* (1985) 1 SCC 422, that has been reaffirmed in *Pal @ Palia v. State of U.P.* (2010) 10 SCC 123. Accordingly, in the peculiar facts and circumstances of the case, indicating that Gorelal and Mulua, though cited as eyewitnesses in the charge sheet, were arraigned as accused in the complaint, the learned Judge was required to hear the cases and take evidence separately.

14. Before entering into merits of the other contentions, it would be necessary to first advert to the medical evidence on record. Dr. J.K. Jain (PW2/P), the Autopsy Surgeon proved existence of the following injuries on the dead body of Gantha–

(i) Incised wound 12 cm x 3 cm x 3.5 cm over left side face over mandible, cutting the lobule of ear. Underlying BVS, MS, nerves and bone (mandible) is cut, exposed, direction towards downwards and posterior.

(ii) Incised wound 10 cm x 2.5 cm x 3 cm below the injury (i) direction towards downwards and backwards underlying BVS, MS, bone exposed.

(iii) Incised wound 4.5 cm x 2 cm x 3.5 cm cutting MS, BVS, nerves, vertebral and spinal cord at level of C3/C4 direction downward and backward.

(iv) Incised wound 4 cm x 2 cm x 2 cm, 3 cm below injury (iii); MS, BVS cut seen in the floor forward direction toward downwards posterior.

(v) Incised wound 3cm x 1.5 cm x 2 cm over posterior aspect

right side of the neck 2" above supra scapular region transversally forward downwards.

(vi) Incised wound 3 cm x 1.5 cm x 1.5 cm over left scapular region medial border middle direction longitudinal downwards laterally.

(vii) Incised wound 3 cm x 0.5 cm x 0.5 cm over left supra scapular region downward laterally.

(viii) Incised wound 3 cm x 0.5 cm x 0.4 cm over posterior aspect at left side base of the neck downwards laterally.

In the opinion of Dr. J.K. Jain, the death was caused as a result of syncope due to haemorrhage. According to him, injury no.(iii) [above] was sufficient in the ordinary course of nature to cause death whereas other injuries were also of the same magnitude as they had resulted into extensive haemorrhage. He further admitted that all the aforesaid injuries could be caused by means of a single weapon/ multiple weapons having sharp edge.

15. Thus, in the light of the medical evidence, learned trial Judge rightly held that death of Gantha was homicidal in nature.

16. Coming to the other evidence on record, it may be seen that Gorelal, Mulua, Khunni and Beti Bai were examined as eyewitnesses to the murder. Out of them, Gorelal and Mulua, admittedly, were tried in the complaint case upon charges of the offences punishable under Sections 148 & 302 read with 149 of the IPC. In this background, before re-analyzing the evidence of Gorelal and Mulua, we would prefer to first re-appreciate the testimony of Khunni and Beti Bai.

17. Khunni (PW9/P) substantially reiterated the version recorded by Sub-Inspector S.K. Goswami (PW13/P) in the FIR (Ex.P-7/P) at his instance only. As per his statement, - (**a**) While searching his brother Gantha, as he reached near the Well belonging to Gorelal, Kalloo and Munnu misinformed him that Gantha had not come there but he was able to witness that inside the *Badi*, Ramdas, Mulua, Gorelal, Kailash, Brajbhushan and Parmanand were not allowing his brother Gantha to rise from the ground and were assaulting him with axes, (**b**) Kailash, while saying that Gantha had survived even after sustaining his blow with axe, insisted upon Ramdas to strike further blow, (**c**) he could not save Ramdas from further assault because he was chased out by Munnu and Kalloo, (**d**) raising alarms, he rushed to the village and on the

way, apprised Beti Bai of the assault on Gantha and on reaching the village, informed Chowkidar Swami, Kalloo and others about the incident, (e) Kuttu Lala, Bhujbal and Swami came, along with him, to the spot located near Gorelal's Well where bloodstained dead body of Gantha was lying and (f) thereafter, he proceeded on foot to the Police Outpost at Digoda to lodge the FIR.

18. After deposing in Para 2 of the chief examination that it was Ramdas, who was having axe, Khunni further asserted in Para 16 of the cross-examination that he had seen only Ramdas dealing axe blows on the person of Gantha who, according to him, was overpowered by Kailash, Parmanand, Brijbhushan and their companions by pushing down. He was cross-examined at length but nothing could be elicited so as to suggest that he was, in any way, interested in securing conviction of Ramdas on false grounds.

19. Beti Bai (PW10/P) supported the facts, as stated by Khunni, that while running away from the spot, he had informed her about the incident. Although, she claimed to have witnessed the later part of the occurrence yet, as rightly concluded by learned trial Judge, her claim did not inspire confidence for the following reasons –

(i) Khunni clearly admitted that the place where she had met him was situated at a distance of one furlong from the spot and at an equal distance from the village whereas, according to him, Gorelal's well was located at a distance of one Kilometer from the Village.

(ii) Her assertion that she had seen Ramdas and Kailash assaulting Gantha with respective axes and four persons namely Brijbhushan, Gorelal, Parmanand and Mulua, constraining him, did not find place in her case diary statement (EX.D-4/P) that only suggested that she had seen Ramdas and his companions fleeing away from the place where her husband was lying dead.

Still, the information conveyed by Khunni to her was admissible as part of *res gestae*.

20. Investigating Officer S.K. Goswami (PW13/P) could not recover any other axe than the one found lying near Gantha's dead body at the spot. He was not cross-examined on the point of seizure of a terrycot shirt and towel from the possession of Ramdas. As indicated in the report of the Serologist (Ex.P-22), shirt belonging to Ramdas was found stained with human blood and non-explanation therefor, also lent assurance to the prosecution version.

21. Evidence of Khunni, so far as it related to the complicity of Ramdas in the murder, could not be disbelieved on the ground that in the FIR as well as in the complaint, he had alleged involvement of seven other persons in the crime. The maxim '*falsus in uno, falsus in omnibus*' is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinize the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, the doctrine does not apply when grain is not separable from chaff because the truth and falsehood are inextricably mixed up. The Court cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest (*Ugar Ahir v. State of Bihar* AIR 1965 SC 277 relied on).

22. There is no legal impediment in convicting a person on the sole testimony of a single witness provided he is wholly reliable. Further, relationship is not a factor to affect credibility of a witness. Foundation has to be laid if plea of false implication is made. Being the younger brother of the deceased, Khunni was not likely to spare the real assailant and implicate an innocent person. As pointed out already, his testimony as against Ramdas drew ample support from *res gestae* evidence of Beti Bai, recitals of the FIR and a consistent medical as well as forensic evidence. The Autopsy Surgeon also did not rule out possibility of use of a single weapon in causing the injuries found on the dead body. In the light of the overwhelming evidence on record, non-corroborative evidence of Swami Prasad, the Chowkidar (PW6/P) did not assume any significance.

23. In such a situation, even if the testimony of Gorelal and Mulua is excluded from consideration, the remaining prosecution evidence, being cogent, consistent and creditworthy, would be sufficient to uphold the conviction of Ramdas as justified.

24. Reverting to the evidence of Gorelal (PW1/P) and Mulua (PW7/P), it may be observed that both had deposed to have witnessed the murderous assault. They were unanimous in saying that Gantha was killed by Ramdas only. According to them, at the behest of Gantha, liquor was consumed near Mulua's Well by them, Gantha and Ramdas together and immediately thereafter, they had seen Ramdas inflicting axe blows on Gantha and as Mulua

tried to catch hold of Ramdas, he ran away but was chased by Mulua, who caught him at a short distance. Their statements suffered from inconsistency on the point as to why Ramdas was not taken to the village. Mulua asserted that he had let Ramdas off at the instance of Gorelal whereas Gorelal clearly stated that Ramdas was able to extricate himself from the clutches of Mulua. However, this minor discrepancy could not be a ground for rejection of their testimony.

25. Evidence of Gorelal and Mulua could not be discarded simply because their statements were recorded by the Magistrate under Section 164 of the Code (*Ram Charan v. State of U.P. AIR 1968 SC 1270* referred to).

26. Furthermore, Gorelal and Mulua did not, in any way, confess their involvement in the murder whereas in *Laxmipat Choraria v. State of Maharashtra* AIR 1968 SC 938 (*relied on by learned trial Judge for taking into account their evidence*), objection as to admissibility of testimony of even a self-confessed criminal, who admitted her role in conspiracy to smuggle gold, as a witness, was rejected and it was held that she was a competent witness but her evidence, if subjected to scrutiny and the usual checks for corroboration, could be received with due caution.

27. As admitted by Beti Bai, Brijbhushan and Gandharva Singh were rival contestants in the election for the office of Sarpanch and her husband (Gantha) and brother-in-law (Khunni) supported Gandharva Singh whereas Ramdas, Parmanand, Gorelal and Mulua were in the political group led by Brijbhushan. Against this backdrop, mere fact that Gorelal and Mulua were named by Khunni in the FIR and in the complaint as persons from amongst the assailants of Gantha was not sufficient to make their evidence unworthy of credit. The eyewitness account given by them could be acted upon as it was corroborated in material particulars by the other evidence on record.

28. To sum up, even without going into question as to whether Gorelal and Mulua were accomplices, it could safely be concluded that they had witnessed the assault leading to Gantha's death.

29. Thus, viewed from any angle, the appeal preferred by Ramdas has no merit or substance. In the light of the overwhelming evidence on record, his conviction deserves to be affirmed as well merited.

30. This brings us to the State's appeal against acquittal of Gorelal, Mulua,

Kailash, Parmanand, Munnu and Kalloo. It is relevant to note that complainant Khunni (PW1/C) has not preferred any revision against the order of acquittal. As such, the appeal against the acquittal of seven persons who, though named in the FIR lodged by Khunni as members of the unlawful assembly involved in the murder of Gantha, were not prosecuted for the offences on its behalf, discloses a self-contradictory approach on the part of the State.

31. At the trial, all the seven accused persons were charged with the offences punishable under Sections 148 and 302 read with 149 of the IPC as per the allegations contained in the complaint and the supportive evidence brought on record. They denied the charges and pleaded that group rivalry had led to their prosecution on totally false grounds. In the examination, under Section 313 of the Code, they further pleaded that the natives of the village were divided into two factions; one led by Brijbhushan and the other by Sobran Singh/Gandharva Singh (PW10/C) who also enjoyed support of complainant Khunni, his brother Gantha, Indal (PW3/C), and Jahari (PW4/C). Two co-villagers namely Hardas (DW1/C) and Jasrath (DW2/C) were examined to support the plea of false implication due to internal rivalry. Both of them clearly deposed that their false implication was an off-shoot of the election for the office of Sarpanch in which Brijbhushan had defeated Sobran Singh.

32. To bring home the charges, the prosecution called 11 witnesses in all. Amongst these, complainant Khunni (PW1/C), Beti Bai (PW2/C), Indal (PW3/C) and Jahari (PW4/C) were examined as eyewitnesses to the incident. The other witnesses were –

(i) S.K. Goswani (PW6/C), the then in-charge of Digoda Outpost, who registered the case upon the FIR (Ex.P-1/C) lodged by Khunni and investigated thereinto.

(ii) Ramswaroop (PW5/C) and Gyan Singh (PW9/C), the *panch* witnesses to the seizure memo (Ex.P-3C/C) evidencing seizure of bloodstained shirt of Mulua by S.K. Goswani (PW6/C).

(iii) Harinarayan (PW7/C), the Patwari, who prepared the spot map (Ex.P-10/C).

(iv) Chandrashekar (PW8/C), the then SHO of Police Outpost Digora, who registered the case at the Outpost.

(v) Gandharva Singh (PW10/C) as witness to inquest panchnama

(Ex.5C/C) and memo seizure (Ex.P7C/C).

(vi) Dr. J.K. Jain, the Autopsy Surgeon and scriber of the corresponding report (Ex.P-6C/C).

33. Khunni (PW1/C) came forward to corroborate the recitals of the FIR, as already reproduced above, indicating involvement of Gorelal, Mulua, Brijbhushan, Kailash, Parmanand, Munnu and Kalloo in Gantha's murder. In the complaint case, Beti Bai (PW2/C) claimed to have seen the murderous assault on her husband Gantha. These relatives of the deceased further introduced Indal and Jahari as eyewitnesses to the incident. According to Khunni, when he returned to the spot along with Swami and the other co-villagers, he had found Indal and Jahari standing there. Both Indal and Jahari vividly described as to how they were able to witness the assault on Gantha in the course of which Brijbhushan, Parmanand, Gorelal and Mulua had pressed down upon him and Ramdas as well as Kailash had inflicted injuries with respective axes on his person.

34. A bare perusal of the judgment would reveal that finding of not guilty was recorded for the following reasons -

(i) Khunni (PW1/C) clearly admitted that his mother Parwatia and sister-in-law Betibai were not able to witness the assault leading to death of his brother Gantha and, therefore, the eyewitness account given by Beti Bai to the effect that she was able to view the spot from the hillock did not inspire confidence.

(ii) Testimony of Indal (PW3/C) and Jahari (PW4/C), who claimed to be eye-witnesses was apparently unworthy of credence in view of a candid admission made by Khunni in para 18 of his statement that he had to run away from the spot as none else was present to witness the incident or to render assistance to him.

(iii) Indal categorically admitted that he was prosecuted for attempting murder of Mulua by firing a gunshot whereas Jahari also acknowledged that in a criminal case ending in conviction Kailash had appeared as a witness against him.

(iv) S.K. Goswami, the Investigating Officer, clearly explained as to why charge sheet was filed against Ramdas despite the fact that as many as 8 persons were named in the FIR as the persons involved in

the murderous assault.

(v) The FIR was lodged more than 6 hours after the incident and no plausible explanation was given for the delay.

(vi) Even in the statement of so-called eye-witnesses including the complainant, no active role of Kallu and Munnu was reflected.

35. On a conspectus of all the leading decisions on the subject, the Apex Court, in *Chandrappa v. State of Karnataka* (2007 (4) SCC 415), culled out the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal -

(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 emphasise 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 is 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.

36. Taking into consideration the reasons assigned for arriving at the findings in the face of evidence on record, the view taken by the trial Court was apparently a possible view. As such, no interference, with the order of acquittal, is called for.

37. In the result, both the appeals are dismissed. Conviction of appellant Ramdas under Section 302 of the IPC and consequent life sentence are hereby affirmed and acquittal of Gorelal, Mulua, Kailash, Parmanand, Munnu and Kalloo for the offences under Sections 148 and 302 read with 149 of the IPC in the complaint case is also upheld. The bail bonds furnished by Gorelal, Mulua, Kailash, Parmanand, Munnu and Kalloo shall stand discharged.

38. Appellant Ramdas is on bail. He is directed to surrender to his bail bonds before the trial Court on or before 11.01.2012 for being committed to custody for undergoing the remaining part of the sentence.

39. Copy of the judgment be retained in the connected criminal appeal.

Appeal dismissed

I.L.R.[2012]M.P. 220
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra

Cr. A. No. 1037/1996 (Jabalpur) decided on 17 November, 2011

RADHELAL & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 306 – Abetment of Suicide – **Report of Chemical Examiner indicating that on examination at the F.S.L., no chemical poison was detected in the viscera of the deceased – Commission of the suicide was not established with reasonable certainty – Conviction under Section 306 of the IPC could not be recorded – Conviction set aside.** (Paras 6 & 8)

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – रसायन परीक्षक का प्रतिवेदन उपदर्शित करता है कि विधि विज्ञान प्रयोगशाला में परीक्षण

करने पर मृतक के अभ्यन्तर अंग/आंतों में कोई रसायनिक विष का पता नहीं चला – आत्महत्या कारित की जाना युक्तियुक्त निश्चितता के साथ स्थापित नहीं किया गया – भा.द.सं. की धारा 306 के अंतर्गत दोषिसिद्धि अभिलिखित नहीं की जा सकती – दोषसिद्धि अपास्त।

Cases referred:

AIR 1989 SC 378, AIR 1984 SC 1622.

A.M. Trivedi with *Sanjay Patel & Sushil Mishra*, for the appellants.
Amit Kumar Sharma, P.L. for the respondent/State.

JUDGMENT

R.C. MISHRA J :-This appeal has been preferred against the judgment-dated 26.04.1996 passed by Second Additional Sessions Judge, Seoni in S.T.No.59/92, whereby each one of the appellants, though charged with the offences punishable under Section 306 and in the alternative under section 498A of the IPC, was convicted under Section 306 of IPC and sentenced to undergo R.I. for 7 years and to pay fine of Rs.5,000/- and in default, to suffer R.I. for 6 months.

2. Prosecution story, in short, may be narrated thus -

(i) Savitri Bai (since deceased), a resident of village Padhera, was the daughter of Gorelal (PW1). Her marriage was solemnized with appellant no.1 Radhelal (hereinafter referred to as 'A1') nearly four years prior to her untimely death. In the wedlock, they were blessed with a son.

(ii) At the relevant point of time, A1 was residing separately from his parents as, being a gambler, he had been thrown out of the parental house. Savitri had a happy married life for a period of about 3 years. Thereafter, she had been subjected to cruelty and harassment not only by A1 but also by his relative appellant no.2 Seetaram (for short 'A2') for her failure to bring an amount of Rs.5,000/- from her father. In such a situation, she was compelled to leave her matrimonial home. However, in the wake of assurance given by Sevaram (DW1), the brother-in-law of A1, that the ill-treatment would not continue any further, Savitri was sent to A1's house only one-and-half months prior to the incident in question.

(iii) Ultimately, in the night intervening 2nd and 3rd of May 1992, Savitri committed suicide presumably by consuming a poisonous substance.

(iv) Upon intimation given by A1 to the effect that Savitri died due to dehydration, a *morgue* (death case) was registered. After inquest proceedings, the dead body was sent to Community Health Centre at Ghansour. The post-mortem was conducted by a panel of doctors comprising Dr. Arjun Saxena (PW3) and Dr. Hemant Chandravanshi. Expressing inability to give any definite opinion as to cause of Savitri's death, they preserved her viscera for histo-pathological and chemical examination.

(v) Gorelal produced a letter (Article 'A') containing instances of cruelty meted out to Savitri at the hands of both the appellants. In the light of the findings of the *morgue* inquiry, ASI O.P. Vinodia (PW4) registered a case under Section 306 of IPC by scribing the FIR (Ex.P-7).

3. The appellants abjured the guilt and pleaded false implication.

4. Legality and propriety of the impugned conviction have been challenged on the following grounds –

(i) There was nothing on record to suggest that Savitri had committed suicide.

(ii) Letter (Article 'A') that was taken into account as one of the incriminating pieces of evidence was not proved to have been written either by the deceased herself or by any identifiable person at her instance.

In response, learned Panel Lawyer has submitted that the conviction is well founded.

5. Although, Dr. Arjun Saxena (PW3) proved existence of an ante-mortem bruise 2" x 2" on the left upper buttock region of Savitri yet, he clearly admitted that the injury could be caused due to fall on or friction against hard surface. Further, the post-mortem report indicated (Ex.P-5) that Savitri's stomach, large intestine and bladder were empty and the Autopsy Surgeon did not rule out the possibility that continuous vomiting and loose motion could be the cause for the aforesaid condition of the abdomen. He clearly admitted

that the improperly treated victim has a high probability of dying due to dehydration. In such a situation, the core question was as to whether any poisonous substance was consumed by or administered to Savitri ?

6. The disturbing feature of the case is that the report of Chemical Examiner indicating that on examination at the FSL, no chemical poison was detected in the viscera of the deceased, escaped consideration. Neither the Public Prosecutor nor the defence counsel bothered to bring the report to the notice of the trial Judge, who also missed this material aspect of the matter through carelessness. It is relevant to note that the memo of appeal does not contain any reference to the FSL report. Needless to say that, by virtue of sub-section (4) of Section 293 of the Code of Criminal Procedure, the Chemical Examiner's report can be read in evidence without any formal proof.

7. Contents of the report available on record are sufficient to answer the question posed above in the negative. In other words, Savitri's death was not caused due to poisoning.

8. In these circumstances, learned trial Judge erred in holding that it was a case of suicide. Since commission of the suicide was not established with reasonable certainty, conviction under Section 306 of the IPC could not be recorded *(Wazir Chand v. State of Haryana,* AIR 1989 SC 378 *referred to)*.

9. Law is well settled on the point that even in a case of suicide, letter written by the deceased, which is directly connected with or related to death in question would fall within four corners of Section 32 of the Indian Evidence Act *(Sharad Biridhichand Sarda vs. State of Maharashtra* AIR 1984 SC 1622 relied on). However, even if it is assumed that Savitri had committed suicide, the inland letter (Article 'A'), relied on by learned trial Judge, could not have formed basis of the impugned conviction as its authenticity was in cloud in view of the following facts -

(i) A bare perusal of the letter, reflecting that Savitri was persistently subjected to cruelty and harassment due to non-satisfaction of demand for a sum of Rs.20,000/- by both the appellants, would reveal that it was not written by Savitri herself.

(ii) The letter appears to have been posted on 02.05.92 and delivered on 13.05.92 whereas, according to Gorelal (PW1), transmission of the letter from Dhanwai to Sukri by post requires only 3 days.

(iii) Gorelal candidly acknowledged that he had not made any complaint regarding the dowry harassment meted out to Savitri in her matrimonial home to any person or authority at any earlier point of time.

(iv) Sevaram (DW1), cited in the charge sheet as the witness, who had brought Savitri back to her matrimonial home nearly one-and-half months prior to her untimely death, did not substantiate the prosecution version as to cruelty at the hands of the appellants.

10. Thus, the assertions made by Gorelal to the effect that the letter was written by Savitri and further that even prior to her death, it had reached his hands, were not acceptable.

11. For these reasons, the appeal is allowed. The impugned conviction and consequent sentences are hereby set-aside. Instead, the appellants are acquitted of the offence. Fine amount, if deposited, be refunded.

12. The appellants are on bail. Their bail bonds shall stand discharged.

Appeal allowed.

I.L.R.[2012]M.P. 224
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
Cr. A. No. 239/1996 (Jabalpur) decided on 18 November, 2011

BAJA ALIAS BAJASINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) – Assault to a woman – **Where the accused being a stranger knows and has reason to believe that the victim of the offence is a member of such a caste or tribe, the offence would squarely fall under Section 3(1)(xi) of the Act and it would not be necessary to establish further that the offence was committed on the ground that she belongs to such a Caste or Tribe.** (Para 17)

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) – महिला पर हमला – जब अभियुक्त को अंजान व्यक्ति होते हुए यह ज्ञात हो और विश्वास करने का कारण हो कि अपराध का पीड़ित

ऐसी जाति या जनजाति का सदस्य है तब अपराध पूर्णतः अधिनियम की धारा *3(1)(xi)* के अंतर्गत आएगा और आगे यह स्थापित करने की आवश्यकता नही कि अपराध इस आधार पर कारित किया गया कि वह ऐसी जाति या जनजाति की थी।

Cases referred:

2005 (1) MPLJ 449, (2004) 1 SCC 215, (2006) 3 SCC 771.

R.K. Samaiya and *I.K. Dwivedi*, 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 16/1/96 passed by Sessions Judge [designated as Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989] (for short 'the Act'), Sehore in Special Case No.135/93, whereby the appellant was convicted under Section 3(1)(xi) of the Act and sentenced to undergo R.I. for 6 months and to pay a fine of Rs.200/- and in default, to suffer S.I. for 1 month.

2. Prosecution story, in short, may be narrated thus -

(i) On 21/8/93, the prosecutrix (PW1), a resident of Village Bandariya Haat and member of a Scheduled Caste, had gone to graze her bullocks in the Jungle of Badli. At about 4 p.m., the appellant, a native of Village Dhand, whose lands were contiguously situated, came from behind and after catching hold of her neck, fell her down near *Khakra* (Palasa) tree. She started shouting but the appellant not only pressed her mouth but also gave slaps while giving threat to kill. Hearing the commotion, Ganpat (PW4), who was grazing cattle at a short distance, came to the spot and the appellant then fled away.

(ii) Upon the FIR (Ex.P-1) lodged by the prosecutrix, a case under Sections 354 of the IPC and 3(1)(xi) of the Act was registered at Police Station Ashta. The prosecutrix was sent to CHC, Ashta where Dr. Suresh Shrimal (PW7) examined her. After due investigation, charge-sheet for the offences under Sections 323 & 354 of the IPC and 3(1)(xi) of the Act was submitted before the Special Court.

3. On being charged with the offence punishable under Section 3(1)(xi)

only, the appellant pleaded false implication due to prevailing animosity. In the cross-examination of the prosecutrix (PW1), her husband Puran (PW2) and Ganpat (PW4), it was suggested that relations between the prosecutrix and the appellant were strained for the following causes -

(i) Despite being objected to, the prosecutrix used to drive her cattle to a nearby rivulet through his field.

(ii) The prosecutrix was inclined to encroach upon a piece of Government Land, possessed by Mitha Bai, sister of the appellant.

However, no evidence was led in defence.

4. Legality and propriety of the conviction have been challenged on the under-mentioned grounds -

(a) There was no cogent evidence to establish that the appellant had used force to outrage modesty of the prosecutrix.

(b) No evidence was adduced by the prosecution to prove that the prosecutrix belongs to a Scheduled Caste.

(c) No offence under Section 3(1)(xi) would be made out as the act in question was not committed on the ground that the prosecutrix was a member of Scheduled Caste.

To buttress the contentions (b) and (c) [above], learned counsel for the appellant has cited decision of a co-ordinate Bench of this Court in *Shankarlal v. State of M.P.* (2005 (1) MPLJ 449).

In response, learned Panel Lawyer has submitted that the appellant has been rightly convicted in the face of trustworthy incriminating evidence on record.

5. The prosecutrix (PW1) substantially reiterated the contents of the FIR (Ex.P-1) recorded by Sub-Inspector Om Prakash Singh (PW3) at her instance. As per her statement, at the time when she was grazing cattle, the appellant caught hold of her neck from behind; caused her to fall down; gagged her and also slapped her. She further deposed that the appellant had fled away only after arrival of Ganpat (PW4). Her evidence drew support from the statement of Ganpat to the effect that while grazing cattle in a nearby field, he had seen

the prosecutrix hurling abuses at the appellant.

6. Dr. Suresh Shrimal (PW7) proved existence of two abrasions on lower lip of the prosecutrix. Though the medical expert admitted that the injuries could be sustained due to fall or on account of friction against a tree yet, there was nothing on record to support such a probability. The acts of holding her neck in throwing the prosecutrix on the ground and pressing her mouth were clearly suggestive of sex. In Shankarlal's case (supra) also, on facts suggesting that after catching hold of her hand, he had tried to drag the prosecutrix towards a nearby temple, he was held guilty of the offence under Section 354 of the IPC.

7. The defence of false implication due to animosity was refuted categorically by the prosecutrix (PW1). Ganpat (PW4) also denied the suggestion that at an earlier occasion, the appellant had complained about damage to his crop by the cattle belonging to the prosecutrix. Further, no suggestion was put to Karan Singh (PW5), the Village Chowkidar, and Virendra Thakur (PW6), the Investigating Officer, in their cross-examination regarding the plea of defence and, as pointed out already, no supportive evidence was adduced. The plea also deserved rejection as no married lady would put her character at stake by making a false charge of indecent assault simply because there existed bitterness of feelings between her and the appellant.

8. Thus, ground (a) [ibid] is not tenable on facts as on one hand, there was overwhelming evidence on record to prove that the appellant had outraged modesty of the prosecutrix and on the other, probability of the defence was also not established.

9. Reverting to the grounds (b) and (c) [above], it may be mentioned that learned counsel for the appellant has placed implicit reliance on the following observations made in *Shankarlal's* case -

> "6. In the testimony of prosecutrix (PW1), it is said that she is Chamar by caste and the appellant has admitted this fact. She has not said that she is a member of SC or ST or whether her caste is included in the list of SC caste. Her husband (PW2) has deposed that he is "Suryavanshi Chamar" by caste. The prosecution has not led any

evidence to the effect that "Suryavanshi Chamar" is the caste which has been included in the list of SC or ST. In the absence of any such evidence, this fact cannot be taken for granted that prosecutrix belongs to the SC or ST community. As being one of the essential ingredients, this fact was required to be proved beyond any reasonable doubt by the prosecution.

7. Assuming that it is established that the prosecutrix belongs to SC or ST, still it is difficult to hold that the offence under Section 3(1)(xi) of the Act is established. There is no evidence to show that the appellant used criminal force to the prosecutrix to outrage her modesty only because she belonged to a particular caste or community. There is no such circumstance to suggest that her modesty was intended or tried to be outraged, simply because she belonged to a particular community. It is thus clear that the ingredient of section 3(1)(xi) of the Act is not proved and conviction of the appellant under section 3(1)(xi) of the Act deserves to be set aside"

10. The Constitution (Scheduled Castes) Order must be read as it is. It is not even permissible to say that a caste, sub-caste, part or group of any caste or community is synonymous to the one mentioned in the Order if they are not so specifically mentioned in it. The aforesaid observations are to be understood in the context of Shankarlal's case wherein the prosecutrix claimed to be a member of Suryavanshi chamar caste. Hence, the decision in Shankarlal's case cannot be treated as an authority for the proposition that non-production of caste certificate issued by the Competent Authority would always be fatal to the prosecution.

11. The assertion made by the prosecutrix (PW1) that she belongs to Balai caste was not subjected to challenge in her cross-examination. Moreover, it was candidly admitted by the appellant in his examination, under Section 313 of the Code of Criminal Procedure. In such a situation, judicial notice could be taken of the fact that Balai caste has been included in the list of Scheduled Castes in the State of M.P. In other words, no further proof in the form of caste certificate/notification or otherwise to show that the prosecutrix is a member of Scheduled Caste was required.

12. This apart, the Supreme Court in *Vidyadharan v. State of Kerala* (2004) 1 SCC 215) has pointed out the distinction between the offences punishable under Section 354 of the IPC and Section 3(1)(xi) of the Act in the following terms -

> "Section 3(1)(xi) of the Act deals with assaults or use of force to any woman belonging to a scheduled caste or scheduled tribe with the intent to dishonour or outrage her modesty is an aggravated form of the offence under Section 354 IPC. The only difference between section 3(1)(xi) and section 354 is essentially the caste or the tribe to which the victim belongs. If she belongs to a scheduled caste or scheduled tribe, section 3(1)(xi) applies. The other difference is that in section 3(1)(xi) dishonour of such victim is also made an offence."

However, neither the offence under Section 354 nor the one under Section 509 of the IPC is punishable with imprisonment for a term of 10 years. As such, the ingredient that it is committed on the ground that the victim belongs to a Scheduled Caste or a Scheduled Tribe, which is *sine quo non* for applying the provision of Section 3(2)(v) of the Act, is not attracted (See. *Dinesh v. State of Rajasthan* (2006) 3 SCC 771)

13. It is true that there may be cases where the accused, being a stranger, may not be aware of the fact that the complainant belongs to a Scheduled Caste or a Scheduled Tribe but if he knows and has reason to believe that the victim of the offence is a member of such a caste or tribe, the offence would squarely fall under Section 3(1)(xi) of the Act and it would not be necessary to establish further that the offence was committed on the ground that she belongs to such a Caste or Tribe.

14. For these reasons, none of the grounds (**b**) and (**c**) [above] has any merit or substance.

15. To sum up, the conviction deserves to be affirmed as well merited. The minimum prescribed sentence for the offence also does not call for any interference.

16. In the result, the appeal stands dismissed. The impugned conviction and consequent sentences are hereby affirmed.

Appeal dismissed.

I.L.R.[2012]M.P. 230
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice M.A. Siddiqui

Cr. A. No. 2144/1997 (Jabalpur) decided on 29 November, 2011

SUSHIL KUMAR ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302 – Murder **– Deceased was sitting in his ration shop – Appellant came armed with a knife and dealt blow on his abdomen, back, hand and leg – Four injuries found on body by sharp edged weapon – Held – From dying declarations and the medical evidence establish that deceased repeatedly caused injuries to deceased by knife – Injuries caused on the lumbar region and on the abdomen were deep up to abdominal cavity – Intention of appellant to cause death of deceased established – Appeal dismissed.**

(Paras 2,3,21,22 & 23)

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृतक अपनी राशन की दुकान पर बैठा था – अपीलार्थी चाकू से सुसज्जित होकर आया और उसके उदर, पीठ, हाथ व पैर पर प्रहार किया – धारदार हथियार की चार चोटें उसके शरीर में पाई गई – अभिनिर्धारित – मृत्युकालिक कथन और चिकित्सीय साक्ष्य से यह स्थापित होता है कि मृतक को चाकू से बार–बार चोटें पहुंचाई गई – कमर के हिस्से में और उदर में कारित चोटें उदर गुहा तक गहरी थीं – अपीलार्थी का उद्देश्य मृतक की मृत्यु कारित करना स्थापित – अपील खारिज।

Case referred:

AIR 1972 SC 1557.

Surendra Singh with *Shivam Singh*, for the appellant.
Amit Pandey, PL for the respondent.

JUDGMENT

The judgment of the court has delivered by : **RAKESH SAKSENA J.** :- Appellant has filed this appeal against the judgment dated 30th September, 1997 passed by II Additional Sessions Judge, Jabalpur in Sessions Trial No.254/1985 convicting him under section 302 I.P.C. and sentencing him to imprisonment for life.

2. In short, the facts of the case are that there had been enmity between acquitted accused Shyam Kesarwani and Shankerlal @ Bhola, the deceased. Appellant Sushil Yadav was the friend of Shyam Kesarwani. On 15.3.1985, at about 6:00 p.m., when deceased was sitting on his ration shop for selling sugar, appellant came armed with a knife and dealt its blow on his abdomen, back, hand and leg and ran away. Deceased believed that appellant assaulted him on the move of Shyam Kesarwani. Deceased was taken to police station Kotwali, Jabalpur where he lodged first information report Ex.P/12, thereafter he was shifted to Victoria Hospital for treatment.

3. Dr. Sheela Agrawal (PW-5) examined the injuries of injured Shankerlal and found four injuries on his body. The injuries were deep and bleeding.

4. On the requisition by police, G.P.Gonthiya, Tehsildar (PW-13) went to Victoria Hospital and recorded dying declaration Ex.P/10 of Shankerlal.

5. On 17.3.1985, at about 11:55, Shankerlal died. His dead body was sent for postmortem examination to Medical College, Jabalpur. Dr. T.Mohan (PW-17), demonstrator of Forensic Medicines Department conducted the postmortem examination and found six injuries on the body of deceased. The injuries were caused by some sharp pointed weapon. Injury on the abdomen was sufficient to cause death of deceased in the ordinary course of nature.

6. The case, after the death of deceased, was converted under section 302 of Indian Penal Code. During investigation, police arrested appellant on 23.3.1985 and on his information under section 27 of the Evidence Act recovered a knife from his possession. Though the said knife was sent to Forensic Science Laboratory, but no report was produced in the Court. After investigation, charge sheet was filed against six accused persons.

7. On charge being framed against the appellant under section 302 I.P.C. he pleaded false implication.

8. To substantiate its case, prosecution examined 17 witnesses. Appellant did not adduce any evidence in his defence. The eyewitnesses examined in the case though did not support the prosecution case, but relying on the evidence of dying declaration Ex.P/12, the F.I.R. lodged by the deceased and Ex.P/10, dying declaration recorded by Tehsildar, learned trial Judge held the appellant guilty and convicted and sentenced him under section 302 I.P.C. Finding the evidence insufficient against rest of other accused persons, learned Judge acquitted them of the charge under section 302 read with section

34 and section 109 I.P.C. Aggrieved by his conviction, appellant has filed this appeal.

9. Learned Senior Counsel Shri Surendra Singh submitted that in the absence of corroboration the evidence of dying declarations was not reliable or sufficient for holding the appellant guilty. None of the eyewitnesses supported the prosecution case. In the first information report and in the dying declaration Ex.P/10 recorded by Tehsildar, deceased merely named 'Sushil' without giving out the name of his father. Correct address of the assailant was also not given to fix the identity of the culprit. He submitted that in these circumstances trial Court committed error in convicting the appellant. In the alternative, learned Senior Counsel submitted that in the facts and circumstances of the case and in view of the nature of injuries found on the body of deceased, the conviction of appellant under section 302 I.P.C. was not justified. At the most the case against the appellant might fall under section 304 Part II I.P.C. Appellant had already served out the sentence of 5 years imprisonment. On the other hand, Amit Pandey, learned Panel Lawyer for the State submitted that the evidence of dying declarations adduced by the prosecution was sufficient to indicate that it was appellant only who caused the death of deceased. In the circumstances of the case, trial Court was justified to hold appellant guilty under section 302 I.P.C.

10. We have heard the learned counsel for the parties and perused the impugned judgment and evidence on record carefully.

11. It is not disputed that the eyewitnesses namely Umashanker Soni (PW-2), Prakash Agrawal (PW-3), Mohanlal Burman (PW-4), Ganesh Prasad (PW-7) and Dashrathlal Gupta (PW-12) examined in the case, did not support the prosecution case. It is also not disputed that death of deceased was homicidal in nature. In the first information report Ex.P/12 lodged by deceased himself, it was clearly mentioned by the deceased that Sushil Yadav Chandal Bhatawala dealt knife blows to him as a result of which he suffered injuries. This first information report was recorded by Sub Inspector Vishwanath Dubey (PW-15). Dr. Sheela Agrawal (PW-5) of Victoria Hospital stated that she examined the injuries of Shankerlal who was brought to hospital by constable Darshan Singh of City Kotwali, Jabalpur. She found four incised injuries on his body. Dr. R.S.Chakrawarti (PW-16) stated that on 17.3.1985, Shankerlal died in Victoria Hospital. Dr. T.Mohan (PW-17) deposed that on postmortem examination of the body of Shankerlal, he found six incised injuries on his

body. The cause of death of Shankerlal was peritonitis due to injury on caecum. This injury alone was sufficient to cause death of deceased. The postmortem examination report Ex.P/12 was written and signed by him. It is thus established that deceased met with a homicidal death.

12. Since the eyewitnesses of the occurrence examined in the case did not support the prosecution case, the case rested mainly on the evidence of dying declarations. Learned Senior Counsel for the appellant argued that in the two dying declarations namely the first information report Ex.P/12 lodged by the deceased and dying declaration Ex.P/10 recorded by Tehsildar, no paternity of assailant Sushil was given. In Ex.P/12, deceased stated that Sushil Yadav Chandal Bhatawala, who ran a tea shop near the petrol pump of Cherital, dealt knife blows to him whereas the appellant was resident of Bhandhiya Mohalla, P.S. Gohalpur, therefore, it could not be held that the person Sushil Yadav named in the first information report was the appellant. There was no other corroborating evidence on record to indicate that appellant assaulted deceased. In the first information report Ex.P/12, which has been proved by Sub Inspector Vishwanath Dubey (PW-15), it has been mentioned that the deceased himself was resident of Miloniganj (Bandhiya Mohalla) P.S. Gohalpur. From seizure memo Ex.P/8, it is apparent that appellant Sushil Kumar S/o Kandhilal Yadav was resident of Bandhiya Mohalla, opposite to Chandal Bhata Hospital, P.S. Gohalpur and from his house the knife was recovered by Sub Inspector Vishwanath Dubey (PW-15). Vishwanath Dubey categorically stated that on 23.3.1985 he went at the address given by the appellant and seized a knife from the house. The fact of knife being seized from the house of appellant situated in Bandhiya Mohalla Chandal Bhata was not challenged by the appellant in the cross-examination of Vishwanath Dubey (PW-15). It can be gathered from Ex.P/8 that Bandhiya Mohalla and Chandal Bhata are situated in the same locality within the jurisdiction of police station, Gohalpur. We are also unable to accept that if the paternity of accused was not given in the dying declaration, the dying declaration would necessarily become doubtful. It was not challenged by the defence that the first information report, which was treated as dying declaration, made by the deceased was a concocted or fabricated document.

13. As far as dying declaration Ex.P/10 recorded by Additional Tehsildar G.P.Gonthiya (PW-13) is concerned, G.P.Gonthiya clearly stated that on being called by Sub Inspector he went to Victoria Hospital for recording the dying declaration of Shankerlal who was admitted in the hospital. Shankerlal was in

a fit condition to give his statement. Though he was speaking slowly but he was capable of speaking. Shankerlal told to him that Sushil Yadav, on being exhorted by Shyam Kesarwani, came at his shop and dealt knife blows on his abdomen, back, hand and leg. Sushil Yadav had a tea shop in Cherital. There had been enmity between him and accused Shyam Kesarwani, and Shyam Kesarwani was the friend of Sushil Yadav, therefore, Sushil Yadav had stabbed him. G.P.Gonthiya (PW-13) stated that after recording the statement of deceased he signed Ex.P/10. Learned counsel for the appellant pointed out that in the cross-examination this witness admitted that some persons were sitting around the bed of Shankerlal but he did not know that they were his relatives. He admitted that those persons asked Shankerlal to name Sushil as assailant because he was friend of Shyam Kesarwani, but he rebuked them and asked them to not to interfere and let Shankerlal speak himself. Thereafter those persons kept quiet. It is true that deceased might have been influenced by his near relatives and friends, but the statement given by him in the instant case to Naib Tehsildar finds sufficient corroboration from the first information report Ex.P/12 which was treated as a dying declaration, as such it cannot be held that deceased named Sushil Yadav on the prompting of the persons present near him. It has not been challenged by the defence that at the time of recording of dying declaration deceased was not in a fit condition to give his statement.

14. It is also important to note that in the cross-examination of investigating officer Vishwanath Dubey (PW-15), or on any other occasion in the trial, accused/appellant no where challenged that he was not the person who was named by the deceased in the dying declaration. Nothing was stated by the accused in his examination under section 313 Cr.P.C. disputing his identity as accused. In these circumstances, we find no substance in the argument advanced by the learned Senior Counsel for the appellant that the appellant was not the person who was named by the deceased in the dying declarations Ex.P/10 and Ex.P/12.

15. It is true that dying declaration which does not contain complete names and addresses of the persons charged with the offence, may not be of such nature on which conviction can be based in the absence of corroboration *[Gopal Singh and another Vs. State of M.P. and another-* AIR 1972 SC 1557], but in the instant case, the fact that the person named as Sushil Yadav in the dying declaration was the appellant has been corroborated by the evidence of investigating officer Vishwanath Dubey (PW-15) who recorded first information report Ex.P/12 and also recovered a knife from the house of

appellant vide seizure memo Ex.P/8. The main feature of the case remains that appellant did not challenge his identity as accused all through the trial. We are, therefore, of the view that the trial Court committed no error in accepting the evidence of dying declarations Ex.P/10 and Ex.P/12.

16. Learned Senior Counsel for the appellant argued that from the facts and circumstances of the case and the nature of injuries found on the body of deceased, no offence under section 302 I.P.C. was made out. The cause of death of deceased was peritonitis due to injury on the caecum (lower portion of large intestine). The incident had occurred on 15.3.1985 and the deceased had died on 17.3.1985. Injury No.5 and injury No.6, which were respectively found on the abdomen and lumbar region of the deceased, were found meeting inside the body, as such the possibility that it was one through and through injury could not be ruled out. Therefore, it could not be held that appellant caused two stab injuries on the vital parts of the body of deceased and that appellant intended to cause death of deceased. We are unable to accept the argument advanced by the learned counsel.

17. Dr. Sheela Agrawal (PW-5) found following four injuries on the body of deceased:-

(i) Incised wound 1½" x ½" on right side of anterior abdominal wall in hypochondrium region. Bleeding present.

(ii) Incised wound ¼" on the back on right lumbar region and haematoma around the wound 3" x 2".

(iii) Incised wound ½" x 1/8" x skin deep on right leg anterior side. Bleeding present.

(iv) Incised wound 1" x ¼" x skin deep on right hand.

In her opinion, all the injuries were caused by sharp edged weapon. Injury No.3 & 4 were simple in nature. The opinion in respect of Injury No.1 & 2 could be given by the treating doctor. MLC report is Ex.P/5.

18. After death, Dr.T.Mohan (PW-17) found following injuries on postmortem examination on the body of deceased:-

(i) Stitched wound over lateral aspect of middle right leg.

(ii) Stitched wound over the base of thiner eminence of right hand

4cm x 1/2cm x 1cm.

(iii) Stitched wound over upper part medial aspect of right thigh 3cm x 1/2cm x 2cm.

(iv) Stitched wound over anterior part of abdomen slightly right to midline.

(v) Stitched wound over right side of abdomen 4.5cm x 1cm entering into abdominal cavity. Margins show infected granulation tissues. Purulent material was coming out through the wound.

(vi) Stitched wound present over back of trunk on right side obliquely 5cm x 1cm entering into abdominal cavity.

19. Doctor (PW-17) found that on inserting a probe through injury No.5 it was coming out through injury No.6 indicating that they were communicating. However, it was not stated by doctor (PW-17) that injuries No.5 & 6 were one and the same and not caused by two different blows. Merely because those injuries met inside the abdominal cavity it could not be held, in the absence of specific medical evidence, that they were one and the same. Postmortem examination report is Ex.P/12.

20. Merely because deceased died after two days of the assault and there had been peritonitis in the wound, it could not held that assailant did not intend to cause the death of deceased or did not intend to cause such bodily injury to deceased as he knew to be likely to cause the death of deceased. Where death is caused by bodily injury, the person who causes such bodily injury is to be deemed to have caused the death, although by resorting to proper remedies and skillful treatment, the death might have been prevented. Dr. T. Mohan categorically stated that even the sole injury caused on the caecum of deceased was sufficient in the ordinary course to cause his death.

21. From the evidence of dying declarations and the medical evidence, it has been amply established that deceased repeatedly caused injuries to deceased by knife. The injuries caused on the lumbar region and on the abdomen were deep up to abdominal cavity. Therefore, it was established beyond doubt that appellant assaulted deceased by knife with the intention of causing his death. In our opinion, trial Judge committed no error in holding the appellant guilty under section 302 I.P.C.

22. Accordingly, the order of conviction of appellant under section 302

I.P.C. and sentence of imprisonment for life awarded to him is affirmed.

23. Appeal fails and is dismissed.

Appeal dismissed.

I.L.R.[2012]M.P. 237

APPELLATE CRIMINAL

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

Cr. A. No. 244/1994 (Jabalpur) decided on 30 November, 2011

BHARAT SINGH & anr. ...Appellants

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302/304 Part-I – Murder or Culpable homicide not amounting to murder **– Deceased went to a shop to eat eggs where appellant was present – Altercation ensued between them – While deceased was going back appellants caused injuries by means of Gupti and Ballam – Held – Incident erupted from a sudden altercation or quarrel – Cause of such altercation also not disclosed by witnesses – Incident of assault took place just in continuation of quarrel and not after a long time – Case fall within the ambit of exception 4 of Section 300 of IPC, but since appellant wielded deadly weapon and caused injuries which cut the lung and heart of the deceased, was sufficient in ordinary course of nature to cause his death – Liable to punished under Section 304-I of the IPC – Appeal partly allowed.**

(Paras 2,3,21,22 & 23)

दण्ड संहिता (1860 का 45), धारा 302/304 भाग–I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक अण्डे खाने के लिये दुकान पर गया जहां अपीलार्थी मौजूद था – दोनों के मध्य कहा–सुनी हुई – जब मृतक वापस जा रहा था, अपीलार्थीगण ने गुप्ती और बल्लम से चोटें पहुंचाई– अभिनिर्धारित – घटना अचानक कहा–सुनी या झगड़े से विस्फोटक हो गई – उक्त कहा–सुनी का कारण भी साक्षियों द्वारा प्रकट नहीं किया गया – हमले की घटना तुरंत झगड़े के क्रम में हुई और न कि लंबे समय बाद –, प्रकरण भा.द.सं. की धारा 300 के अपवाद 4 की परिधि में आता है, परंतु चूंकि अपीलार्थी घातक हथियारों से सुसज्जित थे तथा क्षतियां कारित की, जिससे मृतक के फेफड़े एवं हृदय फट गये, प्रकृति के सामान्य क्रम में उसकी मृत्यु कारित करने के लिये पर्याप्त थे – भा.द.सं. की धारा

304–I के अंतर्गत दंडित किये जाने योग्य – अपील अंशतः मंजूर।

Case referred:

AIR 1988 SC 1028.

Siddharth Datt, for the appellants.
Umesh Pandey, G.A. for the respondent.

JUDGMENT

The judgment of the court was delivered by : **RAKESH SAKSENA, J.** :-Appellants have filed this appeal against the judgment dated 14.12.1993 passed by II Additional Sessions Judge, Sehore, in Sessions Trial No.98/1990, convicting appellant No.1 Bharat Singh under Section 302 of the Indian Penal Code and appellant No.2 Babulal under Section 302/34 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs.1000/- each. In default of payment of fine, further rigorous imprisonment for six months.

2. The prosecution case in nutshell is that on 7.1.1990, at about 8.45 in the night, Hari Om (deceased) and Kishorilal went to eat eggs at the shop of Kallu. Accused Bharat Singh was also present there. For some reason, an altercation ensued between them. When Hari Om was going back to his house, Bharat Singh and Babulal came armed with Gupti and Ballam. Acquitted accused Ramesh and Pannalal also reached there. Ramesh had a Lathi in his hand. On way, in front of the shop of Narayan, accused Babulal caught Hari Om from the back side and Bharat Singh dealt 3-4 blows of Gupti in his abdomen. Babulal and Ramesh also assaulted him and Pannalal exhorted them to kill him. On hearing noise, Rajendra Kumar (PW-1), brother of Hari Om and Kaluram (PW-4), his father also reached there and saw occurrence. Kallu, Kishorilal, Ram Singh and some other persons were also present there. After assaulting Hari Om, accused persons ran away.

3. Rajendra Kumar (PW-1) rushed to Police Kotwali, Sehore and lodged the first information report (Ex.P/1) at 9.00 pm. A case under Section 307/34 of the Indian Penal Code was registered against four accused persons. Station Officer, R.S. Chudawat (PW-15) rushed to spot and carried Hari Om to District Hospital, Sehore, however, Hari Om succumbed to his injuries. The case then converted under Section 302/34 of the Indian Penal Code.

4. Dr. Laxmi Narayan Namdeo (PW-16) conducted postmortem

examination of the body of deceased and vide his report Ex.P/26 found six incised wounds on his body. In his opinion, injuries found on the body of deceased were sufficient in ordinary course of nature to cause his death. On the same day, during investigation, statements of prosecution witnesses were recorded and accused were arrested. On the information given by accused Bharat Singh, a Gupti was seized from the bushes near Sindhi Dharamshala. Similarly, on the information of accused Babulal a Ballam was seized. Seized weapons were sent to Forensic Science Laboratory for examination and its report Ex.P/24 was obtained.

5. Accused Bharat Singh had also lodged a report on the same day i.e. on 7.1.1990 at Police Kotwali, Sehore, at 22.00 Hrs, which was recorded in Rojnamcha Sanha No.594/7.1.1990 by Head Constable Shiv Gopal (DW-2). Accused Bharat and Babulal were sent for medical examination and their MLC reports (Ex.D/3 & D/4) were received. On the basis of aforesaid Rojnamcha report, Crime No.15/1990 under Section 324 of the Indian Penal Code was registered. However, due to lack of evidence, final report was submitted.

6. After completion of the investigation, charge sheet was filed and the case was committed to the court of sessions for trial.

7. During trial, accused persons abjured their guilt and pleaded false implication. In their statements, recorded under Section 313 Cr.P.C., they merely pleaded false implication without putting forth any particular defence version. They however examined Dr.A.B. Niyazi (DW-1), Head Constable Shiv Gupta (DW-2) and Station Officer R.S. Chudawat (DW-3).

8. To substantiate its case, prosecution examined 16 witnesses.

9. Learned trial judge, relying mainly on the evidence of eyewitnesses viz. complainant Rajendra Kumar (PW-1) and Kaluram (PW-4) and finding their evidence corroborated by the evidence of Durga Prasad (PW-2), Kishorilal (PW-3), Satpal (PW-9), Hitesh (PW-10) and Dr. Laxmi Narayan Namdeo (PW-16) held the appellants/accused guilty and convicted and sentenced them, as mentioned above. However, finding the evidence not sufficient against accused Ramesh, acquitted him. Since accused Pannalal had died during pendency of the trial, case against him stood abated. Aggrieved by the impugned judgment of conviction, appellants have preferred this appeal.

10. Shri Siddharth Datt, learned counsel for the appellants, submitted that

the evidence of eyewitnesses was not reliable. Rajendra Kumar (PW-1) and Kaluram (PW-4), respectively, were the brother and father of the deceased. They being close relations of the deceased, their evidence was not reliable. Independent eyewitnesses did not support the prosecution case and did not explain the injuries found on the persons of accused. He submitted that since the incident occurred suddenly upon a sudden quarrel, the conviction of appellants under Section 302 of the Indian Penal Code was not justified. At worst, they could have held liable under Section 304-I or 304-II of the Indian Penal Code. On the other hand, Shri Umesh Pandey, learned Government Advocate, submitted that the evidence of Rajendra Kumar and Kaluram was reliable. It stood corroborated from the evidence of other eyewitnesses, though declared hostile for not supporting the prosecution case wholly. He justified and supported the finding of conviction recorded by the trial Court.

11. We have heard learned counsel for the parties at length and perused the impugned judgment and record carefully.

12. It has not been disputed that deceased met with a homicidal death. It has been clearly stated by Rajendra Kumar (PW-1) and Kaluram (PW-4) that deceased was assaulted by accused persons by Gupti and Ballam and he died due to injuries received by him. Investigating Officer, R.S. Chudawat (PW-15) conducted the inquest proceedings and carried deceased to hospital, where he died. The postmortem examination of the body of deceased was conducted by Dr. Laxmi Narayan Namdeo (PW-16), who, vide his report Ex.P/26 found following injuries on his body:-

> "1. One oblique incised wound on the abdomen right side, at the level of umbilicus, size 3½ cm x 1 cm, omentum coming out from the wound.
>
> 2. One oblique incised wound on chest 3½ cm x 1 cm, just left from the sternal border at the level between 5th and 6th ribs. Depth of wound was very deep, about 8 cm and profuse blood was coming out from the wound on pressing chest or changing the position of body.
>
> 3. Incised wound 2 x 1/2 x cm superficial on left shoulder.
>
> 4. One incised wound on the thumb of left hand 2½ cm x 1 cm.
>
> 5. One incised wound on head of left temporal region muscle deep, size 5 cm x 1 cm.

6. One incised wound, size 1 cm x 1/2 cm at the level of iliac crest right side.

Due to injury No.2, which had pierced the left lung and cavity of right ventricle, sudden severe haemorrhage and shock was produced, which was responsible for the death. All the injuries were ante-mortem in nature. Injury No.2 was sufficient in ordinary course of nature to cause death of deceased."

From the above evidence, it is amply established that the deceased died of a homicidal death.

13. Rajendra Kumar (PW-1) and Kaluram (PW-4) respectively were, the brother and father of deceased. Learned counsel for the appellant submitted that their evidence was not reliable because they were close relatives of deceased and were interested in the conviction of accused. It is well settled that the testimony of eyewitnesses cannot be ignored merely because they are either partisan witnesses or close relatives of the deceased. There is no rule of law that the evidence of partisan witnesses cannot be accepted. The fact that the witnesses are associated with the deceased by itself do not render their evidence false. It is common knowledge that neutral witnesses are reluctant to come forward to give testimony to support one or the other side. Therefore, merely because the eyewitnesses are associated with one side, their evidence cannot be discarded. However, it should be subjected to a careful scrutiny and accepted with caution *(State of U.P. V. Ram Swarup and others* AIR 1988 SC 1028).

14. Rajendra Kumar (PW-1) deposed that while he was standing in the verandah of his house, he heard some noise of quarrel at the egg shop of Kallu. Out of curiosity, when he went out of the house and tried to know about the quarrel, he saw that an altercation was going on between bis brother (deceased) and accused. All the accused then went to their house, which was situated about 10-15 ft. from the shop of Kallu and came back armed with weapons. Accused Bharat had *Gupti*, Babu had Ballam, Ramesh had Lathi and Pannalal had an iron rod. When deceased tried to run away, in front of the shop of Narayan, accused Babu held him from the back side and accused Bharat dealt blows with *Gupti* on his abdomen and hand. Accused Babu then left deceased and assaulted him by his Ballam. He shouted and rushed to the spot. In the meantime, his parents also reached there. Accused then ran away from the spot. Deceased fell down on the spot and became unconscious.

He rushed to police station and lodged the report (Ex.P/1). This witness was subjected to a gruelling cross-examination, but he stood firm. Learned counsel for the appellants drew our attention to some omissions in his statement, but, we find them not of substantial nature. It was not mentioned by this witness in the FIR (Ex.P/1) that accused went to their house and came back at the spot armed with weapons. He however, explained that at the time of lodging report he was disturbed and was not in fit mental condition due to serious condition of his brother. Therefore, this fact could not be mentioned in the FIR. It is important to note that incident had occurred at 8.45 pm and the first information report was lodged at 9.00 pm i.e. within 15 minutes of the occurrence. The omissions about the fact that this witness shouted, hearing which, his parents came on the spot or the fact that accused Bharat dealt a blow with *Gupti* on the hand of his brother, in our opinion, do not appear of material nature. The facts that accused Bharat was armed with a *Gupti,* Babu was armed with a Ballam and that Babu caught hold of deceased and Bharat dealt blows with *Gupti* in the abdomen of deceased, as stated by witness in the court, were clearly mentioned by this witness in the first information report. Therefore, his evidence finds sufficient corroboration from the first information report (Ex.P/1), which was lodged by him within 15 minutes of the incident. The evidence of Rajendra Kumar (PW-1) finds support from the evidence of Kaluram (PW-4), who categorically stated that hearing the cries of Hari Om (deceased) and Rajendra Kumar, when he came out of his house, he saw the occurrence. The house of Narayan, in front of which the incident occurred, was about 25-30 ft. away from his house. He saw accused Bharat assaulting Hari Om with *Gupti.* Accused Babu caught Hari Om from the back side. After causing injuries to Hari Om, accused persons ran away. In cross-examination, this witness was confronted with his police statement (Ex.D/2) wherein he did not disclose that he heard cries of deceased and Rajendra Kumar, but, in our opinion, merely on the basis of such omission, the evidence of this witness cannot be discarded especially because it was not disputed that the assault on deceased was made in front of the house of Narayan, which was about 25-30 paces away from the house of this witness.

15. It is true that other eyewitnesses viz. Durga Prasad (PW-2), Kishorilal (PW-3), Satpal (PW-9) and Hitesh (PW-10) were declared hostile, as they did not support the prosecution case fully, but, on perusal of their evidence, it is revealed that they substantially corroborated the evidence of Rajendra Kumar (PW-1) and Kaluram (PW-4). Durga Prasad (PW-2) deposed that he saw

altercation between deceased and accused Bharat at the hand-cart of Kallu. Bharat went to his house and brought *Gupti,* but thereafter this witness stated that he went to his house and did not see the incident. Kishorilal (PW-3) deposed that he and Hari Om had gone at the egg shop of Kallu. Accused Bharat was also present there. There had been an altercation between Hari Om and Bharat. He stated that he left the place, but, from a distance about 10 paces, he saw Bharat and Babu bringing something like sticks, but he did not see the Maar-Peet. Satpal (PW-9) stated that when he and Hitesh were going to see movie, they saw an altercation between accused Bharat and Hari Om at the egg shop of Kallu. Thereafter, Bharat went to his house and came back with a Gupti. When Hari Om tried to run away, Ramesh caught him and Bharat dealt 3-4 blows with Gupti on his abdomen. Hari Om fell down. Since this witness did not name accused Babu and Pannalal, he was declared hostile. Similarly, Hitesh (PW-10) stated that he saw an altercation and scuffle between Hari Om and accused Barat at the shop of Kallu. Bharat had a Gupti and Babu had a Ballam. According to him, he did not see the complete incident and went towards Sanjay Talkies. Thus, these witnesses though did not give the complete account of the incident, but they substantially supported the evidence of Rajendra Kumar (PW-1) and Kaluram (PW-4).

16. After a close and careful scrutiny of the evidence of Rajendra Kumar (PW-1) and Kaluram (PW-4), we find their testimony reliable. Their evidence finds further support from the evidence of Dr. Laxmi Narayan (PW-16), who, on postmortem examination of the body of deceased, found six incised injuries on his body. In our opinion, it was clearly established that accused Babulal caught hold of deceased with a view to facilitate accused Bharat to assault him with Gupti, and accused Bharat inflicted injuries with Gupti on the abdomen and other parts of the body of deceased, as a result of which he died.

17. Learned counsel for the appellant next submitted that since the prosecution witnesses did not explain the injuries found on the person of deceased, the genesis of occurrence was doubtful and that since a sudden quarrel ensued between deceased and accused Bharat and accused persons also suffered injuries, though minor in nature, it could not be held that accused intended to commit murder of the deceased. At the most, they could be held liable of the offence under Section 304-I or 304-II of the Indian Penal Code.

18. Learned counsel for the State submitted that the accused persons did not advance any specific plea either in their statements under Section 313

Cr.P.C. or by way of suggestion to eyewitnesses of the occurrence that deceased or any of the prosecution witness caused injuries to them.

19. No doubt that accused persons did not suggest to any of the prosecution witnesses that deceased initiated the quarrel or assaulted accused persons, but it is revealed from the evidence of Head Constable Shiv Gopal (DW-2) that on 7.1.1990 i.e. on the day of occurrence at about 8.55 pm accused Bharat Singh, Pannalal and Babulal appeared at the police station and lodged a report, which was recorded in Rojnamcha Sanha No.594. The said report was Ex.D/5. On the basis of that report, an offence u/s 324 of the Indian Penal Code was registered. Similar statement was given by Station Officer of Kotwali, district Sehore viz. R.S.Chudawat (DW-3), who was also examined as Investigating Officer of the case as PW-15. He stated that he had registered Crime No.15/1990 under Section 324 of the Indian Penal Code on the report lodged by accused Bharat Singh. This crime was registered on the basis of Rojnamcha Sanha No.594 recorded on 7.1.1990 at 8.55 pm. The first information report registered by him was Ex.D/7. He stated that he obtained MLC reports (Ex.D/8 & D/9) in respect of the injuries of accused Bharat Singh and Babulal. According to him, a final report in respect of this crime was filed because Hari Om, against whom the crime was registered, had died. Dr.A.B.Niyazi (DW-1) proved the injuries of accused Bharat Singh and Babulal. He deposed that on examination of the person of Bharat Singh, he found following injuries on his body:

> "1. Abrasion 4½" in length on right thigh.
>
> 2. Contusion on the left thigh 2" in diameter.
>
> Injury No.1 was caused by hard and pointed weapon and injury No.2 was caused by some hard and blunt weapon. Both the injuries were simple in nature."

Dr. Niyazi found following injury on the body of accused Babulal:

> "1. Incised wound 1¼" x 1/ 4"x 1/4" on left palm.
>
> Injury was simple in nature and was caused by hard and sharp weapon."

The aforesaid injuries were recorded by Dr. Niyazi in Medico Legal Register. Copies of the reports were proved as Ex.D/3 and Ex.D/4.

20. From the evidence of all the eyewitnesses examined by the prosecution, it is apparent that the incident, which culminated in the assault by accused persons on deceased, erupted from a sudden altercation or a quarrel. Neither prosecution witnesses disclosed the cause on which the altercation started nor accused persons disclosed the genesis of the occurrence in their statements under Section 313 Cr.P.C., yet something can be gathered from the Rojnamcha report (Ex.D/5) and the first information report (Ex.D/7) lodged by accused Bharat at about 10.00 pm on the same day. The narration given by accused Bharat in the report was that at about 8.30 pm when he and his cousin were eating eggs at the shop of Kallu, deceased reached their and asked to give eggs to him. When he told that he had come first and Kallu was preparing eggs for him, deceased suddenly abused him. When he objected to it, he brought a knife from his tea shop and assaulted with it on his thigh. When his elder brother Babu came there to intervene, deceased caused injury to him also. In the meanwhile, his brother Ramesh and father Pannalal also reached there. He admitted in the said report that he also beat deceased. This report might not be wholly true, yet it gives some indications about the genesis of the occurrence. It can be safely inferred that the incident occurred on the spur of the moment, when accused Bharat and deceased wanted to have eggs first. There is absolutely nothing on record to indicate that there had been any past enmity or bad-blood between them.

21. No doubt, the prosecution case is that accused Bharat, in the course of quarrel, rushed to his house and brought Gupti for assaulting deceased, but it has come in evidence that the houses of both the parties were not away from the place of occurrence. The incident of assault took place just in continuation of the quarrel and not after a long gap, which could have provided opportunity to accused to give up their heat of passion. In our opinion, in these circumstances, the case of accused/appellants would squarely fall within the ambit of Exception 4 of Section 300 of the Indian Penal Code, but, since accused Bharat wielded deadly weapon like Gupti and caused as many as six injuries out of which Injury No.2, which cut the lung and heart of the deceased, was sufficient in ordinary course of nature to cause his death, it has to be held that accused intended to cause death or to cause such bodily injury as was likely to cause death of deceased. As such, they would be liable to be punished under Section 304-I of the Indian Penal Code.

22. Accordingly, the conviction of appellants under Section 302 and 302/34 of the Indian Penal Code and sentence of imprisonment for life awarded

to them is modified to under Section 304-I and 304-I/34 of the Indian Penal Code, respectively, and their sentences are reduced to rigorous imprisonment for 10 years, especially in view of the fact that at the time of occurrence appellant Bharat was a young boy of about 18 years and that both the appellants have already remained in jail from 7.1.1990 to 28.8.2000. Sentences of fine are affirmed.

23. Appeal partly allowed.

Appeal partly allowed

I.L.R.[2012]M.P. 246
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena

Cr. A. No. 2108/1996 (Jabalpur) decided on 10 December, 2011

INDAL SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 376 – Rape*** **– Appellant alleged to have taken away the prosecutrix on the false pretext of illness of her mother and committed rape – Held – Prosecutrix travelled with appellant to various places and stayed at Bhopal for 10 days without making any sort of complaint – Prosecutrix had written letters to appellant to take her away from her parents or else she would end her life – Prosecutrix was consenting party – No offence made out.**
(Paras 11 to 13)

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभिकथित रूप से अपीलार्थी ने अभियोक्त्रि को उसकी माता की बीमारी का झूठा बहाना बनाकर उसे ले गया और बलात्कार कारित किया– अभिनिर्धारित–अभियोक्त्रि ने अपीलार्थी के साथ बिना किसी शिकायत के विभिन्न स्थानों पर प्रवास किया और 10 दिनों तक भोपाल में रूकी – अभियोक्त्रि ने अपीलार्थी को पत्र लिखे कि वह उसे उसके माता पिता से दूर ले जाये अन्यथा वह अपना जीवन समाप्त कर देगी–अभियोक्त्रि सहमत पक्षकार थी–कोई अपराध गठित नही होता।

B. ***Penal Code (45 of 1860), Sections 363 & 366 -A Kidnapping*** **– Prosecutrix aged about 16 years and 6 months – Where the minor leaves her father's protection knowing and having capacity to know what she is doing voluntarily joins the accused person, no**

offence under Section 366-*A* is made out – As prosecutrix was consenting party therefore, no offence under Section 363 is made out. (Paras 17 to 19)

ख. दण्ड संहिता (1860 का 45), धाराएँ 363 व 366–ए – व्यपहरण – अभियोक्त्रि की आयु करीब 16 वर्ष और 6 माह – जब कोई अवयप्राप्त लड़की अपने पिता के संरक्षण से जानते हुए और जानने की क्षमता रखते हुए कि वह क्या कर रही है स्वेच्छापूर्वक अभियुक्त से मिलती है, धारा 366-*A* के अंतर्गत कोई अपराध गठित नही होता–चूंकि अभियोक्त्रि सहमत पक्षकार थी इसलिए धारा 363 के अंतर्गत अपराध गठित नही होता।

Case referred:

AIR 19645 SC 942.

S.K. Gangrade, for the appellant.
Amit Pandey, P.L. for the respondent/State.

JUDGMENT

RAKESH SAKSENA, J :- Appellant has preferred this appeal against the judgment dated 6th November 1996, passed by Sessions Judge, Mandla, in Sessions Trial No.66/1987, convicting the appellant under Sections 366-A and 376 of the Indian Penal Code and sentencing him to rigorous imprisonment for three years, on each count respectively. Both the sentences have been directed to run concurrently.

2. In short, the prosecution case is that on 14.6.1985 appellant went to the house of prosecutrix when her parents were not present and told to her that her mother was seriously ill and her father had taken her to Jabalpur. He also told her that her father had called her with money. Father of the prosecutrix viz. Sudarshan, who was a Patwari, had kept Rs.30,000/- in a box for the marriage of the prosecutrix. Prosecutrix took that money and went with the appellant. He took her by bus to Niwas, Shahpura and kept her in a lodge. In the morning, he took her to Shahdol in a bus. Thereafter, he took her to Maihar and told to her that he would marry her. In the night, they stayed at Maihar and then went to Jabalpur. On the next day, he took her to Bhopal and kept her in a rented room. He told to other people that she was his wife. While they stayed at Bhopal, he committed sexual intercourse with her. Sudarshan, father of the prosecutrix, gave a written report on 21.6.1985 to Station Officer of Police Station, Tikariya, that appellant enticed away his

minor daughter and also took away Rs.30,000/-.

3. In search of prosecutrix, Sudarshan reached Bhopal and found her with appellant. On 28.7.1985, then first information report (Ex.P/7) under Section 366 of the Indian Penal Code was registered at Police Station, Tikariya. Appellant and the prosecutrix were subjected to medical examination.

4. Investigating Officer seized a school certificate from the father of the prosecutrix, and after completing the investigation, filed charge sheet in the court.

5. Trial Court framed charges under Sections 366-A and 376 of the Indian Penal Code against the appellant.

6. Appellant abjured his guilt. Though no specific plea was put forth by the appellant in his statement under Section 313 Cr.P.C., however, it was suggested to witnesses that prosecutrix herself abandoned guardianship of her father and insisted appellant to take her, and that she was not under the age of 16 years. He also tendered Ex.D/1, D/2 and D/3 in his defence evidence.

7. Prosecution examined 7 witnesses in the case to prove the charge against the appellant.

8. Upon trial and after appreciation of the evidence learned trial judge though impliedly found prosecutrix to be a consenting party, however, finding her under 16 years of age, held the appellant guilty, convicted and sentenced him on both the counts. Aggrieved by the impugned judgment of his conviction, appellant has preferred this appeal.

9. Learned counsel for the appellant submitted that learned trial Judge committed serious error in holding that prosecutrix was a girl under the age of 16 years and that appellant had taken/enticed her. He submitted that the evidence of Sudarshan (PW-6), the father of prosecutrix, about her age was not reliable. It was established by the evidence of school record that the prosecutrix was above 16 years of age on the day of occurrence. He further submitted that from the documents tendered by the appellant in his defence, it was clear that prosecutrix persuaded appellant to take her with him. Appellant at the time of occurrence was a young boy of about 19-20 years of age. On the other hand, learned Penal Lawyer supported and justified the finding of conviction recorded by the trial judge.

10. I have heard the learned counsel for the parties and perused the impugned judgment and the evidence adduced by both the parties in the case.

11. Prosecutrix (PW-2) deposed that while she was at her house at village Majhgaon, appellant came to her and informed that her parents had gone to Jabalpur because her mother was ill and that they called her to bring the money. Since she had no money, appellant broke open the lock of the box in which Rs.30,000/- were kept by her father. Appellant took her to Jabalpur and said that her mother had been sent to Bhopal. He then took her to Bhopal in a train. Her mother was not there. Appellant took her to the house of a friend. In the night, they stayed there. Next day, he took her in a different room and intimidated her. In the night, he forcibly committed sexual intercourse with her. He kept her there for about 10 days and committed rape on her daily. When her parents reached Bhopal, they took out her from the room. Appellant then ran away. She was then taken to village Majhgaon where she was subjected to medical examination. In the cross-examination, prosecutrix admitted that letters (Ex.D/2, D/3 and D/4) were written and signed by her, though, according to her, these letters were got written by her under intimidation by accused. She also admitted that the photograph, in which she was shown with the appellant, was snapped at Bhopal. From these letters, it is revealed that she insisted appellant to take her from her house, otherwise, she would hang herself or jump in the Well. The fact that appellant intimidated her to write letters was not mentioned by the prosecutrix in her police statement (Ex.D/5) with which she was duly confronted. She was further confronted with her police statement in which she mentioned that she went with the appellant to Shahpura and stayed in the lodge of Agrawal Seth. She also denied to have mentioned in the said statement that she went to Shahpura, Shahdol and Maihar with the appellant. According to her, at the time of occurrence she was studying in Class VIII. She denied the suggestion put by the defence that she had sexual relations with the appellant and as a result of which she conceived and that her pregnancy was got terminated.

12. From the evidence of Dr. (Mrs.) P. Singhai (PW-1), who examined the prosecutrix on 7.9.1985, it is revealed that prosecutrix was habituated to sexual intercourse and that she got her pregnancy of more than 2½ months terminated.

13. On a close scrutiny of the evidence of prosecutrix (PW-2), it clearly transpires that she was a consenting party. She moved from her house with

the appellant, travelled to several places and lived with him for about 10 days at Bhopal without making any sort of complaint to anybody. Admittedly she wrote letters to appellant persuading him to take her with him else she would end her life.

14. Learned counsel for the appellant contended that the evidence of Sudershan (PW-6), father of prosecutrix, that the date of birth of prosecutrix was 9.9.1969, was false and unreliable. It was proved by the evidence of school record adduced by the Headmaster of school viz. Raghuveer Singh (PW-5) that the correct date of birth of prosecutrix was 1.1.1969. Learned Panel Lawyer, on the other hand, submitted that the evidence of father regarding date birth of prosecutrix was more reliable.

15. Sudershan (PW-6) deposed that the date of birth of his daughter was 9.9.1969 and the same date he got recorded in the school and Kotwari Register. According to him, if 1.1.1969 was recorded in the school record, it was not correct.

16. Investigating Officer, A.K. Samadhiya (PW-7), stated that vide seizure memo Ex.P/6 he seized a school certificate in respect of the date of birth of prosecutrix from Sudershan Prasad. However, this certificate was not produced in the court. Similarly no Kotwari register, in which the date of birth of the prosecutrix was said to have been recorded, was produced. This gives an indication that if the said documents would have been produced, they would have gone against the prosecution. If the evidence of Sudershan Prasad (PW-6r) is seen in juxtaposition to the evidence of Raghuveer Singh (PW-5), the Headmaster of Primary School, Majhgaon, it is found that the date of birth of prosecutrix in the admission register (Ex.P/4) was recored as 1.1.1969. Raghuveer Singh (PW-5) categorically deposed that in the admission register of the school entries of the admissions and date of birth were recorded right from 25.12.1954 to 30.6.1994. At Sl.No.482, the date of birth of prosecutrix was recorded as 1.1.1969. He deposed that the dates of birth of the children were recorded on the basis of the information given by their parents. Sudershan (PW-6) also admitted that he got recorded the date of birth of prosecutrix in the school, however, he stated that he had given the date of birth of prosecutrix as 9.9.1969. The evidence of entry of the date of birth in the admission register of the school appears more reliable. It appears that with a view to make out a case under Section 376, father of prosecutrix deliberately gave the date 9.9.1969 as date of birth. If the age of prosecutrix on the date of

occurrence i.e. on 14.6.1985 is calculated from 1.1.1969, it comes around 16 years and 6 months. Thus, in view of the fact that prosecutrix has been found to be a consenting party, the charge under Section 376 of the Indian Penal Code against the appellant fails.

17. As far as the conviction of appellant under Section 366-A of the Indian Penal Code is concerned, an essential ingredient of the offence is that a minor girl under age of 18 years is induced to go from any place with intent that such girl may be or is likely to be forced or seduced to illicit intercourse with another person. Since it has been found that the prosecutrix was a consenting party to the sexual intercourse, no charge under Section 366-A of the Indian Penal Code is made out.

18. Now the question before this Court would be whether appellant is liable to be convicted under Section 363 of the Indian Penal Code, since the age of prosecutrix at the time of occurrence, in the instant case, was around 16 years and 6 months. Learned counsel for the appellant placing reliance on *S. Varadarajan v. Staste of Madras*-AIR 1965 SC 942 submitted that since the prosecutrix was a girl of mature understanding and was on the verge of majority and that she herself persuaded appellant to take her away from her house, no offence under Section 363 of the Indian Penal Code was made out against him.

19. The Apex Court in *S. Varadarajan* (supra) observed that "there is a distinction between "taking" and allowing the minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purpose of Section 361. Where the minor leaves her father's protection knowing and having capacity to know the full import of what she is doing voluntarily joins the accused person, the accused person cannot be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of guardian.....when the girl (who though a minor had attained the age of discretion and is on the verge of majority and is a senior college student) from the house of the relative of the father where she is kept, herself telephones the accused to meet her at a certain place, and goes there to meet him and finding him waiting with his car gets into that car of her own accord, and the accused takes her to various places and ultimately to the Sub-Registrar's

Office....., the accused by complying with her wishes can by no stretch of imagination be said to have "taken" her out of the keeping of her lawful guardianship."

20. In the instant case also, the prosecutrix was a student of Class VIII. She wrote letters to appellant persuading him to take her away from her parents' house or else she would end her life. The last letter was written by her on 13.6.1985 and she went with the appellant on 14.6.1985. It clearly indicates that whatever appellant did, was to fulfill the wishes of prosecutrix. It was also established from her medical evidence that she got terminated her pregnancy, though she denied to have sexual relations with anybody.

21. On appraisal of the above circumstances in the light of the above proposition laid down by the Apex Court, in my opinion, no offence, even under Section 363 of the Indian Penal Code, is made out against the appellant. As such, he is entitled to be acquitted.

22. In view of the foregoing discussion, this appeal is allowed. Conviction and sentence of appellant under Section 366-A and 376 of the Indian Penal Code are set aside. He is acquitted.

23. Appeal allowed.

Appeal allowed

I.L.R.[2012]M.P. 252

CIVIL REVISION

Before Mr. Justice J.K. Maheshwari

C.R. No. 377/2009 (Jabalpur) decided on 13 October, 2011

HAJI ABDUL AZIZ ANSARI ...Applicant

Vs.

M.P. WAKF BOARD, BHOPAL & anr. ...Non-applicants

A. Wakf Act (43 of 1995), Section 3(i) – Mutawalli – **After the death of Mutawalli, petitioner was discharging the functions of Mutawalli and was managing the affairs and property of Maszid for the last 13 years – Also paying annual contribution to the Board – Petitioner can be treated as Mutawalli.** (Para 8)

क. वक्फ अधिनियम (1995 का 43), धारा 3(i) – मुतावली – मुतावली की मृत्यु के बाद याची मुतावली के कार्यों का निर्वहन कर रहा था और पिछले 13

वर्षों से मस्जिद की सम्पत्ति एवं कार्यकलापों की देखभाल कर रहा था –बोर्ड को वार्षिक अंशदान भी अदा कर रहा था – याची को मुतावली माना जा सकता है।

B. ***Wakf Act (43 of 1995), Section 64 – Removal of Mutawalli – Opportunity of Hearing*** **– Inquiry under Section 64 of the Act ought to have been conducted – Petitioner can be said to be aggrieved person.** (Para 14)

ख. वक्फ अधिनियम (1995 का 43), धारा 64 – मुतावली का निष्कासन–सुनवाई का अवसर–अधिनियम की धारा 64 के अंतर्गत जांच की जानी चाहिए थी–याची को व्यथित व्यक्ति कहा जा सकता है।

C. ***Wakf Act (43 of 1995), Sections 64 & 67 – Appointment of Committee*** **– Committee can be appointed for the Supervision or management of Board – Power can be exercised for suppression of Committee – As removal of petitioner as Mutawalli was in violation of Section 64(5), therefore appointment of Committee also not in accordance with law.** (Para 14)

ग. वक्फ अधिनियम (1995 का 43), धाराएँ 64 व 67 – समिति की नियुक्ति – समिति की नियुक्ति बोर्ड के पर्यवेक्षण एवं प्रबंधन हेतु की जा सकती है – समिति के दमन हेतु शक्ति का प्रयोग किया जा सकता है – चूंकि धारा 64(5) के उल्लंघन में मुतावली के रुप में याची को हटाया गया, इसलिए समिति की नियुक्ति भी विधि के अनुसार नहीं।

Cases referred:

2000(2) MPLJ S.N. 25, 1995 MPLJ 463, 2009(4) MPLJ 646.

S.P. Tripathi, for the applicant.
R.B. Patel, for the non-applicant No. 1.
*Ishtiyaque Hussain,*for the non-applicant No.2.

ORDER

J.K. MAHESHWARI, J.:- In both these revisions, the order dated 31st of October, 2009 passed by the Wakf Tribunal has been challenged by both the parties, however, they are being decided by this common order.

2. As per order dated 5.10.2009 passed by the Wakf Board, a committee was appointed in exercise of powers conferred under Section 67 of the Wakf Act, 1995 (hereinafter referred to as "the Act") by which Mubarak Ansari was appointed as Chairman of the said committee consist with 10 other

members. The said order was challenged by Haji Abdul Aziz Ansari. By the order impugned Tribunal found that appellant was having no locus to challenge the order of supersession because he was not duly appointed *Mutawalli* of *Masjid* known as *Wakf Masjid Yasin, Katra, Rewa* (for short "the *Masjid*"). It has further been held that an opportunity of hearing is not required to be afforded to petitioner, but by the same order it is also held that appointment of the committee by the Board as per order dated 5.10.2009 is not fair and reasonable, therefore, order of appointment of committee was also set aside. Being aggrieved by the order dated 5.10.2009 and also of Tribunal, Haji Abdul Aziz Ansari filed CR No.377/09 and President of Committee Mubarak Ansari filed CR No.393/2009 as his committee was not recognised, raising common questions of law and facts for adjudication.

3. Shri S.P. Tripathi, learned cousnel representing Haji Abdul Aziz Ansari contends that the *Masjid* was registered with Wakf from 1988 and *Kuvar* Noshad was the *Mutawalli*. The said *Masjid* was having no deed and instrument of Wakf. Kuvar Noshad died on 12.04.1996 since then petitioner is working as *Mutawalli* and managing the affairs of Wakf and property of *Masjid*. He is also paying *Chanda Nigrani* to the Board annually in view of provisions contained in Section 72 of the Act. Thus, by virtue of managing the affairs of said *Masjid* he has become the *Mutawalli* as defined under Section 3(i) of the Act. The Tribunal committed an error by recording the finding that applicant was not appointed as *Mutawalli,* however, having no right to challenge the appointment of the committee. He has placed reliance on the judgment of this Court in the case of *Jardar Ali s/o Ban Ali and others vs. Wakf Intajamiyan Committee, Khandwa and Ors.* 2000 (2) MPLJ Short Note 25, and urged that if petitioner is working as *Mutawalli* since last more than 13 years, he cannot be removed without following the due procedure as specified under Section 64 of the Act and affording reasonable opportunity of hearing, however, finding as recorded by Tribunal is unsustainable in law. It is further contended that appointment of committee headed by Chairman Mubarak Ansari is unfair and unreasonable as apparent from the findings of the Tribunal, however, such committee cannot be continued as *Mutawalli* to look after the affairs of said *Masjid,* however, Tribunal has rightly reduced the period of appointment of the committee and directed the appointment of fresh *Mutawalli* or committee as the case may be.

4. Shri Ishtiyaq Hussain, learned counsel representing Janab Mubarak Ansari has strenuously urged that Janab Haji Abdul Aziz Ansari has no *locus*

to challenge the appointment of committee constituted by Board because he was not duly appointed As *Mutawalli*. It is further contended that as per Section 63 of the Act, Board is having power to appoint *Mutawalli* or committee. As per Section 67 if such appointment is directed by Board in exercise of powers under Section 63 and 67 of the Act, appointing a committee, it cannot be said to be arbitrary or unreasonable. Placing reliance on two judgments of this Court in the case of *Haji Moosakhan and others Vs. M.P. Wakf Board and others* 1995 MPLJ 463 and S*yed Masood Ali Vs. M.P. Wakf Board* 2009 (4) MPLJ 646, it is submitted that no opportunity of hearing deserves to be granted to Haji Abdul Aziz Ansari as he was not a validly appointed *Mutawalli.* It is also submitted that if appointment of Mutawalli was made by Board in exercise of powers as conferred under the law, the said committee may be continued to work for the period so specified.

5. Learned counsel appearing for Wakf Board contends that order dated 5.10.2009 appointing a committee has been passed by Wakf Board in exercise of powers under Section 63 of the Act because some complaints regarding financial irregularities were received along with the letter of Collector, District-Rewa against Haji Abdul Aziz Ansari, however the order of appointment of new committee is in the interest of wakf and also of community. It is further submitted that Janab Haji Abdul Aziz Ansari has not been appointed as a *Mutawalli* by the Board, however, assuming the vacancy the order of appointment of the committee has rightly been passed.

6. After having heard learned counsel appearing on behalf of parties and on perusal of record, it is not in dispute that the *Masjid was* registered with Wakf in the year 1988 and Kuvar Noshad was the *Mutawalli* of said Masjid. Kuvar Noshad died on 12.04.96 and since then Janab Haji Abdul Aziz Ansari was manging the affairs of the *Masjid* till passing the orders dated 2.9.09 and 5.10.09. It is also not in dispute that Wakf Board was receiving annual contribution from Janab Haji Abdul Aziz Ansari raising demand by every year which was deposited by him. On perusal of record, it reveals that some complaints regarding financial irregularities and mis-management of said *Masjid* were submitted before the Collector whereupon reply was sought for and the order dated 2nd September, 2009 was passed appointing one *Tahsildar* as a receiver. A copy of the said order was also sent to Board, however, in consequence thereto the Wakf Board has passed the order on 5.10.09 appointing a committee headed by Janab Mubarak Ansari. In the said fact, it is clear that action has been taken against Janab Haji Abdul Aziz

Ansari on account of allegation of financial irregularities and mis-management of *Masjid.* This Court while considering the issue of removal of *Mutawalli* without holding an enquiry in the case of *Jardar Ali (supra)* held that even if appointment is prior to commencement of the Wakf Act, 1995, the principle of natural justice has to be observed prior to displacement of person. As the question has been posed by other side that Haji Abdul Aziz Ansari does not fall within the definition of *Mutawalli*, however, an opportunity of hearing is not required to be afforded to him. As he was not appointed as *Mutawalli*, however, on appointment of fresh committee, he is having no *locus* to challenge the said order of appointment.

7. The argument so advanced is required to be dealt with in the context of definition of *Mutawalli* and in the context of power to appoint a *Mutawalli* by the Wakf Board. To deal with the said argument, the definition of *Mutawalli is* required to be referred which is reproduced as under :-

> "3(i) "mutawalli" means any person appointed, either verbally or under any deed or instrument by which a wakf has been created, or by a competent authority, to be the mutawalli of a wakf and includes any person who is a mutawalli of a wakf by virtue of any custom or who is a naib-mutawalli, khadim, mujawar, sajjadanashin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person, committee or corporation for the time being managing or administering any wakf or wakf property.

8. On going through the aforesaid provisions, it is apparent that if any vacancy in the office of *Mutawalli* of a Wakf arises and no one is appointed under the deed or instrument of a Wakf or where the right of any person to act as *Mutawalli* is disputed, the Board is having power to appoint any person to act as *Mutawalli* for such period and on such conditions as it may think fit. In the context, no other provision has been shown in the matter of appointment of *Mutawalli.* In the facts of the present case, Kuvar Noshad was the Mutawalli of the said Masjid who died on 12.04.96, since then Abdul Aziz Ansari is discharging the functions of Mutawalli and managing the affairs and property of the Masjid. He is paying annual contribution on raising such demand by the Board. The documents thereof are available on record however by unrebutted facts, he can be treated as a Mutwalli appointed verbally of the

said Masjid and discharging his duties continuously since last more than 13 years. Thus, in the opinion of this court he can be called as Mutawalli as per the said definition.

9. In the present case, the Board by passing an order dated 5.10.2009 appointed a committee. The said order of appointment was passed because a group of the person submitted an application to the Collector indicating some irregularities of the Mutawalli. On such application, by issuing a notice reply was filed by Haji Abdul Aziz Ansari thereafter the order was passed by the Dy. Collector on behalf of the Collector District Rewa on 2nd September, 2009 appointing Mr. Balveer Raman Singh, Tehsildar as a receiver of the said Masjid. Copy of the order has been sent to the Wakf Board. The Board on receiving such order exercising power under Section 67 of the Act appointed a committee. Thus, by appointment of a new committee by the Board Haji Abdul Aziz Ansari was removed. As per section 64 of the Act, procedure for removal of Mutawalli has been specified which is relevant for the purpose of this case, however it is reproduced as under:-

> **64. Removal of mutawalli :-** (1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli-
>
> (a) has been convicted more than once of an offence punishable under section 61; or
>
> (b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or
>
> (c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or
>
> (d) is an undischarged insolvent; or
>
> (e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(f) is employed as a paid legal practitioner on behalf of, or against, the wakf; or

(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of section 46; or

(h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any work being done for, the wakf or is in arrears in respect of any sum due by him to such wakf; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication or funds or breach of trust in relation to the wakf or in respect of any money or other wakf property; or

(j) willfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;

(k) misappropriates or fraudulently deals with the property of the wakf.

(2) The removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf property either as a beneficiary or in any other capacity or his right, if any, as a *sajjadanashin.*

(3) No action shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (i) of sub-section (1), may, within one month from the date of the receipt by him of

the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(5) Where any inquiry under sub-section (3) is proposed, or commenced, against any mutawalli, the Board may, if it is of opinion that it is necessary so to do in the interest of the wakf, by an order suspend such mutawalli until the conclusion of the inquiry;

Provided that no suspension for a period exceeding ten days shall be made except after giving the mutawalli a reasonable opportunity of being heard against the proposed action.

(6) Where any appeal is filed by the mutawalli to the Tribunal under sub-section (4), the Board may make an application to the Tribunal for the appointment of a receiver to manage the wakf pending the decision of the appeal, and where such an application is made, the Tribunal shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), appoint a suitable person as receiver to manage the wakf and direct the receiver so appointed to ensure that the customary or religious rights of the mutawalli and of the wakf are safeguarded.

(7) Where a mutawalli has been removed from his office under sub-section (1), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer duly authorized in this behalf or to any person or committee appointed to act as the mutawalli of the wakf property.

(8) A mutawalli of a wakf removed from his office under this section shall not be eligible for re-appointment as a mutawalli of that wakf for a period of five years from the date of such removal."

10. From the bare reading of the aforesaid, it is clear that the Wakf may remove a Mutawalli from his office if there are allegation as specified under

sub clause (1)(a) to (k). It further appears that prior to passing an order of removal of a Mutawalli an enquiry into the matter in a manner prescribed is to be held and the decision may be taken by a majority of not less than 2/3rd members of the Board, and he cannot be continued as a Mutawalli up to 5 years if removed once, and person aggrieved may prefer an appeal. In the facts of the present case, the order of appointment of the committee was passed pursuance to the order of Collector dated 2nd September, 2010 appointing a receiver on a complaint received to him. The said power can be exercised by the Collector after approval of the Board as enumerated under Section 28 of the Act. It is true that there are certain allegations against Haji Abdul Aziz Ansari, however as contemplated under sub-section (3) of Section 64 of the Act an inquiry ought to be conducted prior to passing an order of removal or otherwise the recourse as specified under sub-section (5) may be taken. The Board ignoring the aforesaid procedure exercising the power under Section 67 of the Act appointed a committee. In such circumstances the petitioner may be a person aggrieved and having locus to challenge the appointment of the committee and its management. It is to be further held that the action as taken by the Board or by the Collector is not in conformity to the provisions of Section 28, 64 (3), (5) and (6) of the Act and also against the procedure prescribed.

11. Learned counsel representing the Wakf Board laid much emphasis that the power has been exercised by the Board under Section 63 of the Act, which confers power of appointment of Mutawalli on the Board. To deal with the said argument, Section 63 of the Act is required to be quoted which is reproduced as thus :

> **"63. Power to appoint mutawallis in certain cases** – When there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or where the right of any person to act as mutawalli is disputed the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit."

Bare reading of the said, it is apparent that when there is a vacancy in the office of Mutawalli of a Wakf and there is no one for appointment under the terms of the deed and instrument or where the right of any person to act as mutawalli is disputed then the Board may appoint a person to act as mutawalli for such period and on such conditions as it may think fit. In the context of the

said provision, it is contended that in the present case, the right of Haji Abdul Aziz Ansari to act as Mutawalli is in dispute, however the Board has rightly exercised the power appointing a committee for managing the affairs of the Masjid. In the opinion of this Court, there is no substance in the said argument and it is liable to be repelled because the action against the Mutawalli has been taken on the basis of an application submitted by a group of the persons showing mismanagement, misfeasance, malfeasance, misapplication of the funds showing breach of trust. Thus in the facts of the present case, it is apparent that Haji Abdul Aziz Ansari was not removed because his right to act as Mutwalli was in dispute.

12. By the impugned order Tribunal has recorded the finding that appointment of committee without due publication in newspaper is not fair and reasonable. In the said context the provisions of Section 67 of the Act which deals with the supervision and supersession of committee of management is relevant which reproduced thus :-

> **67. Supervision and supersession of committee of management.** - (1) Whenever the supervision or management of a wakf is vested in any committee appointed by wakf, then, notwithstanding anything contained in this Act, such committee shall continue to function until it is superseded by the Board or until the expiry of its term as may be specified by the wakf, whichever is earlier;
>
> Provided that such committee shall function under the direction, control and supervision of the Board and abide by such directions as the Board may issue from time to time;
>
> Provided further that if the Board is satisfied that any scheme for the management of a wakf by a committee is in consistent with any provision of this Act or of any rule made thereunder or with the directions of the wakf, it may, at any time, modify the scheme in such manner as my be necessary to bring it in conformity with the directions of the wakf or of the provisions of this Act and the rules made thereunder.
>
> (2) Notwithstanding anything contained in this Act and in the deed of the wakf, the Board may, if it is satisfied, for reasons to be recorded in writing, that a committee, referred to in sub-

section (1) is not functioning properly and satisfactorily, or that the wakf is being mismanaged and that in the interest of its proper management, it is necessary so to do, by an order, supersede such committee, and, on such supersession, any direction of the wakf, in so far as it relates to the constitution of the committee, shall cease to have any force;

Provided that the Board shall, before making any order superseding any committee, issue a notice setting forth therein the reasons for the proposed action and calling upon the Committee to show cause within such time, not being less than one month, as may be specified in the notice, as to why such action shall not be taken.

(3) Every order made by the Board under sub-section (2) shall be published in the prescribed manner and on such publication shall be binding on the mutawalli and all persons having any interest in the wakf.

(4) Any order made by the Board under sub-section (2) shall be final:

Provided that any person aggrieved by the order made under sub-section (2) may, within sixty days from the date of the order, appeal to the Tribunal:

Provided further that the Tribunal shall have no power to suspend the operation of the order made by the Board pending such appeal.

(5) The Board shall, whenever it supersedes any committee under sub-section (2), constitute a new committee of management simultaneously with the order made by it under sub-section (2).

(6) Notwithstanding anything contained in the foregoing sub-sections, the Board may, instead of superseding any committee under sub-section (2), remove any member thereof if it is satisfied that such member has abused his position as such member or had knowingly acted in a manner prejudicial to the interests of the wakf, and every such order for the removal

of any member shall be served upon him by registered post;

Provided that no order for the removal of the member shall be made unless he has been given a reasonable opportunity of showing cause against the proposed action:

Provided further that any member aggrieved by any order for his removal from the membership of the committee may, within a period of thirty days from the date of service of the order on him, prefer an appeal against such order to the Tribunal and the Tribunal may, after giving a reasonable opportunity to the appellant and the Board of being heard, confirm, modify or reverse the order made by the Board and the order made by the Tribunal in such appeal shall be final."

13. Bare reading of the aforesaid, it is apparent that whenever the supervision or management of a wakf is vested in any committee appointed by the wakf, it may continue to function until it is superseded by the Board or until the expiry of its term as may be specified by the Board whichever is earlier on having satisfaction that the action of the committee is inconsistent to the scheme for the management of the Wakf. The power of Section 67 of the Act can be exercised for supersession of a committee. Thus, as per the language of the said provision it can safely be accepted that the Board is having a power to appoint a committee for management of the affairs of the Wakf and as per the definition specified under Section 3(i), it may be treated as a Mutawalli, however, the power is vested with the Board to appoint a committee. Under Section 65 of the Act, the Wakf is having a power to take the direct management if there is a mismanagement, misfeasance, malfeasance, misapplication and also that function of the Wakf is inconsistent to the object of the scheme of the Wakf and deed or instrument of the said Wakf. The State Government is also having power of removal of Mutawalli as conferred by Section 66 of the Act. In the scheme of the Act, it is clear that if the Wakf is registered it may function through Mutawalli as defined under Section 3(i) of the Act. In case of mis-management, action may be taken for removal as per the procedure prescribed under Section 64 of the Act. The Board may directly take the management as per Section 65 of the Act while the power of supervision and supersession of the committee is with the Board as per Section 67 of the Act.

14. In view of the foregoing discussion, it is to be examined whether the

removal of Haji Abdul Aziz Ansari on the allegation as revealed from the record is in accordance to law and the appointment of the committee without having any order of removal or without taking recourse as specified under sub-section (5) of Section 64 of the Act is justifiable. In the present case the committee was appointed as per order dated 5.10.2009 and by virtue of such order Haji Abdul Aziz Ansari has been superseded though there are certain allegations of mismanagement, misfeasance, malfeasance and financial irregularities. In the opinion of this Court, without following the procedure specified under Section 64 of the Act, he cannot be removed; and without his removal the order of appointment of the committee by the Board is not in accordance to law.

15. In the facts of the present case, it is not out of place to observe here that if any application has been filed before the Board disputing the right of Haji Abdul Aziz Ansari to act as Mutawalli, the Board is at liberty to take the recourse as specified under Section 63 of the Act otherwise for his removal the action is required to be taken by following the procedure as prescribed under Section 64 of the Act and thereafter only the appointment of the committee may be ordered by the Board.

16. In view of the foregoing discussion, the order dated 5.10.2009 appointing a committee by the Board and the order impugned dated 31.10.2009 passed by the Wakf Tribunal are hereby set aside. The Board is at liberty to take recourse of law in view of the foregoing observations. Both the revision petitions stand disposed of accordingly. In the facts and circumstances of the case, parties are directed to bear their own costs.

Revision disposed of

I.L.R.[2012]M.P. 264
CRIMINAL REVISION
Before Mr. Justice G.D. Saxena
Cr. Rev. No. 850/2006 (Gwalior) decided on 3 October, 2011

MUKESH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Excise Act, M.P. (2 of 1915), Section 34(2) – Possession of illicit liquor* – Prosecution has to prove that accused was in possession of illegal liquor exceeding 50 bulk litres – Seized liquor was not measured either on the spot or during investigation – Container in which illicit**

liquor was kept were not produced before Court – Prosecution failed to prove that liquor which was seized was exceeding prohibited limit – Revision allowed. (Paras 9 &10)

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 34 (2) – अवैध मदिरा का कब्जा – अभियोजन को साबित करना होगा कि अभियुक्त के कब्जे में 50 बल्क लीटर की मात्रा से अधिक अवैध मदिरा थी – जब्दशुदा मदिरा को न तो घटनास्थल पर और न ही अन्वेषण के दौरान माप किया गया – बक्सा, जिसमें अवैध मदिरा रखी गयी थी, न्यायालय के समक्ष प्रस्तुत नही किया गया – अभियोजन साबित करने में असफल रहा कि मदिरा जिसे जब्त किया गया था वह विनिषिद्ध सीमा से अधिक थी – पुनरीक्षण मंजूर।

J.P. Mishra, for the applicant.
R.K. Shrivastava, P.L. for the non-applicant/State.

ORDER

G.D. SAXENA, J :- This revision petition under Section 397/401 of the Code of Criminal Procedure 1973, preferred by the petitioner is directed against a judgment dated 18th September 2006 in Criminal Appeal No. 341/2006 passed by the Sessions Judge, Guna, confirming thereby the judgment dated 8th August 2006 in Criminal Case No. 167/2006 by the Chief judicial Magistrate Guna (M.P.), convicting the petitioner-accused for commission of offence punishable under Section 34 (2) of the M.P. Excise Act, 1915 and sentencing him to a term of one year's simple imprisonment with a fine of Rs.25,000/-(Rs. Twenty Five Thousand only) with default punishment of six months' in the event of non-payment of fine.

2. The facts, in brief, just for the decision of this revision are that on 10th February 2006 on receiving reliable information through informer that one person is selling an illicit liquor at Katra Mohalla, raid was arranged under the supervision of Har Narayan, Head Constable with Police Force of Police Station Raghogarh and in furtherance of their action, they found the accused petitioner carrying 55 liters of illegal liquor in two plastic cans. Accused was arrested on the spot and the said illegal liquor in two plastic containers were seized. Thereafter, the seized illegal material was sent for examination to R.R. Dubey, Sub Inspector, Excise Department at Raghogarh (Guna). After due examination, by him, the seized material was found country-made liquor. After investigation, the charge-sheet was filed against the accused before the court of Judicial Magistrate First Class, Raghogarh from where the proceedings

alongwith his opinion were forwarded to the court of Chief Judicial Magistrate under Section 325 of Cr.P.C. The trial Magistrate after recording the prosecution and defence evidence passed the Judgment of conviction and sentence against the accused as mentioned above. Being aggrieved by the said Judgment of the trial court, an appeal was preferred by the accused before the Sessions Judge Guna. The appellate court by affirming the judgment of conviction and sentence passed by the trial Magistrate, dismissed the appeal, hence, this revision.

3. The contention of the learned counsel appearing for the petitioner/ accused is that the impugned judgments passed by the trial Magistrate as well as appellate court both are not in accordance with the law and the facts of the case, hence, they deserve to be set aside. It is submitted that in this case, the persecution has utterly failed to prove the guilt against the accused beyond reasonable doubts. It is submitted that the seized liquor was not chemically examined by the recognized agencies and further the prosecution was not able to prove the capacity of the containers seized from the possession of the accused having a liquor. It is contended that the petitioner/accused after judgment of trial/appellate court had spent more then nine months in custody. Therefore, it is prayed that by allowing the revision petition the conviction and sentence recorded against the petitioner by the trial Magistrate and maintained by the learned Sessions Judge in appeal be set aside.

4. The learned Panel Lawyer for the State, on the other hand, opposed the prayer of the petitioner and supported the impugned judgment.

5. Heard the learned counsel appearing for the parties and also perused the record of the courts below and the law applicable to the present case.

6. The question for consideration in this case is that whether the courts below (i.e., trial court and the appellate court) overlooked the measurement of the illegal liquor and without chemical examination of the seized article, fell in error to convict the petitioner/accused?

7. On perusal of the statements of prosecution witnesses Narayan Bunkar (PW-1), Sonu (PW-5) Hari Narayan Sharma Head Constable of the Police Station Raghogarh (PW-6), it is clear that on receiving information, raid was arranged and when it proceeded to play its role, the accused was found on the spot standing with two plastic canes, having approximately 35 and 20 liters of country-made illegal liquor in each container. However, during their

chief and cross examination, none of the witnesses had deposed about the capacity of the container in which the liquor was filled in and further no attempt was made by the prosecution either on the spot or at any later stage of investigation to get the seized liquor measured to have ascertained the fact that same was 55 liters or above 50 liters, though in the F.I.R. (Ex.P/7) it is mentioned that the liquor was approximately 55 liters. It is further noted that the containers, in which the illegal country-made liquor was kept were not produced before the trial court at the time of trial neither were they shown to the prosecution witnesses and nor were they exhibited.

8. The relevant provision of law under the Excise Act speaks in the manner below:-

> **Sec 34.-(1)** Whoever, in contravention of any provisions of this Act or of any rule, notification or order make or issued thereunder or of any condition of a licence permit or pass granted under this Act,
>
> (a) manufactures transports,imports, collects, or possesses any intoxicants;
>
> (b) save in the cases provided for in Section 38 sells any intoxicants; or
> shall subject to the provisions of sub section (2) be punishable for every such offence with imprisonment, for a term which may extend to one year and fine which shall not be less than five hundred rupees but which may extend to five thousand rupees:
>
> Provided that when any person is convicted under this section of any offence for second or subsequent time he shall be punishable for every such offence with imprisonment for a term which shall not be less than two months but which may extend to twenty four months and with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees.
>
> (2) Notwithstanding anything contained in Sub Section (1), if a person is convicted for an offence covered by clause (a) Or clause (b) of sub section (1) of Sub Section (1) and the quality of the intoxicant **being liquor found at the time or in the**

course of detection of the offence exceeds fifty liter, he shall be punishable with imprisonment for a term which shall not be less than one year but which 'may extend to three years and with fine which shall not be less than twenty five thousand rupees but may extend to one lac Rupees:

Provided that when any person is convicted under this Section for an offence for second or subsequent time, he shall be punishable for every such offence with imprisonment for a term which shall not be less than two years but which may extend to five years and fine which shall not be less than fifty thousand rupees but may extend to two lac rupees.

9. To prove the guilt for commission of offence punishable under Section 34 (2) of the Act, the prosecution in case of recovery of illegal liquor in open container from the accused was bound to prove by some cogent material that the recovered illegal liquor exceeded 50 bulk litres. Hence upon consideration of the totality of the facts in the case, it has not been satisfactorily established that the objects recovered from the possession .of the accused-petitioner were exceeding the prohibited strength. In other words, the prosecution by placing ocular evidence of prosecution witnesses, utterly failed to show that the illegal liquor seized from the accused exceeded 50 bulk liters. Hence, the charge for commission of offence punishable under Section 34 (2) of the Act is not proved beyond reasonable doubt against the accused.

10. Consequently, the revision is allowed and the judgments of the trial Magistrate and of Appellate Court are hereby set aside.

Revision allowed.

I.L.R.[2012]M.P. 268
CRIMINAL REVISION
Before Mr. Justice S.N.Aggarwal & Mr.Justice Anil Sharma
Cr.Rev.No.413/2001 (Gwalior) decided on 11 October, 2011

ANITA KUSHWAH ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 217 – Amendment of Charges – Further Evidence - **Accused persons were**

being tried for offence punishable under Section 376 of I.P.C. – Prosecutrix was examined and thereafter the charge was amended to Section 376(2)(g) of I.P.C. – Held- It was obligatory on the part of the Trial Court to gave an opportunity to the prosecution and also to the defence to lead such further evidence as they deem proper on the amended charge – Non-grant of such opportunity to the prosecution by the trial Court amounted to manifest error of law and procedure – Matter remanded back to the Trial Court permitting the prosecution to lead such further evidence as it may consider necessary with an equal opportunity to the accused person to further cross examine the witnesses. (Para 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 217 – आरोपों में संशोधन – अतिरिक्त साक्ष्य – अभियुक्तगण का विचारण भा.द.सं. की धारा 376 के अंतर्गत दण्डनीय अपराध के लिए किया जा रहा था – आभियोक्त्रि का परीक्षण किया गया तथा उसके पश्चात् आरोप संशोधित कर भा.द.सं. की धारा 376 (2)(जी) के अंतर्गत किया गया – अभिनिर्धारित – संशोधित आरोप पर यथोचित अतिरिक्त साक्ष्य प्रस्तुत करने के लिए अभियोजन तथा बचाव पक्ष को अवसर देना विचारण न्यायालय के लिए बाध्यकारी था – विचारण न्यायालय द्वारा अभियोजन को ऐसा अवसर प्रदान नही किया जाना विधि एवं प्रक्रिया की प्रकट भूल की कोटि में आता है – अभियोजन को ऐसी अतिरिक्त साक्ष्य प्रस्तुत करने की अनुमति के साथ जैसा कि वह आवश्यक समझे तथा अभियुक्त को साक्षियों का और आगे प्रतिपरीक्षण करने के समान अवसर के साथ मामला विचारण न्यायालय को प्रतिप्रेषित किया गया।

Cases referred:
AIR 1962 SC 1788, 1973 CAR 343 (SC), 1998 CAR 486.

R.P.Singh, for the applicant.
Pramod Pachori, P.P.for the non-applicant No.1/State.
None for non-applicants No.2 & 3.

ORDER

The order of the court was delivered by :
S.N. AGGARWAL, J. :- The respondents No.2 and 3 were tried on charge of rape under Section 376 IPC. The charge under Section 376 IPC was framed against them by the trial court on 24th October 1996. The charge was later on amended vide order dated 1st July 1999 and respondents No. 2 and 3 were charged for gang rape of the proscutrix under section 376 (2)(g) of IPC. The trial court vide its impugned judgment has acquitted the respondents No. 2

and 3 of charge of gang rape against them. The prosecutrix aggrieved by the acquittal of the respondents No. 2 and 3 has filed the present revision petition. This revision petition was filed in 2001 as at that time there was no provision for appeal by the complainant against the judgment of acquittal of the accused persons.

2. In *K. Chinnaswamy Reddy v. State of Andhra Pradesh and another,* AIR 1962 SC 1788, it was held by the Hon'ble Supreme Court that an order of acquittal can be set aside by the High Court even in revision against the judgment of acquittal filed by the private party even if the state has not filed any appeal. It was, however, held by the Hon'ble Supreme Court in the said judgment that the High Court should exercise its jurisdiction in revisional jurisdiction to set aside the judgment of acquittal only in exceptional cases when there is some glaring defect in the procedure or manifest error on the point of law and consequently a flagrant miscarriage of justice.

3. In *Akalyu Ahir and others Vs. Ramdeo Ram,* 1973 CAR 343 (SC), it was held by the Hon'ble Supreme Court that the High Court should not set aside the trial lightly and may interfere in judgment of acquittal in exercise of its revisional jurisdiction only if it finds that the acquittal is not in accordance with rules of criminal jurisprudence.

4. In *Vimal Singh Vs. Khuman Singh and another,* 1998 CAR 486, it was held by the Hon'ble Supreme Court that the powers of the High Court in Criminal Revision is limited and that it should not convert the order of acquittal into an order of conviction unless there is a manifest error of law or procedure.

5. We have examined the present revision on the touchstone of law regarding powers of the High Court in criminal Revision laid down by the Hon'ble Supreme Court in the aforementioned judgments. This revision filed before us is by the prosecutrix. She has alleged gang rape with her by respondents No.2 and 3 in the incident that took place on 5th November 1994. The FIR of the incident was lodged by her promptly on next day of the occurrence. The respondents No.2 and 3 were initially charged by the trial court vide order dated 24th October 1996 for offence under Section 376 IPC. At a stage when trial was at last stage of prosecution evidence, the trial court on its own amended the charge vide order dated 1st July 1999 and converted the charge from Section 376 to Section 376 (2)(g) of IPC. On the day the charge was amended by the trial court, an application was filed on behalf of the accused persons for permission to recall the prosecutrix for further

cross-examination, which permission was granted by the trial court to them. A perusal of order of the trial court dated 1st July 1999, by which charge was amended would show that no opportunity was, given by the trial court to the prosecution to lead evidence on amended charge and this amounts to violation of mandatory provisions contained in Section 217 of the Code of Criminal Procedure 1976. A perusal of the impugned judgment particularly para 16 thereof would show that the respondents No.2 and 3 have been acquitted by the trial court only because the evidence of the prosecutrix was not corroborated either by medical evidence or by any other independent evidence. The trial court has noted in its impugned judgment that the prosecution has not produced medical evidence to prove rape upon the prosecutrix or to prove potency of respondent No.2 that he was capable of doing act of sexual intercourse. We have found from the record of the trial court that the charge was amended by the trial court on 1st July 1999 at a stage when the prosecution had not yet closed its evidence. Assuming *arguendo* that even if the prosecution had closed its evidence at a time when charge was amended by the trial court still in view of provisions contained in Section 217 of Code of Criminal Procedure 1976, it was obligatory on the part of the trial court to have given an opportunity to the prosecution and also to the defence to lead such further evidence as they deem proper on amended charge. Non grant of such an opportunity, in our opinion, amounts to manifest error of law and procedure in the impugned judgment acquitting respondents No.2 and 3 of the charge. In our opinion, the impugned judgment suffers from manifest error of law which needs to be corrected by us in exercise of our revisional jurisdiction. We have taken note of the fact that the incident in this case is of the year 1994 and also the fact that the impugned judgment of acquittal in favour of respondents No.2 and 3 is of the year 2001. However, we find that not granting an opportunity to the prosecution to lead further evidence on amended charge is an error on the part of the trial court for which the victim of the incident can not be made to suffer. Accordingly, we deem it appropriate to remand the case back to the trial court for permitting the prosecution to lead such further evidence in the case as it may consider necessary with an equal opportunity to the accused person to further cross-examine the witnesses of the prosecution including their right to produce their evidence in defence.

6. For the foregoing reasons, the impugned judgment of acquittal, whereby respondents No. 2 and 3 have been acquitted of charge under Section 376 (2) (g) IPC against them is hereby set aside, the case is remanded back

to the trial court with directions to proceed further with the trial against the accused persons in accordance with law. Since respondent No. 2 being one of the accused persons has died during pendency of the present revision, the trial against him stands abated. The remaining trial shall now proceed only against respondent No. 3.

7. Having regard to the fact that the incident in this case is of the year 1994, we direct the trial court to conclude the remaining trial as expeditiously as possible but not later than four months of receipt of certified copy of this order. Lest we may be misunderstood, we make it clear that our remand order should not be misconstrued by the trial court as any suggestion by us for convicting respondent No. 3 being the lone accused person left in the case. Trial court on the basis of evidence shall be free to form its independent opinion regarding the guilt of respondent No. 3 in the case. This revision is disposed of accordingly.

Revision disposed of.

I.L.R.[2012]M.P. 272
CRIMINAL REVISION
Before Mr. Justice G.D. Saxena
Cr. Rev. No. 786/2011 (Gwalior) decided on 14 October, 2011

AJAY SHARMA ...Applicant
Vs.
SMT. ARCHANA SHARMA ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 125 & 127 – Payment of Maintenance amount – **Petitioner was directed to pay interim maintenance – Application for alteration of interim maintenance amount on the ground of delay tactics being adopted by wife filed by husband is pending – Held – Unless the interim order of maintenance passed earlier is amended/altered or maintained same will be enforceable – Petitioner bound to pay interim maintenance amount – Revision is dismissed with direction to dispose of the petition of petitioner within two months from date of order.** (Paras 8 & 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 125 व 127 – भरण पोषण की रकम का भुगतान – याची को अंतरिम भरण पोषण अदा करने के लिए निदेशित

किया गया था – पत्नी द्वारा विलंब की युक्तियां अवलंबित किये जाने के आधार पर पति द्वारा अंतरिम भरण पोषण की रकम के परिवर्तन हेतु आवेदन लंबित है – अभिनिर्धारित – जब तक पूर्व में पारित भरण पोषण का आदेश संशोधित/परिवर्तित अथवा कायम नहीं रखा जाता, वह प्रवर्तनीय रहेगा – याची अंतरिम भरण पोषण अदा करने के लिए बाध्य – आदेश दिनांक से दो माह के भीतर याची की याचिका निर्णित करने के निदेश के साथ पुनरीक्षण खारिज।

Kamal Jain, for the applicant.
Manish Nayak, for the non-applicant.

ORDER

G.D. SAXENA, J :- Being aggrieved by an order dated 2nd August 2011 in Criminal Case No. 47/2010 by the Additional Principal Judge of the Family Court, Gwalior, directing thereby the petitioner to pay the arrears of interim maintenance amount to respondent till decision on the application under Section 151 of Cr.P.C., filed by the petitioner to set aside the order of interim maintenance, this revision petition under section 397/401 of Cr. P.C. has been submitted.

2. The facts, in short, just for the decision of the aforesaid cases, are that petitioner Ajaya Sharma was married to respondent Mrs. Archana Sharma on 16/2/97 at Gwalior and a child Ekansh was born on 10th February, 2000 out of their wedlock. The petitioner Ajay Sharma was working as AGM in Larsen and Toubro Company in USA. It is alleged that there the petitioner developed an illicit relations with another lady and he used to torture and threatened the respondent and was also trying to get divorce from her. She was forced to leave for her parental house. Accordingly, the complaint was lodged by her at police station Mahila where a Crime No. 121/09 for commission of offence punishable under sections 498-A and 506-B of I.P.C. against the petitioner husband was registered. Ultimately, the respondent-wife decided to take shelter in the house of her parents with her son. The petitioner-husband did not take care of her and her son and deprived of her from basic amenities. For redressal of her grievance, the respondent filed the application under Section 12 of the Protection of Women from Domestic Violence Act - 2005. The trial Magistrate vide order dated 12th November 2010, in Criminal Case No.1290/2010 granted a. sum of Rs.15000/- towards monthly interim maintenance to respondent-wife. Then, the petitioner-husband filed the appeal under Section 29 of the said Act. The Appellate court vide order dated 31st January, 2011 in Criminal Appeal No. 615/2010 reduced the monthly interim

maintenance amount up to Rs. 7000/-. Aggrieved by the said order both the parties have filed the petitions against each other, bearing Misc. Cri. C. Nos. 1939/11 and 2470/11, which came up for hearing and decided by this court by a common order dated 9th May 2011. The relevant portions of the said are extracted below-

> "(6) In Criminal Revision No. 966/2010 filed by respondent Ajay Sarma vide dated 25th January 2011 another bench of this court passed the order to the following effect:-
>
> "After taking into consideration facts and circumstances of the case, this revision is dismissed as withdrawn and it is directed to the learned Trial Court that if any application is filed by applicant alongwith relevant documents concerning source of income of respondent, then after taking into consideration facts and circumstances of the case and social and economic status of the parties and standard of living and also considering the facts that whether respondent has any independent source of income sufficient for her maintenance, pass appropriate order as per law.
>
> It is also directed to the trial court that before considering the application, if any filed on behalf of the applicant, the trial court shall make sure that the amount of interim maintenance awarded in favour of respondent as per order dated 27/10/10 is to be paid to respondent."
>
> (7) In that view of the matter and the liberty granted by the aforesaid order, the petitioner vis-a-vis the respondent in both the petitions shall have a legal recourse to apply before the concerning Magistrate seeking alteration, modification or revocation of the order impugned in view of the provisions of Section 25 of the said Act. Thus, at this stage, this court does not feel it proper to interfere in the impugned order. Even otherwise, the power under Section 482 of Cr.P.C. has to be exercised sparingly depending upon the facts and circumstances of each case and no straitjacket formula can be laid down for exercise of such power. Accordingly, both petition have no force and are dismissed hereby. "

(3) It is thereafter that the order was passed by the trial court challenged in the revision.

(4) The contention of the learned counsel appearing for the petitioner is that in compliance of the directions of this court contained in the order dated 25th January 2011 in Cri. Rev. No. 966/2011, the petitioner moved an application before the trial court on 3rd of February, 2011 and also paid Rs. 30,000/- towards arrears of interim maintenance to the respondent. It is contended that the respondent is responsible for causing delay in the disposal of his application by not filing reply despite giving various opportunities. Therefore, it is requested that by allowing the revision the order passed by the court below directing the petitioner to pay the arrears of interim maintenance before disposal of his application be set aside.

(5) The learned counsel for the respondent on the other hand, opposed the prayer and prayed for dismissal of the revision.

(6) Heard the learned counsel for the parties and also perused the impugned order and the documents annexed with the revision memo.

(7) After marriage, it is the duty of the husband to provide shelter and maintenance to the wife. If he neglects, the wife is legally entitled to have it from the court by moving a petition under the provision of Section 125 of Cr.P.C. The section gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. At this juncture, it would be profitable to quote the relevant provisions under the Code.

> **S.125(1)** If any person having sufficient means neglects or refuses to maintain-
>
> (a) his wife, unable to maintain herself, or
>
> (b) his legitimate or illegitimate minor child/ whether married or not unable to maintain itself or
>
> (c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate/ as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from time to time direct:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub section/order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceedings which the Magistrate considers reasonable,and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application of the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as for as possible / be disposed of within sixty days from the date of the service of the notice of the application to such person.

Sec.127(1)- [On proof of a change in these circumstances of any person, receiving under Section 125 a monthly allowance for the maintenance or interim maintenance or ordered under the same section to pay a monthly allowance for the maintenance or interim maintenance to his wife child, father or mother as the 'case may be, the Magistrate may make such alteration, as he thinks fit in the allowance for maintenance or the interim maintenance as the case may be]

(2) XXXX XXXX XXXX XXXX

(3) XXXX XXXX XXXX XXXX

(4) XXXX XXXX XXXX XXXX

(8) A perusal of the provisions of Section 127 of Cr.P.C. makes it clear that where once an order for maintenance is passed under Section 125 of Cr.P.C., the amount can be increased or decreased by change of circumstances of the person receiving, or of the person paying, the amount. Change in circumstances envisaged by this section is of pecuniary or other circumstances of the party paying or receiving maintenance allowance which would justify an

increase or decrease of the amount originally fixed. Change in circumstances would also mean change in the circumstances of the husband. An application for alteration in maintenance allowance on ground of change in circumstance can be filed by either party. As discussed above, by way of directions dated 25th January 2011 in Cri. Rev.No. 966/2010, this court granted the petitioner-husband a liberty to move an appropriate application for alteration of monthly interim allowance originally granted to his wife and child on proof of change of circumstances, which is said to be pending consideration before the court. Suffice it to say, until the interim order of maintenance passed earlier on dated 27th October 2010 is amended/altered or maintained, as the case may be, same will be enforceable on the date of pronouncement of such order or the date as the trial Judge may direct in his order and under the circumstances, the petitioner is bound to pay the interim maintenance amount as ordered by the Court.

(9) Consequently, this court does not find any merit in this revision. Same is hereby dismissed with a direction to the trial court to dispose of the petition of the petitioner-husband within a period of two months from the date of communication of the order of this court.

Revision dismissed

I.L.R.[2012]M.P. 277
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1144/2011 (Jabalpur) decided on 11 November, 2011

PUSHPA THAKUR (SMT.) & anr. ...Applicants
Vs.
BHAGWANDAS BHAVEDI ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Reasonable sum of Maintenance **– If the husband like the respondent is healthy and able bodied person then, on account of less income, he can not escape from his liability to pay the reasonable sum of maintenance to his wife and children.**

Maintenance awarded by the trial Court enhanced from Rs. 600/- per month to Rs. 1500/- per month for wife and from Rs. 200/- per month to 900/- per month for child. (Paras 9 & 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण पोषण की उचित राशि – यदि पति प्रत्यर्थी की तरह स्वस्थ्य और सक्षम व्यक्ति है, तो कम आय के आधार पर वह अपनी पत्नि और बच्चे को भरण पोषण की उचित राशि देने के उत्तरदायित्व से नहीं बच सकता।

विचारण न्यायालय द्वारा पारित भरण पोषण की राशि में पत्नि के लिये रुपये 600/– प्रति माह से 1500/–रुपये प्रति माह और बच्चे के लिये रुपये 200/–प्रति माह से 900/–रुपये प्रतिमाह की वृद्धि की गई।

Manish Tiwari, for the applicants.
Brijesh Verma, for the non-applicant.

ORDER

U.C. MAHESHWARI, J :- The applicants/wife and the son of the respondent have preferred this revision for further enhancement of the sum being dissatisfied with the order dated 25.4.2011 passed by IInd Principal Additional Judge of Family Court Jabalpur in MJC No. 35/07, whereby allowing their application filed under Section 125 of Cr.P.C., the respondent has been directed to pay only Rs. 600/- per month to the applicant no.1 and Rs. 200/- per month to applicant no.2.

2. The applicant no.1 being wife of respondent on her own behalf and on behalf of minor son, the applicant no.2, filed an application against the respondent under Section 125 of Cr.P.C. with a prayer to direct the respondent to pay them the sum of monthly maintenance for their livelihood. As per averments of the application, the applicant no.1, got married with the respondent no.1 in accordance with Hindu rites and rituals on 27.1.2004. Out of such wedlock, the applicant no.2 was borne on 20.6.2005. As per further averments, subsequent to marriage, the applicant no.1 was subjected to harassment and cruelty in the matrimonial home by the respondent where she was also treated to be the servant of the family and even in her pregnancy period, she was subjected to same harassment and cruelty by the respondent and his other family members. In continuation of such activities, by taking all her belonging she along with the applicant no.2, the minor son was ousted from the matrimonial home without any sufficient cause and since then under compulsion, they were residing in the parental home of the applicant no.1. It is also stated that the respondent did not make any effort to bring them back to his home and in such premises, they have neglected and refused by the respondent. It is further stated that the applicant no.1 being household lady, is not having any source of income and the applicant no.2 being minor, is not in

a position to earn. In such premises, they are in need of sum for maintenance from the respondent. As per further averments, the respondent is involved in the business of contractor of furniture, and of maintenance of the houses. Besides this, he is having the house property and agricultural land and from all sources, he is earning near about Rs.10,000/- to Rs. 12,000/- per month. With these submissions, the prayer for appropriate direction to the respondent to pay the maintenance at the rate of Rs. 3000/- per month to the applicant no.1 and Rs. 2,000/- per month to applicant no.2, is made.

3. In reply of the respondent, the factum of the marriage and birth of the applicant no.2 from such wedlock are admitted while, the allegations regarding harassment and cruelty committed by the respondent with the applicant have been denied. It is also stated that the applicant no.1 along with her son-applicant no.2, is residing, separately from the respondent, in her parental family without any sufficient cause while, the respondent was always remained ready and willing to keep them with him in his family. It is stated that he did not have any business of the contractor-ship or maintenance of the houses and in such premises, he is not having any income from such alleged business. The averments regarding income from the agricultural field is also denied. As per further averments, the respondent is working as daily wage labour at Bhopal and out of which, his income is not so high to pay the amount of maintenance as prayed by the applicants. Some other allegations have also been made against the applicant no.1 in the reply and the prayer for dismissal of the application was made.

4. In view of the aforesaid pleadings of the parties, some issues were framed by the trial Court on which, the evidence was adduced by the parties. On appreciation of the same, by allowing the applicants' application in part, the respondent was directed to pay them Rs.600/- per month and Rs.200/- per month respectively to the applicant no.1 and applicant no.2 for their maintenance. Being dissatisfied with the impugned order, the applicants have come to this Court with this revision for further enhancement of such sum in accordance with their prayer made in the application filed under Section 125 of Cr.P.C.

5. Applicants' counsel after taking me through pleadings of the parties, evidence led by them along with the impugned order said that, on appreciation of the evidence even after holding the applicants have been neglected and refused by the respondent, without considering the present price index of the food stuffs and other necessary things in the market, has allowed their

application for the sum at very lower side, which is not sufficient to fulfill the regular necessity of the applicants. So far income of the respondent is concerned, by referring para 10 of the cross-examination of respondent Bhagwandas (DW-1), said that he is having the sufficient property and the source of income to pay the reasonable sum of the maintenance to the applicants and prayed to enhance the sum awarded by the trial Court by allowing this revision.

6. On the other hand responding the aforesaid arguments, Shri Brijesh Verma, learned appearing counsel by justifying the impugned order said that the same is based on proper appreciation of the evidence and also taking into consideration the monthly income of the respondent i.e. near about Rs.2,700/- per month hence, it does not require any interference at this stage for further enhancement of the sum. In continuation, he also argued that besides the liabilities of the applicants, the respondent is also having the liabilities of some other family members i.e. mother and younger brother. He also said that the respondent was ready and willing to keep the applicants with him in his family but without sufficient cause, they are residing separately and in such premises, the applicants are not entitled for further enhancement of the sum and prayed for dismissal of this revision.

7. Having heard the counsel at length, keeping in view their arguments, after perusing the record along with the impugned order, I am of the considered view that this revision deserves to be allowed in part.

8. It is apparent that after passing the impugned order holding the applicants are neglected and refused by the respondent without any sufficient cause with a findings that they did not have any source of income for their livelihood, such findings of the trial Court have not been challenged on behalf of the respondent by filing any revision or any other proceedings. So in such premises, such findings of the trial Court have got finality between the parties and the same does not require any interference at this stage. So, only question remains in this revision whether the applicants are entitled for further enhancement in the monthly sum awarded by the trial Court or not.

9. It is settled law that if the wife and children like applicants are non-earning members and have been neglected and refused by the husband/father like the respondent then, it is the duty of the husband like the respondent to pay them the appropriate sum for their livelihood and maintenance. It is also settled proposition that if the husband like the respondent is healthy and able bodied person then, on account of less income, he cannot escape from his liability to pay the reasonable sum of maintenance to his wife and children.

10. Although, in the available circumstances and evidence of the case at hand, the respondent is not having the less income, on the contrary in view of para 10 of his deposition recorded in the trial Court, he is having the house along with the agricultural land. In such premises, it could not be deemed that the respondent is having only income Rs.2,700/- per month. His income appears to be of that level on which he may give sufficient and reasonable sum to the applicants for their livelihood. Looking to the current price index of the market regarding food stuffs and other necessary things for human being, Rs. 600/- per month and Rs.200/- per month for applicant no.1 and applicant no.2 respectively, is apparently at very lower side. Whenever the amount of maintenance is awarded to the wife and children then, the Courts are bound to consider all the probable circumstances, that on receiving the sum awarded by the Court, the wife and children may maintain themselves properly by taking the necessary food of both the times. Keeping in view such aspect, on examining the case of applicants, in the present scenario of market and price index of food stuffs, Rs.800/- per month even for one person either the applicant no.1 or applicant no.2 is no sufficient and in such they cannot survive by fulfilling their necessity. In such premises, it is held that they are in need of more sum of maintenance from the respondent. In the light of the present price index of the food stuffs in the market and also looking to the status of the parties, I am of the considered view that now-a-days, minimum Rs.50/- per day for applicant no.1 and Rs.30/- per day for a minor son applicant no.2 are required for their maintenance. It is needless to state here that wife and children are also entitled to live in equal status of the respondent and respondent is bound to pay that much amount as maintenance according to his status.

11. In view of the aforesaid discussions and keeping in view the status of the applicants as well as the respondent and their family circumstances, I deem fit to enhance the sum of the maintenance awarded by the trial Court from Rs. 600/- per month to Rs. 1500/- per month for the applicant no.1 and from Rs. 200/- per month to Rs. 900/- per month for the applicant no.2.

12. Therefore, by allowing this revision in part, the respondent is directed to pay Rs.1,500/- per month to the applicant no.1 and Rs.900/- per month to the respondent no.2 from the date of the impugned order i.e. 25.4.2011. Till this extent the impugned order is modified while other findings of the same are hereby affirmed.

Revision partly allowed

I.L.R.[2012]M.P. 282
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1380/2007 (Jabalpur) decided on 21 November, 2011

SURESH CHANDRA ...Applicant
Vs.
N.C. JAIN ...Non-applicant

Penal Code (45 of 1860), Section 500 – Defamation – **Respondent filed complaint against applicant before State Bar Council alleging professional misconduct which was dismissed – Applicant filed complaint alleging that respondent has criticized the applicant thereby adversely affecting his practice – Trial Court took cognizance on the ground that respondent had stated that "he will get his black coat off" – Such allegation did not find place in complaint but was stated in evidence – Revisional Court rightly dismissed the complaint on the ground that allegation of taking off the black coat was not alleged in complaint – Application dismissed.** (Paras 2, 5 & 6)

दण्ड संहिता (1860 का 45), धारा 500 –मानहानि–प्रत्यर्थी ने आवेदक के विरुद्ध स्टेट बार काउंसिल में व्यवसायिक अवचार अभिकथित करते हुये शिकायत प्रस्तुत की, जो खारिज की गई–आवेदक ने यह अभिकथित करते हुये शिकायत प्रस्तुत की कि प्रत्यर्थी ने आवेदक की आलोचना की है, एतद् द्वारा उसकी प्रेक्टिस पर प्रतिकूल प्रभाव पड़ रहा है –विचारण न्यायालय ने इस आधार पर संज्ञान लिया कि प्रत्यर्थी ने कहा था कि "वह उसका काला कोट उतरवा देगा"–उक्त अभिकथन शिकायत में नहीं है, किन्तु साक्ष्य में कथन किया गया–पुनरीक्षण न्यायालय ने शिकायत उचित रुप से इस आधार पर खारिज की कि काला कोट उतरवा देना शिकायत में अभिकथित नहीं किया गया – आवेदन खारिज।

M. Shafiqulla, for the applicant.
Rajnish Jain, for the non-applicant.

ORDER

U.C. MAHESHWARI, J :- The applicant/complainant has filed this revision under section 397/401 of the Cr.P.C, being aggrieved by the Judgment dated 11.06.2007 passed by the Sessions Judge, Jabalpur in Cr.R.No.16/07 setting aside the order dated 29.11.06, passed by the ACJM, Jabalpur in Private complaint Case initiated by the applicant taking the cognizance against the respondent for the offence of section 500 of the IPC, and dismissed the

aforesaid complaint of the applicant.

2. The facts giving rise to this revision in short are that the applicant herein, being Advocate, was engaged by the respondent in some pending case before the Court. Subsequently, as per allegation of the respondent in his mater some professional misconduct was committed by the applicant, on which, the respondent has filed a complaint under section 35 of the Advocate Act, 1961 (in short 'the Act') before the State Bar Council of Madhya Pradesh. Later, in accordance with the procedure, the same was forwarded to the Bar Council of India under section 36(b) of the Act and, ultimately, on consideration, such complaint was dismissed by the Bar Council of India vide dated 8.8.04 holding that the respondent had failed to prove any professional misconduct on the part of the present applicant. Subsequent to such order of Bar Council of India, the applicant has filed the impugned private complaint against the respondent contending that on several occasions, in presence of various Advocates and clients, the respondent has criticized the applicant and pursuant to such act the prestige of the applicant has been adversely affected at large. Due to this reason, he also suffered the loss in his profession because so many clients had taken away their cases from his office. In such premises, the applicant had prayed to prosecute the respondent for the offence under section 500 of the IPC. Subsequent to filing the complaint, at the initiate stage, the statement of the applicant and his witnesses were recorded under section 200 and 202 of the Cr.P.C. On appreciation of such statement and the other papers placed before the trial court, the cognizance of the aforesaid section 500 of the IPC was taken against the respondent. The same was challenged by the respondent before the subordinate revisional Court. On consideration , taking into consideration the record of the trial court, by allowing such revision, the aforesaid order of the trial court taking the cognizance in the matter, was set aside, on which, the applicant has come to this court with this revision.

3. Shri M.Shafiqulla, learned appearing counsel of the applicant after taking me through the averments of the complaint, depositions of the applicant as well as the witnesses recorded under section 200 and 202 of the Cr.P.C along with the papers placed with the complaint and also the impugned order of both the courts below, argued that on appreciation of the available circumstances and the evidence, the trial court has rightly took the cognizance against the respondent for the offence. The revisional court, in its turn, contrary to the record, has set aside the order under wrong premises. In continuation, he said that criticism of

the Advocate by any client alleging something against his bonafide professional activities, is a outright defamation of the counsel. With these submissions, he prayed for restoration of the order of the trial court and set aside the order of the revisional court by admitting and allowing this revision.

4. Having heard the counsel, keeping in view his arguments, I have carefully examined the record of the trial court. It is apparent from the impugned order that the same has been passed by the Sessions Judge in a very elaborate manner and also taking into consideration the entire facts stated by the applicant in the complaint as well as the aforesaid depositions recorded at the initial stage of the complaint and also after perusing the papers annexed with the complaint. It appears from the complaint itself that initial complaint was filed with the allegation against the respondent that in presence of various Advocates and the clients, the respondent asked the applicant that "he will get his black coat off". Some after formal allegations are also stated in the complaint.

5. On the basis of the aforesaid allegation of the respondent that "he will get his black coat off", the trial court took the cognizance of section 500 of the IPC in the matter while the revisional court after examining the case categorically stated that in the initial complaint filed before the trial court the aforesaid allegation stating that respondent will "get his black coat off" was not stated anywhere in the entire complaint and after filing the complaint, such version was stated by the applicant and his witnesses at first time in their deposition recorded under section 200 of the Cr.P.C 202 of the Cr.P.C and in view of such material omission in the complaint, so also the inconsistency between the complaint and the deposition of the complainant and his witnesses by invoking the vested jurisdiction under section 397 of the Cr.P.C, the order of the trial court taking cognizance of the aforesaid offence against the respondent was set aside and the complaint was dismissed.

6. Even on re-appreciation of the available circumstances from the complaint as well as the aforesaid deposition of the applicant and his witnesses, I have not found any perversity, infirmity or illegality and appreciation of the same by the Sessions Court in passing the impugned order setting aside the order of the trial court taking the cognizance against the respondent in the matter. Consequently, this revision being devoid of any merit, is hereby dismissed at the initial stage of motion hearing.

Revision dismissed

I.L.R.[2012]M.P. 285
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 2014/2011 (Jabalpur) decided on 23 November, 2011

DEEPAK RAIKWAR & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 311 – Recall of Witness – **Doctor who conducted postmortem was examined at earlier stage – He was sought to be recalled in the light of subsequent evidence which has come on record – Held – Accused should be extended the ample opportunity to defend his case and such right should not be curtailed on account of minor technical grounds and specially in those cases in which capital punishment has been provided under the law – Applicants facing trial of Section 302 of IPC in which the maximum punishment till death is provided – Doctor directed to be recalled – Revision allowed.** (Paras 1,2,5,6,7,8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – साक्षी को पुनः बुलाना – चिकित्सक जिसने पोस्टमार्टम किया था, पूर्वतर प्रक्रम पर परीक्षित – अभिलेख पर आई पश्चातवर्ती साक्ष्य के प्रकाश में उसे पुनः बुलाना चाहा गया – अभिनिर्धारित – अभियुक्त को अपने प्रकरण के बचाव के लिये प्रचुर अवसर विस्तारित किया जाना चाहिए और उक्त अधिकार गौण तकनीकी आधारों पर कम नहीं किया जाना चाहिए और विशेषतः उन प्रकरणों में जिसमें विधि के अंतर्गत मृत्युदंड उपबंधित है – अपीलार्थीगण भा.द.सं. की धारा 302 के तहत विचारण का सामना कर रहे हैं, जिसमें अधिकतम दण्डादेश मृत्युदण्ड तक उपबंधित है – चिकित्सक को पुनः बुलाने हेतु निदेशित किया गया – पुनरीक्षण मंजूर।

Pranay Gupta, for the applicants.
Pramod Kumar Chourasia, PL for the non-applicant/State.

ORDER

U.C. MAHESHWARI, J :- The applicants/accused have preferred this revision under Section 397/401 of Cr.P.C. being aggrieved by the order dated 3.11.2011, passed by Vith Additional Sessions Judge Bhopal, in Sessions Trial No.16/11, whereby their application filed under Section 311 of Cr.P.C. to recall the examined prosecution witness Dr. M. Lalwani (PW-17) for further cross-examination, has been dismissed.

2. Applicants' counsel after taking me through depositions of Dr. M. Lalwani (PW-17) and Imtiaz Ali (PW-21), which was recorded on 2.10.2011, subsequent to examination of the aforesaid Dr. M.Lalwani along with the impugned order and the applicants' application filed under Section 311 of Cr.P.C., said that as per settled proposition of law, the accused like applicants should be extended sufficient opportunity to defend the case and in such premises, if the Doctor of criminal case, who carried out the post-mortem of the deceased, was examined at earlier stage and thereafter, some other witness relating to the material facts is examined then, the accused like applicants, have a right to recall the earlier examined prosecution witnesses to carry out his further cross-examination in the light of material factual circumstances came in the deposition of subsequent examined witness/witnesses. In continuation, he said that as per para 4 of the deposition of Imtaiz Ali (PW-21), the deceased Saad after stepping down in front of the hospital from the auto rickshaw, went inside the hospital by walking while, the aforesaid earlier examined expert witness Dr. M.Lalwani (PW-17) in his post-mortem report and paragraph 3 & 10 of his deposition has categorically stated that the deceased sustained multiple fractures in his head and his brain material had also come out. In such circumstances, subsequent to recording the depositions of Imtiaz Ali (PW-21), the further cross-examination of the Doctor on behalf of the applicants is necessary. Otherwise, the right of applicants to defend the case may be prejudiced at large and prayed to allow his application and extending the opportunity to cross-examine the Doctor M.Lalwani (PW-17) by recalling him in the trial Court by allowing this revision.

3. On the other hand, by justifying the impugned order, the learned Panel Lawyer Shri Chourasia said that in the available factual matrix of the case the trial Court has not committed any error in dismissing the impugned application of the applicants. As such Dr. M. Lalwani (PW-17) has already been cross-examined at length and prayed for dismissal of this revision.

4. Having heard the counsel, keeping in view their arguments, I have carefully gone through the copy of application filed by the applicants under Section 311 of Cr.P.C., the aforesaid depositions of the witnesses and the impugned order.

5. It is settled proposition of law that accused should be extended the ample opportunity to defend his case and such right should not be curtailed on account of minor technical grounds and specially such right could not be curtailed in those case in which capital punishment has been provided under the law. It is undisputed fact that applicants are facing the trial of Section 302

of I.P.C. also in which the maximum punishment till death is provided.

6. At this stage, I do not want to express any opinion on merits with respect of the depositions of Dr. M. Lalwani (PW-17) and Imtiaz Ali (PW-21) recorded by the trial Court for adjudication of matter as the same is to be appreciated but after going through both the depositions, in view of para 4 of the depositions of Imtiaz Ali (PW-21) and in view of para 3 & 10 of the deposition of Dr. M.Lalwani (PW-17), who was examined earlier to Imtiaz Ali, the further cross-examination of Dr. M. Lalwani, on behalf of the defence appears to be necessary. Hence, by allowing this revision, the impugned order is hereby set aside. Pursuant to it, by allowing the applicants' application filed under Section 311 of Cr.P.C., the applicants are extended an opportunity to recall the examined prosecution witness Dr. M. Lalwani (PW-17) for his further cross-examination.

7. Consequently, the trial Court is directed to take appropriate steps to recall the abovementioned Doctor M. Lalwani (PW-17) and extent an opportunity to the applicants for his further cross-examination.

8. The revision is allowed as indicated above.

Certified copy as per rules.

Revision allowed

I.L.R.[2012]M.P. 287

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 1998/2011 (Jabalpur) decided on 23 November, 2011

RAGHURAJ SINGH & anr. ...Applicants

Vs.

STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Section 306 – Abetment to commit suicide – **Applicant and co-accused used to demand money from deceased Sarpanch by making criminal intimation and complaints – Secretary of Gram Panchayat also withdrew some money by playing fraud with deceased – Held – Prima facie offence punishable under Section 306 IPC made out – Charge rightly framed.** (Paras 2 & 12)

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या के लिये दुष्प्रेरण – आपराधिक अभित्रास और शिकायतों द्वारा मृतक सरपंच से आवेदक तथा सह–अभियुक्त रुपयों की मांग करते थे – ग्राम पंचायत के सचिव ने भी मृतक से कपट करके कुछ

रुपये निकाले – अभिनिर्धारित – भा.द.सं. की धारा 306 के अंतर्गत प्रथम दृष्ट्या दण्डनीय अपराध गठित होता है – आरोप उचित रुप से विरचित।

Case referred:

AIR 2005 SC 359.

Deepak Okhade, for the applicants .
Pramod Kumar Chourasia, PL for the non-applicant.

ORDER

U.C. MAHESHWARI, J :- The applicants/accused have filed this revision under section 397/401 of the Cr.P.C, being aggrieved by the Judgment dated 3.10.2011 passed by the Addl.Sessions Judge, Satna in S.T.No.124/11 framing the charge against them along with other co-accused for the offence of section 306/34 of the IPC.

2. The facts giving rise to this revision in short are that on 6.7.2009 at about 6.10 O' clock in the morning the information regarding unnatural death of Hiralal Singh was received at Police Station Civil Lines, Satna from the informer Dhiru Singh, according to which, the deceased left his home at about 10 in the night of 5.7.09 and on 6.7.09 at 5 O' clock in the morning when his mother went outside to answer the call of nature then she saw said Baba Hira Lal Singh was hanging dead on the tree, on which, the Marg intimation No.30/09 was registered at such police station. In its inquiry, the interrogatory statements of Surendra Singh and Nagendra Singh were recorded. Besides this, the dead body panchnama and the spot map was also prepared. In inquiry one suicidal note written by the deceased on the letter-pad of the Gram Panchayat showing the reason for committing suicide was also found on the dead body of said Hira Lal Singh, according to which, Raghuraj Singh and Rishi Kumar Garg, the applicants, subsequent to the election of the deceased as Sarpanch of the village, by giving criminal intimidation and making complaints, use to demand the money from him. Besides this, the Secretary of the Gram Panchayat also withdrew the money by practicing fraud with the deceased and that is why, he is committing the suicide. On the basis of such interrogatory statements and the suicidal note, it was revealed that the applicants and the Secretary of the Panchayat, had abetted the deceased for committing suicide, on which, the Dehati Nalishi No.0/09 was drawn-up by the Police Officer on 6.7.09 at about 11 O' Clock in the morning. The same was sent to the Police Station where the original offence was registered at Crime No.285/09 on the same day. In further investigation, the interrogatory statements of

Surendra Singh, Nagendra Singh, Kamlesh Singh, Narendra Sing and Dhiru were recorded. On completion of the investigation, it was established that the applicants and the Secretary of the Gram Panchayat had abetted the deceased Hira Lal Singh for committing the suicide, on which they all were charge sheeted for the offence of section 306/34 of the IPC.

3. After committing the case to the Sessions Court on evaluation of the charge sheet, the charge of the aforesaid offence of section 306 of the IPC was framed against the applicants and other co-accused. They abjured the guilt and thereafter the applicants have come to this court with this revision.

4. Shri Deepak Okhade, counsel for the applicants after taking me through the papers of the charge sheet placed on the record along with the order dated 18.12.08 passed by the SDO and the competent authority in Case No.4/A-89/07-08 along with some inquiry report, the FIR of Crime No.276/09 registered on dated 3.7.09 against the deceased and some other five persons including the Secretary of the Gram Panchayat for the offence under section 420,467,468 and 471 of the IPC, which are not part of the charge sheet; and also the impugned order, argued that keeping in view the aforesaid FIR of Crime No.276/09 registered at the same Police Station before two days from the date of committing the suicide by Hira Lal Singh and the aforesaid order of the SDO with the inquiry report if the evidence collected by the investigating agency placed before the Court with the police report under section 173(2) of the Cr.P.C is taken into consideration as accepted in its entirety even then the ingredients of the alleged offence of section 306 of the IPC are not made out against any of the applicants for framing the impugned charge. In continuation, he said that from the averments of the suicidal note or the case diary statements of the above mentioned witnesses, any of the ingredients of section 107 of the IPC defining "abetment of thing" are not made out and, in such premises, it could not be inferred even for framing the charge that any of the applicant has abetted the deceased to commit suicide or at their instigation, he proceeded and committed suicided. With these submissions he prayed for discharging the applicants from the aforesaid charge by admitting and allowing this revision.

5. Having heard the counsel at length, keeping in view his argument, I have carefully gone through the papers of the charge sheet as well as the papers placed on behalf of the applicants with this revision which are not part of the charge sheet along with the impugned order and the charge framed.

6. It is settled proposition of the law laid down by the Apex Court in the

matter of ***State of Orissa Vs. Devendra Nath Padhi***-AIR 2005 SC-359 that at the stage of framing the charge only the material placed by the prosecution along with the police report filed under section 173 of the Cr.P.C could be considered and taken into consideration. The papers which are not part of the charge sheeted placed by the accused like applicants in their defence, could not be taken into consideration at the stage of framing the charge. In view of such law of land, it is held that the FIR of Crime No.276/09 registered at the same police station on dated 3.7.09 against the deceased and the Secretary of the Gram Panchayat along with four others for the offence of section 420,467,468 and 471 of the IPC and the order of SDO dated 18.12.08 along with the inquiry report, could not be taken into consideration at the stage of framing the charge in the case at hand.

7. It is apparent fact on record that immediately after registration of the inquest report, the police went to the place where the dead body of deceased Hira Lal Singh was hanging on a tree in dead position for which the inquest panchnama and the spot map were also prepared. In the course of such process, a suicidal note written on the letter pad of the Gram Panchayat, as alleged written by the deceased, was also recovered from the dead body. The same was seized and in further inquiry of the Marg, the interrogatory statements of two persons, namely, Surendra Singh and Nagendra Singh were recorded. On the basis of the suicidal note, it was revealed that the deceased in his life-time, subsequent to becoming Sarpanch of the village, was subjected to demand of money with criminal intimidation and complaints to the authorities by the present applicants Raghuraj Singh, Rishi Kumr and one Rudra Pratap Singh. From the averments of the suicidal note, prima facie it is made out that the deceased was subjected to offence of extortion, by the applicants and said Rudhra Pratap Singh because by creating fear and making demand of money without any sufficient cause, the deceased was extorted by them. Accordingly, prima facie, it could be said that the applicants by their criminal activities created the atmosphere against the deceased, on which, the deceased was instigated to commit suicide and committed the same.

8. True it is that as per further averments of the suicidal note, the deceased also committed suicide because his Secretary of the Gram Panchayat was used to withdraw the money after taking his signature on the cheque by practicing fraud for which the criminal case was also registered against the deceased including the Secretary and other persons as stated above. The averments of the suicidal note are further supported by the interrogatory statements of Surendra Singh, Nagendra Singh, Kamlesh Singh, Narendra

Singh and Dhiru Singh.

9. Undisputedly, the word "abetment" mentioned in section 306 of the IPC has not been separately defined under such section so, as per practice and settled proposition, for the purpose of its interpretation, section 107 of the IPC defining the words "the abetment of thing" is always taken into consideration. In Section 107 of the IPC to define "the abetment of a thing" following three material ingredients have been stated. The ingredients are; A person abets the doing of a thing, who (a) instigates any person to do that thing or, (b) Engages with one or more person or persons in any conspiracy for the doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or (c) intentionally criminal aids by any act or illegal omission the doing of that thing. Out of the aforesaid if any of the ingredients is found in the matter then it could be said that such thing was abetted by the person.

Keeping in view the aforesaid ingredients of section 107 of the IPC on examining the case at hand, then from the available evidence in the charge sheet, as per the aforesaid discussion, prima facie it is established that prior to committing suicide by Hira Lal Singh, on account of illegal demand of money was subjected to extortion with criminal intimidation, complaints to the various authorities by the applicants and, due to such activities of the applicants Hira Lal Singh, after writing the suicidal note mentioning all the aforesaid things, proceeded to commit suicide and committed the same by hanging himself on a tree. So, in such premises, there is a prima facie evidence in the charge sheet showing the deceased was instigated and abetted by the applicants to commit suicide.

10. It is also settle proposition of the law that whenever on evaluation of the charge sheet even if slight prima facie evidence with respect of the alleged offence is found against the accused like the applicants then there is no option with the Court except to frame the charge of such section against the accused like the applicants. It is needless to state here that at the stage of framing the charge, the court has not to consider the question whether on framing the charge and holding the trial the accused like applicants could be convicted in the matter or not.

11. It also appears from the charge sheet that besides the aforesaid instigation of the applicants and said Rudra Pratap Singh, the deceased also proceeded to commit suicide because of some instigation given by the Secretary of the Gram Panchayat by practicing fraud with him. But the present revision

has not been preferred by said Secretary of the Gram Panchayat, therefore, I do not find fit to consider such aspect in the present matter at this stage.

12. In view of the aforesaid, I have not found any perversity, infirmity, illegality or anything against the propriety of the law in the order impugned, framing the aforesaid alleged charge of section 306/34 of the IPC against the applicants, requiring any interference under the revisional jurisdiction of this Court, hence this revision being devoid of any merit is hereby dismissed at the stage of motion hearing.

Revision dismissed

I.L.R.[2012]M.P. 292
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1936/2011 (Jabalpur) decided on 25 November, 2011

PUSHPENDRA SINGH THAKUR ...Applicant
Vs.
SMT. MAMTA THAKUR ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125, Evidence Act (1 of 1872), Section 45 – Medical Examination **– Applicant took a defence that wife is having character of Hermaphroditism (Ubhaylingata) and prayed for her karyotype medical test – Held – Person can not be insisted contrary to her wish to examine herself for any medical examination – Such direction would be violative of Article 21 of Constitution – Revision dismissed.** (Paras 3,5, & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125, साक्ष्य अधिनियम (1872 का 1), धारा 45 – चिकित्सीय परीक्षण – आवेदक ने बचाव लिया कि पत्नी में उभयलिंगता के लक्षण हैं और उसके केरयोटाईप चिकित्सीय परीक्षण के लिये प्रार्थना की – अभिनिर्धारित – व्यक्ति को किसी चिकित्सीय परीक्षण हेतु स्वयं के परीक्षण की उसकी इच्छा के विरुद्ध आग्रह नहीं किया जा सकता – ऐसा निदेश संविधान के अनुच्छेद 21 का उल्लंघनकारी होगा – पुनरीक्षण खारिज।

Cases referred:

1923 SC 2295, AIR 2010 SC 1974.

Ajay Kumar Jain, for the applicant.

ORDER

U.C. MAHESHWARI, J :- The applicant/husband has directed this revision under Section 397/401 of Cr.P.C. against the order dated 17.10.2011

passed by Judicial Magistrate First Class Budhni, District Sehore in MJC No. 47/05, whereby, his application filed under Section 45 of the Evidence Act for appropriate direction to carry out the "karyotype" investigation of the respondent through some expert of the medical filed, has been dismissed.

2. The facts giving rise to this revision in short are that the respondent herein filed an application under Section 125 of Cr.P.C. contending that she got married with the applicant in the year 1994 in accordance with the rites and rituals of Hindu community. Subsequent to marriage she has been neglected and refused by the respondent without any sufficient cause and under such compulsion, she is residing separately. In this regard by stating some other averments, the prayer for monthly maintenance is made.

3. In reply of the respondent by denying the averments of the application in addition, it is stated that the respondent is not a lady as such she is having the character of Hermaphroditism [Ubhaylingata] and in such premises, the alleged marriage being null and void, she could not be treated to be the wife of the applicant and in such premises, is not entitled to get any relief of maintenance as prayed.

4. In the course of trial, on behalf of the respondent as many as four witnesses namely Mamta Thakur (PW-1) herself, her father Ramesh Thakur (PW-2), Madanlal Yadav (PW-3) and Dr. Sunita Pandey (PW-4) have been examined while, on behalf of applicant herein, as many as six witnesses namely Pushpendra Singh Thakur (NAW-1), applicant himself, Dr.(Smt.) Archana Baser, (NAW-2), Dr. R.K. Sodani (NAW-3), Dr. Ranjana Hawaldar (NAW-4), G.K. Yadav, (NAW-5) and Ajay Garg (NAW-6), have been examined.

5. After examining the aforesaid witnesses, out of some circumstances made out from the deposition of respondent herself (PW-1) and her witness Dr. Sunita Pandey (PW-4) so also from the deposition of Dr. (Smt) Archana Baser (NAW-3) and Dr. R.K. Sodani (NAW-3), along with Dr. Ranjana Hawaldar (NAW-4), on arising the situation on behalf of the applicant, an application under Section 45 of the Evidence Act for appropriate direction to carry out the karyotype medical test of the respondent for confirming the aforesaid diecease of Hermaphroditism, was filed. On consideration, such application of the applicant has been dismissed by the impugned order. On which, the applicant has come to this Court with this revision.

6. Shri Ajay Kumar Jain, learned appearing counsel of the applicant after taking me through copy of the impugned application filed under Section 45 of the Evidence Act along with the other papers including the recorded depositions of the abovementioned witnesses and the impugned order, argued

that in the available circumstances specially in view of depositions of abovementioned doctors examined by the parties, the aforesaid "karyotype" medical test of the respondent is necessary to adjudicate the present matter. Unless such test is carried out, the impugned case could not be effectively adjudicated between the parties. In continuation, he also said that if, he is not permitted to get examined the respondent from the expert for the aforesaid test then, he would be deprived of his valuable right to prove his defence stated in the reply. In continuation, he said that unless the respondent is directed for such test and such direction is not complied with by her, on this issue adverse inference against the respondent could not be drawn in the matter. So in such premises, the appropriate direction for the alleged test is necessary. He fairly pointed out that besides the present litigation, at the instance of present applicant, an application under Section 12 of the Hindu Marriage Act, declaring the impugned marriage of the applicant and respondent ab-initio void, is also pending as Civil Original Suit No.01/11 in the Court of Additional District Judge Sohagpur, District Hoshangabad in which till some extent, identical application was filed on behalf of the applicant. The same was opposed by the respondent and on consideration, the same was dismissed vide order dated 28.4.2011 by such Court holding that the respondent cannot be insisted to get her examine from the medical practitioner without her wish. On which, the applicant has challenged such order before this Court through Writ Petition No.8032/11. By entertaining such petition vide order dated 22.6.2011, the further proceedings of such Civil Suit has been stayed till next date of listing and the same is yet to be listed and heard for it's adjudication. But simultaneously, he also argued that every case either it is a civil case or criminal case, is always decided on the basis of evidence recorded in the concerning case and not by the evidence recorded in the other case, as such the order/ judgment of the Court should not be influenced by the evidence of the other case and prayed for allowing his application and setting aside the impugned order by admitting and allowing this revision.

7. Having heard the counsel, keeping in view his arguments I have carefully gone through the papers of the impugned case along with the impugned order placed on the record so also the aforesaid order dated 28.4.2011 passed in Civil Original Suit No.1/11, along with the order of this Court dated 22.6.2011 passed in writ petition No.8032/11. After perusing the same, I am of the considered view that this revision at this stage, does not have any material question requiring any interference under the revisional jurisdiction of this Court specially on the question raised by the applicant's counsel. In this regard the

Civil Court has already expressed it's opinion against the applicant vide order dated 28.4.2011 and such order is still sub-judice in the aforesaid writ petition. It is also apparent fact that in such writ petition, the operation of such order dated 28.4.2011 has not been stayed. Thus, at this juncture, in view of the settled proposition of law that the order passed by the Civil Court, till some extent is binding against the Criminal Court but the order of the Criminal Court is not binding against the Court dealing with the Civil matter of the same dispute between same parties. So, in such premises, the aforesaid interim order of the Civil Court is binding between the parties and, therefore, firstly this revision could not be entertained even for admission on this count.

8. Apart the above, in view of the law laid down by the apex Court in the matter of ***Goutam Kujju*** vs. ***West Bangal*** 1993 SC 2295 and also in the matter of ***Smt. Selabi and others*** vs. ***State of Karnataka*** reported in AIR 2010 SC 1974, the person like respondent the wife of the applicant could not be insisted contrary to her wish to examine herself for any medical investigation as prayed by the applicant's counsel. In the case at hand, contrary to the fundamental right of the respondent vested under Article 21 of the Constitution of India, she could not be insisted by the trial Court as well as by this Court to get examined herself for the abovementioned test as prayed by the applicant's and it is apparent from the impugned order that the same has been passed by taking into consideration the aforesaid law of the land laid down by the apex Court, thus on this count also the impugned order does not have any question which could be interfered for any interference under the revisional jurisdiction of this Court.

9. In view of the aforesaid discussions, I have not found any perversity, infirmity, illegality or anything against the propriety of the law in the order impugned dismissing the applicant's application under Section 45 of the Evidence Act. Consequently, this revision being devoids of any merits, is hereby dismissed at the stage of motion hearing.

10. However, it is made clear that any observations made in this order shall not affect the right of the applicant to prosecute petition filed by the applicant under Section 12 of the Hindu Marriage Act or it's aforesaid writ petition. The same shall be decided by the Court on it's own merits without influencing from any findings or observations of this order. It is also made clear that subject to decision of said writ petition, on arising the occasion, the applicant shall be at liberty to file the fresh application in this regard.

11. Revision is dismissed at the stage of admission in motion hearing.

Revision dismissed

I.L.R.[2012]M.P. 296

MISCELLANEOUS APPEAL INCOME TAX

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

M.A.I.T. No. 17/2003 (Jabalpur) decided on 1 August, 2011

COMMISSIONER OF INCOME TAX ...Appellant

Vs.

M/s D.P.R. CHARITABLE TRUST, SATNA ...Respondent

Income Tax Act (43 of 1961), Section 12AA – Procedure for Registration of Charitable Trust **– While deciding the application for registration, the authority has to examine whether the application has been made in accordance with the provisions of Section 12A, Rule 17-A and form No. 10A – Commissioner is not required to examine whether the income derived by the trust is being spent for charitable purposes or the trust is earning profit– Activities of the trust must be genuine which should be in consonance with object of the trust–Commissioner is not required to examine the application of income–He has to examine whether the object of the trust are charitable or not.** (Para 8)

आयकर अधिनियम (1961 का 43), धारा 12एए – चेरिटेबल ट्रस्ट के रजिस्ट्रीकरण की प्रक्रिया – रजिस्ट्रीकरण हेतु आवेदन का विनिश्चय करते समय प्राधिकारी को परीक्षण करना चाहिए कि क्या आवेदन धारा 12–ए, नियम 17–ए व फार्म नं. 10–ए के उपबंधों के अनुसार किया गया है – कमिश्नर को यह परीक्षण करना आवश्यक नहीं कि क्या ट्रस्ट द्वारा प्राप्त आय पूर्त प्रयोजनों हेतु खर्च की जा रही है अथवा ट्रस्ट लाभ अर्जित कर रहा है – ट्रस्ट के क्रियाकलाप वास्तविक होने चाहिए जो ट्रस्ट के उद्देश्य के अनुरुप होने चाहिए – कमिश्नर को आय के आवेदन का परीक्षण करना अपेक्षित नहीं – उसे परीक्षण करना चाहिए कि क्या ट्रस्ट का उद्देश्य पूर्त (चेरिटेबल) है अथवा नहीं।

Cases referred:

247 ITR 18, 82 ITR 704, 163 Taxman 19, 246 ITR 532, 135 ITR 634, (1939) 7 ITR 415(PC), 185 ITR 634, (1999) 239 ITR 528(GUJ.)

Sanjay Lal, for the appellant.

G.N. Purohit with *Abhishek Oswal*, for the respondent.

ORDER

The order of the court has delivered by **S.R. ALAM, C. J.** :- This appeal under Section 260-A of the Income Tax Act has been preferred by the Revenue against the order dated 30.9.2002 passed

by the Income Tax Appellate Tribunal (in short 'the tribunal').

2. Facts shorn of unnecessary details are that the respondent is a Trust registered under the provisions of the M.P. Public Trust Act, 1951. The aforesaid Trust was created vide trust deed dated 22.8.2001 for public charitable purposes which include providing education and medical reliefs etc. to the weaker sections of the society. The Trust has set-up an engineering college. Vide Communication dated 8.2.2002, Commissioner, Income Tax required the respondent to give details with regard to the admission procedure and also to state whether in the college run by the respondent, free education would also be imparted. The respondent submitted a reply to the aforesaid communication vide letter dated 6.3.2002. The respondent trust filed an application for registration under Section 12-A of the Income Tax Act, 1961. The Commissioner of Income Tax vide order dated 15.3.2002 inter-alia held that since the rules and regulations of granting admission/education facilities have not yet been decided therefore, it is not clear as to whether there would be any restriction for admission to any particular category of students. It was further held that mere establishment of an engineering college does not constitute a charitable activity. Accordingly, the application preferred by the respondent under Section 12-A of the Income Tax Act, 1961 was rejected.

3. The respondent preferred an appeal against the order passed by the Commissioner of Income Tax before the tribunal. The tribunal vide order dated 30.9.2002 inter-alia held that Section 10(2AD), Section 12A and Section 11 have to be read along with Section 2(15) of the Income Tax Act, 1961. The purpose of seeking registration is to get recognition under the Act for exemption for charitable purposes subject to fulfillment of other conditions. It was further held that while considering the application for registration under Section 12A of the Act, the Commissioner of Income Tax has to examine whether formalities for registration are satisfactorily complied with or not and that the purpose of institution is charitable. Accordingly, the order passed by the Commissioner of Income Tax was set aside and the Commissioner was directed to register the respondent under Section 12-A of the Act.

4. This Court while admitting the appeal vide order dated 10.8.2006 formulated the following substantial question of law:

> "Whether on the facts and circumstances of the case, the learned Income Tax Appellate Tribunal was justified in canceling the order of CIT dated 15.3.2002 refusing the assessee for registration as a charitable trust under Section

12-A of the Act of 1961 read with Section 12AA of the Act of 1961?"

5. Mr. Sanjay Lal, learned counsel for the Revenue submitted that finding recorded by the appellate authority i.e. the Income Tax Appellate Tribunal is based on additional evidence. Rule 29 of the Rules framed under the Act provides that the reasons have to be recorded by the authority while permitting additional evidence to be adduced. It was also submitted that the tribunal erred in relying on 256 ITR 277(MP) as the ratio laid down in the aforesaid case had no bearing on the controversy involved in the appeal pending before the tribunal. It was also urged that as the additional evidence was permitted to be adduced, the matter should have been remanded by the tribunal. It was further submitted that there was no material on record to show that the respondent is engaged in charitable work. In support of his submissions, learned counsel has placed reliance on the decisions rendered by Kerala High Court in the case of ***Self Employer Service Society Vs. Commissioner of Income Tax,*** 247 ITR 18.

6. On the other hand, Mr. G.N. Purohit, learned senior counsel for the respondent has drawn our attention to Section 2(15) of the Act and has submitted that charitable purposes include education. It was also submitted that until and unless the trust is registered under Section 12-A of the Act, the trust is not entitled to the benefit of Sections 11 and 12. It was further submitted that trust deed was filed before the Commissioner of Income Tax and therefore, there was material on record to show that the trust is engaged in charitable activities. It was argued that objects of the trust are in tune with Section 2(15) of the Act. While referring to clauses 15 and 16 of the trust deed, learned senior counsel submitted that from perusal of aforesaid clauses, it is apparent that income of the trust has to be applied for the purpose of the objects for which the trust was constituted, and even if application for adducing additional evidence is ignored, then also there was material on record to show that the trust is engaged in charitable activities. It was urged that while deciding the application under Section 12-A of the Act, the procedure for admission in the institution run by the respondent-trust was not required to be gone into. The Commissioner, Income Tax, while dealing with the application did not properly appreciate the scope and ambit of Section 12-A of the Act. In support of his submissions, learned senior counsel has placed reliance on the decisions rendered in the cases of ***Ahmedabad Rana Caste Association Vs. Commissioner of Income Tax,*** 82 ITR 704. ***Commissioner of Income Tax Vs. Red Rose School,*** 163 Taxman 19, ***New Life in Christ***

Evangelistic Association Vs. Commissioner of Income Tax, 246 ITR 532, ***Fifth General Foundation Society Vs. Commissioner of Income Tax,*** 135 ITR 634, ***the Trustees of the Tribune In Re,*** (1939) 7 ITR 415 (PC), ***Fifth Generation Education Society v. Commissioner of Income Tax, 185 ITR 634*** and ***Shantagauri Ramniklal Trust v. Commissioner of Income-tax*** [1999] 239 ITR 528 (Guj).

7. We have considered the submissions made on both sides. Before proceeding to deal with the Controversy we deem it appropriate to notice relevant provisions, namely, Sections 2 (15), 12A and 12-AA of the Act. Sections 2 (15) and 12A, as they stood at the relevant time, read as under:

> **"2. Definitions.**
>
> 2 (15) "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility; "
>
> **12A. Conditions as to registration of trusts etc.**
>
> The provisions of Section 11 and Section 12 shall not apply in relation to the income of any trust or institution unless the following conditions are fulfilled, namely:-
>
> (a) the person in receipt of the income has made an application for registration of the trust or institution in the prescribed form and in the prescribed manner to the Commissioner before the Ist day of July, 1973 or before the expiry of a period of one year from the date of the creation of the trust or the establishment of the institution whichever is later and such trust or institution is registered under Section 12AA:
>
> Provided that where an application for registration of the trust or institution is made after the expiry of the period aforesaid, the provisions of Section 11 and Section 12 shall apply in relation to the income of such trust or institution, -
>
> (i) from the date of creation of the trust or the establishment of the institution if the Commissioner is, for reasons to be recorded in writing, satisfied that the person in receipt of the income was prevented from making the application before the expiry of the period aforesaid for sufficient reasons;
>
> (ii) Where the total income of the trust or institution as computed under this Act without giving effect to the provisions of

Section 11 and Section 12 exceeds fifty thousand rupees in any previous year, the accounts of the trust or institution for that year have been audited by an accountant as defined in the explanation below sub-section (2) of Section 288 and the person in receipt of the income furnishes along with the return of income for the relevant assessment year the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed."

Section 12AA which was inserted by the Finance Act, 1996 w.e.f. 1.4.1997 reads as under:

"12AA. Procedure for registration.

(1) The Commissioner, on receipt of an application for registration of a trust or institution made under clause (a) or clause (aa) of sub-section (1) of Section 12A, shall -

(a) Call for such documents or information from the trust or institution as he thinks necessary in order to satisfy himself about the genuineness of activities of the trust or institution and may also make such inquiries as he may deem necessary in this behalf; and

(b) after satisfying himself about the objects of the trust or institution and the genuineness of its activities, he -

(i) shall pass an order in writing registering the trust or institution;

(ii) shall, if he is not so satisfied, pass an order in writing refusing to register the trust or institution, and a copy of such order shall be sent to the applicant:

Provided that no order under sub-clause (ii) shall be passed unless the applicant has been given a reasonable opportunity of being heard.

(1A) All applications, pending before the Chief Commissioner on which no order has been passed under clause (b) of sub-section (1) before the 1st day of June, 1999, shall stand transferred on that day to the Commissioner and the Commissioner may proceed with such applications under that sub-section from the stage at which they were on that day.

(2) Every order granting or refusing registration under clause (b) of sub-section (1) shall be passed before the expiry of six

months from the end of the month in which the application was received under clause (a) or clause (aa) of sub-section (1) of Section 12A.

(3) Where a trust or an institution has been granted registration under clause (b) of sub-section (1) and subsequently the Commissioner is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution:

Provided that no order under this sub-section shall be passed unless such trust or institution has been given a reasonable opportunity of being heard."

8. Section 12A of the Act prescribes conditions for registration of the trust whereas Section 12AA of the Act prescribes the procedure for registration. A careful reading of the relevant provisions would reveal that application for registration under Section 12A has to be made in form No.10A prescribed by Rule 17-A before the expiry of one year from the date of creation of the trust or establishment of the institution whichever is later. The application has to be made by a person in receipt of income of the trust. Thus, while dealing with the application for registration the Commissioner of Income Tax has to examine whether the application is made in accordance with Section 12A read with Rule 17-A and whether form No.10A has been properly filled up. He may also examine whether objects of the trust are charitable or not. Section 12AA nowhere provides that Commissioner of Income Tax while considering the application for registration is also required to examine whether the income derived by the trust is being spent for charitable purposes or the trust is earning profit. The language employed by the Legislature in Section 12AA only requires that activities of the trust or institution must be genuine which should be in consonance with the object of the trust. At this stage, the Commissioner is not required to examine the application of income. All that he may examine is whether the application is made in accordance with the requirements of Section 12A read with rule 17A and whether Form No.10A has been properly filled up. He has also to see whether the objects of the trust are charitable or not. Our view finds support from the Division Bench decision of the Allahabad High Court rendered in the case of ***Red Rose School*** (supra) and the decisions in the cases of ***New Life in Christ Evangelistic***

Association (supra), ***Fifth Generation Education Society (supra)*** and ***Shantagauri Ramniklal Trust (supra).***

9. In the backdrop of aforesaid legal position, facts of the case may be seen. Admittedly, the application submitted by the respondent was in consonance with the procedural requirement prescribed in this regard. From the trust deed which was filed before the Commissioner of Income Tax, the objects of the trust could be ascertained. From perusal of clause 3 of the trust deed we find that the objects of the trust are charitable in nature and are in tune with Section 2 (15) of the Act and, therefore, the tribunal rightly opined that the order of the Commissioner of Income Tax rejecting the application under Section 12-A was unjustified.

10. For the aforementioned reasons, the substantial question of law framed by this court vide order dated 10.8.2006 has to be answered in the affirmative i.e. in favour of the assessee and against the Revenue. In the result, the appeal fails and is hereby dismissed.

Appeal dismissed

I.L.R.[2012]M.P. 302

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice T.K.Kaushal

M.Cr.C.No. 2113/2010 (Jabalpur) decided on 5 July, 2011

CHANDRA PAL SINGH ...Applicant

Vs.

ASHOK LEYLAND LTD. ... Non–applicant

Criminal Trial – Amendment in Complaint – Complaint under Section 138 of NI Act **– To provide full and effective opportunity to the parties, application requesting for the amendment in the complaint should be allowed.** (Para 10)

आपराधिक विचारण – शिकायत में संशोधन – परक्राम्य लिखत अधिनियम *की धारा 138 के अंतर्गत शिकायत* – पक्षकारों को पूर्ण और प्रभावी अवसर दिये जाने के लिये, शिकायत में संशोधन की प्रार्थना का आवेदन मंजूर किया जाना चाहिये।

Gyanendra Singh Baghel, for the applicant.

Atul Choudhary, for the non–applicant.

ORDER

T.K. KAUSHAL, J :- This petition has been directed under Section 482 of the Code of Criminal Procedure (hereinafter shall be referred as Code) seeking relief to set aside the order dated 21/01/2010 passed by the Additional Sessions Judge, Rewa in Criminal Revision No. 359/2009 and to dismiss the complaint Case no. 277/2006 pending in the Court of JMFC, Rewa under Section 138 of NI Act.

2. Facts giving rise to this petition, in short, are that on 16/10/2003 petitioner entered into a hire-purchase agreement with the respondent, to take loan of Rs.11,92,264/- to purchase the Truck bearing Chassis no. 215461, Engine No. 243151. On 30/04/2005, petitioner issued cheque no. 102457 of Rs.1,50,000/-, which was bounced on the ground of "*no sufficient balance*". Respondent filed complaint under Section 138 of NI Act against the petitioner in JMFC, Rewa on 23/06/2005. On behalf of Ashok Leyland, a complainant was filed by Shri R.S. Chouhan, Manager.

3. At the stage of judgment i.e. on 25/08/2009, petitioner filed application mentioning that Ashok Leyland Finance Limited Company is not in existence and Manager Shri R.S. Chouhan was not authorized person to file the complaint, hence any such complaint should not be permitted to continue and should be dismissed.

4. The respondent also filed an application before the Trial Court requesting that w.e.f. 29/04/2004 Ashok Leyland Finance Limited Company has been merged with Indusind Bank Limited by the order of the competent court. Shri Praveen Chandra Mishra, has been authorized to continue the complaint.

5. Vide order dated 09/10/2009, holding that though this complaint has been filed by Ashok Leyland Finance Limited on 23/06/2005, whereas it was merged in the Indusind Bank Limited on 06/05/2005, complainant will be not deemed to be non-existing company. It is merely a transfer of liabilities and assets. At the same time, request of the respondent was also declined to make amendment in the complaint by making reference of Indusind Bank Limited and also reference of Shri Praveen Chandra Mishra, having authority to file and continue the complaint.

6. Trial Court gave much emphasis on the fact that during trial, while arrest warrant was issued against the petitioner, he deposited Rs.50,000/- in lieu of part payment of the cheque amount, hence, all above such objections

are of technical nature. Above such order was assailed in the revision by the petitioner, Court of Revision also declined by holding that these objections are of technical nature, and Trial Court has committed no error.

7. Fact that Ashok Leyland Finance Limited Company is not in existence and Manager Shri R.S. Chouhan is not authorized by the Company to file this complaint cannot be simply ignored because taking responsibility of the aforesaid lapses, even respondent requested the Court to make amendments in the complaint.

8. It is pertinent to note that whole trial was completed and case was fixed at the stage of judgment. Considering the defence of the petitioner, as he stated in his statement recorded under Section 313 of the Code that he purchased the Truck on hire purchase from Ashok Leyland and delivered 10 cheques after signing them, though the blank cheques. Further in view of the fact that for getting rid of the arrest warrant issued during Trial he agreed to deposit Rs.50,000/- as part payment of the cheque amount, quashment of complaint will amount to miscarriage of justice. Rather, interest of justice demand that Trial should be continued, with full fairness and openness between the parties.

9. While complainant himself, in view of the fact of the merger of the Company, requested for amendment in the complaint, it should have been allowed because admittedly Ashok Leyland Finance Limited Company Rewa is now not in existence in the same form as it existed at the time of the agreement.

10. With the view to provide full and effective opportunity to the parties, application requesting for the amendment in the complaint should be allowed. Since Truck was purchased on hire purchase and petitioner is under the obligation to owe the responsibility of payment through cheque signed and issued by him in that regard.

11. No case for quashment of complaint under Section 138 NI Act is made out. Application of the respondent filed before the Trial Court (*Annexure A-7*), should have been allowed. In the result, this petition is allowed to the extent that impugned order is set aside and Trial Court is directed to permit the respondent to amend the complaint accordingly and to proceed further in the Trial according to law.

This petition is allowed in part as indicated above.

Petition partly allowed