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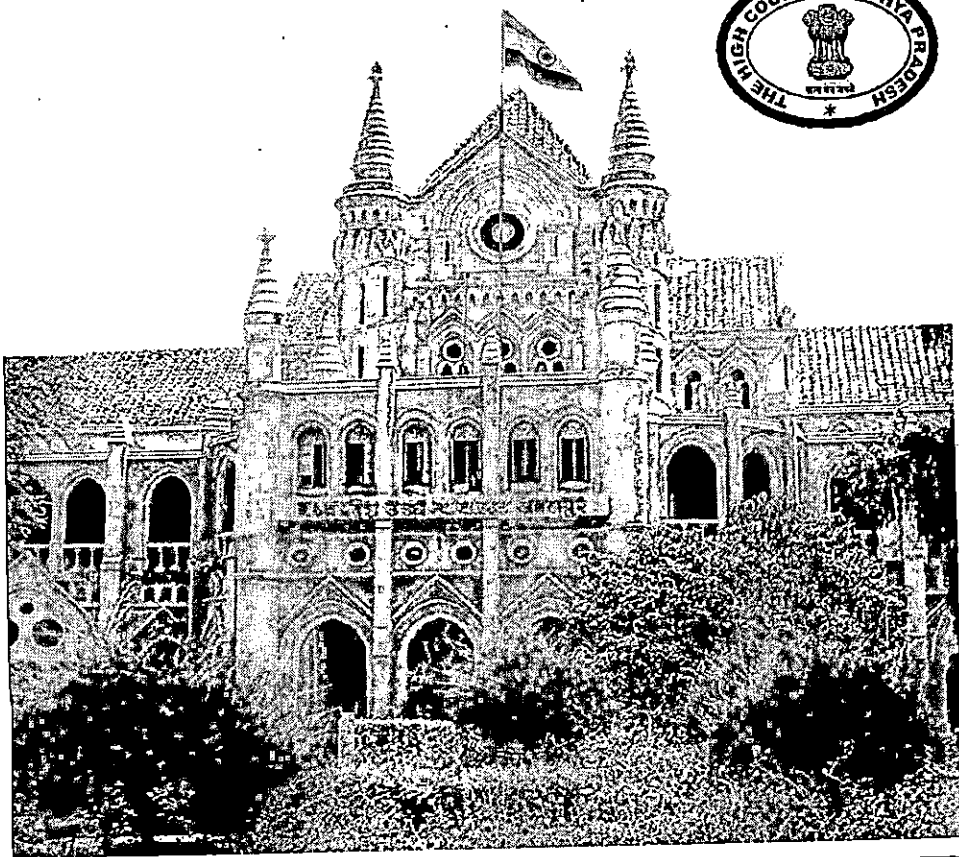
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Short Note

*(75)

Before Mr. Justice K.K. Trivedi

W.P. No. 1796/2010 (Jabalpur) decided on 1 February, 2012

AVINASH PATHAK

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Constitution – Article 226, 300A, 19, Urban Infrastructure Development Scheme for Small and Medium Towns (UIDSSMT), Land Acquisition Act (1 of 1894), Section 4 – Respondents encroached upon the land of petitioner for construction of Stop Dam – During pendency of petition, notification under Section 4 of the Act, 1894 for acquisition of land issued – Held – Property rights of petitioners were grossly violated – Plan for construction of Stop Dam was neither published nor exhibited to the people who were going to be effected – Subsequent notification issued is also vague – However, in view of Public Interest involved instead of directing to demolish the construction, respondents are directed to pay compensation at market price on the date of notification within 2 months – Rs. 50,000/- as damages be also paid – Petition allowed.

संविधान – अनुच्छेद 226, 300ए, 19, छोटे व मध्यम शहरों के लिए नगरीय अधोसंरचना विकास योजना (UIDSSMT), भूमि अर्जन अधिनियम (1894 का 1), धारा 4 – स्टाप डेम के निर्माण हेतु प्रत्यर्थीगण ने याची की भूमि पर अधिक्रमण किया – याचिका के लंबित रहने के दौरान, अधिनियम 1894 की धारा 4 के अंतर्गत अधिसूचना जारी की गई – अभिनिर्धारित – याचीगण के सम्पत्ति अधिकारों का घोर अतिलंघन हुआ – स्टाप डेम के निर्माण हेतु योजना ना तो प्रकाशित की गई और न ही उन लोगों को प्रदर्शित किया गया जो इससे प्रभावित होने वाले थे – जारी की गई पश्चातवर्ती अधिसूचना भी अस्पष्ट – अपितु, अंतर्गस्त लोक हित को दृष्टिगत रखते हुए, निर्माण नष्ट करने के लिए निदेशित करने की बजाए प्रत्यर्थीगण को अधिसूचना की तिथि से 2 माह के भीतर प्रतिकर बाजार मूल्य पर अदा करने के लिए निदेशित किया गया – रुपये 50,000/- क्षतिपूर्ति के रूप में भी अदा किये जाये – याचिका मंजूर।

Cases referred :

2011 (2) MPLJ 185, AIR 1967 SC 1074, (1992) 2 SCC 168, (2005) 7 SCC 627, AIR 1995 SC 142, (2008) 15 SCC 517, (2005) 13 SCC 477, 1992 (2) MPLJ 714,

NOTES OF CASES SECTION

Rajesh Kumar Pancholi, for the petitioner.

Rahul Jain, G.A. for the respondent No.1.

Arpan J. Pawar, for the respondents No. 2 & 3.

Short Note

*(76)

Before Mr. Justice Sujoy Paul

W.P. No. 3541/2010(S) (Gwalior) decided on 25 June, 2012

GANESH SINGH RAWAT

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Constitution – Article 226 – Writ of quo warranto – Writ of quo-warranto can be filed even at the instance of a busybody questioning the appointment in public office.

क. संविधान – अनुच्छेद 226 – अधिकार पृच्छा की याचिका – अधिकार पृच्छा की याचिका दूसरों के कार्य में रुचि रखने वाले व्यक्ति की ओर से भी लोक कार्यालय में नियुक्ति पर सवाल करते हुए प्रस्तुत की जा सकती है।

B. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69 – Disqualification – Real brother of Sarpanch is disqualified for appointment even if at the time of selection, Sarpanch did not attend the meeting.

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69 – अयोग्यता – सरपंच का सगा भाई नियुक्ति हेतु अयोग्य है तब भी यदि चयन के समय, सरपंच बैठक में उपस्थित नहीं रहा।

C. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69 – Disqualification – Disqualification will not wipe out subsequently if Sarpanch for whatever reason discontinues.

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69 – अयोग्यता – यदि सरपंच किसी कारण से पद पर नहीं बना रहता है, तत्पश्चात भी अयोग्यता समाप्त नहीं होगी।

D. Interpretation of Statutes–Precedent–Interpretation of law by a judgment relates back to the date of law itself and can not be prospective from the date of judgment unless said otherwise in the judgment.

घ. कानूनों का निर्वचन – पूर्व निर्णय – निर्णय द्वारा विधि का निर्वचन,

NOTES OF CASES SECTION

विधि की तिथि से संबंधित होता है और निर्णय की तिथि से भविष्यलक्षी नहीं हो सकता जब तक कि निर्णय में अन्यथा व्यक्त नहीं किया गया है।

Cases referred :

2009 ILR MP 1607, 1999(2) JLJ 374, (2009) 7 SCC 1, 2009(1) MPLJ 138, (2009) 8 SCC 273, (2000) 6 SCC 224.

Gaurav Samadhiya, for the petitioner.

None for the State.

S.K. Sharma & D.S. Raghuvanshi, for the respondent No.6.

Short Note (DB)

*(77)

Before Mr. Justice Sheel Nagu & Mr. Justice Sujoy Paul

W.A. No. 137/2012 (Gwalior) decided on 19 June, 2012

M.P.S.E.B.

...Appellant

Vs.

BRAJENDRA SINGH KUSHWAH & ors.

...Respondents

Service Law – Equal pay for equal work – Principle when may not apply – Service conditions of employees of the erstwhile Rural Electricity Co-operative Societies absorbed in the M.P.S.E.B. – Will be governed by the terms and conditions of the order of absorption – Pay disparity can not be challenged, if the terms and conditions of absorption were not challenged.

Since such absorbed employees were enjoying salary in pay scale inferior to the pay scale of the original employees of the Board at the time of absorption, the pay disparity can not be challenged because disparity arose out of the difference which existed in the pay scales between the two classes of employees not only since prior to absorption but even subsequent thereafter especially when the terms and conditions of absorption were not challenged by the absorbed employees.

सेवा विधि – समान कार्य के लिए समान वेतन – सिद्धांत कब लागू नहीं होगा – भूतपूर्व ग्रामीण विद्युत सहकारी सोसाइटी के कर्मचारियों की सेवा शर्तें म. प्र. राज्य विद्युत मंडल में आमेलित हो गई हैं – नियम एवं शर्तें आमेलन के आदेश से शासित होंगी – यदि आमेलन के नियम एवं शर्तों को चुनौती नहीं दी गई थी, तो वेतन की असमानता को चुनौती नहीं दी जा सकती।

The order of the Court was delivered by : SHEEL NAGU, J.

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Vivek Jain, for the appellant.

Navnidhi Parharya, for the respondents.

Short Note (DB)

*(78)

Before Mr. Justice A.K. Shrivastava & Mrs. Justice S.R. Waghmare
Cr. A. No. 901/1997 (Indore) decided on 31 January, 2012

MADANMOHAN JATWA

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. *Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) – Demand and Illegal Gratification – Ingredients* – Prosecution must prove that there was occasion or motive on the part of the accused to make demand of bribe and indeed he has made the demand of bribe and has also accepted the same.

क. *अष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी) – मांग व अवैध परितोषण – घटक* – अभियोजन को यह सिद्ध करना चाहिए कि वहाँ अभियुक्त की ओर से रिश्वत की मांग करने का अवसर एवं हेतु था तथा यथार्थ में उसने रिश्वत की मांग की और उसे स्वीकार भी किया।

B. *Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Illegal Gratification* – Inconsistent version of complainant regarding amount demanded – Appellant who was Secretary of Samiti had no role to play for issuance of cheque – Scriber of Complaint not examined by prosecution – Complaint which was written was neither read over nor explained to complainant – Appellant had also issued receipt of Rs. 200 which was although seized but not produced – Phenolphthalein powder test was also not correctly conducted by adopting due procedure – On dipping the fingers in the solution of sodium carbonate, of Panch witness who took out the currency note from the pocket of the appellant, also did not turn into pink – Prosecution failed to prove the guilt – Appellant acquitted.

ख. *अष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – अवैध परितोषण* – शिकायतकर्ता के कथन में राशि की मांग के संबंध में अंतर्विरोध हैं – अपीलार्थी जो समिति का सचिव था ने घनादेश जारी करने में कोई भूमिका अदा नहीं की – अभियोजन ने शिकायत लिखने वाले का परीक्षण नहीं कराया – लिखी गयी शिकायत शिकायतकर्ता को न तो पढ़कर सुनाई गई और न ही समझाई

NOTES OF CASES SECTION

गई – अपीलार्थी द्वारा जारी रु. 200/- की रसीद जब्त की गई किंतु प्रस्तुत नहीं की गई – फिनॉल्फ्थलीन पाऊडर परीक्षण भी सम्यक प्रक्रिया का पालन कर सही ढंग से संचालित नहीं किया गया – पंच साक्षी जिसने अपीलार्थी की जेब से करेंसी नोट निकाले थे, उसकी जंगलियां सोडियम कौबोनेट के घोल में डुबोने पर वह गुलाबी नहीं हुआ – अभियोजन दोष साबित करने में विफल रहा – अपीलार्थी दोषमुक्त।

C. Prevention of Corruption Act (49 of 1988), Section 20 – Presumption – Initial burden of proof of demand of bribe and its acceptance should have been proved by the prosecution and then only the statutory presumption would shift upon the accused.

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 20 – उपधारणा – रिश्वत की मांग के सबूत का प्रारंभिक भार और उसकी स्वीकृति को अभियोजन द्वारा साबित किया जाना चाहिए था और केवल तब कानूनी उपधारणा अभियुक्त पर परिवर्तित होगी।

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

Cases referred :

2001 Cr.L.J.175, 2001 Cr.L.J. 515, 2006(1) SCC 401, (2006) 2 SCC 250, (2009) 6 SCC 587, AIR 2007 SC 489.

Sachin Bhatnagar, for the appellant.

L.N. Soni, P.P. with *Jerry Lpoez* for the respondent/State.

Short Note

* (79)

Before Mr. Justice Sanjay Yadav

W.P. No. 1860/2012 (Jabalpur) decided on 11 May, 2012

MAHAKAUSHAL TRANSPORT

SAHKARITA MARYADIT

Vs.

UNION OF INDIA & ors.

...Petitioner

...Respondents

Cantonment Act (41 of 2006), Section 66, Municipal Corporation Act, M.P. (23 of 1956), Section 132(6)(d)(e)(o) – Power to impose tax – Entry Tax – Section 66 of Act, 2006 empowers Cantonment Board to impose any tax which under any enactment for the time being in force may be imposed in any municipality in the State – Cantonment

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Board imposed entry tax when Clause (d) and (e) of Section 132(6) of Act, 1956 were in existence - Subsequent omission of Clause (d) and (e) of Section 132(6) of Act, 1956 would not amount to bar - Further, the cantonment Board can impose any tax as per provisions of Clause (o) of Section 132(6) of Act, 1956 - Board has power to levy Vehicle Entry Tax - Petition dismissed.

छावनी अधिनियम (2006 का 41), धारा 66, नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 132 (6), (डी), (ई), (ओ) - कर अधिरोपित करने की शक्ति - प्रवेश कर - अधिनियम 2006 की धारा 66 छावनी बोर्ड को कोई कर अधिरोपित करने की शक्ति प्रदान करती है जिसे वर्तमान में प्रवृत्त किसी अधिनियमिती के अंतर्गत राज्य की किसी नगरपालिका में अधिरोपित किया जा सकता है - छावनी बोर्ड ने प्रवेश कर अधिरोपित किया जब अधिनियम 1956 की धारा 132 (6) का खंड (डी) व (ई) अस्तित्व में थे - अधिनियम 1956 की धारा 132 (6) का खंड (डी) व (ई) का पश्चातवर्ती लोप वर्जन की कोटि में नहीं आयेगा - और आगे, छावनी बोर्ड अधिनियम, 1956 की धारा 132 (6) के खंड (ओ) के उपबंधानुसार कोई कर अधिरोपित कर सकता है - बोर्ड को वाहन प्रवेश कर लगाने की शक्ति है - याचिका खारिज।

Cases Referred

(1997) 9 SCC 450, AIR 1960 Allahabad 119, (2006) 2 SCC 740, (2008) 17 SCC 416, (2008) 11 SCC 223.

Sanjay Verma, for the petitioner.

Indira Nair with S.S. Chouhan, for the respondents.

Short Note (DB)

*(80)

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

W.P. No.2967/2012 (Jabalpur) decided on 2 March, 2012

MITHULAL JAIN

Vs.

STATE OF M.P. & anr.

...Petitioner

...Respondents

Municipal Corporation Act, M.P. (23 of 1956), Sections 136, 138, 140, Municipality (Determination of Annual letting Value of Building/Lands) Rules (M.P.), 1997 - Rule 10 - Annual Letting Value - Separate Rates for Separate Types of Houses - It is open to the holder of tenement to declare the manner in which he wants the assessment

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of the building and for that the return appended with the resolution is a sufficient guide.

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएँ 136, 138, 140, नगरपालिक (भवन/भूमि का वार्षिक भाटक मूल्य निर्धारण) नियम (म.प्र.), 1997 – नियम 10 – वार्षिक भाटक मूल्य – पृथक प्रकार के मकानों के लिए पृथक दर – वासगृह धारक भवन का अपनी इच्छानुसार निर्धारण पद्धति घोषित करने के लिए स्वतंत्र है और इस हेतु संकल्प के साथ संलग्न विवरणी पर्याप्त मार्गदर्शक है।

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

Case referred :

2003(4) MPHT 1.

Ashok Lalwani, for the petitioner.

Short Note

*(81)

Before Mr. Justice Sujoy Paul

W.P. No. 3149/2007 (Jabalpur) decided on 19 January, 2012

RAJEEV KUMAR MISHRA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Service Law – Adverse Confidential Report – Representation against ACR rejected – Review also rejected – Held – ACR not treated as punishment in service jurisprudence but have potential to spoil career – ACR should be written objective, scientific and dispassionate manner with the view to improve the officer – It's a mirror image of performance – Can not be used as weapon of colonial era.

क. सेवा विधि – प्रतिकूल गोपनीय प्रतिवेदन – वार्षिक गोपनीय प्रतिवेदन के विरुद्ध प्रत्यावेदन खारिज – पुनर्विलोकन भी खारिज – अभिनिर्धारित – सेवा विधिशास्त्र में ACR को शास्ति नहीं माना जा सकता परंतु भविष्य खराब करने की क्षमता रखता है – ACR को अधिकारी से सुधार के दृष्टिकोण के साथ वास्तविक, वैज्ञानिक एवं निष्पक्ष रूप से लेख किया जाना चाहिए – यह कार्यक्षमता का प्रतिबिंब है – औपनिवेशिक काल के हथियार के रूप में प्रयोग नहीं किया जा सकता।

B. Service Law – Adverse Confidential Report – Reasons – Recording of reasons may not be requirement of the provision but the

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authority is required to act in a fair and just manner – Order which does not contain reason, always open in court of law for scrutiny – No application of mind in rejecting the representation – No document on record to show reasons – Contention not proved – Held – Even, the court is not obliged to act as appellate authority and is not concerned with the decision but can examine decision making process – Decision making process is vitiated or polluted, certainly the Court can exercise its jurisdiction and interfere in the matter.

ख. सेवा विधि – प्रतिकूल गोपनीय प्रतिवेदन – कारण – कारण अभिलिखित किये जाना उपबंध की अपेक्षा नहीं भी हो सकती परंतु प्राधिकारी से उचित और न्यायसंगत कार्यवाही की जाना अपेक्षित है – आदेश जिसमें कारण अंतर्विष्ट नहीं है, न्यायालय में संविक्षा के लिए सदैव खुला है – प्रत्यावेदन अस्वीकार करने में मस्तिष्क का कोई प्रयोग नहीं – कारण दर्शाने के लिए अभिलेख पर कोई दस्तावेज नहीं – तर्क साबित नहीं किया गया – अभिनिर्धारित – न्यायालय भी अपीली प्राधिकारी के रूप में कार्य करने के लिए बाध्य नहीं और निर्णय से संबद्ध नहीं परंतु निर्णय देने की प्रक्रिया का परीक्षण कर सकता है – निर्णय लेने की प्रक्रिया दूषित या प्रदूषित, निश्चित रूप से न्यायालय अपनी अधिकारिता का प्रयोग कर सकता है और मागले में हस्तक्षेप कर सकता है।

Cases referred :

(1994) (SUPPL.) (3) SCC 424, 2009 (17) SCC 770, (1991) 3 SCC 38, 2005 (3) MPLJ 313, (2010) 3 SCC 732, (2010) 9 SCC 496.

N.S. Ruprah, for the petitioner.

Rajesh Tiwari, G.A. for the State.

None for the respondent No.5.

Short Note (DB)

*(82)

Before Mr. Justice S.N. Aggarwal & Mr. Justice Sheel Nagu

W.A. No.170/2012 (Gwalior) decided on 17 May, 2012

RAJENDRA SINGH SALUJA

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

Caste Certificate – Vigilance Officer's Report – Value of – Directives contained in para 7 of decision of Apex Court in the case of Ku. Madhuri Patil that if report of Vigilance Officer is found in favor of

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candidate is to be believed and no further action is to be taken against the candidate is subject to the report having been prepared after strictly following the detailed procedure provided in Clause 5 – Failing which any favorable report can be termed as procured false or fraudulent.

जाति प्रमाण पत्र – सतर्कता अधिकारी का प्रतिवेदन – इसका मूल्य – कु. माधुरी पाटिल के प्रकरण में उच्चतम न्यायालय के निर्णय की कंडिका 7 में अंतर्विष्ट निदेश कि यदि सतर्कता अधिकारी का प्रतिवेदन अम्यर्थी के पक्ष में पाया जाता है, उस पर विश्वास करना है और अम्यर्थी के विरुद्ध आगे कार्यवाही नहीं की जाना है, यह प्रतिवेदन को खंड 5 में उपबंधित विस्तृत प्रक्रिया का कड़ाई से पालन करने पश्चात तैयार किये जाने के अध्याधीन है – ऐसा न करने से किसी भी अनुकूल प्रतिवेदन को मिथ्या या कपटपूर्वक प्राप्त किया जाना समझा जा सकता है।

The judgment of the Court was delivered by : SHEEL NAGU, J.

Cases referred :

(1994) 6 SCC 241, (1996) 3 SCC 685, (2012) 1 SCC 113, (2008) 9 SCC 718, (2009) 10 SCC 268, (1980) 4 SCC 329, (2000) 7 SCC 529, (2012) 1 SCC 333.

Kishore Shrivastava with Pawan Dwivedi, for the appellant.
Vivek Khedkar, Dy. A.G. for the respondents No. 1 & 2.
Anil Mishra & Rajneesh Sharma, for the respondent No.3.

Short Note (SC)

*(83)

Before Mr. Justice R.M. Lodha & Mr. Justice H.L. Gokhale
Civil Appeal No. 684/2004 decided on 11 May, 2012

STATE OF M.P.

...Appellant

Vs.

RAKESH KOHLI & anr.

...Respondents

A. Constitution – Article 226 – Constitutional Validity – Grounds – Legislative Enactment can be struck down on two grounds – (i) That appropriate legislature does not have competency to make law (ii) That it take away or abridge any of the fundamental rights or any other constitutional provisions.

क. संविधान – अनुच्छेद 226 – संवैधानिक विधिमान्यता – आधार – विधायी अधिनियमिती को दो आधारों पर खंडित किया जा सकता है – (i) यह कि

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समुचित विधायिका, विधि बनाने के लिए सक्षम नहीं (ii) यह कि वह किसी मूलभूत अधिकार या किसी अन्य संवैधानिक उपबंधों से वंचित करती है या उसे न्यून करती है।

B. Fiscal Statute – Stamp Duty is a tax – Hardship is not relevant in interpreting fiscal statutes.

ख. वित्तीय कानून – स्टाम्प शुल्क एक कर है – वित्तीय कानूनों के निर्वचन में, कठिनाई सुसंगत नहीं है।

C. Fiscal Statute – Constitutional Validity – While dealing with constitutional validity of a taxation law enacted by Parliament or State Legislature following principles must have regard : (i) There is always a presumption in favor of constitutionality of law (ii) No enactment can be struck down by just saying that it is arbitrary or unreasonable or irrational but some constitutional infirmity has to be found (iii) The court is not concerned with the wisdom or unwisdom, the justice or injustice of law as the Parliament and State Legislatures are supposed to be alive to the needs of the people (iv) Hardship is not relevant in pronouncing on constitutional validity of a fiscal statute or economic law (v) in the field of taxation, the Legislature enjoys greater latitude for classification.

ग. वित्तीय कानून – संवैधानिक विधिमान्यता – संसद या राज्य विधान मंडल द्वारा अधिनियमित कर कानून की संवैधानिक विधिमान्यता पर विचार करते समय निम्न सिद्धांतों का आदर करना चाहिए : (i) उपधारणा सदैव विधि की संवैधानिकता के पक्ष में होती है (ii) किसी अधिनियमिती को मात्र यह कहकर खंडित नहीं किया जा सकता कि वह मनमाना, अयुक्तियुक्त या अनुचित है, बल्कि कोई संवैधानिक कमी पायी जानी होती है (iii) न्यायालय कानून के विवेकपूर्ण या अविवेकपूर्ण होने, न्यायपूर्ण या अन्यायपूर्ण होने के बारे में विचार नहीं करता क्योंकि संसद व राज्य विधान मंडल जनता की जरूरतों के बारे में जागरूक होना अनुमित है (iv) वित्तीय कानून या अर्थ विधि की संवैधानिक विधिमान्यता घोषित करने के लिए कठिनाई सुसंगत नहीं है (v) कराधान के क्षेत्र में, विधायिका को वर्गीकरण करने के लिए अधिक स्वतंत्रता प्राप्त है।

D. Stamp Act (2 of 1899), Clause (d), Article 45 of Schedule 1-A (State Amendment Act (M.P.), 2002) – Constitutional Validity - High Court wrongly struck down the provision as ultra vires being arbitrary, unreasonable and irrational without consideration that

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legislature has sought to curb inappropriate mode of transfer of immovable properties – Provision Intra Vires.

घ. स्टाम्प अधिनियम, (1899 का 2), खंड (डी), अनुसूची 1ए का अनुच्छेद 45 (राज्य संशोधन अधिनियम (म.प्र.), 2002) – संवैधानिक विधिमान्यता – उच्च न्यायालय ने यह विचार में लिए बिना कि विधायिका ने अचल सम्पत्तियों के अंतरण की अनुचित पद्धति पर रोक लगाना चाहा है, उपबंध को मनमाना, अयुक्तियुक्त व अनुचित मानते हुए अधिकारातीत होना स्वीकार कर गलत रूप से खंडित किया – उपबंध शक्त्याधीन।

The judgment of the Court was delivered by : R.M. LODHA, J.

Cases referred :

AIR 1962 SC 123, (1996) 3 SCC 709, (1999) 5 SCC 62, (1999) 5 SCC 725, (2000) 6 SCC 345, (2008) 2 SCC 254, (2008) 4 SCC 720, (2010) 11 SCC 1, (2012) 1 SCC 656, (1995) 1 SCC 519, AIR 1955 SC 661, AIR 1965 SC 1216, AIR 1968 SC 623, (1979) 1 SCC 23, AIR 1958 SC 731, AIR 1959 SC 942, AIR 1960 SC 554, AIR 1951 SC 41, AIR 1951 SC 318, 1962 Supp (2) SCR 589, AIR 1964 SC 370, (1980) 1 SCC 223, (1981) 4 SCC 675, (2003) 5 SCC 239.

Short Note

*(84)

Before Mr. Justice J.K. Maheshwari

F.A. No. 368/2001 (Jabalpur) decided on 15 March, 2012

VINOD AGRAWAL & ors.

...Appellants

Vs.

BHARAT KUMAR LATHI & ors.

...Respondents

A. Evidence Act (1 of 1872), Sections 67, 101 - Burden of Proof - Burden of proof lies on a person who desires a Court to give judgment as to any legal right or liability dependent on the existence of facts which the person asserts, must prove that those facts exist.

क. साक्ष्य अधिनियम (1872 का 1), धाराएँ 67, 101 – सबूत का भार – सबूत का भार उस व्यक्ति पर होता है जो उसके द्वारा प्राख्यान किये गये विद्यमान तथ्यों पर आधारित किसी विधिक अधिकार या दायित्व के संबंध में न्यायालय से निर्णय चाहता है, उसे उन तथ्यों के अस्तित्व को साबित करना चाहिए।

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B. Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Seller is an old, illiterate lady who is the resident of Sagar - Agreement to sell executed at Bhopal - Burden of proof lies on the intended purchasers to establish execution of the sale agreements after explaining the contents to executant and its genuineness to get decree of specific performance of contract - It is not merely a physical act of the executant, but also the mental act of the person executing the document is of great value.

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 - संविदा का विनिर्दिष्ट अनुपालन - विक्रेता एक वृद्ध अशिक्षित महिला है जो सागर की निवासी है - विक्रय का अनुबंध भोपाल में निष्पादित - संविदा के विनिर्दिष्ट पालन की डिक्री प्राप्त करने हेतु निष्पादक को विक्रय अनुबंधों की अंतर्वस्तु समझाने के पश्चात उसका निष्पादन एवं उसकी सत्यता को स्थापित करने के लिए सबूत का भार इच्छुक क्रेता पर होगा - यह निष्पादक का मात्र वास्तविक कृत्य नहीं बल्कि दस्तावेज निष्पादित करने वाले व्यक्ति का मानसिक कृत्य भी है जो अधिक मूल्यवान है।

C. Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Burden of Proof - Burden remains on plaintiff to prove that defendant had executed the agreement and not on the defendant to prove the negative - By taking a plea of impostor or execution of a forged document, the said burden would not shift on the defendant.

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 - संविदा का विनिर्दिष्ट पालन - सबूत का भार - यह साबित करने का भार वादी पर रहेगा कि प्रतिवादी ने अनुबंध निष्पादित किया और न कि प्रतिवादी पर नकारात्मकता साबित करने के लिए होगा - छद्मवेशी का या कूटरचित दस्तावेज के निष्पादन का अभिवाक् करके उक्त भार प्रतिवादी पर परिवर्तित नहीं होगा।

D. Evidence Act (1 of 1872), Section 67 - Exhibiting of document - Exhibiting of document in Court does not amount of proof of its contents - It amounts to admission of its contents but not their truth - Genuineness, truthfulness of the document is an essence to prove it even on exhibiting and admitting the said document in the Court.

घ. साक्ष्य अधिनियम (1872 का 1), धारा 67 - दस्तावेजों को प्रदर्शित किया जाना - दस्तावेजों को न्यायालय के समक्ष प्रदर्शित किया जाना उसकी

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अंतर्वस्तु का सबूत होने की कोटि में नहीं आयेगा — यह उसकी अंतर्वस्तु की स्वीकृति की कोटि में आयेगा न कि उसके सत्य होने की — उसे दस्तावेज की सत्यता और वास्तविकता साबित करना आवश्यक है तब भी जब उक्त दस्तावेज को न्यायालय के समक्ष प्रदर्शित एवं स्वीकार किया गया है।

E. Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Agreement to sell mentions that entire consideration amount has been paid and possession has been delivered - However, subsequent power of attorney allegedly executed by executant gives power to holder of power of attorney to receive advance amount, to sign agreements to sell, sale deed or any other document by receiving amount and to deliver the possession on the land - If only sale deed was remained for execution, then there was no need to execute the general power of attorney - Plaintiffs also failed to explain that when the entire consideration amount was already paid and possession was delivered, then executant could have executed the sale deed itself and there was no necessity to take her power of attorney - Holder of power of attorney is brother of one of the plaintiffs and power of attorney holder in other four suits - Nothing on record that who purchased the stamp paper and who was the scribe of the agreement - No evidence brought to dispel such suspicious circumstances.

ड. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 — संविदा का विनिर्दिष्ट पालन — विक्रय के अनुबंध में उल्लेख कि संपूर्ण प्रतिफल राशी का भुगतान किया गया है और कब्जा दे दिया गया है — किन्तु अभिकथित रूप से निष्पादक द्वारा निष्पादित पश्चातवर्ती मुख्तारनामा, मुख्तारनामा धारक को अग्रिम राशी स्वीकारने, विक्रय अनुबंध, विक्रय पत्र या अन्य किसी दस्तावेज पर हस्ताक्षर करने और रकम प्राप्त कर भूमि का कब्जा देने की शक्ति प्रदान करता है — यदि केवल विक्रय विलेख का निष्पादन बाकी है तब मुख्तारनामा निष्पादित करने की कोई आवश्यकता नहीं थी — वादीगण यह स्पष्ट करने में भी विफल कि संपूर्ण प्रतिफल राशी पहले ही अदा की जा चुकी है और कब्जा दे दिया गया है, तब निष्पादक विक्रय विलेख निष्पादित कर सकता था और उसका मुख्तारनामा लेने की कोई आवश्यकता नहीं थी — मुख्तारनामा धारक वादीगण में से एक का भाई और अन्य चार प्रकरणों में मुख्तारनामा धारक है — अभिलेख पर कुछ नहीं कि किसने स्टाम्प पेपर खरीदा और अनुबंध का लेखक कौन था — ऐसी संदिग्ध परिस्थितियों का खंडन करने के लिए कोई साक्ष्य प्रस्तुत नहीं।

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F. Civil Procedure Code (5 of 1908), Order 3 Rule 1 and 2 - Power of Attorney Holder - Principal may assign to the agent authorizing for appearances and not for the acts done by the principal - Presence of Holder of Power of Attorney at the time of execution of agreement to sell is of no help, as the agreements were executed by the intended purchasers - Power of Attorney holder can not appear as a witness on behalf of the principal for the act done by him.

च. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 3 नियम 1 व 2 - मुख्त्यारनामाधारक की शक्ति - स्वामी, उपस्थितियों के लिए अभिकर्ता को प्राधिकार सौंप सकता है और न कि स्वामी द्वारा किये गये कार्यों के लिए - विक्रय के अनुबंध के निष्पादन के समय मुख्त्यारनामाधारक की उपस्थिति कोई सहायता प्रदान नहीं करती, क्योंकि अनुबंधों को आशयित क्रेताओं द्वारा निष्पादित किया गया था - स्वामी की ओर से उसके द्वारा किये गये कार्य के लिए मुख्त्यारनामा धारक साक्षी के रूप में उपसंजात नहीं हो सकता।

G. Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Readiness and Willingness - Readiness and willingness is still required to be proved even when the entire consideration amount is paid and possession is delivered - Readiness and willingness to perform ones part of contract and its obligation also includes purchasing of stamp duty and registration charges of sale deed which is incumbent upon vendee as per evidence on record - Plaintiffs have failed to prove their readiness and willingness to perform their part of contract.

छ. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 - संविदा का विनिर्दिष्ट पालन - तैयारी व रजामंदी - तैयारी व रजामंदी तब भी साबित करना आवश्यक है जब संपूर्ण प्रतिफल राशी का भुगतान हो चुका है और कब्जा दे दिया गया है - संविदा के अपने भाग के पालन के लिए तैयारी व रजामंदी और उसके दायित्वों में स्टाम्प शुल्क व विक्रय पत्र का पंजीयन शुल्क समाविष्ट है जो अभिलेख पर साक्ष्य के अनुसार क्रेता के लिए जरूरी है - वादीगण उनके भाग की संविदा को पूरा करने की तैयारी व रजामंदी साबित करने में विफल रहे हैं।

H. Transfer of Property Act (4 of 1882), Section 52 - Doctrine of Lis Pendence - In case plaintiff fails to prove his entitlement to get the decree of specific performance, the question of alienation of land in dispute to the subsequent purchaser during the pendency of Trial

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would be redundant and Court need not to decide the validity of transaction entered between the parties during the pendency of the Civil Suits.

ज. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 – विचाराधीन वाद का सिद्धांत – वादी विनिर्दिष्ट पालन की डिक्री प्राप्त करने के अपने हक को साबित करने में विफल होने की स्थिति में, विचारण के लंबित रहने के दौरान पश्चातवर्ती क्रेता को विवादित भूमि का अन्य संक्रमण का प्रश्न अनावश्यक होगा और न्यायालय को सिविल वाद के लंबित रहने के दौरान पक्षकारों के मध्य किये गये संव्यवहार की वैधता का निर्धारण करने की आवश्यकता नहीं।

I. *Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Reasonable Time* - In case of specific performance of contract, filing of a suit within a reasonable time to grant the discretionary relief is having substance to the issue - Alleged agreement to sell was executed on 30.08.1990 - Executant died on 25.12.1992 - Suit filed on 01.05.1995 - Plaintiffs must explain that why the suits were not filed during the life time of executant showing readiness and willingness to get the sale deed executed - Even if time may not be the essence of contract but filing of suit after 4 ½ years is not within reasonable time.

झ. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – युक्तियुक्त समय – संविदा के विनिर्दिष्ट पालन के प्रकरण में, वैवेकिक अनुतोष प्रदान करने के लिए युक्तियुक्त समय के भीतर वाद प्रस्तुत करना विवाद्यक के लिए महत्वपूर्ण है – अभिकथित विक्रय का अनुबंध 30.08.1990 को निष्पादित किया गया – 25.12.1992 को निष्पादक की मृत्यु हो गई – वाद 01.05.1995 को प्रस्तुत किया गया – वादीगण को स्पष्ट करना होगा कि निष्पादित की जीवित रहते विक्रय पत्र को निष्पादित करने की तैयारी व रजामंदी दर्शाते हुए वाद प्रस्तुत क्यों नहीं किये गये – यद्यपि समय संविदा की अत्यावश्यक शर्त नहीं किन्तु 4½ वर्ष पश्चात वाद पेश करना युक्तियुक्त समय के भीतर नहीं।

Cases referred :

2005(1) MPLJ 421 (SC), AIR 2001 Karnataka 231, AIR 2006 Karnataka 231, 2009 (5) MPHT 38, 1997(2) VB 80, (1994) 4 SCC 243, AIR 1967 SC 1395, (2006) 5 SCC 558, (2004) 9 SCC 468 : AIR 2003 SC 4351, 1993 (II) MPWN 155, AIR 2003 MP 145, AIR 2004 Karnataka 31,

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(1997) 5 SCC 476 : 1997 (II) MPWN 48, 2009 (1) MPLJ 302 (SC), AIR 1963 SC 1203, 1981 JLJ 388, AIR (36) PC 278, (2008) 4 SCC 530, AIR 2000 SC 1203, 2001 (2) JLJ 261, (2010) 10 SCC 512, (2010) 4 SCC 491, (2011) 4 SCC 240, (1999) 3 SCC 573, AIR 1967 SC 1395, (2006) 5 SCC 558, (2004) 9 SCC 468, 1993 (II) MPWN 155, (1986) 2 WLL 713(RAJ.), AIR 1998 RAJ 185, 2000 (1) MPJR 151, 1993 (1) SCC 519, (1969) 2 SCC 539, AIR 1990 SC 682, (1995) 5 SCC 115, 2003(II) MPJR 95, AIR 1971 SC 2192, AIR 1975 Madras 374, AIR 1925 PC 75, AIR 1986 MP 39, (2010) 8 SCC 1, (2002) 1 SCC 134, (2003) 10 SCC 390, (2003) 9 SCC 478.

R.P. Agrawal with Ashok Lalwani, Sanjay Agrawal, Sharad Gupta
for the appellants.

Imtiaz Husain, for the respondent No. 1/Plaintiff.

Ravish Agrawal with Pranay Verma, for the respondent No.2.

Sheetal Dubey, G.A. for the respondent/State.

I.L.R. [2012] M.P., 1501

SUPREME COURT OF INDIA

**Before Mr. Justice Deepak Verma, Mr. Justice B.S. Chauhan &
Mr. Justice K.S. Radhakrishnan**

Civil Appeal No. 4060/2009 decided on 3 April, 2012

MODERN DENTAL COLLEGE AND RESEARCH
CENTRE & ors

....Appellants

Vs.

STATE OF M.P. & ors.

...Respondents

Private Medical and Dental Under Graduate Course Entrance Examination (M.P.), Rules 2011 - Rule 5 - Admission to Medical Colleges - Vacant Seats of NRI Quota - It is open to unaided professional educational institutions to fill up unfilled NRI seats through the entrance test conducted by them till the disposal of Appeal.(Para 13)

निजी चिकित्सा और दंत पूर्व स्नातक पाठ्यक्रम प्रवेश परीक्षा (म.प्र.) नियम 2011 - नियम 5 - चिकित्सा महाविद्यालयों में प्रवेश - अनिवासी भारतीयों के कोटे की रिक्त सीटें - अननुदानित व्यवसायिक शैक्षणिक संस्थानों को अपील का निपटारा होने तक उनके द्वारा संचालित प्रवेश परीक्षा के जरिए एन.आर.आई. की खाली सीटें भरने की स्वतंत्रता है।

Cases referred :

(2002) 8 SCC 481, (2005) 6 SCC 537, (2009) 7 SCC 751, (2010) 10 SCC 225, (1994) 4 SCC 728, (1995) 5 SCC 220, (2000) 10 SCC 565, (2005) 6 SCC 537.

ORDER

The Order of the Court was delivered by **K.S. RADHAKRISHNAN, J.** : We are in these applications called upon to decide the question as to whether the unfilled-NRI seats are to be transferred to general pool and be shared equally to be filled up on the basis of the Common Entrance Test conducted by the State level Committee- Vyavsayik Pariksha Mandal (VYAPAM) or by the Common Entrance Test conducted by the Association of Private Dental and Medical Colleges (APDMC), so far as the private unaided medical/dental colleges, in the State of Madhya Pradesh are concerned.

2. Applicants, herein had filed Writ Petition No. 2732 of 2009 before

the High Court of Madhya Pradesh (Jabalpur) challenging the constitutional validity of Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Vinayaman Avam Shulka ka Nirdharan) Adhiniyam, 2007 (in short 'the Act') and the Rules framed thereunder. The High Court vide its judgment dated 15.5.2009 repelled the challenge to 'the Act' and the Rules but declared that the provisions of Rule 10(2)(iii) of 2009 as *ultra vires*. The High Court also held that the Judgment would not affect the Common Entrance Test already conducted by VYAPAM for the year 2009-10. The above-mentioned Writ Petition was disposed of along with other similar matters and a common Judgment was delivered by the High Court.

3. Aggrieved by the judgment in Writ Petition No. 2732 of 2009, Civil Appeal No. 4060 of 2009 was filed by the applicants herein. While admitting the appeal, a Bench of this Court had prima facie found that the provisions of the Act handing over the entire selection process to the State Government or the agencies appointed by the State Government for undergraduate, graduate and postgraduate medical/ dental colleges and fee fixation was contrary to and inconsistent with the principles laid down by the eleven Judges Bench Judgment in *TMA Pai Foundation and Others Vs. State of Karnataka and others* [(2002) 8SCC 481] (for short 'Pai Foundation') and the Judgment in *P.A. Inamdar and others Vs. State of Karnataka and others* [(2005) 6 SCC 537] (in short 'Inamdar'). The Court also observed that 2007 Act would become unconstitutional, if read literally, but an interim arrangement was made with regard to the admissions in the private unaided medical/ dental colleges in the State of Madhya Pradesh for the year 2009-10; the operative portion of that order reads as follows.

"We, therefore, direct that the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh will be done by first excluding 15% NRI seats (which can be filled up by the private institutions as per para 131 of Inamdar case), and allotting half of the 85% seats for admission to the undergraduate and post graduate courses to be filled in by an open competitive examination by the State Government, and the remaining half by the Association of the Private Medical and Dental Colleges. Both the State Government as well as the Association of Private Medical and Dental Colleges. Both the State Government as well as the Association of Private Medical and Dental Colleges will hold their own separate

entrance examination for this purpose. As regards "the NRI seats", they will be filled as provided under the Act and the Rules, in the manner they were done earlier."

4. The Court also observed that the solution arrived at might not be perfect, but it had only tried to find out a best via media for admissions for the academic year 2009-10. However, it was recommended that the same might also be considered for future sessions. The order passed by the Court is reported in *Modern Dental College and Research Centre and Ors. v. State of Madhya Pradesh and Ors.* [(2009) 7 SCC 751]. (in short Modern Dental College)

5. The above arrangement indicates that 15% of the total sanctioned intake in the unaided private Medical and Dental Colleges was set apart for giving admission to NRI students and the remaining 85% seats would be filled up equally through the examination conducted by the State and the common Entrance Test conducted by the Colleges. Controversy now is only with regard to unfilled NRI seats due to lack of sufficient NRI students, and in what manner those seats have to be filled up. State, has maintained the stand that those unfilled seats would also go to the general pool and be shared by both the State and the Colleges equally. Such a stand was taken by the State on the basis of the interpretation placed by this Court in filling up the unfilled NRI seats in its judgment dated 30.9.2010 in *R.D. Gardi Medical College and Anr. etc. V. State of M.P. and Ors.* (2010) 10 SCC 225 (in short *Gardi Medical College*), wherein, while interpreting Rule 8 of the M.P. Admission Rules, 2008 the two-Judges Bench of this court observed as follows :

"A plain reading of the above leaves no manner of doubt that unfilled NRI seats had to be transferred to the general pool to be filled up on the basis of the merit of the candidates in the State- level common entrance test conducted by the Madhya Pradesh Vyavsayik Pariksha Mandal or by any other agency authorised by the State Government for that purpose. The unfilled seats in the NRI quota were, therefore, to be treated as a part of the general pool and once that was done the share of the college in terms of the order passed by this Court would be 50% out of the said seats. The High Court has, in that view, rightly held that while the management was justified in filling up 5 unfilled seats in NRI quota, the remaining 5 could

not have been filled up otherwise than on the basis of the entrance test referred to in Rule 8."

Court, in the above case, was dealing with the admissions for the academic year 2010-11.

6. The State Government while framing the Madhya Pradesh Private Medical and Dental Under Graduate Course Entrance Examination Rules, 2011 incorporated Rule 5 with regard to unfilled NRI seats with specific reference to the above-mentioned, judgment dated 30.9.2010. The Rule reads as follows:

"RESERVATION: Every Institution shall be allowed to fill up to 15% of the sanctioned seats by NRI candidates only, in the manner prescribed by the admission and Fee Regulatory Committee. These NRI seats shall be filled up through a separate counselling. NRI seats remaining vacant shall be merged into the counselling of Non NRI Candidates, as per Hon'ble Supreme Court Order in Civil Appeal No. 8429-8430/2010 dated 30.9.2010."

7. The applicants, noticing that the judgment dated 30.9.2010 in **Gardi Medical College** would seriously affect the rights of unaided educational institutions in the matter of filling up of unfilled NRI seats, filed IA Nos. 51-52 of 2011 in Civil Appeal No. 4060 of 2009 for appropriate modification / clarification of the orders passed by two-Judges Bench in **Modern Dental College** as well as **R.D. Gardi Medical College**. The applications came up for hearing before two-Judges Bench of this Court on 1.8.2011 and this Court passed the following order:

"We are of the opinion that there appears to be some conflict between the observations' made in para 28 of the judgment of the two-Judges Bench rendered in the case of **R.D. Gardi Medical College and Another. etc. v. State of MP. and Ors.** [(2010) 10 SCC 225], quoted below:

28. A plain reading of the above leaves no manner of doubt that unfilled NRI seats had to be transferred to the general pool to be filled up on the basis of the merit of the candidates in the State-level common entrance test conducted by the Madhya Pradesh Vyavsayik Pariksha Mandal or by any other

agency authorised by the State Government for that purpose. The unfilled seats in the NRI quota were, therefore, to be treated as a part of the general pool and once that was done the share of the College in terms of the order passed by this Court would be 50% out of the said seats. The High Court has, in that view, rightly held that while the management was justified in filling up 5 unfilled seats in NRI quota, the remaining 5 could not have been filled up otherwise than on the basis of the entrance test referred to in Rule 8.

and the observations made in para 27(1), quoted below, of *T.M.A. Pai Foundation and others v. State of Karnataka and others* [(1995) 5 SCC 220] which is a three Judge Bench decision:

"27(1) So far as NRI quota is concerned, it is fixed at fifteen per cent for the current academic year. It shall be open to the management to admit NRI students and foreign students up to the aforesaid specified percentage, it shall be open to them to admit students on their own, in the order of merit, within the said quota. This direction shall be a general direction and shall operate in the case of all the States where admissions have not been finalized. It is, however, made clear that by virtue of this direction, no student who has already been admitted shall be disturbed or removed."

The Court, therefore, referred the matter to a larger Bench. However, by the time year 2011-2012 came to a close hence, the larger Bench could not resolve the apparent conflict and hence, a two Judges Bench of this Court disposed of both IA Nos.51 and 52 vide its order dated 23.9.2011.

8. The same issue, has again been cropped up, now for the academic year 2012-13, hence, it is necessary to clarify the order dated 27.5.2009 in *Modern Dental College* and the judgment of this Court dated 30.9.2010 in *R.D. Gardi Medical College* as to how the unfilled NRI seats be filled up. For the said purpose, the applicants have filed IA Nos. 57-59 of 2011, which came up for hearing before two Judges Bench of this Court on 9.12.2011 and the Court ordered that the applications be placed before the Constitution Bench.

9. Since main issue referred to Constitution Bench is not likely to come up for hearing shortly and the issue projected in IAs with regard to unfilled seats is of urgent nature, thus, they have been considered by us. Hence, these applications have come up before us for consideration vide order passed by Hon'ble the Chief Justice of India.

10. We have heard learned senior counsel - Shri C.A. Sundaram and Dr. Rajeev Dhawan and learned counsel for the State of Madhya Pradesh - Shri B.S. Banthia. We may at the outset point out that in the instant applications, we are concerned only with the question as to how and in what manner the unfilled NRI seats be filled up for the year 2012-13 till the appeal is finally disposed of, which issue, in our view, is no more res integra. This Court had earlier in various judgments dealt with the purpose and object of creating NRI quota and the manner in which those quota had to be filled up. A three-Judges Bench of this Court in *TMA Pai Foundation and Others v. State of Karnataka and Others* (1994) 4 SCC 728 had an occasion to consider how, the vacant seats, in the NRI quota be filled up and ordered as follows:

"So far as NRI quota is concerned, we fixed the same as 15% last year. We fixed NRI quota in respect of minorities' institutions as 5%. Although the NRI quota should not, normally, be more than 5% but keeping in view the reduction in the fee structure, we fix the same as 10% (of the total seats) for this year. We further make it clear that in case any in the NRI quota remains unfilled, the same can be filled by the Management at its discretion."

Later another three-Judges Bench of this Court in *TMA Pai Foundation and Others v. State of Karnataka and Others* (1995) 5 SCC 220 had also endorsed the same view holding that it would be open to the Management to admit NRI students and foreign students within that quota and in case they were not able to get the NRI or foreign students upto the aforesaid specified percentage, it would be open to them to admit students on their own, in the order of merit, within the said quota. The operative portion of the order with regard to NRI quota for the year 1995-96 was as follows:

(1) So far as NRI quota is concerned, it is fixed at fifteen per cent for the current academic year. It shall be open to the management to admit NRI students and foreign students within

this quota and in case they are not able to get the NRI or foreign students upto the aforesaid specified percentage, it shall be open to them to admit students on their own, in the order of merit, within the said quota. This direction shall be a general direction and shall operate in the case of all the States where admissions have not been finalized. It is, however, made clear that by virtue of this direction, no student who has already been admitted shall be disturbed or removed."

Similar order was also passed by this Court in *AP (P) Engg. College Management Assn. v. Govt. of A.P.* (2000) 10 SCC 565. The operative portion of the order of the two-Judges Bench reads as follows:

"4. After hearing learned counsel for the parties, we direct that the State of Andhra Pradesh shall allow the 5% NRI quota in the private engineering colleges in the State of Andhra Pradesh to be filled up in the manner earlier directed by this Court and to permit the management of the private engineering colleges to fill up the unfilled NRI quota, at its own discretion; subject, however, to the criteria of merit, qualification and fee structure - as prescribed by the Government not only for the current academic year but also for successive academic years, till the main matter is decided by this Court in the pending cases."

11. We may also in this connection refer to the judgment of the seven-Judges Bench in *P.A. Inamdar v. State of Maharashtra* ((2005) 6 SCC 537], wherein this Court had dealt with the rights of unaided minority and non-minority educational institutions and held that the State cannot regulate or control admissions, so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling up, the seats available, to be filled up at its discretion in such private institutions. Court held that would amount to nationalization of seats, such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. It was also ordered that such appropriation of seats can also not be held to be a regulatory measure in the interest of the minority within the meaning of Article

30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution.

Inamdar having said so dealt with NRI seats as well. In Para 131 of judgment, the Court had only dealt with the question as to how NRI seats had to be filled up: First, it was ordered that the seats should be utilized bona fide by NRIs only and for their children or wards. Further, it was ordered that within quota, merit should not be given a complete go-bye. Further, it was also ordered that the amount of money, in whatever form collected from such NRIs, should be utilized for benefiting students such as from economically weaker sections of the society, whom, on well defined criteria, the educational institution might admit on subsidized payment of their fee.

Further, In para 132 of the *Inamdar*, it had also been clearly held that the policy of reservation should not be enforced by the State nor any quota or percentage of admissions could be carved out to be appropriated by the State in a minority or non-minority unaided educational institution.

12. We are of the considered view that the above principles laid down by a larger Benches of this Court, in the matter of filling up of NRI seats were not correctly understood or applied by this Court. in *RD. Gardi Medical College* while interpreting Rule 8 of the M.P. Admission Rules, 2008. The finding recorded in *R.D. Gardi Medical College* that the unfilled seats in NRI quota in unaided professional colleges should be treated as a part of the general pool and be shared equally by the State and the unaided professional colleges goes contrary to the principles laid down by the eleven-Judges Bench in *Pai Foundation*, *Inamdar* as well as the Judgments rendered by the three Judges Bench in *Pai Foundation* referred to earlier. The wrong interpretation given by in *RD. Gardi Medical College* is seen incorporated in Rule 5 of the Madhya Pradesh Private Medical and Dental Under Graduate Course Entrance Examination Rules 2011 as well, which in our view cannot be legally sustained.

13. We are, therefore, inclined to allow both the applications and over rule the direction given by the two. learned Judges of this Court in *R.D. Gardi Medical College* and hold that it is open to the unaided professional educational institutions to fill up unfilled NRI seats for the year 2012-13 and for the succeeding years through the entrance test conducted by them till the disposal of the appeal subject to the conditions laid down in *Inamdar* strictly on the basis of merits.

14. IA Nos. 57 and 59 of 2011 in Civil Appeal No. 4060 of 2009 are allowed to the extent mentioned above and disposed of on the basis of the above modifications and clarifications.

Appeal allowed.

I.L.R. [2012] M.P., 1509

WRIT APPEAL

Before Mr. Justice Ajit Singh & Mr. Justice R.S. Jha

W.A. No. 25/2012 (Jabalpur) decided on 12 March, 2012

PREETAM

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhrithi Adhikaron Ka Pradan Kiya Jana) Adhiniyam (M.P.), 1984, Section 2 - Occupier of Govt. Land - Respondents in possession of Nazul Land for the last several years which was proposed to be settled in their favor by the State Govt. - House constructed over the land was also purchased by respondents - Appellant inducted as tenant by respondent No. 5 - Decree of eviction also passed against appellant - Occupancy rights of respondent No. 5 are already pre-settled and finally adjudicated - Appellant can not be allotted land - Provisions of Adhiniyam 1984 can be attracted only in cases where land occupied by a landless person must be Government land on which no other person has any pre-existing rights and must therefore, be vacant and free from encumbrance.

(Paras 6 to 11)

नगरीय क्षेत्रों के भूमिहीन व्यक्ति (पट्टाधृति अधिकारों का प्रदान किया जाना) अधिनियम (म.प्र.), 1984, धारा 2 - सरकारी भूमि का अधिभोगी - प्रत्यर्थीगण पिछले कई वर्षों से नजूल भूमि पर काबिज हैं जिसे राज्य सरकार द्वारा उनके पक्ष में निपटाया जाना प्रस्तावित किया था - भूमि पर निर्मित मकान भी प्रत्यर्थीगण द्वारा क्रय किया गया - प्रत्यर्थी क्रं. 5 द्वारा अपीलार्थी को किराएदार के रूप में प्रतिष्ठित किया गया - अपीलार्थी के विरुद्ध बेदखली की डिक्री भी पारित की गई - प्रत्यर्थी क्रं. 5 के अधिभोगी अधिकार पहले से पूर्व स्थापित और अंतिमतः न्यायनिर्णित किये गये - अपीलार्थी को भूमि आवंटित नहीं की जा सकती - अधिनियम 1984 के उपबंध केवल उन मामलों में आकर्षित होंगे जब भूमिहीन व्यक्ति द्वारा अधिभोग की जा रही भूमि सरकारी भूमि है जिस पर अन्य किसी व्यक्ति का कोई विद्यमान अधिकार नहीं है और इसलिए उसे रिक्त व भारों से मुक्त होनी चाहिये।

Ashok Lalwani, for the appellant.

Rahul Jain, Dy. A.G. for the respondents.

Siddharth Patel, for the respondents No.4.

J U D G M E N T

The Judgment of the Court was delivered by :
R. S. JHA, J: The appellant has filed this writ appeal under the provisions of Section 2(1) of the M.P Uchha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005 being aggrieved by order dated 22.11.2011 passed by the learned Single Judge in W.P No.2591/2011, upholding and affirming the order passed by the respondent authorities dated 3.2.2011 whereby the claim of the appellant for grant of lease hold rights over Nazool land bearing Khasra No.254 in District Umaria has been rejected.

2. It is alleged by the learned counsel for the appellant that the impugned order passed by the learned Single Judge deserves to be set aside as the petition filed by the appellant has been decided without taking into consideration the orders passed by this Court in W.P No.5624/2006 and M.P No.597/1993 inspite of the fact that the appellant had relied upon the same and had also filed an application for review alongwith the copies of the aforesaid judgments wherein relief, similar to the one prayed by the appellant, has been granted by this Court. It is also submitted that the learned Single Judge has also failed to take into consideration the fact that the appellant was entitled to grant of lease hold rights under the provisions of the Madhya Pradesh Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Adhiniyam, 1984 (hereinafter referred to as the Adhiniyam of 1984) inspite of the fact that the eviction suit filed by the respondent no.4 against the appellant had been allowed. It is submitted that in view of the aforesaid infirmities the order passed by the learned Single Judge as well as the order passed by the respondent authorities dated 3.2.2011, rejecting the application of the appellant for grant of lease hold rights, be set aside.

3. The learned counsel for the private respondent submits that the land in question was and is in the possession of the respondents since the past several decades and a house had also been constructed by them over the same. It is stated that the respondents had inducted the appellant as a tenant but subsequently a suit for eviction had been filed by them against the appellant in which the appellant had also filed a counter claim for being declared bhoomi swami of the land in question. It is also pointed out that the aforesaid suit

no.Civil Suit 3-A/2002 filed by the respondents was decreed on 20.9.2007 while the counter claim filed by the appellant was dismissed. The First Appeal/ Civil Appeal No.184-A/2007 filed by the appellant was dismissed on 19.11.2007 and the Second Appeal No.1838/2007 filed against the aforesaid judgment and decree was also dismissed by this Court on 23.2.2011 affirming the judgment and decree of the trial court. It is further submitted that the land of Khasra No.254 is a Nazool land however as the respondents were in possession of the same prior to 1955 the same was settled in their favour by the erstwhile Rewa State and the house thereon was purchased by them from Durga Prasad in auction and thereafter the land was also proposed to be settled in their favour by the State Government by granting them lease in Nazool Case No.1412-A-20/78-79 and, therefore, as the land in question was in their occupation and was not vacant land, the same could not have been allotted to the appellant under the provisions of the Adhiniyam of 1984.

4. The learned Dy. Advocate General appearing for the respondent/State submits that as the dispute between the appellant and the respondents regarding right to occupy the land, bhoomi swami rights and tenancy rights, etc., was raised by the parties before the trial court and as the competent civil court had decided the same against the appellant and in favour of the respondents, therefore, the authorities have rightly rejected the claim of the appellant.

5. We have perused the order passed by the learned Single Judge in W.P.No.2591/2011 dated 22.11.2011 wherefrom it is evident that the learned Single Judge has duly taken into consideration the provisions of the Adhiniyam of 1984; the judgment and decree of the First Civil Judge, Class-I, Umaria in Civil Suit No.3-A/2002 dated 20.9.2007; the order passed by the First Appellate Court in Civil Appeal No.184-A/2007 dated 19.11.2007 and the order passed by this Court in Second Appeal No.1838/2007 decided on 23.2.2011 and has thereafter dismissed the petition filed by the appellant/petitioner assailing the order passed by the respondent authorities dated 3.2.2011.

6. We have also scrutinized the orders passed by this court in M.P. No.597/1993 dated 4.1.2011 and W.P No.5624/2006 decided on 22.10.2008 on which heavy reliance has been placed by the learned counsel for the appellant to contend that the learned Single Judge should have either followed the aforesaid dictum or referred the matter to a larger Bench. From

a perusal of the orders passed by this Court in the aforesaid two writ petitions it is clear that this Court in the aforesaid two writ petitions was dealing with cases in which rival claims were made by two individuals having unsettled rights seeking allotment of the same plot of land under the provisions of the Adhiniyam of 1984 and in that background this Court had held that the person who was actually in occupation of the land was entitled to grant of patta/lease hold rights under the Adhiniyam of 1984 whereas the fact situation in the present case is totally different.

7. In the instant case there is a concurrent finding of fact against the appellant by three courts to the effect that the respondents were and are in possession of the land prior to 1955; that the State proposed to lease out the said land to them in Revenue Case No.1412-A-20/78-79 and that the courts below have gone on to hold that the respondents are the bhoomi swami and have the right to evict and obtain vacant possession of the plot in question. It is also undisputed that the claim of the appellant for declaration of his title over the land in question as a Bhoomi Swami has been rejected by the trial court and that there is a decree of eviction against him and, therefore, in the light of the judgment and decree of the competent civil courts against the appellant and the concurrent finding of facts against him which have become final, binding and conclusive and cannot be reopened or disturbed by this Court in the present proceedings, the reliance placed by the appellant on the decision of this Court rendered in W.P Nos.5624/2006 and W.P No.597/1993 and the claim of parity in that respect is patently misconceived.

8. We are inclined to say so as three competent courts have recorded concurrent findings to the effect that the respondents have a pre-existing more dominant right over the plot in question so much so that they are also entitled to evict the appellant and obtain vacant possession of the land which finding of law and fact has attained finality and, therefore, the facts and circumstances of the present case cannot be compared with and are totally different from the facts and circumstances on the basis of which W.P No.5624/2006 and W.P No.597/1993 were decided wherein two individuals having equal status in the eyes of law had made rival claims for allotment of the same plot of land whereas in the instant case the appellant is claiming allotment of land under the Adhiniyam of 1984 by ignoring the pre-settled and finally adjudicated dominant occupancy rights of the respondents.

9. We are also of the considered opinion that the second contention of

the appellant also deserves to be rejected on the ground that in view of the aforesaid judgment and decree and the fact that the respondents were in possession of the land that was proposed to be given to them on lease hold rights by the State, the respondents already have a settled and pre-existing right on the plot in question and, therefore, the appellant cannot claim to have a better or dominant right for grant of lease hold rights in respect of the same land under the Adhiniyam of 1984 moreso as he cannot be said to be in occupation of unoccupied vacant nazool land but had infact been inducted as a tenant by the respondents on the land that was actually occupied and settled in their favour and which was also being used by the appellant for business purpose.

10. A perusal of the provisions of the Adhiniyam of 1984 makes it further clear that they are attracted only in cases where a landless person is in occupation of any Government land in an urban area for residential purpose which necessarily pre-supposes that the land occupied by the landless person must be Government land on which no other person has any pre-existing rights and must therefore be vacant and free from encumbrance in that respect.

11. We are inclined to record the aforesaid conclusion as any other interpretation would lead to an absurd situation where a tenant in occupation of land rented out to him by a person having legally settled or valid leasehold rights granted to him by the State Government under law, would claim settlement of the land in his favour simply on the ground that it is Government land, contrary to and in negation of the judicially affirmed and decreed rights and the valid lease granted by the State to the landlord by invoking the provisions of the Adhiniyam of 1984 which situation, in our considered opinion, is neither contemplated nor the object of the Adhiniyam of 1984 which in fact has been enacted only for the purpose of providing lease hold rights to landless persons in respect of sites for dwelling houses in urban areas in the State of Madhya Pradesh and not to curtail or abridge judicially affirmed and decreed existing rights. In view of the aforesaid analysis of the Adhiniyam of 1984 the very claim of the appellant for allotment of land under the Adhiniyam of 1984 is misplaced and misconceived as his claim does not fall within the purview of the Adhiniyam of 1984 as he is not an "occupier" of the Government land in the sense as envisaged under the aforesaid Adhiniyam.

12. As a result of the aforesaid, we are of the considered opinion that the

reliance placed by the learned counsel for the appellant on the decision of this Court rendered in W.P Nos.5624/2006 and W.P No.597/1993 is misplaced as the aforesaid judgments have no applicability to the facts and circumstances of the present case. We are also of the considered opinion that no fault can be found with the decision of the learned Single Judge upholding the order passed by the respondent authorities rejecting the application filed by the appellant claiming lease hold rights under the Adhiniyam of 1984.

13. In view of the aforesaid facts and circumstances of the present case, the appeal filed by the appellant being meritless is, accordingly, dismissed.

14. There shall be no order as to the costs.

Appeal dismissed.

I.L.R. [2012] M.P., 1514

WRIT APPEAL

Before Mr. Justice Ajit Singh & Mr. Justice R.S. Jha

W.A. No. 1390/2010 (Jabalpur) decided on 16 April, 2012

RAMKINKAR VISHWAKARMA

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

A. Service Law - Panchayat Karmi Scheme - Appointment - Preference to reserved category - It does not provide reservation of posts in favor of reserved categories - It only provides for giving them preference in case all things are equal. (Para 10)

क. सेवा विधि - पंचायत कर्मी योजना - नियुक्ति - आरक्षित वर्ग को प्राथमिकता - यह आरक्षित वर्ग के पक्ष में पदों का आरक्षण उपलब्ध नहीं कराती - सभी परिस्थितियां समान होने पर उन्हें केवल प्राथमिकता उपलब्ध कराती है।

B. Panchayats (Appeal & Revision) Rules, (M.P.), 1995 - Rule 5 - Second Revision - Second Revision before Minister is maintainable. (Paras 12 & 13)

ख. पंचायत (अपील व पुनरीक्षण) नियम, म.प्र., 1995 - नियम 5 - द्वितीय पुनरीक्षण - द्वितीय पुनरीक्षण मंत्री के समक्ष पोषणीय है।

Case referred :

2009(1) MPHT 322.

V.S. Trivedi, for the appellant.

Vivek Agrawal, G.A. for the respondents No. 1 & 2.

V.D.S. Chouhan, for the respondents No. 4 & 5.

ORDER

The Order of the Court was delivered by **R.S.JHA, J.** : The appellant has filed this appeal under section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 being aggrieved by order dated 21.10.2010 passed in Writ Petition No.11352/2009 by the learned Single Judge.

2. The brief facts leading to the filing of the present appeal are that pursuant to proceedings for appointment of a Panchayat Karmi taken by the Gram Panchayat, Banjari, Janpad Panchayat, Sidhi an advertisement was issued on 8.3.2006 pursuant to which the appellant who was at serial no.6 of the merit list was recommended for appointment as majority of votes of the Panchas present were cast in his favour. Admittedly, in the merit list prepared in accordance with the Panchayat Karmi scheme, respondent no.5 Ravikumar Singh, was placed at serial no.1 while respondent no.6 Pushpraj Singh was placed at serial no.3.

3. As the appellant was appointed ignoring the merit of respondent nos. 5 and 6, respondent no.6 challenged the appointment of the appellant by filing an appeal before the Collector, Sidhi who allowed the same and directed the Panchayat to conduct proceedings afresh in accordance with the rules. Being aggrieved with the order of the Collector, dated 18.8.2006 the appellant filed a revision before the Commissioner, who rejected the same on 5.8.2008.

4. While the revision filed by the appellant was pending before the Commissioner, respondent no.5 who was the most meritorious candidate in accordance with the merit list submitted an application for intervention before the Commissioner, which has also been rejected. Being aggrieved with the rejection of his application for intervention as well as the order passed by the Commissioner, respondent no.5 filed a further revision before the Minister of the Panchayat Department who up-held the order passed by the Collector and while recording a finding that respondent no.5 was the most meritorious candidate having received 63% marks directed that he be appointed as Panchayat Karmi vide order dated 8.9.2008.

5. The appellant being aggrieved by order passed by the Minister filed

Writ Petition No.11744/2008 before this Court alleging therein that the order passed by the Minister was passed behind his back without giving any notice to him. In view of the submissions of the appellant, this Court by order dated 19.6.2008 remanded the matter back to the Second Revisional Authority to decide the matter in accordance with law after giving opportunity of hearing to the appellant. It is pertinent to note that in the meanwhile in view of the order passed by the Minister, the respondent no.5 has been appointed as Panchayat Karmi and has also been notified as Panchayat Secretary and is working on the said post.

6. Pursuant to the order passed by this Court the Minister of the concerned Department by order dated 1.9.2009 again held the proceedings of the Gram Panchayat to be illegal and contrary to law and by recording a finding that the appointment should have been made on the basis of merit alone and not on the basis of majority of votes, approved the appointment of respondent no.5 as Panchayat Karmi.

7. The appellant being aggrieved again filed a petition before this Court against the order passed by the Minister contending therein that inspite of the order of remand by this Court, no notice and opportunity of hearing was given to him, that the orders passed in favour of respondent no.5 were contrary to law as he had not challenged the initial appointment of the appellant, the appellant being a Other Backward Class (OBC) candidate was entitled to be given preference and priority in appointment above respondent nos. 5 and 6.

8. The learned Single Judge after extensively dealing with the issues raised by the appellant has recorded a finding that the Minister after remanding the matter issued notice to the appellant but he failed to respond to the same, that the cause of action accrued to respondent no.5 to assail the proceedings when the Collector for the first time directed the Panchayat to take up the matter as he was placed at serial no.1 in the merit list, that the respondent no.5 being the most meritorious candidate has rightly been appointed as Panchayat Karmi and that the scheme of the Government clearly specifies that a reserved category candidates would be given preference over the general category candidate only in case where they are otherwise equally placed and after recording such findings the learned Single Judge has dismissed the petition filed by the petitioner.

9. The appellant in the present appeal has again reiterated the aforesaid grounds raised by him before the learned Single Judge.

10. After hearing the learned counsel for the parties, we are of the considered opinion that the findings recorded by the learned Single Judge in respect of the first three issues raised by the appellant deserves no interference as they are based on the facts on record which have been duly considered by the learned Single Judge. As far as the issue regarding preference in appointment to reserved category candidate is concerned, it is clear from a bare reading of the scheme relating to Panchayat Karmi itself, which has been filed by the appellant himself as Annexures P1 and P2 along with the petition, that it does not provide for reservation of posts in favour of reserved categories but only provides for giving them preference in case all things are equal. In fact the State Government in the circular which was filed by the petitioner as Annexure P-2, has clearly specified that reserved category candidates and women would be given preference only in case all things being equal between them and the general category candidates in the following terms :

“चूँकि शासन ने यह स्पष्ट नहीं किया है कि किन पंचायतों में किस जाति वर्ग के पंचायत कर्मों को नियुक्त किया जावेगा, ऐसी दशा में पंचायतों को चाहिए कि वे प्राप्त आवेदन में योग्यता के समान होने पर अनुसूचित जाति, जनजाति या पिछड़ावर्ग तथा महिला उम्मीदवार को प्राथमिकता दे तथा नियुक्त करें।”

11. In view of the aforesaid, we do not find any merit in the submission made by the appellant to the effect that he being a OBC candidate is entitled to be appointed even though he is less meritorious. The contention is accordingly rejected.

12. At the end the learned counsel for the appellant has raised an additional issue contending that the second revision filed by respondent no.5 before the Minister was in fact not maintainable. The aforesaid contention of the learned counsel for appellant is heard only to be rejected on two counts. Firstly, that the appellant did not raise this issue in the previous petition filed by him before the learned Single Judge and in fact submitted to the jurisdiction of the Minister of the Department by seeking a direction to that effect from this Court and secondly in view of the decision of this Court rendered in the case of *Abdul Hasan Qureshi Vs. State of M.P. and others*, 2009 (1) M.P.H.T. 322, wherein the provisions of rule 5 of the M.P.Panchayat and Revisional Rules have been considered and analyzed and it has been held as under :

"Rule 5 has already been quoted above. Second Proviso to Rule 5 makes it clear that no application for revision shall be

entertained against an order appealable under the Act. It is thus clear that an appealable order has been excluded from the jurisdiction of revision. Sub-rule (2) is to be taken note of. Powers of revision under rule 5 may be exercised by any of the Revisional Authorities at first instance. However, sub-rule (2) makes it clear that if, the revisional powers are exercised by the State Government (obviously at first instance of revision), no interference shall be made by other officer mentioned in sub-rule (1) of Rule 5. Sub-rule (2) begins with a non-obstante clause. It further provides that where revisional proceedings have been commenced by the officer mentioned in sub-rule (1), the State Government may either refrain from taking any action under this rule in respect of such case until the final disposal of such proceedings by such officer or may withdraw such proceedings and pass such order as it may deem fit. It goes to suggest that if the revisional power is exercised by any of the officers out of the Commissioner, the Director of Panchayats or the Collector, the State Government may withdraw such proceedings or to wait until final disposal of such proceedings by such officer. This is clearly suggestive of the fact that after final disposal of such proceedings by any of the aforesaid officers, the State Government may entertain the matter. Any other interpretation would make the words 'until the final disposal of such proceedings by such officer' redundant and meaningless. Thus, the State Government is not debarred from exercising revisional jurisdiction against the order of final disposal by the Commissioner, the Director of Panchayats or the Collector made in the exercise of revisional jurisdiction at first instance".

13. We are in respectful agreement with the learned Single Judge and with the aforesaid decision and are of the considered opinion that the second revision filed by respondent no.5 before the Minister was maintainable and permissible in view of the interpretation of Rule 5 of the M.P.Panchayats (Appeal & Revision), Rules, 1995 which has been given in the quoted paragraph.

14. In view of the aforesaid, we do not find any merit in the appeal. It is accordingly dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1519**WRIT APPEAL****Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma****W.A. No. 163/2012 (Indore) decided on 10 May, 2012****LAXMI BAI SOLANKI (SMT.)**

...Appellant

Vs.**C.P.P.C. (CENTRALISED PENSION****PROCESSING CENTRE) & ors.**

...Respondents

Service Law - Family Pension - Excess Payment - Recovery - Bank erroneously paid in excess to her entitlement as sanctioned by State Govt. in the Pension Payment Order - There was no order by State Govt. to fix the appellant's pension at the rate at which it was paid by Bank - Relationship between bank and appellant is that of banker and customer - Appellant can not take benefit of mistaken excess payment made by it - Recovery of excess amount by bank proper - Appeal dismissed.

(Paras 5 & 6)

सेवा विधि - परिवार पेंशन - अधिक भुगतान - वसूली - बैंक ने त्रुटिपूर्ण रूप से उसकी हकदारी से अधिक का भुगतान किया जैसा कि राज्य सरकार द्वारा पेंशन भुगतान आदेश में मंजूर किया गया था - राज्य सरकार द्वारा अपीलार्थी की पेंशन बैंक द्वारा अदा किये गये दर पर निश्चित करने का कोई आदेश नहीं था - बैंक और अपीलार्थी के बीच बैंकर व ग्राहक का संबंध है - अपीलार्थी, बैंक द्वारा गलती से किये गये अधिक भुगतान का लाभ नहीं ले सकता - बैंक द्वारा अतिरिक्त रकम की वसूली उचित - अपील खारिज।

Cases referred :

1994 SCC (L&S) 683, 2010(5) MPHT 125.

M.L. Sharma, for the appellant.*R.C. Singhal*, for the respondents No. 1 & 2.*Mini Ravindran*, Dy. G.A. for the respondents No. 3 to 5.**ORDER**

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

1. By filing this intra Court appeal under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, the

appellant has challenged the order dated 29.03.2012 passed by the learned Single Judge of this Court in Writ Petition No.7008/2010.

2. Briefly stated, the appellant/writ petitioner filed the aforesaid writ petition challenging the recovery of excess payment of Rs.87,239/- sought to be made by respondents No.1 and 2 Bank. The contention of the appellant before the writ Court was that the excess payment was made to her was not on account of any fault or fraud on her part, and therefore, in view of the law laid down by the Supreme Court in the case of *Shyam Babu Verma v. Union of India* 1994 SCC (L&S) 683, the recovery, after retirement, cannot be ordered.

3. The respondents filed reply to the petition. The respondents No.1 and 2-Bank in its reply had stated that excess amount of family pension was erroneously credited in the petitioner's saving bank account. According to the respondent-Bank, the petitioner was not entitled for the amount, which has been credited by the Bank to the petitioner's account. The payment was made in excess to her entitlement, as sanctioned to by the State Government in the Pension Payment Order. In the circumstances, according to the respondent-Bank, the amount, which is sought to be recovered, is not having any bearing about the master and servant relationship, but is a pure dispute of civil nature between the banker and its customer.

4. The case of the respondents No.3, 4 and 5/State was that as per the Madhya Pradesh Pension Rules, 1976 any retired government servant is entitled for full pension till he attains the age of 67 years or till seven years from his death, whichever is earlier. In the present case, the petitioner's husband was retired on 31.12.2001 and died on 26.01.2003. As per the relevant Rules, he was entitled for full pension till 09.01.2008 and thereafter, the petitioner wife of the deceased employee was entitled to get family pension to the extent of amount, which is less than the full pension. However, due to the mistake of respondent-Bank, the petitioner was continued to be paid more amount than her entitlement, which resulted in excess payment.

5. Taking into consideration the aforesaid averments made in the petition, amended petition, reply and rejoinder, learned Single Judge dismissed the writ petition holding that the relationship between the writ petitioner and respondents No.1 and 2 is not of the employer and the employee, but the relationship is of banker and the customer, and therefore, the law laid down by the Supreme Court in the case of *Shyam Babu Verma* (supra) is not applicable.

6. Having gone through the aforesaid order as also the orders passed by the Single Judge of this Court in the case of *Ratan Bai v. State of MP & others* Writ Petition No.3730/2009 (s) decided on 22.03.2010 reported in 2010(5) MPHT 125, we are of the view that the appeal deserves to be dismissed.

7. It is not in dispute that at no point of time, there was any order passed by the State Government to fix the petitioner's pension at the rate at which it was paid by the respondents No.1 and 2 Bank after 09.01.2008. In the circumstances, if the respondent-Bank has paid the excess amount of family pension than the amount payable to the appellant/writ petitioner as per the Pension Payment Order, the appellant cannot be allowed to get the benefit of the said mistaken excess payment made by the Bank. Therefore, the judgment passed by the Supreme Court in the case of *Shyam Babu Verma* (supra) has got no application to the facts of the present case. The appellant/writ petitioner cannot be allowed to take benefit of mistake occurred on the part of the respondent Bank. Thus, the recovery of the excess payment proposed to be made by respondents No.1 and 2-Bank cannot be said to be illegal.

8. As a result, we decline interference into the order passed by the learned Single Judge.

9. The writ appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1521

WRIT PETITION

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

W.P. No. 8180/2011 (Indore) decided on 5 January, 2012

CHANDAN DAGORIYA

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

***National Security Act (65 of 1980), Section 3 - Detention -
Petitioner already in jail - Nothing on record to show that detinue authority
was aware of the fact that Petitioner is already in jail - Detention order
bad due to non-application of mind - Petition allowed. (Para 13)***

**राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 - निरोध - याची पहले
से ही जेल में है - अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि निरोध प्राधिकारी**

इस तथ्य से अवगत था कि याची पहले से जेल में है - मस्तिष्क का प्रयोग नहीं किये जाने के कारण निरोध आदेश अनुचित - याचिका मंजूर।

Cases referred :

(1982) 2 SCC 43, 2011(1) MPHT 208, (1990) 3 SCC 309, (1989) 4 SCC 418, AIR 1990 SC 1196, AIR 1991 SC 1640, (1992) 1 SCC 1, JT 1994 (1) SC 350, 2011(1) MPHT 332, (2011) 5 SCC 244, AIR 2004 SC 4703, (1990) 1 SCC 35, 1982 MPLJ 363.

R.S. Chhabra, for the petitioner.

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

ORDER

The Order of the Court was delivered by :
PRAKASH SHRIVASTAVA, J. : THE petitioner being aggrieved with the orders dated 7th July, 2011 and 30th August, 2011 passed by the respondent No.1 and 2 under the provisions of the National Security Act, 1980 (for short "the Act") has filed the present Writ Petition.

2. In brief, the petitioner's case is that an FIR was registered against the petitioner on 12/4/2011 on the basis of which the petitioner was arrested on 2/7/2011 and was kept in Bherugarh Jail, Ujjain. When the petitioner was in custody, the order dated 7/7/2011 was passed by the respondent No.2, District Magistrate, Ujjain under Section 3(2) read with (3) of the Act, directing the detention of the petitioner. The petitioner was supplied the grounds of detention showing that said detention order was passed on the basis of the FIR registered on 12/4/2011 and three rojnamcha entries dated 16/6/2011, 29/6/2011 and 30/6/2011. The petitioner had submitted the representation before the Advisory Board constituted under Section 9 of the Act and on the basis of the report of the Advisory Board, the respondent No.1 has passed the order dated 30/8/2011, confirming the order of detention passed by respondent No.2 and directing the detention of the petitioner for a period of 12 months till 6/7/2012.

3. A reply has been filed by the respondents taking the plea that the petitioner has criminal back ground and is involved in the anti social activities thereby causing fear and terror to the general public. It has further been stated that various FIRs have been lodged against the petitioner, his brother and other co-accused persons since 2006 and cases are pending against them and though reports have been received in respect of the commission of offence by

the petitioner but due to his terror general public is afraid to lodge FIR against him. The order of detention is sought to be justified on the ground that the activities of the petitioner had led to the problem of public order.

4. Learned counsel appearing for the petitioner has attacked the order of detention primarily and substantially on the ground that the impugned detention order has been passed without considering the fact that at the time of passing of the detention order, the petitioner was already in custody, therefore, such a detention order cannot be upheld in view of the judgments of the Supreme Court as well as of this Court.

5. Learned counsel for respondents has supported the impugned detention order by submitting that the sufficiency of the material on the basis of which the order of detention has been passed cannot be gone into by this Court and that since the activities of the petitioner had created the problem of public order, therefore, the order of detention has rightly been passed.

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

7. The arrest memo (Annexure P.6) filed along with the Writ Petition indicates that the petitioner was arrested on 2/7/2011 in connection with the FIR No.216/2011 dated 12/4/2011 for alleged commission of offence under Section 307/120-B/34 of the IPC and 25/27 of the Arms Act. In the Writ Petition, a clear averment has been made that the petitioner was arrested during investigation of Crime No.216/2011 on 2/7/2011 and since then he is suffering incarceration in Bherugarh Jail, Ujjain and that the impugned detention order has been passed when the petitioner was already in jail. The said fact has not been disputed by the respondents in their reply. A perusal of the impugned order also indicate that the respondents have not taken into account the fact that the petitioner was already in custody when the impugned detention orders were passed. Therefore, the sole question which arises for consideration is as to whether the impugned detention order could have been passed by the respondents without considering the fact and the effect of the petitioner being in jail at the time of passing of the impugned detention order ?.

8. The law in this regard is well settled by various pronouncements of the Supreme Court as well as of this Court that if at the time of passing of the detention order, the detenu is already in jail in connection with some criminal offence, the detaining authority can pass the detention order but the detention authority is required to be aware of the fact that the detenu is already in jail

and he must apply his mind to the possibility of the detenu being released on bail and his probability of indulging in the activities disturbing the public order. While recording the satisfaction, the detaining authority in such cases must apply his mind to the aforesaid aspect of the matter.

9. The Supreme Court in the matter of *Vijay Kumar Vs. State of Jammu and Kashmir and another* reported in 1982(2)SCC 43 has held:-

“10.....Preventive detention is resorted to, to thwart future action. If the detenu is already in jail charged with a serious offence, he is thereby prevented from acting in a manner prejudicial to the security of the State. May be, in a given case there yet may be the need to order preventive detention of a person already in jail. But in such a situation the detaining authority must disclose awareness of the fact that the person against whom an order of preventive detention is being made is to the knowledge of the authority already in jail and yet for compelling reasons a preventive detention order needs to be made. There is nothing to indicate the awareness of the detaining authority that detenu was already in jail and yet the impugned order is required to be made. This, in our opinion, clearly exhibits non-application of mind and would result in invalidation of the order”.

10. The similar issue had come up before the Division Bench of this Court in the matter of *Chhenu @ Yunus Vs. State of MP and another* reported in 2011(1)MPHT 208 wherein after taking note of the judgment of the Supreme Court in the matter of *Sanjay Kumar Agarwal Vs. Union of India* reported in (1990) 3 SCC 309, *N. Meera Rani V. Government of Tamil Nadu* reported in (1989)4 SCC 418, *Dharmendra Suganchand Chelawat v. Union of India* reported in AIR 1990 SC 1196, *Kamarunnissa v. Union of India* reported in AIR 1991 SC 1640, *Abdul Sathar Ibrahim Manik v. Union of India* reported in (1992) 1 SCC 1, *Veeramani v. State of Tamil Nadu* reported in JT 1994(1) SC 350, the Division Bench of this Court held thus:-

“9. From the catena of decisions of Supreme Court it is clear that even in the case of a person in custody, a detention order can validly be passed if the authority passing the order is aware of the fact that he is actually in custody: if he has reason to believe on the basis of the reliable material that there is a

possibility of his being released on bail and that on being so released, the detenu would in all probabilities indulge in prejudicial activities and if the authority passes an order after recording his satisfaction the same cannot be struck down”.

11. In the matter of *Chheni @ Yunus* (supra), the Division Bench of this Court found that nothing was produced to show that the detaining authority was aware of the fact that the detenu was already in jail, therefore, the detention order was held to be invalid by observing :-

“12. The impugned detention order does not give the slightest indication that the Detaining Authority was aware that the detenu was already in jail and yet on the material placed before him he was satisfied that a detention order ought to be made. There is nothing in the order to show that to the knowledge of the Detaining Authority the detenu was already in jail before the date on which he passed the order and that such detention in the opinion of the Detaining Authority was not sufficient to prevent the detenu from acting in a manner prejudicial to the security of the State, and, therefore, power under Section 3(2) of the Act is required to be exercised. The reply and affidavit of the District Magistrate does not throw any light on the vexed question whether the Detaining Authority was aware of the fact that the detenu on being suspected of having committed a serious offence, was already in jail. There is nothing to indicate the awareness of the Detaining Authority that detenu was already in jail and yet the impugned order was made. This, in our opinion, clearly exhibits non-application of mind and would result in invalidation of the order.

13. In view of the foregoing discussion we allow this writ petition and quash the detention order dated March 3, 2010 and the subsequent confirmation order dated April 19, 2010 and direct that the detenu Chheni alias Yunus be released immediately from the custody if he is not required in any other cause. Order accordingly”.

12. In the matter of *Sanjay Yadav and another Vs. State of Madhya Pradesh and another* reported in 2011(1)MPHT 332, the another Division Bench of this Court reiterated the said settled position in law by observing thus:-

“8. It is the settled position in law that the authorities are not precluded from passing an order of detention when the person concerned is in jail, but while passing the order of detention, they are required to apply their mind to the fact that the person concerned is already in jail and there are compelling reasons implies that there must be cogent material before the Detaining Authority on the basis of which it may be satisfied that the detenu is likely to be released from custody in the near future or taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities. The aforesaid proposition in law is supported by the judgments of the Supreme Court in the matter of *Abdul Razak Abdul Wahab Sheikh v. S.N. Sinha, Commissioner of Police, Ahmedabad and Anr*, reported in (1989) 2 SCC 222; in the matter of *N. Meera Rani v. Government of Tamil Nadu and Anr*; reported in (1989) 4 SCC 418; and in the matter of *Dharmendra Suganchand Chelawal v. Union of India and Ors*; reported in (1990) 1 SCC 746”.

13. In the present case, we have minutely perused the impugned order dated 7/7/2011 passed by the respondent No.2. In the said impugned order, there is no mention of the fact that the petitioner was in jail at the time of the passing of the said order. It is not reflected from the said order that the detaining authority was aware of the fact that the petitioner was in jail at the time of passing of the said order nor any such material has been produced before this Court to establish such a fact. The impugned order clearly indicates the non application of mind by the detaining authority on this relevant aspect of the matter. Same is the position in respect of the order dated 30/8/2011 (Annexure P.12) passed by the respondent No.1. Since the detaining authority was not made aware of the fact that the petitioner was in custody in relation to the investigation in a criminal case, therefore, the detaining authority had no occasion to apply his mind in respect of the possibility of the petitioner being released on bail and the probability of his involvement in such activities after releasing on bail.

14. Learned counsel for respondents has placed reliance upon the judgment of the Supreme Court in the matter of *Rekha Vs. State of Tamil Nadu through*

Secretary to Government and another reported in (2011) 5 SCC 244 but in the said judgment also the position in law in respect of passing of the detention order when the detenu is already in jail as noted above has been reiterated.

15. Learned counsel for respondents has placed reliance upon the judgment of the Supreme Court in the matter of *State of MP and another V. Sanjai Pratap Gupta alias Pappu and others* reported in AIR 2004 SC 4703, *State of Punjab Vs. Sukhpal Singh* reported in (1990) 1 SCC 35 and the Division Bench judgment of this Court in the matter of *Sobransingh Rajaram Goojar v. State of MP and others* reported in 1982 MPLJ 363 in support of her submission that High Court cannot substitute its subjective satisfaction for subjective satisfaction of the District Magistrate and that single act affecting public order can also be considered but these judgments are not relevant while dealing with the ground which has been put forth by the counsel for the petitioner and which has been discussed above.

16. Therefore, keeping in view the settled position in law noted above, the impugned detention orders (Annexure P.10 and P.12) cannot be sustained and are hereby set aside. The respondents are directed to set the petitioner free if he is not apprehended in any other matter.

17. The Writ Petition is allowed to the extent indicated above.

Petition allowed.

I.L.R. [2012] M.P., 1527

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 15227/2007 (Jabalpur) decided on 19 January, 2012

GOKUL PRASAD

...Petitioner

Vs.

STATE LEVEL COMMITTEE & anr.

...Respondents

Constitution - Article 226/227 - Cancellation of Caste Certificate - "Bhuniya" Caste is notified Scheduled Tribe in State of M.P. - High Level Caste Verification Committee constituted on a complaint - Caste Certificate cancelled - Held - Report of S.P. was not in consonance and accordance with requirement of judgment 'Madhuri Patil' - Can not be binding on committee - Proceedings are quasi judicial in nature - Impugned order is based on conclusion which is without any

reason - Principle of Natural Justice not followed - Impugned order quashed and set aside - Matter remanded to C.V. Committee again for fresh disposal.
(Para 6, 13 to 18)

संविधान - अनुच्छेद 226/227 - जाति प्रमाण पत्र की खारिजी - म.प्र. राज्य में "भुनिया" जाति अनुसूचित जनजाति अधिसूचित है - शिकायत पर उच्च स्तरीय जाति प्रमाणन समिति का गठन - जाति प्रमाण पत्र खारिज - अभिनिर्धारित - पुलिस अधीक्षक का प्रतिवेदन 'माधुरी पाटिल' निर्णय की अपेक्षाओं के अनुरूप एवं अनुसरण में नहीं - समिति पर बाध्यकारी नहीं हो सकता - कार्यवाहियां अर्धन्यायिक स्वरूप की हैं - आक्षेपित आदेश, कारण विहीन निष्कर्ष पर आधारित - नैसर्गिक न्याय के सिद्धांत का पालन नहीं किया गया - आक्षेपित आदेश अभिखंडित एवं अपास्त - मामला पुनः जाति प्रमाणन समिति को नये सिरे से निपटारे के लिए प्रतिप्रेषित।

Cases referred :

AIR 1995 SC 94, 2006 AIR SCW 6093, 2004 (II) MPJR SN 22, Civil Appeal No. 6253/2009, (2010) 9 SCC 496.

Vivek Dalal, for the petitioner.

Vivek Sharma, for the respondents.

ORDER

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

1. The petitioner obtained a certificate Annexure P-3 dated 2.11.1982 certifying that he belongs to "BHUNJIYA" caste which is notified Scheduled tribe in the State of Madhya Pradesh. However, subsequently pursuant to some complaint, the High Level Caste Verification Committee took cognizance of the matter and by the impugned order dated 17.7.2007 cancelled the aforesaid caste certificate of the petitioner. This cancellation order Annexure P-2 is called in question in the present writ petition.

2. Shri Dalal, learned counsel for the petitioner submits that as per the judgment of the Supreme Court in *Madhuri Patil Vs. Additional Commissioner, Tribal Development and ors.* [AIR 1995 SC 94], the Vigilance Officer/ Superintendent of Police (SP) prepared and filed two reports before the Committee, which are annexed with the petition at page 42 and 46 respectively. By placing reliance on these two reports of the SP, Shri Dalal submits that both the reports clearly show that the petitioner's caste was found

to be 'Bhunjiya' and reports are in his favour. By drawing the attention on the circular of G.A.D., filed by the respondents as Annexure R-2 dated 8.9.1997, Shri Dalal further submits that in clause 3, it is made crystal clear that where the report of the Vigilance Officer is in favour of the petitioner, the Caste Verification Committee is not required to take any further action. The next submission of Shri Dalal is that the impugned order is a non-speaking order where as as per the judgment of Madhuri Patil and the judgment of Supreme Court reported in 2006 AIR SCW 6093 *State of Maharashtra vs. Ravi Prakash Babulalsing Parmar*, It is made clear that the proceedings before the screening committee is quasi judicial in nature and it was obligatory on the part of the said committee to deal with the every aspect of the matter and pass a reasoned and speaking order. He submits that the impugned order is basically an ipse-dixit of the committee and no reasons are assigned for arriving the said conclusion.

3. Learned counsel for the petitioner submits that it is strange that basic reason for cancelling the certificate is Section 80 CPC notice issued by an Advocate. Learned counsel while criticising the order submits that the procedure adopted by the committee is totally unknown to law. In support of this he placed reliance on the judgment of this Court in 2004 (II) MPJR SN 22 *Sudhir Batham vs. M.P. State Level Committee for Verification of Caste Certificate*. He also placed reliance on the judgment of the Apex Court delivered in Civil Appeal No. 6253 of 2009 *Sayanna vs. State of Maharashtra* and others. By relying on para 10 of the judgment, learned counsel submits that the committee has committed an error of law in deciding the matter against him.

4. *Per contra*, learned Panel Lawyer supported the order passed by the Verification Committee and submits that it is open to the verification committee to decide whether the report submitted by the S.P. is to be relied upon or not. In other words, he submits that the Caste Certificate Committee is not bound by the order of the S.P. and in case it has any doubt or is not satisfied with the report of the S.P., the committee can still proceed in accordance with the procedure laid down in the case of *Madhuri Patil* (supra). He placed reliance on para 6 of his return which shows that one certificate in favour of the petitioner was issued by the M.L.A. and the Councillor of Municipal Corporation, Sehore. The petitioner on the strength of this certificate obtained caste certificate which was rightly cancelled by the aforesaid Committee.

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

6. This is now a matter of common knowledge that the High Level Caste Verification Committee is constituted pursuant to the judgment of the Supreme Court in *Madhuri Patil* (supra). The Apex Court in the aforesaid matter has held that obtaining a false caste certificate is not only a fraud on the society, it is fraud on the constitution as well. The Apex Court therefore prescribed a methodology for the purpose of examining and scrutinizing the caste certificate/status of an employee. On the basis of that judgment which became the law of the land under Art. 141/142 of the Constitution of India, the Caste Verification Committees are established nationwide and they are obliged to act and conduct in consonance with the procedure prescribed in the aforesaid judgment of *Madhuri Patil*. I find force in the submission of Shri Dalal that the procedure to be followed by the Caste Verification Committee is quasi judicial in nature and it has been held by the Supreme Court in *Ravi Prakash* (supra).

7. There is yet another reason for holding that the procedures is quasi judicial in nature i.e because cancellation of caste certificate of a candidate/person may lead to civil and criminal consequences. He may lose his employment or occupation which he has obtained on the basis of aforesaid caste status. In certain cases, Caste Verification Committee had directed for holding criminal prosecution where the certificate is obtained by fraud or misrepresentation of facts. Therefore, it is necessary in all these matters to conduct the proceedings in a fair and quasi judicial manner.

8. Pausing here a moment, I will deal with the first contention of Shri Dalal, which is based on the G.A.D.Circular dated 8.9.1997, clause 3. On the strength of this paragraph and para 6 of judgment of *Madhuri Patil* (supra), Shri Dalal submits that once the reports of the Vigilance Committee/S.P. Was in his favour, the further proceedings by the Caste Verification Committee was impermissible in law.

9. Before dealing with this aspect it is profitable to refer para 12(5) and (7) of the judgment which reads thus:-

12(5). Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over-all charge and such number of Police Inspectors to investigate into the social status claims. The Inspector

would go to the local place of residence and original place from which the candidate hails and usually resides or in case of migration to the town or city, the place from which he originally hailed from. The vigilance officer should personally verify and collect all the facts of the social status claimed by the candidate or the parent or guardian, as the case may be. He should also examine the school records, birth registration, if any. He should also examine the parent, guardian or the candidate in relation to their caste etc. or such other persons who have knowledge of the social status of the candidate and then submit a report to the Directorate together with all particulars as envisaged in the pro forma, in particular, of the Scheduled Tribes relating to their peculiar anthropological and ethnological traits, deity, rituals, customs, mode of marriage, death ceremonies, method of burial of dead bodies etc. by the castes or tribes or tribal communities concerned etc.

7. *In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.*

10. It is made obligatory for the Vigilance Officer to conduct an enquiry in a particular manner. This para shows that Vigilance Officer has to personally verify and collect all the facts regarding social status claimed by the candidate or his parents or guardian. The said officer is required to examine the school records, birth register and further required to examine the parents, guardian of the candidate in relation to their caste etc. The Vigilance officer is required to examine other persons who have knowledge of social status of the candidate and then submit a report to the Directorate with all particulars as envisaged in the proforma.

11. In para 12(7), it has been held that in case the report is in favour of the candidate and found to be "genuine" and "true", no further action need be taken except where the report or the particulars given are procured or found to be fraudulently obtained. The conjoint reading of para 12(5) and (7)

would show that the SP was required to conduct an enquiry in a particular manner and to collect evidence in the manner and the methodology prescribed in the para 5 and 7 of the judgment. On this report which should be prepared strictly in consonance of para 12(5), the Caste Verification Committee is required to apply its mind on the genuineness and correctness of the said report. A microscopic reading of para 12(7) of the judgment shows that when the report is found to be genuine and true then only no further action need be taken by the said Committee. However, while examining "genuineness" or "trueness" of the said report, needless to mention that the committee is to be guided by para 5 of the said judgment. In other words, it is obligatory on the part of the S.P to conduct an enquiry in a particular manner in consonance with the requirement of para 5 of the judgment in *Madhuri Patil* (supra).

12. When report prepared, is as per the aforesaid methodology and report is in favour of the candidate, the Committee cannot have any objection to give a finding that it is genuine and true. However, when the report is sketchy and not dealing with each and every aspect which is required to be dealt with as per para 5 of the judgment, it is open to the Caste Verification Committee to proceed further and such a cryptic report or a report which is not in consonance with para 5 of the judgment would not stop the committee to proceed further. Therefore, in the fact situation of the case, it is to be seen that whether the report placed on the record at page 42 and 46 of this writ petition fulfills the requirements of para 12(5) of the aforesaid judgment.

13. The report dated 19.5.2003 Annexure P-8 shows that there is no application of mind and the requirement of para 12(5) are not fulfilled in this report dated 19.5.2003. There is no finding about school record, birth certificate etc. The statement of parents and guardian are not recorded. So far as the report dated 24.11.2003 is concerned, it is also a sketchy report. This report also shows that there is no whisper about examining the records of the petitioner regarding his qualification, birth certificate etc. The statement of certain complainants were recorded and on the basis of that, in two paragraphs it is held that petitioner belongs to "Bhunjiya" community. In the considered opinion of this Court, reports are not in consonance with the requirement of judgment of the Supreme Court in *Madhuri Patil* (supra). Since these reports do not fulfill the requirement of the aforesaid, the same cannot be binding on the committee and as per para 12(7) of the judgment, it was open for the committee to proceed further. Therefore, the contention of Shri Dalal that as per clause 3 of circular dated 8.9.1997, it was not open for

the Committee to proceed further after receiving S.P.'s report has to be and accordingly negated. The second attack on the report is that it is not in consonance with the principles of natural justice, equity and fair play. It is not as per the requirement of the Supreme Court judgment wherein it is held that the said proceedings are *quasi judicial* in nature (Ravi Prakash). It is gathered that the petitioner filed his own detailed affidavit which is placed on record at page 28. The petitioner filled up the prescribed format Annexure P-6 and provided details against each and every entry of the prescribed proforma.

14. A Committee which is quasi judicial in nature is under a legal obligation to deal with every defence taken by the petitioner. However the Committee has only recorded that on perusal of S.P. report, statement of non-applicants and on the basis of available documents, the petitioner does not belong to scheduled tribe community. For arriving to this conclusion, a legal notice sent by Advocate under Section 80 CPC was also taken into account. The Supreme Court in catena of judgments has held that the conclusion should be based on reasons. It is held that reasons are heart beat of conclusions and in absence of reasons, no conclusions can sustain judicial scrutiny. In recent judgment of *Kranti Associates Private Limited and another Vs Masood Ahmed Khan and Others* reported in (2010) 9 SCC 496, the Apex Court has laid down the necessity for providing reasons for quasi judicial and administrative authorities. The relevant para reads as under:-

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

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

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

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

- (f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- (g) Reasons facilitate the process of judicial review by superior courts.
- (h) The ongoing judicial trend in all countries, committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.
- (i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
- (j) Insistence on reason is a requirement for both judicial accountability and transparency.
- (k) If a judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.
- (l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.
- (m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny.
- (n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said

requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence.

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

15. This judgment makes it crystal clear that quasi judicial authority has to deal with every aspect of defence taken by the petitioner by a reasoned order.

16. Applying the aforesaid litmus test laid down by the Supreme Court, it would show that the impugned order is based on conclusion without their being any reasons for the same. No reasons are assigned by the Committee as to why affidavit filed by the petitioner is not found to be trust worthy. There is no whisper about the said affidavit filed by the petitioner before the committee. The entries made by the petitioner in Annexure P-6 are also not discussed and no reasons are assigned as to why the defence and description given by the petitioner are not found to be trust worthy by the said committee.

17. In the light of the aforesaid, impugned order Annexure P-2 does not fulfill the requirement of principles of natural justice and such an order passed by a quasi judicial authority cannot sustain judicial scrutiny. Accordingly, I have no hesitation to quash and set aside the order dated 17.7.2007 Annexure P-2.

18. For the reasons stated above, the impugned order Annexure P-2 is quashed and set aside. The matter is remitted back to the Caste Verification Committee from the stage of passing of final order. Needless to mention that the said Committee has to pass fresh order in accordance with the judgment passed in *Madhuri Patil* (supra) and in accordance with law. The petition is allowed to the extent indicated above. The said Committee shall issue fresh notice to the parties and shall try to decide the matter as expeditiously as possible, preferably within four months.

No costs.

Petition allowed.

I.L.R. [2012] M.P., 1536

WRIT PETITION

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

W.P. No. 692/2012 (PIL) (Indore) decided on 23 January, 2012

VALMIK SAKARGAYEN

...Petitioner

VS.

STATE OF M.P. & ors.

...Respondents

A. Constitution - Article 19 - National Flag - Flying National Flag is a fundamental right under Article 19 of Constitution of India. (Para 4)

क. संविधान - अनुच्छेद 19 - राष्ट्र ध्वज - राष्ट्र ध्वज फहराना भारत के संविधान के अनुच्छेद 19 के अंतर्गत मूलभूत अधिकार है।

B. Flag Code, 2002 - Is not a law within the meaning of Article 13 of Constitution of India. (Para 4)

ख. ध्वज संहिता, 2002 - यह भारत के संविधान के अनुच्छेद 13 के अर्थान्तर्गत कोई विधि नहीं है।

C. Constitution - Article 226 - Public Interest Litigation - Rampant use of Proscribed material for preparing National Flag - Contravention of provisions of Emblems and Names (Prevention of Improper Use) act, 1950 or Prevention of Insult to National Honour Act, 1971 may constitute an offence and machinery can be set in motion by taking appropriate steps in that direction - PIL based on vague allegations and inchoate right does not call for any ubiquitous action and direction. (Para 4)

ग. संविधान - अनुच्छेद 226 - लोक हित वाद - राष्ट्रध्वज बनाने के लिए बहिष्कृत सामग्री का बिना रुकावट उपयोग - संप्रतिक और नाम (अनुचित प्रयोग निवारण) अधिनियम, 1950 या राष्ट्र गौरव अपमान निवारण अधिनियम, 1971 के उपबन्धों का उल्लंघन अपराध गठित कर सकता है और उस दिशा में उचित कदम उठाकर तंत्र को क्रियान्वित किया जा सकता है - लोक हित वाद अस्पष्ट अभिकथनों एवं अधूरे अधिकार पर आधारित, किसी सर्वव्यापी कार्यवाही और निदेश की आवश्यकता नहीं।

Case referred :

2004 AIR SCW 704.

Valmik Sakargayen petitioner in person.

ORDER

The Order of the Court was delivered by :
S.K.SETH, J. : A practicing lawyer of this Court has filed this PIL petition on the eve of Republic Day. Petition is not directed any particular order but for a 'probe' and 'writ of mandamus'.

2. We have heard the petitioner at length. Perused the material placed on record.

3. Basic grievance of the petitioner lie in rampant use of proscribed material for preparing the National Flag other than the material mentioned in the Flag Code 2002. According to him it should be stopped to prevent insult to National Flag. There are other vague averments, for example, "The national Flag is not only thrown after its use but also easily be found at every street of the towns"; "the public at large including children after celebrating the Republic Day and Independence Day drape the National Flag manufactured by the aforesaid materials on their vehicles and some even write slogans on it."

4. The right to fly National Flag respectfully is no longer res integra or malum in se. The law on this point is settled by the elaborate judgment of the Supreme Court in *Union of India vs. Naveen Jindal 2004 AIR SCW 704*. It is now recognised as a fundamental right of every Indian citizen. It is a part of the fundamental right of "freedom of expression" enshrined in Article 19 of Part III of the Constitution of India. But that right is subject to restrictions. The right is not unfettered. Flag Code 2002 on flying the National Flag issued by Government of India is not a law within the meaning of Article 13 of the Constitution of India. However, in a given case, contravention of provisions of the 'Emblems and Names (Prevention of Improper Use) Act, 1950 or 'Prevention of Insults to National Honour Act, 1971' may constitute an offence and for that the machinery can be set in motion by taking appropriate steps in that direction. So long as that does not happen; we are of the opinion that present PIL based on vague allegations and inchoate right does not call for any ubiquitous action and direction.

5. We are conscious that our 'National Flag' is a most solemn and secular symbol of the country. The distinctive design and colours of National Flag is intended to project the identity of our country and foster national spirit. It is proclamation of the country's separate and sovereign existence. It is definitely one of the most revered objects in our society. It must be treated with utmost

respect and dignity because it represents collective expression of commitment and loyalty to nation as well patriotism for the country. All this may not be possible without imposing reasonable restrictions on its use. It is necessary to protect the National Flag against mutilation, destruction, misuse but that does not mean to prevent individuals from having access to the flag. A liberal use of National Flag would require greater civic awareness on the part of citizens. The desired enforceability can be better achieved by providing not merely legal sanctions but to facilitate performance of the task through example, role-model. The element of compulsion, in legal sanction when combined with natural urge for obedience of the norms to attract social approbation would make the citizens willing participants in the exercise. As regards the use of material, we can not resist the temptation of quoting Pandit Govind Malaviya who said, "The importance of a National Flag does not depend on its colour, its bands or its other parts. The Flag as a whole is important and other things the colours etc. that it contains are immaterial. The flag may be of a piece of white cloth or of any other insignificant material but when it is accepted as a National Flag, it becomes the emblem of national self-respect. It becomes an expression of the sense of freedom of a nation."

6. In this view of the matter we find no merit in the writ petition. Same is dismissed summarily.

Petition dismissed.

I.L.R. [2012] M.P., 1538

WRIT PETITION

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

W.P. No. 16274/2007 (Jabalpur) decided on 25 January, 2012

RAMJILAL BURMAN

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

A. Central Fundamental Rules - Rule 56(j) - Compulsory Retirement - Benefit of Assured Career Progression Scheme was granted on Seniority cum fitness basis - Revenue Committee found that petitioner remained absent from duty consistently even after warning - Also found in drunken condition during duty hours - As the merit consideration to extend the ACP Scheme was not the criteria, therefore, it cannot be said that the petitioner was not compulsorily retired in public interest.
(Para 12)

क. **केन्द्रीय आधारभूत नियम - नियम 56(जे) - अनिवार्य सेवानिवृत्ति** - ए.सी.पी. स्कीम का लाभ वरिष्ठता-सह योग्यता पर दिया जाता है - राजस्व समिति ने पाया कि चेतावनी देने के बाद भी याची कर्तव्य से सतत अनुपस्थित रहा - साथ ही कार्य अवधि के दौरान नशे की हालत में पाया गया - चूंकि गुणदोषों पर विचार किया जाना ए.सी.पी. स्कीम का मानदंड नहीं था, अतः यह नहीं कहा जा सकता कि याची को अनिवार्य सेवा निवृत्ति लोक हित में नहीं दी गई थी।

B: Central Fundamental Rules - Rule 56(j) - Central Civil Services (Pension Rules) 1972 - Rule 48 - Compulsory Retirement - Petitioner was initially compulsorily retired under Rule 56(j) - As petitioner had not attained the age of 55 years, therefore, subsequently corrigendum was issued and petitioner was retired in public interest under Rule 48 of Rules, 1972 - Merely mentioning a wrong provision in order and subsequently amending the same referring correct rule would not vitiate the proceedings and consequential order. (Para 16)

ख. **केन्द्रीय आधारभूत नियम - नियम 56(जे) - केन्द्रीय सिविल सेवा (पेंशन नियम), 1972 - नियम 48 - अनिवार्य सेवानिवृत्ति** - आरम्भ में याची को नियम 56(जे) के अंतर्गत अनिवार्य सेवानिवृत्ति किया गया - याची ने 55 वर्ष की आयु नहीं प्राप्त की थी, अतः उसके बाद शुद्धि पत्र जारी किया जाकर नियम 1972 के नियम 48 के अंतर्गत याची को लोक हित में सेवा निवृत्ति दी गई - आदेश में मात्र गलत उपबंध उल्लिखित किये जाने से और तत्पश्चात सही नियम का संदर्भ देकर उसमें संशोधन, कार्यवाहियों को एवं परिणामिक आदेश को दूषित नहीं करेगा।

Cases referred :

(1992) 2 SCC 299, 1993 SCC (L&S) 710, (1984) 2 SCC 8, 1992 SLR 673, 2001 AIR SCW 862, 2000 (4) SLR 581, 1985 SCC (L&S) 535, AIR 1998 SC 3058, AIR 2010 SC 1105, AIR 1964 SC 1329, AIR 1936 PC 253(2).

M.B. Saxena, for the petitioner.

K.N. Pethia, for the respondents No. 2 & 3.

ORDER

The Order of the Court was delivered by :
J.K. MAHESHWARI, J.: Invoking the supervisory jurisdiction of this Court under Article 226/227 of the constitution of India by challenging the tenability of order dated 18.9.2007 (Annexure-P/10) passed by the Central

Administrative Tribunal dismissing the Original Application No.1210/2005 filed by the petitioner, assailing the order of compulsory retirement dated 26.8.2004 and also of rejection of representation after decision of review committee dated 26.8.2005 petitioner has filed the present writ petition.

2. The facts in brief are that the petitioner was appointed as Monument Attendant on 11.10.1971. The benefit of Assured Career Progression Scheme (hereinafter it be called as 'the ACP Scheme') was granted w.e.f. 9.8.1999 as per order dated 13.2.2001. Vide order dated 26.8.2004, in exercise of power under Section 56 (j) of Central Fundamental Rules, he was retired compulsorily in public interest on completion of 50 years of age and 33 years of service. Assailing the said order an OA No.986/2004 was filed, which was disposed of as per order dated 1.4.2005 with the direction to the respondents to decide the representation of the petitioner dated 27.11.2004 and to pass the detailed, reasoned and speaking order within the period of two months from the date of receipt of certified copy of the order of the Tribunal. Thereafter the respondents have rejected the representation on 26th of August, 2005 upholding the order of compulsory retirement dated 26.8.2004. Thus the Original Application was filed before the Central Administrative Tribunal inter-alia contending that petitioner was extended the benefit of the ACP Scheme in the year 2001 based upon the recommendation of scrutiny committee, examining the performance and the records, however no room left with the department to treat him to be a deadwood and to retire him compulsorily in public interest. It is further contended that the scrutiny committee has merely considered the period of unauthorized leave, which was sanctioned by the department, however it would have no impediment on a service career. If the allegation of absence from duties has been denied, it is required to be examined by initiating the departmental enquiry and the order of compulsory retirement ought not to be passed solely for the said reason, as nothing is adverse after granting him the benefit of ACP scheme. It is said that the action so taken by the department is discriminatory because many of the employees whose service record is worse but their cases have not been scrutinized to retire them compulsorily taking appropriate action. . It was also stated that passing of an order in exercise of power under FR 56 (j) without completion of 55 years of age merely on the basis of 33 years of service is not in accordance to law, therefore, the order of compulsory retirement and rejection of representation may be quashed.

3. The respondents have filed their reply stating the fact that the entire

service record of the petitioner was screened by the review committee. As per report of the review committee dated 14.6.2004, it was clear that in addition to absence of duty and availing half pay leave and without pay leave, while discharging the duty he was found consuming liquor for which his service was terminated. On reinstatement again he was found consuming the liquor and was not discharging the duties of Chowkidar with integrity on monuments and found absent. On account of his willful absence from duties and carelessness, his integrity was found doubtful, however the petitioner was found to be deadwood for the employment of respondents. It is said that on account of his willful absence and on receiving complaints various notices and warning have been given to him which were not replied and responded. It is further stated that mere grant of the benefit of ACP Scheme cannot be compared with the promotion because it is merely a financial upgradation which may be given to the employees on the basis of seniority-cum-merit, however it may not be a ground to retain an employee in service. It is said that during the period 1998-2004 more than 50 valuable sculpture were resulted into the loss due to inappropriate working of petitioner. In such circumstances the order of compulsory retirement, rejection of the representation has rightly been passed.

4. The Central Administrative Tribunal after hearing him recorded the finding that the order passed in the case of *N.P. Samadariya Vs. Union of India and Ors* in OA No.691 of 2003 dated 23.6.2004 relied upon by the petitioner is having no application to the facts of the present case. In view of the judgment of Apex Court in the case of *Baikuntha Nath Das Vs. Chief District Medical Officer, Baripad* (1992) 2 SCC 299 and in the case of *Post and Telegraph Board and others Vs. C.S. No. Murthy*, 1993 SCC (L & S) 710 and after examining the ACP Scheme it was held that extending the benefit of financial upgradation, which is based upon the seniority-cum-fitness and not upon the merit, it is of no help to the petitioner. The Tribunal while dealing with the issue of not attaining the age of 55 years after referring FR 56(j) has observed that the case of the petitioner falls under sub clause (ii) and not under sub clause (i) of FR 56(j), therefore the order has rightly been passed. In addition thereto, it has been observed that he has completed 30 years of service which has not been denied, however considering the service record of the petitioner, he can be retired under rule 48 of the CCS (Pension) Rules, 1972. The Tribunal found that the order retiring the petitioner compulsorily is after following the procedure laid down and as per the

recommendations of the Committee which do not appear to be mala fide or suffer from vice of arbitrariness.

5. Shri Saxena, learned counsel representing the petitioner contends that after extending the benefit of ACP Scheme in the year 2001, no adverse material was available to the respondents to retire him compulsorily treating him to be a deadwood. In support of such contention reliance has been placed on judgments of *J.D. Shrivastava Vs. State of Madhya Pradesh*, (1984) 2 SCC 8, *Ram Ekbal Sharma Vs. State of Bihar and Anr*, reported in 1992 SLR 673, *State of Gujrat Vs. Umedbhai M. Patel* 2001 AIR SCW 862, *Sayed Mubark Ali Vs. State of Rajasthan and another*, reported in 2000 (4) SLR 581, *Chandu Lal Vs. Management of M/s Pan American World Airways Inc.*, 1985 SCC (L&S) 535, *M.S. Bindra v. Union of India and others*, AIR 1998 SC 3058 and *Ms. G. Vallikumari V. Andhra Education*, AIR 2010 SC 1105.

6. It is further contended that the order of compulsory retirement has been passed in exercise of power under FR 56 (i) but as the petitioner has not completed 55 years of age, therefore, order of compulsory retirement cannot be passed in exercise of such power and the Tribunal committed an error in rejecting the aforesaid plea. In the rejoinder plea has been taken that the rectification of the mistake on the note-sheet (Annexure R/1) is an outcome of manipulation to treat the order of retirement passed under rule 48 of CCS (Pension) Rules, 1972 instead of FR 56(j). It is submitted that the reasoning specified by the Review Committee is based upon no material, to which explanation of his working without demand of extra remuneration on the monuments at remote areas since 1971 to 2004 has been pleaded. It is further submitted that during the discharge of the duties, there was no loss to valuable sculptures, therefore the order impugned may be set aside.

7. Per contra, Shri K.N. Pethia, learned counsel representing the respondents has argued in support of the findings as recorded by the Tribunal and contends that looking to the recommendations of the review committee, it is apparent that the petitioner was consistently found absent from duty and also found consuming liquor again and again on the duty place of monuments. His integrity has been found doubtful due to carelessness, however rightly recommended to retire him in public interest compulsorily. So far as non-completion of age of 55 years as required under FR 56 (j) is concerned, it is submitted that the said matter was reconsidered by the committee as apparent

from the note sheet (Annexure R/1) and looking to the recommendations it was found his order of retirement may be passed in public interest under Rule 48 of Central Civil Services (Pension) Rules, 1972. It is further contended that merely mentioning a wrong provision in the order would not invalidate the order once the criteria to retire an employee compulsorily, either under FR 56 (j) or under rule 48 of Pension Rules is the same. The reliance has been placed on the judgment of the Apex Court in the case of *Baikuntha Nath Das (supra)* and *Hukumchand Mills Ltd. V. The State of M. P. and another, AIR 1964 SC 1329*. In the said facts and circumstances, it is prayed that the petition filed by the petitioner may be dismissed.

8. After having heard learned counsel for the parties, it is to be seen whether the order of compulsory retirement Annexure-A/2 and rejection of representation Annexure-A/1 attached with O.A as Annexure-P/1 is based upon sufficient material available on record and the findings recorded by the Tribunal upholding the aforesaid order is in conformity to law or not?

9. To answer the aforesaid question guidelines framed by the Apex Court in the case of *Baikuntha Nath Das (supra)* are referred and still holds the field, which are reproduced as under:

"(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is Passed (a) mala fide, or (b) that it is based on no evidence, or (C) that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material in short; if it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service

before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/ character rolls, both favourable and adverse. If a government servant is promoted to higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.'

10. In the case of *Post and Telegraph Board* (supra) the Apex Court has held as under :-

"As has already been pointed out, an order of compulsory retirement is not an order of punishment. Fundamental Rule. 56 (j) authorises the Government to review the working of its employees at the end of their period of service referred to therein and to require the servant to retire from service if, in its opinion, public interest calls for such an order. Whether the conduct of the employee is such as to justify such a conclusion is primarily for the departmental authorities to decide. The nature of the delinquency and whether it is of such a degree as to require the compulsory retirement of the employee are primarily for the Government to decide upon. The courts will not interfere with the exercise of this power, if arrived at bona fide and on the basis of material available on the record."

11. In view of foregoing it is clear that the order of compulsory retirement is not an order of punishment. If the authority competent is of the opinion that the compulsory retirement of an employee is required in the public interest, the principles of natural justice, having no application because it is not the punishment. The order ought to be passed by authorities without having any *malafide* based on sufficient material after subjective satisfaction by due application of mind. The order ought to have been passed, after considering the entire service record giving more importance to the service record of last

5 years. If a person is promoted the adverse remarks lose their sting if promotion is based upon merit-cum-seniority, and the un-communicated adverse remarks may also be taken note of. The Court while making the judicial scrutiny of the recommendations would not examine the matter as an appellate court. On the anvil of the touchstone of the aforesaid legal position, the recommendation of the review committee so made is required to be seen, which is reproduced as under :-

**MINUTES OF THE REVIEW COMMITTEE MEETING
HELD ON 14/6/2004**

Today i.e. 14/6/2004, a meeting of the Review Committee was held under FR 56, in the chamber of Dr. N. Vyas, Dy. Superintending Archaeologist to review the service performance of Sri Ramji Lal Barman, Monument Attendant, Tigwa, who has joined in the Survey on 5/10/71, completed the 33 years of service and attained 50 years of age. In this meeting the following were present to review the performance:

1. Dr. N. Vyas, Dy. SA,
2. Sri M.S. Chauhan Dy. SA
3. Sri R.K. Sinha, ASA
4. Sri G. Ramchandani, ASAE
5. Sri D.S. Sood, ASAE

The performance of Sri Ram Ji Lal Barman was reviewed with a view, whether he should continue in service or awarded compulsory retirement. The following lapses have been noticed on part of Sri Ram Ji Lal Barman :

1. He was absent from duty for 727 days for which he has been treated on LWP.
2. He has availed EL for 534 days.
3. He has availed ML for 201 days.
4. HPL for 32 days.
5. Total leave period 1493 days.
6. He has been warned for proceeding on leave without

permission and without handing over the charge.

7. He is used to sign the duty register while on leave.
8. He has been warned several times for remaining willfully absent from his duty.
9. He has been issued show cause notice for not found on duty and remaining absent from his duty place, consuming liquor and due to these lapses why the services not be terminated.
10. He has been found consuming liquor and not giving duty at the monument.
11. He has been found irregular during Govt. duty.

After going through his performance after assessing the personal records of the above mentioned employee it has been observed that

1. His integrity is doubtful due to willful absence and carelessness in duty.
2. He is ineffective for the Government.

Hence it has been decided that he may be given compulsory retirement:

Submitted to Superintending Archaeologist for orders please.

(D.S.Sood)
ASAE II

(G. Ramchandani)
ASAE I

(R.K.Sinha)
ASA

(M.S.Chauhan)
Dy.SA

(Dr. Narayan Vyas)
Dy.SA

Agreed with the decision
of the Review Committee

Sd/

22.6.04

12. On examination of the instructions of the ACP Scheme, it is apparent that the benefit of ACP Scheme was granted to the petitioner on the basis of seniority-cum-fitness, however while extending the benefit of the second career advancement and financial upgradation, the merit consideration to extend the

said benefit was not the criteria. In such circumstances, considering the recommendation of the review committee, it is apparent that the petitioner remained absent consistently, even after warning. On duty he was found in drunken position to which disciplinary action was taken, even thereafter he was again found consuming liquor consistently on duty place however his integrity was found doubtful. The performance of the petitioner was also not found satisfactory becoming to a government employee as expected by the officer while recording subjective satisfaction. Thus in the opinion of this Court, it is not a case, in which no material is available or sufficient material is not available to reach a conclusion as arrived by the committee, recommending the petitioner to retire compulsorily in public interest. In the opinion of this Court, the sufficient material is available before the Committee to form an opinion against the petitioner to pass the order of compulsory retirement. It is to be observed here that the power so exercised by the authorities is after due application of mind and on satisfying with material so available before them. As per the instructions of the ACP scheme, such recommendations are based upon seniority-cum-fitness, the merit consideration is subsidiary, therefore such argument loses the strength in view of the legal position discussed herein above. It is to be further observed that in the facts of the present case, specific allegation of mala fide has not been alleged except to say the subsequent change of provisions from FR 56(j) to rule 48 of CCS (Pension) Rules, 1972 is by way of manipulation. In the opinion of this Court, the explanation put forth by respondent that wrong provision was referred in earlier order which is rectified subsequently appears to be a plausible explanation and liable to be accepted because the recommendation was made by committee after going through the entire service record, which do not suffer from vice of arbitrariness warranting interference by this Court, and also looking to the fact that the employer vests with the absolute power and the discretion to chop off the employees who are deadwood and not fit to continue further in the employment.

13. In view of foregoing facts, the judgments relied upon by petitioner is required to be analyzed. In the case of *J.D. Shrivastava* (supra) the facts were different wherein the consideration to recommend the judicial officer was made as per the entries of about 20 years before from the date of decision though the said officer was promoted subsequently relying upon the same entries. While in the present case, the petitioner was granted the benefit of ACP scheme on the basis of criteria of seniority-cum-fitness and not on

consideration of merit, however such judgment is of no help to the petitioner. In the judgment of *Ram Ekbal Sharma* (supra), the Apex Court found that the order so passed making the allegation of financial irregularities committed by the officer concerned without following due process of law, which was punitive, however quashed the order of compulsory retirement. While in the present case, the competent authority has applied its mind on the basis of material available on record and the order is not punitive, therefore, it is of no help. In the case of *Umedbhai M. Patel* (supra), the Apex court found that the order of compulsory retirement was passed against an employee against whom disciplinary enquiry was initiated and he was under suspension without having adverse entry in the confidential record even after crossing efficiency bar, and merely two years were remained in his retirement, however the order was set aside. While in the facts of the present case, the position is entirely different as apparent from the discussion made herein above. In the case of *Syed Mubarak Ali* (supra) which is a case of Jaipur Bench of Rajasthan High Court where no material was placed to form an opinion to retire an employee compulsorily although it is not binding but the reasoning so assigned to quash the order of compulsory retirement in the said case is entirely different and distinguishable on facts, therefore the petitioner cannot derive any benefit of such judgment. The cases of *Chandu Lal* (supra) and *Ms. G. Vallikumari* (supra) are the cases of the penalty, however the principles in a case of penalty are different than the order of compulsory retirement passed in public interest, however those cases are of no help to the petitioner.

14. The reliance so placed in the case of *M.S. Bindra* (supra) of the Apex Court is also to be seen wherein after going through the entire record the Apex Court found that the recommendations made was found inappropriate in a judicial scrutiny and not based on the sound principles while in the present case in view of the foregoing discussions, it is apparent that the scrutiny made by the authority competent is based on material available and with subjective satisfaction. In view of the foregoing, we are of the considered opinion that the power so exercised by the authorities to retire the petitioner compulsorily is in public interest with bona fides.

15. Now to dwell upon the argument so advanced by learned counsel Shri Saxena that the petitioner had not completed 55 years of age at the time of passing the order of compulsory retirement, however issuance of impugned order under FR.56(j) is unsustainable in law, and amounting to commit the illegality, to issue subsequent corrigendum Annexure R-1. It may also be seen

that interpretation of the provisions of FR 56(j) (i) and (ii) made by the Tribunal is innocuous and contrary to the spirit of FR 56(j).

16. Under Fundamental Rule 56(j) the Government is having power to retire their employees in public interest and also under Rule 48 of CCS (Pension) Rules, 1972. In Pension Rules an employee is also having a right to obtain retirement by giving a notice as prescribed. After going through the said rules and the various judgments produced by the parties, it is apparent that under FR 56(j) the appropriate authority has absolute right to retire an employee if it is necessary to do so in public interest to the employee of group A or B service or post and has entered in Government service before attaining the age of 35 years, after he has attained the age of 55 years; in any other case, after he has attained the age of 55 years provided that in the age of a Group D official such action can be taken if he entered in service after 23rd July, 1966. In other words, a government servant belonging to Group A and B who has entered government service after attaining the age of 35 years, and officers belonging to Group C and D can be prematurely retired after they have attained the age of 55 years with the exception of Group D officials, who entered into service on or before 23d July, 1966. In addition a Government servant in Group C service or post who is not governed by any Pension Rules can also be retired after he has completed 30 years service under FR 56(j). The identical provisions exists under Article 459 of Civil Services Regulations. Under the aforesaid Rules the recommendations may be made by the Committee following guidelines. The criteria is required to be followed by the Committee, to a Government employee whose integrity is doubtful will be retired. If the employee was found ineffective will also be retired. The decisive consideration should be the fitness, competence of the employee to continue on the post which he is holding. The service record is also required to be considered as specified in the judgment of *Baikunth Das Nath* (supra). It is further to be observed that no employee should ordinarily be retired on the ground of ineffectiveness if in any event he would be retired attaining the age of superannuation within a period of one year from the date of consideration of his case. In view of the foregoing it is clear that either for issuance of order under FR 56(j) or under Rule 48 of the CCS (Pension) Rules, it shall be based upon the recommendation of the committee. If the committee has recommended that employee is fit to retire in public interest and completed the age or the qualifying service of 30 years on the date of recommendation, the orders to retire him compulsorily may be passed. If this

Court assumes that the petitioner's case falls under category D employee and he has not attained the age of 55 years but the order was passed under FR 56(j) by wrongly quoting the provision in place of rule 48 of CCS (Pension) Rules, 1972, it would not invalidate or vitiate the recommendations of the Committee because he was not found fit to be continue in the employment looking to his past performance and conduct relates to his integrity. In view of the discussion made herein above, it is clear that the recommendations to retire the petitioner in public interest has rightly been made by the Committee after subjective satisfaction and on the basis of material, however in such circumstances if the order of compulsory retirement of the petitioner was passed under FR 56(j) which is subsequently corrected by issuing the corrigendum as per Annexure R/1, it would not invalidate the recommendations of the committee. In the opinion of this Court, the petitioner may be retired compulsorily in public interest under rule 48 of CCS (Pension) Rules, 1972 because he had already completed 30 years of service on the date of order. In the said context, reliance on the judgment of Privy Council in the case of *Nazir Ahmad vs. King Emperor*, AIR 1936 PC 253(2) contending that the power is given to do a certain thing in a certain way the thing must be done in that way or not otherwise, and per contra the judgment of the Apex Court in the case of *Hukumchand Mills Ltd. (supra)* has been considered. In this context, it is to be observed that merely mentioning a wrong provision in order and subsequently amending the same referring correct rule would not vitiate the proceedings and consequential order. In such circumstances the rectification made by the respondent cannot be said to be the manipulation tainted with the mala fide, in fact, it is amounting to rectification of mistake which may amounting to the irregularity and not the illegality. In view of the foregoing discussion if the interpretation of FR 56(j) (i) and (ii) made by the Tribunal has not been found appropriate even then it would not change the result of the petition. Thus the argument advanced on the said issue by Shri Saxena is hereby repelled.

17. In view of the foregoing discussions and for the reasons stated herein above we are of the considered opinion that the order passed by the authority retiring the petitioner compulsorily in public interest is based upon the recommendations of the committee, made bona fide and after subjective satisfaction finding the petitioner to be a deadwood and required to be chopped off. Consequently the order of compulsory retirement of petitioner passed in public interest is in accordance with law. Accordingly, the order passed by the

Tribunal dismissing the original application filed by the petitioner do not warrant any interference in this writ petition which is hereby dismissed. In the facts and circumstances of the case, parties are directed to bear their costs.

Petition dismissed.

I.L.R. [2012] M.P., 1551

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 14419/2011 (Jabalpur) decided on 27 January, 2012

PRABHU DAYAL SINGH

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Sections 13, 57, 57-A, 70, 72(2)(3) - Appointment of Officer In-charge - One Krishi Upaj Mandi was split in two different mandies - Splitting of Mandi took place after the completion of tenure of elected body - State Government postponed the holding of election in exercise of power under Section 57-A of Adhiniyam, 1972 - Committee In-charge should have been appointed instead of Officer In-charge - Petitioner permitted to continue as Chairman of Committee In-charge till holding of election - Petition allowed.

(Paras 4 & 6)

कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धाराएँ 13, 57, 57ए, 70, 72(2)(3) - प्रभारी अधिकारी की नियुक्ति - एक कृषि उपज मंडी दो अलग-अलग मंडियों में विभाजित - मंडी का विभाजन निर्वाचित निकाय का कार्यकाल समाप्त होने के पश्चात हुआ - राज्य सरकार ने अधिनियम 1972 की धारा 57ए के अंतर्गत शक्ति का प्रयोग करते हुए चुनाव स्थगित किये - प्रभारी अधिकारी के बजाए समिति प्रभारी नियुक्त किया जाना चाहिए था - याची को चुनाव सम्पन्न होने तक समिति के अध्यक्ष के रूप में बने रहने की अनुमति दी गई - याचिका मंजूर।

Vivek Rusia, for the petitioner.

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

ORDER

K.K. TRIVEDI, J.: The petitioner by this petition under Article 226 of the Constitution of India has called in question the order dated 21.7.2011 (Annx.P/6), by which in place of the nominated Committee, Tahsildar Chourai

has been appointed as Officer Incharge of the Krishi Upaj Mandi Samiti Chourai, and has prayed for a writ of certiorari for quashment of Notification dated 21.7.2011 (Annx.P/7) in so far as it relates to appointment of Tahsildar Chourai as Officer Incharge of Krishi Upaj Mandi Chourai. It is the contention of the petitioner that earlier there was one composite Krishi Upaj Mandi Samiti (hereinafter referred to as Mandi for short) constituted under the provisions of M.P. Krishi Upaj Mandi Samiti Adhiniyam, 1972 (hereinafter referred to as the Act for brevity) for Amarwada and Chourai. The elections of the said Mandi were held and the petitioner was elected as Chairman of the said composite Mandi and other members were also elected. However, the State Government in exercise of its powers conferred under Section 70 of the Act, decided to alter the area of the said Mandi, splitting up Mandi in two different Mandis one for Amarwada and one for Chourai. For the purposes of constituting the said split up Mandi Chourai, elections were required to be held, but since there was an intention expressed by the State Government in this respect, the election of the Mandi which was due in the year 2010 were postponed. The Notification in this respect was issued on 1.5.2010. The elections were further postponed by Notification dated 4.11.2010. Again the State Government exercised the power under Section 57 of the Act and postponed the election of the Mandi upto May 2012. However, as there was splitting up of Mandi and two different Mandis were constituted in exercise of power under sub-section (2) of Section 72 of the Act, the Notification was issued on 7.12.2010 and a Committee Incharge was constituted by the State Government and the petitioner being the earlier elected President of the consolidated Mandi was nominated as President of the said Committee Incharge. The said Committee was to remain in operation till the fresh election of the Mandi is held and an elected body of Mandi is constituted. However, in a complete ignorance of the Law, the order impugned was issued pursuance to the Notification dated 21.7.2011 and in place of the Committee Incharge, an Officer Incharge, the Tahsildar of Chourai has been appointed to function in the Mandi at Chourai. According to the petitioner, such an action is bad in law and, therefore, the Notification as also the order passed in this respect are bad in law and are liable to be quashed.

2 : Refuting the allegations made by the petitioner, return has been filed by the respondent No.2. Learned Deputy Advocate General, appearing for the respondents, has vehemently contended that the interpretation as has been done by the petitioner with respect to the constitution of the Committee

Incharge, is totally misconceived. It is submitted by the learned Deputy Advocate General that in fact the provisions of sub-section (3) of Section 72 of the Act are to be read harmoniously along with the provisions of Section 13 of the Act. It is contended that since the Committee Incharge was constituted from amongst the members of the earlier Committee, therefore, their term was fixed as per the provisions of Section 13 of the Act. It is contended that the tenure of a Chairman, Vice Chairman and Members of the Market Committee is only for a period of five years from the date of first meeting of the Market Committee which could be extended for a period of one year by granting extension of six months each on two occasions in case the elections are not held or could not be held. In case the elections are not held even after the extended period, only the Officer Incharge is required to be appointed as per the provisions of Section 57 of the Act. It is contended that since the election of the Mandi was not held and it was postponed in exercise of powers conferred on the State Government, the Notification was rightly issued in consequence of such circumstances under Section 57 of the Act and an Officer Incharge has rightly been appointed. It is contended that if this is examined from the angles aforesaid, the claim of the petitioner is totally misconceived and the petition deserves to be dismissed.

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

4 : Undisputedly, the splitting up of the Mandi earlier compositely constituted for two areas has taken place after the period of tenure of the elected body of composite Mandi had completed. The State Government has extended the period for holding the elections by issuing the Notification. It was open to the State Government to dissolve the elected body and to appoint an Officer Incharge of the Mandi as per the provisions of Section 57 of the Act at that time. Instead of doing this, exercising the power under Section 57-A of the Act, the State Government has postponed the election of Mandis upto the month of May 2012. In between the order was issued by the State Government in exercise of power conferred under Section 70 of the Act splitting up the composite Mandi in two different Mandi for two different areas. Consequently, it was necessary for the State Government to constitute a Committee for the purposes of looking after the work of split up and newly constituted Mandis. For the said purposes, Notification was issued on 7.12.2010. Thus, it was a totally different action which was taken under subsection (2) of Section 72 of the Act. This power was to be exercised only in the circumstances when action was taken under Section 70 of the Act, by

which the intention of the State Government was shown to split up a Market Committee or to constitute two or more Market Committees. This particular aspect is dealt with in Chapter- XII of the Act separately, whereas, the constitution of the Committee on its first Notification by holding election is prescribed in Chapter-III of the Act. The appointment of Officer Incharge pending constitution of first Market Committee is prescribed under Section 10 of the Act in Chapter-III which is totally different than that of a specific provision made in Chapter-XII of the Act. The contingencies are totally different. The first constitution of the Committee is prescribed under Section 7 of the Act for which the provisions are made under the said Chapter. If the intention of the Legislature was to make prescription of the very same provision for split up or bifurcated Market Committees, instead of prescribing constitution of a Committee Incharge, the legislature itself would have prescribed appointment of Officer Incharge in such a circumstances in Chapter-XII of the Act and specifically under sub-section (2) of Section 72 of the Act. Since this was never intended by the legislature to appoint an Officer Incharge in such a contingency where already an existing Mandi is split up in two, specific provision is made for appointment of a Committee Incharge till the constitution of the split up Committee by holding election of office bearer.

5 : Therefore, in the considered opinion of this Court, it was not open to the respondents to issue a Notification, appoint an Officer Incharge in place of the Committee Incharge in the Mandi at Chourai. Further, the arguments of learned Deputy Advocate General, that since the period of the elected body of consolidated Committee had over and extended period had also expired, the Committee Incharge could not continue in a split up Committee, presided over by the petitioner cannot be accepted. The Committee Incharge was appointed under sub-section (3) of Section 72 of the Act with specific prescription that said Committee will remain operative till the elections are held and a Market Committee is constituted, as it is specifically provided under sub-section (2) of Section 72 of the Act that such Committee Incharge be established "during the period of pendency of the Constitution of the Market Committee". If the elections of the Market Committee are postponed for any reason, it cannot be said that the period of Committee Incharge is over as there is no period prescribed for the Committee Incharge under the entire Act. The life of such a Committee is already qualified by use of words that the same is to remain functional till constitution of the elected body of the Mandi by holding the election. Thus, such a contention of the learned Deputy Advocate

General is not acceptable nor the Notification and order of the State Government can be accepted to be just and proper.

6. Consequently, the writ petition stands allowed. The Notification and the order impugned dated 21.7.2011 so far as they relate to appointment of Officer Incharge in Krishi Upaj Mandi Samiti Chourai, are hereby quashed. The petitioner be allowed to continue as Chairman of the Committee Incharge of Krishi Upaj Mandi Chourai, District Chhindwara, till holding of the election of the said Krishi Upaj Mandi Samiti and constitution of an elected Committee. There shall be no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 1555

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 10570/2011 (Jabalpur) decided on 1 February, 2012

GURUNANAK PRATHMIK UPBHOKTA BHANDAR ...Petitioner
Vs.

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

Kerosene Dealers Licensing Order (M.P.), 1979 - Cancellation of Semi whole sale dealership - Scheme has been prepared under order, 1979 providing that semi wholesale dealers for distribution of Kerosene shall function only in those areas where wholesale dealers are not appointed - Nothing in show cause notice that petitioner is functioning in area where wholesale dealers are functioning - No enquiry in this regard conducted - No enquiry as to whether continuance of petitioner as semi wholesale dealer is desirable under Scheme or not - Order cancelling dealership quashed. (Paras 7 & 8)

कैरोसीन डीलर्स अनुज्ञप्ति आदेश (म.प्र.), 1979 - अर्ध थोक डीलरशिप का निरस्तीकरण - आदेश 1979 के अंतर्गत योजना तैयार की गई है, जिसमें उपबंधित है कि कैरोसीन के वितरण हेतु अर्ध थोक विक्रेता केवल उन क्षेत्रों में कार्य करेगा जहां थोक विक्रेता नियुक्त नहीं हैं - कारण बताओ नोटिस में ऐसा कुछ नहीं कि याची उन क्षेत्रों में कार्यरत है जहां थोक विक्रेता कार्य कर रहे हैं - इस संबंध में कोई जांच संचालित नहीं की गई - कोई जांच नहीं कि क्या याची का अर्ध थोक विक्रेता के रूप में बने रहना, योजना के अंतर्गत वांछनीय है अथवा नहीं - डीलरशिप निरस्त करने का आदेश अभिखंडित।

Sanjay Bahirani for the petitioner.

S.P. Rai, P.L. for the respondents.

A.K. Pare, for the intervenor.

ORDER

K.K. TRIVEDI, J.: This order will also govern disposal of W.P. No.10572/2011 and W.P. No.10574/2011 because the facts and the impugned order passed in the said cases are identical. However, for the purposes of this order, the facts are taken from W.P. No.10570/2011.

2. The petitioner, a semi wholesale dealer of kerosene, has come before this Court ventilating its grievance against the order dated 31.05.2011 passed by the respondent No.2 by which the semi wholesale dealership of the petitioner has been cancelled and it has been directed that the kerosene be distributed through the wholesale dealer to the fair price shop for sale of the same to the consumers. The contention of the petitioner is that the semi wholesale dealers were appointed in terms of the policy made by the State Government for distribution of the kerosene within the rural areas. Later on a policy was made by the State Government that the semi wholesale dealer shall not be appointed. The respondent No.3 filed a writ petition in public interest before this Court in which the policy of the State Government was called in question. Considering the contentions raised, as also the reply given by the State Government that after making of the new policy, no semi wholesale dealers were appointed after 1999, this Court passed the order while disposing of the said writ petition on 26.10.2009 in the following manner :

“Regard being had to the totality of circumstances, we command that the price of kerosene at any cost shall not exceed the price fixed by the Central Government and no semi whole sale dealer shall be appointed where whole sale dealers are functioning as 1999 circular holds field. The price declared by the Collector shall always be subject to maximum price fixed by the Central Government.”

3. Pursuant to the said order, it is alleged that a show cause notice was given to the petitioner, of which a reply was filed but without taking any action under the provisions of Madhya Pradesh Kerosene Dealers Licensing Order, 1979 (herein after referred to as ‘Licensing Order’), the order was passed against the petitioner cancelling the licence of distributorship of the petitioner, which was required to be challenged in W.P. No.18911/2010. The said writ

petition came up for hearing before this Court on 10.01.2011. Since it was found that no opportunity of hearing was extended to the petitioner and the impugned order run de hors to *audi alteram partem*, this Court was of the opinion that the order impugned passed on 23.11.2010 be kept in abeyance, an opportunity of hearing to the petitioner be given and a fresh order be passed against the petitioner, if necessary as per the provisions of the Licensing Order, referred to herein above. It is the case of the petitioner that a show cause was issued to the petitioner again quoting the order passed by the Division Bench of this Court in the P.I.L. filed by the respondent No.3 and a reply of the same was filed by the petitioner. It was the case of the petitioner that for the rural areas semi wholesale dealers were still to continue as per the scheme and since the petitioner was working as a semi wholesale dealer in the rural area, even under the scheme or in terms of the order passed by this Court, licence of the petitioner was not required to be cancelled.

4. This is also stated by the petitioner that since in the aforesaid writ petition filed by the respondent No.3 as P.I.L. a specific stand was taken by the State Government by filing a return, it was not open to the respondents now to take an U turn now and refute such a stand. The return of the respondents in that respect, which was filed before the Division Bench of this Court in the aforesaid P.I.L. of respondent No.3, also contemplates the same condition. It was categorically contended by the State Government that only in the headquarters where there were no wholesale dealers, the semi wholesale dealers were being allowed to distribute the kerosene oil to the retailers. It was categorically said that semi wholesale dealers were allowed to supply kerosene oil only in remote areas as per the scheme. Since this was the stand of the State Government before this Court, it was not open to respondent No.2, Collector, to cancel the licence of the petitioner without again conducting an enquiry to the effect whether the petitioner was working in the remote area or was carrying on the business in the district headquarter. Thus, it is contended that the order impugned passed by the respondent No.2 is bad in law and is liable to be quashed.

5. On service of the notice of this writ petition, the respondents No.1 and 2 have filed their return. It is contended by the respondents that in terms of the directions issued by the Division Bench of this Court in the P.I.L. of respondent No.3, the State Government was required to keep price of the kerosene at such a level that it shall not exceed the price fixed by the Central Government and the other part of direction was that no semi wholesale dealer

shall be appointed where wholesale dealers are functioning. It is further contended that entire exercise was done. The case of the petitioner was examined and after holding that the petitioner cannot be allowed to continue to function in terms of the order passed by this Court, the licence of the petitioner was cancelled. It is contended that a show cause was given to the petitioner and after receiving the reply from the petitioner, the order has been passed after hearing the petitioner and, therefore, it cannot be said that the order impugned is bad in law. The respondents have prayed that the writ petition be dismissed.

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

7. Undisputedly the policy has been made by the State Government in terms of the provisions of supply order. The semi wholesale dealer is prescribed in the said scheme. It is categorically said that the semi wholesale dealers have to function only in the areas where wholesale dealers are not appointed at the headquarters. In the very same scheme it is further said that in case wherever the need is felt, only the cooperative societies are to be appointed as semi wholesale dealer. Thus, it is clear that semi wholesale dealers were not to be removed from the distribution scheme as a whole. The Division Bench of this Court has also considered this aspect and this much only has been said in the order passed by this Court that no semi wholesale dealer shall be appointed where wholesale dealers are functioning in terms of the provisions of circular of 1999. What was the need of issuing the show cause notice to the petitioner when the order passed by the Collector was set aside by this Court and whether the petitioner was functioning in a area where the wholesale dealer has already been appointed, was not mentioned in the show cause notice and, therefore, the show cause itself was vague. The reply was submitted by the petitioner categorically pointing out the fact that the appointment of semi wholesale dealer has not been put at knot by this Court while passing the order in the aforesaid P.I.L. On the other hand, it was categorically contended by the petitioner that the semi wholesale dealers were appointed in the said district only because wholesale dealers were not making proper supply of kerosene in the remote areas. It was further categorically said that at district headquarter no semi wholesale dealer was appointed. The petitioner has annexed with its reply to show cause notice, an order issued by respondent No.2 on 23.06.2003 in which it was categorically said that the wholesale dealers were supplying kerosene to the Sewa Sahkari Samiti, who were not distributing the kerosene on all centers and the same were kept only up to the

head office of the Sewa Sahkari Samiti. The consumers of kerosene from the rural areas were required to come to such distant place at head office of the Samiti for obtaining the kerosene and, therefore, distribution of kerosene on all sub centers be got done through the semi wholesale dealers. This fact was brought to the notice of the District Cooperative Central Bank so that the societies affiliated with the Bank may also be directed accordingly. It was further contended by the petitioner that the appointment of petitioner as a semi wholesale dealer was prior to coming into force of 1999 Scheme and in the said scheme there was no provision made for cancellation of licence of those, who were earlier granted the licence of distribution of kerosene as semi wholesale dealer. Therefore, it was said that the show cause notice issued to the petitioner was bad in law. The circular dated 05.09.2009 (Annexure P-12) was also brought to the notice of Collector whereby the Commissioner of Food & Civil Supplies and Consumer Protection, Madhya Pradesh, Bhopal, has pointed out that semi wholesale dealer is also an important integral part of the scheme of distribution of kerosene, therefore, appointment of semi wholesale dealers in rural area was correct. It was stated in that order that the opinion with respect to such a scheme of the State Government was being sent. The petitioner further contended that a proposal was given that transportation charges may be reduced so that the cost of kerosene, even after supply of the same by semi wholesale dealer, may not rise above the price fixed by the Central Government.

8. From the aforesaid facts, it is clear that a detailed enquiry was required to be conducted by the respondent No.2 to the effect whether the petitioner was distributing the kerosene within the headquarter area or was distributing the kerosene only in the remote area. It was to be examined whether continuance of the petitioner as a semi wholesale dealer was desirable as per the scheme of the State Government, indicated in the order dated 05.09.2009. A perusal of the order passed by the respondent Collector makes it clear that nothing has been considered by the said authority, no finding has been recorded that the petitioner is functioning as a semi wholesale dealer within the headquarter area and not in the rural area. No finding is recorded as to the scheme of the State Government and simply it is said that the reply of the petitioner is not satisfactory, therefore, the supply of kerosene to the petitioner is stopped with immediate effect and in place of the petitioner, the wholesale dealer will continue to distribute the kerosene to the retail shop for supply of the same to the consumers. The order impugned is, thus, not a speaking order

in true sense. The meaning of speaking order is that if a plea is raised, the same has to be decided and a finding is required to be given. In absence of any finding, it is deemed that such an objection or a plea raised by the aggrieved is rejected. However, there is again no reasons for rejection. The other aspect is that once the State Government has already taken a plea before this Court that semi wholesale dealers are to be appointed in the remote area and such a plea has been accepted by this Court and a direction in that respect is issued, without holding any enquiry, without recording any finding whether the petitioner was working in the same area where a wholesale dealer was functioning or not, the order could not have been passed by the respondent No.2. If such an order is passed in such a manner, the only reasons, as have come in the return of the respondents, would be that it is only in alleged compliance of the order of this Court, without even examining that the order would be applicable in particular case or not. By no stretch of imagination can it be interpreted from the order of this Court that there was a complete ban for appointment of semi wholesale dealers. Therefore, the order of respondent Collector cannot be supported in such circumstances nor can be given a stamp of approval by this Court.

9. Consequently, the writ petition is allowed. The order impugned dated 31.05.2011 (Annexure P-1) is hereby quashed. The respondents are commanded to restore the supply of kerosene to the petitioner for distribution of the same in its capacity as semi wholesale dealer within the remote areas. There shall be no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 1560

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 17709/2011 (Jabalpur) decided on 2 February, 2012

PREETAM SAHU

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Section 9, Public Gambling Act (3 of 1867), Section 4-A, 6(c) - Externment - Superintendent of Police submitted report against petitioner in the year 2008 - Order of Externment passed in 2011 - No material to show that petitioner continued to remain involved in offences*

under Gambling Act - Although, petitioner was convicted more than thrice within a period of three years under Gambling Act, but no material available on record for District Magistrate to record satisfaction that petitioner is likely to engage himself in the commission of offence - Order of Externment quashed. (Paras 4 & 5)

क. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 9, सार्वजनिक द्यूत अधिनियम (1867 का 3), धारा 4ए, 6(सी) - निष्कासन - पुलिस अधीक्षक ने वर्ष 2008 में याची के विरुद्ध प्रतिवेदन प्रस्तुत किया - निष्कासन का आदेश 2011 में पारित किया गया - कोई तथ्य शेष नहीं जो यह प्रदर्शित करते हों कि याची लगातार द्यूत अधिनियम के अंतर्गत अपराध में लिप्त रहा है - यद्यपि, याची द्यूत अधिनियम के अंतर्गत तीन वर्ष की अवधि में तीन बार से ज्यादा सिद्धदोष किया गया - किंतु जिला मजिस्ट्रेट की संतुष्टि हेतु अभिलेख पर कोई तथ्य मौजूद नहीं कि याची के आगे भी अपराध में संलग्न रहने की संभावना है - निष्कासन का आदेश अपास्त।

B. *Rajya Suraksha Adhiniyam, M.P. 1990 (4 of 1991), Section 14 - Appeal - Appellate Authority is required to examine each and every ground raised in memo of appeal. (Para 6)*

ख. राज्य सुरक्षा अधिनियम, म.प्र., 1990 (1991 का 4), धारा 14 - अपील - अपीलीय प्राधिकारी से अपेक्षित है कि मेमो ऑफ अपील में उठाये गये आधारों का एक साथ या पृथक-पृथक परीक्षण करे।

C. *Constitution - Article 21 - Reasonable Restriction - If restraints are to be put or such restraining power is exercised, germane reasons are required to be given. (Para 7)*

ग. संविधान - अनुच्छेद 21 - युक्तियुक्त निर्बन्धन - यदि अवरोध लगाना है या ऐसी निर्बन्धनकारक शक्ति का प्रयोग किया जाता है, समुचित कारण देना आवश्यक है।

Case referred :

(1979) 1 SCC 222.

Shailesh Mishra, for the petitioner.

Samdarshi Tiwari, G.A. for the respondents.

O R D E R

K.K. TRIVEDI, J.: The grievance of the petitioner in this petition filed under Article 226 of the Constitution of India is that by the order dated 04.08.2011, the respondent No.2, Collector, has directed the petitioner to

leave the area of Districts Raisen, Vidisha, Sagar, Bhopal, Hoshangabad, Sehore and Narsinghpur within 48 hours from the date of receipt of order and not to enter in the said area for a period of one year without the permission of the competent authority. It is further directed by this order that in case of breach of the order aforesaid, action be taken against the petitioner under Section 14 of the Madhya Pradesh Rajya Suraksha Adhiniyam, 1990 (herein after referred to as 'Act'). It is contended that in response to the show cause notice issued, petitioner has filed his detailed reply pointing out the fact that the petitioner was not involved in any such activities on account of which such order of externment can be issued against him. No conduct of the petitioner was there after 2007 to indicate that the petitioner was involved in any such illegal activities, which has caused fear in the mind of people living in the society or that the peace in the area was likely to be disturbed. However, without considering such pleas raised by the petitioner, relying on the statement of certain persons recorded behind the back of the petitioner, the order impugned was passed. The petitioner preferred an appeal under the provisions of Section 9 of the Act aforesaid but without considering the grounds raised in the appeal, the same was dismissed by order dated 05.10.2011, therefore, the petitioner was required to approach this Court by way of filing this writ petition. It is, thus, contended that order passed against the petitioner is per se illegal and is liable to be quashed.

2. That no return has been filed by the respondent State but to assist the Court, record in original was called. After perusal of record, it is contended by the learned Govt. Advocate that there were reports against the petitioner and after considering the reports, action was initiated against the petitioner in the year 2008. Full opportunity of defence was granted to the petitioner. The reports submitted against the petitioner indicated that till the year 2007, there were cases registered against him involving the petitioner in the offences of Public Gambling Act. The petitioner is keeping a shop and while doing the business, the petitioner was also involved in such gambling continuously and the offences were registered against him, of which the trial was conducted. It was further stated that on such action, the petitioner was sentenced with the fine under the aforesaid Gambling Act but he has not improved his behaviour. Thus, because of such reasons, on making a proposal against the petitioner by the police authorities, the statement of witnesses were recorded and after recording the statement, authorities came to the conclusion that because of the illegal activities of the petitioner, the atmosphere in the society was being

polluted, therefore, show cause notice was issued to the petitioner and his reply was obtained which was not found satisfactory. In view of this, it is contended that if the order was passed against the petitioner, nothing wrong was committed by the competent authority. It is further contended that the appeal of the petitioner was considered and after examining the record, the appellate authority came to the conclusion that no wrong was committed by the authorities while passing order against the petitioner and, therefore, the appeal of the petitioner was dismissed.

3. Heard learned Counsel for the parties at length and perused the original record.

4. Undisputedly the report was given against the petitioner in the year 2008 on the basis of which the proceedings were initiated on 08.07.2008. The report submitted by the Superintendent of Police indicates that the petitioner was involved in committing offence of Section 4-A of the Gambling Act and he was imposed with the fine under the said Act by the Court. The report further said that the petitioner continued to remain involved in the same offences and thereby was creating unrest in the society. However, when the statements of witnesses were recorded, it was nowhere said that even after the submission of the report, further offences were registered against the petitioner and it was found that he continued to remain involved in the offences under the Gambling Act. No independent witness was examined to indicate that because of said activities of the petitioner, there was unrest in the society. The provisions of Section 6(c) of the Act prescribe that if a person has been convicted thrice of an offence within a period of three years under Section 3 or 4 or 4-A of the Public Gambling Act in its application to the State of Madhya Pradesh, the District Magistrate may, if he has reason to believe that such person is likely again to engage himself in the commission of offence similar to that for which he was convicted, direct such person by an order, to remove himself outside the district or part thereof or such area or any district or districts or any part thereof, contiguous thereto by such route and within such time as the District Magistrate may order and not to enter or return to the District or part thereof or such area or such contiguous district or part thereof, as the case may be, from which he was directed to remove himself. However, this Section has two parts. First is with respect to the involvement of a person and his conviction thrice of an offence within a period of three years and the other part is that the District Magistrate may, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar

to that for which he was convicted. For the first part, there was sufficient material available on record to indicate that the petitioner was convicted more than thrice within a period of three years for the offence under Section 4-A of the Gambling Act. However, for the purposes of recording the satisfaction of the authorities, i.e. the District Magistrate that the petitioner is likely again to engage himself in the commission of an offence similar to the aforesaid offence, it was necessary to record the evidence of the independent witnesses. As is seen from the record, the respondent No.2 has recorded the statements of only three persons namely, (i) Shriniwas Sharma, Head Constable of Police Station, Badi; (ii) H.L. Thakur, Station House Officer, Bamhori, who was earlier Station House Officer of Police Station, Badi; and (iii) Surendra Kumar Tiwari, Police Station Incharge, Badi. The statements of these witnesses are examined.

5. The fact which was proved was only this much that certain challans were filed against the petitioner for offence under Section 4-A of the Gambling Act and fine was imposed by the Court. However, even on the date of statement, it was nowhere said in the statement categorically by these persons that the petitioner was still involved in the commission of offence under Section 4-A of the Gambling Act or that there were certain other cases registered against him continuously. The first statement of witness Shriniwas Sharma was recorded on 18.05.2009, the other statement of witness H.L. Tiwari was recorded on 04.09.2010 but the said person was not the Police Station Incharge at the relevant time and he was not in a position to state whether the petitioner was still involved in commission of such offence of Gambling Act. The only person Surendra Kumar Tiwari, who could state about such fact, was examined on 24.02.2011 but even he could not state that there were any offences committed by the petitioner after 2007 and cases were registered against the petitioner under the Gambling Act after the said year so as to indicate that still the petitioner was continuously involved in such offence. No other witnesses were examined nor any independent evidence was recorded in that respect. Therefore, it could not be said that there was sufficient material to hold that the District Magistrate was satisfied that the petitioner is continuously involved in commission of offence similar to that for which he was convicted. How could it be inferred when neither there was any evidence nor a proof nor even registration of a single crime against the petitioner after the date of show cause notice issued way back in the year 2008. Thus, the finding reached by the respondent No.2 with respect to his satisfaction could

not be said to be justified.

6. The other aspect is that when the appeal was preferred by the petitioner under the statutory provisions of Section 9 of the Act, the appellate authority was required to examine each and every ground raised by the petitioner in his memo of appeal. The copy of memo of appeal is available on record as Annexure P-5. The petitioner has very categorically contended that he was not involved in any such activities after the year 2007. It was categorically pointed out that when the show cause notice was received by the petitioner, he stated that all such offences were committed by the petitioner earlier. It further appears that show cause was issued to the petitioner only on 26.02.2011, i.e. after recording of the evidence and when the petitioner refuted such allegations made in the show cause, he was not offered an opportunity of cross-examining those witnesses, who were examined by the respondent No.2. Nothing is available on record to indicate that after filing of the reply of show cause the petitioner was granted an opportunity of defence in appropriate manner by permitting cross-examination of those witnesses who were examined behind the back of the petitioner. After recording the ordersheet dated 23.05.2011 when the petitioner was directed to produce the defence witness, on three dates the case was adjourned because the Presiding Officer was not available. Only on 30.06.2011 the fact is recorded that the petitioner was present, he was heard and thereafter the order was passed on 04.08.2011. This indicates that virtually opportunity of defence was not granted to the petitioner. With the show cause the petitioner has filed the certificate of the Sarpanch of the Gram Panchayat where he is residing and it was said that the petitioner was living peacefully and was doing his grocery business. Thus, if this is how the respondent No.2 came to the conclusion that the petitioner was still involved in the case of gambling and this was refuted and a specific ground was raised in his memo of appeal that the petitioner was not involved in any such offence after 2007 and no case was registered against him in the year 2008, 2009, 2010 or 2011, the appellate authority was required to examine such a ground and was required to record its finding. The order passed by the appellate authority (Annexure P-1) lacks every such consideration. The appeal of the petitioner was not properly decided. The intention of providing statutory appeal under the statutory act is not to decide such appeal cursorily. The intention is to consider each and every ground raised in memo of appeal, record a finding on the said grounds and then either to accept or to reject the said ground. If this is not done, the statutory appeal

would become illusionary.

7. Various aspects have to be considered if such orders of restraint are to be issued because Article 21 of the Constitution of India gives a constitutional right to every citizen to live freely in India. Ofcourse such a right can be restrained or curtailed in the given circumstances when it is found by the competent authority that such a freedom is being misused, causing hinderance in the right to live freely in respect of other citizens. If such restraints are to be put or such restraining power is required to be exercised, germane reasons are required to be given. The Apex Court in case of *Ashadevi wife of Gopal Ghermal Mehta vs. K. Shivraj, Additional Chief Secretary to the Government of Gujrat and another* [(1979) 1 SCC 222] has categorically held in paragraph 6 of the report as follows :

“It is well settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order.

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It is true that the detention order in that case was ultimately set aside on other grounds but the observations are quite significant. These observations were approved by this Court in *Suresh Mahato Vs. The District Magistrate, Burdwan*. The principle that could be clearly deduced from the above observations is that if material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. After all the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely

to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order.”

8. Somewhat same principles are applicable if this Court is required to examine the subjective satisfaction, which is the pre-requisite on the part of authority imposing a restriction on a citizen. As has been stated herein above, involvement of the petitioner in the similar offence continuously after the show cause has not been proved. There is no material evidence available on record to indicate that the petitioner was involved in such an offence, which was causing any fear in the mind of members of the society. No independent evidence has been produced or obtained in that respect except the statement of witnesses, who were examined prior to issuance of show cause notice to the petitioner. There was lack of grant of opportunity to cross-examination of those witnesses also. Accordingly, the orders of the respondents cannot be given the stamp of approval by this Court.

9. Consequently, the writ petition is hereby allowed. The impugned orders dated 04.08.2011 and 05.10.2011 are hereby quashed. The petitioner be allowed to remain peacefully at his place of residence. However, it will be open to the respondents-authorities to keep a watch on the activities of the petitioner and in case it is found that he has resorted to the same criminal activities, they will be free to take action against the petitioner in accordance to law.

10. The writ petition is allowed to the extent indicated herein above but with no order as to cost.

Petition allowed.

I.L.R. [2012] M.P., 1567

WRIT PETITION

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

W.P. No. 14799/2008 (Jabalpur) decided on 23 February, 2012

NTPC LTD., SIDHI

...Petitioner

Vs.

**THE COMMISSIONER, MUNICIPAL
CORPORATION & anr**

....Respondents

***Constitution - Article 246 - Entries 53 and 56 of List II of
Schedule VII, Municipal Corporation Act, M.P. (23 of 1956), Sections***

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5,132,433 - Terminal Tax on transmission of Electricity - Respondent No.1 levied terminal tax on the transmission of electricity outside the Corporation Limit - Power of State Govt. in the present context is derived from Entry 56 of List II of Schedule VII - It makes no reference to transmission of electricity - Electricity can not be said to be carried by road or inland water-ways - Demand notice for payment of such terminal tax illegal - Terminal tax if any deposited by Petitioner is liable to be immediately refunded @ 6% interest per annum.(Paras 12 &13)

संविधान - अनुच्छेद 246 - अनुसूची VII की सूची II की प्रविष्टि 53 एवं 56, नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएं 5, 132, 433 - विद्युत के पारेषण पर सीमा कर - प्रत्यर्थी क्रमांक 1 ने निगम सीमा से बाहर विद्युत के पारेषण पर सीमा कर लगाया - अनुसूची VII की सूची II की प्रविष्टि 56 द्वारा वर्तमान संदर्भ में राज्य सरकार को अधिकार प्राप्त हैं - इसमें विद्युत पारेषण के संदर्भ में कोई उल्लेख नहीं - विद्युत को सड़क मार्ग या अंतर्देशीय जल मार्ग से ले जाया जाना नहीं कहा जा सकता - ऐसे सीमा कर के भुगतान हेतु मांग पत्र अवैध हैं - सीमा कर यदि याची द्वारा जमा किया गया हो तो उसे 6 प्रतिशत ब्याज प्रतिवर्ष की दर से तुरंत लौटाये जाने योग्य है।

Cases referred :

M.P. No. 2610/1991, 1987 MPLJ 643, JT 1995 (2) SC 359, 1997(2) MPLJ 333, 2010 (2) MPLJ 202, (2007) 5 SCC 447, (1989) SCC 488, (2002) 5 SCC 203.

H.S. Shrivastava with Abhijeet Shrivastava & Sandesh Jain for the petitioner.

Shobha Menon with Rahul Choubey, for the respondent No.1.

Rahul Jain, Dy. A.G. for the respondent No.2/State.

ORDER

The Order of the Court was delivered by :
AJIT SINGH, J. : This order shall also decide Writ Petition No. 12767/2008 because it was heard analogously along with the present petition and involves a common issue.

2. By this petition, the petitioner has mainly prayed that levy of terminal tax on electricity transmitted through wire outside the corporation limits of Singrauli be declared as illegal being violative of the provisions of Article 246 and Entry 56 of List II, Schedule VII, of the Constitution. The petitioner has

also prayed for quashing of demand notices for payment of terminal tax issued by respondent no.1, Commissioner, Municipal Corporation, Singrauli.

3. Petitioner, National Thermal Power Corporation Limited (in short, "the NTPCL") has a thermal power station situated at Vindhya Nagar, District Singrauli. The electricity generated by the petitioner is fed into Power Grid Corporation of India Limited (PGCL) from where the transmission lines transmit the electricity to several States. The electricity so transmitted is also consumed in the State of Madhya Pradesh. Respondent no.1 is Commissioner of the Municipal Corporation, Singrauli. He has issued the impugned demand notices to the petitioner levying terminal tax on the electricity exported from the municipal limits of Singrauli at the rate of 0. 10% on the basis of price. Aggrieved, the petitioner has filed the present petitions on the ground that neither respondent no.1 nor respondent no.2, the State of Madhya Pradesh, is competent to levy such a tax on the transmission of electricity.

4. It is argued by the learned senior counsel for the petitioner that from the reading of Entry 56 of List II, Schedule VII, read with Article 246 of the Constitution it is clear that the State Legislature has power to levy taxes only on goods and passengers carried by road or on inland water-ways. According to the learned senior counsel although the electricity is goods, it is not carried by road or on inland water-ways and, therefore, does not come within the purview of Entry 56 of List II. The learned senior counsel further submitted that the terminal tax on electricity can be levied by the Parliament alone in exercise of its powers under Entry 97 of List I read with Article 246 of the Constitution which covers any other matter not enumerated in List II or List III.

5. The learned senior counsel appearing for respondent no.1, on the other hand, defended the levy of terminal tax on the ground that Entry 56 of List II, Schedule VII, of the Constitution covers levy of such tax and the State Legislature has power to impose tax on the consumption or sale of electricity. The learned senior counsel also submitted that under sub-section (6) of section 132 clause (0) of the Madhya Pradesh Municipal Corporation Act, 1956 (in short, "the Act") the Corporation for the purposes of the Act, subject to general or special order, which the State Government may make in this behalf, impose any other tax which the State Government has power to impose under the Constitution of India with the prior approval of the latter. The learned senior counsel further submitted that the State Government has made The Terminal

Tax (Assessment and Collection) On The Goods Exported From The Madhya Pradesh Municipal Limits Rules, 1996 (in short, "the Rules") and sub-rule (3) of Rule 2 of the Rules defines "terminal tax" to mean terminal tax on goods exported from the Municipal limit in accordance with the sanction of the State Government under clause (o) of sub-section (2) of the Act. According to the learned senior counsel, sub-rule (3) of the Rules provides that every person, businessman, establishment and the licence holder shall be responsible to collect the terminal tax on the goods at the rate specified in the Schedule, if he himself exports any goods as shown in the Schedule or sale for the purpose of export. The learned senior counsel also referred to the definition of "goods" defined in clause (28) of section 5 of the Act.

6. The learned Deputy Advocate General appearing for the State Government has adopted the submissions made by the learned senior counsel for respondent no.1.

7. "Goods", as defined in Clause (28) of section 5 of the Act, reads as under:

'goods' means any material, commodity or article, and include animals, electricity and electro-magnetic waves or signals transmitted through wires or wireless devices."

8. Section 132 of the Act deals with taxes to be imposed by the Corporation under the Act. Under sub-section (6) of section 132 the Corporation, in addition to the taxes specified in sub-section (1), is empowered to impose taxes enumerated therein. Clauses (n) and (o) of this sub-section read as under:

"132. Taxes to be imposed under this Act.

(6) In addition to the taxes specified in sub-section (1), the Corporation may for the purpose of this Act, subject to any general or special order which the State Government may make in this behalf, impose any of the following taxes, namely:-

- (a) xxxxxx
- (b) xxxxxx
- (c) xxxxxx
- (d) xxxxxx

- (e) xxxxxx
- (f) xxxxxx
- (g) xxxxxx
- (h) xxxxxx
- (i) xxxxxx
- (j) xxxxxx
- (k) xxxxxx
- (l) xxxxxx
- (m) xxxxxx
- (n) a terminal tax on goods or animals exported from the limits of the Corporation; and
- (o) any other tax which the State Government has power to impose under the Constitution of India, with the prior approval of the State Government."

9. In exercise of the powers conferred under section 433 read with clause (o) of sub-section (2) of sections 132 and 133 of the Act, the State Government has made the rules to regulate the assessment and collection of the terminal tax on the goods which are exported from the limits of Municipal Corporations, Municipal Councils and Nagar Panchayats. These rules come into force in a Municipal Corporation on such date on which such Municipal Corporation, under clause (o) of sub-section (6) of section 132 of the Act, imposes the terminal tax on goods exported from the Municipal limits, clause (c) of sub-rule (2) of the Rules defines the terminal tax. It reads as under:

"(c) *"Terminal tax"* means the terminal tax on goods exported from the Municipal limit in accordance with the sanction of State Government under clause (o) of sub-section (2) of Section 132 of the Madhya Pradesh Municipal Corporation Act, 1956 and the tax described in clause (xvi) of sub-section (1) of Section 127 of the Madhya Pradesh Municipalities Act, 1961."

10. Sub-rule (3) of the Rules reads as under:

"3. Every person, businessman, establishment and the licence

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holder under the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1971 (No.24 of 1973), shall be responsible to collect the terminal tax or the goods at the rate specified in the Schedule, if he himself exports any goods as shown in the Schedule or sale for the purpose of export"

11. There are two relevant entries in List II of Schedule VII of the Constitution. They are Entry Nos.53 and 56 and read as under:

"53. Taxes on the consumption or sale of electricity.

56. Taxes on goods and passengers carried by road or on inland water-ways."

12. In the present case, respondent no.1 has not levied tax on the consumption or sale of electricity which falls under Entry 53. Respondent no.1 has levied terminal tax on the transmission of electricity outside the Corporation limits. For such levy of terminal tax, respondent no.1 has relied upon Entry 56 of List II as well as section 5(28) and section 132(6)(n)(o) of the Act.

13. The power of the State Government in the present context is derived only from Entry 56 of List II which has been quoted above. It makes no reference to transmission of electricity. It is true that the goods include electricity but it cannot be said to be carried by road or inland water-ways. The learned counsel for respondent no.1 argued that the electric poles of electric lines, by which the electricity is transmitted, can be read as road within the meaning of Entry 56 but it is very difficult to agree with this submission. Electricity cannot be said to be goods carried by a road nor can electric lines be equated to roads. They are two different and distinct mode of carriage. In this background, the terminal tax on goods mentioned in section 132(6) (n) and (o) cannot be construed to mean terminal tax on electricity. It may be made clear that the Corporation, in this case, is not charging sales tax on electricity generated and transmitted by the petitioner.

14. It was also pointed out by the learned Deputy Advocate General that "electricity" has been included in concurrent List III as Entry 38, Schedule VII, of the Constitution. But the State Legislature has not enacted any law under this entry and, therefore, the entry has no bearing in the present petitions. Also a power to tax cannot be inferred from a general entry for taxes are

specifically named and distributed between the Union and States by various entries in List I and List II of the Constitution (See *Principles of Statutory Interpretation* 13th edition by Justice G. P. Singh, pp. 820, 821).

15. For these reasons, I quash the demand notices for payment of terminal tax issued to the petitioner by respondent no.1. The amount of terminal tax, if any, deposited by the petitioner be immediately refunded at the rate of six percent per annum.

16. The petitions succeed and are allowed. However, no order as to costs.

PER SANJAY YADAV, J. : While entirely agreeing with the view by my learned brother that, the levy of export tax on the transmission of electricity, generated at Singrauli, within the territorial limits of Municipal Corporation Singrauli and the demand raised therefor from the petitioner, is beyond the competence of the Municipal Corporation Singrauli, I have following reasons to add.

2. Indisputably, as borne out from the pleadings the Electric Power (Electricity) generated at Super Thermal Power Plant at Vindya Nagar, Singrauli; owned by the petitioner, a government company, registered under the Companies Act, 1956, is transmitted, through transmission lines (overhead power lines) to the purchaser, the Western Power Grid, comprising of Madhya Pradesh, Gujarat and Maharashtra. As per the petitioner the portion is also utilised within the limits of Singrauli Municipal Corporation. It is also not in dispute that the petitioner company pays Electricity Duty under the M.P. Electricity Duty Act, 1949 and the Entry Tax under the Entry Tax Act, 1976 to the State of Madhya Pradesh.

3. Admittedly, Municipal Corporation Singrauli, owes its incorporation to the Madhya Pradesh Municipal Corporation Act, 1956 (referred as Act of 1956 hereforth). An Act, enacted by the State Legislature, to provide for the establishment of Municipal Corporation for certain cities in Madhya Pradesh. Part IV of the Act 1956 comprise of Chapter XI which deals with Taxation which vests the Municipal Corporation to impose tax under the Act of 1956. Sub section (6) of Section 132 provides for that in addition to the taxes specified in sub Section (1), the Corporation may, for the purpose of the Act of 1956 and subject to any general or special order which the State Government may make in this behalf, impose any of the taxes enumerated therein.

4. Clauses (n) and (o) of this sub section respectively stipulates "(n) a terminal tax on goods on animals exported from the limit of the Corporation", and "(o) any other tax which the State Government has power to impose under the Constitution of India, with prior approval of the State Government". The power to impose terminal tax on goods or animals exported from the limits of the Corporation and in respect of "any other tax" thus can be levied to the extent of the powers State Government has under the Constitution of India.

5. The expression "goods" which appear in Section 132 find its meaning in clause (28) of Section 5 of 1956 Act. Prior to 31.8.2005, the "goods" was defined as "(28) "goods" includes animals". However, with Madhya Pradesh Nagar Palik Vidhi (Sansodhan) Ahiniyam, 2005, Clause (28) in Section 5 of 1956 Act was substituted by new a clause namely:- "(28) "goods" means any material, commodity or article, and include animals, electricity and electro-magnetic waves or signals transmitted through wires or wireless devices." The amendment came into effect from 31.8.2005.

6. Said amendment led the Municipal Corporation Singrauli to issue notification on 1.12.2006 imposing export tax (terminal tax) on electricity and electro-magnetic waves or signals transmitted through wires or wireless devices @0.10 percent w.e.f 1.12.2006, i.e, the date of notification. The notification is in the following terms:

कार्यालय नगरपालिका निगम सिंगरौली जिला—सीधी (म0प्र0)

क्रमांक / 5206 / राजस्व / 2006,

सिंगरौली दिनांक 1 / 12 / 06

अधिसूचना

एतद् द्वारा सर्व साधारण को सूचित किया जाता है कि म0प्र0 नगरपालिक विधि (संशोधन) अधिनियम 2005 का प्रकाशन म0प्र0 राजस्व (असाधारण) विधि एवं विधायी कार्य विभाग भोपाल दिनांक-31 अगस्त 2005 में किया गया है। उक्त के तहत म0प्र0 नगरपालिक निगम अधिनियम 1956 (क्र0 23 सन् 1956) की धारा 5 के खण्ड 28 के स्थान पर निम्नलिखित खण्ड स्थापित किया गया है। अर्थात् "माल" से अभिप्रेत है कोई सामग्री वस्तु या चीज और उसमें सम्मिलित है पशु, तार या बेतार के युक्त के माध्यम से पारंपरिक विद्युत और विद्युत चुम्बकीय तरंगे या सिंगनल उल्लेखित म0प्र0 नगरपालिक विधि (संशोधन) अधिनियम 2005 के आधार पर नगरपालिक निगम सिंगरौली की बैठक दिनांक- 16-10-2006 के प्रस्ताव क्रमांक 14 में म0प्र0 नगरपालिका सीमा से निर्यात किए गये मालपर सीमाकर (निर्धारण तथा संग्रहण) नियम 1996 के प्रस्तावित अनुसूची के बिन्दु क्रमांक 15 में अंकित स्थानीय उत्पाद के रूप में एन0टी0पी0सी0 विद्युत विभाग तथा दूर संचारविभाग द्वारा तार या बेतार युक्त के

माध्यम से विद्युत और चुम्बकीय तरंगे या सिग्नल पारेषित करने पर दर मूल्य के आधार पर @ 0.10 प्रतिशत आरोपण का संकल्प पारित किया गया है।

अतः उक्त संशोधन एवं पारित संकल्प के तहत नगरपालिक निगम सीमा से निर्यात किए जाने वाले तार या बेतार के माध्यम से पारेषित विद्युत और विद्युत चुम्बकीय तरंगे या सिग्नल पर दर मूल्य के आधार पर @ 0.10 प्रतिशत दिनांक 01 दिसम्बर 2006 से आरोपण प्रभावशील किया जाता है।

(एस0बी0सिंह)
आयुक्त-
नगरपालिक निगम
सिंगरौली

7. The notification and the levy of tax thereby is in exercise of powers under the Terminal Tax (Assessment and Collection) on the Goods Exported from Madhya Pradesh Municipal Limits, Rules 1996. These Rules are framed by the State Government in exercise of the powers conferred under Section 433 read with clause (o) of sub-section (2) of Section 132 and Section 133 of the Madhya Pradesh Municipal Corporation Act, 1956 and Section 355 read with clause (xvi) of sub-section (1) of Section 127 and Section 129 of the Madhya Pradesh Municipalities Act, 1961, to regulate the assessment and collection of the terminal tax on the goods which are exported from the limits of Municipal Corporation, Municipal Councils and Nagar Panchayats.

8. At this juncture pertinent it would be to note that competence of State legislature to enact Sections 132 and 133 of 1956 Act and Sections 127 and 129 of the M.P. Municipalities Act, 1961 which provides for and enable the Municipal Corporations, Municipalities and Nagar Panchayats to levy export tax has been affirmed in various cases. To note few

9. In *Eternit Everest Ltd. v. State of M.P. and others* : Misc. Petition No. 2610/1991 decided on 10.5.1995, the Division Bench upheld the validity of Section 129 of 1961 Act. The Division Bench referred to Entry No. 52 of List II and also referred to the decisions rendered in the case of *Monji Kalyanji and others v. State of M.P.* : 1987 M.P.L.J 643 and *Amrit Banaspati Co. v. Union of India* : JT 1995 (2) SC 359.

10. Similarly in *Smt. Meera Khandelwal v. State of M.P. and others*: 1997 (2) MPLJ 333; wherein validity of amended provision of Sections 129 of 1961 Act was called in question. The Division Bench taking note of relevant entries in Schedule VII and Articles 301 and 304-B of the Constitution of India upheld the provisions.

11. In *Northern Coal Fields Ltd. v. State of M.P. and another* 2010 (2) MPLJ 202, Division Bench after referring to Entries 5, 23, 50, 56 of List II and Entries 54 and 89 of List I of the Constitution of India, upheld the validity of Section 132 (6) (n) and (o) 1956 and Rule 3 of the Rules, 1996.

12. Be that as it may.

13. In the case at hand the competence of State legislature in amending clause (28) of Section 5 of 1956 Act is being questioned on the anvil that, incorporating 'electricity and electro-magnetic waves or signals transmitted through wires or wireless devices' is beyond its competence as the same is not covered by any entry falling within list II of VIIth Schedule. It is urged that, Entry 89, 92 A, 97 of list I of Schedule VII covers the field whereon only Parliament can legislate. Entry 89 and 92 A of List I of Schedule VII of the Constitution of India respectively relates to "Terminal Taxes on goods or passengers, carried by railway, sea or air; taxes on railways fares and freights" and "Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce."

Clause (28) of Section 5 which is amended is not a charging section but is a definition clause. The charging provision is Section 132 of 1956 Act and clauses (n) and (o) of sub-section (6) have an inbuilt limitation within which and the extent to which the Municipal Corporations is enabled to levy taxes. Thus the validity of taxation provision, i.e., Section 132, having not been challenged in this petition, question is whether clause (28) of Section 5 is assailable on the assumption that the word finds mention in taxation provision (i.e Section 132 (6) (n) and (o)).

14. Trite it is that 'the power to impose tax ordinarily would not be deduced from a general entry. (Please see *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and E.T.I.O and others* [(2007) 5 SCC 447 paragraph 55].

15. Also that field of operation in respect of entries respectively varies, e.g. field of operation of entry 53 of List II being Taxes on the consumption or sale of electricity and of entry 56 'Taxes on goods and passengers carried by road or on inland waterways' and of entry 38 of List III is Electricity.

16. Competence to legislate flows from Article 245, 246 and the other Articles, following in Part XI of the Constitution of India. And as held in *M/s*

Ujagar Prints and others v. Union of India and others : (1989) 5CC 488 that "If a legislation purporting to be under a particular legislative entry is assailed for lack of legislative competence, the State can seek to support it on the basis of any other entry within the legislative competence of the legislature. It is not necessary for the State to show that the legislature, in enacting the law, consciously applied its mind to the source of its own competence". (Paragraph 53 of the report).

17. No prohibition being imposed vide entry 89 and 92A for effecting a legislation of a general nature, it cannot be presumed that the State legislature exceeded in causing amendment in clause (28) of Section 5 of 1956 Act by incorporating "electricity and electro-magnetic waves on signals transmitted through wires or wireless devices."

18. It was suggested during course of argument in support of the proposition that Entry 89 of List I covers the field, that, electricity is being transmitted through air, the suggestion is not acceptable for the reason that the definition of 'goods' being clear to include electricity and electromagnetic waves or signals transmitted through wires or wireless devices, meaning thereby that, the electricity gets transmitted through wires and electromagnetic waves or signals are transmitted through wireless devices. In the case at hand the extent of challenge is the inclusion of 'electricity'. The contention of learned senior counsel is not acceptable as the definition is clear and unambiguous. Technically also, the submissions of learned senior counsel that the transmission of electricity be presumed to be through air is not acceptable. The characteristic of electric energy has been noted in following terms in *State of A.P and others V. National Thermal Corpn Ltd. And others*: (2002) 5 SCC 203 :-

"21 .Another significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. To quote from Aiyar's Law Lexicon (Second Edition, 2000) "Electricity in physics is "the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves." Its true nature is not understood. Imperial Dictionary (quoted in *Spensley v. Lancashire Ins. Co.*, where the court, quoting from the same authority, said, "We are totally ignorant of the nature of this cause whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for

explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores or all bodies, and is capable of motion from one body to another."

This characteristic quality of electric energy was judicially noticed in Indian *Aluminium Co.etc.etc. Vs. State of Kerala*. Vide para 25 this Court has noted,(SCC p. 650)

13. "Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place." "as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place."

These properties of electricity as goods are of immense relevance as we would state' hereafter."

19. The characteristic as noted above nowhere suggests that the electricity can be transmitted through air (the air is a mixture of oxygen, nitrogen etc. and the gas is the bad conductor of electricity).

20. In *State of Andhra Pradesh v. National Thermal Power Corporation Ltd.* (supra), reliance whereon is placed by learned senior counsel appearing for the petitioner it was held :

"28. It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extra territorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra territorial operation of a

State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In *Burmah Shell Oil Storage & Distributing Co. India Ltd.* (supra), which we have noticed, it was held that sale for use or consumption would mean the goods being brought inside the area for sale to an ultimate consumer, i.e. the one who consumes. In Entry 53, 'sale for consumption' (the meaning which we have placed on the word 'sale') would mean a sale for consumption within the State so as to bring a State Legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of electricity the events of sale and consumption are inseparable. Any State legislation levying duty on sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated because of extra territorial operation of State legislation.

30. In both the cases before us, contracts have been entered into between parties to the transaction, that is, the sellers and the buyers (in other States) prior to the generation of electricity. The NTPCL generates electricity and pursuant to these contracts supplies the same from its power stations situated in the States of A.P. or M.P. to the buyers in other States where it is received and consumed. There is no hiatus between generation, sale, supply, transmission, delivery and consumption. The inter-State movement of electricity is pursuant to contracts of sale. Such sales can be held only as inter-State sales. Though it may be permissible to fix the situs of sale either by appropriate State legislation or by Judge made law as held by the majority opinion in 20th Century Finance Corporation case, we would like to clarify that none of the two can artificially appoint a situs of sale so as to create territorial nexus attracting applicability of tax legislation enacted by any State Legislature and tax an inter-State sale in breach of Section 3 of the CST Act read with Articles 286 (2) and 269(1) and (3) of the Constitution. No State legislation, nor any stipulation in any contract, can fix the situs of sale within

the State or artificially define the completion of sale in such a way as to convert an inter-State sale into an intra-State sale or create a territorial nexus to tax an inter-State sale unless permitted by an appropriate central legislation. But this is exactly what the definition of 'consumer' in Clause (2)(a) of the M.P. Electricity Duty Act, 1949 has done. The definition of consumer has been artificially extended to include any person who receives electrical energy (without regard to its consumption) and also to include a person who, receiving the electrical energy in bulk, forwards it onwards for distribution, (without regard to the fact whether it transmitted outside the State and whether the electricity or is not consumed within the State). The same definition has been adopted in M.P. Upkar Adhinlyam, 1981. This definition of consumer shall have to be read down as including within it only such persons who receive the electricity for consumption or distribution for consumption within the State. Without such reading down, the definition of 'consumer' would be rendered ultra vires of Articles 286 and 269 of the Constitution read with Section 3 of the Central Sales Tax Act, 1956."

21. When tested on above proposition the definition of "goods" which as per the petitioner when amended has enabled the Corporation to levy tax on transmission of electricity by wires which is beyond its competency, stands the scrutiny because of the inbuilt limitation in clauses (n) and (o) of sub-section (6) of Section 132 of 1956 Act.

22. For these reasons the petition fails to the extent of challenge that the State Legislature exceeded its legislative competence in amending clause (28) of Section 5 of 1956 Act.

23. Coming to the next issue that, whether it is beyond the competence of Municipal Corporation, Singrauli, to levy export tax on the transmission of electricity through wires, finds its answer in clause (n) of sub-section 6 of Section 132 of 1956 Act, that the Corporation is vested with the power to levy any other tax only to the extent the State Government has power to impose under the Constitution of India. And as observed in *State of Andhra Pradesh v. National Thermal Power Corporation Ltd.* (supra) : ".....In such a case when the generation takes place in one State wherefrom it is

supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another occasioned by the sale or purchase of goods, squarely covered by Section 3 of the CST Act." (Paragraph 29). Demand of tax raise by the respondent Corporation does not specify as to how much of the electricity generated at Singrauli transmitted through wires, is consumed within the State of Madhya Pradesh. In absence whereof the Municipal Corporation, Singrauli is not within its right in levying export tax on the entire electricity generated and transmitted through wires from within Singrauli Municipal limits. The definition of "goods" in clause (28) of Section 5 of 1956 Act has to be read within the confines of Section 132 (6) (o) of 1956 Act. Thus the Corporation since has no powers to levy tax beyond the powers of the State, the demand raised on the entire transmission of electricity deserves to be and is hereby quashed.

24. Petition is allowed to the extent above. There shall be no costs.

Result :

The petitions are allowed and the demand notices for payment of terminal tax issued by the Municipal Corporation, Singrauli, are hereby quashed. It is ordered that, the amount of terminal tax if any deposited by the petitioner, be immediately refunded @ 6% per annum. The interest to be calculated from the respective dates of deposit.

The petitions succeed and are allowed. There shall be no costs.

Petition allowed.

I.L.R. [2012] M.P., 1581

WRIT PETITION

Before Mr. Justice R.S. Jha

W.P.No. 9094/2010 (Jabalpur) decided on 6 March, 2012

PADMANABHA BHASKARAN PILLAI

...Petitioner

Vs.

FOOD CORPORATION OF INDIA & ors.

...Respondents

A. Service Law - Back Wages - Grant of back wages is not a natural consequence of every order of reinstatement or retrospective promotion and in such cases, the person concerned is not ipso facto entitled to arrears of salary or back wages - Issue of back wages has to

be considered in the facts of each case and authority has to determine as to whether back wages should be awarded fully or partially. (Para 16)

क. सेवा विधि - पिछला वेतन - पिछला वेतन प्रदान किया जाना बहाली के या भूतलक्षी प्रभाव की पदोन्नति के प्रत्येक आदेश का स्वामाविक परिणाम नहीं है और ऐसे प्रकरण में, संबंधित व्यक्ति वेतन का बकाया या पिछला वेतन पाने का यथा तथ्यतः हकदार नहीं - पिछले वेतन के प्रश्न का विचार प्रत्येक प्रकरण के तथ्यों पर किया जाना होता है और प्राधिकारी को निर्धारित करना होता है कि क्या पिछला वेतन पूर्णतः प्रदान करना है अथवा अंशतः।

B. Service Law - Back Wages - Petitioner was not granted promotion as there were adverse entries - Subsequent expunction of adverse entries - Petitioner was notionally given promotion on the basis of revised and upgraded entries - The denial of promotion to the petitioner can not be found fault with - As the respondents can not be held responsible nor can any fault be found with authorities in not awarding promotion earlier, petitioner is not entitled to full arrears of salary of back wages.
(Paras 19 to 24)

ख. सेवा विधि - पिछला वेतन - याची को पदोन्नति प्रदान नहीं की गई क्योंकि प्रतिकूल प्रविष्टियां थी - प्रतिकूल प्रविष्टियों को तत्पश्चात हटाया जाना - याची को संशोधित व उन्नत प्रविष्टियों के आधार पर काल्पनिक पदोन्नति दी गई - याची को पदोन्नति नहीं देने में कोई दोष नहीं पाया जा सकता - चूंकि प्रत्यर्थीगण को जिम्मेदार नहीं ठहराया जा सकता और न ही पूर्व में पदोन्नत नहीं किये जाने में प्राधिकारियों का कोई दोष पाया जा सकता है, इसलिए याची पिछले वेतन का पूर्ण बकाया पाने का हकदार नहीं।

Cases referred :

(2007) 7 SCC 689, (2010) 7 SCC 678, (1978) 1 SCC 405, (2007) 6 SCC 524, (2011) 5 SCC 142, (2007) 11 SCC 632, (2007) 2 SCC 433, (2005) 5 SCC 591, (2010) 11 SCC 71, (2006) 9 SCC 172, (2010) 12 SCC 47, (2006) 5 SCC 446, (2005) 8 SCC 211.

Shobha Menon with Rahul Choubey, for the petitioner.
M.K. Agrawal, for the respondents.

ORDER

R.S. JHA, J. :- The petitioner has filed this petition being aggrieved by the orders dated 6-5-2010, 11-5-2010 and 17-5-2010 issued by the respondent No.5, respondent No. 3 and respondent No. 7 respectively

wherein while granting notional promotion to the petitioner on the post of Assistant Manager (General) with effect from 6-8-1986, arrears of pay have been awarded to him only from the date he actually assumed the charge of the promoted post.

2. The brief facts leading to the filing of the present petition are that the petitioner was serving with the respondents as a steno typist. In view of a vigilance enquiry against him he was awarded adverse entries in his service records for the years 1983, 1984 and 1985 as a result of which he was not found fit for promotion along with his peers and juniors in the DPC that was held in the year 1986 for making promotions on the post of Assistant Manager (General). On 17-12-1988 a punishment of reversion to the post of AG-II (Ministerial) with a further stipulation that he would not be eligible for being considered for promotion for a further period of five years was imposed upon the petitioner on his being found guilty of the charges levelled against him in the enquiry conducted by the respondents. The aforesaid order of punishment was modified by the appellate authority by order dated 11-9-1990 and a lesser punishment of withholding of three increments non-cumulatively was imposed upon the petitioner.

3. The petitioner assailed the aforesaid order of punishment by filing a writ petition before this Court which was registered as W.P.No. 2822/1992 and was ultimately disposed of by order dated 28-2-1998 by setting aside the order of punishment and remitting the matter back to the authority for reconsidering the quantum of punishment. Pursuant to the aforesaid directions issued by this Court the matter was again taken up by the appellate authority and after reconsidering the matter a punishment of withholding three increments (non-cumulative) was awarded to the petitioner. The petitioner again assailed the order passed by the authorities by filing W.P.No. 5122/1999 which was ultimately allowed by order dated 24-4-2008 and the order imposing punishment on the petitioner was set aside. In the meanwhile, the petitioner had been considered by the respondent/authorities in the DPC held in the year 1996 for promotion on the post of Assistant Manager (General) and promoted on the said post by order dated 4-1-1996 and thereafter he stood superannuated from service with effect from 28-2-1998.

4. As far as the adverse entries in the petitioner's service record for the year 1984 are concerned, the petitioner had filed W.P.No. 6067/1998 assailing the same. When this petition came up for hearing on 10-12-2009 it was

informed to this Court that the vigilance enquiry and the consequent punishment imposed upon the petitioner, on the basis of which adverse entries for the year 1984 were recorded by the respondents, had been quashed and set aside by the order passed by this Court in W.P.No. 5122 of 1999 dated 24-4-2008. In view of the aforesaid, this Court allowed the petition filed by the petitioner by order dated 10-12-2009 by observing that as the basis on which the adverse entries for the year 1984-85 were recorded no longer existed, therefore, the respondent/authorities were required to reassess the aforesaid entries made in the petitioner's record and thereafter hold a review DPC to reconsider his case for promotion on the post of Assistant Manager (General) as on 1986 along with his peers and juniors and in case he is found fit, all usual benefits that would accrue be granted to him.

5. Pursuant to the orders passed by this Court the respondent/authorities conducted a review DPC on 4-5-2010 and thereafter in view of the orders passed by this Court the petitioner's ACR gradings for the years 1983, 1984 and 1985 were revised to "good", "very good" and "very good" respectively. The DPC also decided that the petitioner be given notional promotion with effect from 6-8-1986 and, therefore, pursuant to the report of the DPC the respondent/authorities have issued the impugned orders dated 6-5-2010, 11-5-2010 and 17-5-2010 granting notional promotion to the petitioner with effect from 6-8-1986 and arrears of pay with effect from the date he actually assumed charge of the promoted post. The petitioner being aggrieved by the denial of full back wages and arrears of pay to the petitioner with effect from 6-8-1986 has filed the present petition assailing the impugned orders to that extent.

6. It is submitted by the learned senior counsel appearing for the petitioner that the petitioner has been victimized inasmuch as adverse entries were recorded in the ACR dossier by the respondents on the basis of a vigilance enquiry which was initiated for no fault on the part of the petitioner as has been held by this Court in W.P.No. 5122/1999 decided on 24-4-2008 and in such circumstances the petitioner has been denied the opportunity to work on the higher post for no fault on his part, therefore, he is entitled to full arrears of salary from the date of his promotion i.e. 6-8-1986. It is further submitted that this Court while deciding W.P.No. 6067/1998 filed by the petitioner assailing the adverse entries made in the service record has already held that in case the petitioner is granted promotion on conducting a review DPC he

would be entitled to all usual benefits that would accrue and in such circumstances, the respondent/authorities had no discretion in the matter and they were bound to award full back wages/arrears of salary to the petitioner, more so, in view of the fact that the order passed by this Court in W.P.No. 6068/1998 dated 10-12-2009 has attained finality as the respondents had not assailed the same before any higher Court. The learned senior counsel appearing for the petitioner in support of her submissions has relied upon the decision of the Supreme Court rendered in the case of *Commissioner, Karnataka Housing Board v. C.Muddaiah*, (2007) 7 SCC 689.

7. It is also contended by the learned senior counsel appearing for the petitioner that the respondent/authorities have not mentioned any reason for denying arrears of salary to the petitioner from the date of awarding retrospective promotion in the minutes of the DPC or in the impugned orders Annexure P-1, Annexure P-2 and Annexure P-3 and in such circumstances the contentions of the respondents in the return in support of their action should not be considered by this Court in view of the decision of the Supreme Court in the case of *East Coast Railway and another v. Mahadev Appa Rao and others*, (2010) 7 SCC 678 and the case of *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 SCC 405.

8. The respondents, per contra, submit that the petitioner's case was considered by the respondent/authorities for promotion in the year 1986 but as he did not have a good service record in view of the adverse entries contained therein for the years 1983, 1984 and 1985, therefore, his case for promotion was rejected. It is further stated that the petitioner did not assail his superannuation in the DPC held in the year 1986. However, in the writ petition filed by the petitioner i.e. W.P.No. 6067/1998 assailing the adverse entries made in his service record for the years 1984 and 1985 this Court directed the respondent/authorities to revise the entries keeping in mind the fact that the petitioner had been exonerated by this Court and the punishment imposed upon him had been set aside in W.P.No. 5122/1999 decided on 24-4-2008 and, therefore, the respondent/authorities in compliance of the orders issued by this Court held the review DPC and revised the entries of the petitioner's service record for the years 1983, 1984 and 1985 and thereafter awarded retrospective promotion to the petitioner with effect from 6-8-1986. It is further stated that the respondent/authorities by fixing his notional pay and seniority on the post of Assistant Manager (General) has also granted him arrears of

salary with effect from the date he actually rendered service on the post of Assistant Manager (General) i.e. 4-1-1996 and have also disbursed the difference of salary for this period to the petitioner by order dated 17-6-2010, a copy of which has been filed before this Court as Annexure R-4 along with the additional return. It is submitted that in view of the aforesaid facts and circumstances the petition filed by the petitioner deserves to be dismissed.

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

10. The question that arise for decision of this Court in the present petition is as to whether the petitioner is automatically and ipso facto entitled to arrears of salary and full back wages on being granted retrospective promotion in the particular facts and circumstances of the present case and whether the observations made by this Court in the order dated 10-12-2009 passed in W.P.No. 6068/1998 to the effect that in case the petitioner is found fit for promotion with retrospective effect he be granted all usual benefits that would accrue, amounts to an order of granting arrears of salary and full back wages leaving no discretion with the respondents in the matter.

11. Several decisions have been placed before this Court by both the parties. The issue regarding grant of back wages in various circumstances came up for consideration before the Supreme Court in the case of *State of Kerala and others v. E.K. Bhaskaran Pillai*, (2007) 6 SCC 524 (supra) and some of the instances and situations that have to be taken into consideration while deciding the issue of grant of back wages and salary have been illustratively (and not exhaustively) been laid down in paragraph 4 in the following terms :-

“4. Learned counsel for the State has submitted that grant of retrospective benefit on promotional post cannot be given to the incumbent when he has not worked on the said post. Therefore, he is not entitled to any benefit on the promotional post from 15-6-1972. In support thereof, the learned counsel invited our attention to the decisions of this Court in *Paluru Ramkrishnaiah v. Union of India* (1989) 2 SCC 541, *Virender Kumar v. Avinash Chandra Chadha*, (1990) 3 SCC 472, *State of Haryana v. O.P. Gupta*, (1996) 7 SCC 533, *A.K. Soumini v. State Bank of Travancore*, (2003) 7 SCC 238 and *Union of India v. Tarsem Lal*, (2006) 10 SCC

145. As against this, the learned counsel for the respondent has invited our attention to the decisions given by this Court in *Union of India v. K.V. Jankiraman*, (1991) 4 SCC 109, *State of A.P. v. K.V.L. Narasimha Rao*, (1999) 4 SCC 181, *Vasant Rao Roman v. Union of India*, 1993 Supp. (2) SCC 324 and *State of U.P. v. Vinod Kumar Srivastava*, (2006) 9 SCC 621. We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facets which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full back wages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date persons junior to him were appointed, in that case the court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle "no work no pay" cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also."

12. In the case of *Chairman-Cum-Managing Director, Coal India Limited and others v. Ananta Saha and others*, (2011) 5 SCC 142 the Supreme Court after analyzing the law has again laid down the same law in the following terms in paragraph 49 :-

"49. The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages

still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is reinstated, it would not automatically make him entitled to back wages as entitlement to get back wages is independent of reinstatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (*Vide U.P. SRTC v. Mitthu Singh*, (2006) 7 SCC 180, *Akola Taluka Education Society v. Shivaji*, (2007) 9 SCC 564 and *Balasaheb Desai Sahakari S.K. Ltd. v. Kashinath Ganapati Kambale*, (2009) 2 SCC 288.)”

13. The Supreme Court in the case of *Union of India v. B.M. Jha*, (2007) 11 SCC 632 in paragraph 5 thereof has held in the following terms :-

“5. We have heard learned counsel for the parties. It was argued by learned counsel for the respondent that when a retrospective promotion is given to an incumbent, normally he is entitled to all benefits flowing therefrom. However, this Court in *State of Haryana v. O.P. Gupta*, (1996) 7 SCC 533 and followed in *A.K. Soumini v. State Bank of Travancore*, (2003) 7 SCC 238 has taken the view that even in case of a notional promotion from retrospective date, it cannot entitle the employee to arrears of salary as the incumbent has not worked in the promotional post. These decisions relied on the principle of “no work no pay”. The learned Division Bench in the impugned judgment has placed reliance on *State of A.P. v. K.V.L. Narasimha Rao*, (1999) 4 SCC 181. In our view, the High Court did not examine that case in detail. In fact, in the said judgment the view taken by the High Court of grant of salary was set aside by this Court. Therefore, we are of the view that in the light of the consistent view taken by this Court in the abovementioned cases, arrears of salary cannot be granted to the respondent in view of the principle of “no work no pay” in case of retrospective promotion. Consequently, we

allow this appeal and set aside the impugned order of the High Court dated 17-5-2000 passed by the Division Bench of the High Court as also the order dated 11-1-2000 passed by the Central Administrative Tribunal, Principal Bench.

14. The Supreme Court has taken a similar view while rendering decision in the case of *J.K.Synthetics Ltd. v. K.P.Agrawal*, (2007) 2 SCC 433 in paragraphs 17 thereof in the following terms :-

“17. There is also a misconception that whenever reinstatement is directed, “continuity of service” and “consequential benefits” should follow, as a matter of course. The disastrous effect of granting several promotions as a “consequential benefit” to a person who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether “continuity of service” and/or “consequential benefits” should also be directed. We may in this behalf refer to the decisions of this Court in *A.P. SRTC v. S. Narsagoud*, (2003) 2 SCC 212, *A.P. SRTC v. Abdul Kareem*, (2005) 6 SCC 36, and *Rajasthan SRTC v. Shyam Bihari Lal Gupta*, (2005) 7 SCC 406.

15. In the case of *G.M., Haryana Roadways v. Rudhan Singh*, (2005) 5 SCC 591, the Supreme Court in paragraph 10 of the aforesaid case has held the following :-

“10. In *Saran Kumar Gaur v. State of U.P.*, 1993 Supp (2) SCC 749 this Court observed that when work is not done remuneration is not to be paid and accordingly did not make any direction for award of past salary. In *State of U.P. v. Atal Behari Shastri*, 1993 Supp (2) SCC 207, a termination order passed on 15-7-1970 terminating the services of a Licence Inspector was finally quashed by the High Court in a writ petition on 27-11-1991 and a direction was issued to pay the entire back salary from the date of termination till the date of his attaining superannuation. This Court, in the absence

of a clear finding that the employee was not gainfully employed during the relevant period, set aside the order of the High Court directing payment of entire back salary and substituted it by payment of a lump sum amount of Rs 25,000. In *Virender Kumar v. Avinash Chandra Chadha*, (1990) 3 SCC 472, there was a dispute regarding seniority and promotion to a higher post. This Court did not make any direction for payment of higher salary for the past period on the principle of "no work no pay" as the respondents had actually not worked on the higher post to which they were entitled to be promoted. In *Surjit Ghosh v. Chairman and MD, UCO Bank*, (1995) 2 SCC 474, the appellant (Assistant Manager in the Bank) was dismissed from service on 28-5-1985, but his appeal was allowed by this Court on 6-2-1995 as his dismissal order was found to be suffering from an inherent defect. His claim for arrears of salary for the past period came to about Rs 20 lakhs but this Court observed that a huge amount cannot be paid to anyone for doing no work and accordingly directed that a compensation amount of Rs 50,000 be paid to him in lieu of his claim for arrears of salary. In *Anil Kumar Gupta v. State of Bihar*, (1996) 7 SCC 83 the appellants were employed as daily-wage employees in Water and Land Management Institute of the Irrigation Department of the Government of Bihar and they were working on the posts of stenotypists, typists, machine operators and peons, etc. This Court allowed the appeal of the workmen and directed reinstatement but specifically held that they would not be entitled to any past salary. These authorities show that an order for payment of back wages should not be passed in a mechanical manner but a host of factors are to be taken into consideration before passing any order for award of back wages."

16. The principle of law discernible from the aforesaid judgments of the Supreme Court are that grant of back wages or arrears of salary are not a natural consequence of every order of reinstatement or retrospective promotion and in such cases the person concerned is not *ipso facto* entitled to arrears of salary or back wages, as the issue of award of back wages has to be considered in the facts of each case and the authority has to determine as to whether back

wages should be awarded fully or partially.

17. Similar view has been taken by the Supreme Court in the cases of *Commissioner, Karnataka Housing Board v. C.Muddaiah*, (2007) 7 SCC 689, *South Bengal State Transport Corpn v. Ashok Kumar Ghosh*, (2010) 11 SCC 71, *N. Selvaraj v. Kumbakonam City Union Bank Ltd.*, (2006) 9 SCC 172, *National Insurance Co. Ltd. v. T. Mahendran*, (2010) 12 SCC 47, *G.M.Tank v. State of Gujrat*, (2006) 5 SCC 446 and *U.P. State Textile Corpn. Ltd. v. P.C.Chaturvedi*, (2005) 8 SCC 211 and various other decisions.

18. In view of the aforesaid law laid down by the Supreme Court it is no longer in doubt that the grant of arrears of salary or back wages is not *ipso facto* or a natural consequence of setting aside of an order of punishment or grant of retrospective promotion on the directions issued by the higher Court or Tribunal and the question has to be decided in the facts and circumstances of each case

19. In the instant case, when the petitioner's case was considered for promotion on the post of Assistant Manager (General) in the year 1986, admittedly and undisputedly he had three adverse entries in his service record for the years 1983, 1984 and 1985 and on that count the petitioner's case for promotion was considered and rejected by the respondent/authorities. It is also undisputed that the aforesaid rejection and superannuation of the petitioner in the year 1986 was not assailed by the petitioner and in such circumstances, the denial of his promotion by the respondent/authorities in the year 1986 on the post of Assistant Manager (General) cannot be found fault with. It is also undisputed and admitted that the adverse entries in the years 1983, 1984 and 1985 were reconsidered and revised by the respondents pursuant to the directions issued by this Court in W.P.No. 6067/1998 decided on 10-12-2009 in the review DPC that was convened by the respondents on 4-5-2010 and were upgraded to "good" and "very good". It is also undisputed that after revising and upgrading the entries for the years 1983, 1984 and 1985 in the DPC held on 4-5-2010 the respondents as per the directions of this Court considered the case of the petitioner for promotion as on 6-8-1986 and finding him fit for promotion notionally promoted him on the said post with effect from 6-8-1986 by the impugned orders dated 6-5-2010, 11-5-2010 and 17-5-2010. From the aforesaid undisputed and admitted facts it is clear that no fault can be found with the respondents in denying the petitioner's promotion

from 1986 till the holding of the review DPC in the year 2010 on the directions issued by this Court as till that date the petitioner's service record was not good and in such circumstances it cannot be said or held that the petitioner, though entitled, was not permitted to work on the higher post for no fault on his part or on account of any fault on the part of the respondents

20. In view of the aforesaid it is also clear that in the peculiar facts and circumstances of the present case it cannot by any stretch of imagination be held that the observations made by this Court to the effect that the petitioner on being found fit in the review DPC would be entitled to all usual benefits that accrue, would amount to or include a direction to grant full arrears of salary or back wages to the petitioner as the words "usual benefits" would not *ipso facto* or automatically include such a relief, in view of the law laid down by the Supreme Court in the judgments quoted above and, therefore, the respondents were entitled to consider and decide what would be the usual benefits in the facts of the petitioner's case.

21. The learned counsel for the petitioner has heavily relied upon a decision rendered by the Supreme Court in the case of *Commissioner, Karnataka Housing Board v. C. Muddaiah*, (2007) 7 SCC 689 to contend that in cases where the Court on allowing a case for promotion or seniority further orders that the petitioner would be entitled to consequential benefits, which order attains finality, the authorities concerned are bound to pay all consequential financial benefits to the petitioner. It is submitted that in the case of *C. Muddaiah* (supra) the Supreme Court, while considering the directions for grant of consequential benefits, has awarded arrears of salary and back wages. It is submitted that as the petitioner's case is identical and similar to that of *C. Muddaiah* (supra), the petitioner is also entitled to grant of arrears of salary.

22. I am unable to accept the contention of the learned senior counsel appearing for the petitioner for two reasons; firstly, that the Supreme Court, while deciding the case of *C. Muddaiah* (supra), has recorded a finding to the effect that the Court while allowing the petition of the petitioner therein had considered several aspects and had thereafter issued a direction to the effect that the seniority list of the petitioner and the respondents therein shall be revised accordingly with a further direction that "necessarily it follows that the petitioner is entitled to such other consequential benefits that he might earn consequent upon the revision of ranking" and, therefore, in the case of *C. Muddaiah* (supra) there was a clear and specific direction of the Court that the petitioner would be entitled to all the consequential benefits claimed

by him consequent upon revision of seniority whereas there is no such direction in the petitioner's case. On the contrary, the direction issued by this Court is that he would be entitled to all usual benefits that accrue. Secondly, I am also of the considered opinion that the connotation of a direction granting "consequential benefits that he might earn consequent upon the revision of ranking" is different from a direction that he would be entitled to all usual benefits that accrue. I am inclined to say so as the words "consequential benefits that he might earn" necessarily means that the employee would be entitled to all the benefits that he would earn on revision of seniority or retrospective promotion, whereas the meaning of words "usual benefits that accrue" would mean that the authority would be at liberty to examine what would be the benefits that the employee would be usually entitled to in view of the changed factual scenario and as grant of arrears of salary and back wages is not automatic and a usual consequence as has been held by the Supreme Court in the cases referred to above, therefore, the decision in the case of *C. Muddaiah* (supra) would not help the petitioner in the present case in view of the different facts obtaining in the present petition. In fact, it is pertinent to note that the Supreme Court in the case of *C. Muddaiah* (supra) itself has stated that the normal rule in such cases is "no work no pay" but the Court may issue directions for payment of full or partial benefits depending upon the facts of the case.

23. In view of the aforesaid, the contention of the petitioner based on the decision rendered by the Supreme Court in the case of *C. Muddaiah* (supra) is hereby rejected.

24. A perusal of the impugned orders indicates that the respondent/authorities on examining the case of the petitioner have given him notional promotion with effect from 6-8-1986 and actual benefit of salary from 1986 i.e. the date from his actual promotion on the post of Assistant Manager (General). As the respondents cannot be held responsible nor can any fault be found with the respondent/authorities in not awarding promotion to the petitioner in the year 1986, I am of the considered opinion that the petitioner is not entitled to full arrears of salary or back wages from 6-8-1986 as claimed by him in the present petition. I am also of the considered opinion that in view of the aforesaid facts and circumstances, no fault can be found with the impugned orders limiting the grant of monitory benefits to the petitioner from the date he actually rendered service on the post of Assistant Manager (General) after granting him notional promotion and pay fixation on the said post from 1986.

25. In view of the aforesaid, the petition filed by the petitioner being meritless is accordingly dismissed.

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

Petition dismissed

I.L.R. [2012] M.P., 1594

WRIT PETITION

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

W.P. No. 903/2012 (Indore) decided on 20 March, 2012

USMAN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *National Security Act (65 of 1980), Section 3 - Detention - Nature of - Detention without trial is a serious matter and the order of detention must be justified by detaining authority, whenever, the personal liberty in peril due to drastic executive action under draconian law.* (Para 3)

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 - निरोध - का स्वरूप - बिना विचारण निरोध गंभीर मामला है और निरोध प्राधिकारी को निरोध के आदेश का न्यायोचित्य देना चाहिये जब कभी निर्दयी विधि के अंतर्गत कठोर कार्यपालिक कार्यवाही के कारण व्यक्तिगत स्वातंत्र्य को खतरा हो।

B. *National Security Act (65 of 1980), Section 3 - Detention - Affidavit - In answer to a rule issued in a Habeas Corpus petition, the counter affidavit on behalf of the State should be sworn by District Magistrate who passed the detention order - City Superintendent of Police in his affidavit has not said that he had personally dealt with the matter - He has merely sworn the affidavit on the information gathered from the record - Except paper cuttings no other cogent material placed before the Court to judge the legality of detention order - Order of detention passed without application of mind - Petition allowed.* (Para 5)

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 - निरोध - शपथ पत्र - बंदी प्रत्यक्षीकरण याचिका में जारी नियम के उत्तर में राज्य की ओर से प्रति शपथपत्र में जिला मजिस्ट्रेट द्वारा शपथ लेनी चाहिये जिसने निरोध आदेश पारित

किया — शहर पुलिस अधीक्षक ने अपने शपथ पत्र में यह नहीं बताया कि उसने मामले में व्यक्तिगत रूप से कार्य किया — उसने अभिलेख से इक्ठ्ठा की गई जानकारी पर मात्र शपथ पत्र पर शपथ ली — निरोध आदेश की विधि मान्यता को निर्धारित करने के लिए पेपर कटिंग के अलावा न्यायालय के समक्ष कोई तर्कपूर्ण सामग्री नहीं — निरोध का आदेश मस्तिष्क का प्रयोग किये बिना पारित किया गया — याचिका मंजूर।

Case referred :

AIR 1950 SC 27.

ORDER

The Order of the Court was delivered by :
S.K. SETH, J. :- On 05.10.2011 the District Magistrate Dhar ordered detention of petitioner under provisions of National Security Act, 1980. Thereafter, State Government by an order dated Nil, confirmed the detention of petitioner for a period of 12 months ending on 04.10.2012. Both these orders (Annexure P-1 and P-2) are under challenge before us. It is urged that the District Magistrate passed the detention order without any application of mind; there was no nexus between the grounds and the detention order, and as such, it is unsustainable in law and deserve to be quashed.

2. Notice of the petition was issued and at the request of Government Advocate, time was granted to file counter reply and to make available the record at the time of hearing. A reply has been filed to oppose the petition on affidavit of City Superintendent of Police Pithampur. Original Record was not made available at the time of hearing nor was explanation submitted why record was not produced. We declined adjournment and proceeded with hearing of the petition.

3. The National Security Act 1980 empowers detention without trial. The object of preventive detention is not to punish a person for having done something but to intercept him before he acts in any manner prejudicial to the maintenance of public order. It has, therefore, to be understood in contradistinction to 'punitive detention' which follows as a consequence when an individual is found guilty in a trial for an offence. Detention without trial is a serious matter and the order of detention must therefore be justified by the detaining authority whenever the personal liberty is in peril due to drastic executive action under the draconian law.

4. The law of preventive detention has stood the test on the anvil of fundamental rights since *A.K. Gopalan v. State of Madras*. It is now well settled, that the order of detention made under the Act is essentially a precautionary measure and is based on a reasonable prognosis of the future behaviour of a person based on his past conduct judged in the light of surrounding circumstances. It may be easier to draw such inference where there is series of acts evincing the course of conduct to form subjective satisfaction that the person concerned, if not detained, would be likely to act in a manner 'prejudicial to the maintenance of public order'. Activities prejudicial to maintenance of 'public order' are quite distinct from activities relating to 'law and order' problem. The difference between 'law and order' and 'public order' may be explained by drawing two concentric circles the larger representing 'law and order' and the smaller representing 'public order'. Every infraction of law affects the law and order, but an act affecting law and order may not necessarily also affect the public order. For example an assault by one individual upon another would affect only law and order but it would not disturb the public peace; tranquility and even tempo of life so as to amount to breach of 'public order'. The true distinction between the areas of 'law and order' and 'public order' lies in the nature and quality of the act done but also upon the circumstances under which it was done and the degree and extent of its reach upon the society. The detaining authority must reach that satisfaction on the basis of relevant and cogent material, then only such satisfaction partakes the character of a 'subjective satisfaction' which is beyond the pale of judicial review. These are the sine qua non for the valid and lawful exercise of power.

5. In the instant case, the District Magistrate who passed the order of detention has not filed his affidavit. It is well established by catena of decisions of the Supreme Court that in answer to a Rule issued in a *habeas corpus* petition, the counter affidavit on behalf of the State should be sworn by the District Magistrate who had passed the detention order. In the present case, there is a direct allegation that the detention order was passed without application of mind and there was no material before the detaining authority to reach the subjective satisfaction. There is no parawise reply. The affidavit in support of the reply does not say that the City Superintendent of Police personally dealt with the matter. He has merely sworn the affidavit on the information gathered from the record. No explanation has been offered for not filing the affidavit of the District Magistrate. The reply also does not show

that all procedural steps, as required under the Act, were taken within the specified time. Except for news-paper cuttings (which have no evidentiary value), no other cogent material has been placed before us to judge the legality of the detention order. In this unsatisfactory state of affairs, we have no hesitation to hold that the District Magistrate passed the detention order in a most cavalier manner without any application of mind, and was confirmed by the State Government in equally callous manner as such, it is difficult for us to sustain the detention order. Yet there is another ground which makes the detention order unsustainable. In this connection, we may refer to the earlier division Bench decision of this court in W.P.No. 3426/2008 decided on 22.7.2008 wherein it is held that the detenu must be appraised of his right to make representation to Central Government. We find even this was not fulfilled in the case on hand.

6. In view of the foregoing discussion, we allow the petition and set aside the detention orders Annexure P-1 and Annexure P-2. As a result the petitioner be released from detention and set at liberty forthwith if not required in any lawful cause.

Petition allowed.

I.L.R. [2012] M.P., 1597

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 1911/2006 (Jabalpur) decided on 27 March, 2012

GOVIND SHARAN

...Petitioner

Vs.

HAR GOVIND

...Respondent

Stamp Act (2 of 1899), Art. 55, Benami Transactions (Prohibition) Act, (45 of 1988), Sections 3 & 4 - Stamp - Relinquishment deed - It is the pre-existing right in property which pre-supposes the relinquishment - Respondent is alleged to have admitted that the petitioner had purchased the property in the name of his father in Sahmati Soochak Ikrarnama - In view of Section 3 and 4 of Act, 1988, the petitioner can not claim that he has an exclusive right over the property which stood in the name of the father and after his death, it passed on to the legal representatives - It cannot be said that respondent had no antecedent right, title or interest in suit property - Document was rightly not taken in evidence being inappropriately stamped. (Para 8)

स्टाम्प अधिनियम (1899 का 2), अनुच्छेद 55, बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धाराएँ 3 व 4 - स्टाम्प - त्यजन विलेख - यह सम्पत्ति में पूर्व विद्यमान अधिकार है जो त्यजन की पूर्व धारणा करता है - अभिकथित रूप से प्रत्यर्थी ने स्वीकार किया कि याची ने सहमति सूचक इकरारनामा में अपने पिता के नाम से सम्पत्ति क्रय की थी - अधिनियम, 1988 की धारा 3 व 4 को दृष्टिगत रखते हुए, याची यह दावा नहीं कर सकता कि उसका सम्पत्ति पर अनन्य अधिकार है जो पिता के नाम से है और उसकी मृत्यु पश्चात, वह विधिक प्रतिनिधिगण को मिला - यह नहीं कहा जा सकता कि प्रत्यर्थी का वाद सम्पत्ति में कोई पूर्ववर्ती अधिकार, हक या हित नहीं था - अनुचित रूप से स्टाम्पित होने से दस्तावेज को उचित रूप से साक्ष्य में नहीं लिया गया।

Cases referred :

AIR 1923 NAG. 284, AIR 1957 RAJ. 125, AIR 1972 AP 373, (2009) 2 SCC 532, AIR 1996 SC 238.

Ravish Agrawal with K.S. Jha, for the petitioner.

Aditya Narayan, for the petitioner.

ORDER

SANJAY YADAV, J. - Order dated 19.1.2006 passed by Civil Judge, Class-I, Gadarwara in Civil Suit No. 37-A/2005 is challenged vide this petition under Article 227 of the Constitution of India. By said order document nomenclatured as 'Sahmati Suchak Ikrarnama; (सहमति सूचक इकरारनामा) tendered in evidence by the petitioner plaintiff to prove part of it recording the statement made therein by the respondent No. 1/defendant has been declined to be taken in evidence on the ground that the same since record relinquishment of right in property is inappropriately stamped.

2. Suit allegations are that the petitioner and respondent No. 1/defendant No. 1 are real brothers. Out of self acquired income the petitioner/plaintiff by registered sale-deed dated 23.6.1967 purchased Khasra No. 299/1 area 2.023, Khasra No.299/2 area 0.405, Khasra No. 299/4 area 2.023 and Khasra No. 297 area 1.259, Mouja Bodri, Patwari Hallka No. 45 from one Sunder Singh Rajpoot. Sale-deed was registered in favour of father. Likewise by registered sale-deed dated 13.5.1968, the petitioner/plaintiff purchased Khasra No. 299/3, area 0.765 from one Chottelal in the name of his father.

3. That, after the death of father said Sahmati Soochak Ikrarnama was executed between the petitioner/plaintiff and the respondent/defendant on 20.4.2002 on a Rs. 50/- stamp paper.

3. The document in question is in two parts. First part comprised of the acknowledgment by the executant, viz., the respondent No. 1/defendant regarding land bearing Khasra No. 299/3, area 0.76 hectare being purchased by the petitioner in the name of the father, and after his death the name of other brother and sister was mutated in the revenue record and since they are not the real owner they have no claim over the said property. The recital is in the following terms:

लिखाने वाले :- गोविन्द शंकर शुक्ला आ० स्व० श्री रामरतन शुक्ला नि०
बीजासेन वार्ड गाडरवारा जिला नरसिंहपुर

लिखने वाले :- हरगोविन्द शुक्ला आ० स्व० श्री रामरतन शुक्ला निवासी
रानी दुर्गावती वार्ड गढ़ा जबलपुर तह० जिला जबलपुर (म०प्र०)

सहमति सूचक इकरारनामा लिख दिया बावत ऐसा कि हम दोनों सगे भाई हैं आपने शासकीय नौकरी में रहते हुये अपनी निजि आय से मौजा बीदरी तह० गाडरवारा स्थित भूमियां बजरिये रजि० बैनामा दिनांक 23-6-67 के अनुसार रकवा 5.710 हे० कय की थी और इसी प्रकार उसी मौजा स्थित भूमि ख०न० 299/3 रकवा 0.765 हे० बजरिये रजि० बैनामा दिनांक 13/5/88 के अनुसार कय की थी । उक्त बैनामा में आपने अपने पिता स्व० श्री रामरतन शुक्ला को सम्मान देने की दृष्टि से क़ेता के रूप में उनका नाम लिखवा दिया था हालांकि मौके पर उक्त खरीद दिनांकों से ही आप उक्त भूमियों पर बतौर मालिक काबिज लगातार रूप से व आवाद रूप से चले आ रहे हैं । चूंकि उक्त भूमियों पर पिताजी का नाम दर्ज होने से उनकी मृत्यु उपरांत बतौर उत्तराधिकारी के आपके साथ मेरा व बहिन सावित्री बाई का नाम दर्ज हो गया था हालांकि उक्त भूमियों में हम दोनों भाई बहिन का कोई हक हकूक नहीं है और नही भविष्य में मेरे वारसानों का किसी प्रकार का कोई हक रहेगा । इसी प्रकार स्थानीय सुभाष वार्ड गाडरवारा में स्थित पैतृक मकान में मेरा आधा हिस्सा था जो आपसी बटवारा में दक्षिणी और का हमें मिला था इस हिस्से में हमारा किरायेदार रज्जू साहू रहता था । अपने हिस्से के इस मकान को हमने आपको दो लाख चार हजार रूपयों में हमेशा पुश्तान पुश्त को दे दिया और दो लाख चार हजार रूपया हमने आज ही गवाहान के समक्ष नगदी प्राप्त कर लिये हैं और आपको कब्जा बतौर मालिक के करा दिया है जो हमेशा करे रहे । इस मकान व उक्त भूमियों में हम या हमारे वारसान किसी भी प्रकार का दावा आदि करें तो वह सब झूठा समझा जाये । और भविष्य में आपको किसी भी प्रकार की कानूनी अडचन आये तो हम आपके कहे अनुसार उक्त मकान का बैनामा आपके पक्ष में लिखने को तत्पर रहेंगे हम जबलपुर में स्थायी रूप से सपरिवार निवास करते हैं ।

लिहाजा इकरारनामा पूर्ण होस हवास तन्दुरुस्ती में बिना किसी दबाव दहशत के आपके पक्ष मे निष्पादित किया और गवाहन के समक्ष पढ सुन समझकर अपने हस्ताक्षर किये सही फ०ता० 20/4/02 व मुकाम गाडरवारा

हरगोविन्द शुक्ला
हस्ताक्षर लिखने वाले

गोविन्द शंकर
हस्ताक्षर लिखाने वाले

5. The second part which the petitioner/plaintiff is not concerned with regard to the portion of the family property.

6. Placing reliance on the decision in *Krishanji v. Sukhdev* : AIR 1923 Nagpur 284, and *Ms. Takhtibai v. The State* : AIR 1957 Rajasthan 125, it is contended by learned Senior Counsel that the trial court has wrongly construed the instrument which is divisible, as a relinquishment deed. It is urged that, unless there is an antecedent right, title or interest in a person there cannot be a relinquishment. It is the pre-existing right in property which pre-supposes the relinquishment. It is urged that since the deed acknowledges the pre-existing right of the petitioner, the same was not required to be registered. In respect of divisibility of the document in question learned Senior Counsel places reliance on the decision in *Sanjeeva Reddy v. Johanputra* (AIR 1972 AP 373) approved in *Avinash Kumar Chouhan v. Vijay Krishna Mishra* : (2009) 2 SCC 532. It was held therein:

"9. While considering the scope of Section 35 of the Stamp Act we cannot bring in the effect of non-registration of a document under Section 49 of the Registration Act. Section 17 of the Registration Act deals with documents, the registration of which is compulsory and Section 49 is concerned only with the effect of such non-registration of the documents which require to be registered by Section 17 or by any provision of the Transfer of Property Act. The effect of non-registration is that such a document shall not affect any immovable property covered by it or confer any power to adopt and it cannot be received as evidence of any transaction affecting such property or conferring such power. But there is no prohibition under Section 49 to receive such a document which requires registration to be used for a collateral purpose i.e. for an entirely different and independent matter. There is a total and absolute bar as to the admission of an unstamped instrument whatever be the nature of the purpose or however foreign or independent the purpose may be for which it is sought to be used, unless there is compliance with the requirements of the provisos to Section 35. In other words if an unstamped instrument is

admitted for a collateral purposes. It would amount to receiving such a document in evidence for a purpose which Section 35 prohibits. There is nothing in *B. Rangaiah v. B. Rangaswamy*, (1970) 2 Andh WR 181 which supports the contention of the petitioner. That was a case as pointed out by Kuppuswami, J., where there were two instruments though contained in one document one a settlement in favour of the 4th defendant therein and the other a will. It was therefore held that part of the instrument which constitutes a will did not require any stamp and will be admissible in evidence for proving the bequest contained therein. It was for that reason that the learned Judge said that Sec. 35 of the Stamp Act has no application to a case where one of the separate instruments relating to one such matters would not at all be chargeable under the Act as in the case before him."

7. The summum bonum of submission by learned counsel for the petitioner is that having purchased the property in question in 1967 and 1968 from his self acquired income though in the name of his father, it is the petitioner/plaintiff who was the real owner of the property and, therefore, an acknowledgment in writing by brother of petitioner will not tantamount to relinquishment of right to property by brother which he does not owe as would warrant the registration of the document in question. Be that as it may. Even if the decision in *Krishanji v. Sukhdev* : (supra), *Mst. Takhtibai v. The State* (supra) and *Sanjeev Reddy v. Johanputra Reddy* (supra) (in respect of divisibility of document in question) is accepted to lay down the correct proportion regarding relinquishment which can be only when a right exists, the question which still lingers is as to whether petitioner on the basis of sale-deed dated 23.6.1967 and 13.5.1968, which admittedly recorded father of the petitioner as the purchaser of the property in question, can claim any right over the property in question after coming into force of Benami Transactions (Prohibition) Act, 1988. And for the reason of provisions contained in Sections 3 and 4 thereof.

Sections 3 and 4 of 1988 Act respectively provides:

3. Prohibition of benami transactions- (1) No person shall enter into any benami transaction.

(2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried

daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife of the unmarried daughter.

(3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this section shall be non-cognizable and bailable.

4. Prohibition of the right to recover property held benami-

(1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,--

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

In *R. Rajagopal Reddy (dead) by L.Rs and others v. Padmini Chandrasekharan (dead) by L.Rs* (AIR 1996 SC 238) it is held:

13. So far as Section 4 (2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the

property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by Section 4 (2) on a preexisting right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent, to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4 (1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 19.5.1988, if before the stage of filling of defence by the real owner is reached, Section 4(2) becomes operative from 19th May. 1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Section 4(1) and 4 (2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed Section 4(2) was out of picture. Section 4 (2) nowhere uses the words "No defence based on any right in respect of any property held benami

whether against the person in whose name the property is held or against any other person, shall be allowed to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of Section 4(2). We may at this stage refer to one difficulty projected by learned advocate for the respondents in his written submissions, on the applicability of Section 4 (2). These submissions read as under

"Section 4(1) places a bar on a plaintiff pleading 'benami', while Section 4 (2) places a bar on a defendant pleading 'benami' after the coming into force of the Act. In this context, it would be anomalous if the bar in Section 4 is not applicable if a suit pleading 'benami' is already filed prior to the prescribed date, and it is treated as applicable only to suit which he filed thereafter. It would have the effect of classifying the so-called 'real' owners into two classes - those who stand in the position of plaintiffs and those who stand in the position of defendants. This may be clarified by means of an illustration. A and B are 'real' owners who have both purchased properties in say 1970, in the names of C and D respectively who, are ostensible owners viz. benamidars. A files a suit in February 1988 i.e. before the coming into force of the Act against C, for declaration of his title saying that C is actually holding it as his benamidar. According to the petitioner's argument, such a plea would be open to A even after coming into force of the Act, since the suit has already been laid. On the other hand, if D file a suit against B at the same for declaration and injunction, claiming himself to be the owner but B's opportunity to file a written statement comes in say November 1988 when the Act has already come into force, he in his written statement cannot plead that D is a benamidar and that he, B is the real owner. Thus A and B, both 'real' owners, would stand on a different footing, depending upon whether they would stand in the position of plaintiff or defendant. It is respectfully submitted that such a differential treatment would not be rational or logical."

14. According to us this difficulty is inbuilt in Section 4(2) and does not provide the rationale to hold that this Section applies retrospectively. The legislature itself thought it fit to do so and there is no challenge to the vires on the ground of violation of Article 14 of the Constitution. It is not open to us to re-write the section also. Even otherwise, in the operation of Section 4 (1) and (2), no discrimination can be said to have been made amongst different real owners of property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to coming into operation of Section 4(2), would form a separate class as compared to those cases where a state for filling such suits or defences has still not reached by the time Section 4(1) and (2) starts operating. Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4 (1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection cannot be sustained."

8. It is not in dispute that the suit filed by the petitioner is after the coming into force of Benami Transactions (Prohibition) Act, 1988 and for the reasons of Sections 3 and 4 thereof petitioner cannot claim that he has an exclusive right over the property which stood in the name of the father and after death the property passed on to the legal representatives. Adjudged from this angle it cannot be said that the defendant No. 1 had no antecedent right, title or interest in the suit property.

9. Tested on the anvil of above analysis, the impugned order cannot be faulted with.

10. For the reasons above petition fails and is hereby dismissed. There shall be no costs.

Petition dismissed.

I.L.R. [2012] M.P., 1606

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 6907/2006(S) (Jabalpur) decided on 3 April, 2012

KANAKLATA (MRS.)

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

A. Service Law - Compassionate Appointment - National Coal Wage Agreement VI - Agreement VI is binding on the management and workmen - Nothing in agreement VI which provides for priority right in favor of adult dependent - On the contrary clause 9.3.3 delineate the line of succession - Rejection of the application that wife has no priority right over adult dependant male son de hors the terms of NCWA.
(Para 6)

क. सेवा विधि - अनुकम्पा नियुक्ति - राष्ट्रीय कोयला मजदूरी/वेतन अनुबंध VI - अनुबंध VI प्रबंधन व कर्मकारों पर बंधनकारी है - अनुबंध VI में कुछ नहीं जो वयस्क आश्रित के पक्ष में प्राथमिकता का अधिकार उपबंधित करता हो - इसके विपरीत खंड 9.3.3 उत्तराधिकार का क्रम दर्शाता है - आवेदन की अस्वीकृति इस आधार पर कि पत्नी को वयस्क आश्रित पुत्र के ऊपर प्राथमिकता का कोई अधिकार नहीं, एनसीडब्ल्यू की शर्तों से असंबद्ध है।

B. Succession Act (39 of 1925), Section 373 - Succession Certificate - Validity of marriage - Proceedings are summary in nature to decide the right of the parties for certificate - Succession Court is not expected for first directing the parties to seek a declaration as to validity of marriage, as the nullity thereof as the case may be - Further as the order of succession Court has not be challenged it has attained the finality.
(Paras 11 & 12)

ख. उत्तराधिकार अधिनियम (1925 का 39), धारा 373 - उत्तराधिकार प्रमाण पत्र - विवाह की वैधता - प्रमाण पत्र के लिए पक्षकारों के अधिकार का

निर्धारण करने हेतु कार्यवाहियां संक्षिप्त स्वरूप की हैं – उत्तराधिकार न्यायालय से यह अपेक्षित नहीं कि वह पक्षकारों की विवाह की वैधता के बारे में या उसकी अकृतता के बारे में, जैसी स्थिति हो, घोषणा चाहने के लिए पहले निदेशित करे – इसके अतिरिक्त जैसा कि उत्तराधिकार न्यायालय के आदेश को चुनौती नहीं दी गई, उसने अंतिमता प्राप्त कर ली है।

Case referred :

AIR 1976 MADRAS 138.

R.P. Agrawal with H.B. Gautam, for the petitioner.

Indira Nair with K.Rohan, for the respondents No. 3 & 5.

D.S. Parihar, for the respondent No.6.

O R D E R

SANJAY YDAV, J. - Heard

1. Order dated 23-02-2006 passed by Sub Area Manager, South Eastern Coal Fields Limited, Bijuri, Sub-Area Hasdeo, is being assailed vide this writ petition, whereby claim for appointment on compassionate ground in lieu of death of Rambharose has been declined on the ground that as per practice adult dependant male member of the deceased employee has the priority right for appointment.

2. Rambharose employed with the respondents-SECL expired on 22-07-2001. Married to one Jamvati, Rambharose had five issues from the marriage, viz., Ashok Lal, Munni Bai, Sangeeta, Santosh and Manbodh. Later two are still minors. Jamvati died on 05-05-1999. It is said that the petitioner subsequently got married to Rambharose. After whose death dispute regarding succession to the corpus of Rambharose got settled in a succession case No. 49/2001 decided on 15-06-2005, whereby the petitioner and the progenies from the wedlock of Rambharose and Jamvati got 1/6th share each. It is on the strength of the succession certificate the petitioner applied for appointment on compassionate ground which was declined by impugned order stating that it is the adult dependant male member who has the priority right for appointment on compassionate ground.

3. Employment of dependant of the worker who dies while in service in SECL is governed by the provisions contained in National Coal Wage Agreement-VI. It is not disputed by either of the parties that the provisions contained in NCWA-VI is binding on the management and the workmen.

Chapter IX of NCWA deals with social security whereunder clause 9.3.0 stipulates provision regarding employment to dependants.

4. Clause 9.3.2, 9.3.3, 9.3.4 and 9.5.0 of the NCWA-VI respectively provides for :-

“9.3.2 Employment to one dependant of the worker who dies while in service in so far as female dependants are concerned, their employment/payment of monetary compensation would be governed by para 9.5.0.

9.3.3 the dependant for this purpose means the wife/husband as the case may be, unmarried daughter, son and legally adopted son. If no such direct dependant is available for employment, brother, widowed daughter/widowed daughter-in-law or son-in-law residing with the deceased and almost wholly dependant on the earnings of the deceased may be considered to be the dependant of the deceased.

9.3.4 the dependants to be considered for employment should be physically fit and suitable for employment and aged not more than 35 years provided that the age limit in case of employment of female spouse would be 45 years as given in Clause 9.5.0 in so far as male spouse is concerned, there would be no age limit regarding provision of employment.

9.5.0 Employment/Monetary compensation to female dependant

Provision of employment/monetary compensation to female dependants of workmen who die while in service and who are declared medically unfit as per Clause 9.4.0 above would be regulated as under :

(i) In case of death due to mine accident the female dependant would have the option to either accept the monetary compensation of Rs. 4,00/- per month or employment irrespective of her age.

(ii) In case of death/total permanent disablement due to cause other than mine accident and medical unfitness under

clause 9.4.0 if the female dependant is below the age of 45 years she will have the option either to accept the monetary compensation of Rs. 3,000/- per month or employment.

In case the female dependant is above 45 years, she will be entitled only to monetary compensation and not to employment.

(iii) In case of death either in mine accident or for other reasons or medical unfitness under Clause 9.4.0 if no employment has been offered and the male dependant of the concerned worker is 12 years and above in age, he will be kept on a five roster and would be provided employment commensurate with his skill and qualifications when he attains the age of 18 years. During the period the male dependant is on live roster, the female dependant will be paid monetary compensation as per rates at paras (i) and (ii) above. This will be effective from 1.1.2000.

(iv) Monetary compensation wherever applicable, would be paid till the female dependant attains the age of 60 years.

(v) The existing rate of monetary compensation will continue. The matter will be further discussed in the Standardisation Committee and finalised.

Note : In the case of TISCO, the matter would be settled at bipartite level."

5. No other provisions, than the clauses above are brought on record, nor shown during the course of hearing which governs employment to dependants.

6. Apparent it is from the clauses, viz., Clause 9.3.2, 9.3.3, 9.3.4 & 9.5.0 that there is no priority right in favour of adult dependant male member in respect of employment on compassionate ground. On the contrary, clause 9.3.3 delineate the line of succession being wife/husband, as he case may be, unmarried daughter, son and legally adopted son. If no such direct dependant is available than brother, widowed daughter/widowed daughter-in-law or son-in-law residing with the deceased and almost wholly dependant on the earnings of the deceased. The NCWA having a binding effect, no amount of common

practice said to be followed by the Sub-Area Manager of preferring an adult dependant male member of deceased for compassionate appointment will override the terms and conditions of the NCWA. The rejection of application by the petitioner on the ground that she has no priority right over the adult dependant male son, being dehors the terms of NCWA deserve to be quashed.

7. The question next would be whether in the wake of objection by the children of the deceased regarding marriage between Rambharose and the petitioner any right accrued in favour of the petitioner by virtue of order dated 15-06-2005 passed in the succession case instituted under section 372 of the Indian Succession Act, 1925 (for short the Act of 1925).

8. Section 372 of the Act of 1925 makes a provision regarding grant of succession certificate, procedure therefor as provided under section 373 which is in the nature of a summary proceedings as it stipulates :

“373: Procedure on application :-(1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing -

(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the Court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit, and under the day fixed, or as soon, therefore, as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining question of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless, grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.”

9. The question is while dwelling upon the limited issue of succession whether the succession Court is precluded from answering the issue set up regarding nullity of a marriage if one of the claimant has set up the claim on the basis of her being the widow.

10. In the considered opinion of this Court that though the proceedings are of summary nature to decide the right of the applicant(s) for certificate, the succession Court is not expected of first directing the party to seek a declaration as to validity of marriage, as the nullity thereof, as the case may be, and then set on to grant certificate. The said view finds support from a decision by learned single Judge, Madras High Court in *Nevilee P. Mehta v. Mrs. Dolly Mehta* : AIR 1976 Madras 138, wherein it is held :-

“13.” The question that arises for my determination is whether it is necessary for the plaintiff to obtain a declaration of nullity of the marriage before he could succeed and whether this court sitting on the testamentary side cannot have jurisdiction to decide whether the wife, the dependant, is also a legal heir, in the absence of such a declaration. In other words, whatever may be said of the other cases, on the admitted facts in this case, the question is whether I cannot decide the validity of the marriage for the limited purpose of deciding as to who is the heir of late Pheroze Mehta. In *Paramsami v. Sornathammal*, AIR 1989 Mad 124=(81 Mad LW 460) it laid down that “resort to a court is necessary to declare a marriage null and void”. Again it is observed that “even in a case where the marriage is a nullity, it would be necessary for the party complaining nullity of the marriage to get a declaration of nullity from court.” These are the two passages on which, as I stated above, Mr. G. K. Damodar Rao relies on strongly. But, I do not think that as an axiomatic proposition, it could be said that in every case the moment a party sets up the nullity

of marriage, or illegitimacy of the children, the testamentary could must direct the party to the ordinary civil court to obtain the necessary declaration. Such a procedure would be opposed to both public policy and expediency that are required from the court sitting on the testamentary side. It would and must have jurisdiction to decide the limited question of nullity of marriage on which decision alone the ultimate result depends. This would be more so in view of Section 387 of the Indian Succession Act which states that the proceedings are summary in character. If later on the party obtains a declaration of nullity, certainly the necessary result will flow from it and it may have a bearing on the testamentary proceedings also.

11. In the case at hand the succession Court categorically records a finding in paragraph 12 and 13 of the decision dated 15-06-2005 of the petitioner having married Rambharose on the basis whereof the Court directed for distribution of 1/6th share amongst the legal heirs of Rambharose, including the petitioner. The order passed by Succession Court is not shown to have been challenged in higher forum and thus has been allowed to attain finality. Moreover, there is also no material on record to show that the marriage of petitioner with Rambharose has been questioned in any forum.

12. Since there is a finding in favour of the petitioner that she was married to Rambharose, the NCWA creates a priority right in her for consideration for compassionate appointment in lieu of death of Rambharose. And as agreed by her during course of hearing that in case appointed fifty percent of the remuneration be delineated in favour of Santosh and Manbodh till they attain majority.

13. Having thus considered, petition is allowed with a direction to the respondents to consider the case of the petitioner for appointment on compassionate ground in accordance with the provisions of NCWA-VI within three months from the date of communication of this order. In case if the petitioner is appointed, she would furnish an undertaking and a no-objection for deduction of fifty percent of the remuneration as agreed by her during course of hearing, for maintenance of Santosh and Manbodh till they attain majority. Parties to bear their own costs.

Petition allowed.

I.L.R. [2012] M.P., 1613

WRIT PETITION

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

W.P. No. 84/2011(S) (Indore) decided on 8 May, 2012

KRISHI UPAJ MANDI COMMITTEE, MAHIDPUR ...Petitioner
Vs.

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

A. Industrial Disputes Act (14 of 1947), Section 25F - Retrenchment - Petitioner did not file any record about payment of salary, attendance register despite specific order by Labour Court - Adverse inference has to be drawn that employee had worked for more than 240 days. (Para 5)

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ - छंटनी - याची ने श्रम न्यायालय के विनिर्दिष्ट आदेश के बावजूद वेतन के भुगतान, उपस्थिति पंजी से संबंधित कोई अभिलेख प्रस्तुत नहीं किया - प्रतिकूल निष्कर्ष निकालना होगा कि कर्मचारी ने 240 दिनों से अधिक कार्य किया।

B. Industrial Disputes Act (14 of 1947) Section 25F - Delay in raising dispute - For raising dispute about termination, reference can not be rejected on the ground of delay - Delay can be a ground to deny back wages. (Para 6)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ - विवाद उठाने में विलम्ब - सेवा समाप्ति के बारे में विवाद उठाने के लिए, निर्देश को विलम्ब के आधार पर अस्वीकार नहीं किया जा सकता - पिछला वेतन नकारने के लिए विलम्ब आधार हो सकता है।

Cases referred :

(2008) 117 FLR 1191, (2007) 4 SCC 94, (2010) 3 MPLJ 457, (2010) 4 MPLJ 212, (2008) 116 FLR 237, (2008) 116 FLR 178, (2010) 4 MPLJ 39, (2004) 103 FLR 146.

D.M. Sharma, for the petitioner.

C.S. Ujjainiya, P.L. for the respondents No. 1 & 2.

Prateek Patwardhan, for the respondent No.3.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. :- This order shall also govern the disposal of W.P. Nos. 86, 89, 92, 95 and 98. of 2011 (S). For the sake of convenience, the facts are taken from W.P. No.84 of 2011.

2. This petition under Article 226/227 of the Constitution of India is directed against the award dated 31.03.2010 passed by Labour Court, Ujjain in Case No.53/2006/ID Act Reference by which the labour Court had ordered reinstatement of the third respondent without backwages.

3. Briefly stated, challenging his oral order of termination from service, the third respondent had approached the Labour Commissioner for making reference under the Industrial Disputes Act. The Deputy Labour Commissioner referred the dispute to the Labour Court, Ujjain. The Labour Court after recording the evidence led by the parties held that the third respondent was working on the post of Assistant Sub Inspector with the petitioner - Krishi Upaj Mandi, Mahidpur from 1.08.1995 and was removed by an oral order dated 31.12.1997. The Labour Court recorded a finding that he had worked with the petitioner for more than 240 days continuously in the year preceding to his termination. It also held that the termination is illegal, retrenchment as the procedure for retrenchment provided under section 25F of the Industrial Disputes Act 1947 was not followed. A finding has also been recorded by the Labour Court that though the record about salary and attendance of the third respondent was summoned but inspite of an order being passed, it was not produced. In the circumstances by drawing adverse inference, the Labour Court held that the petitioner has illegally retrenched the third respondent. As regards the delay in raising the dispute challenging the termination, the Labour Court has observed that there is no limitation fixed under the Industrial Disputes Act, 1947. However for the delay, the Labour Court declined to grant backwages and directed reinstatement of the third respondent without backwages.

4. Having gone through the impugned award and after considering the grounds raised by the petitioner, we are of the view that the petition has no merit.

5. On going through the impugned award and the record we find that on

the application for summoning the record a specific order was passed by the Labour Court directing the petitioner to produce the record about payment of salary, attendance register pertaining to third respondent, however in spite of the said order the petitioner had failed to produce the record. In the circumstances, the labour Court drawn adverse inference and after taking into consideration the evidence led by the parties, the Labour Court held that third respondent has been able to prove that he had worked for more than 240 days continuously in the year preceding to his termination. The view taken by the Labour Court appears to be justified and gets support from the law laid down in the matter of *Sita Ram and others vs. Motilal Nehru Farmers Training Institute* (2008) 117 FLR 1191, *Sriram Industrial Enterprises Ltd. Vs. Mahak Singh and others* (2007) 4 SCC 94, *Sanjay Kumar vs. Chief Executive Officer Janpad Panchayat, Ratlam* (2010) 3 M.P.L.J. 457, *Naveen Singh Bhadoriya Vs. State of M.P. and others* (2010) 4 MPLJ 212.

6. It is also well settled that since there is no limitation under the Industrial Disputes Act for raising the dispute about termination, reference cannot be rejected on the ground of delay. The delay can be a ground to deny the backwages. [See (2008) 116 FLR 237 *Karan Singh vs. Executive Engineer, Haryana State Marketing Board*, (2008) 116 FLR 178 *Irrigation Research Institute and another vs. Kripal Singh*]. In the present case also for the delay in raising the dispute the labour Court has rightly denied back wages to the third respondent.

7. In the circumstances, on our view, the third respondent's termination was an illegal retrenchment as the same has been done without following procedure, therefore, the same has rightly been set aside by the Labour Court. [See (2010) 4 MPLJ 39 *Anoop Sharma Vs. Executive Engineer, Public Health Division No.1, Panipat (Haryana)*, (2004) 103 FLR 1465 *Krishna Bahadur Vs. M/s Purna Theatre and others*).

8. As a result, the petition fails and is hereby dismissed.

9. No orders as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 1616

WRIT PETITION

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

W.P. No. 438/2012 (Indore) decided on 16 May, 2012

AZAM

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

National Security Act (65 of 1980), Sections 8 & 14 - Right to make representation - Petitioner not informed about his right to make representation against detention to the Central Govt. also, as per provisions of Section 14 - Constitutional Right envisaged under Article 22 infringed - Detention order quashed. (Para 8)

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराएँ 8 व 14 - अभ्यावेदन करने का अधिकार - याची को निरोध के विरुद्ध केन्द्र सरकार को भी धारा 14 के उपबंधों के अनुसार अभ्यावेदन करने के उसके अधिकार के बारे में सूचित नहीं किया गया - अनुच्छेद 22 के अंतर्गत परिकल्पित संवैधानिक अधिकार का उल्लंघन किया गया - निरोध आदेश अमिखंडित।

Cases referred :

(1995) 4 SCC 511, 2007 MPHT (II) 443, 2007(2) MPLJ 99.

Asif Warsi, for the petitioner.*Mini Ravindran*, Dy. G.A. for the respondents/State.**ORDER**

The Order of the Court was delivered by : **SHANTANU KEMKAR, J. :-** BY this petition under Article 226 of the Constitution of India, the petitioner has challenged the order dated 10.10.2011 passed by the District Magistrate, Mandsaur and also the order dated 15.12.2011 passed by the State Government confirming the order passed by the District Magistrate by which the petitioner has been detained under Section 3(2) of the National Security Act, 1980 [for short "the Act"].

2. In the writ petition, the petitioner has raised various grounds for challenging the order of detention including the ground that he was not

made aware of his right to make representation to the Central Government but was made aware of his right to make representation only to the State Government. In the circumstances, according to the petitioner, there is a violation of Article 22 (5) of the Constitution of India.

3. Shri Asif Warsi, learned counsel for the petitioner in order to support the aforesaid ground raised that the petitioner was also required to have made aware by the detaining authority that he has got right of representation before the Central Government, placed reliance on a judgment of the Supreme Court in the case of *Kamleshkumar Ishwardas Patel v/s Union of India and others* [(1995) 4 SCC 51].

4. Ms. Mini Ravindran, learned Deputy Govt. on the other hand has contended that Section 8 (1) of the Act provides that the detenu shall be afforded an opportunity of making a representation by the detaining authority against the order of detention before the appropriate Government which in the present case is the State Government and, therefore, there was no necessity for making the petitioner aware about his right to make representation to the Central Government.

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

6. Section 2 (1) (a) of the Act defines "appropriate Government". According to which if a detention order is made by the Central Government, the appropriate Government would be the Central Government and if the detention order is made by the State Government or by an officer subordinate to a State Government, the appropriate Government would be the State Government. Section 8 of the Act deals with grounds of order of detention to be disclosed to the persons affected by the order. It also provides that opportunity of making a representation against the order of detention to the appropriate Government shall be afforded at the earliest. Section 14 of the Act deals with power for revocation of detention order. It empowers the State or Central Government to revoke or modify the order of detention.

7. The Supreme Court in the case of *Kamleshkumar Ishwardas Patel v/s Union of India and others* (Supra), while considering the safeguard provided to the detenu under Article 22 (5) of the Constitution

of India, in paragraph 14 has held that Article 22 (5) must, therefore, be construed to mean that the person detained has a right to make a representation against the order of detention which can be made not only to the Advisory Board but also to the detaining authority, i.e., the authority that has made the order of detention or the order for continuance of such detention, which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order of detention and thereby give relief to the person detained. The Supreme Court has very categorically held that the right to make a representation carries within it a corresponding obligation on the authority making the order of detention to inform the person detained of his right to make a representation against the order of detention to the authorities who are required to consider such a representation.

8. In the present case, as would be clear from Section 14 of the Act that the Central Government is equally empowered to revoke or modify the detention order and, therefore, in our considered view the authority making the order of detention was duty bound to inform the petitioner of his right to make a representation to the Central Government also. By not doing so, in our considered view there is an infringement of constitutional right guaranteed under Article 22 (5) of the Constitution of India. A Division Bench of this Court in the case of *Nirmaljeet Kaur v/s State of M.P.* [2007 MPHT (II) 443 = 2007 (2) MPLJ 99] in identical circumstances had quashed the detention order and had allowed the petition by placing reliance on the judgment of the Supreme Court in the case of *Kamleshkumar Ishwardas Patel v/s Union of India and others* (Supra).

9. Having regard to the aforesaid clear violation of Article 22 (5) of the Constitution of India read with Sections 8 and 14 of the Act, we are of the considered view that the impugned order of detention is liable to be quashed. As a result, without going into the other grounds we deem it proper to allow this petition on this ground alone. As a result the impugned detention order as also the confirmation order are hereby quashed. The petitioner be released forthwith, if he is not required to be detained in any other case.

Petition allowed.

I.L.R. [2012] M.P., 1619

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 3321/2012 (Gwalior) decided on 17 May, 2012

SHIVHARE ROADLINES (M/S)

...Petitioner

Vs.

M/S GAMMON INDIA LTD. & anr.

...Respondents

Arbitration and Conciliation Act (26 of 1996), Section 12 - Change of Arbitrator - Bias - Legal History traced on "bias" - There is a shift from the earlier test of reasonable likelihood of bias to real danger of bias - Bias has to be gathered from the facts and circumstances of a particular case - No straight-jacket formula can be made for this purpose - Merely because the Arbitrator granted certain adjournments to the respondent would not lead to the conclusion that he is biased. (Paras 7 to 9)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 12 - मध्यस्थ को बदला जाना - पक्षपात - "पक्षपात" के विधिक इतिहास को खोजा गया - पक्षपात की युक्तियुक्त संभावना की पूर्वतर परीक्षा बदलकर पक्षपात का वास्तविक खतरा हो गई है - पक्षपात को विशिष्ट प्रकरण के तथ्यों एवं परिस्थितियों से समझा जाना होता है - इस प्रयोजन हेतु कोई निश्चित मानदंड नहीं बनाया जा सकता - मात्र इसलिए कि मध्यस्थ ने प्रत्यर्थी को कतिपय स्थगन प्रदान किये, यह निष्कर्ष नहीं निकलेगा कि वह पक्षपाती है।

Cases referred :

(2010) 2 SCC 385, (2006) 127 DLT 646, (2009) 162 DLT 441, (2011) 181 DLT 504, (1909) 2 IR 763, (1969) 1 QB 577, (2000) QB 451, (2001) 1 SCC 182, 2002 (1) All. E.R. 465, 2001 (1) WLR 700, (2004) 8 SCC 788, (2010) 13 SCC 427, (2011) 10 SCC 106.

Arvind Dudawat, for the petitioner.

ORDER

SUJOY PAUL, J. : This petition is directed against the order dated 28/30.3.2012 passed by respondent No.2. The petitioner preferred an application under section 12 of Arbitration and Conciliation Act, 1996 (for short, the 'Act') for restraining the arbitrator to conduct the arbitration proceedings. The arbitration application (Annexure P/10) was filed on the

ground of bias. The main attack of the petitioner on the ground of bias is the alleged conduct of the arbitrator. In the said application it is stated that the arbitrator was appointed pursuant to Supreme Court's order dated 23.7.2010. The arbitration proceedings were belatedly started by the arbitrator after sending various reminders by the petitioner. The first meeting was conducted on 7.3.2011 wherein the arbitrator fixed a time-schedule for conducting and completing the arbitral proceedings. The petitioner submitted its claim within the time limit. The respondent did not adhere to the time limit and prayed for time beyond the time schedule fixed by the arbitrator. The arbitrator in spite of objection of petitioner granted time to file statement of defence by the respondent. The said time was granted up to 15.9.2011 but within said time also the statement of defence was not filed. The objection of petitioner is that time was generously extended in favour of the respondent for filing its defence statement. It is further stated that the matter was fixed on 2.1.2012 and statements of witnesses were recorded. On 6.2.2012 time was again extended in favour of the respondent to file statement of defence. On the strength of these allegations, it is stated that the arbitrator is extending undue favour to the respondents. It is also stated that because of unnecessary delay in conducting the proceedings, the petitioner is required to pay Rs.10000/- on each meeting, which is a sheer waste for no valid reason. On the strength of these allegations/factual backdrop, it is alleged that the petitioner has justiciable doubt in respect of independence and impartiality of the arbitrator. Thus, the basic ground of challenge is the reasonable likelihood of bias on the basis of aforesaid factual backdrop.

2. I have heard Shri Dudawat, learned counsel for the petitioner at length.

3. Shri Dudawat cited (2010) 2 SCC 385 (*NBCC Limited vs. J.G.Engineering Private Limited*) and also (2006) 127 DLT 646 (*Indira Rai vs. Vatika Plantations (P) Ltd.*); (2009) 162 DLT 441 (*Arun Ka Thpalia vs. J.M.Mukhi*); and, (2011)181 DLT 504 (*Délhi Chemical and Pharmaceuticals Works Pvt.Ltd. vs. Himgiri Realatirs Pvt.Ltd.*) in support of his contentions.

4. There was a long debate in the legal circles regarding bias. The bias is described by Lord O' Brien CJ in *Rex v. Justice of County Tyrone* (1909) 2 IR 763, as under:

"By bias, I understand a real likelihood of a operative prejudice, whether conscious or unconscious. There must,

in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias."

"Thus, the real question is not whether a person is really biased. It is difficult to prove the state of mind of a person. Therefore, one has to see whether there is reasonable ground for believing that the person was likely to have been biased-mere suspicion is not enough." (A.K.Kraipak v. Union of India, AIR 1970 SC 150).

It is further held by Lord Denning in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon* (1969) 1 QB 577 as under:-

"There must be circumstances from which a reasonable man would think it likely or probable that the arbitrator would, or did, favour one side favourably at the expense of the other. The court will not enquire whether he did, in fact, favour one side favourably. Suffice it that reasonable person might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking "That judge/arbitrator was biased."

Again in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* (2000) QB 451, the Court of Appeal was of the view that "danger of bias will depend on the facts, which may include the nature of the issue to be decided. A real danger of bias might for instance arise if there is a personal friendship or animosity between the Judge and any member of the public involved in, the case, or if the Judge were closely acquainted with any member of the public involved, particularly if the credibility of that individual could be significant in the decision of the case. The circumstance of each case have to be taken into consideration."

The decision in *Locabail's* case was referred with approval by the Supreme Court in *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant* (2001 (1) 5CC 182). It was held:

"The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn there from

- in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias. the administrative action cannot be sustained: If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence

(Emphasis Supplied)

In 2002 (1) All.E.R. 465 (Porter v. Mangill) the House of Lords referred to the judgment of the Court of Appeal in Re-Medicaments and related Classes of Goods No.2 (2001 (1) W.L.R.700) in which the Court had taken the view that the test laid down in R. V. Gough (supra) required a modest adjustment. Lord Hope, in the House of Lords approved the modification of the real danger test which had been pronounced in the Medicaments case and deleted from it the reference to a real danger. As a result, in considering the question as to whether an arbitrator, is liable to be disqualified in the facts of a given case on the ground of bias, the test to be applied is whether the circumstances are such as would lead a fair minded and informed observer to conclude that there was a real possibility that the arbitrator was biased.

In Kumaon's case (supra) the Apex Court held that it is well settled that an arbitrator is liable to be disqualified only if from the surrounding circumstances the decision is inescapable that there exists a real danger of bias. There has to be positive and cogent evidence. The circumstances should be such as would lead a fair minded and informed observer to conclude that there was a real possibility that the Judge or Tribunal was biased. In para 35 of the judgment this view was taken.

5. Thus, the Apex Court has followed the "real danger test". This view of Supreme Court in *Kumaon's case* (supra) is consistently followed by Supreme Court in (2004) 8 SCC 788 (*M.P.Special Police Establishment vs. State of MP and others*). The relevant portion reads as under:

"The question in such cases would not be whether they would be biased. The question would be whether there is reasonable ground for believing that there is likelihood of

apparent bias. Actual bias only would lead to automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. The principle of real likelihood of bias has now taken a tilt to "real danger of bias" and "suspicion of bias".

This view is again followed by Supreme Court in (2010) 13 SCC 427 (*Oryx Fisheries Private Limited vs. Union of India and others*). It is apt to quote para 34 in this regard, which reads as under:

"34. A somewhat similar observation was made by this Court in Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant². In that case, this Court was dealing with a show-cause notice-cum-charge-sheet issued to an employee. While dealing with the same, this Court in para 25 (5CC p. 198 of the Report) by referring to the language in the show-cause notice observed as follows:

"25. Upon consideration of the language in the show-cause notice-cum-charge-sheet, it has been very strongly contended that it is clear that the officer concerned has a mindset even at the stage of framing of charges and we also do find some justification in such a submission since the chain is otherwise complete."

After para 25, this Court discussed in detail the emerging law of bias in different jurisdictions and ultimately held in para 35(5CC p. 201 of the Report), the true test of bias is:

"35. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom-in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained:"

6. Recently, same view is followed by Supreme Court in (2011)10 SCC 106 (*Lalit Kumar Modi vs. Board of Control for Cricket in India and others*). Para 40 of this judgment reads as under:

"40. We have noted the submissions of the petitioner with respect to his apprehensions. However, as far as the propositions of law are concerned, we cannot take a different view in the present case from the law laid down in the judgment of the Constitution Bench of this Court in M.P. Special Police Establishment v. State of M. P. (2004)85CC 788, and the judgment of four Judges in T. P. Daver v. Lodge Victoria, AIR 1963 SC 1144. As held in M. P. Special Police Establishment (supra) a mere all apprehension of bias cannot be a ground for interference. There must exist a real danger of bias. And, following T.P. Daver v. Lodge Victoria, though such domestic inquiries have undoubtedly to be fair, a member of a society cannot stretch the principle of fairness to the extent of demanding a tribunal consisting of outsiders, on the basis that the society members are biased against him."

(Emphasis Supplied)

7. Thus, the basic test shows that the principle is whether a prudent man in the factual backdrop can come to the conclusion that the arbitrator is acting with bias. The test is not only reasonable likelihood but is the real danger of bias.

8. In view of the aforesaid legal principle, it is to be seen whether as per the allegations mentioned in the application under section 12 of the Act (Annexure P/10) the said test is fulfilled. The entire allegation is founded up on fact that the arbitrator has not adhered to the time schedule and is delaying the proceedings. He is granting time leisurely to the respondent. There is no other basis for alleging bias. In para 13 of the said application, the petitioner himself stated that he has serious doubt in respect of independence and impartiality of the arbitrator. Mere doubt without any cogent basis cannot be a ground for directing the arbitrator to recuse himself or to change the arbitrator.

9. In the considered opinion of this Court, although the arbitrator has fixed a time schedule for completing the proceedings, on the request of the respondent he granted certain adjournments. Merely because certain adjournments are granted by the arbitrator, it cannot be presumed or concluded that he is biased against the petitioner or favouring the respondent. In the proceedings before the court also this kind of events take place. In the discretion

of the court, many times after granting final opportunity to file reply, yet another opportunity is granted to a party to file its response. This kind of exercise of discretionary power does not lead to any presumption of bias or spite. However, such a presumption can be drawn if the adjournments are granted unnecessarily for unreasonable long time. In the judgments of Delhi High Court cited by Shri Dudawat, the inference was drawn because the delay was four years (*Arun Ka Thpalia vs. J.M. Mukhi*) (supra). In other case also the delay was running in years. In the present case the time schedule itself was fixed on 7.3.2011. There is no improper, inordinate or long delay because of adjournments granted by the arbitrator. Thus, in the aforesaid factual backdrop, I am unable to hold that a real danger theory is applicable because of the aforesaid conduct and nature of proceedings conducted by the arbitrator. The Apex Court has also repeatedly held that whether the arbitrator is biased or not depends on the facts and circumstances of a particular case. No straight-jacket formula can be laid down. The other judgments cited by Shri Dudawat (*NBCC Limited*) (supra) has no application in the facts and circumstances of this case.

10. On the basis of aforesaid analysis, this Court is of the considered opinion that petitioner could not establish real danger of bias against the arbitrator. Since no case is made out by the petitioner against the arbitrator, interference is declined. Petition is dismissed. No costs.

Petition dismissed.

I.L.R. [2012] M.P., 1625

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No. 9409/2012 (Jabalpur) decided on 16 July, 2012

KEHAR SINGH

...Petitioner

Vs.

DURJAN SINGH GOND

...Respondents

Workmen Compensation Rules, 1924 - Rule 41 - Civil Procedure Code (5 of 1908), Order 9 Rule 13 - Setting aside ex parte award - While setting aside ex-parte award, the Commissioner directed for deposit of 50% of the award amount - Held - Provisions of Order 9 Rule 13 are applicable to proceedings - Proviso to Rule 41 gives discretion to Commissioner to construe and to make alteration without

affecting the substance of procedure - Discretion exercised by Commissioner in directing payment of 50% of amount can not be termed as illegal or erroneous - Petition dismissed. (Paras 5 & 6)

कर्मकार प्रतिकर नियम, 1924 - नियम 41 - सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 - एकपक्षीय अवार्ड का अपास्त किया जाना - एकपक्षीय अवार्ड अपास्त करते समय कमिश्नर ने अवार्ड की राशी का 50 प्रतिशत जमा करने के लिए निदेशित किया - अभिनिर्धारित - आदेश 9 नियम 13 के उपबंध कार्यवाही में लागू होंगे - नियम 41 का परंतुक कमिश्नर को प्रक्रिया का सार प्रभावित किये बिना अर्थान्वयन व परिवर्तन करने का विवेकाधिकार देता है - कमिश्नर द्वारा विवेकाधिकार का प्रयोग कर 50 प्रतिशत राशी का भुगतान करने का निदेश अवैध या त्रुटिपूर्ण नहीं कहा जा सकता - याचिका खारिज।

Case referred :

III (2008) ACC 562.

Sanjay Verma, for the petitioner.

None for the respondent.

ORDER

RAJENDRA MENON, J. : Challenging an interlocutory order passed by the Commissioner for Workmen Compensation, directing the petitioner to deposit 50% of the compensation awarded for considering an application submitted for setting aside an ex-parte award, petitioner has approached this Court.

2. Records indicate that due to certain injuries sustained respondent filed an application before the Commissioner for Workmen Compensation-cum-Labour Court, Narsinghpur and an ex-parte award has been passed. Seeking setting aside of the ex-parte award, an application under Order IX Rule 13 of the Code of Civil Procedure has been filed and in the said application the Commissioner, Workmen Compensation-cum-Labour Court has passed an order directing the petitioner to deposit 50% of the amount awarded as a pre-condition for hearing of the application.

3. *Inter alia* contending that under Order IX Rule 13 CPC, a Court is not empowered to direct for any deposit before deciding the application on merits and pointing out that such a direction can be given only after final order is passed on the application under Order IX Rule 13, this writ petition is filed challenging the impugned action.

4. Having heard learned counsel for the petitioner and on a perusal of the records, it is clear that the proceedings in this case are being held in accordance to the Employees Compensation Act, 1923 and the Rules framed therein i.e... the Workmen Compensation Rules, 1924, the procedure for deciding an application for compensation is contemplated in Part V from Rule 19 onwards. A perusal of these Rules indicates that all the provisions of the CPC are not applicable and the learned Commissioner for Workmen Compensation is required to conduct the proceeding as per the statutory rules framed under the Act. Except for certain provisions of the CPC as are contained in Rule 41, the strict rules of the CPC are not applicable. Even with regard to applicability of the provisions of the CPC as contemplated under Rule 41, the proviso thereof gives a power to the Commissioner to make such alterations as may be necessary for proceeding in the matter in accordance with law.

Rule 41 and its proviso reads as under:

"41. Certain provisions of Code of Civil Procedure, 1908 to apply - Save as otherwise expressly provided in the Act or these Rules, the following provisions of the First Schedule to the Code of Civil Procedure, 1908, namely, those contained in Order V, Rule 9 to 13 and 15 to 30; Order IX; Order XIII, Rules 3 to 10; Order XVI, Rules 2 to 21; Order XVII; and Order XXIII, Rules 1 and 2, shall apply to proceeding before Commissioners, in so far as they may be applicable thereto:

Provided that -

- (a) for the purpose of facilitating the application of the said provisions the Commissioner may construe them with such alterations not affecting the substance as may be necessary or proper to adapt them to the matter before him.
- (b) the Commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provisions, if he is satisfied that the interests of the parties will not thereby be prejudiced."

(Emphasis supplied)

5. Even though by virtue of Rule 41, the provisions of Order IX Rule 13 CPC has been made applicable to a proceeding, but in the light of the proviso to Rule 41 of the Workmen Compensation Rules, 1924, as discretion is given to the Commissioner to construe and to make alteration without affecting the substance of a procedure, I am of the considered view that the discretion exercised by the learned Commissioner in directing for payment of 50% of the amount cannot be termed as illegal or erroneous to such an extent that interference at this interlocutory stage in a proceeding under Article 227 of the Constitution is called for.

6. The proviso clearly mandates that for facilitating decision on application, the Commissioner can adopt such procedure and if such a procedure is fair and reasonable, interference into the matter is not called for. In the present case, except for contending that the order for deposit has been made even before the application under Order IX Rule 13 is not decided and the same is not permissible under the said provision. Nothing is brought to the notice of this Court to indicate as to how and on what basis the discretion exercised by the learned Commissioner can be termed as arbitrary or unreasonable warranting interference in the matter at this interlocutory stage. Even no financial or other constraint on the part of the petitioner is pointed out at the time of hearing in this regard.

7. In this regard the Rajasthan High Court also in the case of *Uttam Chand Gangwal Vs. Commissioner, WCC Act, Ajmer, III(2008) ACC 562*, has held that while applying the principles of the Code of Civil Procedure to Workmen Compensation, Commissioner may proceed otherwise than in accordance to the said provision, if the interest of the parties are not prejudiced. In the present case, the petitioner has not demonstrated before this Court as to how prejudice is caused to him because of the discretion exercised by the learned Commissioner in the manner indicated.

8. Except for contending that the learned Commissioner has proceeded in excess of the powers conferred upon him under Order IX Rule 13 of the Code of Civil Procedure, no other ground is canvassed at the time of hearing and even in the memorandum of the petition, this is the only ground taken.

9. Accordingly, finding no ground to interference into the matter on the grounds raised, the petition is dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 1629

MISCELLANEOUS CIVIL CASE

Before Mr. Justice Rajendra Menon

M.C.C. No. 976/2006 (Jabalpur) decided on 29 June, 2012

SATYENDRA SHUKLA

...Applicant

Vs.

SMT. MANORAMA RAGHUVANSHI & anr.

...Non-applicant

A. Arbitration and Conciliation Act (26 of 1996), Section 11(6), Contract Act (9 of 1872), Section 29 - Identification of property - In agreement to sell, the entire description of property is mentioned except the place for new khasra number was left blank - Identification and area of property can be made out by means of stipulations already contained in the agreement - Agreement not void. (Para 5)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6), संविदा अधिनियम (1872 का 9), धारा 29—सम्पत्ति की पहचान—विक्रय के अनुबंध में सम्पत्ति का संपूर्ण विवरण उल्लिखित है सिवाय नये खसरा नम्बर का स्थान जिसे खाली छोड़ा गया था — सम्पत्ति की पहचान व क्षेत्र अनुबंध में पहले से अंतर्विष्ट शर्तों के जरिए निकाला जा सकता है — अनुबंध शून्य नहीं।

B. Arbitration and Conciliation Act (26 of 1996), Section 11 - Arbitrator - Manipulation or forgery in agreement is disputed question and such objections are to be raised before the Arbitrator when proceedings are held. (Para 7)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 — मध्यस्थ — अनुबंध में फेरबदल या कूटस्वचना विवादित प्रश्न है और जब कार्यवाही की जाती है, ऐसे आक्षेपों को मध्यस्थ के समक्ष उठाया जाना होता है।

Cases referred :

AIR 1963 SC 1879, (2002) 6 SCC 375.

Ravish Agrawal with Pranay Verma, for the applicant.

S.B. Patel, for the non-applicants.

ORDER

RAJENDRA MENON, J. : Seeking constitution of an Arbitral Tribunal and invoking the jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation Act, this application has been filed by the applicant.

2. Dispute in question pertains to enforcement of an agreement for sale

entered into between the parties for sale of certain property. Vide an agreement for sale executed between the parties at Bhopal on 7th August, 2004 parties agreed to sell certain property situated in village Kalkheda, Tahsil Huzur, District Bhopal bearing old Khasra No.24/1 measuring 2 acres. According to the applicant the agreement was entered into as is filed along with the application and in the said agreement the description of the property is indicated by referring to the old Khasra number as 24/1 measuring 2 acres. The boundaries of the property on all sides are indicated in the agreement and thereafter the property is also demarcated and identified by the portion marked in 'red' enclosed to a map which forms part of the agreement. However, after so indicating particulars of the property while entering into the agreement, new khasra number of the property has not been mentioned completely and as thereafter certain blank space is left. Initially there were some deficiency in payment of stamp duty with regard to the agreement, matter went to the Court of Collector (stamps) exercising jurisdiction of a statutory authority under the Stamps Act and stamp duty on the agreement has been affixed in accordance to the directions of the competent authority. It is the case of the applicant that as the agreement for sale is not being given effect to in its true later and spirit, they seek enforcement of arbitration clause as contained in Clause 6 of the agreement.

3. Shri Ravish Agrawal, learned Senior Counsel argued that even though the agreement in question is properly stamped and it contemplates an arbitration clause but the respondents have raised an objection and contend that as the agreement is not complete and as the new khasra number is not properly incorporated in the agreement, the agreement is a void agreement and based on such a agreement, arbitral proceedings is not maintainable and no arbitrator can be appointed. Shri Ravish Agrawal, learned Senior Counsel points out that merely because new Khasra number is not mentioned properly in the agreement, the agreement will not become a void agreement. Referring to Section 29 of the Indian Contract Act, 1982, learned Senior Counsel argues that if the meaning and import of the agreement is capable of being ascertained from the agreement then such an agreement would not be a void agreement. Referring to illustrations given under Section 29 of the Indian Contract Act particularly, illustrations (c) and (e), learned Senior Counsel argues that in the agreement in question the identification of the property is given in more than two ways. The property is identified by its old Khasra number and area, secondly it is identified by means of the boundaries of the property on all sides and thirdly, it is also identified with reference to the purchase made by the vendor from the original owner by a registered sale deed dated 13.10.1988

bearing registration No. A1/5699 Srl. No.4181 in the office of Deputy Registrar, Registration, Bhopal. Accordingly, contending that in the agreement in question sufficient material is available for identifying and demarcating the property, therefore, it cannot be construed that the agreement is void or incomplete. Learned Senior Counsel submits that agreement is not a void agreement and can be given effect to. In this regard, he invites my attention to certain principles laid down by the Supreme Court in the case of *Sheodhyan Singh and others Vs. Mst. Sanichara Kuer and others* - AIR 1963 SC 1879 and by referring to the principles laid down in the said judgment it is argued that if there is no doubt as to the identity of the property and if there is only a mis- description of the property, it is merely a irregularity and the agreement on such misdescription of the area would not become void if the identification of the property and its area can be made from other relevant information available in the agreement. Similarly placing reliance on another judgment of the Supreme Court in the case of *Ram Khilona and others Vs. Sardar and others* - (2002)6 SCC 375, learned counsel argues that in para 12 and 13 of this judgment also after referring to certain principles laid down in Halsbury's Laws of England, 4 Edn. Vol. 12 at pp.552-53 it has been held that if the alteration in a document is not material and which does not vary the legal effect of the documents and if it expresses in clear terms the particulars of the property, the agreement will not become a void agreement. It was submitted by Shri Ravish Agrawal, learned Senior Counsel that in the present case also the property can be identified by the description of the property given in the manner as indicated herein above and mere non mention of one part of the new khasra number will only amounts to mis-description of the property and on such ground agreement cannot be refused to be enforced for the purpose of maintainability of this proceedings under Section 11 of the Arbitration and Conciliation Act. Shri Agrawal, learned Senior Counsel therefore, submits that as the question of the agreement being fraud or not are question of dispute which are to be adjudicated by the Arbitrator, for the present in the light of the arbitration clause available in the agreement entered into between the parties, dispute be referred to the Arbitral Tribunal for adjudication.

4. Shri S. B. Patel, learned counsel for the respondents has only raised an objection with regard to validity of the agreement in question on the ground that new khasra number of the property is not mentioned property in the agreement filed along with the application under Section 11 of the Arbitration and Conciliation Act and in a separate copy of the agreement filed along with

I.A. No.8710/07 all the particulars are mentioned and as there is serious differences in both the agreement, it is stated that petitioner has fraudulently manipulated the agreement, agreement is nothing but a document prepared by fraudulent means and based on such a document the Arbitral Tribunal cannot be constituted. Objections are also raised to say that as certain part with regard to identity of the property is missing in the agreement (it is kept blank) filed by the petitioner along with the application under Section 11, the agreement is void and such a agreement and cannot be enforced. Accordingly, the aforesaid objections are raised by the respondents.

5. Having heard learned counsel for the parties and on a perusal of the record it is clear that in the agreement filed with application under Section 11 with reference to the new khasra number of the property certain numbers have been kept blank and it is because of this reason that respondents have raised an objection that the agreement is not complete and it is void as the identification and particulars of the property are not correctly mentioned in the agreement, however, if the agreement is analyzed in its totality, it would be seen that the description of the property is given by referring to the village where the property is situated, the Tahsil and District where the property is situated and its old Khasra number and area is given. Thereafter the eastern side of the property, northern side, western side and southern side are indicated by proper particulars in the agreement, the area of the property is shown as 2 acres and along with the agreement for sale a map of the property with demarcation and identification of the property in 'red' colour is also annexed. That apart, the particulars of the property and its area is also mentioned by referring to the earlier sale deed dated 13.10.1988 by which the present vendor purchased the property and the registration number in the office of Registrar is also mentioned. Merely because a particular portion of the new khasra number is missing from the agreement when all the details of the property as indicated herein above are available, it cannot be said that the agreement in question is lacking in material particulars and therefore, is incomplete. On the contrary, Shri Ravish Agrawal, learned Senior Counsel is right in contending that the agreement is complete in all respect, as the meaning of the agreement and identification of the property in certain terms is capable of being made out from the description of the property given in the agreement, the agreement will not be a void agreement in view of the provisions of Section 29 of the Indian Contract Act. That apart, as held by the Supreme Court in the cases of *Sheodhyan Singh* (supra) and *Ram Khilona* (supra), mere mis-description

of the property in the agreement will not make the agreement void when other particulars available in the agreement are sufficient enough to identify the property on the basis of the particulars available.

6. Accordingly, keeping in view the provisions of Section 29 of the Indian Contract Act, principles of law laid down in the cases relied upon and the agreement which are available on record, I am unable to accept the contention of the respondents that the agreement is vague, incomplete and therefore, cannot be enforced. On the contrary, agreement does give identification of the area of the property and therefore, identification and area of the property can be made out by means of stipulations already contained in the agreement and therefore, objections raised by the respondents cannot be accepted.

7. As far as contention of the respondent with regard to their being two agreements and manipulation in the agreement is concerned, or manipulation or forgery is concerned, these are disputed questions and such objections are to be raised before the Arbitrator when the proceedings are held.

8. Accordingly, finding a case made out for constituting an Arbitral Tribunal for adjudication of dispute between the parties, this application is allowed. Smt. Renu Sharma, District and Sessions Judge, posted at Bhopal is appointed as Arbitrator to adjudicate the dispute between the parties. Registry of this Court is also directed to communicate this order to the Hon'ble Arbitrator for proceeding in the matter and decide it at an earlier date.

9. Application stands allowed and disposed of.

Application allowed.

I.L.R. [2012] M.P., 1633

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No.729 /1994 (Jabalpur) decided on 1 March, 2012

RAMSAJIVAN

...Appellant

Vs.

LALJI RAM

...Respondent

Evidence Act (1 of 1872), Section 58 - Judicial Admissions - Judicial admissions or admissions in pleadings made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions - Former class of admissions are fully binding on the party that makes them and constitute a waiver of

proof - On the other hand evidentiary admissions are by themselves not conclusive and can be shown to be wrong and also can be explained.

(Para 13)

साक्ष्य अधिनियम (1872 का 1), धारा 58 - न्यायिक स्वीकृतियां - पक्षकारों द्वारा या उनके अभिकर्ताओं द्वारा प्रकरण की सुनवाई पर या पहले दी गई न्यायिक स्वीकृतियां या अभिवचनों में दी गई स्वीकृतियां, साक्ष्यिक स्वीकृतियों से अधिक महत्व रखती हैं - पूर्व वर्ग की स्वीकृतियां, उसे देने वाले पक्षकार पर पूर्णतः बंधनकारा हैं और सबूत का अभित्यजन गठित करती हैं - दूसरी ओर साक्ष्यिक स्वीकृतियां अपने आप में निर्णायक नहीं और उन्हें गलत दर्शाया जा सकता है और स्पष्ट भी किया जा सकता है।

Case referred :

AIR 1974 SC 471.

Pranay Varma, for the appellant.

A.D. Mishra, for the respondent No.3.

None for other respondents, though served.

J U D G M E N T

A.K. SHRIVASTAVA, J. : This second appeal has been filed by plaintiff against the judgment and decree dated 19-08-1994, passed by learned Second Additional District Judge, Sidhi in Civil Appeal No.8-A/1992 allowing the appeal of defendant and thereby setting aside the judgment dated 4-4-1990 and decree dated 09-04-1990, passed by learned III Civil Judge Class-II, Sidhi in Civil Suit No.15-A/1989, decreeing the suit of plaintiff/appellant.

2. No exhaustive statement of facts are required to be narrated for the purpose of disposal of this appeal. Suffice it to say that a suit for declaration that plaintiff is the *Bhumiswami* of Survey No.2630 (old No.2697) area 1.85 acres and the registered sale-deed dated 6-6-1988 executed by second and third defendants in favour of first defendant is null and void against the plaintiff and in the alternative, it has been prayed that the plaintiff be declared *Bhumiswami* of Survey No.380 (old No.330) area 2.85 acres and the possession thereof be also delivered to him.

3. In the plaint, it has been pleaded by the plaintiff that he is *Bhumiswami* of Survey No.2630 area 1.85 acres, and this land was given to him in exchange by Suryadeen who was the predecessor of second and third defendants and in exchange, plaintiff gave his land Survey No.380, area 2.85 acres to said

Suryadeen and thus, plaintiff is the *Bhumiswami* of Survey No.2630. According to the plaintiff, Survey No.380, which he gave in exchange to said Suryadeen, was given to him by the then *Ilakedar* by executing a Patta in *Samwat* 1998 (corresponding year 1941) and thus, he became *Bhumiswami* of the Survey No.380. However, the said land was given by plaintiff in exchange to predecessor of defendants no.2 and 3 namely; Suryadeen who in exchange gave the suit land Survey No.2630 to the plaintiff. But, defendant nos.2 and 3 illegally sold it to first defendant Laiji vide registered sale-deed dated 6-6-1988. Hence, it has been prayed by the plaintiff that the suit of plaintiff be decreed by declaring him to be *Bhumiswami* having possession over Survey No.2630 and the sale-deed dated 6-6-1988 be declared null and void. Alternatively, relief has been claimed that in case the transaction of exchange is not found to be proved, then plaintiff may be declared *Bhumiswami* of Survey No.380 area 2.85 acres and the possession thereof be also given to him.

4. The first defendant filed written-statement and denied the plaint averments, defendant no.2 did not file any written-statement, however, defendant no.3, Rajeev Lochan, who is the successor of Suryadeen filed a separate written-statement and specifically admitted the averments made in paragraphs 1 to 5 of the plaint to be true. However, other pleadings of the plaintiff has been denied in the written-statement filed by him. The first defendant who is a purchaser from defendants no.2 and 3 also denied the averments made in the plaint.

5. The learned Trial Court after framing necessary issues, recorded the evidence of the parties and decreed the suit of plaintiff in toto including the alternative relief which the plaintiff sought. The second and third defendants did not prefer any appeal although first defendant/respondent filed first appeal before the learned First Appellate Court which was allowed and the suit of plaintiff has been dismissed.

6. In this manner, this second appeal has been filed by the plaintiff.

7. This Court on 18-04-1995 admitted the second appeal on the following substantial question of law:

"Whether the alternative claim decreed by the trial Court could be set aside while negating plaintiffs title over the suit land Khasra No.2630?"

8. The contention of Shri Varma, learned counsel for the appellant is that

even if learned First Appellate Court came to the conclusion that the transaction of exchange is not proved, it was incumbent upon that Court to affirm the judgment and decree passed by the Trial Court granting the alternative relief to the plaintiff by passing a decree in that regard. Learned counsel further submits that transaction of exchange was between the predecessor of second and third defendant and the plaintiff and therefore, first defendant, who came in the picture only on 6-6-1988 when the land Survey No.2630 was sold to him, has no locus standi to say anything about exchange including the title of plaintiff on Survey No.380 before the exchange, because that transaction was between plaintiff and second and third defendants' predecessor Suryadeen. It has also been put forth by him that in the written-statement filed by defendant no.3, the factum of the ownership of Survey No.380 earlier was of plaintiff has been specifically admitted in paragraph 1 of the plaint by the said defendant and thus, it amounts to strong admission in his favour with regard to ownership of Survey No.380 and hence, if the said transaction of exchange was not found to be decreed, the alternative decree sought by the plaintiff ought to have been decreed.

9. Learned counsel for the appellant further submits that Survey No.380 which was given in exchange to Suryadeen by him was given by ilakedar to plaintiff in Samwat 1998 (corresponding year 1941) and hence, the ownership of that Survey No.380 of plaintiff has been unambiguously proved.

10. On the other hand, Shri Mishra, learned counsel for respondent no.3/ defendant no.3 argued in support of the impugned judgment and submitted that the factum of exchange has not been found to be proved by the First Appellate Court by assigning cogent reasons and therefore, this appeal be dismissed.

11. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be allowed.

Regarding substantial question framed

12. On bare perusal of the record and the pleadings of the parties, this Court finds that the transaction of exchange took place between Suryadeen who was admittedly the predecessor of second and third defendants, and defendant no.1 Lalji was nowhere in the picture in the said transaction for the simple reason that he came into existence only on 6-6-1988 when the second and third defendants namely, Ram Prakash and Rajeev Lochan sold Survey No.2630 which was given to said Suryadeen in exchange to the first defendant

and therefore, if he has denied in his written statement that plaintiff was not the owner of Survey No.380 earlier, his denial will have no significance. On the other hand, the defendant no.3 Rajeev Lochan in his written-statement has specifically admitted that plaintiff was the owner of Survey No.380 area 2.85 acres which he gave in exchange to his predecessor Suryadeen and Survey No.2630 which was of Suryadeen was given to the plaintiff. Looking to the the clear and unambiguous pleading of defendant no.3 Rajeev Lochan, who admitted the plaintiff to be the owner of Survey No.380 earlier is the turning point of the case. Because, the admissions, if it is true and clear are the best proof of the facts admitted.

13. According to me, the admissions in pleadings or judicial admissions admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves, can be made the foundation of the rights of the parties. On the other hand evidentiary admissions which are receivable at the trial as evidence are by themselves not conclusive. They can be shown to be wrong and also can be explained. In this context, I may profitably place reliance on (*Nagindas Ramdas Vs. Dalpatram Iccharam alias Brijram and others*) AIR 1974 SC 471, para 26. Since clear and unambiguous admission has been made by defendant no.3 Rajeev Lochan in his written-statement admitting that before the transaction of exchange took place, the plaintiff was owner of Survey No.380, therefore, I am of the view that the case of plaintiff comes in the former category of admission made by the defendant, and if that would be the position, it stands on a higher footing and is fully binding upon the plaintiff and not only this, it constitutes the waiver of proof. By such admission, the foundation of the rights of the parties can be determined. Hence, I am of the view that it has been proved that the plaintiff was the owner of Survey No.380 and because the theory of exchange has been negated by learned First Appellate Court, he (plaintiff) was entitled to take back the possession of Survey No.380.

14. Apart from what I have held here-in-above, on bare perusal of the document of title Survey No.380 which is a *Patta Ex.P-8 of Sam wat 1998* (corresponding year 1941), it is gathered that *Ilakedar* gave Suvery No.380 to the plaintiff by executing the said Patta to the plaintiff. Since the document of Patta is of Samwat 1998 (corresponding year 1941), it is 30 years old document and when the same was proved by plaintiff Mahaveer in his

testimony on 28-07-1989, it attained the age of presumption of its correctness i.e. 30 years, and therefore, its execution and attestation also stands proved.

15. For the reasons stated here-in-above, the substantial question of law is thus answered that if the factum of exchange was not found to be proved by First Appellate Court, it had erred in setting aside the decree of learned Trial Court decreeing the suit of plaintiff by granting alternative relief to him and it is hereby held that plaintiff is the *Bhumiswami* of Survey No.380 and also entitled for possession of the said land.

16. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by the First Appellate Court is set aside and the suit of plaintiff is partly decreed. He is hereby declared to be *Bhumiswami* of Survey No.380. Let possession of this land area 2.85 acres be delivered to him. No order as to costs.

17. Let a decree be drawn up accordingly.

Appeal allowed.

I.L.R. [2012] M.P., 1638

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 407/1994 (Jabalpur) decided on 2 March, 2012

LOLAR (SMT.) & anr.

...Appellants

Vs.

GULAB SINGH & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 22 Rule 4, 9 - Substitution of Legal Heirs - Appellants were aware of the death of respondents as necessary applications were filed in revenue cases - Delay of 16,14 and 1 year in filing application for substitution of their L.Rs. and setting aside abatement can not be condoned - Applications dismissed consequently, appeal is also dismissed. (Paras 7 & 8)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 22 नियम 4, 9 - विधिक वारिसों का प्रतिस्थापन - अपीलार्थीगण, प्रत्यर्थीगण की मृत्यु से अवगत थे क्योंकि राजस्व प्रकरणों में आवश्यक आवेदन प्रस्तुत किये गये थे - विधिक प्रतिनिधियों को प्रतिस्थापित करने के लिए तथा उपशमन अपास्त करने के लिए आवेदन प्रस्तुत करने में 16,14 व 1 वर्ष के विलंब को माफी नहीं दी जा सकती - आवेदन पत्रों को खारिज किया गया, परिणामतः अपील भी खारिज।

Amit Khatri, for the appellants.

Vipin Yadav, for the respondents

ORDER

A.K. SHrivastava, J. : Learned counsel for the parties are heard on I.A. nos. 2876/2012, 2877/2012 and I.A. No. 2879/2012 filed under Order 22 Rule 4 CPC, under Order 22 Rule 9 CPC and under Section 5 of the Indian Limitation Act respectively.

2. In the application under Order 22 Rule 4 CPC (I.A. no. 2876/2012) it has been averred that during the pendency of this second appeal, respondent no.1 Gulab Singh died on 11.10.1996, respondent no.4 Suryabali Singh died on 26.05.1998 and respondent no.2 Munna Singh also died on 26.10.2010 leaving behind their legal representatives mentioned in the application. Photocopies of death certificate of these deceased respondents have also been filed. In the application under Order 22 Rule 9 CPC (I.A. no. 2877/2012) it has been stated that appellants have no connection to the respondents and their LRs and the distance between the two villages where the respective parties live is quite far away to each other and hence the delay in filing the application to bring the LRs of deceased respondents 1, 2 and 4 be condoned and the abatement be set aside and the same prayer has been made in the application under Section 5 of the Indian Limitation Act (I.A. no. 2879/2012).

2. The aforesaid applications of appellants have been vigorously opposed by Shri Vipin Yadav, learned counsel for the respondents no.1 to 4 by filing reply and also filed photocopies of proceedings dated 10.7.2008, 25.9.2008 and 16.10.2008 of the Tahsildar, Raipur, District Rewa in Case No. 2A6/07-08. A photocopy of certified copy of application of compromise executed between Smt. Chandrawati (widow of respondent no.4 Suryabali of this appeal) and others Vs. Sukhmanti (second appellant of this appeal) and others has also been filed and it is submitted that appellants and respondents are near relatives to each other and looking to the application of compromise which was filed before Tahsildar and upon which the order was passed by it on 10.7.2008 to 16.10.2008, it cannot be said that the factum of death of these respondents were not known to the appellants because Chandrawati Singh who is one of the applicant before the Tahsildar is the widow of fourth respondent Suryabali Singh while Sukhmanti who is appellant no.2 in this appeal, jointly filed the compromise application. Learned counsel for the respondents further submits that although the parties belong to two

different villages but they are closely related to each other.

3. Learned counsel for the respondents further submits that this Court on 7.7.2011 allowed the appeal of appellants in part and plaintiffs were declared Bhumiswami of Survey Nos. 243, 274, 258 and 261 but since the judgment was passed against three dead respondents, hence this Court on 22.02.2012 in Review Petition 42/2012 allowed the review application on the said ground. Learned counsel submits that Survey Nos. 243, 274, 258 and 261 are not even the part of suit property and, therefore, a decree in favour of plaintiffs for these survey numbers cannot be allowed.
4. Having heard learned counsel for the parties, I am of the view that these three applications deserves to be dismissed and the appeal also deserves to be abated.
5. This Court earlier on 7.7.2011 partly decreed the suit of appellants/ plaintiffs by passing a decree in their favour in regard to survey numbers 243, 274, 258 and 261. But, this Court on 22.2.2012 set aside that judgment in Review Petition 42/2012 since it was passed against the dead persons. On bare perusal of the list of survey numbers which are disputed in the plaint, nowhere survey numbers 243, 274, 258 and 261 for which the decree was passed were made part of the suit property.
6. On account of showing by the appellants themselves, all these three applications are hopelessly time barred and the limitation to set aside the abatement for respondents no.1 and 4 namely Gulab Singh and Suryabali Singh respectively had expired for more than a decade since respondent no.1 died 16 years ago while respondent no.4 died 14 years ago.
7. A party cannot be permitted to submit an application based upon false averments by concealing reality. Very conveniently in the applications it has been submitted by appellants that they had no connection with the respondents and they were not aware about the factum of their death and hence they could not file the applications well in time. But, if we uplift the veil, the appellants are exposed and just like a naked truth it is apparent that they were quite aware about the factum of death of these persons because necessary applications were filed in the revenue case, the description whereof has been mentioned hereinabove for compromise and the order has also been procured by the appellants and in the compromise application before the Tahsildar, Chandrawati Singh (widow of respondent no.4 Suryabali Singh) was one of the party and

she described herself to be the widow of Suryabali Singh. Similarly, second appellant Sukhmanti was also a party in the said compromise application which was filed in the revenue case and hence if the applications are allowed it would mean to over power the false averments upon the true facts which were well known to the appellants and which law would never permit them.

8. In this view of the matter, I am of the view that looking to the abnormal delay of 16 years, 14 years and more than a year after the death of respondent nos. 1, 4 and 2 respectively, it cannot be condoned and all these three applications deserve to be and are hereby dismissed.

9. Resultantly, this appeal stands dismissed as abated.

Appeal dismissed.

I.L.R. [2012] M.P., 1641

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 55/1996 (Jabalpur) decided on 13 April, 2012

NONE JOO & anr.

...Appellants

Vs.

KARAN SINGH & ors.

...Respondents

Hindu Succession Act (30 of 1956), Section 14 - Succession - Son died issueless during the lifetime of his father - Father died prior to commencement of Act, 1956 - Provisions of Act, 1956 would not apply - Share of deceased son would devolve on his father. (Para 8)

हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 14 - उत्तराधिकार - पुत्र की अपने पिता के जीवित रहते निःसंतान मृत्यु हो गई - पिता की मृत्यु अधिनियम 1956 के प्रभावी होने के पूर्व हो गई - अधिनियम 1956 के उपबंध लागू नहीं होंगे - मृतक पुत्र का हिस्सा उसके पिता को क्रमागत होगा।

Cases referred :

AIR 1975 MADRAS 253, AIR 1971 PUNJAB & HARYANA 323, AIR 1984 BOMBAY 208.

Mohd. Ali, for the appellants.

M.L. Jaiswal with *K.K. Gautam*, for the respondent No.1.

None for the respondents No. 2 to 4.

J U D G M E N T

ALOK ARADHE, J. : This appeal has been preferred by the plaintiffs. This Court vide order dated 23.4.1996 while admitting the appeal had formulated the following substantial question of law:-

"Whether the lower appellate Court was right in reversing the decree of the trial Court holding that respondent No.1 Karan Singh was entitled to 1/3 share in the property of Ganpat in view of Sections 8 and 18 of the Hindu Succession Act ?"

2. Facts giving rise to filing of the appeal briefly stated are that plaintiffs filed a suit on the ground that they are the owners and in possession of the lands situate at villages Ganiyari and Malkapur. It was pleaded in the plaint that their grandfather namely Bhagirath had partitioned the lands during his lifetime and had handed over the possession of the lands. Since, then the parties are in separate cultivating possession of the lands in question. The plaintiff and Ganpat used to live jointly. Ganpat died issueless on 30.10.1954, therefore, his share devolved on the plaintiffs. Thereafter, the plaintiffs moved an application for mutation of their names in the revenue records. However, on an objection being raised by defendant No.1, the revenue officer passed an order against the plaintiffs. Thereupon, the plaintiffs instituted the suit seeking the relief of declaration that the order passed by the revenue officer is null and void as well as permanent injunction restraining the defendants from interfering with their possession over the suit lands.

3. The defendant No.1 filed the written statement in which inter-alia it was pleaded that suit lands are ancestral lands and were not subjected to partition. It was further pleaded that defendant No.1 also has share in the suit lands and is in joint cultivating possession with the plaintiffs. Therefore, he is entitled to share in Ganpat's share in the lands in question. The defendants No.3 to 5 were proceeded ex-parte by the trial Court.

4. The trial Court vide judgment and decree dated 11.7.1990 while taking into account the admission made by defendant No.1 namely Karan Singh (DW-1) in paragraphs 3 and 4 of his statement held that during the lifetime of Bhagirath, the partition had taken place and the parties were in separate cultivating possession of the lands in question. It was further held that plaintiffs were in joint cultivating possession with late Ganpat. The trial Court in view of Section 6 of the Hindu Succession Act, 1956 held that share of Ganpat

would devolve on the plaintiffs. Accordingly, the suit was decree.

5. Being aggrieved by the aforesaid decree, the defendant No.1 preferred an appeal. The lower appellate Court vide judgment and decree dated 14.12.1995 inter-alia held that partition had taken place during the lifetime of Bhagirath. It was further held that plaintiffs were in joint cultivating possession with late Ganpat. The lower appellate Court further held that Ganpat's 1/3rd share in the lands would devolve on his father namely Rajaram as well as plaintiffs and defendant No.1. Accordingly, it was held that defendant No.1 is entitled to 1/4th share of 1/3rd share of deceased Ganpat in the suit lands. Accordingly, the decree passed by the trial Court was set aside.

6. Learned counsel for the appellants submitted that plaintiffs were full blood brothers of Ganpat whereas, defendant No.1 is half blood brother of Ganpat and, therefore, in view of Section 14 of the Hindu Succession Act, 1956, the plaintiffs are entitled to succeed to the share of deceased Ganpat to the exclusion of defendant No.1. In support of his submissions, learned counsel for the appellants has placed reliance on *Yellava Gounder and another Vs. Lakshmi and others*, AIR 1975 Madras 253, *Sarwan Singh and others Vs. Smt. Dhan Kaur and another*, AIR 1971 Punjab & Haryana 323 and *Waman Govind Shindore and others Vs. Gopal Baburao Chakradeo and others*, AIR 1984 Bombay 208.

7. On the other hand, learned senior counsel for respondent No.1 submitted that Ganpat died on 30.10.1954 and at the time of death of Ganpat, his father Rajaram was alive, who died on 5.9.1956 and, therefore, the share of Ganpat would devolve on his father. Learned senior counsel for respondent No.1 has invited the attention of this Court to paragraphs 38, 39 and 43 of Hindu Law.

8. I have considered the submissions made on both sides and have perused the record. Admittedly, Ganpat died on 30.10.1954. At the time of his death, his father namely Rajaram was alive. Rajaram expired on 5.9.1956 i.e. prior to commencement of Hindu Succession Act, 1956. Chapter IV of the Hindu Law deals with order of inheritance of males according to Mitakshara Law. Paragraph 36 provides that under Mitakshara, the right to inherit arises from propinquity, that is, proximity of relationship. Para 38 deals with classes of heirs namely Gotraja sapindas, Samanodakas and Bandhus. Para 39(ii) provides that Gotraja Sapindas of a person according to Mitakshara are his six male ascendants in the male line, the wives of the first three of them, and

probably also of the next three, that is his father, father's father, father's father's father, etc. Admittedly, Ganpat died issueless prior to commencement of the Hindu Succession Act. Therefore, the provisions of Hindu Succession Act would not apply to the devolution of the property in the facts of the case. Therefore, the share of Ganpat in the property would devolve on his father namely Rajaram who was alive at that time and after Rajaram, to devolve on the plaintiffs and the defendants.

9. For the aforementioned reasons, the substantial question of law framed by this Court is answered in the affirmative and against the appellants. In the result, the appeal fails and is hereby dismissed with cost.

Appeal dismissed.

I.L.R. [2012] M.P., 1644

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 380/1996 (Jabalpur) decided on 16 April, 2012

MANIK RAO & ors.

...Appellants

Vs.

RAMESH & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Section 9 - Suit for recovery of possession - Co-owner - A Co-owner can file a suit for recovery of property from a person in wrongful possession and that such a suit is regarded as one on behalf of all the co-owners. (Para 6)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 - कब्जे की वापसी के लिए वाद - सहस्वामी - एक सहस्वामी सदोष कब्जा धारक व्यक्ति से सम्पत्ति की वापसी हेतु वाद प्रस्तुत कर सकता है और ऐसे वाद को सभी सहस्वामियों की ओर से किया जाना माना जायेगा।

B. Transfer of Property Act (4 of 1882), Section 53-A - Conditions precedent for applicability - Law Discussed. (Para 7)

ख. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 53-ए - प्रयोज्यता हेतु पूर्ववर्ती परिस्थितियां - विधि विवेचित।

C. Transfer of Property Act (4 of 1882), Section 53-A, Land Revenue Code, M.P. (20 of 1959), Section 190 - Possession - Defendants instead of filing suit for specific performance of contract initiated proceedings before revenue court for acquisition of title - They have

also not pleaded the readiness and willingness to perform their part of contract - Defendants are not entitled to benefit of Section 53-A of Transfer of Property Act. (Para 8)

ग. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 53ए, भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 190 - कब्जा - प्रतिवादीगण ने संविदा के विनिर्दिष्ट पालन हेतु वाद प्रस्तुत करने की बजाए हक के अर्जन हेतु राजस्व न्यायालय के समक्ष कार्यवाहियां आरंभ की - उन्होंने अपने भाग की संविदा के पालन हेतु तैयारी व रजामंदी का भी अभिवाक् नहीं किया है - प्रतिवादीगण सम्पत्ति अंतरण अधिनियम की धारा 53ए का लाभ पाने के हकदार नहीं।

Cases referred :

AIR 1947 Nagpur 188, 1967 MPLJ 711, AIR 2002 SC 960, AIR 1982 SC 989, 1960 MPLJ 962.

B.K. Singh, for the appellants.

Ravish Agrawal with *K. Jha*, for the respondents.

J U D G M E N T

ALOK ARADHE, J. : This appeal has been preferred by the defendant, who have lost in both the Courts. This Court vide order dated 31.7.1996 while admitting the appeal had formulated the following substantial question of law:

- "1. Whether the first appellate Court was justified in granting a decree for whole of the property when the trial Court has granted a decree for 1/3rd and the plaintiff did not file any cross-objection against rejection of their claim ?
 2. Whether on the facts and in the circumstances of the case the appellants are entitled to maintain the possession of the property under the provisions of Section. 53-A of the Transfer Property Act ?"
2. Facts giving rise to filing of the appeal briefly stated are that the plaintiffs filed a suit for confirmation of possession and in the alternative, seeking a decree for possession on the ground that one Prahlad was the owner of the land admeasuring 64.25 acres. On death of Prahlad, the suit lands devolved on his three Sons namely Yashwant Rao, Madhav Rao and Sudarshan Rao. Yashwant Rao and Madhav Rao relinquished their share in the suit lands in favour of Sudarshan Rao i.e. father of the plaintiffs. Sudarshan Rao died in

the year 1962. After his death, the suit lands devolved on the plaintiffs. However, during the minority of the plaintiffs, defendants got their names mutated in the revenue records. The defendants on the basis of an agreement dated 7.7.1961 allegedly executed by late Sudarshan Rao, disclosed themselves to be the owner of the suit lands and tried to take forcible possession of the suit lands in the year 1968. It was averred in the plaint that late Sudarshan Rao had neither entered into an agreement for sale with the defendants nor had placed them in possession. If such an agreement is in existence, the same is forged. It was further pointed out that the market value of the land was Rs.1 Lac whereas, the sale consideration in the agreement is shown as Rs.13,000/- only. The defendants filed the written statement in which inter-alia it was pointed out that Sudarshan Rao i.e. plaintiffs' father had one-third share in the suit lands. It was denied that Yashwant and Madhav Rao had relinquished their share in the suit property. It was further pleaded that Sudarshan Rao had entered into an agreement dated 7.7.1961 with the defendants for a consideration of Rs.13,000/- and had received the entered sale consideration. However, on account of his death in the year 1962, the sale deed could not be executed. It was also pleaded that defendants are in possession of the suit lands on the basis of the agreement which has been executed in their favour by late Sudarshan Rao.

3. The trial Court initially, vide judgment and decree dated 25.11.1975 decreed the suit filed by the plaintiff and directed the defendants to handover the joint possession of 1/3rd share in the suit lands. In an appeal preferred by the defendants, the matter was remanded. The trial Court thereafter vide judgment and decree dated 28.3.1990 inter-alia held that plaintiff is the sole owner of the suit lands. It was further held that defendants have not been able to prove that plaintiffs' father had entered into an agreement for sale dated 7.7.1961 and handed over the possession of suit lands to the defendants. Accordingly, it was held that plaintiff is entitled to possession of the suit lands. Being aggrieved by the aforesaid decree, the defendants preferred an appeal. The lower appellate Court vide judgment and decree dated 23.3.1996 on the basis of Ex.D/7, D/8 and D/9 held that plaintiffs father namely Sudarshan Rao had entered into an agreement for sale with the defendants. It was further held that Sudarshan Rao died in the year 1962 leaving behind his son namely the plaintiff and four daughters, therefore, the plaintiff is not the sole owner of the suit lands. It was further held that plaintiff is entitled to obtain possession of the suit lands.

4. Learned counsel for the appellants submitted that the lower appellate Court grossly erred in holding that plaintiff is entitled to possession of the suit lands in the face of Ex.D/7, D/8 and D/9. It was also submitted that defendants are in possession of the lands in question under the agreement dated 7.7.1961 and, therefore, are entitled to protection of their possession under Section 53-A of the Transfer of Property Act.

5. On the other hand, learned senior counsel for respondents No.3, 4 and 5 submitted that infact the first substantial question of law framed by this Court on the facts of the case does not arise. It was further submitted that as per the agreement dated 7.7.1961, the sale deed was to be got executed up to June, 1962 however, despite payment of entire sale consideration, no explanation has been offered on behalf of the defendants as to why the sale deed has not been got executed. It was further submitted that from perusal of paragraph 3(ka) of the written statement, it is apparent that in the year 1967, the defendants had initiated proceedings under Section. 190 of the M.P. Land Revenue Code. It was further submitted that the aforesaid proceedings were dismissed in default of appearance on 26.10.2007. It was also urged by learned senior counsel that defendants in the facts of the case the defendants are not entitled to protection under Section 53-A of the transfer of Property Act. In support of his submissions, learned senior counsel has placed reliance on decisions reported in *Pusaram Maniklal Izardar Vs. Deorao Gopalrao Mali (minor) by guardian mother Parvati W/o. Gopalrao*, AIR 1947 Nagpur 188, *Devisahai Vs. Govindrao and others*, 1967 MPLJ 711, *Shrimant Shamrao Suryavanshi and another Vs. Pralhad Bhairoba Suryavanshi (dead) by LRs. and others*, AIR 2002 SC 960, *Sardar Govindrao Mahadik and another Vs. Devi Sahai and others*, AIR 1982 SC 989 and *Smt. Pilanoni Janakram vs. Anandsingh Sakharam*, 1960 MPLJ 962.

6. I have considered the submissions made by learned counsel for the parties and have perused the records. In *Smt. Pilanoni Janakram vs. Anandsingh Sakharam*, supra, the Division Bench of this Court has held that it is settled view that a co-owner can file a suit for recovery of property from a person in wrongful possession and that such a suit is regarded as one on behalf of all the co-owners. Thus, even assuming the plaintiff to be the co-owner, the suit filed by him shall be treated as on behalf of all the co-owners. Thus, the first substantial question of law framed by this Court in the facts of the case does not arise.

7. The condition precedent for applicability of Section 53-A of the Transfer of property Act are firstly, that there should be a contract to transfer for consideration any immovable property; secondly, that the contract should be in writing and its terms can be ascertained with reasonable certainty; thirdly, that the transferee in part-performance of the contract has taken possession of the property or any part thereof or if he is already in possession, he continues in possession in part-performance of the contract; fourthly, that the transferee has done some act in furtherance of the contract; and fifthly, that the transferee has performed or is willing to perform his part of the contract. Besides that, a party relying on Section 53-A of the Transfer of Property Act has to plead and prove the readiness and willingness on its part to perform the contract.

8. From perusal of paragraph 3(ka) of the written statement, it is apparent that defendants instead of filing the suit for specific performance of the contract, had initiated proceedings before the revenue Court for acquisition of title. The defendants in their written statement have failed to plead the readiness and willingness to perform their part of the contract. On the other hand, the defendants had initiated the proceedings under Section 190 of the M.P. Land Revenue Code, 1959 for conferral of Bhumiswami rights in 1967 and, therefore, the defendants are not entitled to benefit of Section 53-A of the Transfer of Property Act. For the aforementioned reasons, the second substantial question of law framed by this Court is answered in the negative and against the appellants.

In the result, the appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1648

APPELLATE CIVIL

Before Mr. Justice N.K. Mody & Mr. Justice G.D. Saxena

F.A. No. 301/2011 (Gwalior) decided on 20 June, 2012

RAMKALI (SMT.) & ors.

...Appellants

Vs.

M.P. ELECTRICITY BOARD & ors.

...Respondents

A. Fatal Accidents Act, (13 of 1855), Section 1-A - Vicarious Liability - Electrocutation - Deceased came in contact with live wire which was hanging on the road - Case of respondent was that due to fault, the said line was disconnected however, subsequently the said

line was rejoined by some unknown persons by putting wire illegally and thereby electricity was restored - Held - Board failed to take required care and not following the required standards in maintaining the electricity supply - There was wanton and gross negligence on the part of Board - Board and its employees were negligent for the resultant death of deceased on account of electrocution. (Paras 14 & 15)

क. घातक दुर्घटना अधिनियम (1855 का 13), धारा 1-ए - प्रतिनिधिक दायित्व - विद्युत आघात - मृतक सजीव तार के संपर्क में आया जो सड़क पर लटक रहा था - प्रत्यर्थी का यह मामला था कि दोष के कारण उक्त लाईन को अलग किया गया था किन्तु तत्पश्चात् उक्त लाईन को किन्हीं अज्ञात व्यक्तियों द्वारा अवैध रूप से तार लगाकर फिर से जोड़ा गया था जिससे विद्युत प्रवाह पुनः स्थापित हो गया - अभिनिर्धारित - बोर्ड आवश्यक सावधानी बरतने में असफल रहा और विद्युत प्रदाय बनाये रखने में आवश्यक मानकों का पालन नहीं किया गया - बोर्ड की ओर से ढिलाई एवं घोर उपेक्षा की गई - बोर्ड व उसके कर्मचारियों की उपेक्षा के फलस्वरूप मृतक की विद्युत आघात से मृत्यु।

B. Fatal Accidents Act, (13 of 1855), Section 1-A - Amount of compensation - Trial Court rightly assessed the monthly income of the deceased at Rs. 3000/- - Total 8 persons including old parents were totally dependent upon deceased - Deduction towards personal expenses ought to have been assessed at the ratio of 1/5th - Applying the multiplier of 16, total loss of dependency comes to Rs. 4,60,800 - Appellants also entitled to receive additional amount of Rs. 22,000 under different heads - Compensation enhanced to Rs. 4,82,800 with interest @ 7% p.a. (Paras 16 & 17)

ख. घातक दुर्घटना अधिनियम (1855 का 13), धारा 1-ए - प्रतिकर की रकम - विचारण न्यायालय ने उचित रूप से मृतक की आय रुपये 3000/- प्रतिमाह निर्धारित की - कुल 8 व्यक्ति, जिसमें वृद्ध माता-पिता सम्मिलित हैं पूर्णतः मृतक पर आश्रित थे - व्यक्तिगत खर्चों के लिए 1/5 के अनुपात में कटौती का निर्धारण किया जाना चाहिये था - 16 का गुणक लागू कर कुल रुपये 4,60,800/- की आश्रितता की हानि होती है - अपीलार्थीगण विभिन्न मदों के अंतर्गत रुपये 22,000/- की अतिरिक्त रकम प्राप्त करने के भी हकदार - प्रतिकर 7 प्रतिशत प्रतिवर्ष ब्याज के साथ बढ़ाकर रुपये 4,82,800/-, किया गया।

Cases referred :

AIR 2002 SC 551, (2005) 6 SCC 156.

Anand Bhardwaj, for the appellants.

Vivek Jain, for the respondents No.1 to 3.

J U D G M E N T

The Judgment of the Court was delivered by : **G.D. SAXENA, J.** : Upon the joint request and on the facts and in the circumstances of the case, both the appeals referred to above are taken up together for final disposal today itself.

2. In these appeals under Section 96 of the Code of Civil Procedure, 1908, the appellants have challenged the judgment and decree dated 13th July, 2011 recorded in Civil Suit No. 17A/11 by the learned First Additional District Judge (Fast Track), Jaura, district Morena whereby the plaintiffs/claimants came to be awarded an amount of Rs. 3,96,000/- (Rs. Three lacs ninety six thousand only) alongwith interest @ 7% p.a. on account of death by electrocution of Kamlesh.

3. The appellants in F.A.No.301/11 are the original plaintiffs, whereas the respondents are the original defendants. The original plaintiffs claimed amount of compensation and damages to the tune of Rs. 6,50,000/- (Rs. Six lacs fifty thousand only) under the provisions of Indian Fatal Accidents Act, 1855. It was the case of the plaintiffs that the deceased Kamlesh who was aged about 35 and was an earning member of the family while going to attend his labour work got electrocuted. It was the contention of the plaintiffs that the original defendants, M.P. State Electricity Board ("the Board" for brevity) was negligent in not taking requisite care as required so as to secure safety of lives of the citizens from being electrocuted. Since a live wire was allowed hanging on road, as a result of which the current started passing which took the life of Kamlesh who was earning Rs. 180/- per day, at the relevant time, as he was healthy and young labourer. The plaintiffs, therefore, claimed an amount of Rs. 6,50,000/- for the death of earning member of their family on account of electrocution which was attributable to the negligence of the Board.

(4) The defendants appeared and resisted the suit, inter alia, contending that they were not at fault though they admitted the death of Kamlesh by electrocution. They pleaded that on 27th May 2004 much prior to the accident, employees of the electricity board due to fault on account of rainy season disconnected 11 KV line of village Umedgarhi, but subsequently the said line was rejoined by some unknown persons by putting wire illegally and thereby electricity was restored, which ended in the present incident. It is submitted that there was no negligence on the part of the employees of the Board and as such no vicarious liability can be fastened on the board under

such circumstances. Accordingly, it was prayed that the suit claiming for compensation be dismissed.

(5) Upon the strength of the pleadings of the parties and the facts and circumstances, the trial court framed issues and after appreciation and analysis of the evidence led by the parties decreed the suit to the extent of Rs. 3,96,000/- in favour of the original plaintiffs of the deceased against the defendants, respondents-Board herein for the tortuous liability which resulted into death of the deceased Kamlesh by virtue of the impugned decree. That is how both the appellants are before us by filing counter cases against each other.

(6) The submissions of the appellants/plaintiffs in counter case (F.A. No.301/2011) are to the effect that the trial court while awarding compensation for death of deceased Kamlesh wrongly assessed his income at Rs. 100/- per day. It is submitted that the income of the deceased should have been assessed at Rs. 180/- per day. Additionally, it is also submitted that the rate of interest looking to the present standard of times should have been more than that of 7%, as awarded. In this manner, it is submitted that the amount of compensation be enhanced. In support of his contentions, reliance is placed on the decision in the case of *M.P. Electricity Board Vs. Sunil Kumar and others* (AIR 2002 SC 551).

(7) On the other hand, the contention of the appellants-Board in F.A.No. 317/11 is that while passing the impugned judgment and decree, the trial court has erred in awarding compensation even without finding proof about the negligence on the part of the employees of the Board and therefore vicarious liability fastened for payment of compensation on the appellants-Board is not sustainable in law. Thus, it is prayed that the impugned judgment and decree being based on no reason, same is liable to be set aside. In support of his submissions, learned counsel placed reliance on the decision in the case of *SDO Grid Corporation of Orrisa Vs. Timudu Ornam* 2005(6) SCC 156.

(8) Heard the learned counsel appearing for the parties and also perused the record of the trial Judge and the law governing the situation.

(9) Following questions arise for consideration in these appeals, which are as under

(a) Whether, the learned trial court has rightly recorded a finding in respect of the vicarious liability against the Board

for the negligence of its employees, causing accidental death of deceased Kamlesh?

(b) Whether, the learned trial court awarded compensation amount and interest on lower side to the plaintiffs which justifies enhancement in the light of the pleadings and averments made in the plaint as well as memo of appeal by the claimants?

(10) On perusal of the pleadings and evidence of the parties, it is proved that on 30th May 2004 deceased Kamlesh died by electrocution being came into contact with live electric line. On considering the statement of witness Ramveer Singh (DW-2), who, at the relevant time, was posted as lineman at the Electric Supply Centre Baghchini and perusal of FOC registrar, it comes to notice that on 28th May 2004, the electric line was cut by the said witness during the period from 28th May, 2004 till 30th May, 2004, on account of fault. He stated that the said line was rejoined by putting wire illegally due to which the present incident has occurred. However, the monthly income of the deceased Kamlesh who was engaged as watchman at the field was not found proved by the plaintiffs by placing cogent and reliable evidence on record. The trial court therefore rightly calculated the income of the deceased @100/- per day and rightly applied multiplication for awarding compensation.

(11) Now, we proceed to consider the issue regarding vicarious/strict liability in respect of the Electricity Board on account of its negligence, as alleged by the plaintiffs.

(12) In *M.P. Electricity Board* (supra) the Hon. Apex Court held as under:

"It is an admitted fact that the responsibility to supply electric energy in the particular locality was statutorily conferred on the Board. If the energy so transmitted causes injury or death of a human, being, who gets unknowingly trapped into if the primary liability to compensate the sufferer is that of the supplier of the electric energy. So long as the voltage of electricity transmitted through the wires is potentially of dangerous dimension the managers of its supply have the added duty to take all safety measures to prevent escape of such energy or to see that the wire snapped would not remain live on the road as users of such road would be under peril. It is no defense on the part of the management of the Board that somebody committed mischief by siphoning such energy of his private

property and that the electrocution was from such diverted line. It is the look out the managers of the supply system to prevent such pilferage by installing necessary devices. At any rate, if any live wire got snapped and fell on the public road the electric current thereon should automatically have been disrupted. Authorities manning such dangerous commodities have extra duty to chalk out measures to prevent such mishaps.

Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. In the present case, the Board made an endeavour to rely on the exception to the rule of strict liability (*Rylands v. Fletcher*) being "an act of stranger". The said exception is not available to the Board as the act attributed to the third respondent should reasonably have been anticipated or at any rate its consequences should have been prevented by the appellant-Board.

In *W.B. State Electricity Board v. Sachin Banerjee* (1999 (9) SCC 21) the Electricity Board adopted a defence that electric lines were illegally hooked for pilferage purposes. This Court said that the Board cannot be held to be negligent on the said fact situation but the question of a strict liability was not taken up in that case.

(13) In *S.D.O. Grid Corporation of Orissa Ltd.* (supra) it has been observed:

"9. In the present case, the appellants had disputed the negligence attributed to it and no finding has been recorded by the High Court that the GRIDCO was in any way negligent in the performance of its duty. The present case is squarely covered by the decision of this Court in *Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others* (supra). The High Court has also erred in awarding compensation in

Civil Appeal No.....of 2005 (arising out of SLP (C) No. 9788 of 1998). The subsequent suit or writ petition would not be maintainable in view of the dismissal of the suit. The writ petition was filed after a lapse of 10 years. No reasons have been given for such an inordinate delay. The High Court erred in entertaining the writ petition after a lapse of 10 years. In such a case, awarding of compensation in exercise of its jurisdiction under Article 226 cannot be justified."

(14) After having heard the learned counsel for the parties, on the facts and in the circumstances of the case and evidence available on record, we are of the opinion that the unfortunate, premature and untimely demise of the deceased, Kamlesh was attributable to the negligence of the original defendants, respondents-Board before us in not taking required care and not following the required standards in maintaining the electricity supply. We have no hesitation in finding that there was wanton and gross negligence on the part of the Board, which culminated into cutting short of life of a young labourer. We do not find any evidence on record whereby prima facie proof of negligence could stand rebutted. Even the doctrine of res judicata successfully applies in the present case since the death arising out of electrocution is not in controversy.

(15) In so far as the actionable and recognisable act of negligence on the part of the original defendants is concerned, there is no doubt in our mind and we are in complete agreement with the trial court and again we have also independently and threadbare considered the facts and circumstances from the analytical point of view the evidence, copies whereof placed before us. The ultimate conclusion of the trial court in holding the Board and its employees negligent for the resultant death of the deceased on account of electrocution on the unfateful day is justified. We, therefore, confirm the finding of the trial court on the issue of negligence. In the above factual aspect of the case, the judgment cited by the learned counsel appearing for the Board in the case of *S.D.O. Grid Corporation of Orissa Ltd* (supra) will not be applicable to the present case.

(16) Obviously, the trial court, in aggregate, has awarded an amount of Rs. 3,96,000/-, which included the amount awarded under different heads such as funeral expenses, loss of estate, loss of consortium. No doubt, it is a settled proposition of law that the appellate court exercises its powers in a case like the one on hand for damages arising out of tortious liability and it would be at

loath to interfere with the discretionary powers exercised by the trial court upon assessment of evidence led before it unless the amount awarded by way of compensation after proof of negligence in a given case is too inadequate or very excessive. Now, on coming to the evidence on record, it appears that the monthly income of the deceased has been assessed at Rs. 3,000/-. It is further evident that the appellants No. 1 to 8 were permanently dependents on the deceased Kamlesh. Similarly, appellants No. 7 and 8 are his old parents. Keeping in view the aforesaid facts and circumstances of the case, this court is of the view that the deduction towards personal expenses ought to have been assessed at the ratio of 1/5th.

(17) Thus, considering the annual income of the deceased and after deducting 1/5th towards personal expenses, the loss of dependency comes to Rs. 2 8,800/- in which after applying multiplier of 16, the total loss of dependency comes to Rs. 4,60,800/-. Apart from this, the claimants/appellants are also held entitled to receive total sum of Rs. 22,000/- under different heads. In this manner, now the appellants are entitled to receive total amount of compensation to the tune of Rs.4,82,800/-(Rs. Four lacs eighty two thousand and eight hundred only) instead of Rs. 3,96,000/-, as awarded by the learned trial court alongwith interest @ 7% p.a. from the date of filing of the suit till realisation of the amount.

(18) In the result, F.A.No. 301/11 filed by the appellants stands allowed in part. The impugned judgment and decree accordingly stand modified in the facts and circumstances of the case. The appellants are held entitled to receive compensation to the tune of 4,82,800/- (*Rs. Four lacs eighty two thousand and eight hundred only*) alongwith interest @ 7% per annum, as awarded by the learned trial court from the date of filing of the suit till realisation of the amount in question. Other appeal bearing F.A.No.317/11 filed by the appellants-Board is eventually dismissed in the light of the above observations.

(19) It is directed that the appellants Madhya Pradesh Electricity Board Morena shall bear the costs of both the appeals which would be payable to the plaintiffs. It is further directed that the court fee of the suit as well as appeal filed by the plaintiffs (F.A. No. 301/2011-) shall be recoverable from the amount of the Award deposited by the Board before the trial Court.

(20) The decree be drawn up accordingly in both the cases.

Order accordingly.

I.L.R. [2012] M.P., 1656

APPELLATE CIVIL

Before Mrs. Justice Vimla Jain

M.A. No. 1177/2005 (Jabalpur) decided on 5 July, 2012

RAJABHAIYA GUPTA

...Appellant

Vs.

KAMLABAI & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 7 Rule 11 - Rejection of Plaint - Scope of scrutiny - Is confined only to the averments made in the plaint - Question relating to the validity of the documents should not be determined at this stage of deciding an application. (Para 13)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 - वादपत्र की खारिजी - संवीक्षा की व्याप्ति - सिर्फ वाद पत्र के प्रकथनों तक सीमित है - किसी आवेदन के निराकरण के इस प्रक्रम पर दस्तावेजों की वैधता के संबंध में प्रश्न निर्धारित नहीं किया जाना चाहिए।

Case referred :

2003(2) MPLJ 320.

Manish Jain, for the appellant.*R.K. Patel*, for the respondents.**ORDER**

VIMLA JAIN, J. - The present miscellaneous appeal under Order XLIII Rule 1(p) of the Code of Civil Procedure, 1908 {for brevity 'Code'} is directed against the order dated 15.3.2005 passed by Additional District Judge, Sihora District Jabalpur in Civil Appeal No.32-A/2004 reversing the order dated 1.9.2004 passed in Civil Suit No.373-A/94 whereby the application under Order VII Rule 11 of the Code preferred by the appellant/defendant has been allowed and the suit of the respondents/plaintiffs was rejected.

2. Facts giving rise to filing of this appeal briefly stated are that late Daduram alias Gayadeen, the husband of respondent no.1 and father of respondents/plaintiffs no.2 to 7 has preferred the instant Civil Suit No.373-A/94 for declaration of title and permanent injunction against Jharokhabai widow of Kashiram in respect of the disputed house and land shown in the map annexed alongwith the plaint. He has further alleged in the plaint that owner

late Kashiram had executed a will dated 15.8.1968 in his favour in respect of the disputed house and land and since then he is in possession of the disputed house. During pendency of the suit, Jharokhabai, widow of Kashiram, had sold the disputed house to appellant/defendant Rajabhaiya Gupta. Gayadeen died during pendency of the suit and his legal representatives i.e. plaintiff Nos. 1 to 7 have been brought on record. Jharokhabai was also died, therefore, her successor in interest Rajabhaiya Gupta was impleaded as defendant in the suit.

3. Considering rival contentions of learned counsel appearing for both the parties, the Court below framed issues and examined one Suresh Prasad as witness. Before the Trial Court the respondents/plaintiffs moved an application for amendment to the effect that late Kashiram had sold the land bearing Khasra Nos.360,361 and the house constructed therein to one Ramesh Chandra Brijpuria vide sale deed dated 9.2.1966 for an amount of Rs.5000/-. Therefore, deceased Kashiram or his widow Jharokhabai has no right/title/interest over the disputed land and the house constructed therein, therefore, the sale deed (BENAMA) entered into by Jharokhabai with Rajabhaiya on 29.5.1993 be declared null and void.

4. The appellant/defendant moved an application under Order VII Rule 11 of CPC on the ground that since the plaintiff has admitted in the amendment application that the disputed house and land were already sold by late Kashiram to Ramesh Chandra Brijpuria vide registered sale-deed dated 9.2.1966, i.e. much prior to the execution of alleged will in favour of the plaintiff, therefore, the suit itself deserves to be dismissed as the alleged will has no force and the late Kashiram had no right to execute the will in favour of plaintiffs when he had already sold the house and land to Ramesh Chandra.

5. The learned Trial Court after considering the rival contentions of the parties allowed the application under Order VII Rule 11 C.P.C. vide order dated 1.9.2004 and rejected the suit filed by the respondents/plaintiffs. Being aggrieved by the order dated 1.9.2004, the respondents/plaintiffs preferred Civil Appeal No.32-A/2004. The Appellate Court allowed the appeal vide impugned order dated 15.3.2005 and directed the Trial Court to decide the suit on merits. Being aggrieved by the order dated 15.3.2005, the appellant has preferred this miscellaneous appeal.

6. In this appeal, the scope of Order VII, Rule 11 of CPC is to be

determined.

7. Order VII Rule 11 of CPC, so far it is relevant for the present case, reads as under:-

"11.Rejection of plaint—The plaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

[(e) where it is not filed in duplicate];

(f) where the plaintiff fails to comply with the provisions of Rule 9]:"

8. Learned counsel appearing for the appellant submits that according to the amendment in the plaint, the disputed property was sold by late Kashiram to Ramesh Chandra Brijpuriya vide registered sale deed dated 9.2.66 i.e. much prior to the date of execution of the alleged will dated 15.8.68 in favour of the plaintiff late Gayadeen. He further submits that after such sale deed, late Kashiram had no right to execute the will in favour of late Gayadeen and as such the suit filed by late Gayadeen was not maintainable. He also submits that the learned Lower Appellate Court committed a grave error of law in allowing the appeal and setting aside the order of the Trial Court. In support of his submissions, he placed his reliance on a decision of the Supreme Court in the matter of *Saleem Bhai and others Vs State of Maharashtra and others* reported in 2003 (2) MPLJ 320.

9. Learned counsel for the respondents submits that the Court below framed issues and examined one Suresh Prasad as a witness, therefore, the

application filed under Order VII Rule 11 of CPC is not maintainable. He further submits that the learned Lower Appellate Court did not commit any error in allowing the appeal and setting aside the order passed by the Trial Court.

10. It is well settled that the Trial Court can exercise the power under Order VII, Rule 11 of Civil Procedure Code at any stage of the suit before registering the plaint or after issuing summons to the defendant and at any time before the conclusion of the trial.

11. After having heard learned counsel appearing for the parties and on going through the impugned order, it is found that the suit instituted by late Gayadeen raised mixed question of law and facts relating to the immovable property owned by late Kashiram.

12. In this case, the following three documents are in question:- (1) Registered sale deed dated 9.2.66, which was executed by late Kashiram in favour of Ramesh Chandra Brijpuriya (2) The will dated 15.8.68, which was executed by late Kashiram in favour of Gayadeen and (3) Another sale deed (BENAMA) dated 29.5.93, which was executed by Jharokhabai w/o late Kashiram in favour of Rajabhaiya.

13. The plaint is based on the said documents. Therefore, it is necessary to examine all these documents before completion of the trial to establish their validity so as to find out the cause of action. The question relating to the validity of the aforesaid documents cannot be determined without holding enquiry into the factual aspects of the dispute at the stage of deciding an application under Order VII Rule 11 of CPC. The Trial Court should not have decided validity of the documents at the time of deciding the application because the scope of scrutiny at this stage under Order VII Rule 11 of CPC is confined only to the averments made in the plaint. In these circumstances, it cannot be concluded that the plaint is manifestly vexatious and without any merit.

14. For the foregoing reasons, I am of the view that the findings of the order dated 15.3.2005 passed by the Additional District Judge Sihora, District Jabalpur in Civil Appeal No.32-A/2004 are unassailable. Therefore, I do not find any merit in this appeal and accordingly it is dismissed in limine. The parties are left to bear their own costs of this appeal.

Appeal dismissed.

I.L.R. [2012] M.P., 1660

APPELLATE CRIMINAL

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

Cr. A. No. 19/2012 (Indore) decided on 14 February, 2012

MANGILAL

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 or 326 - Murder - Cause of Death - Appellant caused one knife injury on the abdomen of the deceased - Deceased died after 21 days on account of complications in the liver as the pus was found in the liver - Appellant guilty of committing offence under Section 326 - Sentence reduced to 3 years R.I. without any remission and fine of Rs. 1 lacs - Amount of fine be paid to the legal heirs of the deceased.
(Para 17)

दण्ड संहिता (1860 का 45), धारा 302 या 326 - हत्या - मृत्यु का कारण - अपीलार्थी ने मृतक के पेट में चाकू का एक घाव कारित किया - मृतक के यकृत में मवाद पाये जाने से यकृत में विकार होने के कारण उसकी 21 दिन पश्चात मृत्यु हो गई - अपीलार्थी धारा 326 के अंतर्गत अपराध कारित करने का दोषी - दण्डादेश 3 वर्ष के कठोर कारावास तक घटाया गया, बिना परिहार के और रु. 1 लाख का अर्थदण्ड - अर्थदण्ड की राशी मृतक के विधिक प्रतिनिधियों को अदा की जाए।

Case referred :

1994 Supp (1) SCC 304.

Vikas Rathi, for the appellant.*B.L. Yadav*, P.P. for the respondent/State.**J U D G M E N T**

The Judgment of the Court was delivered by :
A.K. SHRIVASTAVA, J. - Feeling aggrieved by the judgment of conviction and order of sentence dated 29.11.11 passed by learned Sessions Judge, Dhar Distt. Dhar in Sessions Trial No.195/10 convicting the appellant under Section 302 IPC and directing to suffer life imprisonment and fine of Rs.1,000/-; in default further RI of one month, this appeal has been preferred by the appellant under Section 374(2) Cr.P.C. 1973.

2. in brief, the case of the prosecution is that on 4.3.2010 at 3 PM Rahul lodged a report against appellant that he is residing along with his parents and grandmother in village Kushawada and is a labour. His grandparents has encroached upon the Govt. land for last 40 years. This land was being cultivated by Bagdiram (hereinafter referred the deceased) and Shaitanbai. However, the appellant was claiming the land on the basis of patta granted in his favour by the State Govt. and he also filed a civil suit in that regard and therefore the appellant was keeping enmity with him. The deceased was the father of the complainant.

03. On the date of the incident appellant in order to allay his enmity, dealt the knife blow on the abdomen of the deceased as a result of which he fell down and appellant by taking of the knife from the abdominal region fled from the place of occurrence. On seeing the incident Ramchandra, Narayan, Anandilal and complainant Rahul caught hold the deceased and Kalu choukidwar tied a towel on the wound which was sustained by the deceased. Further it has stated that Ramchandra and Narayan brought the deceased on the motorcycle at Badnavar hospital and complainant Rahul along with Antarsingh went to police station on a motorcycle and lodged the report.

04. On lodging of the report, the criminal law was triggered and set in motion. The investigating agency sent the deceased who was alive and was in injured condition to Primary Health Center, Badnavar where he was examined by Dr. M.M. Upsani however later on the deceased was shifted to the Indore and while undergoing the treatment the deceased had died on 25.3.2010.

05. The case which was originally registered against the appellant was altered to Section 302 IPC. After the death of the deceased his dead body was sent for postmortem.

06. After the investigation was over, the charge-sheet was submitted in the committal court which committed the case to the Court of Session where the appellant was tried for offence under Section 302 IPC.

07. The learned Trial Judge framed the charge under Section 302 IPC which appellant denied as a result of which the prosecution examined its witnesses and also proved the documents. The defence of the appellant is of false implication however in support of his defence he did not examine any witness.

08. The learned trial Judge on the basis of the evidence placed on record came to hold that charge under Section 302 IPC has been proved against the appellant and eventually convicted him and passed the sentence which we are mentioned herein above.

09. In this manner, this appeal has been filed by the appellant assailing his judgment of conviction and order of sentence.

10. The contention of Shri Rathi learned Counsel for the appellant is that from the evidence it is not proved that the appellant has committed the offence under Section 302 IPC and therefore he be acquitted. An alternative submission has also been put forth by him that because the deceased had died after 21 days of the incident on 25.3.2010 on account of complications which arose during the long treatment, therefore at the most the case would come within the ambit and scope of Section 326 IPC and therefore necessary sentence be awarded.

11. On the other hand Shri Yadav, learned Public Prosecutor has argued in support of the impugned judgment and has submitted that the appeal deserves to be dismissed.

12. Having heard learned Counsel for the parties we are of the considered view that this appeal deserves to be allowed in part.

13. In the present case the prosecution has examined complainant Rahul (P.W.1), Anandilal (P.W.2), Narayan (P.W.3) and Indersingh (P.W.4) as eyewitnesses. In the same voice all the eyewitnesses are saying that appellant came and dealt the blow of knife on the person of the deceased as a result of which he fell down and he was brought to the hospital by Anandilal and Narain while the complainant Rahul (P.W. 1) went to lodge the report. From their testimony it is also proved that from Primary Health Center at Badnavar looking to the serious condition of the deceased he was shifted to Indore where ultimately he died after 21 days on 25.3.2010. These eyewitness were cross-examined at length but nothing has been carved out from their testimony in order to disbelieve them or to hold that appellant did not cause any injury to the deceased on his abdominal region by knife. Judging from all the angles we find that the testimony of eyewitnesses is clear, cogent and trustworthy.

14. The testimony of the eyewitnesses is corroborated by the testimony of MLC doctor M.M. Upasani (P.W.7) who found one incised wound on the abdominal region of the deceased admeasuring 2 ½" x 1 cm x 2 cm. This

witness has also proved the MLC report of the deceased Ex.P/6.

15. On bare perusal of the testimony of the autopsy surgeon doctor Bharat Prakash (P.W.12) and the postmortem report Ex.P/13 we find that the deceased sustained following injuries:

Surgical intervention- Vertical Surgery scar with Syntheses mark from xiphisternum to below umbilicus, 22 cm length from to right to umbilicus, vertical, at upper end (xiphisternum). It is extended left 5 cm 42. Healed ICC scar on below lateral mid chest. Left lobe of liver wound 6 x 1 x 3 cm deep are inferior surface. Little pus collection point, abdominal cavity come 300 ml. reddish fluid. Healed draw wound on right lower abdomen. Infected wound 6 x 4 x ½cm on mid lower back. Scar are within 2 to 4 wks. prior to death. Liver wound from left lobe inferior surface three loose stitches present.

According to the autopsy surgeon the deceased had died on account of infection in the liver. Specially the autopsy surgeon is saying in examination-in-chief that the pus was found in the liver and thus according to the autopsy surgeon the deceased had died on account of complications arose during the treatment in the liver.

16. By placing reliance on the decision of the Supreme Court *B.N. Kavatakar and another Versus State of Karnataka* 1994 Supp (1) SCC 304 it has been contended by learned Counsel that because the deceased had died after 21 days of the incident and the death has occurred on account of complications as the pus was found in the liver therefore the case rest under Section 326 IPC and the Supreme Court passed the jail sentence of 3 years RI.

17. On bare perusal of the testimony of the autopsy surgeon we find that the deceased had died on account of complications in the liver as the pus was found in the liver and the deceased had died after 21 days of the incident therefore the appellant has committed the offence under Section 326 IPC and is hereby sentenced to suffer RI of 3 years. However, the amount of fine Rs.1,000/- imposed by learned Trial Court is enhanced to Rs.1,00,000/- (Rs. One Lac), which the appellant shall deposit it in the Trial Court; failing which the appellant shall further undergo a jail sentence of 3 years. Let the entire amount of fine of Rs.1,00,000/- (Rs. One Lac) be paid to the Class-1 heirs of the deceased mentioned in the schedule to Section 8 of the Hindu Succession Act, 1956. On bare perusal of the record of the Trial Court it is

gathered that appellant is in custody since 13.3.2010 and is undergoing the sentence, he should suffer the actual jail sentence of 3 years and no remission for these three years be provided to him. In case appellant deposits Rs.1,00,000/- (Rs. One Lac) in the trial Court he shall be released after undergoing the jail sentence of three years. But in case within that period if he fails to deposit Rs.1,00,000/- (Rs. One Lac), he shall further undergo a jail sentence of three years RI.

18. The Principal Registrar of this Bench is hereby directed to send the record post-haste to the learned trial Court so as to reach that Court prior to 13th March 2012. The Trial Court shall take up the matter on this date and fix a date not beyond a fortnight and will direct the Jail Authorities to send the appellant on the date fixed and thereafter dates may be given according to the convenience of the appellant; so that the amount of fine be deposited. The Trial Court shall also make an enquiry in this regard that who are the Class-1 heirs of the deceased and thereafter disburse the entire amount of compensation equally amongst them.

19. For the reasons stated this appeal succeeds in part with the aforesaid modifications in the sentence.

Appeal Partly succeeds.

I.L.R. [2012] M.P., 1664

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 182/2000 (Jabalpur) decided on 28 February, 2012

CHARAN SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 306 - Abetment to commit suicide - No material on record that deceased committed suicide or died unnatural death - Appellant can not be convicted under Section 306 of IPC. (Para 8)

क. दण्ड संहिता (1860 का 45), धारा 306 - आत्महत्या कारित करने के लिए दुष्प्रेरण - अभिलेख पर कोई सामग्री नहीं कि मृतिका ने आत्महत्या की या उसकी अप्राकृतिक मृत्यु हुई - अपीलार्थी को भा.द.सं. की धारा 306 के अंतर्गत दोषसिद्ध नहीं किया जा सकता।

B. Penal Code (45 of 1860), Section 498-A - Cruelty - Witnesses have deposed that whenever the deceased resided in her matrimonial house she was subjected to cruelty - Acquittal of appellant under Section 306 would not entitle him for acquittal from 498-A - Appellant guilty of committing offence under Section 498-A - Appeal partly allowed. (Para 9)

ख. दण्ड संहिता (1860 का 45), धारा 498-ए - क्रूरता - साक्षियों ने कथन किया है कि जब भी मृतिका अपने ससुराल में निवास करती उसके साथ क्रूरता का व्यवहार किया जाता - अपीलार्थी की धारा 306 के अंतर्गत दोषमुक्ति उसे 498-ए से दोषमुक्ति हेतु हकदार नहीं बनाती - अपीलार्थी धारा 498-ए के अंतर्गत अपराध कारित करने का दोषी - अपील अंशतः मंजूर।

C. Penal Code (45 of 1860), Section 498-A - Sentence - Appellant has already remained in jail for 56 days - Considering the long pendency and mental agony which the appellant has suffered sentence is reduced to period already undergone by enhancing the fine amount to Rs. 7,500/-. (Paras 10 & 11)

ग. दण्ड संहिता (1860 का 45), धारा 498-ए - दण्डादेश - अपीलार्थी पहले ही जेल में 56 दिनों तक रहा - लंबित रहने की दीर्घ अवधि और अपीलार्थी द्वारा सहन की हुई मानसिक पीड़ा को विचार में लेते हुए दण्डादेश भुगताई जा चुकी अवधि तक घटाया गया और अर्थदण्ड की रकम बढ़ाकर रुपये 7,500/- की गई।

V.P. Singh, for the appellant.

Yogesh Dhande, Dy. G.A. for the respondent/State.

J U D G M E N T

U.C. MAHESHWARI, J. : The appellant/accused has directed this appeal under Section 374 (2) of Cr. P. C. being aggrieved by the judgment dated 20.12.1999 passed by 2nd Additional Sessions Judge, Jabalpur in S. T. No.698/92, convicted him under Section 498-A and 306 of IPC for RI one year with fine of Rs.200/-, in earlier section while RI three years with fine of Rs.300/- in later.

2. The facts giving rise to this appeal in short are that the deceased Leelabai got married with the appellant on 24.6.1988. As alleged subsequent to marriage in matrimonial home Leelabai was subjected to beating in regular course under the influence of liquor by the appellant. She was used to ask by the appellant to bring Rs.20,000/- in dowry from her parental family. On 6.6.1992 in the morning the appellant under the influence of the liquor carried

out beating of his wife Leelabai by means of kicks and fists, consequently she got ill and was admitted in the hospital by her brother-in-law Ganesh. On receiving such information at the Police Station, a preliminary inquiry was held in which it was known that she had consumed some poisonous substance but was not found fit to give her statement so the same was not recorded. Later in the late night during treatment she passed away, on which an inquest intimation was registered, in it's inquiry after preparing the dead body Panchnama, her corpus was sent to the hospital for autopsy. The same was carried out by Dr. A. K. Yadu, (P.W. 12). According to postmortem report (Ex. P.9), no definite opinion regarding her cause of death was given by the doctor, however viscera was preserved for chemical examination and the same was sent to the FSL Sagar. On establishing some prima-facie circumstances of the offence the crime was registered and the same was investigated. On completion of the same the appellant was charge sheeted for the offence of Section 306 and 498-A of IPC.

3. After committing the case to the Sessions Court initially the charge of Section 304-B of IPC was framed against the appellant subsequently on 15.1.1998 the same was modified and the charge of Section 498-A and 306 in alternate 304-B of IPC were framed against the appellant, he abjured the guilt, on which the trial was held. After recording the evidence on appreciation holding the appellant guilty for the offence of Section 498-A and 306 of IPC he was punished with the above mentioned punishment while he was acquitted from the charge of Section 304-B of IPC. Being dissatisfied with such conviction and sentence the appellant has come to this Court with this appeal.

4. Appellant's counsel Shri R. S. Patel, after taking me through the record without challenging the impugned conviction of the appellant under Section 498-A of IPC assailed the conviction and sentence of the appellant under Section 306 of IPC. In this regard he argued that the prosecution has utterly failed to prove the exact cause and nature of death of the deceased Leelabai whether her death was homicidal, suicidal or in any case was accidental. In this connection by referring the deposition of aforesaid Dr. A. K. Yadu (P.W.12), who carried out the autopsy and prepared postmortem report (Ex.P.9) of the deceased, argued that such doctor has specifically stated in the postmortem report as well as in his deposition that he could not find out the exact cause and nature of death of Leelabai, however her viscera was preserved to rule out the possibility of her death due to consuming any poisonous substance. In this regard he further argued that although preserved viscera of the deceased was sent to FSL for it's chemical examination but it's report had neither produced

nor proved on record and in the lack of such report there was no occasion with the trial Court to draw the inference that Leelabai by consuming some poisonous substance committed the suicide. In the lack of material and admissible evidence showing that Leelabai died with suicidal or unnatural death, it could not be assumed that she was abated by the appellant to commit suicide and in such premises prayed for setting aside the conviction and sentence of the appellant under Section 306 of IPC. Besides this he also argued that considering the long pendency of the present matter in which the appellant has suffered the mental agony of it for years together along with the judicial custody of 56 days during trial between 11.6.1992 to 7.8.1992, by adopting the lenient view his awarded jail sentence under Section 498-A of IPC be reduced up to the aforesaid period for which he has already undergone by enhancing the amount of fine under the discretion of the Court and prayed to allow this appeal accordingly.

5. On the other hand State counsel Shri Yogesh Dhande by justifying the impugned conviction and sentence of the appellant under both the sections said that the same being based on proper appreciation of evidence do not require any interference at this stage. He further said that once the charge of Section 498-A of IPC is found to be proved against the accused then in view of provision of presumption enumerated under Section 113-A of Evidence Act the conviction of such accused under Section 306 of IPC is justifiable and does not require any interference at the stage of appeal. However, in response of some query of the Court he fairly conceded that unless the nature and cause of death of deceased is proved on the record as suicidal the accused like appellant could not be convicted under Section 306 of IPC. In such premises he also fairly conceded that in view of available postmortem report (Ex.P.9) and in the lack of FSL report regarding viscera of Leelabai, it could not be inferred that Leelabai died due to suicidal death or the homicidal death because no injuries either internal or external was found on the body of the deceased and in the lack of viscera report showing some poisonous substance was found in the same, it could not be assumed that she died with suicidal death. He further argued that in any case even on extending the acquittal to the appellant from the charge of Section 306 of IPC the conviction and awarded jail sentence of the appellant under Section 498-A of IPC for which sufficient evidence is available deserves to be sustained and looking to the nature of the case the awarded jail sentence of the appellant under such section could not be reduced from one year to some lessor punishment by enhancing the amount of fine and prayed for dismissal of this appeal..

6. Having heard the parties at length keeping in view their arguments, I have carefully gone through the record.

7. It is undisputed fact on record that the deceased Leelabai died within seven years from the date of her marriage with the appellant. As per settled proposition in order to prove the unnatural death of any person the prosecution is duty bound to prove the mode of his death by admissible medical evidence, whether such death was homicidal, suicidal or accidental in nature. If it is stated to be suicidal then the prosecution has to prove further that such suicide was committed by which mode either by hanging or consuming some poisonous substance or setting fire on herself or otherwise. Till some extent the above mentioned cause, nature and mode of death could be proved by the FSL report from viscera or any other organs collected from the dead body while carrying out the postmortem.

8. Keeping in view the aforesaid in order to examine the question whether Leelabai committed suicide or died with some other mode of death like homicidal or accidental, I have carefully gone through the postmortem report (Ex. P.9) prepared by Dr. A.. K. Yadu (P.W. 12), so also the deposition of such doctor. According to such report as well as deposition of such doctor, no external or internal injury was found in the corpus of the deceased Leelabai. On page No.6 of such postmortem report such doctor had given his opinion regarding her cause of death in these words "Time since death within 24 hours. No cause of death found viscera to be chemically examined." in such premises, it could be said that prosecution could not prove the exact cause of death of Leelabai through postmortem report. In the lack of any injury on the corpus of the deceased Leelabai, it could not be assumed that she died with homicidal or accidental death. It is apparent on the record that seized viscera was sent to the FSL for it's chemical examination but its report was neither filed nor proved on record. Even the explanation regarding non-production of such report has also not been placed on record. Therefore, in the lack of such report of FSL showing that some poisonous substance was found in the alleged viscera of the deceased, mere on imagination it could not be assumed that Leelabai might have committed suicide by consuming some poisonous substance. In such premises, I am of the considered view that in the lack of admissible and reliable evidence to prove the case beyond reasonable doubt that Leelabai committed suicide or died with unnatural death, the accused like appellant could not be convicted under Section 306 of IPC. In such premises, even on taking into consideration the ocular evidence of the witnesses examined

from the parental family of the deceased the awarded conviction and sentence of the appellant under Section 306 of IPC could not be upheld. Mere on the basis of evidence or deposition of witnesses showing that in the life time of the Leelabai, she was subjected to harassment, torture or cruelty by the appellant, it could not be assumed that she instigated by the appellant to commit suicide and pursuant to that she committed the same. In view of the evidence available on the record, the possibility of natural death of the deceased Leelabai could not be ruled out. Therefore, the conviction of the appellant under Section 306 of IPC being not sustainable along with it's awarded punishment is hereby set aside.

9. Setting aside the conviction and sentence of the appellant under Section 306 of IPC does not mean that he is also entitled for acquittal from the charge of Section 498-A of IPC. On going through the depositions of Dhaniram (P.W.1), Gulab Patel (P.W.2), Harishankar (P.W.3), Ganesh (P.W.9), Rama Patel (P.W. 15), uncles of the deceased, Dropdi Bai (P.W.8), mother of the deceased and Ganesh Patel (P.W. 17) brother-in-law of the deceased so also the deposition of defence witnesses Kandhilal Patel (D.W. 1), uncle of the appellant Bachchi Bai (D.W.2), mother of the appellant I have found sufficient *prima-facie* evidence against the appellant showing that in the life time of the deceased whenever she resided in the matrimonial home with the appellant she was subjected to harassment and torture by him and such act of the appellant comes under the preview of cruelty defined under Section 498-A of IPC but from the available evidence it has not been proved that such cruelty was committed by the appellant with Leelabai on account of demand of dowry. In such premises the trial Court has not committed any error in acquitting the appellant from the charge of Section 304-B of IPC. Even otherwise in the lack of evidence proving that Leelabai died with unnatural death the acquittal of the appellant from the charge of Section 304-B of IPC could not be said to be faulty. But in view of the depositions of aforesaid witnesses the approach of the trial Court holding guilty to the appellant under section 498-A of IPC does not require any interference at this stage. Consequently, the awarded conviction of the appellant under Section 498-A of IPC is hereby affirmed.

10. Coming to consider the prayer of the appellant's counsel for reducing the awarded jail sentence of the appellant under Section 498-A of IPC is concerned, I have found some substance in it. Considering the long pendency in which the appellant has suffered the mental agony of this case for more than

fourteen years and also appeared on the various dates in the trial Court so also before this Court. Beside this he also suffered the judicial custody of fifty six days during trial as stated above and as per available record he did not have any criminal antecedents, so considering overall circumstances of the matter after affirming the conviction of the appellant under Section 498A of IPC, I deem fit to reduce his jail sentence up to the aforesaid period of fifty six days for which he has already undergone, by enhancing some amount of fine.

11. In view of the aforesaid discussion, by affirming the conviction of the appellant under Section 498-A of IPC, this appeal is allowed in part and appellant is acquitted from the charge of Section 306 of IPC, consequently the awarded punishment of such section is also set aside while the awarded jail sentence of the appellant under Section 498-A of IPC is hereby modified and reduced from one year to the aforesaid period of fifty six days for which he has already undergone by enhancing the amount of fine from Rs.200/- to Rs.7,500/-. The amount of fine deposited by the appellant under Section 306 of IPC shall be adjusted in the above mentioned enhanced fine amount under Section 498-A of IPC. The remaining enhanced fine amount is to be deposited by the appellant in the trial Court within four months from today, failing in depositing the enhanced fine he has to suffer further six months 'RI. The bail bond of the appellant is hereby discharged. Till the aforesaid extent the impugned judgment is modified while other findings of the same are hereby affirmed.

12. Appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2012] M.P., 1670

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 1334/1996 (Jabalpur) decided on 6 March, 2012

SANTOSH KUMAR

Vs.

STATE OF M.P.

...Appellant

...Respondent

A. *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) - Caste - No certificate issued by Competent Authority to prove the Caste of Complainant filed - Mere oral testimony of complainant not sufficient to hold that she*

belonged to community concerned under the Act - Prosecution failed to prove the caste of complainant - Conviction under Section 3(1)(xi) of Act 1989 set-aside. (Para 6)

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) - जाति - किसी सक्षम प्राधिकारी द्वारा जारी प्रमाण पत्र शिकायतकर्ता की जाति प्रमाणित करने के लिए प्रस्तुत नहीं किया गया - शिकायतकर्ता की मात्र मौखिक परिसाक्ष्य यह धारणा करने के लिए पर्याप्त नहीं है कि वह अधिनियम के अंतर्गत आने वाले समुदाय की है - अभियोजन शिकायतकर्ता की जाति साबित करने में असफल रहा - अधिनियम 1989 की धारा 3(1)(xi) के अंतर्गत दोषसिद्धि अपास्त।

B. Penal Code (45 of 1860), Section 354 - Sentence - Appellant not entitled for the benefit of the Probation of Offenders Act - However, incident took place in 1995 and appellant has remained in jail for 4 days - Sentence reduced to period already undergone by enhancing the fine amount to Rs. 7,500/-.

ख. दण्ड संहिता (1860 का 45), धारा 354 - दण्डादेश - अपीलार्थी अपराधी परिवीक्षा अधिनियम का लाभ लेने के लिये हकदार नहीं - किन्तु, घटना 1995 को घटित हुई है और अपीलार्थी 4 दिनों तक जेल में रहा है - मुगताई जा चुकी अवधि तक दण्डादेश घटाया गया और अर्धदण्ड बढ़ाकर रुपये 7,500/- किया गया।

R.S. Patel, for the appellant.

Rakesh Kesharwani, P.L. for the respondent.

J U D G M E N T

U.C. MAHESHWARI, J. : The appellant/accused has directed this appeal under Section 374 (2) of Cr. P. C. being aggrieved by the judgment dated 26.7.1996 passed by Special Judge, Balaghat constituted under S.C.S.T. (Prevention of Atrocities), Act (in short "the Act"), in Special Criminal Case No.91/95, convicted him under Section 3 (1) (xi) of the Act for RI six months with fine of Rs.1,000/-.

2. The facts giving rise to this appeal in short are that on 3.7.1995 at about 7.00 p. m. victim Kalabai Basnik lodged the FIR at P. S. Kirnapur contending that today at about 4.00 p. m. when she was carrying out the agricultural activities on the boundary of her field at the same time her neighbor agriculturist namely Santosh accompanied with his brother Harish came there and by abusing her with filthy language asked that her husband could not be

traced out for his murder, hence they will outrage her modesty and in continuation of it with intention to commit the same the appellant accompanied his brother Harish have assaulted on her and by using criminal force and tried to snatch her sari to outrage her modesty, on which after shouting she ran away from such place some neighbor agriculturist also came there and saw the incident. Thereafter the appellant and his brother have fled away from the place of incident. On reaching home she apprised her husband about the incident and thereafter went to police station and lodged the aforesaid FIR, on which a crime for the offence of Section 294, 506-B, 354/34 of IPC and Section 3 (1) (xi) of the Act was registered against the appellant and his brother co-accused Harish. The accused were arrested and on completion of the investigation they were charge sheeted for their prosecution under the above mentioned offence. On evaluation of the same the charge of section 3(1)(xi) of the Act was framed against them, they abjured the guilt, on which the trial was held. After recording the evidence on appreciation of the same by acquitting the co-accused Harish the appellant was convicted and sentenced under the aforesaid section with the above mentioned punishment. Being dissatisfied with such conviction and sentence the appellant has come to this Court.

3. Appellant's counsel Shri R. S. Patel, after taking me through the record of the trial Court as well as the exhibited documents assailed the impugned conviction and sentence of Section 3 (1) (xi) of the Act on the ground that on taking into consideration the prosecution evidence available in the record as accepted in it's entirety the prosecution has failed to prove the caste of victim Smt. Kalabai, whether it was covered under the Act. In continuation he said that unless the caste of the victim is proved by admissible and reliable evidence the person like appellant could not be held guilty for such offence of the Act. In this regard he also argued that there are certain rules and regulations to make inquiry and issue the certificate of caste to the concerning person, who is covered under the Act. Even at the time of the incident there was some provision and procedure under which the Revenue Officers were authorized by the State Government for issuing such caste certificate but it is apparent on record that neither such certificate was obtained and placed on record nor proved by any of the documentary evidence. In the lack of such evidence regarding the caste of the victim, the impugned conviction of the appellant is not sustainable. He further said that on the basis of the language of the charge framed by the trial Court on re-appreciation of evidence if the Court comes to

the conclusion that offence of Section 354 of IPC is made out against the appellant, then in that circumstance keeping in view the long pendency of the present matter in which the appellant has suffered the mental agony of it for years together along with the judicial custody of 4 days during trial between 26.7.1995 to 7.8.1992 and did not possess any criminal antecedents and in such premises being first offender by adopting the lenient view he be extending the benefit of Probation of Offenders Act and in case if such benefit is not extended then under such Section or Section 354 of IPC he be punished with the jail sentence for which he has already undergone by imposing the amount of fine under the discretion of the Court and prayed to allow this appeal accordingly.

4. On the other hand learned P. L. Shri Rakesh Kesharwani by justifying the impugned conviction and sentence of the appellant under the aforesaid section said that the same being based on proper appreciation of available evidence and specially the testimony of victim Kalabai (P.W.1), in which she categorically stated that her community is community is covered under the Act, do not require any interference at this stage. He further said that mere on account of non-production of caste certificate of the victim the appellant could not be acquitted from the alleged charge of the Act. According to him justice should not be defeated mere on the formal technicalities. He also said that on evaluation of the evidence and other available circumstances of the case it is apparent that victim is belonging to the caste which is covered under the Act. In alternate he said that in the lack of any admissible and reliable evidence regarding caste of the victim if the appellant is acquitted from the alleged charge then in that circumstances by virtue of Section 222 of Cr. P. C. taking into consideration the language stated in the charge framed by the trial Court in the light of available evidence the appellant be held guilty and punished under Section 354 of IPC and prayed to adjudicate this appeal accordingly.

5. Having heard the parties keeping in view their arguments, I have carefully gone through the record of the trial Court so also the impugned judgment.

6. It is apparent fact on record that to prove the caste and community of the victim no certificate, either issued by the Revenue Authority or local Gram Panchayat, has neither been produced nor proved. I am of the considered view that in the lack of such certificate of the competent authority mere on the basis of the oral testimony of victim Kalabai (P.W.1), it could not

be deemed or held that she was/ is belonging to the community which is covered under the Act. I have not found any document on the record or any specific averments in the deposition of any of examined witnesses showing that at any point of time the investigation agency had taken any step to obtain such certificate. The prosecution has also failed to explain the circumstance regarding non-production of such certificate. In the lack of such certificate, it is held that the prosecution has failed to prove the caste of the victim covered under the Act and pursuant to it the impugned conviction and sentence of the appellant under Section 3 (1) (xi) of the Act is hereby set aside.

7. Acquitting the appellant from the aforesaid charge of Section 3 (1) (xi) of the Act does not mean that appellant deserves to be acquitted from his alleged offending committed by him with the victim for which sufficient evidence is available on record. I am of the considered view that by virtue of section 222 of Cr. P. C. on the basis of the language and facts stated in the charge framed by the trial Court against the appellant if the specific offence for which the charge was framed is not found to be proved then on appreciation of available evidence if any other offence is made out against the accused like appellant then such accused on such charge could be convicted under such proved offence of other enactment because the impugned case has been prosecuted and defended by the appellant with full understanding of the language stated in the charge framed.

8. In such premises, keeping in view the language of charge framed by the trial Court I have carefully gone through the evidence available on record. The victim Kalabai (P.W.1) on her deposition categorically stated that on the aforesaid date and time when she was carrying out the agricultural activities on her filed at the same time the appellant accompanied is brother Harish came there and asked her that he wanted to kill her husband but he could not be traced out hence he will outrage her modesty and pursuant to it the appellant by holding her hands pressed her breasts and asked his brother Harish co-accused to remove her Sari with intention to outrage her modesty, due to such act of the appellant she fell down and shouted on which her neighbor agriculturist Hemraj, Duryodhan and some other persons also came there. On going through her cross-examination I have not found any material destroying the version stated by her in chief. Her testimony is further supported by Duryodhan (P.W.2) and Hemraj (P.W.3), on recording their deposition as eyewitnesses of the incident, they categorically stated about the act of the appellant whereby they committed the offence of outraging the modesty of

victim Kalabai. In such premises I have found sufficient evidence against the appellant to hold that he has committed the offence of outraging the modesty of the victim defined under Section 354 of IPC. In such premises the appellant is hereby held guilty for the offence of Section 354 of IPC.

9. So far the prayer of the appellant's counsel for extending the benefit of Probation of Offender's Act to the appellant is concerned, looking to the nature of the offence and the manner in which it was committed by the appellant, I do not find fit to extend the benefit of the Probation of the Offenders Act to him.

10. So for alternate prayer of the appellant's counsel for adopting the lenient view in awarding the jail sentence under such section is concerned, it is apparent on record that alleged incident took place in the year 1995 and since then the appellant has been suffering the mental agony of this case, so also in last seventeen years he appeared on the various dates in the trial Court so also before this Court. Besides this as per record he also suffered the judicial custody of four days between 26.7.1995 to 29.7.1995 during trial and according to available record he did not possess any criminal antecedent. Therefore, considering all these circumstances, instead to send the appellant to jail again by imposition of the higher sentence, I deem fit to punish him with the jail sentence of the aforesaid period of four days for which he has already undergone, by imposing the fine of Rs.7,500/- and the same is ordered.

11. In view of the aforesaid discussion, by allowing this appeal in part, appellant is acquitted from the charge of Section 3(1)(xi) of the Act. Consequently, the awarded punishment of such section is also set aside and instead of such section, after holding guilty to the appellant for the offence under Section 354 of IPC, as stated above he is punished with the jail sentence of four days, which has already been suffered by him during trial but with fine of Rs.7,500/-. The amount of fine deposited by the appellant under Section 3 (1)(xi) of the Act shall be adjusted in the above mentioned imposed fine amount under Section 354 of IPC. The remaining fine amount is to be deposited by the appellant in the trial Court within three months from today, failing in depositing the fine he has to suffer further six months RI. The bail bond of the appellant is hereby discharged. Till the aforesaid extent the impugned judgment is modified.

12. Appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2012] M.P., 1676

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 299/1996 (Jabalpur) decided on 6 March, 2012

STATE OF M.P.

...Appellant

Vs.

MUKESH

...Respondent

Penal Code (45 of 1860), Sections 392, 392/397 - Complainant while riding his Motorcycle was going towards the bus stand from residence - He was anticipated with a blow of stick by the respondent - Complainant sustained injuries on his back and fell down with his motor cycle - Respondent by showing the knife took out purse from his pocket - Held - Respondent is guilty of offence under Section 392 of IPC - Offence under Section 397 is not made out - Appeal allowed in part.

(Paras 2 & 14)

दण्ड संहिता (1860 का 45), धाराएँ 392, 392/397 - शिकायतकर्ता अपनी मोटर साईकिल चलाते हुए घर से बस स्टैंड की ओर जा रहा था - उस पर प्रत्यर्थी द्वारा डंडे से वार किया गया - शिकायतकर्ता को पीठ पर चोट आई और वह मोटर साईकिल के साथ नीचे गिर गया - प्रत्यर्थी ने चाकू दिखाते हुए उसकी जेब से पर्स निकाला - अभिनिर्धारित - प्रत्यर्थी मा.द.सं. की धारा 392 के अंतर्गत आरोप का दोषी - धारा 397 के अंतर्गत आरोप गठित नहीं होता - अपील अंशतः मंजूर।

Rakesh Kesharwani, P.L. for the appellant.

Devesh Khatri & Anil Kumar Ban, for the respondent.

J U D G M E N T

U.C. MAHESHWARI, J. : The appellant- State has directed this appeal under Section 378 of Cr.P.C. being aggrieved by the judgment dated 4.4.1995 passed by the 4th Additional Sessions Judge, Sagar in S.T. No. 7/1994 acquitting the respondent from the charge of Section 392 and 392/397 of IPC.

2. The facts giving rise to this appeal in short are that on 4.9.1993 at about 8 o'clock in the night the complainant - victim - Prakash Chand while riding his motor cycle was going towards the bus stand, Rahatgarh from his residence. On the way, he was anticipated with a below of stick by the respondent. Resultantly he sustained the injuries on his back and fell down

with his motor cycle. Thereafter respondent by showing the knife had taken out purse from his pocket, in which according to prosecution Rs. 500/- with one diary was kept. The alleged incident was witnessed by Kamal, Mohd. Yusuf, (PW-3) Shikhar Chand and Nemichand Jain, (PW-10). Soon after the incident on lodging the FIR, (Ex. P-4) by the victim, he was sent to the hospital, where on medical examination, his MLC was prepared by Dr. Arif Khan, (PW-6). On completion of investigation, the respondent was charge sheeted for his prosecution under Sections 392 and 397 of IPC.

3. The case was committed to the Sessions Court where on framing the charge of Section 392 and 392/397 of IPC, the respondent abjured the guilt, on which the trial was held in which as many as nine witnesses were examined on behalf of the prosecution. On appreciation of such evidence, the respondent was acquitted from charge framed, on which the State has come to this court with this appeal for setting aside the impugned judgment with a prayer to punish the respondent under the aforesaid charge.

4. Learned PL Shri Rakesh Keshwarwani after taking me through the record of the trial court by referring the deposition of the victim Prakash (PW-1) as well as FIR, (Ex. P-4) argued that this witness by proving the incident, as stated in the FIR also proved the test identification parade, (Ex. P-3) held with respect of his stolen purse by Makhn Singh, (PW-2), the Sarpanch of the village. According to counsel, the testimony of this witness regarding alleged robbery has been further supported by the eye witness Mohd. Yusuf, (PW-3) and also till some extent by the other alleged eye witness Nemi Chand Jain, (PW-10). So far memorandum of respondent disclosing the place of concealment of the stolen property recorded under Section 27 of the Evidence Act and its seizure memo, whereby at the instance of respondent such purse was recovered, have been proved by the Investigating Officer Shri H.P. Singh, (PW-9). He fairly conceded that the independent witnesses of such memorandum and the seizure memo namely Gowardhan and Raja Ram on recording their depositions turned hostile. In continuation, he said that in any case from the evidence available on record, it has been proved beyond reasonable doubt that the respondent after anticipating the victim Prakash with intension to snatch his purse caused him the injury on his back by the blow of stick and thereby committed the offence of robbery. In such premises, he said that in any case on re-appreciation, if the Court finds that offence of Section 397 is not made against the respondent even then he

deserves for conviction for the offence of robbery, made punishable under Section 392 of IPC and prayed to convict the respondent under such Section by allowing this appeal.

5. On the other hand, Shri Devesh Khatri and Shri Anil Kumar Ban by justifying the impugned acquittal of the respondent argued that the approach of the trial court acquitting the respondent being based on proper appreciation of evidence does not require any interference at this stage. In continuation, it was argued that on appreciation of the evidence, if two probable views are possible then as per settled proposition, out of them the view favourable to the accused should be adopted. In such premises, only to convict the respondent, the view adopted by the trial court could not be replaced by another view, as prayed by the State's Counsel. He further said that the story put fourth by the victim in the FIR as well as in his deposition being unnatural in the available factual matrix, the respondent could not be convicted even under Section 392 of IPC and prayed for dismissal of this appeal.

6. Having heard the counsel present at length, keeping in view their arguments, I have carefully gone through the record of the trial court, so also the impugned judgment.

7. It is undisputed fact on record that the alleged incident took place at 8 o'clock in the night on the public way and immediately thereafter at 8.30 the victim Prakash Chand lodged the named FIR, (Ex.P-4) against the respondent, in which his committed offending act has been specifically mentioned. After registration of offence, he was sent to the hospital where his MLC report was prepared by Dr. Arif Khan, (PW-6), according to which near his shoulder on scapular region the injuries were found. As per opinion, the same were caused by hard and blunt object. So the version stated by the victim in the FIR that he was anticipated by the respondent with a blow of stick on his person has been proved by corresponding injuries. Such MLC report has been proved by the said Doctor on recording his deposition.

8. Now the Court has to answer the question that after anticipating the victim in the aforesaid manner whether his purse was snatched away or taken away from his pocket by the respondent. The victim – Prakash (PW-1) categorically deposed that after falling down from the motor cycle his purse was taken away from his pocket by the respondent. Such testimony of victim is further supported by the alleged eye witness Mohd. Yusuf, (PW-3), who

categorically stated that in his presence such purse was taken away from the pocket of the victim by the respondent. The same is also supported till some extent by Nemi Chand Jain, (PW-10), the alleged eye witness, who in his deposition said that on reaching to the spot, he saw the respondent running away alongwith a stick from the place of the incident and at the same time the victim – Prakash apprised him that said Mukesh after giving him a blow of stick had snatched the purse and run away. He further said that except the stick, he has not seen any implement in the hand of the respondent. Accordingly by the aforesaid evidence the prosecution has successfully proved the alleged incident of robbery. In such premises, the respondent is held guilty for the offence defined under Section 392 of IPC and till this extent the findings of the trial court acquitting the respondent from such charge also is set aside.

9. So far offence of Section 397 of IPC is concerned, on recording the FIR the allegation of showing the knife to the victim by the respondent for snatching the purse was stated in the same, but on medical examination no such injury of knife was found on the person of the victim, secondly in the course of investigation such knife was also not seized at the instance or from the possession of the respondent, thirdly as per deposition of Nemi Chand, (PW-1), he did not see the respondent on the spot with the knife. So in the lack of such material evidence, I am of the considered view that the accused like the respondent could not be convicted under Section 397 of IPC. So in such premises, I am with the agreement of the trial court that the prosecution has utterly failed to prove the alleged offence of Section 397 of IPC beyond reasonable doubt against the respondent. In such premises, the approach of the trial court acquitting the respondent from the charge of Section 397 of IPC is hereby affirmed.

10. In view of the aforesaid discussion, the finding of the impugned judgment till the extent of acquitting the respondent from the charge of Section 392 of IPC being perverse with the record is hereby set aside and respondent is held guilty for such offence of Section 392 of IPC.

11. On aforesaid appreciation of evidence the court has not found two probable contradicting views in the matter as such no probable view for acquitting the respondent from the charge of Section 392 of IPC has been found. So in such premises, the arguments of the appellant's counsel in this regard is hereby failed.

12. After holding guilty to the respondent for the offence of Section 392

of IPC, I deem fit to consider the available circumstance of the case for imposition of sentence on the respondent under such Section. It is apparent fact on record that the respondent is facing the mental agony of the present matter since the year 1993 and during this period near about eighteen years he has appeared on so many occasions before the trial court as well as before this court and as per record except the present case, the respondent did not have any criminal antecedents. In such premises, he appears to be a first offender. Besides this, it was also submitted by the respondent's counsel that subsequent to the incident in pendency of the trial and appeal the respondent has settled in his family and he being the bread winner of his family, on sending him again to jail by imposing any higher sentence, then in comparison of the respondent, his family has to suffer a lot and in such premises, prayed to punish him with the jail sentence for which he has already suffered the judicial custody between 26.10.1993 to 4.4.1995, from the date of his arrest till passing the impugned judgment during trial by imposition of some fine amount under the discretion of the court.

13. Keeping in view aforesaid circumstances alongwith the entire scenario of the matter instead to send the respondent again to jail by imposition of any higher jail punishment, I deem fit to punish him with the jail sentence upto the aforesaid period, i.e. one year and five months, for which he has already undergone in the judicial custody by imposing the fine of Rs.5000/-. Accordingly the same is ordered.

14. In view of the aforesaid discussion, by allowing this appeal in part, the judgment of the trial court acquitting the respondent from the alleged charge of Section 392/397 of IPC till the extent of the offence of Section 392 of IPC is hereby set aside and the respondent is held guilty for such offence of Section 392 of IPC. Under such Section he is punished with the jail sentence suffered by him in the judicial custody between 26.10.1993 to 4.4.1995 in pendency of trial but with imposition of fine of Rs.5000/- (Rs. Five thousand). The imposed fine is to be deposited by the respondent within three months from today. Failing in depositing the same within the stipulated period, the respondent has to suffer further one year RI. On depositing such fine amount, out of it, Rs.2000/- be given to the victim Prakash by calling him in the trial court through summon. The bail bond of the respondent is hereby discharged. Till this extent the impugned judgment is hereby modified.

Appeal Partly allowed.

I.L.R. [2012] M.P., 1681

APPELLATE CRIMINAL

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

Cr.A. No. 1627/2002 (Jabalpur) decided on 13 March, 2012

VIJAY @ CHANDRA VIJAY GUPTA

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - F.I.R. - Omissions in F.I.R. - Minor omissions can not be held to be material as they were merely details which could not essentially be expected from a witness to have been mentioned in the F.I.R. - F.I.R. can not be expected to be an encyclopedia - When a witness speaks in Court, he is bound to speak some more about the occurrence than what he stated to police - Such improvements can not be held sufficient for branding a witness liar. (Para 12)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 - प्रथम सूचना रिपोर्ट - प्रथम सूचना रिपोर्ट में लोप - गौण लोपों के सारवान होने की धारणा नहीं की जा सकती क्योंकि वे मात्र विवरण थे जिन्हें एफ.आई.आर. में आवश्यक रूप से उल्लिखित किया जाना साक्षी से अपेक्षित नहीं - एफ.आई.आर. को विश्वज्ञान कोष होना अपेक्षित नहीं - जब साक्षी न्यायालय में बोलता है तब वह घटना के बारे में पुलिस को दिये गये कथन से कुछ और अधिक कहने के लिए बाध्य है - ऐसे सुधारों को साक्षी को झूठा दर्शाने के लिए पर्याप्त नहीं माना जा सकता।

B. Penal Code (45 of 1860), Section 302 - Murder - Injuries on accused - In each and every case, prosecution is not supposed to explain the injuries of accused - In Statement under Section 313, the accused also did not explain that as to how he received the injuries - It was not his case that deceased assaulted him - Non-explanation of injury not fatal. (Para 14)

ख. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - अभियुक्त की क्षतियां - हर एक प्रकरण में, अभियोजन द्वारा अभियुक्त की क्षतियों को स्पष्ट करना अनुमित नहीं - धारा 313 के अंतर्गत कथन में अभियुक्त ने भी स्पष्ट नहीं किया कि उसे क्षतियां कैसे कारित हुई - उसका यह मामला नहीं था कि मृतक ने उस पर हमला किया - क्षति का स्पष्टीकरण नहीं दिया जाना घातक नहीं।

C. Penal Code (45 of 1860), Section 302 - Murder - Sole injured witness - Merely because the witness was made to sit in the

police station for 30-40 hours by itself is not sufficient to hold that he was the suspect. (Para 15)

ग. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – एकमात्र आहत साक्षी – मात्र इसलिए कि साक्षी को 30-40 घंटों तक पुलिस थाने में बैठाया गया अपने आप में यह धारणा करने के लिए पर्याप्त नहीं कि वह संदिग्ध था।

D.N. Shukla, for the appellant.

Amit Pandey, P.L. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
RAKESH SAKSENA, J. : Appellant has filed this appeal against the judgment dated 28.9.2002, passed by Special and Additional Sessions Judge, Shahdol, in Sessions Trial No.88/2002, convicting him under Sections 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.1500/-. In default of payment of fine, further rigorous imprisonment for six months.

2. In short, the prosecution case is that on 30.11.2001, at about 4.00 pm, when complainant Bodhan Singh (PW-3) was sitting in front of the house of Jagdish Sahu, accused Vijay Gupta and Mohan Kewat alongwith Lavkesh Singh, the deceased, reached there. Lavkesh Singh asked Bodhan Singh to arrange for a chicken party. Lavkesh and Vijay Gupta purchased a chicken, collected grocery and gave it to Mahto Kewat for cooking. After about one hour, when chicken was prepared and Bodhan Singh (PW-3) was ready to serve the food, one Basant Gupta reached there. It was objected by accused Mohan Kewat as to why he came without invitation, but Lavkesh admonished Mohan Kewat. However, when Bodhan Singh and Vijay Gupta pacified Mohan Kewat, he joined them. At that time Lavkesh told to Vijay Gupta that fake grocery was being sold from his shop. Vijay Gupta got enraged and went away. In the night, at about 10.30 pm, when Bodhan and Lavkesh were going back to their house, Vijay Gupta and Mohan Kewat came there armed with axe and iron rod. Vijay Gupta dealt blows with the axe on the head of Lavkesh due to which he died. Mohan assaulted Bodhan with iron rod due to which he suffered injuries. Bodhan (PW-3) went to Police Station, Bijuri and lodged a report on 1.12.2001 at about 4.00 am. Investigating Officer Arun Singh Baghel (PW-7) recorded first information report (Ex.P/15) and also a Murg Intimation Report (Ex.P/16). Bodhan Singh was sent to hospital, Bijuri for treatment and examination of his injuries. Arun Singh Baghel (PW-7) went at the spot,

conducted inquest proceedings, drew inquest memorandum (Ex.P/17) and sent the dead body of Lavkesh Singh for postmortem examination.

3. Dr. D.K. Kori (PW-1) examined the injuries of Bodhan Singh (PW-3) and also conducted autopsy of the body of Lavkesh Singh. He found injuries on the body of Bodhan Singh caused by hard and blunt object and prepared injury report (Ex.P/1). On postmortem examination of the body of deceased, Dr. Kori found three incised injuries on his head and face. These injuries were caused by some sharp edged weapon. He submitted his postmortem examination report (Ex.P/6).

4. After investigation, police filed charge sheet against three accused persons viz. Appellant Vijay @ Chandra Vijay Gupta, Mohanlal Kewat and Bhole @ Jawaharlal. The case was thereafter committed for trial.

5. Learned Additional Sessions Judge framed charge under Section 302 of the Indian Penal Code against appellant Vijay Gupta, under Section 307 of the Indian Penal Code against accused Mohanlal and under Section 323 of the Indian Penal Code against accused Bhole. All the accused abjured their guilt and pleaded false implication. Though no specific defence was put by appellant Vijay Gupta in his statement under Section 313 of the Code of Criminal Procedure, but it was suggested in the course of trial that it was Bodhan Singh (PW-3), who had caused injuries to deceased.

6. Prosecution, to support its case, examined 7 witnesses in the court. Learned trial judge, relying on the evidence of Bodhan Singh (PW-3) and finding it corroborated by the evidence of Ganga Prasad Pandey (PW-6) and Dr. D.K. Kori (PW-1), held appellant Vijay Gupta guilty of the offence under Section 302 of the Indian Penal Code. Other accused persons viz. Mohan Kewat and Bhole were convicted under Section 323 of the Indian Penal Code. Aggrieved by his conviction and sentence, appellant Vijay Gupta has filed this appeal.

7. Learned counsel for the appellant submitted that the trial court misappreciated the evidence in holding the appellant guilty. The evidence of sole eyewitness Bodhan Singh (PW-3) was not reliable since there were material contradictions and omissions in his evidence. Injuries were also found on the body of appellant, but they were not explained by the prosecution. Bodhan Singh (PW-3) was also made to sit in the police station for sometime. This indicated that appellant was falsely implicated. On the other hand, learned

Panel Lawyer for the State, submitted that in the facts and circumstances of the case the evidence of Bodhan Singh (PW-3), which stood corroborated by the medical evidence, was trustworthy particularly because he and appellant were friends. There was no reason for him to have made false accusation of murder of Lavkesh against appellant.

8. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

9. It has not been disputed that Lavkesh Singh, the deceased, died of homicidal injuries. The information of his death was got recorded at police station by Bodhan Singh (PW-3). Investigating Officer Arun Singh Baghel (PW-7) recorded first information report (Ex.P/15) and Murg Intimation (Ex.P/16). He conducted inquest proceedings in front of Ajit Singh (PW-4) and recorded memorandum (Ex.P/17). The dead body of deceased was sent to PHC Bijuri for postmortem examination where Dr. D.K.Kori (PW-1) conducted the same. Dr. Kori deposed that he found following injuries on the body of deceased:-

“1. Incised wound on forehead left side, vertically placed, going downwards laterally up to left eyebrow. Size 6 cm x 2½cm x 3 cm (brain deep). Frontal bone was broken into multiple pieces. The pieces of bone pierced into brain tissue.

2. Incised wound on right side of face extending from medial end of right eyebrow up to 3 cm below to right eye. The size of injury was 8 cm x 3 cm x 5 cm. Under portions of the wound were injured. Maxilla bone, right side of frontal bone and nasal bones were fractured into several pieces. Hard Palate was broken into multiple pieces. Ethmoid bone was also fractured in multiple pieces.

3. Incised wound on lower lip extending to right chin. Size of wound was 6 x 2½ x 3 cm. Under parts of the injuries were damaged. Mandible was broken in two pieces and two incisors and one canine teeth were missing.

On internal examination, Dr. Kori found that undigested food and rice was filled in his stomach.

Injuries No.1,2 and 3 were caused by some sharp and heavy

weapon. They were ante-mortem in nature. The cause of death was injury to brain by injury No.1 and 2 resulting in haemorrhagic shock and coma. Injuries were sufficient in ordinary course of nature to cause death. Death was homicidal in nature. Postmortem report (Ex.P/6) was written and signed by him.”

From the aforesaid evidence, it has been amply established that Lavkesh Singh died due to homicidal injuries caused to him by some heavy sharp weapon.

10. The next question before us is whether appellant caused injuries to deceased which resulted into his death. Admittedly the case against appellant rested upon the sole evidence of eyewitness Bodhan Singh (PW-3). He deposed that on 30th November 2001 he was sitting on the platform of Panchayat Secretary. Lavkesh, Vijay and Mohan came to him and requested for having a chicken party to which he readily agreed. They purchased a chicken from Abdul Kalam and went to the house of Mahto Kewat for cooking the chicken. They gave grocery and flour to Mahto Kewat. After about one hour, all of them assembled there and he made preparation for serving the dinner. In the meanwhile, Basant Gupta reached there. Lavkesh Singh wished him to join the feast, but accused Mohan did not agree and admonished and pushed Basant away saying why he came there as an uninvited guest. Basant went away. Lavkesh rebuked and insulted Mohan saying that he was also their friend. When accused Vijay pacified, Mohan sat in the house of Mahto Kewat. At the same time, Lavkesh told to accused Vijay that he used to sell fake articles from his shop, which resulted into a quarrel between them. Mohan and Vijay went away. Bodhan (PW-3) further stated that after about 10 minutes, when he was coming out of the house of Mahto Kewat, Vijay and Mohan came there wielding axe and iron rod. When they reached near the door of Komal Sahu, Vijay told to Lavkesh that he would beat him. When Lavkesh retorted and challenged him, he took out an axe kept under his shawl and dealt 3-4 blows with it on the head of Lavkesh. Lavkesh fell down and died. According to Bodhan, when he tried to intervene accused Bhole caught hold of his neck and grappled with him and accused Mohan dealt 3-4 blows of iron rod. Accused persons then went away. He went to the house of Lavkesh, but he found nobody there, then he went back to his house and informed the incident to his elder brother Ayodhya Singh. Ayodhya Singh called a dresser viz. Pandey. He asked Pandey and Ayodhya Singh to see Lavkesh.

They went and saw Lavkesh lying dead. He then went to Police Station, Bijuri and lodged report (Ex.P/15) and Murg Intimation (Ex.P/16).

11. Learned counsel for the appellant submitted that there were material omissions in the first information report (Ex.P/15) lodged by Bodhan Singh, therefore, his evidence was not reliable. He also submitted that the injuries were also found on the body of appellant, but these injuries were not explained by Bodhan Singh.

12. It is true that there appeared discrepancy in respect to the actual place where the incident occurred, but, in our opinion, this discrepancy was not so material to render the evidence of Bodhan Singh unreliable. In first information report (Ex.P/15), Bodhan Singh did not say that after about 10 minutes of their leaving the house of Mahto Kewat, Mohan and Vijay, armed with axe and iron rod, reached there and Vijay told to deceased that he would beat him and thereafter assaulted him with axe, but these omissions also cannot be held to be material as they were merely the details which could not essentially be expected from a witness to have been mentioned in the first information report. First information report cannot be expected to be an encyclopedia. It is common when a witness makes a statement in the court, he is bound to speak some more about the occurrence than what he stated to police. All these improvements, therefore, normally cannot be held sufficient for branding a witness liar. The facts deposed by Bodhan Singh (PW-3) that he went to his house, informed the incident to his brother Ayodhya Singh, who called a dresser, and sent them to see Lavkesh Singh were though not stated in the first information report or in the police statement, but, on a sincere analysis of his evidence, we find truth in the story narrated by him. His evidence finds corroboration from the first information report (Ex.P/15) lodged by him in the next morning. He clearly stated that appellant assaulted deceased with axe on his head. His evidence stands further corroborated by dresser Ganga Prasad Pandey (PW-6) and the evidence of Dr.D.K.Kori (PW-1), who found three incised injuries on the head-face of deceased and further from the fact that the axe recovered at the instance of appellant was found stained with human blood, vide FSL report Ex.P/22. The presence of Bodhan (PW-3), at the spot, is established by the fact that he also suffered injuries in the incident. Dr.D.K. Kori (PW-1), vide his report (Ex.P/1) found following injuries on his body:

“(1) Lacerated wound 3 x 3/4 x bone deep on the left parietal region of the skull.

(2) Lacerated wound $4 \times 3\frac{1}{4}$ x bone deep on the left parietal region just below the injury No.1.

(3) An oblique contusion 6×2 cm on the back side of left scapula." In the opinion of Dr. Kori, these injuries were simple in nature and were caused by hard and blunt object within 24 hours before his examination.

13. Learned counsel for the appellant next argued that injuries found on the body of appellant were not explained by the prosecution witness Bodhan Singh (PW-3), therefore, his evidence was not worthy of credit.

14. It is true that after his arrest on 2.12.2001 appellant Vijay Gupta was sent for medical examination. Dr.D.K. Kori (PW-1) found one lacerated wound $3 \times 1\frac{1}{2}$ cm x skin deep on the left occipital region of his skull. This injury was caused by some hard and blunt object between 24 to 72 hours of examination. His report is Ex.P/5. But, it is well settled that in each and every case the prosecution is not supposed to explain the injuries of accused. Appellant, in his statement under Section 313 Cr.P.C., did not say as to how he received the said injury. It was not his case that deceased assaulted him. It is true that he put suggestions that Bodhan Singh (PW-3) assaulted to him as well as to deceased in the quarrel, but there was absolutely no evidence or material on record to probablize this suggestion. Apart from it, his injury was of very trivial in nature. In view of the evidence of Bodhan Singh (PW-3), which stood supported from the other circumstances, no inference was possible that deceased or Bodhan Singh (PW-3) caused the said injury to him.

15. Learned counsel for the appellant argued that Bodhan Singh (PW-3) was made to sit in the police station for a long time, therefore, a doubt was created that he was the assailant. No doubt Bodhan Singh (PW-3) admitted that when he returned from the hospital at about 10.00 O'clock in the morning, he remained at police station till 4-5 O'clock in the evening. In the night also he was at police station and went back to his house at about 11-12 am in the morning. He passed 30-40 hours in the police station before he was permitted to go. In our opinion, merely by these facts no inference can be drawn that Bodhan Singh was also a suspect. It is quite natural for the police to make a person sit at the police station particularly in villages when a murder is reported, with a view to ensure that any information given by that witness was correct or truthful.

16. After a close appraisal of the evidence of Bodhan Singh (PW-3) we find that his evidence was trustworthy and he was an absolutely reliable witness. In our opinion, learned court below committed no error in placing reliance on his evidence and holding that it was appellant, who assaulted deceased with an axe and caused his death. In view of the nature of injuries, as revealed from the evidence of Dr.D.K.Kori (PW-1), it can be held with certainty that appellant assaulted deceased with axe with the intention of causing his death. We are unable to accept the arguments advanced by the learned counsel for the appellant that the incident was sudden and without premeditation.

17. For the aforesaid reasons, the finding of conviction of appellant under Section 302 of the Indian Penal Code and sentence of life imprisonment awarded to him is affirmed.

18. Appeal is dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1688

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 503/1996 (Jabalpur) decided on 22 March, 2012

TRILOKI

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 376 - Non- Examination of Doctor -Non-examination of Doctor would not be fatal if the circumstances, the testimony of the prosecutrix inspires confidence and is found to be reliable.
(Para 12)

दण्ड संहिता (1860 का 45), धारा 376 - चिकित्सक का परीक्षण नहीं किया जाना - चिकित्सक का परीक्षण नहीं किया जाना घातक नहीं होगा यदि परिस्थितियाँ, अभियोक्त्री की परिसाक्ष्य पर विश्वास उत्पन्न करती हैं और विश्वसनीय होना पाई जाती है।

Cases referred :

(2006) 10 SCC 92, 2002(2) MPLJ 376, (2007) 12 SCC 390, (1996) 2 SCC 384, (1983) 4 SCC 10, (1983) 3 SCC 217, (2005) 8 SCC 122.

Harmeet Singh Ruprah, for the appellant.

Rakesh Keshewani, P.L. for the respondent.

J U D G M E N T

U.C. MAHESHWARI, J. : This appeal is directed by the appellant-accused being aggrieved by the judgment dated 24.2.1996, passed by 1st Additional Sessions Judge Bhopal, in Sessions Trial No. 273/94, convicting him under Section 376 of I.P.C. for R.I. seven years.

2. The facts giving rise to this appeal in short are that, one Smt. Ganeshiabai, the complainant-prosecutrix along with her husband came to Bhopal for their livelihood as labour. Her husband being Meson, was working at some other place at Rajat Nagar, while the said Smt. Ganeshiabai, was working with the appellant on some plot no.90, Neeraj Nagar. On dated 30.4.1994, the complainant was working as labour on the aforesaid plot with the appellant at about 11.00 O'clock in the morning, when she went inside the premises to bring the cement, at the same time, the appellant also entered in such premises and caught hold her. She tried to shout, but by giving the criminal intimidation, she was forcefully taken by the appellant into the bathroom where after throwing her on the floor by removing her cloths, he committed rape on her. After such incident prosecutrix came to her home, but her husband was not there, who came in the evening from his job, then after apprising him regarding aforesaid, she accompanied with him went to the Police Station Piplani, and lodged the First Information Report (Ex.P-1) of the offence of Section 376 of I.P.C. against the appellant. She was sent to the hospital for her medical examination where after carrying out the same, the MLC report was prepared. On completion of the investigation, the appellant was charge-sheeted for the aforesaid offence.

3. After committing the case to the Sessions Court, on evaluation of the charge-sheet, on framing the charge of Section 376 of I.P.C. against the appellant, he abjured the guilt. On which, the trial was held. After recording the evidence on appreciation after holding guilty to the appellant under the aforesaid Section, he was punished with the abovementioned punishment, hence this appeal.

4. Shri Harmeet Singh Ruprah, learned counsel for the appellant after taking me through the record of the trial Court argued that the story put forth by the prosecution has not been proved by any independent source of the evidence except the prosecutrix and her husband. Any of the independent

witness has not stated any incriminating thing against the appellant showing his involvement with the alleged offence. In this respect, he also referred the deposition of the defence witnesses namely; Shivwati (DW-1), Haragram (DW-2) and Gourishanker (DW-3). He further argued that in support of the testimony of the prosecutrix and her husband-Rajendra, the concerning doctor, who prepared the MLC report of the prosecutrix, has also not been examined. In the lack of such material medical evidence to prove the alleged rape on the person of the prosecutrix mere on the basis of oral testimony of the prosecutrix and her husband, the impugned conviction of the appellant could not be sustained. He further argued that the story put forth by the prosecution has also not been supported by the FSL report relating to the slide of the vaginal fluids of the prosecutrix and prayed for acquittal of the appellant by allowing this appeal. He also placed his reliance on the case laws in the matter of *Sadashiv Ramrao Hadbe vs. State of Maharashtra* and another reported in (2006) 10 SCC 92, in the matter of *Nandlal Yadav vs. State of M.P.* reported in 2002(2) MPLJ 376 and in the matter of *Bibhishan vs. State of M.P.* reported in (2007) 12 SCC 390.

5. On the other hand, by justifying the impugned conviction and sentence of the appellant Shri Rakesh Keshewani, learned Panel Lawyer, said that the same being based on proper appreciation of the evidence, do not require any interference at this stage. In continuation he said that, as per settled proposition, mere on the testimony of the prosecutrix the accused of the offence of rape could be held guilty and punished. In the available circumstances, the deposition of prosecutrix being natural is reliable. The corroboration of the same either from the independent source or the medical evidence are not necessary. In the available factual matrix even in the lack of examination of the doctor, who examined and prepared the MLC report of the prosecutrix, so also in the absence of any deposition of independent witness, by discarding and disbelieving the deposition of the prosecutrix and her husband, the appellant could not be acquitted in the matter. In continuation he said that, in the matter of rape mere absence of any injury on the person of the prosecutrix or in the lack of any medical evidence in that regard, the deposition of the prosecutrix could not be disbelieved. So far as FSL report is concerned, he said that according to such report, some sign of committing the rape were found in the examination of her wearing cloths so also on examining her vaginal fluid slide prepared by the doctor. He further argued that on the same day after coming her husband to the residence the prosecutrix accompanied with him went to

the Police Station and lodge the report against the appellant so it could not be deemed to be delayed. With these submissions, he prayed for dismissal of this appeal.

6. Having heard the counsel, keeping in view their arguments, I have carefully gone through the record along with the exhibited papers of the charge-sheet so also the impugned judgment.

7. It is apparent fact on record that the alleged rape was committed by the appellant upon the prosecutrix at about 11 O'clock in the morning on 30.4.1994 and the alleged incident was reported on the same day at 6.10 PM in the evening at Police Station Piplani (Ex.P.1) by the prosecutrix, who went there accompanied with her husband. So far lodging such FIR at belated stage, it is stated in the same that after coming her husband from the work place, she accompanied with him came to lodge report. As per initial version of the prosecution, the prosecutrix Smt. Ganeshiabai (PW-1) was working with the appellant as labour at the alleged plot which was under construction. She started the work with the appellant before 6 days from the date of incident. On the date of incident, she went for work at about 9 O'clock in the morning where at about 11.00 O'clock in the morning, when she went inside the house under construction to bring the cement to prepare the construction material at the same time, the appellant also entered in the house behind her and caught hold her. She annoyed and also tried to keep out from her holdings by the appellant, but by giving some criminal threat, he took her to the bath room where after throwing her on the floor by turning her lower cloth to the upper side, committed the rape on her. In spite of her crying, she was not left by the appellant till the alleged act was over thereafter, he asked her not to say this incident to anyone. In the alleged incident her petticoat has also become dirty. Thereafter, she ran away from such place and came to her hut from where on coming her husband in the evening from the work, she came to the Police Station and lodge the aforesaid report. The story put forth in the F.I.R. has been proved by the prosecutrix on recording her deposition in which she categorically stated that before 6-7 days, she was working as labour with the appellant at the plot of some Shrivastava Sahab and Usma Mada in Niraja Nagar. On the aforesaid date, she was asked by the appellant to prepare the construction material on which she went inside of some room to bring cement at that time, she was caught hold by the appellant from the back side. She tried to keep her out from his holding, but by giving a threat, the appellant took her inside the bathroom where after throwing on the floor, the alleged

act of rape was committed by the appellant on her. In continuation she stated that after the incident, she went to her Hut and after coming her husband from his work in the evening, she apprised him the incident and thereafter, she accompanied with him went to the Police Station and lodge the report (Ex.P.1). She further stated that subsequent to lodging the report, she was sent to the hospital where she was medically examined by the doctor and her petticoat was seized. She further stated that in her presence the place of incident was seen by the police and it's map was also prepared. Although, she has been cross-examined on behalf of the appellant at length, but on perusing para 3 of the cross-examination it appears that the story put forth by the prosecutrix in her chief has been further supported by said cross-examination. On going through the entire cross-examination, I have not found any material which is destroying the version stated by the prosecutrix in her chief. Although, in the cross-examination, the defence of false implication of the appellant on account of some money transaction or arrears of money of the husband of the prosecutrix against the appellant was taken, but in support of such defence neither any documents nor material circumstances have been put forth. In such premises, the testimony of the prosecutrix could not be discarded. The testimony of the prosecutrix is further supported by her husband Rajendra Kumar (PW-2), who on recording his deposition categorically stated that before 6 days from the date of the incident, her wife has started the work with the appellant under his Contract and on the aforesaid date of the incident when he came back to him from his work place then, her wife Smt. Ganeshiabai (PW-1) apprised him about the aforesaid incident. On going through the deposition of this witness, I have not found any material circumstances destroying the version of his chief. So far as the defence of the appellant with regard to arrears of wages of this witness against him has also not been proved by cogent and reliable evidence. The spot map prepared by the police in the investigation has also been proved by A.K. Singh (PW-3). The Investigating Officer Mamta Singh (PW-4) on recording her deposition categorically proved all the papers prepared during the course of the investigation. She also stated that in the course of investigation she found the alleged house was under construction and also came to know that the prosecutrix (PW-1) was working with the appellant at such place since last 5-6 days from the date of the alleged incident. So far proving the age of the prosecutrix on the date of the alleged incident, her Ossification Test report (Ex.P-6) was prepared by Dr. Ashok Sharma (PW.5) in which, her age was found to be 15 and half year. The same is stated on recording in her deposition, but at present, the findings

of the trial Court holding that the prosecutrix was above 16 years of the age, could not be interfered at this stage and that question is also not involved in this appeal.

8. In order to rebut the aforesaid evidence on behalf of the appellant in his defence as many as three witnesses namely Shivwati (DW-1), Harakram (DW-2) and Gourishanker (DW-3) have been examined. All these witnesses have been examined to prove the fact that the prosecutrix was neither employed by the appellant for the alleged construction work nor she was working on the date of the alleged incident with the appellant as labourer at the alleged construction site. But on going through the depositions of these witnesses although, they are saying that they were working with the appellant at the aforesaid plot, but in support of their version no admissible documentary evidence has neither been produced nor proved on the record. Even the presence of the above-mentioned witnesses have not been proved on behalf of the appellant by examining the aforesaid Usha Shrivastava on whose plot, the construction was going on. Besides this, in entire cross-examination of the prosecutrix (PW-1) as well as her husband Rajendra (PW-2) so also in the cross-examination of said investigating Officer Mamta Singh (PW-4), by placing the name of these witnesses no such defence was placed on record on behalf of the appellant. So, in such premises, the trial Court has not committed any error in not relying on the testimonies of the said defence witnesses.

9. True it is from the record that at trial the prosecution had not examined the concerning doctor namely S. Jain, who after examining the prosecutrix prepared her MLC report. Although, the same was place on the record. As per aforesaid MLC report, the slide of vaginal fluid of the prosecutrix were also prepared and besides this, pubic hair was also collected by such doctor and the petticoat of the prosecutrix was also handed over to the police. Thereafter, all these articles were sent for medical examination to Medico Legal Institute Bhopal, from where report dated 25.7.1994 (Ex.P.6) was received by the prosecution and as per submission of the appellant's counsel such report is also not helping to the case of prosecution.

10. Keeping in view the aforesaid evidence available on the record and also the factum of non-examination of the doctor, who examined the prosecutrix and prepared her MLC report and in the absence of exhibiting the MLC report on the record by the concerning doctor, the Court has to answer the

question whether taking into consideration the aforesaid testimonies of the prosecutrix, her husband and the Investigating Officer, the appellant has been rightly convicted by the trial Court or in the lack of examination of the doctor by extending the benefit of doubt, the appellant ought to have been acquitted by the trial Court. It is settled proposition of law that in the matter of involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to through out or otherwise reliable to the prosecution case. The testimony of the prosecutrix if inspires the confidence and is found to be reliable then, no further corroboration of her testimony is required. Such principle was laid down by the apex Court in the matter of *State of Punjab vs. Gurmit Singh and others* reported in 1996(2) SCC 384 in which it was held as under:-

"8.....The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl of a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the

evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In *State of Maharashtra Vs. Chandraprakash Kewalchand Jain* (1990 (1) SCC 550) Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words:

"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She

is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

11. In view of the aforesaid citation on examining the case at hand, in view of the aforesaid discussions regarding evidence available on the record the testimony of the prosecutrix (PW-1) supported by her husband Rajendra (PW-2) inspires the confidence and is also found to be reliable even in the absence of any other corroboration from the independent source or medical evidence.

12. Apart the above on non-examining of the doctor, who medically examined the prosecutrix and prepared her MLC report or even producing or non-marking such MLC report at trial in the matter, cannot be a ground to extend him acquittal on the ground of benefit of doubt. In the available circumstances the testimonies of the prosecutrix inspires confidence and is found to be reliable. My such approach is fully fortified by the decision of the

apex Court in the matter of *Sheikh Zakir vs. State of Bihar*, reported in 1983(4) SCC 10, in which it was held as under:-

"8..... In so far as non-production of a medical examination report and the clothes which contained semen, the trial courts has observed that the complainant being a woman who had given birth to four children it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the Santhal tribe living in a remote area could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable. It is, however, nobody's case that there was such a report and it had been withheld."

13. So, in view of the aforesaid principles of the apex Court on account of non-examination of the aforesaid doctor, in the available factual matrix of the case at hand in which the deposition of the prosecutrix inspire the confidence and pursuant to it, the same is reliable, the appellant could not be acquitted from the alleged charge of Section 376 of I.P.C.

14. In the matter of *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat* reported in 1983(3) SCC 217, the apex Court has held that no independent corroboration of the prosecutrix testimony is required as rule.

15. Considering the aforesaid all earlier decided cases of the apex Court on arising the occasion in the matter of *State of M.P. vs. Dayal Sahu* reported in (2005) 8 SCC 122 the apex Court again answered such question as under:-

"14. A plethora of decisions by this Court as referred to above would show that once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction

can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not cause fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. It is also noticed that the Court while acquitting the accused on benefit of doubt should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities"

16. In view of the aforesaid discussions and the legal position, I am of the considered view that the trial Court has not committed any error in holding conviction against the appellant under the aforesaid offence even in the absence of examination of the doctor who examined the prosecutrix and prepared her MLC report.

17. So far as the case law cited on behalf of the appellant's are concerned, in the available factual matrix of the case, the same is not helping to the appellant. The same is being taken one by one.

18. The case law in the matter of *Sadashiv Ramrao Hadbe* (supra), the concerning appellant was acquitted by the apex Court taking into consideration the factual matrix that the appellant being doctor has committed rape with the victim in his clinic in which large number of persons were present, and in presence of such large number of persons committing the alleged act by the appellant is highly impossible, such appellant was acquitted. It was also taking into consideration by the apex Court that the prosecutrix went out from the clinic without being assaulted. But in the case at hand, it is apparent fact that the alleged rape was committed by the appellant with the prosecutrix when she went inside of the house under construction after taking her in the bathroom where nobody was present to hear the noise of the prosecutrix, although as

per deposition of the prosecutrix (PW-1), she cried and tried to keep out from holding of the appellant. So, the cited case is not helping to the appellant. So far as the principle laid down by the apex Court in this case, this Court did not have any dispute.

19. So far as the law laid down in the case of *Bibhishan* (supra), the same was decided taking into consideration some different facts and circumstances in which the prosecutrix was not found reliable in the light of the available medical evidence which is not the situation here in the case at hand. On appreciation of the evidence, the testimony of the prosecutrix supported by her husband is found reliable and, therefore, this cited case is also not helping to the appellant. Besides this in the matter of *Nandlal Yadav* (supra), decided by this Court, being distinguishable on facts with the present matter, the same is also not helping to the appellant.

20. In the aforesaid premises, I have not found any perversity, illegality, infirmity or anything contrary to the propriety of the law in the impugned judgment holding conviction against the appellant under Section 376 of I.P.C., hence by affirming the conviction as well as the imposed punishment, this appeal being devoid of any merit is hereby dismissed. In view of dismissal of this appeal, the bail bonds of the appellant is hereby cancelled and he is directed to surrender himself before the trial Court on or before 15.4.2012 for facing the remaining jail sentence awarded by the trial Court failing which, the trial Court is directed to take appropriate steps to take the appellant in custody and send him to jail to serve the remaining jail sentence.

21. Appeal is dismissed as indicated above.

Appeal dismissed.

I.L.R. [2012] M.P., 1699

APPELLATE CRIMINAL

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

Cr.A. No. 2061/2001 (Jabalpur) decided on 28 March, 2012

FAGNU

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 - Murder - Deceased was the uncle of the appellant - Accused claimed that since his land was more than deceased and the well was situated on his land, he would

take more water - Accused assaulted with Axe - Held - As per post mortem report injuries by sharp edged weapon were found on the body of deceased - Appellant rightly held guilty of causing murder - Appeal dismissed.

(Paras 2, 16 & 19)

दण्ड संहिता (1860 का 45), धारा 302 - हत्या - मृतक अपीलार्थी का चाचा था - अभियुक्त का दावा कि चूंकि उसकी भूमि मृतक की भूमि से ज्यादा थी और उसकी भूमि पर कुआ था, वह अधिक पानी प्राप्त करेगा - अभियुक्त ने कुल्हाड़ी से हमला किया - अभिनिर्धारित - पोस्टमार्टम रिपोर्ट के अनुसार मृतक के शरीर पर धारदार हथियार की क्षतियां पाई गई - अभियुक्त को उचित रूप से हत्या के लिए दोषी ठहराया गया - अपील खारिज।

Case referred :

Criminal Appeal 554/1993.

Neena Khera, for the appellant.

Amit Pandey, P.L. for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
RAKESH SAKSENA, J.:- Appellant has filed this appeal against the judgment dated 29.11.2001 passed by Additional Sessions Judge, Multai District Betul in Sessions Trial No.80/2000 convicting the appellant under section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.1000/-. In default of payment of fine further rigorous imprisonment for one year.

2. Facts of the case are that Sopat, the deceased was the uncle of appellant/accused Fagnu. Agricultural lands of deceased and accused were situated adjacent in village Muariya, however, the well and motor-pump installed on it were common. Accused claimed that since his land was more than deceased, and the well was situated on his land, he would take more water. On this dispute, there occurred frequent quarrels and accused hurled abuses to deceased. Because of this dispute, in the intervening night between 19th-20th of January, 2000 at about 12 o'clock, when deceased came out of his house to urinate, accused assaulted him with axe. He dealt many blows with it as a result of which deceased died at the spot. Complainant Tillu (PW-2), the son of deceased, when heard screams of his mother Chikko Bai (PW-3), rushed to the spot and saw accused running away with axe in his hand. He saw his father lying injured in a pool of blood. Many people reached at the spot. Tillu (PW-2) went to police station Bordehi and lodged first information report Ex.P/4 at 11:40 a.m. Sub Inspector K.P.S.Chauhan (PW-17) went at

the spot and conducted inquest proceedings. He prepared inquest memorandum Ex.P/2, spot map and sent the dead body of Sopat for postmortem examination to Primary Health Centre, Amla.

3. Dr.D.Singh conducted postmortem examination of the body and gave report Ex.P/11. Since Dr.Singh died after retirement, the said report was proved by Dr.B.P.Chouriya (PW-18), Block Medical Officer of P.H.C., Amla. As per postmortem report, number of incised wounds were found on the neck and left forearm of deceased. Deceased had died due to shock resulting from excessive haemorrhage. After requisite investigation, charge sheet was filed and case was committed for trial.

4. On charge under section 302 I.P.C. being framed, accused abjured his guilt and pleaded false implication due to enmity. He also examined Ram Kishore (DW-1) and Sonu (DW-2) in his defence.

5. Prosecution, to prove its case, examined 18 witnesses. Relying mainly on the evidence of Chikko Bai (PW-3) as eyewitness and the medical evidence of Dr. B.P.Chouriya (PW-18), learned trial Judge held the appellant guilty, convicted and sentenced him under section 302 I.P.C. Aggrieved by his conviction, appellant has filed this appeal.

6. Learned counsel for the appellant submitted that the evidence of Chikko Bai (PW-3), the wife of deceased, as a solitary eyewitness, was not reliable. Her son Tillu (PW-2) and many other witnesses did not support the prosecution case. Since the incident had occurred in the night and there was no light, it was not possible for Chikko Bai or any other witness to identify the assailant. Learned trial Judge mis-appreciated the evidence on record and illegally recorded the finding of conviction of appellant. On the other hand, learned counsel for State submitted that in the facts and circumstances of the case, the evidence of Chikko Bai was reliable. It stood corroborated by the evidence of Jagoti Bai (PW-9), Bagga (PW-10), Buklu (PW-11) and Bhagoti Bai (PW-12), who stated that Chikko Bai (PW-3) disclosed the name of appellant to them immediately after the occurrence. He submitted that merely because some witnesses turned hostile and did not support the prosecution version, the evidence of eyewitness Chikko Bai (PW-3) could not be discarded.

7. We have heard the learned counsel for the parties, perused the impugned judgment and the evidence on record.

8. It has not been disputed that Sopat died in the night intervening between

19th-20th January, 2000 and that his death was homicidal. Chikko Bai (PW-3), the wife of Sopat, stated that accused Fagnu assaulted her husband with axe when he went out of the house for urination. As a result of injuries on his neck, head and hand, Sopat died. Tillu (PW-2), Vinodi, Kotwar (PW-5), Suklu (PW-8), Jagoti Bai (PW-9), Bagga (PW-10), Buklu (PW-11), Bhagoti (PW-12) and Sunde (PW-13) categorically stated that Sopat died due to injuries on his body. Investigating Officer K.P.S. Chauhan recorded first information report Ex.P/4 on the information given by Tillu (PW-2). He went at the spot, prepared inquest memorandum Ex.P/2 in presence of witnesses and sent the dead body for postmortem examination. Dr. B.P. Chauriya (PW-18) stated that postmortem examination of deceased was conducted by Dr. D. Singh, who died after his retirement. Postmortem examination report Ex.P/11 was prepared by Dr. D. Singh. According to said report, Dr. Singh found following injuries on the body of deceased:-

- (i) Incised wound 4" x 2" x bone deep on right side of upper neck.
- (ii) Incised wound 4" x 2" x bone deep on right side middle and lower part of neck.
- (iii) Incised wound 4" x 2" x bone deep on lower part of neck.
- (iv) Incised wound on left forearm.
- (v) Incised wound 4" x 2" x bone deep on back.

In the opinion of doctor, the cause of death was shock due to excessive haemorrhage from the injuries found on head and neck. The injuries were ante mortem and death was homicidal in nature. Postmortem report Ex.P/11 was written and signed by Dr. D. Singh.

9. From the aforesaid evidence, it stood proved that deceased Sopat died a homicidal death.

10. Now the question before us is whether appellant caused the death of deceased. Learned counsel for the appellant submitted that there was only solitary evidence of Chikko Bai (PW-3), the wife of deceased, who stated that she witnessed the occurrence. She could not be said to be a wholly reliable witness; her evidence was suspicious since number of witnesses contradicted her in stating that she did not disclose the name of appellant after the occurrence

and that it was not possible for her to have identified the assailant in the night in the absence of light.

11. Chikko Bai (PW-3) stated that she knew the appellant since he was the son of her husband's younger brother. In the night at about 12 o'clock, when she was in her house with her children and her husband went out for urination, she heard noise. When she went out she saw appellant assaulting her husband with axe on his neck, head and hand. On her shouting, her son Tillu also reached there and appellant ran away. Tillu informed the incident to Kotwar and went to lodge the report. She stated that there was light in her house and also at the place where appellant had assaulted her husband. She denied the suggestion that she did not tell Tillu that somebody killed her husband and that she could not identify the assailant due to darkness. It is true that Vinodi, Kotwar (PW-5), Tillu (PW-2) and Suklu (PW-8) stated that Chikko Bai did not tell them that it was appellant who assaulted the deceased, but at the same time Jagoti Bai (PW-9), Bagga (PW-10) and Bhagoti (PW-12) who were with Chikko Bai in the house, categorically stated that Chikko Bai immediately after the occurrence, told to them that appellant killed Sopat.

12. As far as the evidence of Sunde (PW-13) is concerned, he did not say that appellant assaulted deceased, but he was confronted with his police statement recorded under section 161 Cr.P.C., by the Court wherein he stated that he saw appellant assaulting his son with axe. Tillu (PW-2) stated that he heard her mother shouting that his father had been killed. When he reached there, he saw his father lying dead. He did not see appellant assaulting his father, but he saw appellant running away. There were about seven injuries of axe in the neck of his father. This witness did not support Chikko Bai on the point that she shouted that Fagnu killed his father. From his evidence, it however seems that he saw appellant running away from the spot. Even if Tillu (PW-2), Vinodi, Kotwar (PW-5) and Suklu (PW-8) did not support the evidence of Chikko Bai on the point that she disclosed the name of appellant after the incident, yet her evidence finds corroboration from the evidence of Jagoti (PW-9), Bagga (PW-10), Buklu (PW-11) and Bhagoti (PW-12) who stated that Chikko Bai informed them that appellant killed Sopat with axe.

13. As far as question of identification of appellant by Chikko Bai (PW-3) is concerned, appellant was her close relative and was well known to her. According to Chikko Bai, there was light of electric bulb. It is true that Tillu (PW-2), Suklu (PW-8), Bhagoti (PW-12) and Sunde (PW-13) admitted that there was no light, but Tillu stated that there was sufficient moon light in which

a person from close distance could be seen. Apart from it, no question about the absence of light on the spot was asked to investigating officer K.P.S. Chauhan (PW-17). Placing reliance on a decision of this Court rendered in *Chain Singh Vs. State of Madhya Pradesh*-Criminal Appeal No.554/1993, learned counsel for the appellant submitted that if an eyewitness improved his evidence and planted the story of electric bulb, which was not mentioned by him in the first information report, and the night was a dark night, the evidence of such witness suffered with material omission. Merely because some witnesses including the son and father of the deceased did not support the prosecution case, it cannot be held that evidence of Chikko Bai who happened to be the wife of deceased, was rendered unreliable. There was no reason for her to have falsely implicated the son of her husband's younger brother. Her evidence about the presence of electric light and the evidence of Tillu (PW-2) and Bhagoti Bai (PW-12) about the presence of moon light at the time of occurrence cannot be lightly brushed aside. The fact about there being light in the house and at the place of occurrence was brought in evidence in the cross-examination part of the evidence of Chikko Bai (PW-3). This fact was not proved to be an omission in her any earlier statement.

14. As far as motive on the part of appellant to cause death of deceased is concerned, Tillu (PW-2), Suklu (PW-8), Jagoti Bai (PW-9), Buklu (PW-11) and Bhagoti (PW-12) categorically stated that there had been some dispute between deceased and his brother Sopti. Appellant was the son of Sopti. Sopti used to tell that he would not give water to deceased from the well for irrigation. True, the enmity is a double edged weapon, but in the instant case, Chikko Bai (PW-3) remained firm in saying that it was appellant who caused the death of her husband whereas her son Tillu and father of deceased Sunde went against the prosecution version. Therefore, there seemed no reason for Chikko Bai to have falsely implicated appellant as assailant in these circumstances.

15. No doubt Tillu (PW-2) denied that he saw appellant assaulting deceased with axe, but he admitted that he saw him running away and that he lodged first information report Ex.P/4. The fact that he saw appellant running away from the spot was mentioned by him in the first information report Ex.P/4 also.

16. Evidence of eyewitness Chikko Bai (PW-3) that appellant assaulted deceased with axe finds further corroboration from the evidence of Dr. B.P.Chauriya (PW-18) who proved the postmortem examination report

Ex.P/11 recorded by Dr. D.Singh. According to Dr. Chauriya, in the postmortem report, Dr. Singh recorded that injuries by sharp edged weapon were found on the body of deceased.

17 On a close and critical scrutiny of the evidence of Chikko Bai, we find that she was a wholly reliable witness. Learned trial Judge, in our opinion, committed no error in placing reliance on her evidence and holding that it was appellant who caused the death of deceased by causing injuries to him with axe.

18. For the aforesaid reasons, the conviction of appellant under section 302 I.P.C. and the sentence of life imprisonment with fine of Rs.1000/- awarded to him by the trial Court is affirmed.

19. Appeal dismissed.

Appeal dismissed..

**I.L.R. [2012] M.P., 1705
APPELLATE CRIMINAL**

Before Mr. Justice Tarun Kumar Kaushal

Cr.A. No. 1184/1996 (Jabalpur) decided on 18 May, 2012

VISHWANATH SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985),
Section 20 - Possession of Contraband - No Rojnamcha entry produced
and proved by prosecution showing the receipt of information and
departure of team from Police Station - Officer preparing seizure not
examined - Appellant was not apprised of his right of search by gazetted
officer nor the police officers disclosed their identity - Nothing on
record to show that seized contraband was kept in safe custody after
seizure till the date of its discharge to FSL Sagar - Appeal allowed -
Appellant acquitted.***

(Para 9)

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20
- विनिश्चि पदार्थ का कब्जा - सूचना की प्राप्ति एवं पुलिस थाने से दल का प्रस्थान दर्शित करते हुए कोई रोजनामचा प्रविष्टि अभियोजन द्वारा प्रस्तुत एवं साबित नहीं की गई - जब्ती तैयार करने वाले अधिकारी का परीक्षण नहीं, - राजपत्रित अधिकारी द्वारा आवेदक की तलाशी लिए जाने के उसके अधिकार के संबंध में सूचित नहीं

किया गया और न ही पुलिस अधिकारियों ने अपनी पहचान जाहिर की – अभिलेख पर दर्शित नहीं कि जब्त विनिश्चिद पदार्थ जब्ती पश्चात एफ.एस.एल. सागर भेजे जाने के दिनांक तक सुरक्षित अभिरक्षा में रखे गये – अपील मंजूर – अपीलार्थी दोषमुक्त।

Rajkamal Chaturvedi, for the appellant.

Amit Kumar Sharma, P.L. for the respondent.

J U D G M E N T

T.K.KAUSHAL, J. : This appeal has been preferred against the judgment dated 10.7.1996 passed by Special Judge, Chhatarpur in Special Case No.151/94 convicting the appellant under Section 20 of Narcotic Drugs & Psychotropic Substance Act, 1985 (for short '**the Act of 1985**') and sentenced to 3 years R.I and fine of Rs.2000/- .

2. Facts of the case, in short, are that on 22.11.1994 at about 17:50 hrs. on receiving information, Virendra Kumar Mishra, Station House Officer (Sub Inspector), Police Station Nowgoan, District Chhatarpur (PW/3) proceeded on the spot situated in village Singrajan Khurd Har in field owned and possessed by the appellant and found him involved in cultivation of cannabis and seized 16 plants of cannabis including 13 shrunked stems and 3 plants having leaves and also found about 100 gm cannabis in a polythene beg. Seizure Ex. P/1 was prepared by J.P. Gautam, Additional Superintendent of Police, Chhatarpur. Vide Ex. P/2, appellant was arrested. Regarding aforesaid incident, Virendra Kumar Mishra (PW/3) drawn a "Dehati Nalishi" Ex.P/5. On the basis of which vide FIR Ex. P/6 at Police Station, Nowgoan a case under Section 20 of the Act of 1985 has been registered against the appellant. On 9.12.1994 vide letter from S.P. Chhatarpur Ex. P/7 seized contraband was sent to Director, Forensic Science Laboratory, Sagar for its chemical examination. Vide FSL report Ex. P/8, the said contraband was found to be cannabis. During investigation Raj Bahadur Khare, Patwari (PW/4) prepared a spot map. After completing the investigation, police Nowgoan submitted a charge-sheet in the court concerned.

3. Trial court framed charge under Section 20 of the Act of 1985. Appellant abjured guilt. Defence of the appellant was that of false implication.

4. To substantiate the case of prosecution, statements of Rajkumar, panch witness (PW/1), Katua (PW-2), Virendra Kumar Mishra, SHO (PW-3) and Raj Bahadur Khare, Patwari (PW-6) were recorded. After appreciating aforesaid evidence, vide impugned judgment learned trial court has found a

case of prosecution to be proved beyond reasonable doubt and he has convicted and sentenced the appellant as above.

5. In this appeal, conviction and sentence of the appellant has been challenged on the grounds that appreciation of evidence is not proper. Prosecution has failed to prove the compliance of the mandatory provisions of the Act of 1985. Independent witnesses had turned hostile. Sole testimony of Sub Inspector (PW/3) is extremely insufficient to hold the appellant guilty of the charge. Conviction is bad in law and sentence is harsh. On the other hand, learned Panel Lawyer supported the findings of conviction and sentence both.

6. Rajkumar (PW/1) has denied the fact of seizure of cannabis from the possession of the appellant. He has been declared hostile. Similarly, Katua (PW/2) has also denied the story of prosecution and has been declared hostile. Statements of these two witnesses are of no avail to the prosecution.

7. Shri V.K. Mishra, Sub Inspector (PW/3) stated that he has received information that appellant had cultivated cannabis plants in his field. After making necessary entries in Rojnamcha, he alongwith police force and punch witness proceeded on the spot. J.P. Gautam, Additional Superintendent of Police had also reached on the spot. 100 gm. cannabis was found, kept below the mattress of the appellant and 10-15 plants grown in the field were also seized. Dehati Nalishi Ex. P/5 was drawn by him in this matter. Thereafter, at Police Station, Nowgoan FIR Ex. P/6 was registered. Prior to that vide Ex. P/3 appellant was arrested.

8. It is further stated by PW/3 that Vide Ex. P/7 aforesaid contraband was sent to FSL Sagar. Vide Ex. P/8 FSL report, the contraband was found to be cannabis. In cross-examination of PW/3, it has come on record that at the time of giving statement in the court, he did not bring the Rojnamcha showing the departure of the team from the police station to the spot. He did not prepare any spot map himself. Prior to search, information has been given to the appellant but any such information produced in writing has not been submitted in the charge-sheet nor was produced in trial court.

9. On careful perusal of evidence of PW/3, it has been revealed that -

(i) No Rojnamcha entry has been produced and proved by the prosecution in the trial Court showing the receipt of information and departure of the team from police station to the spot;

(ii) Ex. P/1 seizure was prepared by the Additional

Superintendent of Police but he has not been examined as prosecution witness in the trial court;

(iii) PW/3 sole police witness did not prepare the panchanam Ex. P/4. Meaning thereby seizure has not been proved by reliable evidence;

(iv) Prior to the seizure, the appellant has not been apprised of his right of search by gazetted officer nor PW/3 or other police officers have disclosed their identity and purpose.

(v) No document is produced to show that the aforesaid contraband was kept in safe custody after seizure till the date of its discharge to FSL Sagar.

10. Normally, testimony of police witnesses are not disbelieved merely on the ground of lack of corroboration by private independent witness, if evidence of such police witnesses is found to be trustworthy and worth inspiring confidence. On the basis of their testimony or even on the basis of sole testimony of police witness conviction can be awarded but in present case sole testimony of police witness PW/3 is showing lapses and showing non-compliance of mandatory provision causing prejudice to the appellant substantially. Such sole testimony of police witness should not be and cannot be made the basis of conviction.

11. In view of the aforesaid, conviction of the appellant is unsustainable and deserves to be set aside. Conviction and sentence of the appellant is hereby set aside. Appeal is allowed. Bail bond of the appellant stands discharged. Fine amount, if deposited, be refunded.

Appeal allowed.

I.L.R. [2012] M.P., 1708

APPELLATE CRIMINAL

Before Mr. Justice N.K. Gupta

Cr. A. No. 1845/1996 (Jabalpur) decided on 20 June, 2012

DEVI

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 376 - Rape - Age of Prosecutrix - Determination - Neither prosecutrix nor her parents could state about her date of birth - Date of birth in School certificate was

allegedly recorded on the basis of information given by father of prosecutrix, however, he could not state date of birth in the Court - No Birth Certificate or Kotwari book produced - Prosecutrix is the eldest child out of 7 children however, even the age of the youngest child not disclosed - There is no option except to assess the age on the basis of ossification test. (Paras 9 to 11)

क. दण्ड संहिता (1860 का 45), धारा 376 - बलात्कार - अभियोक्त्री की उम्र - निर्धारण - ना तो अभियोक्त्री और ना ही उसके माता-पिता उसकी जन्मतिथि के बारे में बता सके - स्कूल प्रमाण पत्र में जन्मतिथि अभिकथित रूप से उसके पिता द्वारा दी गई जानकारी के आधार पर दर्ज की, किन्तु वह न्यायालय में जन्मतिथि नहीं बता सके - कोई जन्म प्रमाण पत्र या कोटवारी किताब प्रस्तुत नहीं की गई - अभियोक्त्री 7 बच्चों में सबसे बड़ी है, किन्तु सबसे छोटे बच्चे की उम्र नहीं बताई गई - ओसीफिकेशन टेस्ट के आधार पर उम्र का निर्धारण करने के अलावा और कोई विकल्प नहीं।

B. Penal Code (45 of 1860), Section 376 - Rape - Age of Prosecutrix - Ossification test - Margin of 2 years - If age of juvenile is to be assessed, the lower side of computation is to be taken into consideration - When the age of prosecutrix is to be considered, then the higher side of the computation shall be considered - Ossification test shows that age of prosecutrix was 16-17 ½ years - Lower side of assessment can not be considered - If the prosecutrix was of 17 ½ years of age in ossification test, then such higher side of the assessment is to be taken. (Para 12)

ख. दण्ड संहिता (1860 का 45), धारा 376 - बलात्कार - अभियोक्त्री की उम्र - ओसीफिकेशन टेस्ट - 2 वर्ष की गुंजाइश - यदि किशोर की उम्र निर्धारित की जानी है, तो संगणना का निम्नतर पक्ष विचार में लेना चाहिए - जब अभियोक्त्री की उम्र विचार में लेना है तब संगणना का उच्चतर पक्ष विचार में लिया जायेगा - ओसीफिकेशन टेस्ट दर्शाता है कि अभियोक्त्री की उम्र 16-17½ वर्ष थी - निर्धारण का निम्नतर पक्ष विचार में नहीं लिया जा सकता - यदि ओसीफिकेशन टेस्ट में अभियोक्त्री की आयु 17½ वर्ष थी, तब निर्धारण का उच्चतर पक्ष माना जावे।

Case referred :

2003(3) MPLJ 115.

Y.P. Sharma, for the appellant.

G.S. Thakur, P.L. for the respondent/State.

J U D G M E N T

N.K. GUPTA, J. : The appellant has preferred this appeal against the judgment dated 1.10.1996 in S.T. No.71/94 passed by the learned 2nd Additional Sessions Judge, Chhindwara, by which the appellant was convicted for the offence punishable under Section 376(1) of IPC and sentenced for four years R.I. with fine of Rs.500/-. In default of payment of fine, the appellant was to undergo for three months R.I. in addition.

2. Prosecution's case in short is that the prosecutrix (PW-8) aged about 14 years stayed in the house of her maternal uncle at Kanhargaon from 12.5.1991 to 10.6.1991. Wife of the appellant was friend of the prosecutrix and therefore, the appellant informed the prosecutrix that wife of the appellant wanted to meet her and with this pretext, he took the prosecutrix to his house. In the house of the appellant, he committed rape upon the prosecutrix. The appellant threatened the prosecutrix that she should not say about the crime to anyone and therefore, she could not say anything in the family of her maternal uncle. Thereafter, she went to her parents' house but she could not say anything to anyone. In the month of January 1992, the prosecutrix was found pregnant and when she was asked about the incident then she told the entire story to her parents. A report was lodged by the prosecutrix at Police Station, Damua on 13.1.1992, which was transferred to the Police Station, Umreth, which has jurisdiction for investigation. The prosecutrix was examined by Dr. Piyusha Sonunshi (PW-11) and a report Ex.P/10 was given by her. The prosecutrix was found pregnant with a foetus of 30-32 weeks. After due investigation, a charge sheet was filed before the J.M.F.C. Chhinwara and thereafter case was committed to the Sessions Court, Chhindwara.

3. The appellant abjured his guilt. He did not take any specific plea, but he has stated that he was falsely implicated in the matter. No defence evidence was adduced by the appellant.

4. After considering the evidence adduced by the prosecution, the trial Court convicted and sentenced the appellant as mention above.

5. I have heard learned counsel for both the parties.

6. Learned counsel for the appellant has submitted that the trial Court has erred in assessing the age of the prosecutrix. She was above 16 years of age at the time of incident. FIR was lodged after eight months of the incident. The overt act as depicted in the statement of the prosecutrix herself clearly indicates that either the prosecutrix was a consenting party or the applicant

was falsely implicated in the matter. Under such circumstances, the appellant could not be convicted for the offence punishable under Section 376 of IPC.

7. On the other hand, learned Panel Lawyer has submitted that the learned trial Court has not committed any error in convicting and sentencing the appellant.

8. There are only three points for determination in the present appeal. Firstly that, whether the prosecutrix was above 16 years of age at the time of incident, secondly whether the appellant could be convicted for the alleged offence and thirdly, whether any interference can be done in the sentence imposed upon the appellant?

9. The prosecutrix (PW-8) could not tell her date of birth by her own. Kalabai (PW-4), mother of the prosecutrix and Dhannu (PW-3), father of the prosecutrix could not say about the date of birth of the prosecutrix. The date of birth of the prosecutrix was established by the Principal Rajabai (PW-6). According to the certificate Ex.P/3, the date of birth of the prosecutrix was shown to be 5.10.1977. However, Rajabai accepted in cross-examination that she gave a certificate on the basis of the entries made in the school admission register. She has also accepted that the date of birth of the prosecutrix was entered in the register as it was informed by her father Dhannu. In the present case, Dhannu could not inform about the basis by which he had given the particulars about the date of birth of the prosecutrix to the school authorities. Learned counsel for the appellant has placed his reliance on the judgment passed by this Court in case of "*Makhan Vs. State of M.P.*" [2003 (3) M.P.L.J. 115] to show that the entries made in the school about the date of birth without any basis cannot be considered as a final proof the age of the prosecutrix.

10. Learned Sessions Judge has assessed the age of the prosecutrix in a haphazard manner. He took a clue from the statement of the prosecutrix and her parents evidence, whereas each of them have stated about the age of the prosecutrix without any basis. Dhannu (PW-3) has informed that age of the prosecutrix was 14 years at the time of incident, whereas he was not in a position to tell the actual date of the incident. The age of any child is to be assessed either by the birth certificate or entry in a Kotwari book, if the same is available. If such type of entries are not available then educational record may be considered. Evidence of parents etc may also be considered for assessment of the age and if such evidence is not reliable then medical evidence

is to be considered for consideration of age of a child. Since it is possible that two years may be added on both the sides in computation of age by ossification test, then such type of assessment depends upon the probability and if age of the accused is to be assessed, then addition of two years may be done with the view that benefit of doubt is to be given to the accused, whereas if age of the prosecutrix is to be considered, then age should be considered in such a manner so that reasonable benefit of doubt is to be given in favour of the accused. Therefore, if age of the accused (a juvenile) is to be assessed then, the lower side of such computation is to be taken into consideration, but when the age of the prosecutrix is to be considered then, the higher side of the computation shall be considered.

11. In the present case, educational record is submitted but no basis could be found for the assessment of the date of birth of the prosecutrix, which was given to the school authorities. The prosecutrix (PW-8) has herself accepted that she has seven sisters and brothers in all and she is the eldest amongst them. It is nowhere established that what was the age of the her youngest brother or sister. Under such circumstances, a computation of age cannot be based on the testimony of the prosecutrix or her parents in the present case. There is no entry of the Kotwari book and the birth certificate is submitted by the prosecution, therefore, there no option except to assess the age of the prosecutrix on the basis of ossification test.

12. Dr. S.K. Dubey (PW-7) gave his report Ex.P/7 on 24.2.2002 that, the prosecutrix could be of 16-17½ years of age at that time. Report was given on the basis of fusion of various joints. Learned 2nd Additional Sessions Judge tried to compute the age of the prosecutrix on the basis of MLC report given by the Dr. Piyusha Sonunshi (PW-11). If that report Ex.P/10 is perused, then it would be clear that Dr. Piyusha has given her report about the age of the prosecutrix on the basis of development of secondary sex characters and her report was incomplete. She did not count the teeth of the prosecutrix. Learned 2nd Additional Sessions Judge observed in para 9 of his judgment that the prosecutrix was examined by the doctor on 13.1.1992 and therefore, he deducted the period of 14-16 weeks of pregnancy from that date and it was found that the first intercourse was committed with the prosecutrix on 12.5.1991. Under such circumstances, it was observed that the prosecutrix was below 16 years of age at the time of incident. Actually, if MLC report Ex.P/10 is perused, then it would be apparent that Dr. Piyusha Sonunshi (PW-11) found the prosecutrix to be pregnant with a foetus of 30-32 weeks, whereas

learned 2nd Additional Sessions Judge computed the age of the prosecutrix with the help of pregnancy of 14-16 weeks without any basis. If, it is presumed that the prosecutrix was about 17½ years of age at the time of her examination, then her ossification test was done on 24.2.1992 approximately i.e. one month after her medico legal examination. Under such circumstances, 8+1=9 months should be deducted from that age to consider the age at the time of the incident. Hence, by such computation she still she appeared to be 16 years and 9 months old at the time of incident. There is nothing on the record by which the observations made by the doctor in ossification test may be discarded. If no addition is done in the age computed by the ossification test, then the prosecutrix was above 16 years of age at the time of incident. If ossification test indicates her age to be 16-17½ years then lower side of the assessment cannot be considered, because a reasonable doubt is to be given to the accused and if the prosecutrix was of 17½ years of age in ossification test then such higher side of the assessment is to be taken. Under such circumstances, it appears that the prosecutrix was above sixteen years of age at the time of the incident.

13. For consideration of second point, the statements of the prosecutrix and her parents may be considered. The prosecution story is that the prosecutrix went to the house of her maternal uncle for the period of 12.5.1991 to 10.6.1991. The appellant took the prosecutrix to his own house with the pretext that she was called by his wife and therefore, the prosecutrix was retained for a night. If the statements of the witnesses including the prosecutrix (PW-8), Kalabai (PW-4), mother of the prosecutrix and Harishchandra (PW-9), maternal uncle of the prosecutrix are perused, then it would be apparent that there is a material contradiction in their statements. The prosecutrix (PW-8) says that the appellant took her with permission of her maternal grand mother, whereas Harishchandra (PW-9), her maternal uncle has accepted that the sister of the appellant took the prosecutrix. Similarly, the prosecutrix has admitted in her cross-examination that the appellant committed intercourse with her for 2-3 times and she was kept for two days in the house of the appellant, whereas Harishchandra (PW-9) has stated that on the next day morning, the prosecutrix was brought back to his house. On the contrary, Kalabai (PW-4) has accepted that the prosecutrix remained in the house of the appellant for two days but such version was not given in her case diary statement.

14. Thirdly, it is strange that the prosecutrix admitted that there were so

many persons in the house of the appellant but she could not make any hue and cry at the time of first instance, because she was given some intoxicant Pan (Betel leaf) to her but no such fact is given in her case diary statement. She has also added against her first version, which was given in the FIR that she was kept for two days and in those two days, the appellant committed rape for two times upon her. If the appellant committed rape with her for two times, then what was the problem to the prosecutrix, not to mention that fact in the FIR. Under such circumstances, it cannot be accepted that a rape was committed with the prosecutrix for two times.

15. The prosecutrix (PW-8) has also accepted in para 11 that on her shouting, the entire family of the appellant ran away from the house because the crime was being committed with their consent. Such version of the prosecutrix is unnatural. If any rape was committed upon the prosecutrix in the house of the appellant, which was fully crowded with the relatives of the appellant, then it was not possible that all the relatives would immediately run away from the spot. If, at all the incident took place in such a manner, then why it was not mentioned in the FIR itself. Under such circumstances, if the version of the prosecutrix is accepted that when she went to the house of the appellant for a day and the appellant committed intercourse with her, then it is apparent that she did not make any hue and cry. No intoxicant was given to her and also she did not inform anyone for at least three to six months of the incident then certainly she appears to be a consenting party.

16. Learned counsel for the appellant has submitted that FIR was lodged with the delay of at least eight months of the incident and no sufficient ground was mentioned to explain that delay. The versions of the parents and relatives of the prosecutrix about the delay in FIR is not acceptable. It is strange that mother of the prosecutrix could not understand that her daughter was pregnant. She claims that she understood the fact, when the doctor opined about the pregnancy of the prosecutrix. There is a lot of contradiction between the statements of various witnesses relating to the knowledge of the pregnancy. Dhannu (PW-3) father of the prosecutrix has accepted in para 6 of his statement that the prosecutrix had informed him about the incident after 2-4 months of the incident and she was shown to the doctor after 6-7 months. They took her to the doctor in a big hospital. He has tried to hide the opinion of the doctor to whom the prosecutrix was shown initially after four months of the incident. Kalabai (PW-4) and the prosecutrix (PW-8) did not say anything about the fact as to when the prosecutrix was taken to the doctor for the first time.

Harishchandra (PW-9) has accepted in his cross-examination that he was informed about the pregnancy within three months of the incident. Under such circumstances, it would be apparent that within three months of the incident, the parents of the prosecutrix got the knowledge that their daughter was pregnant but they did not take any step to lodge any FIR. Under such circumstances, FIR is delayed by at least five months and no reasonable ground is established for that delay. Looking to the delay in lodging the FIR, the prosecution story comes under the clouds of doubt.

17. It is also stated by parents of the prosecutrix that the appellant was summoned, then he was given a proposal that he may get himself married with the prosecutrix in the Court. Kalabai (PW-4) has stated in para 5 of her statement that the appellant accepted his guilt but he refused the proposal of the marriage and ran away but such a fact was not stated in her case diary statement, neither that fact was confirmed by her husband Dhannu (PW-3). FIR should have been lodged just after the parents of the prosecutrix got the knowledge of pregnancy and the incidence. It appears that father of the prosecutrix is making the stories to implicate the appellant. Some portion of statement of Harishchandra (PW-9) appears to be important. In para 2, he has accepted that his brother-in-law Dhannu informed him that the prosecutrix was pregnant but he did not state about the fact that who was the father of the child but, Harishchandra himself presumed that it must be the accused.

18. Defence has suggested its version to the various witnesses that the prosecutrix was already pregnant and she was sent to Kanhargaon in the house of her maternal uncle for her treatment and abortion but, since no abortion took place then entire guilt was imposed upon the appellant. None of the witnesses have accepted the proposal of the defence. No defence witness was examined to prove the defence story. However, the period of pregnancy is considered then it would be clear that pregnancy was due to any other person. Dr. Piyusha on 13.1.1992 found that there was a pregnancy of 30-32 weeks to the prosecutrix and thereafter, the prosecutrix delivered a female child on 16.1.1992, who expired on the same day. The date of delivery may be confirmed by the death register Ex.P/5, then certainly at that time, eight months were completed. Therefore, the prosecutrix must have been conceived by the intercourse done with her on or before 15.5.1991.

19. According to the prosecution, the prosecutrix remained in the house of her maternal uncle for the period of 12th May 1991 to 10th June 1991.

She has accepted in para 9 (second) of her statement that after three days of the incident, she went to the house of her parents at Damua from the house of her maternal uncle. According to the FIR, she remained in the house of her maternal uncle upto 10th June 1991, then according to this calculation, the incident must have taken place in between 6th and 7th June 1991 but looking to the computation of the incident from the entire period of her pregnancy, the period comes prior to the date 16.5.1991, which nowhere matches with the actual alleged date of incident. Under such circumstances, it appears that the prosecutrix was pregnant due to any other reason and thereafter, since the prosecutrix went to the house of her maternal uncle for sometime i.e. in the period of 12th May 1991 to 10th June 1991, a story was cooked against the appellant to get advantage of that period. However, no specific interference can be drawn on the basis of evidence adduced by the prosecution. The evidence adduced by the prosecution appears to be shaky. A doubt is created that the prosecutrix was pregnant since before the date of alleged incident. The version of the prosecutrix cannot be believed that a rape was committed with her in a house, which was situated in a dense area and also crowded by so many relatives of the appellant. There was no satisfactory reason established by the prosecution in relation to the fact by which the prosecutrix could be sent to the house of the appellant in such a manner. Under such circumstances, a doubt is created that either the prosecutrix was a consenting party at the time of incident or a false case is created against the appellant and if such doubt is created then, the benefit of doubt is to be given to the accused and he cannot be convicted for the offence punishable under Section 376 of IPC.

20. On the basis of aforesaid discussion, the appeal filed by the appellant seems to be acceptable and therefore, it is accepted. The conviction and sentence directed by the trial Court for the offence punishable under Section 376(1) of IPC are hereby set aside. The appellant is acquitted from all the charge appended upon him. He would be entitled to get the fine amount back, if he has deposited the same before the trial Court. Presence of the appellant is no more required hence, it is directed that his bail bonds etc shall stand discharged.

21. Copy of the judgment be sent to the trial Court for information and compliance.

Order accordingly.

I.L.R. [2012] M.P., 1717

APPELLATE CRIMINAL

Before Mr. Justice N.K. Gupta

Cr. A. No. 907/1996 (Jabalpur) decided on 26 June, 2012

GUDDU ALIAS SAMEER

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3 - Appreciation of Evidence - F.I.R. was lodged by brother of the victim, who was not the eye-witness - He took the information from the victim when victim was admitted to the Hospital in a serious condition - When the victim was examined by police u/s 161 of Cr.P.C. he stated categorically that it was the appellant 'G' who assaulted him in his abdomen and thigh by a knife - It can not be said that omnibus allegations were made against all the three persons and thereafter the present appellant was chosen as a main culprit. (Para 10)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्ष्य का अधिमूल्यन - प्रथम सूचना प्रतिवेदन पीड़ित के भाई ने दर्ज कराई, जो चक्षुदर्शी साक्षी नहीं है - उसे पीड़ित से तब सूचना प्राप्त हुई जब पीड़ित गंभीर अवस्था में अस्पताल में मर्ती था - दंड प्रक्रिया संहिता की धारा 161 के अंतर्गत जब पुलिस द्वारा पीड़ित का परीक्षण किया गया तब उसने स्पष्ट कथन किया है कि वह 'जी' था जिसने उसके उदर व जांघ पर चाकू से वार किया - यह नहीं कहा जा सकता कि सभी तीनों व्यक्तियों पर सिर्फ आरोप लगाये गये और इसके बाद वर्तमान अपीलार्थी को मुख्य दोषी मान लिया गया।

B. Penal Code (45 of 1860), Section 307 - Attempt to Murder - Appellant assaulted the victim in his abdomen with a force so that knife pierced the abdomen of the victim as well as other portion of the abdomen - Injuries caused in abdomen of the victim were fatal in nature and if surgery was not performed, then certainly the victim would have died because the vital organs of the victim were found cut in his abdomen - Appellant assaulted the victim for at least two times, first in his abdomen and second on his thigh - Intention is visible - Sessions Judge has rightly convicted the appellant for commission of offence punishable under Section 307 of IPC. (Para 14)

ख. दण्ड संहिता (1860 का 45), धारा 307 - हत्या का प्रयत्न -

अपीलार्थी ने पीड़ित के उदर में ऐसे बल के साथ प्रहार किया जिससे कि चाकू पीड़ित के उदर को और साथ ही उदर के अन्य हिस्सों को भी भेद गया – पीड़ित के उदर में कारित क्षतियाँ घातक स्वरूप की थी और यदि शल्यक्रिया नहीं की जाती तो निश्चित रूप से पीड़ित की मृत्यु हो जाती क्योंकि पीड़ित के उदर में कोमल अवयव कटे हुये पाये गये थे – अपीलार्थी ने पीड़ित पर कम से कम दो बार वार किया, प्रथम उसके उदर में और द्वितीय उसकी जाँघों पर – आशय दृश्यमान है – सत्र न्यायाधीश ने अपीलार्थी को भा.द.सं. की धारा 307 के अंतर्गत दण्डनीय अपराध के लिए उचित रूप से दोषसिद्ध किया है।

Cases referred :

1985 WN NOTE 336, 1983 CR.L.J. 331, 1998 SCC (CRI) 587, 2004(2) MPHT 1 (NOC), AIR 2006 SC 571,

H.S. Dubey, for the appellant.

S.K. Kashyap, G.A. for the respondent/State.

J U D G M E N T

N.K. GUPTA, J. : This criminal appeal is preferred by the appellant being aggrieved by the judgment dated 9/5/1996 passed by the Sessions Judge, Betul in ST No.81/1995, whereby the appellant was convicted for commission of offence punishable under Section 307 of IPC and sentenced for five years' rigorous imprisonment with fine of Rs.100/-. In default of payment of fine amount, an additional RI for three months was directed.

2. Prosecution case, in short, is that on 22/1/1995 the victim Mohd. Anees (PW-1) was working on his paan thaila situated at Tikari Road, Betul. At about 8:00 PM the victim Mohd. Anees went to Lalli Chowk after closure of his paan thaila. After sometime he came back to his paan thaila, then he found that the appellant and other co-accused persons were standing near his thaila. A sum of Rs.15/- was due towards the appellant Guddu and therefore victim Mohd. Anees demanded that sum from appellant Guddu. The appellant with the help of other co-accused persons viz. Sallu @ Salim and Abid assaulted the victim Mohd. Anees by a knife. He assaulted the victim on his abdomen and left thigh for 2-3 times. Mohd. Shafi (PW-2), brother of the victim after getting news of the incident rushed to the spot. He tried to engage an auto-riksaw but in the meantime witness Moin Khan (PW-10) and Tanvir (PW-4) took the victim to the District Hospital, Betul and thereafter to the Padhar Hospital in a jeep. Mohd. Shafi went to the hospital and asked his brother about the incident. On the information received from his brother, he gave

Dehati nalishi (FIR) Ex.P-3 to the concerned police officers, who came to the hospital. Victim Mohd. Anees was referred to the doctors for his examination and treatment. In district hospital Betul Dr. M.L.Rathore (PW-5) examined the victim Mohd. Anees and found two stab wounds. One on the left abdomen and another on the left thigh. One side of each wound was clean cut whereas second side of wound was irregular. The wound caused in abdomen was deep to peritoneal cavity. In Padhar Hospital Dr. Anil Alikatti (PW-7) treated the victim Mohd. Anees. Victim was vomiting blood at that time. A surgery was done in Padhar Hospital by this witness and he found that some portion of intestine was cut due to that wound caused in abdomen of victim Mohd. Anees. Bladder was also found cut in length of 1.5 cm. Blood was oozing from the mesentery and bladder. As per his opinion, death of the victim could be caused in ordinary course of the nature due to that injury if surgery was not done upon him. After due investigation, a challan was filed by the police before the Chief Judicial Magistrate, Betul and thereafter case was committed to the Sessions Judge, Betul.

3. The appellant-accused abjured his guilt. He did not take any specific plea in defence but simply stated that he was falsely implicated in the matter. No defence evidence was adduced.

4. After considering the prosecution, the learned Sessions Judge, Betul convicted the appellant for commission of offence punishable under Section 307 of IPC and inflicted the sentence as mentioned above, but acquitted the other co-accused persons namely Abid and Sallu @ Salim.

5. I have heard the learned counsel for the parties.

6. Learned counsel for the appellant-accused has submitted that there was no enmity between the appellant and the victim, on the contrary they were friends. Omnibus allegations were made against three persons but a compromise took place out the Court between the victim and other co-accused persons, therefore the present appellant was falsely implicated in the matter by saving the others. Incident took place in a spur of moment. The injuries were not fatal in nature. No offence under Section 307 of IPC is made out against the present appellant. In support of his contention, learned counsel for the appellant has placed his reliance on the judgment of the Hon'ble Division Bench of this Court in the case of "*Kanhaiyalal Vs. State of Madhya Pradesh*", (1985 WN Note 336). It is also submitted that the present case is much old and the appellant is suffering custody and attending the proceeding

since long. He has suffered for 17 years due to this case and appeal. Under such circumstances, where his age was only 18 years at the time of incident, jail sentence of the appellant may be reduced to the period which he has already undergone in the custody.

7. On the contrary, learned counsel for the State has supported the impugned judgment mainly on the ground that the offence under Section 307 of IPC is very well constituted against the present appellant and looking to the gravity of offence, the instant appeal filed by the appellant may be dismissed.

8. In the present case only three questions are to be considered. Firstly, that the appellant assaulted the victim by a knife, secondly as to whether offence under Section 307 of IPC is constituted against the present appellant or not and thirdly as to whether any interference can be done in the sentence inflicted by the trial Court.

9. It is submitted by learned counsel for the appellant that in the FIR Ex.P-3 omnibus allegations were made that the victim Mohd. Anees was assaulted by three accused persons with the help of a knife. But during the trial a compromise took place between the remaining accused persons and the victim. All the witnesses were saving those two accused persons and shifted their guilt upon the present appellant.

10. Contention of learned counsel for the appellant cannot be accepted in the light of the statement given by the victim Mohd. Anees (PW-1). He has specifically mentioned that it was the appellant Guddu, who assaulted him on his abdomen and left thigh by a knife. He did not allege anything against co-accused Abid and Sallu @ Salim that they assaulted him by any weapon. Under such circumstances, it would be apparent that original version of the victim was that the appellant assaulted him by a knife on his abdomen and thigh. The FIR was lodged by witness Mohd. Shafi (PW-2), brother of the victim, who was not the eye-witness in the case. He took the information from the victim when victim was admitted to the Padhar Hospital in a serious condition. Under such circumstances, the complainant could lodge the FIR in an omnibus manner on the basis of information given by the victim in such a critical condition. But when the victim was examined by the police under Section 161 of Cr.P.C. only then he has categorically mentioned that it was the appellant Guddu who assaulted him in his abdomen and thigh by a knife. Under such circumstances, it cannot be said that omnibus allegations were made against

all the three persons and thereafter the present appellant was chosen as a main culprit. On the contrary, it is apparent from the statement of the victim that the appellant was the culprit who assaulted him by a knife.

11. The evidence given by the victim Mohd. Anees is duly supported by the statement of witness Mohd. Shafi (PW-2) that the victim informed him about the incident soon after the incident. However, witness Jamal (PW-3), Tanvir (PW-4) and Moin Khan (PW-10) have turned hostile. They did not support the fact that they saw the incident. Moin Khan (PW-10) and his companions have stated before the trial Court that they took the victim to the hospital only in an injured condition, but the victim did not say anything about the name of the culprit etc. However, no enmity is established against the present appellant so that victim could allege the ground of enmity against the appellant. On the contrary, it is established that prior to this incident, the victim and present appellant were friends. Under such circumstances, the evidence given by the victim Mohd. Anees is duly supported by the FIR and medical evidence.

12. Learned counsel for the appellant has invited attention of this Court that there is a lot of contradiction between the number of injuries as stated by the victim and those that were found by the doctor. It is true that number of injuries are different on these two ends, but a person who was assaulted in such a manner that his bladder and mesentery were cut. Some portion of the intestine was also cut. Victim was vomiting blood, hence it was not possible for him to remember number of strokes given by the appellant. Therefore by such contradictions, the testimony of the victim Mohd. Anees cannot be disbelieved. Under such circumstances, learned Sessions Judge has rightly held that it was the present appellant Guddu who assaulted the victim Mohd. Anees by a knife.

13. Learned counsel for the appellant has relied upon the judgment of the Hon'ble Division Bench of this Court in the case of *Kanhaiyalal* (supra) to show that since nature of the injury was not fatal, the alleged offence falls under Section 324 of IPC. Actually, looking to the factual aspects of the case, the judgment passed by the Hon'ble Division Bench of this Court in the case of *Kanhaiyalal* (supra) is not applicable in the present case. In this connection, the relevant portion of the judgment of the Hon'ble Apex Court in the case of "*State of Maharashtra Vs. Balram Bama Patil & others*", (1983 C.R.I.L.J. 331) may be referred in which it is held as under:

"To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often given considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deducted from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds.....

It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

14. In the light of the aforesaid judgment of the Hon'ble Apex Court, it is to be considered that what was the intention or knowledge of the appellant. It is true that the incident was not pre-planned. A quarrel took place between the parties in a sudden manner. It is also true that the appellant and the victim were friends in the past. But it is observed by Dr. Anil Alikatti (PW-7) that the victim was vomiting blood. His mesentery, intestine and some portion of the bladder were found cut and if surgery was not performed upon him, then injuries were sufficient to cause his death in ordinary course. Under such circumstances, it is apparent that the present appellant assaulted the victim in his abdomen with a force so that knife pierced the abdomen of the victim as well as other portion of the abdomen. Looking to the opinion of the Dr. Anil Alikatti (PW-7), the injuries caused in abdomen of the victim were fatal in nature and if surgery was not performed, then certainly the victim would have died because the vital organs of the victim were found cut in his abdomen. Secondly, it is alleged that the appellant assaulted the victim for at least two times. First in his abdomen and second on his thigh, and therefore his intention is visible. If he had not intended to kill the victim, then there was no need to give another assault to the victim by a knife. In such circumstances, in the light of the judgment of the Hon'ble Apex Court in the case of *Balram Bama Patil* (supra), it would be apparent that the appellant was intended to kill the victim,

and therefore offence under Section 307 of IPC is made out against the present appellant. The learned Sessions Judge has rightly convicted the appellant for commission of offence punishable under Section 307 of IPC.

15. It is true that the present appellant and the victim were friends prior to the incident. The quarrel started due to payment of very small amount of Rs.15/- and during the quarrel the appellant lost his temper and assaulted the victim in such a manner. The appellant is facing the trial and appeal since the year 1995 i.e. for last 17 years. He remained in custody for 40 days. It is also admitted that the appellant was 18 years old at the time of incident. His age is mentioned in the judgment of the trial Court to be 18 years of age. In such a tender age, it is possible that due to lack of maturity, the appellant could do such a crime. Therefore all these facts may be considered for consideration of sentence of the appellant. In the case of "*Tarak Nath Singh & another Vs. State of WB*", [1998 SCC (Cri) 587] the Hon'ble Apex Court reduced the sentence of the accused to the period which he has already undergone in the custody by enhancing the fine amount but the period of custody of the accused in that case is not known.

16. Learned counsel for the appellant has placed his reliance on the order of this Court in the case of "*Sanjay alias Sanju Patil & another Vs. State of Madhya Pradesh*", [2004(2) MPHT 1 (NOC)] in which the appellant was convicted for commission of offence punishable under Section 307 of IPC, but his sentence was reduced to the period which he had undergone in the custody. In that case such period was computed to be 19 days only. In this connection, the order of the Hon'ble Apex Court in the case of "*State of MP Vs. Badri alias Bhuru*", (AIR 2006 SC 571) may be referred in which such type of orders are deprecated. It was criticized that sentence lesser than one year was granted in such a grave offence without any basis. In the light of the judgment passed by the Hon'ble Apex Court in the case of *Badri alias Bhuru* (supra), the order passed in the case *Sanjay alias Sanju Patil* (supra), cannot be considered as a precedent in the present case.

17. In the light of the judgment of the Hon'ble Apex Court in the case of *Badri alias Bhuru* (supra) it appears that while considering the various facts, that the appellant was of tender age, he has faced the trial for a longer period, he remained in custody for sometime, then custody period to be considered proportionate to the offence committed by the accused in the case. Under such circumstances, the order passed by the Single Judge in the case of *Sanjay*

alias Sanju Patil (supra) appears to be per incurium. In the present case, when the appellant remained in the custody for only 40 days, then his sentence cannot be reduced to the period which he has already undergone in the custody. In such circumstances, considering the age of the appellant at the time of incident and the period in which he has suffered the trial and appeal, it would be essential to reduce his jail sentence appropriately by enhancing the fine amount.

18. On the basis of aforesaid discussion, the appeal filed by the appellant is partly allowed. The conviction directed by the Court below for commission of offence punishable under Section 307 of IPC is hereby maintained, but his sentence is reduced from five years' rigorous imprisonment to two years' rigorous imprisonment by enhancing the fine amount from Rs.100/- to Rs.10,000/-. The appellant is directed to deposit the remaining fine amount before the trial Court within a period of two months from today, failing which he shall undergo rigorous imprisonment for two years in addition.

19. The appellant is on bail, therefore he is directed to surrender before the trial Court within one month and after his surrender, the trial Court shall send him to undergo the remaining jail sentence. It is also directed that if fine amount is deposited, then entire amount may be given to the victim Mohd. Anees S/o Mohd. Yusuf, resident of Azad Ward Tikari, Betul (MP) by way of a compensation.

Order accordingly.

I.L.R. [2012] M.P., 1724

APPELLATE CRIMINAL

Before Mr. Justice N.K. Gupta

Cr. A. No. 195/1996 (Jabalpur) decided on 26 June, 2012

MUNNA SINGH & anr.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) - Schedule Tribe - Proof of Caste - Prosecutrix and her husband stating them to be 'Pav Gond' which is a tribal community - Accused accepting prosecutrix and her husband are Gond and therefore, member of Schedule Tribe - No need to prove that fact by the prosecution separately - No difference, if cast certificate is not submitted or proved by the prosecution. (Para 8)*

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) - अनुसूचित जनजाति - जाति का सबूत - अभियोक्त्री एवं उसके पति का कहना है कि वे 'पाव गोंड' हैं जो कि एक जनजाति समुदाय है - अभियुक्त ने स्वीकार किया कि अभियोक्त्री एवं उसका पति गोंड है और इसलिए अनुसूचित जनजाति के सदस्य हैं - अभियोजन को इन तथ्यों को अलग से सिद्ध करने की आवश्यकता नहीं - यदि अभियोजन द्वारा जाति प्रमाण पत्र प्रस्तुत या सिद्ध नहीं किया जाता हो कोई अंतर नहीं पड़ता।

B. *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi), Penal Code (45 of 1860), Section 354 - Proof of offence under - Appellant outraged modesty of prosecutrix belonging to schedule tribe by using criminal force - Offence under Section 354 of I.P.C. as well as Section 3(1)(xi) of the Special Act are made out.* (Para 11)

ख. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi), दण्ड संहिता (1860 का 45), धारा 354 - के अंतर्गत अपराध का सबूत - अपीलार्थी ने आपराधिक बल प्रयोग करते हुए अभियोक्त्री की लज्जा भंग की जो कि अनुसूचित जनजाति की है - अपराध भा.द.सं. की धारा 354 के साथ ही विशेष अधिनियम की धारा 3(1)(xi) के अंतर्गत गठित होगा।

C. *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi), Penal Code (45 of 1860), Section 354 - Proof of offence under - Difference between the offence punishable under Section 354 of I.P.C. and Section 3(1)(xi) of the Special Act - If offence punishable under Section 354 of I.P.C. is committed on a prosecutrix who, belongs to either Scheduled Caste or Scheduled Tribe then offence under Section 3(1)(xi) of SC/ST (Prevention of Atrocities) Act shall be made out.*

Shankarlal's case (Shankarlal Vs. State of M.P. (2005) (1) MPLJ 449) and Dabloo alias Shahjad's case (Dabloo alias Shahjad Vs. State of M.P. 2007 (1) MPLJ 250) are per incuriam, in the light of the judgment passed by Hon'ble the Apex Court in the case of Vidyadharan (Vidyadharan Vs. State of Kerla 2004 (2) MPLJ 251). (Para 12)

ग. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi), दण्ड संहिता (1860 का 45), धारा 354 - के अंतर्गत अपराध का सबूत - भा.द.सं. की धारा 354 एवं विशेष अधिनियम की धारा 3(1)(xi) के अंतर्गत दण्डनीय अपराध के बीच अंतर - यदि अपराध भा.द.सं.

की धारा 354 के अंतर्गत अभियोक्त्री पर कारित किया गया है जो या तो अनुसूचित जाति अथवा अनु. जनजाति की है तब अ.जा./अ.ज.जा. (अत्याचार निवारण) अधिनियम की धारा 3(1)(xi) के अंतर्गत अपराध गठित होगा।

माननीय उच्चतम न्यायालय द्वारा विद्याधरन के मामले में पारित निर्णय (विद्याधरन वि. केरल राज्य 2004 (2) एमपीएलजे 251) के आलोक में शंकरलाल का मामला (शंकरलाल वि. म.प्र. राज्य 2005 (1) एमपीएलजे 449) व डबलू @ शहजाद का मामला (डबलू @ शहजाद वि. म.प्र. राज्य 2007(1) एमपीएलजे 250) अनवधानता के कारण है।

Cases referred :

2005 (1) MPLJ 449, 2004(2) MPLJ 251, 2007 (1) MPLJ 250.

Suyash Tripathi, for the appellants.

G.S. Thakur, P.L. for the respondent/State.

J U D G M E N T

N.K. GUPTA, J. : The appellants have preferred this appeal against the judgment and conviction dated 12.1.1996 passed by the Special Judge under SC/ST (Prevention of Atrocities) Act shahdol in Special Case No.36 of 1994 whereby the appellant Munna Singh was convicted for offence punishable under Section 354 of I.P.C and Section 3(1)(xi) of SC/ST (Prevention of Atrocities) Act, 1989 (hereinafter it is referred as the "Special Act") and sentenced for six months rigorous imprisonment with fine of Rs.200/- . The appellant Munna Singh has also to undergo additional sentence for one month's rigorous imprisonment in default of payment of fine whereas, the appellant Bhaiyalal was convicted for offence punishable under Section 323 of I.P.C and sentenced for six month's rigorous imprisonment.

2. Prosecution's case in short is that on 14.1.1994 at about 4.00 p.m in the evening the prosecutrix (P.W.1) came to her house situated in the outskirts of Village Mauhari, Police Station Bijuri, District Shahdol from her field. After some time the appellants came to her house and asked about her husband. Thereafter, the appellant Munna Singh held the right hand of the victim and tried to pull her in the house. He also touched her breasts. The prosecutrix made hue and cry and therefore, her husband Farzul (P.W.2) and witness Shivram (P.W.3) came to the spot. Appellant Bhaiyalal who had a stick at that time with him assaulted the husband of the prosecutrix on his head and various parts of the body and thereafter, both of the appellants ran towards

the village. The prosecutrix told about the incident to her parents-in-law and thereafter, she went to the Police Station Bijuri, District Shahdol with her husband. FIR was lodged on the same very day at about 8.30 p.m. In Police Station Bijuri a case was registered against the appellants. Victim Farzul was sent to the hospital for his examination and treatment. Dr. Gautam (P.W.6) found six simple injuries to the victim Farzul on his person. After due investigation charge sheet was submitted before the Special Court.

3. The appellants abjured their guilt. They did not take any specific plea in the case. However, it is alleged that the appellants were falsely implicated due to previous enmity. In support of their defence Phoolbai (D.W.1), Ashok Kumar (D.W.2) were examined. After considering the evidence adduced by the parties learned Special Judge convicted and sentenced the appellants as mentioned above.

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

5. Learned counsel for the appellants has submitted that a false case was registered against the appellants. They were falsely implicated due to enmity. A separate quarrel took place with Farzul and other persons in which Farzul sustained the injuries. Thereafter, a false case was lodged related to Section 354 of I.P.C etc. It is also submitted that the defence witnesses were reliable but, learned Special Judge did not believe the defence witnesses. It is further submitted that the prosecutrix was not of scheduled tribe and therefore no offence punishable under Section 3(1)(xi) of the Special Act is made out. Learned counsel for the appellant has also placed his reliance upon the judgment passed by this Court in case of "*Shankarlal Vs. State of M.P.*" [(2005) (1) MPLJ 449] to show that there was no intention of the appellant Munna Singh to outrage the modesty of the prosecutrix because she was of the scheduled tribe and therefore, no offence under Section 3(1)(xi) of the Special Act is made out. It is also submitted that case is very much old. The appellants are suffering from the trial and the appeal since the year 1994 and therefore, their sentence may be reduced to the period which they have already undergone in custody.

6. On the other hand learned Panel Lawyer has submitted that conviction and sentence passed by the Special Court are correct and appropriate. Learned Panel Lawyer placed his reliance on the judgment of the Hon'ble Apex Court in the case of "*Vidyadharan Vs. State of Kerala*", [(2004) (2) MPLJ 251] to show that offence under Section 3(1)(xi) of the Special

Act is made out and judgment passed by this Court in the case of *Shankarlal* (supra) appears to be per incuriam.

7. In the present appeal there are only four points which are to be decided. Firstly as to whether the prosecutrix was a Member of the Scheduled Tribe? Secondly that whether the incident took place and the appellants committed the crime for which they are convicted? Thirdly whether no offence under Section 3(1)(xi) of the Special Act is made out against the appellant Munna Singh? And lastly that whether any interference can be done in the sentence inflicted on the appellants?

8. Farzul (P.W.2) in para 1 of his statement has stated about his caste and claimed to be a member of the scheduled tribe. The prosecutrix (P.W.1) has also stated in para 1 of her statements that she was "Pav Gond" and therefore, she was a member of scheduled tribe but, in para 5 of her cross examination she has accepted that she is "Pav Thakur" and not a person of scheduled caste. She had shown lack of her knowledge that whether "Pav Thakurs" are tribal persons or not. Due to the statement of the prosecutrix in para 5 it was submitted that the prosecutrix was not of scheduled tribe. However, both the appellants in their statements under Section 313 of Cr.P.C have accepted that the prosecutrix and her husband were Gond and therefore, member of scheduled tribe. If any fact is admitted by the accused in his accused statement then there is no need to prove that fact by the prosecution separately. Looking to the FIR Ex.P/1 where it was mentioned by the concerned Police Officer that since the prosecutrix was "Pav Gond" which is a tribal community and therefore, a case was registered for offence punishable under Section 3(1)(xi) of the Special Act from the very beginning. Under such circumstances, when the appellants have admitted the caste of the prosecutrix then it will make no difference if caste certificate is not submitted or proved by the prosecution. Under such circumstances, it is apparent that the prosecutrix was a member of the scheduled tribe.

9. Prosecutrix (P.W.1), Farzul (P.W.2) and Shriram (P.W.3) have stated the entire story that the appellant Munna Singh held the right hand of the prosecutrix and tried to pull her in the house and also pressed her breasts. Thereafter, on hearing the hue and cry of the prosecutrix, Farzul and Shriram reached to the spot. Appellant Bhaiyalal assaulted the victim Farzul by a stick causing him so many injuries. Their statements are duly supported by the FIR Ex.P/1 lodged at Police Station Bijuri soon after the incident. It is

submitted by the learned counsel for the appellants that there was enmity between the parties. Some suggestions were given in that respect to the prosecutrix and her husband that there was an enmity between Munna Singh and Ashok and Ashok went with the prosecutrix to lodge the FIR but, the witnesses denied about the presence of Ashok at the time of lodging the FIR. A suggestion was given to the husband of the prosecutrix that he had some quarrel with Gangaram but, it was not established that the appellants have any relation with Gangaram and therefore, they were falsely implicated. Under such circumstances, the defence could not establish any enmity between the parties.

10. Defence witnesses Phoolbai (D.W.1) and Ashok Kumar (D.W.2) were examined for the fact that on 14.1.1995 when Bhaiyalal was going on a tractor, Farzul came to the spot and assaulted Bhaiyalal by a stick. No such incident was suggested to either the prosecutrix or Farzul in their cross examination. The defence witnesses appear to be concocted witnesses. They were examined in the month of January 1996. Phoolbai has stated about the incident which took place one year back whereas witness Ashok Kumar gave a specific date of incident and that was 14.1.1995. Looking to the version of these witnesses it appears that they are stating about the incident which occurred on 14.1.1995 but, as per FIR the incident committed by the appellants took place on 14.1.1994. If the witness Farzul assaulted the appellant Bhaiyalal one year after the incident then by this act of Farzul it cannot be said that there was an enmity between the parties prior to the incident and the appellants are falsely implicated in the matter. On the contrary it appears that the defence witnesses were tutored and since they were not genuine they could not tell the actual period of the incident and they could not say about the incident which took place one year prior to their statements whereas the incident in question took place two years prior to their statements. Under such circumstances, the defence witnesses are not believable. No enmity could be established between the parties by them and no inference can be drawn that the appellants could be falsely implicated in the crime.

11. Testimony of the prosecutrix is duly supported by other witnesses though they are interested. But there is no rule that testimony of interested witnesses may not be accepted. Evidence given by Farzul, husband of the prosecutrix is very natural. He has accepted that after hearing the cries of his wife, he came to the spot and he saw that the appellant Munna Singh had held the hand of his wife and thereafter, Bhaiyalal assaulted him. He has stated

that his wife informed him that the appellant Munna Singh has also pressed her breasts. It is true that during the trial the prosecutrix has stated that she was held by both the appellants but, the portion which was mentioned by her in the FIR can be believed. Under such circumstances, where there is no enmity between the parties there is no reason for false implication of the appellants, and testimony of the prosecutrix is corroborated by her husband and witness Shriram and also by the First Information Report Ex.P/1, injuries of the witness Farzul were proved by Dr. Gautam (P.W.6) in his report Ex. P/4 thus the testimony of the prosecutrix and her husband is believable. Therefore, learned Special Judge has rightly held that the appellants Munna Singh had outraged the modesty of the prosecutrix by using criminal force and appellant Bhaiyalal had voluntarily caused hurt to the victim Farzul.

12. Learned counsel for the appellants has submitted that there was no intention of the appellant Munna Singh to outrage the modesty of the prosecutrix on the basis of her caste and therefore, no offence punishable under section 3(1)(xi) of the Special Act will be made out. Learned counsel for the appellant placed his reliance on the judgment of this Court in the case of *Shankarlal* (supra). Also reliance was placed on the judgment of this Court in the case of "*Dabloo alias Shahjad Vs. State of M.P.*", [2007 (1) MPLJ 250] which is on the same point. On the other hand learned Panel Lawyer placed his reliance on the judgment passed by the Hon'ble Apex Court in the case of *Vidyadharan* (supra). For ready reference some portion of para 10 of the judgment passed by Hon'ble Apex Court in the case of *Vidyadharan* (supra) may be perused which is as under :

"Section 3(1)(xi) of the Act which 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 of I.P.C. 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."

By perusal of aforesaid portion and law laid by Hon'ble the Apex Court the difference between the offence punishable under Section 354 of I.P.C and

Section 3(1)(xi) of the Special Act is clear that if offence punishable under Section 354 of I.P.C is committed on a prosecutrix who, belongs to either Scheduled Caste or Scheduled Tribe then, offence under Section 3(1)(xi) of SC/ST (Prevention of Atrocities) Act shall be made out. Difference is of the caste of the prosecutrix. Under such circumstances, where judgment passed by Hon'ble the Apex Court is binding over all the subordinate Courts therefore, the contrary view taken in the judgments passed by this Court in the case of *Shankarlal* (supra) and *Dabloo alias Shahjad* (supra) may not be accepted as a binding precedent. Being contrary to the law laid by Hon'ble the Apex Court judgments of both the cases i.e *Shankarlal's* case (supra) and *Dabloo alias Shahjad's* case (supra) are per incuriam. In the light of the judgment passed by Hon'ble the Apex Court in the case of *Vidyadharan* (supra) it would be clear that since appellant Munna Singh has outraged the modesty of the prosecutrix belonging to Scheduled Tribe by using criminal force then offence under Section 354 of I.P.C as well as 3(1)(xi) of the Special Act are clearly made out. Learned Special Judge did not made any error in convicting the appellant Munna Singh for offence punishable under Section 3(1)(xi) of the Special Act.

13. As far as the sentence is concerned the trial Court has awarded minimum jail sentence to the appellant Munna Singh for offence punishable under Section 3(1)(xi) of the Special Act and therefore, no reduction in that sentence can be done because there is a statutory provision relating to minimum sentence. However, it appears that a very lesser amount of fine was imposed upon the appellant Munna Singh. No appropriate compensation can be granted from the fine. In the absence of the counter appeal fine amount cannot be increased. However, it is directed that out of that fine amount a sum of Rs.200/- be paid to the prosecutrix by way of compensation.

14. As far as the sentence of the appellant Bhaiyalal is concerned his offence is not so grave. He has faced the trial including the appeal for last 18 years and therefore, under such circumstances, it would not be proper to send him in the jail again. He remained in custody for two days in all. Looking to the period of the trial and appeal where the appellant Bhaiyalal was directed to remain present before the various Courts including this Court for 17 years and also looking to his period of custody it would be proper that his sentence may be reduced to the fine only but, looking to the injuries to the victim maximum fine is to be imposed.

15. On the basis of the aforesaid discussion the appeal filed by the

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appellant Munna Singh is not acceptable and therefore, it is hereby dismissed. Appellant Munna Singh is directed to surrender before the trial Court within a month from today and trial Court is directed to execute the jail sentence imposed upon Munna Singh. Appeal filed by Bhaiyalal is partly allowed. Conviction directed under Section 323 of I.P.C is hereby confirmed but his sentence is reduced to the period which he has already undergone in custody with a fine of Rs.1000/- in addition. The appellant Bhaiyalal is directed to deposit the fine amount before the trial Court within two months from today. In default of payment of fine he has to undergo for three months rigorous imprisonment. If fine is deposited by Bhaiyalal then victim Farzul shall receive a sum of Rs.700/- out of that fine as compensation.

16. Copy of the judgment be send to the trial Court with its case file for information and compliance.

Order accordingly.

**I.L.R. [2012] M.P., 1732
APPELLATE CRIMINAL**

Before Mr. Justice Tarun Kumar Kaushal

Cr.A. No. 747/1996 (Jabalpur) decided on 27 June, 2012

KALLU @ DONGER SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) - Outraging Modesty - Prosecutrix was new in the village - Appellant was not knowing that she belongs to either SC/ST - No caste certificate produced before the Court - No evidence with regard to caste of the prosecutrix except the oral evidence of prosecutrix herself - F.I.R. lodged after a delay of 2 days - Conviction set aside - Appeal allowed. (Paras 7 to 9)

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) - लज्जा भंग करना - अभियोक्त्री गांव में नई आई थी - अपीलार्थी नहीं जानता था कि वह अनुसूचित जाति अथवा अनुसूचित जनजाति की है - न्यायालय के समक्ष कोई जाति प्रमाण पत्र प्रस्तुत नहीं किया गया - जाति के संबंध में अभियोक्त्री की स्वयं की मौखिक साक्ष्य के अलावा कोई साक्ष्य नहीं - प्रथम सूचना प्रतिवेदन दो दिन के विलम्ब से दर्ज कराई गई - दोषसिद्धि अपास्त - अपील मंजूर।

Case referred :

2006(4) MPLJ 171.

Kunal Dubey, for the appellant.

R.S. Shukla, P.L. for the respondent.

J U D G M E N T

T.K. KAUSHAL, J. : This appeal has been preferred against the judgment dated 15.4.1996 passed by Special Judge(SC/ST), Khandwa in Special Case No.32/1991 convicting the appellant under Section 3(1)(xi) of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'SC/ST Act') and sentenced to six months R.I.

2. Facts of the case, in short, are that on 16.9.1995 prosecutrix aged 15 years (PW/1) alongwith her sister-in-law(Nanad) Nanibai (PW/2) went to flour mill of the appellant for grinding of wheat. Appellant caught her hand and outraged her modesty. PW/1 pushed the appellant and managed to run away from the flour mill. She reached at the camp where she lived alongwith her husband and other family members and narrated the incident.

3. On 18.6.1995, PW/1 lodged FIR Ex. P/1 at Police Station, Dhangaon, District Khandwa. A case at Crime No.56/93 under Section 354 IPC has been registered against the appellant. During the investigation, prosecutrix was found to be a member of Scheduled Tribe and the appellant was found to be a member of non-scheduled tribe. After completing the investigation, police Dhangaon submitted a charge-sheet against the appellant under Section 354 IPC and 3(1)(xi) of the SC/ST Act.

4. Trial court framed charge under Section 3(1)(xi) of the SC/ST Act against the appellant. Appellant abjured the guilt. Defence of the appellant before the trial court was that of false implication.

5. To substantiate the case of the prosecution, statements of prosecutrix (PW/1), Nanibai (PW/2), Munnibai (PW/3), Sakubai (PW/4), M.P. Tiwari, the then ASI (PW/5) and Dinesh Joshi, Station House Officer (PW/6) were recorded. In respect of defence, appellant produced Motiram (DW/1) as his defence witness. After appreciating the aforesaid evidence, trial court convicted and sentenced him as above.

6. Challenging the aforesaid conviction and sentence, this appeal has been preferred on the grounds that appreciation of evidence is not proper.

Prosecution has failed to prove the caste of the complainant and the appellant by positive reliable evidence. Conviction has been based on insufficient unreliable evidence. Conviction is bad in law and sentence is harsh. On the other hand, learned Panel Lawyer supported the findings of conviction and sentence both and submitted that only minimum sentence has been passed.

7. Complainant (PW/1) has stated that she is "Barela" by caste and appellant is "Rajput". Except this version, none of the witnesses said anything about the caste of the appellant and the complainant. No caste certificate has been produced and proved in this case. Prosecutrix (PW/1) has stated that she alongwith her family members had come in the village for labour work only 8-10 days prior to the incident. Dinesh Joshi (PW/6) has recorded the FIR Ex. P/1. It is pertinent to note that Ex. P/1 FIR is registered for the offence punishable under Section 354 IPC only. There is no mention of offence under Section 3(1)(xi) of the SC/ST Act. There is no mention about the caste of parties in the report itself. On perusal of Ex. P/1, it is also pertinent to note that this report has been lodged after two days of the incident. Cause of delay has been mentioned that out of fear she became unsettled (Ghabrajane se), she reached late at the police station.

8. In view of the aforesaid, it is clear that FIR was lodged after two days of the incident. Cause of delay is not very specific and reliable rather it is vague. Prosecutrix (PW/1) was new in the village and there is no evidence that appellant knew her previously. There is no mention of the caste in the FIR Ex. P/1. No case under Section 3(1)(xi) of the SC/ST Act was registered in the FIR. Caste certificate has not been obtained during investigation. Caste certificate has not been produced in the trial court to prove the caste of the prosecutrix and the appellant as well.

9. It is true that trial court did not frame charge under Section 354 IPC against the appellant, but to bring home the charge under 3(1)(xi) of the SC/ST Act, proof of caste by specific evidence is a necessary. Particularly, in view of this case, as the parties are not known to each other earlier and the report has been lodged with the delay of two days without any specific cause. In facts and circumstances of the present case, proof of caste was a necessary requirement.

10. It is also submitted by learned counsel for the appellant that in this case investigation has been conducted by ASI who is not a gazetted officer of police of the rank of DSP which is mandatory in SC/ST Act. Learned counsel for the appellant has placed reliance on the decision of this Court in the case

I.L.R.[2012]M.P. Panchan Mochiyan Ratlam Vs. Santosh Kumar 1735 of *Bharatsingh vs. State of M.P.* reported in 2006(4) M.P.L.J. 171 and submitted that for want of conduction of investigation by Gazetted officer, serious prejudice has been caused to the appellant and conviction has rendered unsustainable.

11. In view of the fact that initially police has registered the case under Section 354 IPC only, charge-sheet has been filed under Section 354 IPC and 3(1)(xi) of the SC/ST Act both and the charge has been framed only under Section 3(1)(xi) of the SC/ST Act; aforesaid both requirements are necessary to be completed by the prosecution.

12. For want of compliance of aforesaid requirements, in my considered opinion, conviction and sentence under Section 3(1)(xi) of the SC/ST Act deserves to be set aside and is hereby set aside. Appellant is acquitted. Appeal is allowed.

Appeal allowed.

I.L.R. [2012] M.P., 1735

CIVIL REVISION

Before Mr. Justice R.C. Mishra

C.R.No. 669/2005 (Jabalpur) decided on 9 April, 2012

PANCHAN MOCHIYAN RATLAM & anr.

...Applicants

Vs.

SANTOSH KUMAR

...Non-applicant

A. *Wakf Act (43 of 1995), Section 6 - Limitation* - By notification issued in the year 1983, certain lands were declared Wakf property however, the land in dispute was not included - C.E.O., by order dated 20.06.2002 declared the disputed property as a Wakf property - The Cause of Action arose on-20.06.2002 therefore, the suit was within jurisdiction. (Paras 9 & 10)

क. *वक्फ अधिनियम (1995 का 43), धारा 6 - परिसीमा* - वर्ष 1983 में जारी अधिसूचना से कुछ भूमि वक्फ संपत्ति घोषित की गई यद्यपि विवादित भूमि सम्मिलित नहीं की गई - सी.ई.ओ. के आदेश दिनांक 20.06.2002 द्वारा विवादित संपत्ति वक्फ संपत्ति घोषित की गई - वाद कारण 20.06.2002 को उत्पन्न हुआ, इस कारण वाद क्षेत्राधिकारिता के भीतर।

B. *Constitutional Law - Order of an absolute Ruler* - No distinction can be made between an executive order or a legislative command issued by him. (Paras 1 & 14)

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ख. संवैधानिक विधि – निरंकुश शासक का आदेश – उसके द्वारा जारी किसी कार्यपालिक आदेश अथवा विधायी समादेश के बीच भेद नहीं किया जा सकता।

Cases referred :

2003(4) MPHT 370, AIR 1963 SC 1638, (1998) 2 SCC 642.

A.S. Usmani, for the applicants.

Yashpal Rathore, for the non-applicant.

ORDER

R.C. MISHRA, J. - This revision, under Section 83(9) of the Wakf Act, 1995 (hereinafter referred to as the 'Act of 1995'), is directed against the judgment dated 1.8.05 passed by M.P. State Wakf Tribunal, Bhopal (for brevity 'the Tribunal'), in Case No.9/2002, whereby the respondent's suit for declarations that the entire land, admeasuring 4535 Square Feet and occupied by him and his brother Sohanlal and father Dhoolchand, is not a Wakf property and also that he is the owner in possession of 1638 Square Feet area, out of the said land as well as for permanent injunction restraining the defendants/petitioners from interfering with his possession on the land and the shops constructed thereon under the garb of order-dated 20.6.2002 passed by Chief Executive Officer (for short 'CEO') of the petitioner no.2 on the application (Ex.P-30) moved by the petitioner no.1 under Section 54 of the Act of 1995.

2. Although, the office raised objection as to maintainability of this revision before the Principal Bench in view of the fact that the property in dispute is situated in the city of Ratlam, which falls under the territorial jurisdiction of the Bench at Indore yet, the same was overruled in presence of both the parties by order-dated 18.5.2010.

3. The following background facts are not in dispute -

In the Khasra for the year 1912-13 (copy of which is placed on record as Ex.D-3), the lands, bearing Survey Nos.1310, 1311, 1312, 1313, 1314 and 1325, having a total area of 12 Bigha 9 Biswa, were shown as Beed and Bawadi (a deep Well with a flight of stairs) dedicated to Masjid Mochiyan, situated in Mochipura at Ratlam. These lands were declared as lands belonging to the Princely State of Ratlam by

its the then Ruler namely Sajjan Singh by way of Rajyaagya (State Order) No.11557 dated 12.12.1940. Panchan Mochiyan, the petitioner no.1, was registered as Wakf, under Section 25 of the Wakf Act, 1954 (for short the 'Act of 1954'). By virtue of notification dated 25.3.1983, published in the M.P. Gazette (Ex-D-2), only 0.187 hectare of the land, bearing khasra no.634 and situated in Ratlam was declared as Wakf property. Thereafter, lands, comprising survey nos.26, 117, 27 and 116 having a total area of 43,527 sq.ft., were also declared by the Tribunal as Wakf property by its order-dated 12.3.99 passed in Case No.81/97.

4. Respondent's claim was based on the under-mentioned averments -

(i) Immediately after being taken over under Ratlam State Order dated 12.12.1940, the lands were given to one Chandanmal for cultivation.

(ii) In the year 1948, Lokendra Singh, the then Ruler, took a decision to develop a residential colony by the name of Modern Colony on the land, bearing new Khasra No.117 and having a total area of 46 Bigha and 16 Biswa that included 12 Bigha 9 Biswas lands falling under the old Survey Nos.1310, 1311, 1312, 1313, 1314 and 1325. The proposed modern colony was divided in different blocks and by way of State order-dated 14.2.1948 (Ex.P-6), ownership of Block No.'A' comprising an area of 34989 sq.ft., and marked in the map (Ex.P-4) as A, B, C and D, was transferred in favour of Thakur Mahendra Singh for a consideration of Rs.1500/- per acre.

(iii) Thakur Mahendra Singh sold different pieces of the land forming part of Block No.'A' in favour of Prakash, Nathulal, Rajmal, Govardhan, Ramkrishna and Gyanchand. Piece of land sold to Gyanchand through sale deed dated 3.4.1957 (Ex.P-7) admeasured 4535 sq. ft. Out of it, Gajadhar and his son Ishwar Prasad purchased respectively 3312 sq. ft. and 1223 sq.ft. from Gyanchand by way of sale-deeds (Ex.P/8 and Ex.P/9). In the family partition and by virtue of the corresponding judgment passed in Civil Suit No.314A/

78, the piece of land purchased by Gajadhar fell to the share of his other son Vishambhar Prasad, who sold an area of 1638 sq.ft. in favour of the plaintiff/respondent for a consideration of Rs.34,398/- by way of a sale-deed dated 10.6.1980 and transferred the remaining area of 1674 sq.ft. vide another sale-deed executed on the same day only in favour of respondent's brother namely Sohan Lal. Thereafter on 15.4.1981, their father Dhoolchand purchased 1223 sq. ft. of land from Ishwari Prasad for a consideration of Rs.25,393.50/- through sale-deed (Ex.P/13).

(iv) In the year 1985, the petitioner no.1 filed a suit, numbered as Civil Suit No.77-A/1985, against the respondent before Civil Judge Class-I, Ratlam for declarations that the land bearing survey no.1310 having area of 3 Bigha 4 Biswa belonged to it; that any deed evidencing transfer of land executed in favour of the respondent was void and ineffective as against it, and that the respondent was not entitled to change the status quo. In that case, the application for grant of temporary injunction restraining the respondent from making construction over the suit land was rejected by the trial Court and the corresponding order was also affirmed by the appellate Court.

(v) By virtue of Section 55G of the Act of 1954 (as substituted by Wakf (M.P. Amendment) Act, 1994), the suit stood transferred to the Tribunal constituted under sub-section (1) of the Section. Ultimately, the petitioner no.1 sought to withdraw the suit with liberty to file afresh. However, instead of filing a fresh suit, the petitioner no.1 moved an application, under Section 54 of New Wakf Act (Act of 1995), before the CEO of the petitioner no.2-Board for removal of encroachment allegedly made by the respondent by constructing shops on a total area of 4500 sq.ft., out of 20150 sq. ft. of land declared as Wakf by way of M.P. Gazette notification dated 25th March, 1983. In that application, it was also asserted that the total area of Wakf property was 12 Bigha 9 Biswas and not 20150 sq. ft. as shown in the notification.

(vi) The respondent raised preliminary objections as to

maintainability of the proceedings and jurisdiction of the CEO to adjudicate the matter. However, rejecting the objections, the CEO insisted upon the parties to lead evidence. Ultimately, vide order-dated 20.6.2002, upon the assumption that the Wakf property comprised of an area of 12 Bigha 9 Biswa and ignoring the fact that in the earlier suit, withdrawal of which had already attained finality, area of the suit land was shown as 3 Bigha 3 Biswa by the petitioner no.1, the CEO declared the entire 4500 sq. ft. of land including portion in possession of the respondent to be the Wakf land, as described in the application (Ex.P-30) under Section 54 of Act of 1995 and, accordingly, directed him to handover vacant possession of the same within a month whereas the question as to whether a property is a Wakf property or not could be decided by the Tribunal only. Moreover, Sohanlal and Dhulchand were not impleaded as parties to the proceedings.

5. In the written statement, the petitioner no.1 raised the plea that even the then Ruler of Ratlam State had no authority to acquire the land or to convert a Wakf land into a State land in view of the well settled principle that "Once a Wakf is always a Wakf". According to it, even if it is assumed that the sale-deeds, referred to by the respondent were made, such transfers were void ab-initio and were not binding on it.

6. Petitioner no.2 filed a separate written statement, supporting the order dated 20.6.2002 (supra) as well as the stand taken by petitioner no.1 that the land in question forming part of a Wakf property could not be divested of its status even by the then Ruler of the Ratlam State.

7. The Tribunal framed as many as 11 issues and afforded opportunity to the parties to adduce evidence. The respondent examined himself as PW4 and also called Shashikant (PW1), the employee of Ratlam Town Improvement Trust, Bhanwar Lal Sharma (PW2), the Patwari, Narendra Singh Rathore (PW3), son of Premkunwar Bai, purchaser of a piece of land from Thakur Mahendra Singh & Vishambharnath (PW5) and exhibited 36 documents in support of the claim. The petitioner no.1 examined its President namely Abdul Salam and also tendered 4 documents in evidence. Upon consideration of the entire evidence on record, the Tribunal granted all the reliefs as prayed for while holding that (i) the land in dispute, having a total area of 4535 Sq. Ft., is

not a Wakf property and (ii) the respondent, his brother and their father are owners in possession of respective parts of the aforesaid land.

8. Legality, propriety and correctness of the impugned judgment have been questioned on the following grounds -

(i) Authority of the then Ruler of Ratlam to divest the petitioner no.1 of its pre-existing right, title and interest in the land.

(ii) The well-settled principle that a public graveyard cannot be divested from the status of Wakf property even by its non-user as such.

(iii) Limitation.

9. Placing reliance on the decision of a co-ordinate Bench of this Court in *M.P. Wakf Board v. Abdul Rais* 2003 (4) MPHT 370, learned counsel for the petitioners has submitted that the suit not filed within 1 year from 25.3.1983, the date of publication of the notification in the Official Gazette, was barred by time in view of proviso appended to sub-Section (1) of Section 6 of the Act of 1995. However, fact of the matter is that in the notification, only 0.187 hectare of the land, bearing khasra no.634, was declared as Wakf property, which did not include the property in dispute. Reasons for this may be enumerated as under -

(i) In the earlier suit filed by the petitioner no.1, the property in dispute was shown as part of land, bearing survey no.1310, and situated in the North of the road leading to Ajanta Talkies.

(ii) From the record of Town Improvement Trust produced by Shashikant (PW1), it is clearly established that the land in dispute is situated in the North of the road whereas the Mosque and adjoining land in possession of the petitioner no.1 are located in the South of the road, as reflected in the Maps (Ex.P-2 and Ex.P-4).

(iii) The fact that earlier suit was filed on 18.1.1985 by the petitioner no.1 for declaration that the land in question, being Wakf property, belonged to it, was also sufficient to infer that

the land covered by the notification, did not comprise the suit land.

10. In this view of the matter, cause of action for filing the suit had accrued only on passing of the order dated 20.6.2002. Accordingly, the plea that the suit filed on 23.9.2002 was barred by time was rightly rejected.

11. A bare reading of the Rajagya No.11557 dated 12.12.1940 would reveal that despite grant of opportunity, the petitioner no.1 had failed to show that the lands described therein and the Bawadi were also dedicated to the Mosque. This apart, while observing that the corresponding entries in the revenue record related to measurement and not to dedication, it was concluded that the lands and the Bawadi deserved to be declared as Khalisa (a Persian word meaning lands or other entities producing revenue directly for the emperor and the central treasury).

12. The contention that even the then Ruler of Ratlam State had no power to acquire or declare the lands and Bawadi as State property, has already been rejected by P.K. Tare, J. (who later became the Chief Justice) in the light of the decision of Supreme Court in *Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan* AIR 1963 SC 1638, vide a common order-dated 21.12.1963 passed in cases registered as Cri. Revision Nos.204 & 118/63 in the Bench at Indore. Relevant observations at Para 15 may be reproduced as under -

"It is to be noted that the Ratlam Darbar, Then a Ruling Prince was Sovereign prior to the integration of the Central Indian States into a United State of Madhya Bharat and particularly prior to the enactment of the Constitution of India when Madhya Bharat became Part B State. Thereafter, the Darbar order passed in the year 1940 would be an order passed by the Sovereign which will have the force of law as laid down by Their Lordships in *Tilkayat's* case"

13. In *Tilkayat's* case (above), the Apex Court pointed out that-

"In the case of an absolute Ruler like the Maharana of Udaipur, no distinction can be made between an executive order issued by him or a legislative command issued by him. Any order issued by such a Ruler has the force of law and

governs the right of the parties affected thereby. An absolute monarch is the fountain-head of all legislative, executive and judicial powers and it is of the very essence of sovereignty which vested in him that he could supervise and control the administration of public charity. This universal principle in regard to the scope of the powers inherently vesting in sovereignty applies as much to Hindu monarch as to any other absolute monarch"

14. Thus, the absolute authority of the then Ruler of Ratlam to declare that the lands were not Wakf property cannot be questioned. Moreover, the order-dated 12.12.1963 was speaking and reasoned order indicating that the petitioner no.1 was not able to show as to when and in what manner the lands and the Bawadi were dedicated to a small Mosque. By that order only, an amount of Rs.4/- per month, was also sanctioned as expenses for 'Chirag Bati'. Obviously, the objection as to the authority of the then Ruler of Ratlam to pass the order-dated 12.12.1940 was also validly rejected as having no merit or substance.

15. Although, Abdul Salam (DW1) asserted that even after passing of the order-dated 12.12.1940 (supra), the land was being used as graveyard yet, no supportive evidence could be brought on record. On the contrary, the evidence led by the respondent clearly proved that from 1940 till 1948, the land remained in possession of the Chandalmal for the purpose of cultivation.

16. In *Sayyed Ali v. Andhra Pradesh Wakf Board* (1998) 2 SCC 642, wherein the principle that once a Wakf is always a Wakf was re-affirmed, grant of Patta in favour of Mukhajdar under the Inams Act was found to be ineffective and it was held that it does not, in any manner, nullify the earlier declaration made of the property constituting the same as a wakf. It was further held that after a wakf has been created, it continues to be so for all time to come and for further time to be governed by the wakf and grant of a Patta in favour of Mukhajdar does not affect the original character of the wakf property. However, facts of the instant case are clearly distinguishable as there was no supportive evidence to show that during the period preceding the order-dated 12.12.1940 or at any time thereafter, the land in question was used as a graveyard. Further, as indicated already, it does not form part of the adjuncts of the Mosque. The mere fact that the land in question was entered as Wakf property in the register (Ex.D-1) maintained by the petitioner

no.2, therefore, did not assume any significance.

17. To sum up, viewed from any angle, no part of entire 4535 sq. ft. of land in question could not be characterized as a Wakf property.

18. For these reasons, none of the contentions raised against legality and propriety of the judgment deserves acceptance. As an obvious consequence, no interference with a well-reasoned judgment is called for under the revisional jurisdiction.

19. The revision stands dismissed and the judgment of the Tribunal is hereby affirmed. No orders as to costs.

Revision dismissed

I.L.R. [2012] M.P., 1743

CRIMINAL REVISION

Before Mr. Justice M.A. Siddiqui

Cr. Rev. No. 360/2012 (Jabalpur) decided on 10 July, 2012

SONAL K. AMEEN (MRS.)

...Applicant

Vs.

DR. MRS. NEENA V. PATEL & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 202 & 208 - Examination of witnesses during trial - Only those witnesses who have been examined before the Trial Court at the time of taking cognizance can only be examined in Sessions Court and no other witness can be permitted to be examined even remaining complainant. (Para 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 202 व 208 - विचारण के दौरान साक्षियों का परीक्षण - केवल उन साक्षियों का परीक्षण सत्र न्यायालय में किया जा सकता है जिनका परीक्षण संज्ञान लेते समय विचारण न्यायालय के समक्ष किया गया था और किसी अन्य साक्षी के परीक्षण की अनुमति नहीं दी जा सकती, शेष शिकायतकर्ता के लिए भी नहीं।

Cases referred :

(2000) 2 SCC 230, 2008 (4) MPLJ 581, 2006(2) MPLJ 24, Cr.A. 4 and 5 of 1979, (2002) 1 SCC 655, AIR 1967 All 150, (2005) 4 CHN 440, AIR 2010 SC 2261.

Surendra Singh, Anil Khare with Som Mishra, for the applicant.

Nitin Pradhan with Pranay Goyal & Priyankush Jain, for the non-applicants.

ORDER

M.A. Siddiqui, J. - Since both the petitions have been filed against the common order passed in Complaint Case No. 272/12 dated 16.1.12 by Judl.Magistrate Ist Class, Jabalpur by which cognizance has been taken under Sections 120-B, 420,465,466, 467, 468, 471, 472,473, 474, 477/34 of Indian Penal Code (hereinafter referred to as "IPC"), so they are being decided by this common order.

2. Learned senior counsel appearing for petitioners do not want to press the relief of quashment of the aforesaid charge at this stage and made a request that they will agitate it before the appropriate forum at appropriate time. So, the only prayer is that since only 5 witnesses have been examined, so no further witness should be permitted to be examined in the Sessions Court as some offences, i.e., offences punishable under Sections 466, 467, 468, 471, 472, 473, 474 and 477 of IPC are exclusively triable by Court of Sessions by Madhya Pradesh Act 2 of 2008, and case is to be committed and will be tried by Court of Sessions. Section 202(2) proviso of Cr.P.C. is mandatory so no other witness should be allowed to be examined except the witnesses already examined by complainant no.2 himself and other Court witnesses.

3. For clarifying the legal position, it is necessary to quote the provisions relating to complaint case which are as under :-

"200. Examination of complainant. A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to

another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in-charge of a police station except the power to

arrest without warrant.

203. Dismissal of complaint.

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

204. Issue of process.

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) a summons- case, he shall issue his summons for the attendance of the accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

207. Supply to the accused of copy of police report and other documents.

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

- (i) the police report;
- (ii) the first information report recorded under section 154;
- (iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;
- (iv) the confessions and statements, if any, recorded under section 164;
- (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

208. Supply of copies of statements and documents to accused in other cases triable by Court of Session.

Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-

(i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under section 161 or section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely:

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

209. Commitment of case to Court of Session when offence is triable exclusively by it.

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) Commit, after Complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this code relating to bail, remand the accused the custody until Such commitment has been made;

(b) Subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) Send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) Notify the Public Prosecutor of the commitment of the case to the Court of Session.

4. Learned counsel for petitioners placed reliance on a decision of Apex Court in *Rosy and another vs. State of Kerala and others* (2000) 2 SCC 230 in which it has been held as per majority that for cognizance it is not necessary to examine all witnesses of complainant, complainant may examine the witnesses of his choice for making out a prima facie case. As per Hon'ble

Thomas, J. provisions of Section 208 of Cr.P.C. requiring the Magistrate to furnish to the accused, free of cost, a copy of the documents, etc. is mandatory.

5. Petitioners have also placed reliance on a decision of this Court in *Nanjiram s/o Mohanlal Lodha vs. State of M.P.* 2008 (4) MPLJ 581 wherein it has been held that offences exclusively triable by Court of Sessions are tried by the Magistrate, irregularity or non-compliance of section 202(2) proviso would not vitiate the further proceedings in all cases. Person complaining such irregularity should raise objection at the earliest stage and point out the prejudice caused or likely to be caused to him by not following the proviso. He shall be precluded from raising the objection later. It has also been observed that :-

"11. 47 (b) However, where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, the direction of investigation by the police officer is not permissible and he is required to hold inquiry by himself. During that inquiry he may decide to examine the witnesses on oath. At that stage, proviso further gives mandatory directions that he shall call upon the complainant to produce all his witnesses and examine them on oath. The reason obviously is that in a private complaint, which is required to be committed to the Sessions Court for trial, it would safeguard the interest of the accused and he would not be taken by surprise at the time of trial and it would reveal the version of the witnesses whose list is required to be filed by complainant under Section 204(2) before issuance of the process."

6. Reliance has also been placed on a single Bench judgment of this Court in *Waseem Siddique (Dr.) vs. State of M.P.* 2006 (2) MPLJ 24 wherein it has been held that the provisions of Section 202(2) proviso of Cr.P.C. is mandatory.

7. Learned counsel appearing for respondents submitted that the discretion of Court cannot be taken away and if complainant is estopped to examine the witnesses other than the examined witnesses in the Court of Session, then the other provisions of Section 311, 319 of Cr.P.C. will be frustrated. Reliance has been placed on a decision of Apex Court in *Mohanlal Shamji Soni vs. Union of India and another* (Criminal Appeal Nos. 4 and 5 of 1979, decided on February 22, 1991) and in *Shailendra Kumar vs.*

State of Bihar and others (2002) 1 SCC 655. These cases relate to provision of Section 311 of Cr.P.C. which deals with the powers of the Court.

As far as provisions of Section 311 and 319 Cr.P.C. are concerned, they are discretionary and relating to powers of the Court. While in this case duty of the complainant is to be seen who has not examined all witnesses.

8. Learned counsel for respondents submitted that since joint complaint was filed by two complainants and one complainant has been examined and the other may be examined before the Sessions Court, and as far as joint complaint is concerned, reliance has been placed on a decision in *Shital Chandra Datta vs. Babu Ram Jodaun and others* AIR 1967 Allahabad 150 wherein it has been held that joint complaint by two or more persons is a valid complainant. Same is the dictum in *Duncan Industries Ltd. and others vs. State and Ors.* 2005 (4) CHN 440 (C.R.R.No.3020 of 2004 decided on 18.03.05 by Calcutta High Court).

The decision of Apex Court in *Shivjee Singh vs. Nagendra Tiwary and others* AIR 2010 SC 2261 is worth referable wherein it has been said that provisions of Section 202 (2) of Cr.P.C. are not mandatory but directory.

9. Learned counsel for petitioners placed reliance on *Rosy and another vs. State of Kerala and others* (supra) in which Hon'ble Thomas, J. has held that provisions of Section 208 Cr.P.C. are mandatory in form. Submission of learned counsel is that statements recorded under Section 200 or 202 of Cr.P.C. or all persons examined by Magistrate, copies shall be given free of cost so as to safeguard the interest of accused and he shall not be surprised at the time of trial. Further submission of petitioners is that under Section 204(2) of Cr.P.C. no summons or warrant shall be issued against the accused until a list of the prosecution witnesses has been filed, and as per list of compliant case, witness no.1 complainants themselves, and witness no.2 to 5 have been examined and 6th number any other witness as and when required is shown. This sixth item has been vehemently objected. It is said that name of any witness has not been cited and no witness has been examined so complainant cannot examine any witness and even remaining complainant can also not be examined.

10. Learned counsel for respondents have submitted that since complaint is joint and names of complainant themselves have been shown as item no.1 so other complainant may be examined at the time of trial before the Court of Session.

11. Learned counsel for petitioners submitted that as per provisions of Section 202 (2) proviso and section 208 of Cr.P.C. those witnesses whose statements' copies are supplied can be examined and none others.

12. As per above authorities, it is clear that complainant and his witnesses who have been examined before the trial Court at the time of taking cognizance can only be examined in Sessions Court and no other witnesses can be permitted to be examined even remaining complainant. So, these petitions are partly allowed. As far as quashing of complaint is concerned, as per request made by learned counsel for petitioners of withdrawal of the above request, and as they want to reserve this right to be raised at the appropriate forum and appropriate time, this petition is disposed of with the direction that complainant and witnesses Goutam Vinay Patel, Anil Kumar Mathur, Dr.V.K.Bhardwaj, Dr. Maya Chansoria and Dr.Ajay Seth who have been examined on 23.8.11 under Section 200 of Cr.P.C. will only be examined at Sessions Court, and no other witness shall be permitted to be examined.

Order accordingly.

I.L.R. [2012] M.P., 1751

INCOME TAX APPEAL

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

I.T.A. No. 8/2001 (Indore) decided on 3 January, 2012

VINOD PRAKASH SAXENA

...Appellant

Vs.

UNION OF INDIA

...Respondent

A. Income Tax Act (43 of 1961), Section 260A - Substantial Question of Law - Word Substantial as qualifying Question of law means of having substance, essential, real of sound worth, importance or considerable. It is to be understood as something in contradistinction with technical, of no substance or consequence or academic merely. (Para 7)

क. आयकर अधिनियम (1961 का 43), धारा 260ए - विधि का सारवान प्रश्न - शब्द सारवान का विधि के प्रश्न की संज्ञा के रूप में अर्थ है सारवान, आवश्यक, वास्तविक, ठोस उपयोगिता का, महत्वपूर्ण या विचारणीय, इसे तकनीकी, महत्वहीन या व्यर्थ या शैक्षणिक मात्र से कुछ भिन्न समझा जाना चाहिए।

B. Income Tax Act (43 of 1961), Section 158B(b), 158BB - Whether returns filed by relatives could be treated as undisclosed

income - Substantial Question of Law - Whether a transaction is a genuine or bogus is a pure finding of fact and does not give rise to any substantial question of law - When charging section speaks of levy of income tax on total income of every person, it necessarily means the person who is liable to pay - Merely a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right with respect to that income. (Para 9)

ख. आयकर अधिनियम (1961 का 43), धारा 158बी(बी), 158बीबी - क्या रिश्तेदारों द्वारा प्रस्तुत विवरणी को अघोषित आय माना जा सकता है - विधि का सारवान प्रश्न - क्या संव्यवहार वास्तविक है अथवा मिथ्या है यह शुद्ध रूप से तथ्य का निष्कर्ष है और विधि के किसी सारवान प्रश्न को उत्पन्न नहीं करता - जब अधिरोपित धारा प्रत्येक व्यक्ति की संपूर्ण आय पर आयकर उद्ग्रहित किये जाने की बात करती है, इसका आवश्यक रूप से अर्थ है व्यक्ति जो भुगतान के लिए दायी है - किसी विशिष्ट आय के संबंध में मात्र किसी गलत व्यक्ति पर कर लगाया गया, निर्धारण अधिकारी उस आय के संबंध में सही व्यक्ति पर कर लगाने से प्रवृत्त नहीं।

Cases referred :

251 ITR 84, (1996) 84 Taxman 630 (SC).

J U D G M E N T

The Judgment of the Court was delivered by :
S.K. SETH, J. :- This appeal by the assessee is directed against the order dated 26.9.2000 passed by the Income Tax appellate Tribunal, Indore in Appeal No. IT (SS) A No. 12/Ind/96 for the block period 86-87 to 5.9.1995.

2. Relevant facts, which are no longer in dispute, are as under on 29.3.1995 assessee was working as District Excise officer, Ujjain. His residential house was raided and a search was carried out by D.S.P. Lokayukta and huge unaccounted investments were unearthed. Certain documents and assets were seized. On 5.9.1995 ADIT (Inv.) made a requisition u/s. 132A of the Income Tax Act, 1961 and seized from the possession of the Lokayukta Police the following valuables :-

Jewellery	14,40,345/-
Share Certificates	6,19,280/-
K.V. P.	19,000/-
I.V.P.	8,86,750/-
F.D. Rs.	2,72,357/-

3. In response to Notice, initially assessee did not file any return of income and after prolonged correspondence ultimately he filed the return in Form No. 2B for the first time on 18.7.1996. Before A.O. as regards various unaccounted investments and assets the stand of the assessee was that they do not belong to him but his parents, sister, nephews, wife, daughters and Sons. The assessment was completed on 26.9.1996 and the ACITO on detailed discussion of evidence found no substance in the contentions put forth by the assessee and held that that various investments were made by the assessee out of his own unaccounted, income, therefore he computed the net undisclosed income of the assessee for the block period at Rs. 95,00,222/- and raised/issued demand notice in the prescribed form.

4. Assessee challenged the order in appeal and by the order impugned, the Income Tax Appellate Tribunal, Bench Indore in Income Tax appeal No.1863/24/1 of 2001 partly allowed the appeal and deleted certain additions. Still dissatisfied with, the order, now this appeal was preferred before us under Section 260A of the Income Tax Act, 1961.

5. 'Appeal was admitted for final hearing on the following substantial question of law -

"Whether the income and acquisition of assets which were declared in the income tax returns filed by various relatives could be treated as undisclosed income in view of the provisions of S.158 B(b) read with S. 158 BB of the Income Tax Act. Whether the returns filled could be treated as null?"

6. Before we take up this question for considerations let us first 'deal with a point raised during the course of argument. Learned counsel for appellant referring to Section 260A(4) sought oral permission to address us on proposed question No. 2 set out in appeal memo. According to him it also involved substantial question of law. He submitted such a course is permissible in view of amplitude of powers conferred on this Court.

7. Bare perusal of provision shows that the *sine qua non* for resorting to Section 260A is the satisfaction of the Court that the appeal involves more/additional substantial question of law other than the one on which appeal was admitted for hearing. The scheme of the Act is quite clear Decisions on factual issues are within the domain of authorities and should be sorted out before the matter reaches the High Court in appeal. This section is analogous to Section 100 of the Civil Procedure Code, 1908 both these sections do not

define the expression 'substantial question of law'. A right of appeal stems from a statute, and is not inherent in every defeated suitor. The legal provisions dealing with the right of appeal to the higher forum have to be read with due regard to the qualifications, limitations and restrictions contained therein. If the words are sufficiently clear, either, for or against an appeal, there can be no issue regarding the right. Recently this legal received the attention of their Lordships of the Supreme Court in *Santosh Hazari v. Purushottam Tiwari* 251 ITR 84 and it was held as under : -.

"The word 'substantial' as qualifying 'question of law', means - of having substance, essential, real, of sound worth' important or considerable. It is to be understood as something in contradistinction with-technical, of no substance or consequence, or academic merely."

It is further observed

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case."

8. When we look at the proposed question No. 2, we find that 'does not fall within the parameters of 'substantial question of law' as explained by their Lordships in *Santosh Hazari's* supra. Even otherwise in the facts and circumstances of the case in hand, we are satisfied that the proposed question does not involve a substantial question of law.

9. Now coming to the question of law which was formulated at the time of admission, we may state that Income Tax Act is self contained code. It has the charging section as well machinery provisions. It, provides for levy of tax on income Broadly speaking, every person is bound furnish voluntary return

of his total income, if such income during the previous year, exceeds the maximum amount which is not chargeable to income tax. Failure to file proper return in time with self assessed tax may entail consequences envisaged under the Act. Filing of return of income, therefore, is the first step for the finalization assessment of the tax liability. The facts of the case show that appellant was a salaried employee of the, State Government. He had filed no return previous to date of search except for the year 1994-95 in which the income was declared' at Rs. 69,300/-. We find from orders that authorities below after careful consideration and detailed analysis of, the material arrived at the conclusion that defense put up by the appellant was not genuine but it was as well thought of attempt to cover-up investments made from the undisclosed income to avoid 'the incidence of taxation and other consequences. It is well established that a transaction is genuine or bogus is pure finding of fact and does not give rise to any substantial question of law. Income Tax is direct tax on income. When charging section speaks of levy of income-tax on the total income of every person, it necessarily means the person who is liable to pay income-tax in respect of that total income according to law. Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. See *ITO V. Ch. Atchaiah* (1996) 84 Taxman 630 (SC).

10. In view of the foregoing discussion we find no merit and substance in this appeal. Consequently appeal is dismissed and we answer the question against the assessee and in favor of the revenue. There shall be no order as to costs.

Appeal dismissed.

I.L.R. [2012] M.P., 1755

INCOME TAX APPEAL

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

I.T.A.No. 2/2012 (Indore) decided on 22 February, 2012

EXECUTIVE ENGINEER,
PWD (NH) DIVISION, INDORE
Vs.

...Appellant

THE RECOVERY OFFICER, TDS-II, INDORE

...Respondent

Income Tax Act (43 of 1961), Section 206 C(7) - Interest - Interest is required to be paid on the tax which was not collected and not on the tax liability of the deductees.

(Para 8)

आयकर अधिनियम (1961 का 43), धारा 206 सी (7) - ब्याज - ब्याज का मुग्तान उस कर पर किया जाना अपेक्षित है जिसे वसूला नहीं गया और न कि जिनसे कटौती किया जाना था के कर-दायित्व पर।

Ms. M. Raveendran, Dy. G.A. for the appellant.

ORDER

The Order of the Court was delivered by : **SHANTANU KEMKAR, J.** - This order shall govern disposal of ITA No.2 of 2012 and ITA No.3 of 2012. For the sake of convenience, facts are taken from ITA No.2 of 2012.

2. This appeal under section 260A of the Income Tax Act, 1961 (for short, the Act) is directed against the order dated 30.03.2011 passed by Income Tax Appellate Tribunal, Indore (for short, the Tribunal). By the said order the Tribunal disposed of two appeal being ITA Nos.167 and ITA 168 OF 2009 in respect of Assessment YEARS 200506 AND 2006/07.

3. The facts very briefly stated are that the appellant / assessee had awarded a contract for collecting toll from 'Kshipra Toll Plaza' situated at Dewas to M/s Kalika Enterprises, Shivpuri and M/s Laxman Electronics, Gwalior (hereinafter referred as Contractors) for the year 2004-05 and 2005-06 respectively. The appellant / assessee did not deduct the tax collected at source (for short, TCS) while collecting the amount of licence fees from the said Contractors. In the circumstances a show cause notice was issued by the Assessing Officer to the appellant raising the demand equal to the amount which the assessee ought to have collected at the time of receiving contract amount as provided under section 206C(1C) inserted by the Finance Act, 2004 w.e.f. 1.10.2004 together with interest thereon. The Assessing Officer after considering the provisions of 206C(1C) and 206(6) of the Act held that it was obligatory on the part of the appellant to have collected the tax at the time of receiving actual contract amount from the Contractors. He, therefore, raised the demand vide order dated 1.12.2006 equal to the amount not collected and interest thereon.

4. The aforesaid order dated 1.12.2006 passed by the Assessing Officer was assailed by the appellant before the Commissioner of Income Tax (Appeals 1) Indore. The Commissioner (Appeals) vide order dated 30.01.2009 partly allowed the appeal and held that the appellant / assessee is no longer liable to pay tax as it has been able to place evidence on record that the

Contractors from whom the appellant had to collect tax while receiving the licence fee have paid their due taxes on their returned income. Accordingly, the demand raised for payment of tax was deleted. However, the Commissioner (Appeals) held that the appellant is liable to pay interest in view of the provisions contained in section 206C(7) of the Act.

5. The said order of the Commissioner (Appeals) by which the order of Assessing Officer regarding interest part has been affirmed, was challenged by the appellant before the Tribunal. The Tribunal vide impugned order dated 30.03.2011 held the appellant to be liable to pay interest. It held that from the Circular dated 29.01.1997 it is clear that even if the deductees (Contractors) pay tax, the liability of the deductor (appellant) with regard to charging of interest will continue till the date of payment of taxes by the deductees (contractors). Aggrieved by the order of the Tribunal, the appellant has filed this appeal.

6. It has been contended by Ms. M Raveendran, learned Deputy Government Advocate that the learned Tribunal has committed error in holding that the appellant is liable to pay interest on the tax which was to be collected by the appellant, but was not collected. According to her, the interest was leviable only on the tax liability of the deductee.

7. We find no merit in the submissions made by learned Deputy Government Advocate for the appellant. The provision contained in section 206C (7) of the Act is very clear, which reads thus :

“ 206C(7) Without prejudice to the provisions of sub-section (6), if the [person responsible for collecting tax] does not collect the tax or after collecting the tax fails to pay it as required under this section, he shall be liable to pay simple interest at the rate of [one] per cent per month or part thereof on the amount of such tax from the date on which such tax was collectible to the date on which the tax was actually paid [and such interest shall be paid before furnishing the quarterly statement for each quarter in accordance with the provisions of sub-section (3)].

(emphasis supplied)

8. A plain reading of the aforesaid section makes it clear that if a person responsible for collecting tax does not collect the tax or even after collecting

the same fails to pay it shall be liable to pay simple interest at the rate of one per cent per month or part thereof on the amount of such tax from the date on which such tax was collectible to the date on which the tax was actually paid. Having regard to this clear provision in our considered view interest is required to be paid on the tax which was not collected by the appellant and not on the tax liability of the deductees (Contractors).

9. In the circumstances, we find no error in the orders impugned in this appeal. In our considered view, no substantial question of law is involved in this appeal warranting admission of the same. Accordingly, the appeal is liable to be and is hereby dismissed in limine.

Appeal dismissed.

I.L.R. [2012] M.P., 1758

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice M.C. Garg

M.Cr.C. No. 1219/2010 (Jabalpur) decided on 9 December, 2011

INDU KABRA (SMT.)

...Applicant

Vs.

ELIXIR INFRASTRUCTURE & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 200, Penal Code (45 of 1860), Section 420 - Complaint filed on the basis of affidavit for prosecution under Section 420 - Process issued without examining the complainant - Held - Examination of complainant under Section 200 is mandatory - Petition allowed with the direction to Magistrate to proceed further in the complaint by examining the complainant and the witnesses - Process issued quashed. (Paras 2 & 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482 व 200, दण्ड संहिता (1860 का 45), धारा 420 - धारा 420 के अंतर्गत अभियोजन के लिए शपथ पत्र के आधार पर शिकायत प्रस्तुत की गई - शिकायतकर्ता का परीक्षण किये बिना आदेशिका जारी की गई - अभिनिर्धारित - धारा 200 के अंतर्गत शिकायतकर्ता का परीक्षण आज्ञापक है - मजिस्ट्रेट को शिकायतकर्ता तथा साक्षियों का परीक्षण कर शिकायत में आगे कार्यवाही करने के लिए निदेशित करते हुए याचिका मंजूर - जारी की गई आदेशिका अभिखंडित।

Cases referred :

(2009) 1 SCC 407, (1998) (1) SCC 687.

K.L. Gupta, for the applicant.

None for the non-applicants.

ORDER

M.C. GARG, J. - In this matter, in support of the complaint only an affidavit has been filed on behalf of the petitioner in support of the allegation made therein which also includes prosecution of the petitioner u/s 420 IPC. It is submitted that notice could not have been issued to the petitioner on the basis of an affidavit only because section 200 Cr.P.C. requires examination of the complainant and his witnesses if any, which has not been done in this case.

2. Reliance has been made to a judgment delivered by the the Supreme Court in *National Small Industries Corporation Ltd Vs. State (NCT) Delhi* (2009) 1 SCC 407, which requires that except in a case where public servant is the complainant, the examination of the complainant u/s 200 Cr.P.C. is mandatory. Another judgment has been relied upon by the learned counsel for the petitioner in the case of *Associated Cement Co. Ltd. Vs. Keshavanand* reported in (1998) (1) SCC 687 wherein the Hon'ble Apex Court has observed as under :-

"22. Chapter XV of the new Code contains provisions for lodging complaints with magistrates. Section 200 as the starting provision of that Chapter enjoins on the Magistrate, who takes cognizance of an offence on a complaint, to examine the complainant on oath. Such examination is mandatory as can be discerned from the words 'shall examine on oath the complainant...' The magistrate is further required to reduce the substance of such examination to writing and it 'shall be signed by the complainant'. Under Section 203, the magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering the said statement on oath. Such examination of the complainant on oath can be dispensed with only under two situations, one if the complaint was filed by a public servant, acting or purporting to act in the discharge of his official duties and the other when a court has made the complaint."

3. In these circumstances perusal of the impugned order dated 9.5.09 shows that process was issued without examining the complainant. Against

the impugned order, petitioner even filed a revision before the Addl. Sessions Judge, Bhopal but as per order dated 24.12.09, the petitioner could not succeed.

4. The revision was dismissed for a different reason that is to say that magistrate had no right to recall his order which has not been issued.

5. In view of the judgment cited above, the petition filed by the petitioner is allowed with a direction to the magistrate to proceed further in the complaint by examining the complainant and his witnesses and then to pass an order of taking cognizance in case he finds material is there. The process issued against the petitioner is quashed. Let a copy of this order be sent to the trial court with a direction to proceed in the matter in the terms of what has been stated above.

Petition allowed.

I.L.R. [2012] M.P., 1760

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice M.C. Garg

M.Cr.C. No. 13833/2011 (Jabalpur) decided on 10 December, 2011

DINESH & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 482, 397, 301 & 311 - Application by victim for producing new witness under Section 311 allowed by trial Court - Held - Provision under Section 311 entitles a judge holding trial to record evidence even of a person who is present in Court and even to recall a witness who was summoned earlier at the instance of the prosecution or the defence or of his own, if the examination of such witness is necessary to meet the ends of justice - Section 301 has no bar over section 311 - No interference in the order passed by trial Court - Petitioner entitled to cross examine the witness - Petition disposed of. (Paras 1,4, 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 482, 397, 301 व 311 - पीड़ित द्वारा धारा 311 के अंतर्गत नये साक्षी को प्रस्तुत करने के लिए दिये गये आवेदन को विचारण न्यायालय द्वारा मंजूर किया गया - अभिनिर्धारित - धारा 311 के अंतर्गत उपबंध, विचारण करने वाले न्यायाधीश को, न्यायालय में उपस्थित किसी भी व्यक्ति की साक्ष्य अभिलिखित करने तथा ऐसे साक्षी को पुनः बुलाने के लिए भी अधिकार प्रदान करता है जिसे पूर्व में अभियोजन के या बचाव के निवेदन पर या

स्वयं से समन किया गया था, यदि ऐसे साक्षी का परीक्षण न्याय करने के लिए आवश्यक है – धारा 301 का धारा 311 पर कोई वर्जन नहीं – विचारण न्यायालय द्वारा पारित आदेश में कोई हस्तक्षेप नहीं – साक्षी का प्रतिपरीक्षण करने के लिए याची हकदार – याचिका का निपटारा किया गया।

Cases referred :

2001 CRLJ 4370, 1980 CRLJ 1159, 1999 STPL(LE) 26658 SC, 1997 (2) CRIMES SC 634.

Satyam Agrawal, for the applicants.

Chandra Kant Mishra, G.A. for the non-applicant/State.

ORDER

M.C. GARG, J. - The petitioner has come before this Court under Section 482 CrPC assailing the order passed by the revisional Court for having dismissed the revision petition filed by the petitioner against the order passed by the Additional Sessions Judge, Sehore, dated 18-10-2011 rejecting the revision petition filed by the petitioner under Section 397 CrPC aggrieved by the order passed by the Additional Sessions Judge in Criminal Case No.33/2008 [*State of M.P. vs. Dinesh and others*] whereby, an application filed by the victim under Section 311 CrPC for producing the doctor who is not a witness as per the list of witnesses filed by the prosecution along with their report under Section 173 CrPC. The petitioner wants quashing of the order of the learned Additional Sessions Judge summoning of such a witnesses on the request of the victim and also the order of the revisional court upholding the said order.

2. According to the learned counsel for the petitioner in view of Section 301 CrPC there being no permission to be granted to the victim to assist the Public Prosecutor and the Public Prosecutor having not filed an application under Section 311 CrPC and the fact that the witnesses who is sought to be produced along with record is not a part of the report filed by the police under Section 173 CrPC, the request of the victim should not have been allowed by the Court concerned. To substantiate his submission the learned counsel for the petitioner has relied upon the following decisions:

1. *Somasundaram vs. P. Chandra Bose and another*, 2001 CrLJ 4370.
2. *Kuldip Singh vs. State of Haryana*, 1980 CrLJ 1159.

3. *Shiv Kumar vs. Hukum Chand, 1999 STPL(LE) 26658 Sc.*

3. I have given my thoughtful consideration to the rival contentions of the learned counsel for the petitioner. I have also gone through the provision contained in Section 311 CrPC which is a unique provision, reads as under:

"311. Power to summon material witness, or examine person present.-

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

4. This provision is a provision which entitles a Judge holding trial to record evidence even of a person who is present in Court and even to recall a witness who was summoned earlier at the instance of the prosecution or the defence or of his own, if the examination of such witness is necessary to meet the ends of justice. Section 301 CrPC has no bearing on the powers of the Court under Section 311 CrPC.

This aspect has been considered by this Court in an elaborate judgment delivered by Hon'ble Justice Dipak Misra [Now a Judge in the Supreme Court] in the case of *Hiralal vs. State of M.P. Reported in 1997 (2) Crimes SC 634*. The entire judgement which is relevant to the issue involved in this case is reproduced hereunder for the sake of reference:

"In this revision the applicant calls in question the legal validity of the order passed by the learned Second Additional Sessions Judge, Seoni in Sessions Trial No.64/92, whereby he has refused to entertain an application filed under Section 311 of Cr. P.C. For summoning of certain witnesses.

To appreciate the rival contentions raised at the bar, I have perused the impugned order. Needless to emphasize, it is absolutely a cryptic order. The reasons given by the Court below relate only to the closer of the prosecution case. There is no discussion with regard to any other aspect. The

prosecution had also not filed any objection indicating its stand. The validity of this order is to be tested keeping the language employed u/S 311 of the Code. It is essential to refer to the provision u/S 311 of Cr. P.C. Which reads as under:-

311. Power to summon materiel witness, or examine person present.

Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person its a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

From the aforesaid provision it is crystal clear that the court has been empowered to summon any person as a witness at any stage of any enquiry, trial or other proceedings. The power is not confined to any particular class of person. The wide power has been conferred to further the ends of justice. The court keeps its mind open to perceive the desirability of any evidence being brought on record for just decision of the case. It is a cardinal principle in the law of evidence that the best available evidence should be brought before the court. If it appears to the court that evidence of a particular witness is essential for the just decision of the case, statute casts the mandate on the court to summon him. Where the evidence of any person which in the opinion of the Court is essential for a just decision of the case the court has authority to exercise its discretionary power in any of the three ways, mentioned in the first part of the section. It is settled in law if the conditions under this provision are satisfied, the court can call a witness not only on the motion of the either the prosecution or the defence, but it can do so on its own motion. The apex court in the case of *Mohanlal Shyamji Soni Vs. Union of India and others*, while dealing with the jurisdiction of the court under section 311 of the code has laid down as under :-

"It is a cardinal rule in the law of evidence that the best

available evidence should be brought before the court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of the court not only to do justice but also to ensure that justice is being done. In order to enable a court to find out the truth and render a just decision the salutary provisions of section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or reexamine any person already examined who are expected to be able to throw light upon the matter in dispute, because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated. The very usage of the words such as 'any court' 'at any stage', or 'any enquiry, trial or other proceedings', 'any persons' and 'any such person' clearly spells out that this Section is expressed in the widest possible terms and do not limit the discretion of the court in any law. However, the vary width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and dconsistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps in the fresh evidence to be obtained is essential to the just decision of the case."

Form the aforesaid decision it is luminously clear that a duty is

cast on the court to scrutinise the situation to arrive at the conclusion whether summoning of a witness for any of the purpose is essential for just decision of the case. The court is required to be guided by sense of fair play and the command of justice. The primary duty of the court is to arrive at the truth by all lawful means. In the famous trial of Warren Hastings, Edmund Burke observed thus:

"A Judge is not placed in the high situation merely as a passive instrument of the parties. He has duty of his own, independent of them and that duty is to investigate truth".

In this regard I may refer to the observation of Lumpkin J. in the case of *Epps vs. State* which reads thus:

"Counsel seek only for their clients' success, but the Judge must watch that justice triumphs."

Judged on the anvil of the aforesaid principles it is clear as day that the learned trial Judge has not dealt with the situation in proper perspective and has casually, observed that the defence could summon those persons as its witnesses. There is no discussion with regard to the concept of essentialness of the evidence to arrive at the just decision or for revelation of the truth. As the order does not meet the requisite legal parameters the same becomes indefensible and is liable to be set aside and accordingly, I do so. The learned trial Judge would be well to consider the matter afresh keeping in view the law governing the field and the observations made above. The entire exercise shall be completed within a period of six weeks from today.

The revision application is accordingly allowed."

5. In the light of the aforesaid judgment even though the victim had not sought permission of the Court for assisting the Public Prosecutor but the request made by her in relation to a report given by the doctor who saw the victim after the incident and this report becomes a material for the purpose of doing complete justice between the parties to assist the Judge to appreciate the rival submissions, i.e., the contention of the complainant and the evidence collected by the prosecution as also the case of the defence, I do not find any

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reason to interfere with the order passed by the learned Additional Sessions Judge or the revisional Court.

6. It is however, made clear that the petitioner will be entitled to cross-examine the witness on all material points including the admissibility of the report which he may produce.

With this observation the petition is disposed of.

Petition disposed of.

**I.L.R. [2012] M.P., 1766
MISCELLANEOUS CRIMINAL CASE**

Before Mr. Justice R.C. Mishra

M.Cr.C. No. 8882/2011 (Jabalpur) decided on 15 March, 2012

NAMRATA CHOPRA (MRS.) & anr.

...Applicants

Vs.

MR. ASHFAQ AHMED QURESHI & ors.

...Non-applicants

A. Penal Code (45 of 1860), Section 420 - Cheating - Same set of facts may give rise to both civil and criminal liability - Mens rea is an essential ingredient of offence of cheating - It is necessary to show that the intention to deceive was in existence at the time of making the promise.
(Para 7)

क. दण्ड संहिता (1860 का 45), धारा 420 - छल - एक ही समूह के तथ्य सिविल व दण्डिक दोनों दायित्वों को उत्पन्न कर सकते हैं - आपराधिक मनःस्थिति छल के अपराध का एक आवश्यक घटक है - यह दर्शाना आवश्यक है कि वचन देते समय प्रवचन का आशय विद्यमान था।

B. Penal Code (45 of 1860), Section 420 - Cheating - Complaint was filed alleging that applicants by deceiving into a belief, that the land forming subject matter of agreement to sell executed by them was free from all encumbrances knowing fully well that the land being earmarked as parking space for a club constructed by their brothers - Relations of applicants with their brothers were not cordial - Applicants are residents of Bombay and Pune - No material to infer knowledge that the land proposed to be sold had already been reserved for parking purpose - Not possible to hold that applicants had intention to deceive complainants.
(Para 11)

ख. दण्ड संहिता (1860 का 45), धारा 420 - छल - इस अभिकथन के

साथ शिकायत प्रस्तुत की गई कि आवेदकगण ने प्रवचन देकर विश्वास में लिया कि भूमि जो उनके द्वारा निष्पादित विक्रय के अनुबंध की विषयवस्तु है, वह सभी भारों से मुक्त है, यह भलिभांति जानते हुए कि भूमि उनके भाईयों द्वारा निर्मित क्लब हेतु पार्किंग की जगह के रूप में चुनी गई है – आवेदकों के अपने भाईयों के साथ संबंध सद्भावपूर्ण नहीं थे – आवेदकगण मुंबई एवं पुणे के निवासी – यह तथ्य ज्ञात होने का निष्कर्ष निकालने के लिए कोई सामग्री नहीं कि विक्रय के लिए प्रस्तावित भूमि को पहले ही पार्किंग के प्रयोजन हेतु आरक्षित किया गया था – यह धारणा करना संभव नहीं कि आवेदकगण का आशय शिकायतकर्ताओं को प्रवंचित करना था।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of Complaint - Possibility of discharge would not be sufficient to prevent an accused to approach High Court to have the proceedings quashed against him. (Para 13)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – शिकायत अभिखंडित की जाना – आरोप मुक्त किये जाने की संभावना, अभियुक्त को उसके विरुद्ध कार्यवाही अभिखंडित किये जाने के लिए उच्च न्यायालय के समक्ष जाने से रोकने हेतु पर्याप्त नहीं होगी।

Cases referred :

AIR 1973 SC 326, AIR 2001 SC 2960, AIR 1999 SC 1216, AIR 2005 SC 9, AIR 2008 SC 251, AIR 1998 SC 128, (1998) 1 SCC 692, AIR 1992 SC 604.

Ajay Gupta, for the applicants.

M.S. Bhatti, for the non-applicants No. 1 & 2.

Vivekanand Awasthy, for the non-applicants No. 3 & 4.

ORDER

R.C. MISHRA, J. - This is a petition, under Section 482 of the Code of Criminal Procedure, for having the proceedings, pending as R.T. No.13567/10, so far as it relates to the petitioners, before Shri Manoj Tiwari, JMFC, Bhopal, quashed. In that case, cognizance of the offence, under Section 420 of the IPC, has been taken upon the complaint made on 26.8.2010 by respondent nos.1 and 2 (hereinafter referred to as 'R1' and 'R2' respectively) against the petitioners as well as respondent nos.3 and 4 (for short 'R3' and 'R4'), who are respectively father and brother of the petitioners.

2. Allegations, as contained in the complaint, are that the petitioners had been able to cheat R1 and R2, who are builders and property developers, by

deceiving into a belief that the land forming subject matter of the agreement to sell executed by them was free from all encumbrances and to induce them to part with a sum of Rs.50 lacs as advance, knowing fully well that the land, being earmarked as parking space for the country club constructed by R3 and R4, could not be used for the purpose of construction.

3. According to the petitioners, their prosecution for the offence is an abuse of the process of the Court in view of the fact that at the time of entering into agreement to sell, they had no knowledge about the building permission obtained by R3 and R4 with whom their relations were strained in view of R4's bid to grab entire share of their mother Late Smt. Kamlesh Kapoor in the joint property under a so-called Will, that was apparently a forgery. They have further alleged that their decline to meet the unreasonable demands made by R1 and R2 had led to criminal proceedings in relation to a civil dispute. In support of these submissions, attention has been invited to the following facts—

(i) Lands situated at Village Koh-e-Fiza, bearing Khasra Nos.18/2/1/6/3 and 18/2/1/6/4, admeasuring a total area of 2.20 acres stood entered in revenue records in the following manner—

Name of Village	Khasra No.	Area	Name of Bhoomiswami
Koh-e-fiza, Bhopal	18/2/1/6/3	0.95 acres	1. Kamlesh Kapoor W/o Dr. H.S. Kapoor 2. Namrata Kapoor (petitioner no.1) D/o Dr. H.S. Kapoor 3. Dr. H.S. Kapoor
	18/2/1/6/4	1.25 acres	1. Dr. H.S. Kapoor S/o Late Prakashchand Kapoor 2. Rajdeep S/o. Dr. H.S. Kapoor 3. Amrita (petitioner no.2) D/o Dr. H.S. Kapoor

(ii) After the death of Kamlesh Kapoor, R4 made an attempt to get the land, bearing Khasra No.18/2/1/6/3, mutated

in his favour on the basis of a Will purported to have been executed by her. They raised objection to the corresponding application made by R4 before Tahsildar (Nazul), Bairagarh characterizing the Will as a false and fabricated document. However, even without entering into merits of the objection, the Tahsildar, vide order dated 28.4.2007, allowed the mutation application.

(iii) Being aggrieved, they preferred an appeal, under Section 44(1) of the M.P. Land Revenue Code, 1959, before the Sub Divisional Officer. It was allowed, by way of order-dated 10.4.2008, in the light of compromise arrived at between the parties to the effect that each one of the petitioners and R3 and R4 shall be entitled to an equal share in the lands, each comprising an area of 0.55 acres and mutation case was remanded to the Tahsildar, for deciding the same afresh upon the compromise.

(iv) During the pendency of the proceedings for mutation and partition of lands before the Revenue Court, the petitioners, on 26.11.2009, entered into an agreement to sell their shares having a total area of 1.10 acres in the aforesaid lands for a sum of Rs.1,50,93,540/- in favour of a partnership firm viz. M/s Super Builders and Developers through its partners viz. R1 and R2 and also obtained a sum of Rs.50,00,000/- as earnest money. Remaining amount of consideration i.e. Rs.1,00,93,540/- was to be paid at different stages specified in the schedule.

(v) Somewhere in March 2010, the Tahsildar passed the order directing mutation of acquisition of rights by petitioners, R3 and R4 in respect of the respective parts of the lands marked as A, B, C & D, in the map forming part of the compromise application.

(vi) As per the agreement, R1 and R2 had undertaken to pay an amount of Rs.72,12,046/- for 0.89 out of 1.10 acres of land by 19.12.2009 to the petitioners, who, in turn, were required to hand over possession of that piece of land after executing a power of attorney in favour of the proposed

purchasers. Thereafter, a sum of Rs.5,00,000/- was to be paid by R1 and R2 on 19.12.2009 whereas the balance consideration of Rs.23,81,484/- was to be paid at the time of handing over of possession of the remaining 0.21 acres of land along with a corresponding power of attorney within a period of 7 days from the date of receipt of separate Revenue Books by the petitioners.

(vii) As R1 and R2 failed to pay the remaining amount of consideration as per the schedule, the petitioners issued notice (Annex.P-8), on 11.5.2010, expressing their intention to cancel the agreement and also to forfeit the advance money.

(viii) In reply-dated 14.5.2010, alleging that along with R3 and R4, the petitioners were also involved in a conspiracy to cheat them, R1 and R2 called upon the petitioners not only to return the earnest money but also to pay a sum of Rs.50,00,000/- as compensation together with interest @ 24% per annum with a threat that in case of failure to pay the aforesaid amount, appropriate legal action would be taken against the petitioners.

4. Learned counsel for the petitioners has contended that while residing in their matrimonial homes located in Mumbai and Pune respectively, they were not expected to be aware of the fact that while obtaining permission from Municipal Corporation, R3 and R4 had proposed earmarking of the parcel of lands falling in their shares for the purpose of parking. Contents of paragraph 5 of the complaint have also been highlighted to buttress the contention that even after knowing much prior to 19.12.2009 that the land forming subject matter of the agreement to sell was to be left open as a parking place for country club, R1 and R2 had expressed intention to purchase the same by publishing a notice inviting objections to the proposed sale in a daily newspaper 'Dainik Bhaskar' on 22.4.2010 (Annex.P-7).

5. In response, learned counsel for R1 and R2 has submitted that the notice was published to fulfill relevant condition of the agreement to sell. Making reference to the corresponding contents of the application for obtaining building permission, corresponding note-sheet, the site inspection report and the sanctioned map, he has further argued that in any case, the petitioners were expected to know about the construction and status of respective parts of the

land falling in their shares in terms of the compromise. According to him, apparently, R1 and R2 are the victims of cheating committed by all members of the family including the petitioners.

6. Learned counsel for R3 and R4 has come forward to contend that they have been unnecessarily dragged into the proceedings.

7. Same transaction or same set of facts may give rise to both, a civil liability and criminal offence but mens rea is an essential ingredient of offence of cheating. To establish a charge of cheating, it is necessary to show that the intention to deceive was in existence at the time of making the promise. For this, reference may be made to the principles of law laid down by the Apex Court in *State of Kerala v. A. Pareed Pillai* AIR 1973 SC 326 and reiterated in series of decisions including the one in *S.N. Palnitkar v. State of Bihar* AIR 2001 SC 2960.

8. As further explained in *Rajesh Bajaj v. State NCT of Delhi and others* AIR 1999 SC 1216, the offence of cheating may be committed in a commercial or in a money transaction yet, the crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not.

9. In *Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque* AIR 2005 SC 9, the Apex Court has held that criminal proceedings can be quashed but such a power is to be exercised sparingly and only when such an exercise is justified by the tests that have been specifically laid down in the statutory provisions themselves. It was further observed that superior courts "*may examine the questions of fact*" when the use of the criminal law machinery could be in the nature of an abuse of authority or when it could result in injustice.

10. The core question, therefore, is as to whether a guilty intention at the inception of the transaction inducing R1 and R2 to part with the advance money was evident from the record ?

11. In the complaint itself, the petitioners have been shown as ordinarily residents of Bandra (Mumbai) and Sopan Bagh (Pune) respectively. Contents of the memo of appeal preferred by them before Sub Divisional Officer clearly reflected the nature and extent of bitterness of relationship between them and their brother viz. R4, who, according to them, had even forged a Will, said to

have been executed on 25.10.1996 by their mother Smt. Kamlesh Kapoor (since expired on 24.11.1996). The compromise application was filed before the Sub Divisional Officer on 10.4.2008 whereas the application for grant of permission to construct a Country Club was made on 18.11.2005. It was, therefore, obvious that at the time when application for the building permission was sought, relations between the petitioners and their brother were not cordial. As rightly pointed out by learned counsel for the petitioners, their purported signatures on the application for grant of permission to erect the country club do not tally with their signatures on the agreement to sell. All these facts are sufficient to exclude the element of mens rea. In such a situation, in absence of cogent evidence to infer knowledge that the land proposed to be sold had already been reserved for parking purpose, it was not possible to hold that the petitioners had the intention to deceive R1 and R2 at the time of executing the agreement to sell.

12. Further, as pointed out by a three-judge Bench of the Supreme Court in *Inder Mohan Goswami v. State of Uttaranchal* AIR 2008 SC 251, dispute about cancellation of agreement to sell property is a civil dispute and the court must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private vendetta or with an ulterior motive to pressurise the proposed vendor.

13. This apart, possibility of discharge would not be sufficient to prevent an accused to approach this Court under Section 482 of the Code to have the proceeding quashed against him (*Pepsi Foods Ltd., M/s. v. Special Judicial Magistrate* AIR 1998 SC 128). Before that, the Apex Court in *Madhavrao Jiwajirao Scindia v. Sambhajirao Chandojirao Angre* (1988) 1 SCC 692, had already re-affirmed the following guideline for exercising inherent powers to quash the proceedings at the pre-charge stage-

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose

and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage”.

14. In the light of the factual scenario as highlighted above and the well-settled position of law on the subject, even if the allegations are taken up at their face value and accepted in its entirety, no offence of cheating would be made out against the petitioners. Their case clearly falls within category nos.(1) and (7) of the cases, attracting interference under inherent powers, as summarized by the Supreme Court in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604 and re-stated in *Zandu Pharmaceutical's case* (supra).

15. Consequently, the petition is allowed and the proceedings in R.T. No.13567/10 (above), so far as they relate to petitioners, are hereby quashed.

Petition allowed.

I.L.R. [2012] M.P., 1773

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No.13223/2011 (Jabalpur) decided on 12 April, 2012

SAI TRACTORS, SAGAR

...Applicant

Vs.

SAI TRACTORS, BINA

...Non-applicant

Negotiable Instruments Act (26 of 1881), Sections 141 & 142 - Complaint by Company - If the payee is a Company, the complaint should be filed in the name of Company- Section 142 does not specify that who should represent the company- A company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney - Company means any body corporate and includes a firm or other association of individuals. (Para 5)

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएँ 141 व 142 - कंपनी द्वारा शिकायत - यदि आदाता एक कंपनी है, तब शिकायत कंपनी के नाम से प्रस्तुत करनी चाहिए - धारा 142 यह विनिर्दिष्ट नहीं करती कि कंपनी का प्रतिनिधित्व

कैसे करना चाहिए – कंपनी का प्रतिनिधित्व कोई कर्मचारी या कोई गैरकर्मचारी भी कर सकता है जिसे मुख्त्यारनामा द्वारा या संकल्प द्वारा कंपनी का प्रतिनिधित्व करने के लिए प्राधिकृत एवं सशक्त किया गया है – कंपनी का अर्थ है कोई निगमित निकाय और जिसमें फर्म या अन्य व्यक्ति संगम समाविष्ट है।

Cases referred :

2000 Cr.L.J. 2386, AIR 2009 SC 1284, 2010 (4) MPHT 472, (2010) 11 SCC 441, AIR 2008 SC 1325, (2006) 6 SCC 39.

Praveen Chaturvedi, for the applicant.

Rajesh Mendiratta, for the Non-applicant.

O R D E R

R.C. MISHRA, J. - With consent the matter is finally heard.

This is a petition under Section 482 of Code of Criminal Procedure, for quashing the proceedings pending as Criminal Case No.224/08 before the J.M.F.C., Bina. In that case, cognizance of the offence of under Section 138 of the Negotiable Instruments Act, 1881, was taken upon a complaint made by the respondent regarding dishonour of cheque for a sum of Rs.19,70,228/-.

2. For the sake of convenience, the petitioner no.1, M/s Sai Tractors and Traders, Sagar and the respondent M/s Sai Tractors and Traders, Bina shall be referred to as 'Sagar Firm' and 'Bina Firm' respectively.

3. According to the petitioners, their prosecution for the offence is an abuse of the process of the Court as the cheque was not issued for discharge of legally recoverable debt or liability. To buttress the contentions, reference has been made to the following background facts -

(i) Shivkesh Chandra Sachar (for short 'Shivkesh'), who has filed a complaint on behalf of Bina Firm, was also a partner of the petitioner no.1/ Sagar Firm.

(ii) The retirement deed dated 31.3.2006 (Annexure P-6) referred by Shivkesh was an unilaterally executed document as it did not contain signatures of other partners of the Firm and was not in conformity with the Clause 10 of the Partnership deed (Annexure P-1), that reads as under -

"10. That, in the event of retirement of any partner, final account will be the date of retirement shall be made up and anything found due from the outgoing

partner shall be recovered from him in a way mutually decided and anything is found due to the outgoing partner it shall be paid to him as decided by the partners".

(iii) There was no occasion to incur liability to pay an amount of Rs.19,70,228/- covered by the cheque as the Sagar Firm was incurring huge financial liability and was running in loss and this fact was also highlighted by Debt Recovery Tribunal in its judgment dated 12.5.2010.

(iv) As reflected in the partnership deed (Annexure P-3), respondent no.1 is not a registered partnership Firm.

In response, while making extensive reference to the documents filed along with the reply, learned counsel for respondent has submitted that -

(i) It was upon a settlement arrived at between the parties that the business being run by M/s Sai Tractors and Traders at Sagar and Bina was bifurcated.

(ii) In accordance with the terms of the settlement reduced in writing (Annexure R-2), Shivkesh had sought retirement from the Sagar Firm and

(iii) The resignation deed was acted upon by informing the Area Manager of Escort Ltd., Income Tax Officer and Sales Tax Officer concerned and the letter addressed to Area Manager of Escort Ltd. bore signatures of Smt. Suchitra Sachar, impleaded as the partner of accused/Petitioner no.1 Sagar Firm.

4. In support of the contention that the complaint as to dishonour of cheque made by unregistered partnership firm viz. the respondent, is not maintainable, learned counsel for the petitioner has placed implicit reliance on a Division Bench decision of the Andhra Pradesh High Court in *Mr. Amit Desai v. M/s Shine Enterprises* 2000 Cri.L.J. 2386.

5. However, as explained by the Supreme Court in *National Small Industries Corporation Ltd. v. State* AIR 2009 SC 1284, if the payee is a company, necessarily the complaint should be filed in the name of the company. Section 142 of the Act does not specify who should represent the company, if a company is the complainant. A company can be represented by an

employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney. Needless to point out that in view of the explanation appended to Section 141(2) of the Act, "company" means any body corporate and includes a firm or other association of individuals.

6. Still, placing reliance on the decision of a coordinate Bench of this Court in *Mahesh Shrivastava v. Ramakant Shrivastava* 2010 (4) MPHT 472, learned counsel for the petitioners has submitted that the offence, under Section 138 of the Act, would not be made out in view of the fact that the cheque was issued after settlement of accounts of the partnership. However, in that case, the conviction of the revisionist was set aside on the ground that the complainant had failed to prove that the cheque was given in respect of any legally enforceable liability whereas in the present case, the evidence is yet to be recorded.

7. A three-Judge Bench in *Rangappa vs. Sri Mohan* (2010)11 SCC 441 has already overruled the observation made in *Krishna Janardhan Bhat vs. Dattatraya G. Hegde* AIR 2008 SC 1325 (wherein the view expressed in *M.S. Narayan Menon v. State of Kerala* (2006) 6 SCC 39) was reaffirmed) to the effect that existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. As explained therein, -

"Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation."

8. For these reasons, I am of the view that it is not a fit case for interference under the inherent powers.

9. The petition, therefore, stands dismissed. However, learned trial Magistrate is expected to expedite the trial.

10. As an obvious consequence, stay order dated 21.11.2011 is hereby vacated.

Petition dismissed.

I.L.R. [2012] M.P., 1777
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra

M.Cr.C. No. 4327/2011 (Jabalpur) decided on 2 May, 2012

DEBABRATADEY

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Wild Life (Protection) Act (53 of 1972), Sections 2, 9, 51, 57 & 58 - Presumption - Presumption can be raised only when the accused is found to be in possession, custody or control of the captive animal, trophy etc. - Dead bodies of monkeys were recovered from tailing dam and there is nothing on record to suggest that applicant was in any way involved in causing wild animals to fall down in the dam - No averment that applicant is sought to be made liable for unfortunate incident, was in charge of and responsible for the conduct of the business of the company at the relevant point of time - No offence under the Act is made - Complaint quashed. (Para 5 & 6)

वन्य जीव (संरक्षण) अधिनियम (1972 का 53), धाराएँ 2, 9, 51, 57 व 58 - उपधारणा - उपधारणा तभी की जा सकती है जब अभियुक्त के कब्जे में, अभिरक्षा में या नियंत्रण में बंधुआ पशु, ट्रॉफी इत्यादि पाया जाता है - टेलिंग डैम से बंदरों के मृत शरीर बरामद किये गये और इस सुझाव के लिए अभिलेख पर कुछ नहीं कि आवेदक किसी प्रकार से वन्य प्राणियों को बांध में गिराने में सम्मिलित था - कोई प्राक्कथन नहीं कि आवेदक दुर्भाग्यपूर्ण घटना के लिए दायी है तथा सुसंगत समय पर कम्पनी के व्यवसाय का संचालन करने के लिए जिम्मेदार एवं उसका प्रभारी था - अधिनियम के अंतर्गत कोई अपराध गठित नहीं होता - शिकायत अभिखंडित।

Case referred :

AIR 1992 SC 604.

R.K. Sanghi, for the applicant.

Ajay Tamrakar, P.L. for the non-applicant/State.

ORDER

R.C. MISHRA, J. - Arguments heard.

This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), for quashing of the proceedings, pending as Criminal Case No.20/10 in the Court of Shri Madhav Rao Ghodki, Baihar Distt.

Balaghat. In that case, cognizance of the offences under Sections 2, 9, 51, 57 and 58 of the Wild Life (Protection) Act, 1972 has been taken upon a complaint made by the Forest Range Officer, Birsa Distt. Damoh.

2. Allegations made in the complaint are that on 5.1.2010, as many as 15 monkeys (*macaca mulatta*) died after being caught in a muddy area of tailing dam maintained by Malanjkhanda Copper Project of Hindustan Copper Ltd. at Baihar, Distt. Balaghat. At the relevant point of time, the petitioner was working as Assistant General Manager (Concentrator) in the Company.

3. Learned counsel for the petitioner has submitted that his prosecution for the offences is an abuse of the process of the Court as it was a case of sheer accident. In support of the arguments, attention has been invited to the following facts -

(i) Malanjkhanda Copper Project was established in 1982. The project has been set up by Hindustan Copper Ltd. to extract copper ore through an open pit mine.

(ii) Wet grinding is done in the ball mill and its output is sent to flotation cell where the copper is collected whereas waste material is dispatched to tailing dam by pumping.

4. Before entering into the merits of the contention, it would be necessary to advert to the provisions of the Act, as mentioned in the complaint -

Section 2(16) of the Act defines hunting as under -

Hunting with its grammatical variations and cognate expressions, includes :-

(a) killing or poisoning of any wild animal or captive animal and every attempt to do so;

(b) capturing, coursing, snaring, trapping, driving or baiting any wild or captive animal and every attempt to do so;]

(c) Injuring or destroying or taking any part of the body of any such animal or, in the case of wild birds or reptiles, damaging the eggs of such birds or reptiles or disturbing the eggs or nests of such birds or reptiles;

Section 9. Prohibition of hunting. - No person shall hunt

any wild animal specified in Schedules I, II, III and IV except as provided under section II and section 12.

Section 51 enumerates the penalties

Section 57. Presumption to be made in certain cases.-

Where in any prosecution for an offence against this Act, it is established that a person is in possession, custody or control of any captive animal, animal article, meat, trophy, uncured trophy, specified plant, or part or derivative thereof, it shall be presumed, until the contrary is proved, the burden of proving which shall lie on the accused, that such person is in unlawful possession, custody or control of such captive animal, animal article, meat, trophy or uncured trophy.

Section 58. Offences by companies.-(1) *Where an offence against this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence against this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.-*For the purposes of this section,-*

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

5. Apparently, the presumption, under Section 57 of the Act, is attracted only when the accused is found to be in possession, custody or control of the captive animal, trophy etc. whereas in the instant case, dead bodies of the monkeys were recovered from tailing dam and there was nothing on record to suggest that the petitioner was, in any way, involved in causing wild animals to fall down in the dam.

6. The complaint nowhere contains such an averment that the petitioner sought to be made liable for the unfortunate incident resulting in deaths of monkeys was in charge of and responsible for the conduct of the business of the company at the relevant point of time.

7. To sum up, even if the allegations made against the petitioner in the complaint, are taken at their face value and accepted in their entirety, the offence under the Act would not be made out. As such, the case against the petitioner falls under categories (1) and (3) of the cases, as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting interference under the inherent powers.

8. The petition is allowed and the proceedings in Cri. Case No.20/10 (above) are hereby quashed.

C.C. as per rules.

Petition allowed.

I.L.R. [2012] M.P., 1780

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.D. Saxena

M.Cr.C. No. 2931/2012 (Gwalior) decided on 3 May, 2012

PARSADILAL

Vs.

STATE OF M.P.

...Applicant

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482, Essential Commodities Act, (10 of 1955), Section 6E - Bar of

Court to release vehicle -Section 6E Bars jurisdiction of courts in releasing the vehicles/commodity in certain cases but do not take away the power of High Court under inherent jurisdiction - High Court has jurisdiction to pass an order to release the commodity or seized vehicle. (Para 6)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 482, आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6ई-वाहन मुक्त करने के लिए न्यायालय का वर्जन - धारा 6ई कतिपय प्रकरणों में वाहन/वस्तु मुक्त करने में न्यायालयों की अधिकारिता वर्जित करती है किन्तु अंतर्निहित अधिकारिता के अंतर्गत उच्च न्यायालय की शक्ति को प्रभावित नहीं करती - उच्च न्यायालय के पास वस्तु अथवा जब्त वाहन मुक्त करने का आदेश पारित करने की अधिकारिता है।

B. Essential Commodities Act, (10 of 1955), Sections 6A, 6C & 6E - Alternate Remedy - Applicant must first avail the alternate remedy by filing application before the Competent Authority for release of vehicle - Competent Authority should dispose off the application within a month and release the vehicle on supurdnama after collecting security - Security not to exceed market price at the time of seizure - Petition disposed of. (Para 13)

ख. आवश्यक वस्तु अधिनियम (1955 का 10), धाराएँ 6ए, 6सी व 6ई - वैकल्पिक उपचार - वाहन की मुक्ति के लिए आवेदक को सर्वप्रथम सक्षम प्राधिकारी के समक्ष आवेदन प्रस्तुत करने का वैकल्पिक उपचार अपनाना चाहिए - सक्षम प्राधिकारी एक माह के भीतर प्रतिभूति प्राप्त कर सुपुर्दनामा पर वाहन मुक्त करते हुए आवेदन निराकृत करे - प्रतिभूति जब्ती के समय के बाजार मूल्य से अधिक न हो - याचिका निराकृत।

Cases referred :

AIR 1986 AP 82, 2011 (2) EFR 574, AIR 1990 SC 1849, 1990 CR.L.J. 1756,

Sanjay Bahirani, for the applicant.

Mukund Bhardwaj, P.P. for the non-applicant/State.

O R D E R

G.D. SAXENA, J. - This petition under Section 482 of the Code of Criminal Procedure 1973 has been submitted for exercising the inherent powers by this court with a prayer to set aside the order of the trial Judge dated 27th March 2012 in relation to Crime No. 20/12, registered by Police Station Survaya which was confirmed on revision bearing No. 49/12, vide order dated 12th April 2012 by the learned Sessions Judge Shivpuri (M.P.), refusing to issue directions for releasing the seized vehicle (Truck No. MP 07 G 4366), owned by the petitioner, on interim supurdginama, till finality of the confiscation proceedings pending before the competent authority.

2. The facts, in short, just for the decision of the petition are that on 2nd March 2012, 180 bags (near about 80 Qu.) of wheat belonging to the Public Distribution System were found to have been illegally transported in the offending vehicle for sale in the open market. On information, the truck with goods was intercepted and was seized by the Assistant Supply Officer Shivpuri. After requisite inquiry, the FIR was lodged in the Police Station Survaya. Investigation was put in motion. After seizure was effected, the confiscation proceedings were instituted before the Collector. The petitioner had applied for delivery of the seized truck under Section 451/457 of Cr.P.C. before the Court of JMFC Shivpuri, but his application was rejected. On revision before the learned Sessions Judge, the said order was affirmed, hence, this petition.

3. The contention of the learned counsel appearing for the petitioner is that the impugned orders of the trial Judge as well as the revisional court are not in consonance with the provisions of law. It is contended that the learned two courts-below committed grave error in not releasing the seized truck under the provisions of Essential Commodities Act on the ground that the seized vehicle is subject to the confiscation proceedings which are pending before the District Magistrate. It is submitted that the learned Sessions court had the authority under the law to grant the interim relief including the interim delivery on supurdginama till finality of the confiscation proceedings before the court of law. It is stated that the petitioner is the legal and registered owner of the seized vehicle, who is

also ready to comply with all the conditions as may be imposed by the court. Accordingly, it is prayed that by allowing the petition appropriate directions may be issued to the competent court/authority to release the vehicle in question subject to furnishing supurdginama in accordance with the terms of the order of this court.

4. The learned Public Prosecutor appearing on behalf of the State, on the other hand, opposed the petition of the petitioner for delivery of the seized vehicle used for the purpose of transportation and selling of the wheat belonging to Public Distribution System in the open market. It is, thus, submitted that the orders passed by the courts-below being according to the law, deserve to be upheld. Therefore, it is prayed that by confirming the aforesaid orders passed by the two courts below, the petition may be dismissed.

5. The only question required to be determined in this case is whether the impugned order dated 12/4/12 requires any interference under the revisional jurisdiction?

6. It is not in dispute that the competent authority is invested with power to seize and confiscate essential commodity, under Section 6A of the Essential Commodities Act, 1955 (hereinafter referred to as 'Act'). Any animal, vehicle, vessel or any other conveyance used in carrying such essential commodity could also be seized under sub-clause (c) of Section 6A, which reads as follows:

6-A. Confiscation of essential commodity.

(1) Where any [essential commodity is seized] in pursuance of an order made under Section 3 in relation thereto, [a report of such seizure shall, without unreasonable delay, be made to] the Collector of the district or the Presidency town in which such [essential commodity is seized] and whether or not a prosecution is instituted for the contravention of such order, the Collector [may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied] that there has been a contravention

of the order [may order confiscation of -

(a) ****

(b) ****

(c) any animal, vehicle, vessel or other conveyance used in carrying such essential commodity:]

Under Section 6B, the competent authority is bound to issue show cause notice to the owner of such commodity, package or vehicle before confiscation. A remedy by way of appeal is prescribed under Section 6C, as quoted hereunder:

6-C. Appeal. - (1) Any person aggrieved by an order of confiscation under Section 6A may, within one month from the date of the communication to him of such order, appeal to [the State Government concerned and the State Government] shall, after giving an opportunity to the appellant to be heard, pass such order as it may think fit, confirming, modifying or annulling the order appealed against.

Section 6E jurisdiction of courts in certain cases, but that do not take away the power of the High Court under inherent jurisdiction. Therefore, it is evident that the High Court has jurisdiction to pass an order to release the commodity or the seized vehicle under Section 482 of Cr.P.C.

7. In the case of *G. Subbarama Naidu Vs. Joint Collector Chittoor & another* (AIR 1986 AP 82), the Division Bench has observed:

"We gain support for our view from the proviso to S. 6A of the Essential Commodities Act, which reads as under:

"Provided further that in the case of any vehicle, vessel or other conveyance used for the carriage of goods or

passengers for hire the owner of such animal, vehicle, vessel or other conveyance shall be given an option to pay, in lieu of its confiscation, a fine not exceeding the market price at the date of seizure of the essential commodity sought to be carried by such animal, vehicle, vessel or other conveyance".

This proviso makes it abundantly clear that the Legislature in its wisdom felt that the vehicle need not be confiscated even if it is involved in a series of offences and it should be released if the owner is prepared to pay fine not exceeding the market price at the date of seizure of the essential commodities."

(8) Further, in *Mewa lal Sharma Vs. State of M.P. through Police Station Mihona District Bhind* 2011 (2) EFR 574 this court held:-

"While considering the facts that applicant is registered owner of the seized vehicle no prolific purpose would be served by letting the vehicle idle in the police station for such long period. In view of the aforesaid. The impugned order is having apparent perverse and as such it requires interference in this revision hence impugned order dated 06th August 2010 is set aside with direction to the trial court that tractor trolley bearing No. MP 06 A 7066 be released on interim Supurdginama of applicant on his furnishing surety bond and personal bond of Rs. One Lakh with the condition that during investigation whenever required applicant will produce that vehicle and shall not alienate, dispose of or transfer that vehicle and also produce it before. the collector if confiscation proceedings are initiated concerning that vehicle and the aforesaid release of the vehicle will be subject to outcome of confiscation proceedings if initiated."

(9) In *State of Madhya Pradesh Vs. Rameshwar Rathore* 1990 (AIR SC 1849=1990 Cr. L. J. 1756.) the Apex court held:

"It was next contended by the respondent before the High Court that the Criminal Court was empowered under S.7 of the Act to confiscate the vehicle after due and proper inquiry and therefore the proceedings by the District Collector under S.6A and S.6B of the Act should be quashed. Reliance was placed on several decisions and authorities. Our attention was drawn to the decision of the Mysore High Court in the case of *The State v. Abdul Rasheed*, AIR 1967 Mysore 231 : (1967 Cri U 1661); *Sri Bhārat Mahey v. State of U.P.*, 1975 Cri U 890 (All) as well as the decision of the learned single Judge in *State of M.P. v. Basant Kumar*, 1972 Jab U Short Note No. 99. On a consideration of the relevant authorities, the High Court came to the conclusion that the criminal Court had jurisdiction to deal with the matter. Mr. Deshpande sought to argue that in view of the enactment of the provisions of S.6A as well as S.7 of the Act, it cannot be held that the criminal Court continued to retain jurisdiction. He submitted that in view of the enactment of these provisions, it would be useless to hold that the criminal Court continued to retain jurisdiction, otherwise the very purpose of enacting S.6A read with S.7 would be defeated. We are, however, unable to accept this contention because normally under the Criminal Procedure Code, the Criminal Courts of the country have the jurisdiction and the ouster of the ordinary criminal Court in respect of a crime can only be inferred if that is the irresistible conclusion flowing from necessary implication of the new Act. In view of the language used and in the context in which this language has been used, we are of the opinion that the High Court was right in coming to the conclusion that the Criminal Court retained jurisdiction and was not completely ousted of the jurisdiction. In that view of the matter, the High Court was therefore right in passing the order under consideration and in the facts and circumstances of the case to return the vehicle to the respondent on furnishing the security."

(10) Learned Public Prosecutor appearing for the respondent/State, on the other hand, submitted that there being an alternative remedy of appeal, generally High Court should not entertain a petition. Controverting his submission, learned counsel appearing for the petitioner, contends that the alternative remedy is not efficacious and the petitions for releasing the vehicle are not disposed of in time by the competent authority and, therefore, the interference by this court in such matters are sought.

(11) Whenever petition is received from the owners of the vehicles requesting release, normally orders are passed within a reasonable time for the release of the vehicle after collecting security as provided in the rules, pending enquiry under Section 6A of the EC Act, 1955 by the competent authority. But in certain cases the owners of the vehicle approach the High Court without either presenting an application to the appropriate forum requesting the release of the vehicle, or concealing the fact of pendency of enquiry of the case before the authority under Section 6A of the EC Act and obtain release order from the High Court.

(12) From the aforesaid, it will be evident that there is not only an alternative remedy available, but such remedy is also efficacious. In fact, orders are passed in many cases by the appellate authority to release the vehicle on certain conditions.

(13) In the facts and circumstances, while this Court is not inclined to interfere with the impugned order, observes as follows:

a) The petitioner shall first avail the alternative remedy before the competent authority for release of his vehicle for the grounds and reasons as may be taken by the aggrieved person;

b) In case such application for release of the vehicle is filed, the competent authority/appellate authority will dispose of the application immediately, preferably within a period of one month from the date of this order and release the vehicle in question to the petitioner on supurdginama, after collecting security as provided in the rules, pending enquiry under Section 6A of the EC Act, 1955, which

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would not be exceeding the market price at the date of seizure of the vehicle.

(14) The petition stands disposed of with the aforesaid directions.

Petition disposed of.

I.L.R. [2012] M.P., 1788

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.D. Saxena

M.Cr.C. No. 6080/2011 (Gwalior) decided on 10 May, 2012

RAJKUMAR PANDEY

...Applicant

Vs.

STATE OF M.P. & ors.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent Power of High Court - For preventing filing false and fake medical certificate by accused to seek temporary bail - Direction issued to prevent such irregularities -

- (i) Enquiry to be made for the period of 01.01.11 to 31.12.11, for the bail applications made on the basis of suspected false and fake medical certificate.**
- (ii) Enquiry Officer will suggest the measures to prevent such unhealthy tradition.**
- (iii) Enquiry Officer will also ascertain the erring officer involved in this.**
- (iv) Place of enquiry will be of D.J. (Inspection & Vigilance), Gwalior; enquiry like criminal court as per provisions of Cr.P.C.**
- (v) Registrar will short out such cases and provide the relevant information for concerned period in tabulated manner.**
- (vi) Administrative officer of Central Jail, Gwalior will coordinate to enquiry officer in all respect.**

(vii) **Dean of G.R. Medical College, Gwalior provides the relevant information within one month.**

Necessary detailed directions are made in this regard for proper execution of the order - Petition disposed. (Paras 10 & 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - उच्च न्यायालय की अंतर्निहित शक्ति - अभियुक्त द्वारा अस्थायी जमानत पाने हेतु मिथ्या व नकली चिकित्सा प्रमाण पत्र प्रस्तुत करने से रोकने के लिए - उक्त अनियमितताओं को रोकने के लिए निदेश जारी किये गये -

- (1) 01.11.11 से 31.12.11 की अवधि में संदेहास्पद मिथ्या व नकली चिकित्सा प्रमाण पत्र के आधार पर प्रस्तुत जमानत आवेदनों की जांच की जावे।
- (2) जाँचकर्ता अधिकारी उक्त अवांछनीय परम्परा को रोकने हेतु सुझाव देंगे।
- (3) जाँचकर्ता अधिकारी इसमें शामिल दोषी अधिकारी का पता भी लगायेंगे।
- (4) जाँच का स्थान जिला न्यायाधीश (निरीक्षण व सतर्कता), ग्वालियर होगा, जाँच द.प्र.सं. के प्रावधानों के अनुसार आपराधिक न्यायालय के समान होगी।
- (5) रजिस्ट्रार उक्त प्रकरणों को छाटेंगे और संबंधित अवधि की सुसंगत जानकारी तालिका में उपलब्ध करायेंगे।
- (6) केन्द्रीय जेल, ग्वालियर का प्रशासनिक अधिकारी, जाँचकर्ता अधिकारी को जाँच में हर प्रकार से समन्वित करेंगे।
- (7) जी.आर. मेडिकल कॉलेज, ग्वालियर के डीन सुसंगत जानकारी एक माह के भीतर प्रदाय करेंगे।

आदेश के उचित क्रियान्वयन हेतु इस संबंध में आवश्यक विस्तृत निदेश दिये गये - याचिका निराकृत।

Y.K. Pathak & Prashant Sharma, for the applicant.

Pramod Pachori, P.P. for the non-applicants No. 1,2,4,5 & 6/ State.

Ankur Maheshwari, for the non-applicant No.3.

O R D E R

G.D. SAXENA, J. - By this petition preferred under Section 482 of the Code of Criminal Procedure 1973, the petitioner is praying for issuing appropriate directions having exercised inherent jurisdiction by this court for preventing the abuse of the process of law to secure the ends of justice so as to deprecate the practices for filing false and fake medical certificates by the accused with intend to seek temporary bail on the ground of serious ailment, being a grave offence in the eyes of law. Under these circumstances, suitable directions to prevent such irregularities in issuing the fake and false certificate by the erring officials in future with an enquiry into such serious lapses committed by them during the period from 1st January, 2011 till 31st December, 2011 year 2011 to be conducted by some competent authority within a stipulated time are solicited from this court.

2. The facts leading to filing this petition are that the accused Puchchi @ Himanshu Gupta/respondent No.3, involved in Crime No. 141/2011 for committing offence punishable under Sections 302, 247, 323, 294, 147, 148 and 149 of I.P.C. During custody, the respondent/accused filed an application under Section 439 of Cr.P.C. being Misc. Cri.C.No.4735/11. Meanwhile, due to sickness, he moved I.A.No. 7325/2011 for his temporary release on bail before this court. Alongwith the application (I.A.No. 7325/2011) filed with the main bail application, the accused furnished certain medical prescriptions from J.A. Hospital, Gwalior for perusal of this court. While considering his prayer, this court by an order dated 21st July, 2011 directed the State to submit a medical report regarding ailment of the applicant, within ten days.

3. It is submitted by the learned counsel for the petitioner that after passing the order aforesaid, the report from Jail doctor was filed on 25th July 2011 and as per report, the accused/respondent was found to have been suffering from Hepatitis-B infection. On raising objection by the learned Public Prosecutor on the report of the Jail doctor dated 25th July, 2011, this court again vide order dated 1st August 2011 came to

hold as under:-

“Learned P.P. is directed to get applicant examined by medical board and his blood sample is to be taken in presence of specialist of Microbiological Department. Medical report of the applicant be submitted within ten days.”

4. In compliance of the aforesaid directions of this court dated 1st August 2011, a Medical Board was constituted consisting of Dr. Vaibhav Mishra, Dr. Mahendra Garg and Dr. Rishika Khetan working in the Microbiological Department of J.A. Hospitals. After examination by the Medical Board, the report dated 6th August 2011 was forwarded to the Superintendent of Central Jail Gwalior. As per the opinion contained in the report of the Department of Microbiology dated 6th August 2011 at col. No.6 Australia-Antigen(HBsAg)– was seen Negative. The said report was filed on behalf of State before this court.

5. At the time of arguments in the main bail application (Misc. Cri. Case No. 4735/2011), learned counsel appearing for the petitioner seeks permission to withdraw the bail application on behalf of present petitioner which was accorded. Consequently, the application was dismissed as withdrawn vide order dated 10th August, 2011. Thereafter, an inquiry was conducted on 19th August, 2011 into the documents by the Prof. & Head of the Department of Biochemistry, G.R. Medical College, Gwalior. It is mentioned in the report dated 19th August, 2011 that during inspection of the routine test report register and L/9 test report register kept in the Microbiology Department, at Sr. No. 9 there was no name of Puchchi @ Himanshu mentioned and name of other patient was mentioned which means that accused Himanshu was not examined on the said day and time by the concerned department. It is also mentioned that on perusal of the disputed report of the accused Himanshu, signatures of the Test Officer conducting the tests were found false. Therefore, it was opined that the report of the accused was false and frivolous.

6. Learned counsel appearing on behalf of petitioner, as well as the learned Panel Lawyer representing the State is of the same grievance that the matter under consideration in this petition is of serious nature. It is submitted that in all cases relating to the serious crime where the relief of bail or suspension of sentence under Section 389 of Cr.P.C. are refused on merits, then after connivance with the authorities concerned and having some ulterior motive, the false medical certificates without examination by the proper Experts are prepared only for achieving the release of the accused detained under custody of Central/District/Sub Jails of the area and under the shelter of such false and fabricated certificates, it is prayed that the prisoners/detainue be bailed out temporarily/permanently on medical grounds. Learned counsel submitted that it is a need of time that the enquiry be ordered to be conducted by some efficient Judicial/Administrative officials with the assistance of the senior officials of the concerned departments to find out the truthfulness or otherwise of the test reports and the medical reports/certificate issued by the medical authorities appointed/posted in jails, duly signed by the authorities/members of Medical Board working including the test reports prepared after tests conducted and examination by the authorities of the Medical College/ Hospitals within a stipulated period.

7. After considering the advisory and suggestive parameters to check and deprecate such practices, with the consent of the learned counsel for the parties, this court deems it proper to appoint the District Judge (Inspection and Vigilance) Gwalior Region to enquire into the matter relating to seriousness of the crimes.

8. As per suggestions, the team of the following members is constituted to make a thorough prob to find out the truthfulness of issuing false and fabricated certificates by the jail/hospital authorities under the garb of which, the prisoners are benefited wrongfully keeping the courts in dark:-

- (i) The Additional District Magistrate, district Gwalior;
- (ii) The Additional S.P. of Gwalior City;

(iii) The Administrative Officer/Jail Superintendent of the Central Jail;

(iv) The Administrative Officer of G.R. Medical College; and

(v) The Chief Medical Officer posted in the J.A. Hospital Gwalior.

9. The aforesaid team shall assist the Enquiry Officer to hold an enquiry. All the documents and information in relation to the enquiry shall be made available by the concerned departments well in time to the Enquiry Officer. They shall render their full co-operation and would also provide Technical Experts from their respective departments, if required. The Enquiry Officer so appointed shall convene and conduct the meeting of the officers mentioned above and other Technical Officers for collecting the necessary information subject to the enquiry and for further discussion, as and when required.

NATURE OF THE ENQUIRY

10. The nature of the enquiry is to gather as to in how many cases the relief of bail or suspension of sentence under Section 389 of Cr.P.C. was refused on merits and after that interim bail applications on the ground of serious ailment were filed during the period from 1st of January, 2011 till 31st December, 2011, on the basis of false and fake certificates issued by the Hospital Authorities, which were produced before the court with an ulterior motive to get the interim bail for further advance treatment of serious ailment, not available in Jail Hospital or local/ JA Hospital/Medical College Gwalior. Under such circumstances, the following directions in the opinion of this court are necessary to be issued to conduct an enquiry into those matters:-

(1) The enquiry shall be made in relation to the suspected false and fake certificates and medical prescriptions/pathological reports on serious ailment of

prisoners issued by the Medical Officers of the jail or hospitals concerned, during the period from 1st of January, 2011 till 31st of December, 2011 in relation to the cases referred to by this court on filing applications for bail/temporary suspension of sentence by the accused;

(2) The Enquiry Officer shall also suggest the safety measurements to prevent the unhealthy tradition of issuing the false and fake treatment papers and certificates in future;

(3) The Enquiry Officer shall also ascertain the erring officials involved in issuing such fake and false certificates and the medical prescription and pathology reports in relation to cases of serious ailing persons detained in jails;

(4) The place of enquiry will be the office of the District Judge ((Inspection and Vigilance)) Rescource Road Gwalior. He shall adopt the procedure for enquiry like criminal courts, as per provisions of criminal law;

(5) It is hereby directed that the Registrar of this bench shall sort out such cases and provide the relevant information in tabulation form for the period mentioned above to the Enquiry Officer within a period of one month from the date of this order with respect to such accused who remained unsuccessful in obtaining bail/suspending sentence on merits before this court and ultimately moved on the ground of ailment and succeeded to remain on bail or suspend his sentence with further extension of bail period from time to time after filing fake and false medical certificates from the hospital/jail authorities;

(6) The Administrative Officer from the Central Jail/District Jail Gwalior shall provide necessary information to the Enquiry Officer within a period of one month from the date of order of this court to the effect that in compliance of the

order of this court/other courts concerned, they referred the prisoners/detenues to the respective Hospitals for their medical check-up/examination on serious ailment and after getting the reports from concerned hospitals, such reports were submitted before the court for consideration;

(7) It is directed that the Dean of the G.R. Medical College, Gwalior or any other officer appointed in that behalf shall make relevant information available in tabulation form to the Enquiry Officer within a period of one month from the order of this court to the effect as to how many under trial/ convicted prisoners in the light of the orders of the courts were medically and pathologically examined with the results of the examination/tests;

(8) The Principal Registrar of this Bench and the Dean of G.R. Medical College including the Supdt. of the Central Jail shall extend their full cooperation to the Enquiry Officer, as and when required by him during enquiry;

(9) All the documents, records and the registers relating and subject to the enquiry shall be delivered/made available in a sealed cover to the Enquiry Officer as and when required by him;

(10) The enquiry shall be concluded within a period of six months from the date of this order positively;

(11) The proceedings of the enquiry or its conclusion shall not in any way effect the prisoners/under trials, who are seriously ill or admitted for their treatment by the Medical Specialist posted in the J.A. Hospitals/G.R. Medical College, Gwalior or outside by the Experts in the medical field. On the other hand, the enquiry report shall suggest safety measurements as a guideline for future precautions to the authorities, which shall be strictly followed;

(12) In case of any difficulty arises in conduction of the enquiry, the Enquiry Officer shall report to the Bench and on the direction of this court, the Additional Advocate General shall provide necessary aid to the Enquiry Officer so as to win over the difficulties well in time.

11. Subject to above directions, the instant petition shall stand disposed of finally.

12. The Registry is directed to communicate the order to the Principal Secretary Law and Legislation, Medical Sciences, Jails of the State for their information and issuing necessary instructions to the concerned officers within a period of one week therefrom so as to enable the Enquiry Officer to conclude the enquiry within a fixed time period.

Petition disposed of.