

I. L. R. (2012) M.P.

RNI. Regn. No. MPBIL/2009/32366

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Jabalpur M. P.



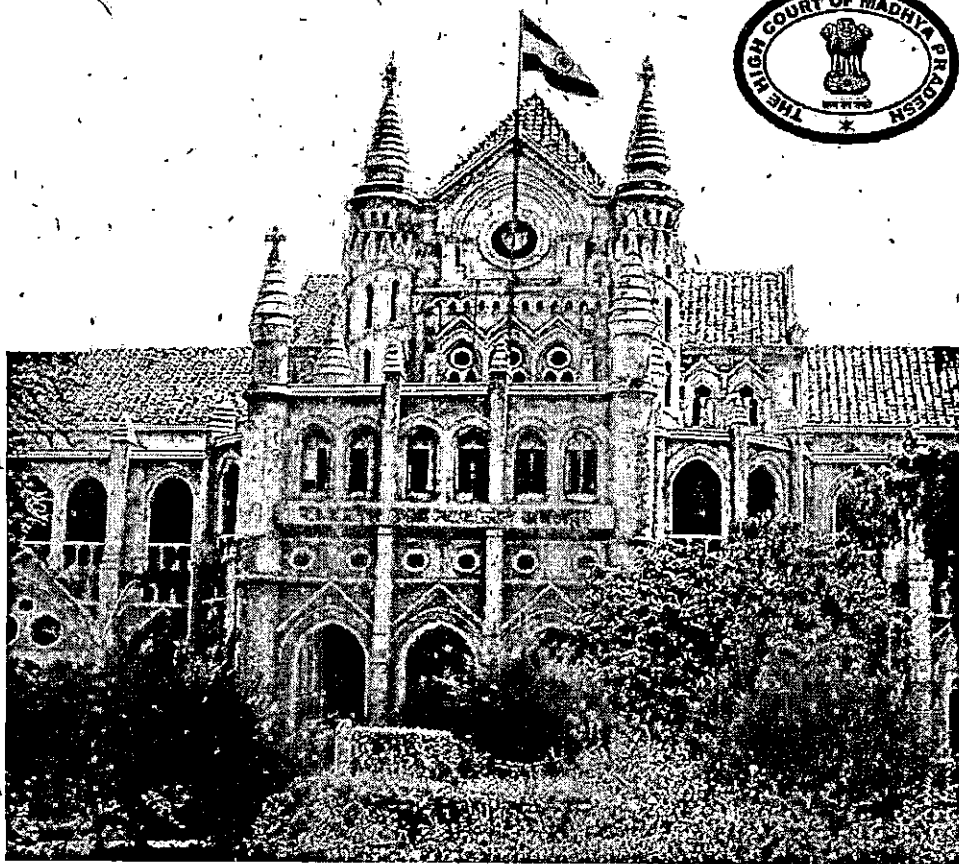
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2012

NOTES OF CASES SECTION

Short Note (DB)

***(51)**

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

W.A. No. 372/2012 (Jabalpur) decided on 7 May, 2012

A.P. SINGH GAHARWAR

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law – Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 – Rule 9(1) – Suspension – Appellant, posted as Chief Municipal Officer and a charge sheet was filed against him under Sections 420, 409, 467 & 120-B of IPC and Section 13(1)(d) & 13(2) of the Prevention of Corruption Act – Pursuant to this he was placed under suspension – Held – The case of the appellant falls under first proviso to Rule 9(1) of the Rules 1966 which is mandatory in nature – The appellant was required to be and has rightly been placed under suspension immediately on filing of a charge sheet against him – Writ Appeal dismissed.

सेवा विधि :- सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – नियम 9(1) – निलम्बन – अपीलार्थी मुख्य नगरपालिका अधिकारी के रूप में पदस्थ और उसके विरुद्ध भा.द.सं. की धारा 420, 409, 467 व 120बी तथा भ्रष्टाचार निवारण अधिनियम की धारा 13(1)(डी) व 13(2) के अंतर्गत आरोप पत्र प्रस्तुत किया गया – इसके अनुसरण में उसे निलम्बन में रखा गया – अभिनिर्धारित अपीलार्थी का प्रकरण नियम 1966 के नियम 9(1) के प्रथम परंतुक के अंतर्गत आता है जो आज्ञापक स्वरूप का है – अपीलार्थी को उसके विरुद्ध आरोप पत्र प्रस्तुत किये जाने के तुरंत बाद उसे निलंबित किया जाना चाहिये और उसे उचित रूप से निलंबित किया गया है – रिट अपील खारिज।

The order of the Court was delivered by : **R.S. JHA, J.**

Cases referred :

2005(4) MPLJ 524, AIR 1968 SC 178, (1976) 1 SCC 226, AIR 1992 SC 1100, AIR 1992 SC 1341, (1998) 6 SCC 590, (2008) 11 SCC 108, (2007) 11 SCC 191, ILR (2009) MP 2766, 1993 SUPP.(3) 483, 2010(4) MPHT 191, AIR 2006 SC 2840,

Manoj Sharma, for the appellant.

Naman Nagrath, Addl. A.G. for the respondents.

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Short Note

***(52)**

Before Mr. Justice Rakesh Saxena

Cr.A. No. 2036/1998 (Jabalpur) decided on 12 March, 2012

ANIL KUMAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 307, Criminal Procedure Code, 1973 (2 of 1974), Section 320 – Compromise of non-compoundable offence – Effect – Non compoundable offence can not be compounded – However, the fact of compromise can be considered in awarding sentence – Incident took place about 20 years back – Appellant was 19 years of age and has remained in jail for a period of 5 months – Sentence reduced to period already undergone.

दण्ड संहिता (1860 का 45), धारा 307, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320 – अशमनीय अपराध में समझौता – प्रभाव – अशमनीय अपराध को शमनीय नहीं किया जा सकता – अपितु, समझौते के तथ्य को दण्डादेश प्रदान करते समय विचार में लिया जा सकता है – घटना लगभग 20 वर्ष पूर्व घटित हुई – अपीलार्थी 19 वर्ष की आयु का था और 5 माह की अवधि तक जेल में रहा है – दण्डादेश को भुगतवाई जा चुकी अवधि तक घटाया गया।

Cases referred :

AIR 2003 SC 1386, AIR 2009 SC 675.

Ashok Lalwani, for the appellant.

G.S. Thakur, P.L. for the respondent.

Short Note (DB)

***(53)**

Before Mr. Justice S.K. Gangele & Mr. Justice Brij Kishore Dube

Cr. A. No. 3/2003 (Gwalior) decided on 8 May, 2012

ANIL SHARMA ALIAS ANIL NAMDEV

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 302 – Evidence Act (1 of 1872), Section 3 – Murder – Proof – Circumstantial evidence – Circumstances proved against appellant are (1) There was strained

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relations between the deceased and the appellant and, therefore, there was a motive to kill the deceased (2) Deceased was last seen in the company of the appellant in room Hotel which was bolted from inside (3) Police was called on spot and the door of hotel's room was broken open (4) Deceased and accused were found lying on the carpet in injured condition and deceased was succumbed to the injuries (5) Death of the deceased was homicidal in nature (6) there was no sign of scuffle or mark of sexual assault on the deceased and no proof of theft of any article from the room or any attempt in doing so (7) Topography of the room excluded all possibility of any outsider entering into the room and committed murder of the deceased (8) Explanation furnished by the accused that some unknown person came and started assaulting the appellant inside the room and when his wife came to rescue, then they have also assaulted her, and fled away is patently false – Held – The chain of circumstances proved by the prosecution clearly and unerringly indicate that it was the appellant/accused only, who committed the murder of his wife.

क. दण्ड संहिता (1860 का 45), धारा 302 – साक्ष्य अधिनियम (1872 का 1), धारा 3 – हत्या – सबूत – परिस्थितिजन्य साक्ष्य – अपीलार्थी के विरुद्ध साबित की गई परिस्थितियां हैं (1) मृतिका और अपीलार्थी के मध्य तनावपूर्ण संबंध थे, और इसलिए मृतिका को मारने का हेतु था (2) मृतिका आखिरी बार होटल के कमरे में अपीलार्थी के साथ देखी गई थी, जो अंदर से बंद था (3) पुलिस को स्थल पर बुलाया गया और होटल के कमरे का दरवाजा तोड़कर खोला गया (4) मृतिका और अभियुक्त घायल अवस्था में कालीन पर पड़े पाये गये और चोटों के कारण मृतिका की मृत्यु हो गई (5) मृतिका की मृत्यु मानववध स्वरूप की थी (6) मृतिका के शरीर पर यौन शोषण के या हाथापाई के निशान नहीं थे और न ही कमरे से किसी वस्तु के चोरी होने के या ऐसा करने का प्रयास किये जाने का सबूत था (7) कमरे की स्थलाकृति से किसी व्यक्ति का कमरे में आना और मृतिका की मृत्यु कारित करने की सारी संभावनाओं को अलग करती है (8) अभियुक्त द्वारा स्पष्टीकरण प्रस्तुत किया गया कि कुछ अपरिचित व्यक्ति आये और अपीलार्थी के साथ कमरे के अंदर मारपीट की और जब उसकी पत्नी उसे बचाने आई तभी उन्होंने उसके साथ भी मारपीट की और भाग गये स्पष्टतः असत्य है – अभिनिर्धारित – अभियोजन द्वारा साबित परिस्थितियों से साफ और अमोघ रूप से प्रकट होता है कि वह केवल अपीलार्थी/अभियुक्त ही था, जिसने अपनी पत्नी की हत्या कारित की।

B. Penal Code (45 of 1860), Sections 302, 304 Part-I – Culpable Homicide – Appellant/husband and the deceased/wife were inside the room at the time of the incident and the door of the room was bolted from inside – The death of the deceased was homicidal in

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nature as a result of injuries caused by sharp weapon and acid – Appellant in his statement under Section 313 of the Cr.P.C. has not stated the fact that there was quarrel took place between him and the deceased and on account of sudden quarrel and in heat of passion, he himself caused injuries to the deceased – Appellant must be held to cause death in ordinary course of nature.

ख. दण्ड संहिता (1860 का 45), धाराएँ 302, 304 भाग-I – सदोष मानववध – अपीलार्थी/पति और मृतिका/पत्नी, घटना के समय कमरे के अंदर थे और दरवाजे की चिटकनी अंदर से बंद थी – मृतिका की मृत्यु मानववध स्वरूप की थी जो धारदार हथियार व एसिड से कारित चोटों के कारण हुई थी – अपीलार्थी ने द.प्र.सं. की धारा 313 के अंतर्गत अपने कथन में यह तथ्य नहीं बताया कि उसके और मृतिका के बीच झगड़ा हुआ और अचानक हुए झगड़े से और भावना की तीव्रता में, उसने स्वयं मृतिका को चोटें कारित की – अपीलार्थी द्वारा प्रकृति के सामान्य क्रम में मृत्यु कारित करने की धारणा नहीं की जानी चाहिए।

C. Evidence Act (1 of 1872), Section 3 – Non-explanation of injuries of accused – Effect – Injuries found on the person of the appellant – Both the injuries sustained by the accused were not serious – It is not the defence of the appellant that the injuries were caused to him by the deceased – It can not be ruled out that the injuries found on the person of the appellant were caused by the appellant himself – Mere non-explanation of the injuries of the appellant by the prosecution may not affect the prosecution case.

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 – अभियुक्त की चोटों का स्पष्टीकरण नहीं दिया जाना – प्रभाव – अपीलार्थी के शरीर पर चोटें पाई गई – अभियुक्त को आई दोनों चोटें गंभीर नहीं थी – यह अपीलार्थी का बचाव नहीं कि मृतिका द्वारा उसे चोटें कारित की गई थी – इससे इंकार नहीं किया जा सकता कि अपीलार्थी के शरीर पर पाई गई चोटें स्वयं अपीलार्थी द्वारा कारित की गई थी – अभियोजन द्वारा अपीलार्थी की चोटों का स्पष्टीकरण नहीं दिये जाने मात्र से अभियोजन का मामला प्रभावित नहीं हो सकता।

The judgment of the Court was delivered by : BRIJ KISHORE DUBE, J.

Cases referred :

2011 (2) CRIMES 292 (SC), 1998 (II) MPWN 18, AIR 1992 SC 2045, AIR 1984 SC 1622, (2001) 9 SCC 227, (2003) 7 SCC 37, (2007) 15 SCC 455, (2007) 10 SCC 443.

Arun Barua, for the appellant.

Vivek Khedkar, P.P. for the respondent/State.

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Short Note

*(54)

Before Mr. Justice R.C. Mishra

Cr. A. No. 232/1995 (Jabalpur) decided on 15 March, 2012

BABLU ALIAS DILIP

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 376(2)(g) – Gang Rape – Evidence of prosecutrix corroborated by testimony of mother and two other witnesses who were immediately apprised of the incident – Delay of 26 hours in lodging F.I.R. is explained – Held – A very natural and probable version of the prosecutrix was therefore, rightly accepted by the trial Judge – Appeal dismissed.

दण्ड संहिता (1860 का 45), धारा 376(2)(जी) – सामूहिक बलात्कार – अभियोक्त्री की साक्ष्य, माँ तथा दो अन्य साक्षी जिन्हें घटना के बारे में तुरंत बताया गया की परिसाक्ष्य से संपुष्ट – प्रथम सूचना रिपोर्ट दर्ज करने में 26 घंटों का विलम्ब स्पष्ट किया गया – अभिनिर्धारित – अभियोक्त्री की बहुत स्वामाविक एवं संभाव्य कथा को विचारण न्यायाधीश द्वारा उचित रूप से स्वीकार किया गया – अपील खारिज।

Cases referred :

AIR 2002 SC 2235, (1996) 2 SCC 384, AIR 1952 SC 54, AIR 1989 SC 702, AIR 2008 SC 1747, AIR 1983 SC 66, (2011) 7 SCC 130, AIR 2003 SC 2669, AIR 2003 SC 2471, AIR 1983 SC 753.

S.K. Nema, for the appellant.

Sudesh Verma, G.A. for the respondent/State.

Short Note

*(55)

Before Mr. Justice Sujoy Paul

W.P. No. 4992/2003 (Gwalior) decided on 15 March, 2012

BHAWANI SHANKAR SINGHAL

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Civil Services (Classification, Control and Appeal) Rules

NOTES OF CASES SECTION

(M.P.), 1966 – Rule 14(11) – Exparte Departmental Enquiry – Absence of one day – Employee participated in departmental enquiry but remained absent on one day – Enquiry Officer proceeded ex parte on that date – Impermissible as per principles of natural justice – Enquiry officer is bound to adjourn the enquiry on the date of absence of delinquent employee to a later date.

क. **सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम (म.प्र.), 1966 – नियम 14(11) – एकपक्षीय विभागीय जाँच – एक दिवस की अनुपस्थिति – कर्मचारी ने विभागीय जाँच में सहभाग लिया परंतु एक दिन अनुपस्थित रहा – जाँचकर्ता अधिकारी ने उस तिथि को एकपक्षीय कार्यवाही की – नैसर्गिक न्याय के सिद्धांत के अनुसार अनुज्ञेय नहीं – जाँचकर्ता अधिकारी अपचारी कर्मचारी की अनुपस्थिति के दिनांक को जांच अगली तिथि के लिये स्थगित करने के लिए बाध्य है।**

B. Service Law – Departmental Enquiry – Application for adjournment – Employee sent telegram, registered letters requesting adjournment of enquiry on the ground of ailment – Later on also submitted application for recalling ex parte order pregnant with medical certificate – Held – When adjournment is sought on medical ground whether or not it is accompanied by medical certificate, in the interest of justice, time should be granted.

ख. **सेवा विधि – विभागीय जाँच – स्थगन के लिए आवेदन – कर्मचारी ने बीमारी के आधार पर जांच स्थगित किये जाने का निवेदन करते हुए टेलीग्राम, रजिस्ट्रीकृत पत्र भेजे – बाद में चिकित्सा प्रमाण पत्र के साथ आवेदन भी एक पक्षीय आदेश वापिस लिये जाने हेतु प्रस्तुत किया – अभिनिर्धारित – जब चिकित्सीय आधार पर स्थगन चाहा गया हो, चिकित्सा प्रमाण पत्र के साथ अथवा उसके बगैर, न्यायहित में समय प्रदान किया जाना चाहिए।**

Cases referred :

(1994) 2 SC 416, AIR 1959 SC 93, (2001) 4 SCC 9, (2002) 1 SCC 633, 2011(2) MPLJ 690, AIR 1969 ASSAM & NAGALAND 99, 1994 SUPPL. (2) SCC 518, 2012 (1) MPLJ 172.

N.S. Kirar, for the petitioner.

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

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Short Note

*(56)

Before Mr. Justice A.K. Shrivastava

S.A. No. 389/1994 (Jabalpur) decided on 6 March, 2012

GOPINATH

...Appellant

Vs.

SHIV PRASAD & ors.

...Respondents

A. Hindu Law – Article 231 (1) of Mulla's Hindu Law – Presumption of Joint Property – There is a presumption of Joint Hindu Family but there can not be any presumption that joint family possess a joint property – It is for the person who claims it to be joint has to prove that from the funds of HUF, it was purchased.

क. हिन्दू विधि – मुल्ला द्वारा लिखित हिन्दू विधि का अनुच्छेद 231(1) – संयुक्त सम्पत्ति की उपधारणा – संयुक्त हिन्दू कुटुम्ब की उपधारणा है परंतु कोई उपधारणा नहीं हो सकती कि संयुक्त कुटुम्ब के पास संयुक्त सम्पत्ति है – उस व्यक्ति को जो उसे संयुक्त होने का दावा करता है साबित करना होगा कि उसे हिन्दू अविभाजित कुटुम्ब की निधि से क्रय किया गया।

B. Hindu Law – Joint Property – Plaintiffs pleaded that the property was purchased from the funds of HUF in the name of Plaintiff No.1 – Defendant No.1 claimed the said property to be his self acquired property – Defendant No.1 merely stated that he was employed in Police Department – No mention in written statement that on which post he was appointed – No pleadings or evidence that what was his salary and whether he was fetching that much of salary so that within a short span of five years only, he could purchase the suit property – No receipt of money orders also filed – It can be gathered that by utilizing the funds of HUF, suit property was purchased – Appeal allowed.

ख. हिन्दू विधि – संयुक्त सम्पत्ति – वादीगण का अभिवचन कि सम्पत्ति का क्रय हिन्दू अविभक्त कुटुम्ब की निधि से वादी क्रं. 1 के नाम से किया गया था – प्रतिवादी क्रं. 1 ने उक्त सम्पत्ति स्वयं अर्जित सम्पत्ति होने का दावा किया – प्रतिवादी क्रं. 1 ने मात्र कथन किया कि वह पुलिस विभाग में नियोजित था – लिखित कथन में कोई उल्लेख नहीं कि वह किस पद पर नियुक्त था – कोई अभिवचन या साक्ष्य नहीं कि उसका वेतन कितना था और क्या वह इतना वेतन प्राप्त कर रहा था कि केवल पांच वर्ष की अल्पावधि के भीतर वह वाद सम्पत्ति क्रय कर सका – मनी ऑर्डर की रसीदें भी प्रस्तुत नहीं की गई – यह निष्कर्ष निकाला जा

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सकता है कि हिन्दू अविमक्त कुटुम्ब की निधि का उपयोग करके वाद सम्पत्ति क्रय की गई थी – अपील मंजूर।

Cases referred :

AIR 1954 SC 379, AIR (34) 1947 PC 189, AIR 1959 SC 906, AIR 1972 SC 2531, 2009(4) MPJR 134, 2007(II) MPJR 448, 2004(4) MPLJ 60, AIR 2003 MP 128, AIR 1976 SC 1953, AIR 2008 SC 673.

Paras Nath Das, for the appellant.

Atulanand Awasthy, for the respondents No.1 & 2.

Divyakirti Bohrey, P.L. for the respondent No.3/State.

Short Note (DB)

*(57)

Before Mr. Justice S.K. Gangele & Mr. Justice Brij Kishore Dube

Cr. A. No. 695/2009 (Gwalior) decided on 26 March, 2012

GUDDA ALIAS SULTAN SINGH & anr.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 32 – Dying Declaration
– Dying declaration is a substantive piece of evidence and an order of conviction can be safely recorded.

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृत्युकालिक कथन एक मौलिक साक्ष्य है और दोषसिद्धि का आदेश सुरक्षित रूप से अभिलिखित किया जा सकता है।

B. Penal Code (45 of 1860), Section 302 – Murder – Appellants poured kerosene oil and put the deceased on fire – Deceased suffered 80% burn injuries – Executive Magistrate recorded dying declaration after obtaining fitness certificate from the Doctor – Another fitness certificate was obtained after the recording of Dying Declaration – F.I.R. lodged by deceased is also a Dying Declaration – Both the dying declarations are reliable – Appellants rightly convicted under Section 302 – Appeal dismissed.

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थीगणों ने मृत्तिका पर मिट्टी का तेल उड़ोला और आग लगा दी – मृत्तिका ने 80 प्रतिशत जलने की क्षतियां सहन की – कार्यपालक मजिस्ट्रेट ने डॉक्टर से स्वस्थता प्रमाण पत्र अभिप्राप्त कर मृत्युकालिक कथन अभिलिखित किया – अन्य स्वस्थता प्रमाण पत्र मृत्युकालिक कथन अभिलिखित होने के उपरांत अभिप्राप्त किया गया – मृत्तिका द्वारा

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दर्ज कराई गयी प्रथम सूचना प्रतिवेदन भी एक मृत्युकालिक कथन है – दोनों मृत्युकालिक कथन विश्वसनीय है – अपीलार्थीगण धारा 302 के अंतर्गत उचित रूप से दोषी पाये गये – अपील खारिज।

C. Penal Code (45 of 1860), Section 302 – Murder – Deceased suffered 80% burns upto her knees – She died because of septicaemia caused due to antemortem injuries – Nothing on record that septicaemia was not the result of the burn injuries – Appellants guilty of committing murder – Appeal dismissed.

ग. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृतिका अपने घुटनों तक 80 प्रतिशत जली थी – उसकी मृत्यु, मृत्युपूर्व कारित क्षतियों से उत्पन्न रक्तविषाक्तता (सेप्टीसेमिया) के कारण हुई – अभिलेख पर कुछ नहीं कि सेप्टीसेमिया जलने की चोटों के कारण नहीं हुआ था – अपीलार्थीगण हत्या कारित करने के दोषी – अपील खारिज।

The judgment of the Court was delivered by: BRIJ KISHORE DUBE, J.

Cases referred :

1994 Supp (1) SCC 304, AIR 1993 SC 973, AIR 1994 SC 32, AIR 1994 SC 1582, AIR 1992 SC 950, 2007 AIR SCW 7156, Cr.A. No. 648/2003, Cr.A. 833/2005, 2007(1) MPHT 86, AIR 1974 SC 2363, 1968 Cr.L.J. 1025, (2007) 15 SCC 455.

A.K. Jain, for the appellants.

Vivek Khedkar, P.P. for the respondent/State.

Short Note

***(58)**

Before Mr. Justice Sujoy Paul

W.P. No. 1632/2012 (Gwalior) decided on 13 March, 2012

HANUMANT SINGH

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 – Secrecy of Ballot – Secrecy of ballot can not be lightly tinkered in a democratic set up unless very specific pleading, material facts and particulars are there in the election petition supported by a proof of a very high degree.

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क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 – मतपत्रों की गोपनीयता – लोकतांत्रिक ढांचे में मतपत्रों की गोपनीयता को हल्के रूप से बदला नहीं जा सकता जब तक कि निर्वाचन याचिका में बहुत उच्च स्तर की साक्ष्य द्वारा समर्थित बहुत विनिर्दिष्ट अभिवचन, तात्त्विक तथ्य एवं विशिष्टियां नहीं हैं।

B. *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 – Recount* – Recount cannot be ordered in a routine and mechanical manner – In absence of specific pleadings supported by contemporaneous evidence, recount is impermissible.

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 – पुनर्गणना – पुनर्गणना नैतिक एवं यांत्रिक ढंग से आदेशित नहीं की जा सकती – समकालीन साक्ष्य द्वारा समर्थित विनिर्दिष्ट अभिवचनों की अनुपस्थिति में पुनर्गणना अननुज्ञेय है।

C. *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 – Recount – Burden of Proof* – Burden is on the shoulder of election petitioner – Even weakness and defence can not become substitute of proof required to be given by the election petitioner – Evidence beyond pleadings is impermissible.

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 – पुनर्गणना – सबूत का भार – सबूत का भार निर्वाचन याचिका के कंधों पर है – कमजोर और बचाव भी सबूत का स्थान नहीं ले सकते जिसे देना निर्वाचन याचिका से अपेक्षित है – अभिवचनों से परे साक्ष्य अननुज्ञेय है।

D. *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 – Proof of submission of election petition* – Entry by Prescribed Officer on the marginal note of election petition and specific order sheets are sufficient proof of the date of filing and presentation by concerned person.

घ. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 – निर्वाचन याचिका प्रस्तुत करने का सबूत – विहित अधिकारी द्वारा निर्वाचन याचिका के हाशिये पर दी गई टीप एवं विनिर्दिष्ट आदेश पत्रिकाएं संबंधित व्यक्ति द्वारा प्रस्तुत करने के दिनांक को पर्याप्त सबूत हैं।

Cases referred :

2010 (4) MPHT 92, AIR 1975 SC 2117, AIR 1993 SC 367, (2004) 6 SCC 331, (1999) 9 SCC 386, (1999) 9 SCC 420, 2011 (2) MPHT 336,

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2011 (2) MPHT 229, (2011) 7 SCC 69, 2011 (3) MPHT 335, (2004) 6 SCC 341, (2004) 7 SCC 166.

S.S. Raghuvanshi, for the petitioner.

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

Gaurav Samadhiya, for the respondent No. 3.

Short Note

*(59)

Before Mr. Justice Sanjay Yadav

W.P. No. 469/2009 (Jabalpur) decided on 25 April, 2012

MAIHAR CEMENT (M/S.)

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

Railways Act (24 of 1989), Section 106(3) – Refund of Overcharge—Rakes were booked for transportation of cement and the petitioner paid freight—Cement were transported through a shorter route—The difference of amount/excess amount charged for aforesaid kms, which was claimed as refund—The claim was repudiated on the ground of delay—Held—Even a case where refund of excess amount paid towards the freight the same would be a refund of overcharge and is governed by the provisions under Section 106 of the Act—The right of the petitioners' claim for refund of time barred dues towards overcharge being covered by the notification dated 11.01.1995, the respondents were not justified in not referring the same to the General Manager who was empowered to decide the time barred claim

रेल अधिनियम (1989 का 24), धारा 106(3) – अधिभार की वापसी – सीमेंट के परिवहन के लिए रैक (मालगाड़ी के डिब्बे) बुक किये गये और याची ने मालभाड़े का भुगतान किया – सीमेंट का परिवहन नजदीकी मार्ग से किया गया – उपरोक्त किलोमीटर के लिए प्रभार की रकम के अंतर/अतिरिक्त रकम की वापसी का दावा किया गया – विलंब के आधार पर दावे का प्रत्याख्यान किया गया – अभिनिर्धारित – ऐसे मामले में भी जहां मालभाड़े के लिए अदा की गई अतिरिक्त रकम की वापसी, अधिभार की वापसी होगी और अधिनियम की धारा 106 के अंतर्गत उपबंधों द्वारा शासित होगा – याची का अधिभार से संबंधित समय वर्जित देयकों की वापसी हेतु दावे का अधिकार अधिसूचना दिनांक 11.01.1995 द्वारा आच्छादित होने के कारण, प्रत्यर्थीगण द्वारा प्रधान प्रबंधक को निर्दिष्ट नहीं करना, जो समय वर्जित दावे का विनिश्चय करने के लिए सशक्त था, न्यायोचित नहीं था।

NOTES OF CASES SECTION

Cases referred :

AIR 1998 MP 241, (1995) 2 SCC 493, (2010) 5 SCC 513, (2011) 7 SCC 639, AIR 1976 SC 1471, AIR 1997 SC 3828.

Aditya Adhikari, for the petitioner.

Atul Choudhary, for the respondents.

Short Note

*(60)

Before Mr. Justice Sanjay Yadav

W.P. No. 4069/2012 (Jabalpur) decided on 27 April, 2012

MANISHA LALWANI (SMT.)

...Petitioner

Vs.

DR. D.V. PAUL

...Respondent

A. Civil Procedure Code (5 of 1908), Order 11 Rule 21 – Scope of exercise of powers – Provision is not available when only production of documents is directed and not produced – Non production at the most would lead the Court to draw an adverse inference – The defence can not be struck in case the defendant fails to produce the document.

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 11 नियम 21 – शक्तियों के उपयोग की व्याप्ति – उपबंध उपलब्ध नहीं है जब केवल दस्तावेजों को प्रस्तुत करने के निर्देश दिये गये और प्रस्तुत नहीं किये गये – प्रस्तुत नहीं किये जाने से न्यायालय ज्यादा से ज्यादा प्रतिकूल निष्कर्ष निकालेगा – बचाव को खंडित नहीं किया जा सकता, यदि प्रतिवादी दस्तावेज प्रस्तुत करने में असफल रहता है।

B. Civil Procedure Code (5 of 1908), Section 151 – Inherent powers – If the Court does not have a jurisdiction under an express provision it does not assume powers under Section 151 – Inherent powers of the Court can not over ride the express provision of law.

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 151 – अंतर्निहित शक्तियां – यदि न्यायालय को किसी अभिव्यक्त उपबंध के अंतर्गत अधिकारिता नहीं है, वह धारा 151 के अंतर्गत शक्तियों को ग्रहण नहीं करता – न्यायालय की अंतर्निहित शक्तियां, विधि के अभिव्यक्त उपबंध के अध्यारोही नहीं हो सकती।

Cases referred :

AIR 1954 MB 65, AIR 1978 SC 1436, AIR 1989 MADRAS 314,

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2000(2) MPLJ 229, AIR 1936 NAGPUR 130, AIR 1964 SC 993, AIR 1966 SC 1899, AIR 1993 KERELA 181, AIR 1962 CAL. 88.

M. Ali, for the petitioner.

None for the respondent.

Short Note

**(61)*

Before Mr. Justice K.K. Trivedi

W.P. No. 6239/2011 (Jabalpur) decided on 10 February, 2012

MEENA SINGH (SMT.) & anr.

...Petitioners

Vs.

THE INDIAN OIL CORPORATION LTD. & ors.

...Respondents

Constitution – Article 226 – Grant of dealership of retail outlet – Selection of respondent No. 3 for grant of dealership and application of petitioner was rejected – HELD – Petitioners of their own have claimed the benefit of FDRS and knowing fully well that they were required to produce original FDR'S at the time of evaluation but failed to produce the same before competent committee of the respondent corporation – It can not be said respondent committed any wrong – Writ Petition dismissed.

संविधान – अनुच्छेद 226 – खुदरा दुकान की डीलरशिप प्रदान करना – डीलरशिप की मंजूरी के लिए प्रत्यर्थी क्रं. 3 का चयन और याची का आवेदन निरस्त – अभिनिर्धारित – याचीगण ने स्वयं एफडीआर के लाभ के लिए दावा किया और पूर्ण रूप से जानते थे कि मूल्यांकन के समय मूल एफ.डी.आर. को प्रस्तुत करने की आवश्यकता होती है, किन्तु प्रत्यर्थी/कॉरपोरेशन की सक्षम समिति के समक्ष प्रस्तुत करने में विफल रहे – यह नहीं कहा जा सकता कि प्रत्यर्थी ने कुछ गलत किया – रिट याचिका खारिज।

Cases referred :

(2005) 9 SCC 779, (2006) 6 SCC 430, AIR 1990 SC 485.

Anshuman Singh, for the petitioners.

Aditya Adhikari, for the respondents No. 1 & 2.

Jitendra Tiwari, for the respondent No.3.

NOTES OF CASES SECTION

Short Note

*(62)

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 2095/1996 (Jabalpur) decided on 3 January, 2012

MUNNA @ MAHENDRA

...Appellants

Vs.

STATE OF M.P.

...Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) – In order to prove caste of prosecutrix, no admissible evidence or documents issued by competent authority appointed for that purpose has neither been placed on record nor proved the same – Merely on the basis of oral deposition of prosecutrix and witnesses, it can not be deemed that prosecutrix belonged to community covered under the Act.

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) – अभियोक्त्री की जाति प्रमाणित करने के लिये किसी ग्राह्य साक्ष्य अथवा उस प्रयोजन हेतु नियुक्त सक्षम प्राधिकारी द्वारा जारी दस्तावेजों को न तो अभिलेख पर लाया गया और न ही उसे साबित किया गया – मात्र अभियोक्त्री के एवं साक्षीगण के मौखिक कथन के आधार पर यह नहीं माना जा सकता कि अभियोक्त्री अधिनियम के अंतर्गत समाविष्ट समुदाय की है।

P.C. Batri, for the appellants.

Rakesh Kesharwani, P.L. for the respondent.

Short Note (DB)

*(63)

Before Mr. Justice Shantanu Kemkar & Mr. Justice Abhay M. Naik

W.P. No. 7250/2008 (Indore) decided on 5 May, 2011

MURTAZA MALIK

....Petitioner

-Vs.

INDORE DEVELOPMENT AUTHORITY

...Respondent

Tender – Giving counter offers to the highest tenderers does not amount to rejection of tenders – Such action of respondents can not be termed as illegal, being not violative of law relating to tenders –

NOTES OF CASES SECTION

Petition dismissed.

IDA issued different advertisements for inviting tenders for various plots situated at different sites in the city of Indore on the price higher than the minimum rate mentioned in the advertisement – The rate offered by the petitioners in respect of respective plots was the highest in respect of their category – IDA instead of accepting the tender, issued letters to the petitioners in the nature of counter offer, intimating thereby that the Board of IDA has decided to give the aforesaid plot at the rate quoted above – The petitioners did not accept the offer – The petition is based mainly on the ground that the rate offered by the petitioners, being the highest amongst the tenderers of a particular category, their tenders ought to have been accepted – Further, the IDA has no right or power to reject the tenders of the petitioners and issue offer letters at a higher rate than the rate quoted by the petitioners – Held – IDA is not found to have rejected the tenders of the petitioners, but has given a counter offer to the highest bidders, including the petitioners – IDA was well justified in giving counter offers to the highest tenderers, including the petitioners and the same did not amount to rejection of tenders – Action of respondents can not be termed as illegal, being not violative of law relating to tenders – Claim of the petitioners for grant of plot in question can not be legally acceded to – Petition dismissed.

निविदा – सबसे ऊँची निविदा वाले निविदाकारों को प्रति प्रस्ताव देना निविदाओं की अस्वीकृति की कोटि में नहीं आता – प्रत्यर्थागण की ऐसी कार्यवाही निविदाओं से संबंधित विधि का उल्लंघनकारी ना होने से अवैध नहीं कही जा सकती – याचिका खारिज।

The order of the Court was delivered by : **ABHAY M. NAIK, J.**

Cases referred :

1994 J LJ 571, AIR 1986 SC 1527, AIR 1979 SC 1628, AIR 1992 SC 566, AIR 1991 SC 537, (2008) 10 SCC 404,

Veer Kumar Jain, for the petitioner.

Sudarshan Joshi, for the respondent.

NOTES OF CASES SECTION

Short Note (DB)

*(64)

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

Cr. A. No. 162/2010 (Indore) decided on 13 January, 2012

PAPPU ALIAS BHARATSINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(2)(v) – Victim has not stated that she is a member of S.C./S.T. – Victim has also not stated that Bhanumati Caste belongs to S.C./S.T. – No document is proved to indicate that persons belonging to Bhanumati Caste are of S.C./S.T. – Even it is not proved that appellant is not the member of S.C./S.T. or the offence was committed because the victim belongs to S.C./S.T. – Offence under Section 3(2)(v) of Act, 1989 not proved.

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(2)(v) – पीड़िता का यह कथन नहीं कि वह अनुसूचित जाति/अनुसूचित जनजाति की सदस्या है – पीड़िता ने यह भी कथन नहीं किया कि भानुमति जाति अनुसूचित जाति/अनुसूचित जनजाति में आती है – यह दर्शाने के लिये कोई दस्तावेज साबित नहीं किया गया कि भानुमति जाति के व्यक्ति अनुसूचित जाति/अनुसूचित जनजाति के हैं – यह भी साबित नहीं किया गया है कि अपीलार्थी अनुसूचित जाति/अनुसूचित जनजाति का सदस्य नहीं या अपराध इसलिए कारित किया गया क्योंकि पीड़िता अनुसूचित जाति/अनुसूचित जनजाति की थी – अपराध अंतर्गत धारा 3(2)(v) अधिनियम, 1989 साबित नहीं किया गया।

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

Asif Warsi, for the appellant.

B.L. Yadav, P.P. for the respondent/State.

Short Note

*(65)

Before Mr. Justice Sujoy Paul

W.P. No. 4843/2008(S) (Gwalior) decided on 23 February, 2012

RAM KUMAR BAISHANDER

...Petitioner

Vs

STATE OF M.P. & ors.

...Respondents

A. ***Service Law – Development Authority Services (Officers***

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and Servants) Recruitment Rules, M.P. 1987 – Promotion on the post of Sub-Engineer – Can be made only as per the method prescribed in the rules – Rules prescribed a method by direct recruitment and promotion – Other methods are accordingly barred – Petitioner is senior to respondent No.3 on the feeder post, he was having requisite experience and eligibility to be considered on the promotional post of Sub-Engineer – Filling up the post of Sub-Engineer by way of regularization is impermissible in law.

क. सेवा विधि – विकास प्राधिकारी सेवा (अधिकारी और सेवक) भर्ती नियम, म.प्र. 1987 – उप अभियंता के पद पर पदोन्नति – केवल नियमों में विहित पद्धति के अनुसार की जा सकती है – नियम सीधी भर्ती और पदोन्नति की पद्धति विहित करते हैं – तदनुसार अन्य पद्धति विबंधित हैं – याची प्रत्यर्थी क्रं. 3 से फीडर के पद पर वरिष्ठ है, उसके पास उप अभियंता के पदोन्नत पद पर विचार किये जाने के लिए अनुभव व योग्यता थी – उप अभियंता के पद को नियमितीकरण द्वारा भरा जाना विधि में अननुज्ञेय है।

B. Constitution – Article 14 & 16 – Interpretation of Statute – If a statute prescribes a mode of doing an act in particular manner that has to be done in that manner alone – Other modes of its performance are forbidden.

ख. संविधान – अनुच्छेद 14 व 16 – कानून का निर्वचन – यदि कानून किसी कार्य को करने की विशिष्ट पद्धति विहित करता है उसे केवल उसी पद्धति से किया जाना चाहिए – उसके संपादन की अन्य पद्धति पर रोक है।

C. Service Law – Appointment – Regularisation is not a permissible mode of appointment, when rules prescribe a procedure of appointment/promotion – Induction can be made only as per those rules.

ग. सेवा विधि – नियुक्ति – नियमितीकरण नियुक्ति की अनुज्ञेय पद्धति नहीं है जब नियम नियुक्ति/पदोन्नति की प्रक्रिया विहित करते हैं – प्रवर्तन केवल उन नियमों के अनुसार ही किया जा सकता है।

D. Development Authority Services (Officers and Servants) Recruitment Rules, M.P. 1987 – Schedule II & III – Qualification for promotion – Schedule II prescribes educational qualification only in case of direct recruitment whereas Schedule III deals with promotion – The educational qualification mentioned for direct recruitment can not be made applicable for promotion unless the same is specifically mentioned in Schedule III.

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घ. विकास प्राधिकारी सेवा (अधिकारी और सेवक) भर्ती नियम, म.प्र. 1987-अनुसूची II व III - पदोन्नति के लिए अर्हता - अनुसूची II केवल सीधी भर्ती के मामले में शैक्षणिक अर्हता विहित करती है जबकि अनुसूची III पदोन्नति से संबंधित है - सीधी भर्ती हेतु उल्लिखित शैक्षणिक अर्हता पदोन्नति के लिए उपयोज्य नहीं की जा सकती जब तक कि उसे अनुसूची III में विनिर्दिष्ट रूप से उल्लिखित नहीं किया जाता।

Cases referred :

(1999) 7 SCC 209, (2007) 6 SCC 704, (2009) 13 SCC 90, 2011(2) MPLJ 690, (2008) 6 SCC 1, (2000) 4 SCC 186.

Anil Sharma, for the petitioner.

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

Raghavendra Dixit, for the respondent No.2.

Rajendra Shrivastava, for the respondent No.3.

Short Note

*(66)

Before Mr. Justice Sanjay Yadav

• W.P. No. 2302/2008 (Jabalpur) decided on 24 April, 2012

RAM LAKHAN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Service Law – Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(2) – Appointment of Panchayat Karmi – Panchayat was required to appoint Panchayat Karmi within 7 days from 01.12.2007 – Panchayat failed to discharge the duties within the time stipulated by the prescribed authority – It was then beyond the powers of the Gram Panchayat to have passed resolution on a subsequent date – The resolution thus passed on 25.12.2007 by Gram Panchayat was without any authority and was thus, non est.

क. सेवा विधि – पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(2) – पंचायत कर्मि की नियुक्ति – पंचायत के लिए यह आवश्यक था कि वह दिनांक 01.12.2007 से 7 दिनों के भीतर पंचायत कर्मि की नियुक्ति करे – विहित प्राधिकारी द्वारा बताये गये कर्तव्यों का निर्वहन समय पर करने में पंचायत असफल रही – तब, पश्चातवर्ती दिनांक को संकल्प पारित करना ग्राम पंचायत की शक्तियों से परे था – इस प्रकार ग्राम पंचायत द्वारा पारित संकल्प

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25.12.2007 बिना प्राधिकार के था और इसलिए अकूत था।

B. Service Law – Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 86(2) – Appointment of Panchayat Karmi – Local Resident – Circular dated 13.08.2007, does not create any bar for a candidate who is not a local resident of Panchayat for which the Panchayat Karmi is to be selected.

ख. सेवा विधि – पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 86(2) – पंचायत कर्मों की नियुक्ति – क्षेत्रीय निवासी – परिपत्र दिनांक 13.08.2007, अभ्यर्थी के लिए कोई वर्जन निर्मित नहीं करता है, जो कि पंचायत का क्षेत्रीय निवासी नहीं है जिनमें से पंचायत कर्मों नियुक्त किया जाना है।

C. Words and Phrase – “as far as possible” – Expression “as far as possible” is interpreted to be not prohibitory in nature but connote a discretion vested in the prescribed authority which can exercise that discretion – And that they are words of limitation and are merely directory.

ग. शब्द और वाक्यांश – “यथासंभव” – “यथासंभव” शब्द का निर्वचन प्रतिषेधात्मक प्रकृति का होना नहीं है बल्कि विहित प्राधिकारी में निहित विवेकाधिकार होने का उपलक्षित अर्थ है जो उस विवेकाधिकार का प्रयोग कर सकता है – और यह कि वे सीमित अर्थ के शब्द हैं और मात्र निर्देशक हैं।

Cases referred :

2011(2) MPLJ 392, (1998) 7 SCC 654, (2005) 2 SCC 145.

Atul Anand Awasthy, for the petitioner.

P. Dharmadhikari, G.A. for the respondent No.5.

Brindawan Tiwari, for the respondent No. 5.

Short Note

***(67)**

Before Mr. Justice R.C. Mishra

Ct. A. No. 746/1996 (Jabalpur) decided on 21 February, 2012.

RAMESH @ DURGA SINGH LODHI

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 52(4) – As S.H.O. himself effected the seizure and

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arrest, the provisions of Section 52(4) do not apply.

क. *स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 52(4)* – एस.एच.ओ. ने स्वयं जब्ती एवं गिरफ्तारी की, धारा 52(4) के उपबंध लागू नहीं होते।

B: *Narcotic Drugs and Psychotropic Substances Rules 1985 – Taking of Sample* – It is always desirable to prepare the panchnama and to take sample at the spot itself – However, there is no express legal bar to drawing of sample at a later stage, provided there are justifiable and reasonable grounds to do so.

ख. *स्वापक औषधि और मनःप्रभावी पदार्थ नियम 1985 – नमूना लेना* – यह सर्वथा वांछनीय है कि पंचनामा तैयार कर नमूना घटनास्थल पर ही लिया जाये – किन्तु, नमूना बाद के प्रक्रम पर लेने के लिये कोई अभिव्यक्त विधिक वर्जन नहीं है, बशर्ते कि ऐसा करने के न्यायोचित एवं युक्तियुक्त आधार मौजूद है।

C. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 20(b)(i), 35 & 54 – Presumption* – Appellant did not discharge the onus of proof to rebut the presumption by showing that he had no knowledge that sack kept in his house was containing ganja – Conviction upheld.

ग. *स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20(बी)(i), 35 व 54 – उपधारणा* – अपीलार्थी ने उपधारणा का खंडन करने के लिये सबूत के भार का निर्वाहन नहीं किया कि उसे कोई ज्ञान नहीं था कि उसके मकान में रखी बोरी में गांजा था – दोषसिद्धि की पुष्टि की गई।

D. *Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20(b)(i) – Sentence* – Offence committed about 17 years back – Appellant has already remained in jail for a period of 1 year & 4 months – Sentence reduced to period already undergone with fine of Rs. 5,000/-.

घ. *स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20(बी)(i) – दण्डादेश* – अपराध करीब 17 वर्ष पूर्व कारित किया गया – अपीलार्थी पहले ही 1 वर्ष 4 माह की अवधि के लिये जेल में रहा है – दण्डादेश रुपये 5,000/- के साथ भुगताई जा चुकी अवधि तक घटाया गया।

Cases referred :

(2003) 8 SCC 726, (2004) 3 SCC 453, AIR 2002 SC 1450.

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Manish Datt, with G.P. Patel, for the appellant.

Amit Kumar Sharma, P.L. for the respondent/State.

Short Note

*(68)

Before Mr. Justice Rajendra Menon

W.P. No. 2742/2012(S) (Jabalpur) decided on 4 April, 2012

RAMESH CHANDRA DIXIT (DR.)

...Petitioner

Vs.

STATE OF M.P.

...Respondent

A. Interpretation of Statute – Statutory Rule – Role of Circular and Communications – When a statutory rule is available, it would be appropriate to consider the rule and interpret it in its existing form and if the rule can be interpreted and a meaning of the Rule derived on such interpretation, then it is not necessary to advert to the circulars or the communications made, executive in nature for clarification of the Rules.

क. कानून का निर्वचन – कानूनी नियम – परिपत्र एवं संसूचनाओं की भूमिका – जब कानूनी नियम उपलब्ध है तब नियम को विचार में लेना और उसे विद्यमान स्वरूप में निर्वचित करना उचित होगा और यदि नियम का निर्वचन किया जा सकता है और ऐसे निर्वचन से नियम का अर्थ निकाला जा सकता है तब नियमों के स्पष्टीकरण हेतु कार्यपालिक स्वरूप के परिपत्र या की गई संसूचनाओं पर ध्यान देने की आवश्यकता नहीं है।

B. Interpretation of Statute – Statutory Rule – Once the statutory Rule on the question is available, no circular, government order or administrative instruction whether it is issued by the State Government or the UGC can over-ride the provisions of the Rules made under Article 309 of the Constitution.

ख. कानून का निर्वचन – कानूनी नियम – जब किसी प्रश्न पर कानूनी नियम उपलब्ध है वे परिपत्र सरकारी आदेश का प्रशासनिक अनुदेश जो या तो राज्य सरकार द्वारा व यूजीसी द्वारा जारी किये गये हैं, संविधान के अनुच्छेद 309 के अंतर्गत बनाये गये नियमों के उपबंधों का अध्यारोही नहीं हो सकते।

C. Educational Services (Collegiate Branch) Recruitment Rule, M.P. 1967 – Rule 13(5) – Educational Services (Collegiate Branch) Recruitment Rule, M.P. 1990 – Rule 15 – ‘Regular

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'appointment' – Induction of the petitioners into the service after following the procedure contemplated under Rule 13(5) of the Rules 1967 or Rule 15 of the Rules of 1990 is a regular appointment to the service and such an appointment qualifies the employee to be considered for grant of senior pay scale.

A regular appointment will not only mean a regular appointment in accordance to Rules 12 of the Rules of 1967 and 1990, but would also include an appointment in accordance to any of the methods contemplated under the Rules – Even an emergency appointment in accordance to the provisions of Rule 13(5) of the Rules of 1967 and Rule 15 of the Rule 1990 would be a regular appointment for the purpose of grant of senior pay scale.

ग. शैक्षणिक सेवा (कॉलेजियट शाखा), भर्ती नियम, म.प्र. 1967 – नियम 13(5) – शैक्षणिक सेवा (कॉलेजियट शाखा), भर्ती नियम, म.प्र. 1990 – नियम 15 – नियमित नियुक्ति – नियम 1967 के नियम 13 (5) या नियम 1990 के नियम 15 के अंतर्गत अनुध्यात प्रक्रिया का पालन करने के पश्चात् याची को सेवा में लिया जाना सेवा में नियमित नियुक्ति है तथा ऐसी नियुक्ति कर्मचारी को वरिष्ठ वेतनमान प्रदान किये जाने के लिए विचार किये जाने की योग्यता प्रदान करती है।

नियमित नियुक्ति का अर्थ केवल 1967 व 1990 के नियम 12 के अनुसार नियमित नियुक्ति नहीं होगा बल्कि नियमों के अंतर्गत अनुज्ञात किसी भी पद्धति के अनुसार नियुक्ति सम्मिलित है – नियम 1967 के नियम 13 (5) व नियम 1990 के नियम 15 के उपबंधों के अनुसार आकस्मिक नियुक्ति भी नियमित नियुक्ति है, वरिष्ठ वेतनमान प्रदान किये जाने के प्रयोजन हेतु।

D. Educational Services (Collegiate Branch) Recruitment Rule, M.P. 1967 – Rule 13(5) – Grant of senior pay scale and selection grade – Petitioners, who are appointed in the Higher Education Department of the State of Madhya Pradesh in the year 1986, 1987 and 1989 under Rule 13(5) of the M.P. Educational Services (Collegiate Branch Recruitment Rules 1967 claim grant of senior pay scale and selection grade in accordance to the provision of the Schemes and Circulars issued by the University Grants Commission and as adopted by the State of Madhya Pradesh and incorporated in the M.P. Educational Service (Collegiate Branch) Recruitment Rules, 1990 – Held – The petitioners are entitled to the benefit – Writ Petitions allowed.

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घ. शैक्षणिक सेवा (कॉलेजियट शाखा), मर्ती नियम, म.प्र. 1967 – नियम 13(5) – वरिष्ठ वेतनमान व प्रवरण श्रेणी प्रदान की जाना – याचीगण ने, जो म०प्र० राज्य की उच्चतर शैक्षणिक विभागों में वर्ष 1986, 1987 व 1989 में म०प्र० शैक्षणिक सेवा (महाविद्यालयीन शाखा) मर्ती नियम 1967 के नियम 13 (5) के अंतर्गत नियुक्त हैं, विश्वविद्यालय अनुदान आयोग द्वारा जारी की गई स्कीम व परिपत्रों के उपबंध के अनुसार और, म०प्र० राज्य द्वारा अंगीकृत तथा म०प्र० शैक्षणिक सेवा (महाविद्यालयीन शाखा) मर्ती नियम 1990 में समाविष्ट है वरिष्ठ वेतनमान व प्रवरण श्रेणी प्रदान किये जाने का दावा किया – अभिनिर्धारित – याचीगण लाम के हकदार – याचिका मंजूर।

Cases referred :

2012(1) MPHT 375, 1986 MPLJ 617, 1984 SCC (L&S) 767, AIR 1990 SC 1607, 1993 SCC (L&S) 783, 1999 SCC (L&S) 1460, 1997 MPLSR 61, (2010) 6 SCC 791, AIR 1974 SC 175, AIR 1984 SC 1595, AIR 2009 SC 2582, 2009(3) MPLJ 146, AIR 2010 SC 1001, AIR 2006 SC 2326, (2011) 2 SCC 794, AIR 2007 SC 2053, AIR 1987 SC 1676, AIR 2002 SC 1533, AIR 1985 482, AIR 1974 SC 1898, AIR 1984 SC 153, (1987) 4 SCC 566, 2000(3) SCC 562, (1980) 3 SCC 174, (2006) 2 SCC 482, 1992 SC 1823, 1998 MPLJ 790, (1997) 2 SCC 360.

Rajendra Tiwari with L.C. Patne, Rajendra Mishra, T.K. Khadka & Abhay Pandey, for the petitioner.

Sanjay Dwivedi, G.A. for the respondent.

Short Note

*(69)

Before Mr. Justice A.K. Shrivastava

S.A. No. 1441/2005 (Jabalpur) decided on 29 February, 2012

RASHIK HASAN

...Appellant

Vs.

NAGAR NIGAM, BHOPAL & anr.

...Respondents

Civil Procedure Code (5 of 1908), Section 151, Krishi Upaj Mandi Adhiniyam, M.P. 1972 (24 of 1973), Section 67 – Permission to file suit before expiry of statutory period of notice – Appellant obtained necessary permissions to construct house over the land purchased by him by registered sale deed – Building material also collected at the site – Employees of Krishi Upaj Mandi restrained him from raising

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construction on the ground that building permission has been cancelled – Appellant filed a suit along with application under Section 151 of C.P.C. seeking leave of the Court to file suit before expiry of statutory period of 2 months as per Section 67 of Adhiniyam, 1967 – Held – A person can not be left like orphan and to wait upto the expiry of statutory period indirectly permitting the Mandi Samiti to take law in their hands – A citizen can not be left remediless – If looking to the urgency, the Court was not powerless and it could grant necessary permission to institute the suit and to pass necessary order granting temporary injunction – Appeal allowed – Trial Court directed to decide the suit on merits.

सिविल प्रक्रिया संहिता (1908 का 5), धारा 151, कृषि उपज मण्डी अधिनियम, म.प्र. 1972 (1973 का 24), धारा 67 – नोटिस की कानूनी अवधि समाप्त होने से पूर्व वाद प्रस्तुत करने की अनुमति – अपीलार्थी ने उसके द्वारा रजिस्ट्रीकृत विक्रय पत्र द्वारा क्रय की गई भूमि पर भवन निर्माण के लिये आवश्यक अनुमतियां अभिप्राप्त की – स्थान पर निर्माण सामग्री भी एकत्रित की गई – कृषि उपज मंडी के कर्मचारियों ने उसे निर्माण करने से इस आधार पर रोका कि निर्माण की अनुज्ञा निरस्त की गई है – अपीलार्थी ने अधिनियम 1967 की धारा 67 के अनुसार 2 माह की कानूनी अवधि समाप्त होने से पूर्व न्यायालय में वाद प्रस्तुत करने की अनुमति चाहते हुए सि.प्र.सं. की धारा 151 के अंतर्गत आवेदन के साथ वाद प्रस्तुत किया – अभिनिर्धारित – व्यक्ति को लावारिस जैसे नहीं छोड़ा जा सकता और कानूनी अवधि की समाप्ति तक रुकने के लिये नहीं कहा जा सकता, मंडी समिति को विधि अपने हाथ में लेने की अप्रत्यक्ष अनुमति मिलेगी – नागरिकों को उपचार विहीन नहीं छोड़ा जा सकता – आवश्यकता को देखते हुए, न्यायालय शक्तिविहीन नहीं था और वह वाद संस्थित करने की अनुज्ञा प्रदान कर सकता है तथा अस्थायी व्यादेश प्रदान करने के आवश्यक आदेश पारित कर सकता है – अपील मंजूर – विचारण न्यायालय को वाद को गुण दोषों पर विनिश्चित करने के लिये निदेशित किया गया।

Cases referred :

2001 (5) MPHT 206, 2006(1) JLJ 42, 1977 JLJ 184, 1969 JLJ Note 101, AIR 1962 SC 527.

Shobha Menon with Surabhi Ahirwar, for the appellant.

Pratush Tripathi, for the respondent No.1.

Rakesh Jain, for the respondent No.2.

NOTES OF CASES SECTION

Short Note

*(70)

Before Mr. Justice J.K. Maheshwari

M.A. No. 3927/2010 (Jabalpur) decided on 10 January, 2012

SHIVNARAYAN MAHANT

...Appellant

Vs.

REGISTRAR, PUBLIC TRUST & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Order 40 Rule 1 – Appointment of receiver – Appointment of the receiver can not be made to affect the rights inter se of the parties – The object of the appointment of a receiver is to secure and preserve the property in controversy as it stands.

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 40 नियम 1 – रिसीवर की नियुक्ति – रिसीवर की नियुक्ति पक्षकारों के परस्पर अधिकारों को प्रभावित करने के लिए नहीं की जा सकती – रिसीवर की नियुक्ति का उद्देश्य विवादित सम्पत्ति को यथास्थिति सुरक्षित एवं बनाये रखना है।

B. Civil Procedure Code (5 of 1908), Order 40 Rule 1 – Appointment of receiver – Pending judicial determination of the rights of the parties for preservation of the subject matter of the litigation, the power so embodied may be exercised by appointing a receiver when it appears to be just and convenient for doing so – Merely showing adverse and conflicting claims to property, without showing any emergency or danger or loss demanding immediate action without having clear picture from doubt the discretion should not be exercised.

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 40 नियम 1 – रिसीवर की नियुक्ति – मुकदमे की विषय वस्तु के परीक्षण हेतु पक्षकारों के अधिकारों का न्यायिक निर्धारण लंबित रहते हुए, इस प्रकार से दृश्य शक्ति का प्रयोग रिसीवर की नियुक्ति कर किया जा सकता है जब ऐसा करना न्यायोचित एवं सुविधापूर्ण प्रतीत होता है – सम्पत्ति पर मात्र प्रतिकूल एवं विरोधी दावे दर्शाने से और तुरंत कार्यवाही की मांग करने वाली किसी आकस्मिकता या भय या हानी दर्शाये बिना, संदेह से स्पष्ट चित्र ना होते हुए विवेकाधिकार का प्रयोग नहीं किया जाना चाहिए।

C. Civil Procedure Code (5 of 1908), Order 40 Rule 1 – Neither the principle of law of exercising judicial discretion in the matter of appointment of receiver has been observed by the trial Court, nor the direction so issued has not been complied with by the Registrar,

NOTES OF CASES SECTION

Public Trust – Possession was taken over of the property for which no direction was issued by the Court – Impugned order set aside.

ग. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 40 नियम 1.* – विचारण न्यायालय द्वारा रिसीवर की नियुक्ति के मामले में न तो न्यायिक विवेकाधिकार की विधि के सिद्धांत का पालन किया गया है और ना ही ऐसे जारी किये गये निदेश का रजिस्ट्रार लोक न्यास द्वारा अनुपालन किया गया है – ऐसी सम्पत्ति का कब्जा लिया गया जिसके लिए न्यायालय द्वारा कोई निदेश जारी नहीं किया गया – आक्षेपित आदेश अपास्त।

D. *Public Trust Act, (M.P.) (30 of 1951); Section 26(2) – Application to Court* – If the Registrar exercises power under sub-section (2) by moving an application he is required to furnish an opportunity of being heard to the working trustees which is missing in the facts of the present case.

घ. *लोक न्यास अधिनियम म.प्र. (1951 का 30), धारा 26(2) – न्यायालय को आवेदन* – यदि रजिस्ट्रार आवेदन पेश कर उप धारा (2) के अंतर्गत शक्ति का प्रयोग करता है, उसे कार्यरत न्यासियों को सुनवाई का अवसर प्रदान करना आवश्यक है जो वर्तमान प्रकरण के तथ्यों में से लोपित हैं।

Cases referred :

1964 MPLJ 502, 1973 MPLJ 941, (1853) 4 H.L. 997.

Girish Shrivastava, for the appellant.

Sheetal Dubey, G.A. for the respondent No.1.

Avinash Zargar, for the respondents No. 2 to 7.

Short Note

***(71)**

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 232/1996 (Jabalpur) decided on 3 January, 2012

SHIVRAJ SAHU

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. *Penal Code (45 of 1860), Sections 307 & 324 – Attempt to commit murder or simple injury* – Incised wound found over left scapular region measuring 8x4x6cm with foster, muscles, blood vessels and nerves cut – No exact opinion regarding nature of injury stated by

NOTES OF CASES SECTION

Doctor – No fracture found – Alleged incised wound would be simple hurt and not under Section 307 of I.P.C.

क. दण्ड संहिता (1860 का 45), धाराएँ 307 व 324 – हत्या कारित करने का प्रयत्न या साधारण चोट – बायें कंधे के भाग पर 8x4x6 सेमी. आकार का कटा घाव पाया गया तथा फोस्टर, मांसपेशियां, रक्त वाहिनियां एवं तंत्रिकायें कटी हुई पाई गई – घाव की प्रकृति के संबंध में चिकित्सक द्वारा कोई निश्चित राय नहीं दी गयी – कोई अस्थि मंग नहीं पाया गया – अभिकथित कटा हुआ घाव साधारण उपहति होगी और न कि भा.द.सं. की धारा 307 के अंतर्गत।

B. *Criminal Procedure Code, 1973 (2 of 1974), Section 294 – Admission of document by Counsel – Certificate of document regarding period of admission of injured in hospital not proved by any witness – Said document was exhibited on the admission of the counsel for the appellant – No inference can be drawn on the admission of the counsel for the appellant – Indeed such document is inadmissible.*

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 294 – अधिवक्ता द्वारा दस्तावेज को स्वीकार करना – आहत के अस्पताल में भर्ती की अवधि के संबंध में दस्तावेज का प्रमाण पत्र किसी साक्षी द्वारा साबित नहीं किया गया – अपीलार्थी के अधिवक्ता द्वारा उक्त दस्तावेज को स्वीकार करने पर प्रदर्शित किया गया – अपीलार्थी के अधिवक्ता की स्वीकृति पर कोई निष्कर्ष नहीं निकाला जा सकता – वस्तुतः उक्त दस्तावेज अग्राह्य है।

C. *Penal Code (45 of 1860), Sections 95, 96 & 99 – Private Defence of property – Number of forest offences registered against victim – Appellant caused injury while protecting the property of the forest department as he was working as Security Labourer/Guard – Appellant acted in private defence of property – Entitled for acquittal.*

ग. दण्ड संहिता (1860 का 45), धाराएँ 95, 96 व 99 – सम्पत्ति की निजी प्रतिरक्षा – पीड़ित के विरुद्ध बहुत सारे वन अपराध पंजीबद्ध – अपीलार्थी द्वारा चोट पहुंचाई गई, जब वह वन विभाग की सम्पत्ति का संरक्षण कर रहा था, चूंकि वह सुरक्षा मजदूर/गॉर्ड के रूप में कार्य कर रहा था – अपीलार्थी द्वारा सम्पत्ति की प्राइवेट प्रतिरक्षा में कार्य किया गया – दोषमुक्त किये जाने का हकदार।

S.K. Dixit, for the appellant.

Ajay Tamrakar, P.L. for the respondent.

NOTES OF CASES SECTION

Short Note(DB)

*(72)

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

Arb. Appeal No. 25/2010 (Indore) decided on 24 October, 2011

STATE OF M.P. & anr.

....Appellants

Vs.

M/s DEWAS UDYOG & ors.

...Respondents

Arbitration and Conciliation Act (26 of 1996), Section 7 – Arbitration Agreement – First Respondent filed Writ Petition against appellant and Zila Panchayat for outstanding amount of contract work – Writ Petition was disposed of with a direction to release the admitted amount alongwith an observation that if the Writ Petitioner has already so applied, the matter shall be referred to an Arbitrator to resolve the dispute between the parties – On realizing, that there was no arbitration agreement, the appellants filed a Review Petition and in the Review Petition the said observation regarding referral of matter to Arbitrator was recalled – During intervening period between passing of the order of Writ Petition and order of recall in Review Petition, a joint meeting between the parties was convened and a Retired High Court Judge was appointed as Arbitrator – The Arbitrator so appointed over ruled the objection raised by the appellants regarding jurisdiction in light of the recall order passed in Review Petition and passed the award for Rs. 16,77,56,010/- – The appeal filed against said award was also dismissed by the District Judge – Held – The order passed in Writ Petition by which the matter was directed to be referred to an Arbitrator under the provisions of the Act of 1996 to resolve the dispute between the parties, was passed on the wrong notion that there exists a written arbitration or clause for reference of the dispute between the parties to an Arbitrator – Having recalled the said order in review petition, it can not be said that the parties have entered into the agreement for arbitration so as to cover it under the term arbitration agreement – In the absence of any arbitration agreement between the parties, the whole proceedings of arbitration, the award passed by the Arbitrator and the order of learned District Judge upholding the award are liable to be set aside – Appeals allowed.

माध्यस्थ्यम् और सुलह अधिनियम (1996 का 26), धारा 7 – माध्यस्थ्यम् अनुबंध

NOTES OF CASES SECTION

— प्रथम प्रत्यर्थी ने अपीलार्थी तथा जिला पंचायत के विरुद्ध ठेकेदारी कार्य की बकाया रकम के लिए रिट याचिका प्रस्तुत की — रिट याचिका का इस निदेश के साथ निपटारा किया गया कि स्वीकृत रकम को मुक्त किया जाये इस सम्प्रेषण के साथ कि यदि रिट याचिकाकर्ता ने ऐसा पहले ही आवेदन किया है कि पक्षकारों के मध्य विवाद के निपटारे के लिये प्रकरण माध्यस्थम को निर्देशित किया जावेगा — यह ध्यान में आने पर कि कोई माध्यस्थम अनुबंध नहीं था, अपीलार्थी ने पुनर्विलोकन याचिका प्रस्तुत की और पुनर्विलोकन याचिका में माध्यस्थम को मामला निर्देशित करने के संबंध में उक्त संप्रेषण को वापस लिया गया — रिट याचिका के आदेश पारित करने और पुनर्विलोकन याचिका में वापस लेने के आदेश के मध्यकाल के दौरान पक्षकारों के मध्य संयुक्त मीटिंग बुलाई गई और एक सेवानिवृत्त उच्च न्यायालय के न्यायमूर्ति को मध्यस्थ के रूप में नियुक्त किया गया — इस प्रकार से नियुक्त मध्यस्थ ने अपीलार्थी द्वारा पुनर्विलोकन याचिका में पारित किया गया वापसी के आदेश के आलोक में अधिकारिता संबंधी उठाये गये आक्षेप को अस्वीकार किया और रुपये 16,77,56,010/- के लिए अवार्ड पारित किया — उक्त अवार्ड के विरुद्ध प्रस्तुत की गयी अपील भी जिला न्यायाधीश द्वारा खारिज की गयी — अभिनिर्धारित — रिट याचिका में पारित आदेश जिसके द्वारा पक्षकारों के मध्य विवाद को सुलझाने के लिये अधिनियम 1996 के उपबंधों के अंतर्गत मामला मध्यस्थ को निर्देशित करने के लिए निदेश दिया गया था गलत धारणा से पारित किया गया था कि पक्षकारों के मध्य मध्यस्थ को विवाद निर्देशित करने हेतु लिखित माध्यस्थम या खंड है — पुनर्विलोकन याचिका में उक्त आदेश वापस लेने पर यह नहीं कहा जा सकता कि पक्षकारों ने माध्यस्थम हेतु करार किया है जिससे कि वह यह माध्यस्थम अनुबंध के अंतर्गत आयेगा — पक्षकारों के बीच किसी माध्यस्थम अनुबंध की अनुपस्थिति में, माध्यस्थम की संपूर्ण कार्यवाहियां, मध्यस्थ द्वारा पारित अवार्ड तथा अवार्ड की पुष्टि करने वाला विद्वान जिला न्यायाधीश का आदेश अपास्त किये जाने योग्य — अपील मंजूर।

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

Cases referred :

(1998) 3 SCC 573, (2003) 7 SCC 418, (2007) 5 SCC 719, (2011) 7 SCC 406, (1989) 4 SCC 595.

Shekhar Bhargava with Romesh Dave, for the appellants.

A.K. Chitale with Seema Sharma for the respondent No. 3.

Vijay Asudani, for the respondent No.1.

Vivek Sharan, Assistant Solicitor General of India for the respondent

No.2.

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Short Note (DB)

*(73)

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

Cr. A. No. 994/2001 (Indore) decided on 7 February, 2012

SUBHASHCHANDRA JOSHI

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3 – Tape Recorded Version – No evidence that the voice recorded in the cassette of tape recorder is of appellant and complainant – The electronic evidence of demand of alleged bribe (through tape recorded version) can not be accepted.

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – टेप रिकार्ड का संस्करण – कोई साक्ष्य नहीं कि टेप रिकार्डर की कैसेट में रिकार्ड की गई आवाज अपीलार्थी तथा शिकायतकर्ता की है – अभिकथित रिश्वत की मांग का इलेक्ट्रानिक साक्ष्य (टेप रिकार्ड संस्करण द्वारा) स्वीकार नहीं किया जा सकता।

B. Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d)/13(2) – Complaint of bribe – Appellant (Head Constable) caught red handed taking bribe – All ingredients present to constitute offence – Bribe money was also seized from possession of appellant – No satisfactory explanation by accused that how the bribe money was received by him – Prosecution proved its case – Appeal dismissed.

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 7, 13(1)(डी)/13(2) – रिश्वत की शिकायत – अपीलार्थी (हेड कॉन्स्टेबल) रिश्वत लेते हुए रंगे हाथों पकड़ा गया – अपराध गठित करने के लिए सभी घटक मौजूद – अपीलार्थी के कब्जे से रिश्वत की रकम भी जब्त की गई – अभियुक्त द्वारा कोई संतोषजनक स्पष्टीकरण नहीं कि उसके द्वारा रिश्वत की रकम कैसे प्राप्त की गई – अभियोजन ने अपना मामला साबित किया – अपील खारिज।

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

Cases referred :

(1995) 3 SCC 351, (2007) 7 SCC 625, (2006) 1 SCC 407.

M.K. Dave, for the appellant.

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

NOTES OF CASES SECTION

Short Note (DB)

*(74)

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

Cr. A.No. 1048/2001 (Indore) decided on 14 February, 2012

SURENDRA TRIVEDI

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Tape Recorder – Admissibility – It is not proved that the voice containing in cassette of the tape recorded is of appellant and complainant by any scientific means and is tallying with admitted voice of appellant and complainant – No reliance can be placed on said electronic evidence.

क. **अष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – टेप रिकार्डर – ग्राह्यता –** किसी वैज्ञानिक साधन द्वारा यह साबित नहीं हुआ है कि टेप के कैसेट में मौजूद आवाज अपीलार्थी तथा शिकायतकर्ता की है और अपीलार्थी एवं शिकायतकर्ता की स्वीकृत आवाज से मिलती है – उक्त इलेक्ट्रॉनिक साक्ष्य पर कोई विश्वास नहीं किया जा सकता।

B. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Demand – Appellant demanded Rs. 1 lacs – Appellant accepted amount of Rs. 45,000 – Since, the amount was quite huge it can be inferred that some settlement must have been arrived between appellant and complainant when he handed over the treated currency notes of Rs. 45,000/-.

ख. **अष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – मांग –** अपीलार्थी ने एक लाख रुपये की मांग की – अपीलार्थी ने रुपये 45,000/- की रकम स्वीकार की – चूंकि रकम बहुत ज्यादा थी यह निष्कर्ष निकाला जा सकता है कि अपीलार्थी व शिकायतकर्ता के बीच कोई समझौता हो गया होगा जब उसने उपचारित करेंसी नोट रुपये 45,000/- उसे सौंपे।

C. Prevention of Corruption Act (49 of 1988), Section 13(1)(d) – Illegal Gratification – Treated currency notes were handed over to the appellant at his residence which were recovered from his possession – Appellant was holding responsible post of Building Officer – He was authorized to sanction maps of buildings etc and to take necessary action against illegal construction including demolition of

NOTES OF CASES SECTION

such structure – Appellant had also given a show cause notice to the complainant against illegal construction – In order to satisfy the lust of his lure, appellant called the complainant at his official residence repeatedly – Circumstances show that the appellant had made demand of bribe and had also accepted the same – Appeal dismissed.

ग. म्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – अवैध परितोषण – उपचारित करेंसी नोट अपीलार्थी को उसके निवास पर सौंपे गये जो उसके आधिपत्य से बरामद किये गये थे – अपीलार्थी बिल्डिंग अधिकारी का जिम्मेदार पद धारक था – वह बिल्डिंग का नक्शा आदि मंजूर करने के लिए पाधिकृत था और अवैध निर्माण के विरुद्ध आवश्यक कार्यवाही कर सकता था जिसमें उक्त निर्माण को ध्वंस करना शामिल है – अपीलार्थी ने शिकायतकर्ता को अवैध निर्माण के खिलाफ कारण बताओ नोटिस भी दिया था – अपीलार्थी ने अपने प्रलोभन की तीव्र लालसा की संतुष्टि के अनुक्रम में शिकायतकर्ता को अपने शासकीय आवास पर बार-बार बुलाया – परिस्थितियाँ दर्शाती हैं कि अपीलार्थी ने रिश्वत की मांग की और उसे स्वीकार भी किया था – अपील खारिज।

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

Cases referred :

AIR 1979 SC 1191, AIR 2000 SC 3377, AIR 2003 SC 2169, 2001(1) JLJ 267, (2010) 1 SCC 398, (2007) 7 SCC 625, (2006) 1 SCC 407, (1995) 3 SCC 351

S.K. Vyas with Ashish Gupta, for the appellant.

L.N. Soni, P.P. with D.N. Joshi, for the respondent.

I.L.R. [2012] M.P., 1105

WRIT APPEAL

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

W.A. No. 526/2006 (Indore) decided on 23 June, 2011

STATE OF M.P. & anr.

...Appellants

Vs.

ONKAR LAL

...Respondent

Service Law – Increment – Respondent was appointed as A.G.-3 – In his order of appointment a condition was imposed to pass Hindi Typing Examination within two years with a further stipulation that only after one year of passing of such examination he will be entitled for the benefit of regular increments – Thereafter, on his passing of Hindi Typing Examination, the appellant released the regular increments payable after passing of the examination – Held – Passing of typing examination being not essential qualification for the purpose of recruitment, the imposition of stipulation of passing of the Hindi Typewriting Examination as pre-requisite condition for release of the increment can not be said to be justified – The said condition can not be made basis to deny the benefit of regular increments after one year from the date of his initial appointment – Appeal dismissed. (Paras 3, 9)

सेवा विधि – वेतनवृद्धि – प्रत्यर्थी सहायक ग्रेड-3 के रूप में नियुक्त किया गया – उसके नियुक्ति आदेश में दो वर्षों के भीतर हिन्दी टायपिंग उत्तीर्ण करने की शर्त अधिरोपित थी आगे और इस शर्त के साथ कि ऐसी परीक्षा उत्तीर्ण करने के एक वर्ष पश्चात ही वह नियमित वेतनवृद्धियों के लाभों का हकदार होगा – तत्पश्चात, उसके द्वारा हिन्दी टायपिंग परीक्षा उत्तीर्ण करने पर अपीलार्थी ने परीक्षा उत्तीर्ण करने के पश्चात देय नियमित वेतनवृद्धियों को मुक्त किया – अभिनिर्धारित – चूंकि भर्ती के प्रयोजन हेतु टायपिंग परीक्षा उत्तीर्ण करना आवश्यक अर्हता नहीं है, वेतनवृद्धि मुक्त करने के लिए पूर्वाकांक्षित शर्त के रूप में हिन्दी टाईपराईटिंग परीक्षा उत्तीर्ण करने की शर्त को न्यायोचित नहीं कहा जा सकता – उक्त शर्त उसकी प्रारम्भिक नियुक्ति की तिथि से एक वर्ष पश्चात नियमित वेतनवृद्धियों का लाभ अस्वीकार करने का आधार नहीं हो सकती – अपील खारिज।

Case referred :

WP No. 2778/2005 (Chamanlal Rathore Vs. State of M.P.).

Vivek Patwa, Dy. G.A. for the appellants.

ORDER

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

2. By this writ appeal, the appellants have challenged the order dated 6.09.2006 passed by learned Single Judge of this Court in W.P.S. No.3238 of 2006.

3. Briefly stated the respondent was appointed as A.G.-3 vide order dated 9.10.1984 issued by the Superintending Engineer, Narmada Vikas Division No.10, Indore on being selected by a duly constituted Departmental Selection Committee. In his order of appointment a condition was imposed to pass Hindi Typing Examination within two years with a further stipulation that only after one year of passing of such examination he will be entitled for the benefit of regular increments.

4. Thereafter in his passing of the Hindi Typing Examination from the recognized Institute, the appellants released the regular increments in favour of the respondent in terms of his appointment order.

5. Feeling aggrieved by non release of the increments after one year of his initial appointment, the respondent herein filed W.P. No.3238 of 2006 claiming increments from the date of his appointment.

6. The learned Single Judge after considering the various orders passed from time to time including an order dated 7.07.2006 passed in W.P. No.2778 of 2005 (*Chamanlal Rathore vs. State of M.P.*) allowed the writ petition of the respondent and directed the appellants herein to grant the respondent regular annual increments after one year from the date of his initial appointment. Aggrieved, the appellants have filed this writ appeal.

7. Having heard learned Deputy Government Advocate for the appellants, we find no merit in this writ appeal.

8. The respondent was appointed in the employment of Water Resources Department. His recruitment was under M.P. Irrigation Department (non Gazetted) Service Recruitment Rules 1969 (for short, the Rules). The eligibility criteria provided in the Rules for recruitment on the post of Lower Division Clerk on which the respondent was appointed was passing of Matriculation or equivalent examination. It further provides that preference shall be given to those possessing certificate in typewriting. Thus as per the Rules, the essential

qualification for the purpose of recruitment on the said post was passing of matriculation or equivalent examination. The candidates possessing the certificate of typewriting were only to be given preference.

9. In the circumstances, passing of typing examination being not the essential qualification for the purpose of recruitment on the said post, the imposition of stipulation of passing of the Hindi Typewriting Examination as prerequisite condition for release of the increment cannot be said to be justified. The said condition imposed in his appointment order that the increment shall be payable only after passing of the Hindi Typing Examination being contrary to the recruitment rules, the same cannot be made basis to deny the benefit of regular increments after one year from the date of his initial appointment.

10. In view of the aforesaid, in our considered view, the order passed by the learned Single Judge being in consonance with the Rules, no case for interference in this Intra Court Appeal is made out.

11. We have also been informed that the cases of number of similarly situated employees of the same department have been decided by the learned Single Judge and in those cases including in the case of *Chamanlal Rathore* (supra) no writ appeals have been filed and the said orders including the order passed in W.P. No. 2778 of 2005 on 7.07.2006 have already attained finality.

12. In view of the aforesaid also the writ appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1107

WRIT APPEAL

Before Mr. Sushil Harkauli, Acting Chief Justice &

Mr. Justice Alok Aradhe

W.A. No. 1166/2009 (Jabalpur) decided on 30 November, 2011

HARISH CHANDRA YADAV

Vs.

STATE OF M.P. & ors.

Appellant

...Respondents

A. Service Law – Panchayats (Appeal and Revision) Rules, M.P. 1995 – Rule 3 – Appointment of Panchayat Karmi – Appeal Against – Person aggrieved – Appellant was appointed as Pachayat Karmi vide order dated 11.08.2007 – Appeal before S.D.O. filed by ‘I’ was

dismissed – A revision preferred by respondent No. 5 before Additional Collector was also dismissed – The respondent No. 5 challenged the order in appeal before the Additional Commissioner – Held – An appeal under Rule 3 can even be preferred by any person aggrieved – Order passed by the Additional Commissioner can not be said to be without jurisdiction. (Para-11)

क. सेवा विधि – पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995 – नियम 3 – पंचायत कर्मियों की नियुक्ति – के विरुद्ध अपील – पीड़ित व्यक्ति – अपीलार्थी को आदेश दिनांक 11.08.2007 द्वारा पंचायत कर्मियों के रूप में नियुक्त किया गया – एसडीओ के समक्ष 'आई' द्वारा प्रस्तुत अपील खारिज की गई – अपर कलेक्टर के समक्ष प्रत्यर्थी क्र० 5 द्वारा प्रस्तुत पुनरीक्षण भी खारिज किया गया – प्रत्यर्थी क्र० 5 ने अपर आयुक्त के समक्ष अपील में आदेश को चुनौती दी – अभिनिर्धारित – नियम 3 के अंतर्गत अपील किसी पीड़ित व्यक्ति द्वारा भी प्रस्तुत की जा सकती है – अपर आयुक्त द्वारा पारित आदेश बिना अधिकारिता के होना नहीं कहा जा सकता है।

B. Service Law – Appointment of Panchayat Karmi – Appointment of appellant as Panchayat karmi was set aside on the grounds (i) there were other candidates who were higher in merit than the appellant, and (ii) that the appellant was convicted for offences under Sections 294, 341, 323, 324 and under Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act – Order was challenged by the appellant on the grounds that (a) the appeal at the instance of respondent No. 5 was not maintainable (b) that at the time when the appellant was appointed on the post of Panchayat Karmi, there were no rules governing the service conditions of Panchayat Karmi and, therefore, the appointment of appellant who is an ex-convict or was not the most meritorious was not barred under any rule – Held – Even there were no service rules at the relevant time an officer, authority or body providing public employment must act in a rational, fair and reasonable manner – The Public appointment can not be permitted to be made at the whims and caprices of the appointing authority – The suitability of candidates for appointment to be a public post must be adjudged on the basis of rational and reasonable criteria – Appeal dismissed. (Para-12,13)

Picking up a less meritorious candidate when more meritorious candidates are available for appointment, in absence of a cogent

and rational reason for so doing would amount to arbitrary capricious and irrational exercise of power on the part of the appointing authority – Appointment of an ex-convict on a public post when candidates with no past criminal record are available would again amount to whimsical exercise of power unless cogent and justifiable reasons are assigned by the appointing authority for picking up the ex-convict in preference over more clean candidates.

ख. सेवा विधि – पंचायत कर्मी की नियुक्ति – पंचायत कर्मी के विरुद्ध में अपीलार्थी की नियुक्ति इन आधारों पर अपास्त की गई – (1) अपीलार्थी से अधिक की गुणवत्ता धारक अन्य अंम्यर्थी थे व (2) अपीलार्थी को धारा 294, 341, 323, 324 व अनुसूचित जाति, अनुसूचित जनजाति (अत्याचार निवारण) अधि० की धारा 3 (1)(x) के अंतर्गत अपराधों के लिए दोषसिद्ध किया गया था – अपीलार्थी के द्वारा आदेश को चुनौती इस आधार पर दी गई थी कि (ए) प्रत्यर्थी क्र. 5 के अनुरोध पर अपील पोषणीय नहीं हैं। (बी) यह कि, अपीलार्थी की पंचायतकर्मी के पद पर नियुक्ति के समय पंचायत कर्मी की सेवा शर्तों को शासित करने वाले कोई नियम नहीं थे और इसलिए अपीलार्थी की नियुक्ति जो कि एक पूर्व सिद्धदोष है या अधिक गुणवत्ताधारक नहीं है, किसी नियम के अंतर्गत वर्जित नहीं थी – अभिनिर्धारित – यद्यपि सुसंगत समय पर कोई सेवा नियम नहीं थे, किसी अधिकारी, प्राधिकारी या लोक नियोजन का प्रबंध करने वाले निकाय को युक्तिसंगत, निष्पक्ष व युक्तियुक्त ढंग से कार्यवाही करना चाहिए – लोक नियुक्ति को नियुक्ति प्राधिकारी की सनक एवं झककी पन पर किये जाने की अनुमति नहीं दी जा सकती – सार्वजनिक पद के लिए नियुक्ति हेतु अंम्यर्थियों की योग्यता का निर्णय युक्तिसंगत एवं युक्तियुक्त मानदण्ड पर आधारित होना चाहिए – अपील खारिज।

Paritosh Trivedi, for the appellant.

Swapnil Ganguly, P.L. for the respondents No.1 to 4.

Shashank Shekhar, for the respondent No.5.

ORDER

The Order of the Court was delivered by : **SUSHIL HARKAULI, AG.CJ.** - With the consent of parties, the matter has been heard finally.

1. In this intra-court appeal the appellant has challenged the validity of the order dated 24.11.2009 passed by a learned Single Judge of this Court, whereby the writ petition preferred by the appellant has been dismissed.

2. The facts leading to filing of the writ appeal, briefly stated, are that

Gram Panchayat Kalpi issued an advertisement for appointment of Panchayat Karmi on 24.7.2007. Pursuant to the said advertisement, 19 candidates submitted their applications out of which 10 applicants were found ineligible at the time of scrutiny of applications. Remaining 9 applications were considered in the meeting of the general body of Gram Panchayat Kalpi. The Gram Panchayat passed a resolution on 8.8.2007 for appointment of the appellant as Panchayat Karmi. In pursuance of the aforesaid resolution, the appellant was appointed as Panchayat Karmi vide order dated 11.8.2007. Being aggrieved by the appointment of the appellant on the post of Panchayat Karmi one candidate namely Ku. Indira, preferred an appeal before the Sub Divisional Officer on the ground that the appointment of the appellant was not in consonance with the circular dated 13.8.2007 issued by the State Government.

3. In the appeal, which was preferred by aforesaid Ku. Indira, the respondent no. 5 filed an application for her impleadment, which was rejected by the S.D.O. with the liberty to the respondent no. 5 to prefer an independent appeal, which she did not file.

4. Eventually, the appeal preferred by aforesaid Ku. Indira was dismissed by the Sub Divisional Officer vide order dated 17.12.2007 on the ground that the appellant was duly appointed on the basis of decision taken by the members by majority in the general body meeting of Gram Panchayat.

5. Being aggrieved by the order dated 17.12.2007 passed by the Sub Divisional Officer, the respondent no. 5 filed a revision before the Additional Collector, Mandla. The revision preferred by the appellant was dismissed vide order dated 29.5.2008. The respondent no. 5 challenged the order passed by the Additional Collector in an appeal before the Additional Commissioner. The appeal preferred by the respondent no. 5 was allowed by the Additional Commissioner vide order dated 10.7.2009 and the appointment of the appellant was set aside inter alia on the ground that appellant could/should not have been selected/appointed because (i) there were other candidates who were higher in merit than the appellant, and (ii) that the appellant was convicted for offences under section 294, 341, 323, 324 and under section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

6. The appellant challenged the order passed by the Additional Commissioner dated 10.7.2009 in the writ petition before the learned Single Judge. The learned Single Judge vide order dated 24.11.2009 dismissed the

writ petition preferred by the appellant. Hence this writ appeal.

7. Learned counsel for the appellant has assailed the setting aside of the appellant's appointment on the ground that (a) the appeal at the instance of respondent no. 5 was not maintainable, (b) that at the time when the appellant was appointed on the post of Panchayat Karmi, there were no rules governing the service conditions of Panchayat Karmi and, therefore, the appointment of appellant who is an ex-convict or was not the most meritorious was not barred under any rule.

8. The appellant further submitted that rules referred to in the impugned order of the learned Single Judge namely, M.P. Panchayat Service (Recruitment and General Conditions of Service) Rules, 1999, do not apply to the appellant as the appellant was appointed on the post of Panchayat Karmi in Gram Panchayat whereas the aforesaid rules apply in respect of the posts under Janpad Panchayat and Zila Panchayat.

9. On the other hand, learned counsel for the respondent no. 5 submitted that the order passed by the learned Single Judge does not call for any interference.

10. We have considered the submissions made on both sides.

11. Under the M.P. Panchayat (Appeal and Revision) Rules, 1995, the right of appeal is not restricted to a party to the proceeding. An appeal under Rule 3 can even be preferred by any person aggrieved. Therefore, it cannot be said that appeal at the instance of respondent no. 5 was not maintainable before the Additional Commissioner. In any case, Rule 5 of the aforesaid rules deals with the power of revision which can be exercised even suo motu. Therefore, the order passed by the Additional Commissioner cannot be said to be without jurisdiction.

12. Even if it is assumed for the sake of argument, that there were no service rules at the relevant time, governing the service conditions of Panchayat Karmi, yet we must keep in mind the mandate contained in Article 14 and more importantly Article 16 of the Constitution of India which deals with matters of public employment. An officer, authority or body providing public employment must act in a rational, fair and reasonable manner. The Public appointments cannot be permitted to be made at the whims and caprices of the appointing authority. The suitability of candidates for appointment to be a public post must be adjudged on the basis of rational and reasonable criteria.

13. In our considered opinion, picking up a less meritorious candidate

1112 P.K. Plastics Vs. Comm. of Commercial Tax (DB) I.L.R. [2012] M.P. when more meritorious candidates are available for appointment, in absence of a cogent and rational reason for so doing, would amount to arbitrary capricious and irrational exercise of power on the part of the appointing authority. Similarly, the appointing an ex-convict on a public post when candidates with no past criminal record are available would again amount to whimsical exercise of power unless cogent and justifiable reasons are assigned by the appointing authority for picking up the ex-convict in preference over more clean candidates.

14. In the instant case, the Gram Panchayat has failed to disclose any such reason for appointing the appellant who is a less meritorious candidate and is an ex-convict.

15. In view of the preceding analysis we are not inclined to interfere with the order passed by the learned Single Judge.

The appeal is accordingly dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1112

WRIT PETITION

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

W.P.No. 767/2011 (Indore) decided on 17 January, 2012

P.K. PLASTICS

...Petitioner

Vs.

COMMISSIONER OF COMMERCIAL TAX & ors.

...Respondents

Value Added Tax Act, M.P. (20 of 2002), Entry 6 of Part II Schedule II – In common parlance utensils means items of daily household use, generally used for preparing, serving or keeping food or beverages – Restricting the meaning of “utensils” to the items used in the kitchen can not be sustained. (Paras 21 & 23)

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), अनुसूची II भाग II की प्रविष्टि 6 – सामान्य बोलचाल में बर्तनों का अर्थ है घरेलू कामों में रोजाना उपयोग की जाने वाली वस्तुएँ जो सामान्यतः खाना या पेय बनाने, परोसने या रखने के लिए उपयोग में लायी जाती हैं – बर्तनों को रसोई में उपयोग की जाने वाली वस्तुएँ होने का सीमित अर्थ पोषणीय नहीं।

Cases referred :

(1988) 68 STC 324(SC), (1980) 46 STC 30(MP), (2006) 147 STC 329 (Karn.)

G.M. Chaphekar with *C.R. Pancholia*, for the petitioner.

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

ORDER

The Order of the Court was delivered by :
PRAKASH SHRIVASTAVA, J. - Petitioner has assailed the correctness of the order dated 5/8/2010 passed by the Commissioner (Commercial Tax) Madhya Pradesh, Indore under Section 70 of the Madhya Pradesh VAT Act, 2002 (for short "the Act").

2. Petitioner is engaged in the business of purchase and sale of plastic and steel items such as water jug and bottle, lunch box etc. Petitioner was assessed to tax on the sale of these items @ 4% from 1/4/2006 to 31/7/2009 and @ 5% after 1/8/2009. Petitioner had filed the application before the Commissioner under Section 70 of the Act for determining the rate of tax on the items purchased and sold by the petitioner. The Commissioner, by order dated 5/8/2010 held that only the water jug is covered within the meaning of utensils in the Entry 6 of Part II of Schedule II of the Act and taxable @ 5% and that the remaining items are covered by the Entry 1 Part IV of Schedule II of the Act taxable @ 13%. The Commercial Tax Officer in the mean while issued the notice dated NIL (Annexure P.3) for the block assessment for the period 1/4/2006 to 26/12/009 intending to make the block assessment and levy tax @ 13% on the sale of the items in question. Aggrieved with the same, the petitioner has filed the present Writ Petition.

3. The stand of the respondent is that the petitioner had furnished the quarterly returns under the Act disclosing the turnover taxable @ 4% till 31/7/2009 and @ 5% after 1/8/2009 and had paid the tax accordingly and there was deemed assessment under Section 20-A of the Act. The petitioner's case was later taken in scrutiny. Further case of the respondent is that the Commissioner has rightly passed the order under Section 70 of the Act and has rightly held that except for water jug, the other items in question are taxable @ 13% under Entry 1 Part IV of Schedule II of the Act, and therefore, the commercial tax officer has rightly issued the notice for making the block assessment for the period 1/4/2006 to 26/12/2009.

4. Shri G.M.Chaphekar, learned Sr.Counsel appearing for the petitioner submitted that the Commissioner has committed an error in restricting the meaning of "utensils" to only the vessel used in the kitchen. Referring to the

judgments on the point he submitted that such a restricted meaning cannot be given to the word "utensils" and that other items purchased and sold by the petitioner are also covered within the meaning of utensils and taxable @ 4% or 5% as per the Entry 6 Part II of Schedule II.

5. Ms. M. Raveendran, learned counsel for the respondents submitted that the order passed by the Commissioner under Section 70 of the Act does not suffer from any error since the Commissioner has rightly held that only water jug is covered within the meaning of "utensils" and other items in question are not the utensils as they are not meant for use in the kitchen.

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

7. It is the settled position in law that the terms appearing in the taxing statutes are required to be understood in the manner defined therein and in the absence of any such definition, they should be understood in their popular meaning as understood in commercial or common parlance or they should be construed in the same way in which they are understood in ordinary parlance in area in which the law is in force. If an expression is capable of a wider meaning as well as narrower meaning the question whether the wider or narrower meaning should be given depends on the context and the background of the case. The Supreme Court in the matter of *Mukesh Kumar Agrawal Vs. State of MP* reported in (1988) 68 STC 324(SC) has held that:-

"4. In a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance, i.e., "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". Such words must be understood in their "popular sense". The particular terms used by the legislature in the denomination of articles are to be understood according to the common commercial understanding of those terms used and not in their scientific and technical sense "for the legislature does not suppose our merchants to be naturalists or geologists or botanists".

8. The controversy involved in the present matter needs to be considered keeping in view the aforesaid settled position in law.

9. Section 70 of the Act gives power to the Commissioner to determine the disputed questions including the question in respect of the rate of tax on any goods. The petitioner had approached the Commissioner under this Section for determining the rate of tax in respect of the following items:-

1. Water Jugs.

2. Lunch Box.

3. Casseroles (Hot Pots)

4. Stainless Steel Flask

5. Thermos Fasks

6. Tray

7. Plastic Insulated Water Bottle

8. Water Bottle in Pouch cover

9. Pet Bottles

10. Plastic Containers

11. Dry Fruit Box

12. Spoon Stand & Brush Stands

13. Fruit Basket

10. The case of the petitioner is that these items are covered under Entry 6 of Part II of Schedule II of the Act which reads as under:-

“6. All kinds of utensils and enamelled utensils including pressure cookers and pans, but excluding utensils made of precious metals”.

11. The Commissioner, in the impugned order, has held that except for water jug all other items are covered by the Entry 1 of Part IV of Schedule II which reads as under:-

“1. All other goods not covered by Schedule I and Part I to III of this Schedule”.

12. Entry 1 of Part IV of Schedule II is a Residuary Entry and it is the settled position in law that the Residuary Entry should be applied as a last

1116 P.K. Plastics Vs. Comm. of Commercial Tax (DB) I.L.R.[2012]M.P.
resort when a particular item is not found to be covered by any other entry of the Schedule.

13. Entry 6 of Part II of Schedule II is very wide entry which covers “all kinds of utensils and enamelled utensils” except those which are expressly excluded from the entry ie. utensils made of precious metals and hand made utensils.

14. The question that arises for consideration is in respect of the common parlance meaning of the word “utensils” since it has not been defined under the Act.

15. Before going to the common parlance meaning of the word, we may look into the dictionary meaning of the word “utensils” which has been defined in different dictionaries as under:-

Shorter Oxford Dictionary

Utensil :- “Any article useful or necessary in a house hold; a domestic implement, vessel, or article of furniture; and instrument or vessel in common use in a kitchen, dairy, etc; any vessel or other article serving a useful end or purpose; a tool or implement used by artisans, farmers, etc.”

Stroud's Judicial Dictionary of Words & Phrases, Volume 3, Sixth Edition

UTENSIL:- anything necessary for our use and occupation; household stuffe” (Cowel).

Chambers 21st Century Dictionary, Revised Edition

“utensil 'ju tensil'-- noun an implement or tool, especially one for every day or domestic use. Cooking utensils.
14C: from French utensile, from Latin utensilis 'fit for use' or 'useful', from uti to use.”

The New International Webster's Comprehensive Dictionary of English Language, Encyclopedic Edition

“u-ten-sil (yoo-ten sel) n. A vessel, tool, implement, etc; serving a useful purpose, especially for domestic or farming use. See synonyms under TOOL. [<OF utensile

<L utensilis fit for use <utens, ppr. Of uti use]”.

16. These definitions give a broad idea of the meaning of utensils which has been defined differently in different dictionaries either widely or narrowly.

17. The Division Bench of this Court in the matter of *Yadav Metal Industries Vs. Commissioner of Sales Tax, MP* reported in (1980)46 STC 30(MP) while considering the similar issue has taken note of the ordinary dictionary meaning of utensils to include any article useful or necessary in a household and has held that the entry cannot be restricted to cover those utensils only which are generally used in kitchen.

18. The Division Bench of the Karnataka High Court in the matter of *Stovekraft Pvt. Ltd Vs. State of Karnataka* reported in [2006]147 STC 329 (Karn) while examining the similar entry in respect of the stainless steel vacuum flask and other items held that:-

“13. From the aforesaid meaning assigned to the word “utensil” it is clear that the word “utensil” includes a vessel and the word “utensil” is not synonymous with the word “vessel”. Utensil means any article useful or necessary in a house-hold commonly used in a kitchen. In other words, an implement, tool or vessel fit for use and serving useful purpose. As the entry stands, the words used are “all utensils” “including”. The word “all” and “including” has special significance. The word “includes” is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import, but also things which the interpretation clause declares that they shall include. The words used in an inclusive definition denote extension and cannot be treated as restricted in any sense. When we are dealing with an inclusive definition it would be inappropriate to put a restrictive interpretation upon the terms of wider limitation. As the word “utensil” is not defined under the Act, but in entry No.5 the word used is “all utensils” “including”, it is inappropriate to put a restrictive

meaning to the word “utensil” as understood in common parlance. The word “utensil” is a term of wider denotation.”

19. Though the Karnataka High Court has taken the view that utensils means any article useful or necessary in a household commonly used in a kitchen, but the said restricted meaning in respect of use in the kitchen only cannot be approved in view of the earlier Division Bench judgment of this Court in the matter of *Yadav Metal Industries* (supra).

20. The similar Entry came up for consideration before the Chhattisgarh High Court in the matter of *M/s. Kamesh Traders Vs. State of Chhattisgarh and another* passed in WP No.6975/2008 decided on 2nd December, 2010 wherein the Chhattisgarh High Court has taken the view that the Entry makes no distinction between the utensils on the basis of the material for making the utensils except precious metals and that the articles used as articles of kitchen and for domestic purpose are covered in it. The Chhattisgarh High Court in the said judgment has taken the view that serving tray, flask, stainless steel tiffin with plastic body, water jug and hot pot (casserole) are covered within the common parlance meaning of utensils.

21. Keeping in view the above analysis and considering the material placed before this Court, we are of the opinion that in common parlance utensils means items of daily household use generally used for preparing, serving or keeping food or beverages.

22. The Commissioner, by the impugned order has taken the view that only the items which are used in the kitchen are covered within the meaning of utensils. The said interpretation of the Commissioner is not correct. It is too narrow an interpretation which cannot be upheld keeping in view the common parlance meaning of utensils. Even otherwise, the view which has been taken by the Commissioner runs counter to the Division Bench judgment of this Court in the matter of *Yadav Metal Industries Vs. Commissioner of Sales Tax, MP* reported in (1980)46 STC 30(MP).

23. Thus, the impugned order passed by the Commissioner under Section 70 of the Act restricting the meaning of “utensils” to the items used in the kitchen cannot be sustained and is hereby set aside. The matter is remanded back to the Commissioner for deciding the petitioner's application afresh in the light of the observations made above.

24. The Writ Petition is accordingly disposed of.

No costs.

Petition disposed of.

I.L.R. [2012] M.P., 1119

WRIT PETITION

Before Mr. Justice A.K. Shrivastava

W.P. No. 6263/2009 (S) (Gwalior) decided on 24 January, 2012

BHUPENDRA SINGH TOMAR

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Police Regulations, M.P.- Clause 70-A - Promotion - Bravest and Extraordinary Act - Superintendent of Police strongly recommended the case of petitioner for the promotion on account of his brave action as he shot down one dacoit - Recommendation subsequently amended on the instructions of I.G. Police and petitioner was left out and name of another Constable was recommended - Held - Case of petitioner was arbitrarily rejected and is similarly situated with the case of another Constable who was given promotion - Respondents directed to consider the name of petitioner for out of turn promotion.

(Paras 9 to 14)

पुलिस विनियम, म.प्र. - खण्ड 70ए - पदोन्नति - साहसी और असाधारण कार्य - पुलिस अधीक्षक ने याची द्वारा डकैत को मार गिराने के उसके साहसी कार्य के कारण उसको पदोन्नति के लिये उसके मामले की दृढ़ता से सिफारिश की - सिफारिश को आई. जी. पुलिस के अनुदेशों पर बाद में संशोधित किया गया और याची को बाहर रखा गया और अन्य आरक्षक के नाम की सिफारिश की गई - अभिनिर्धारित - याची का मामला मनमाने रूप से अस्वीकार किया गया और अन्य आरक्षक जिसे पदोन्नति दी गई के मामले के समानांतर स्थित है - प्रत्यर्थीगण को याची के नाम को बिना क्रम के पदोन्नति के लिये विचार में लेने के लिये निदेशित किया गया।

D.S. Raghuvanshi, for the petitioner.

Nidhi Patankar, G.A. for the respondents/State.

ORDER

A.K. SHRIVASTAVA, J. - By this petition under Article 226 of the Constitution of India the petitioner has prayed for a direction to the respondents

to consider and grant out of turn promotion to the petitioner on the post of Head Constable on the basis of his bravest and extraordinary act performed in an incident dated 16.1.2008 where the notorious dacoit Bunty alias Virendra s/o Gangaram Gurjar died.

2. The contention of the learned counsel for the petitioner is that on 16.1.2008 an encounter between the police party and gang of dacoit Bunty Gurjar took place in which petitioner was also the member of the police party and was serving on the post of Constable. On account of his brave action as he shot down the dacoit Bunty Gurjar and said dacoit died, the Superintendent of Police, Shivpuri on 24.4.2008 recommended for his promotion out of turn. The contention of the learned counsel is that although three persons, namely, Kedar Singh, Arun Kumar and present petitioner Bhupendra Singh were recommended for promotion out of turn, but, only Arun Kumar has been given out of turn promotion whereas the petitioner has been benefited by award of cash Rs.2,000/- only.

3. Learned counsel for the petitioner submits that in an arbitrary manner his candidature to promote him out of turn has been rejected.

4. On the other hand, Smt. Patankar, learned Government Advocate submits that the recommendation of the Superintendent of Police, Shivpuri was later on amended on the basis of the amended recommendation as the petitioner was not found fit to be promoted out of turn and therefore, rightly he has not been given promotion out of turn. It has also been put forth by her that out of the availability of the vacant posts, a quota of 10% has been fixed to promote out of turn the eligible police candidates and therefore, the petitioner cannot be promoted out of turn.

5. Having heard learned counsel for the parties I am of the view that this petition deserves to be allowed.

6. The relevant Clause 70-A of the M.P. Police Regulations reads, thus:

"Notwithstanding anything contained in Regulation 70, a Constable may be promoted to the rank of Head Constable by the Superintendent of Police with the prior approval of the Directors General of Police and a Head Constable to the rank of Assistant Sub-Inspector by the Deputy Inspector General of Police with the prior approval of the Director General of Police if he has distinguished himself in anti dacoity operations,

law and order situations of shooting competitions or in some other field of duty or who has been awarded the President's Police Medal for Gallantry or for meritorious/distinguished services, if he considers him suitable for promotion. Similarly the Inspector General of Police may promote an Assistant Sub-Inspector to the rank of Sub-Inspector and a Sub-Inspector to the rank of an Inspector on similar grounds if found suitable for promotion and subject to the prior approval of the Director General of Police. The number of Officers promoted under this Regulation shall not exceed 10 per cent"

7. On bare perusal of the letter dated 2.4.2008 (Annexure P-1) of Superintendent of Police, Dist. Shivpuri addressed to the Deputy Inspector General of Police, Gwalior Range, Gwalior it is gathered that strong recommendation was made for three persons serving on the post of Constable. Their names are Kedar Singh, Arun Kumar and present petitioner Bhupendra Singh. In the recommendatory letter it was strongly stated that on account of gunshot fire of the Constables including the present petitioner the dacoit Bunt Gurjar had died. Further it has been mentioned that for last four years the present petitioner Bhupendra Singh Tomar is deputed for "To Extinguish the Dacoit Project". However, on perusal of Annexure R-2 which is a letter of Superintendent of Police, Shivpuri in reference to the letter of the Inspector General of Police to make certain necessary amendment in the recommendation, the name of the petitioner has been left out.

8. According to me, the procedure so adopted by the department is wholly arbitrary, since strong recommendation was made in favour of the petitioner by the Superintendent of Police. It appears that on account of the verdict given by the Inspector General of Police, the recommendation was amended deleting the name of the petitioner.

9. At this juncture, it would be condign to quote the recommendation which was made by Superintendent of Police in his letter (Annexure P-1), which reads, thus:

“डकैतों ने इनके ऊपर जानलेवा फायरिंग की जिससे तीनों आरक्षक बाल-बाल बचे ऐसी परिस्थितियों में भी आरक्षक भूपेन्द्र, आरक्षक अरुण, आरक्षक कैदार ने आगे बढ़कर डकैतों पर फायर किये जिससे एक डकैत धराशायी हो कर गिर गया। शेष डकैतों के हौसले अब एक साथी के गिरने एवं फोर्स के द्वारा लगातार जबरदस्त फायरिंग करने पर पस्त हो गये तथा डकैत लंगल में भागने लगे

जिनका पीछा किया गया लेकिन घना जंगल एवं अंधेरा होने के कारण शेष डकैत भागने में सफल रहे । डकैतों की ओर से फायर आना बंद होने पर बारिकी से सर्चिंग करने पर घटना स्थल पर एक व्यक्ति का शव मिला जिसके पास एक 12 बोर की दुनाली बंदूक तथा चले हुये 6 कारतूस पड़े थे दुनाली बंदूक खोल कर देखने पर दो खाली खोखे बेरल में फसे हुए मिले। मृतक की कमर में काले रंग का पट्टा जिसमें 05 जिन्दा कारतूस तथा एक मिस राउंड 12 बोर का लगा था। लगभग आधा घंटे चली मुठभेड़ में डकैतों की ओर से करीब 50-60 राउंड फायर किये गये तथा पुलिस की तरफ से करीब 103 राउंड फायर किये गये ।

उक्त डकैतों द्वारा पुलिस पार्टी पर जान से मारने की नियत से अवैध हथियारों से फायर किये गये । यहां यह उल्लेख करना वाजिब होगा कि इस साहसिक मुठभेड़ में शामिल आरक्षक 119 भूपेन्द्र सिंह तोमर गत 4 वर्षों से लगातार दस्यु उन्मूलन कार्य में संलग्न होकर पूर्ण लगन, निष्ठा एवं ईमानदारी से कार्य कर रहा था।

निश्चय ही इस साहसिक पुलिस मुठभेड़ में आरक्षक 119 भूपेन्द्र सिंह तोमर डकैत गैंग का प्रमुख दुर्दान्त सदस्य डकैत बन्टी गुर्जर उर्फ वीरेन्द्र पुत्र गंगाराम गुर्जर जिस पर हत्या के प्रयास, अपहरण, लूट, डकैती जैसे गम्भीर अपराध पंजीबद्ध थे, तथा इसकी गिरफ्तारी हेतु उप पुलिस महानिरीक्षक ग्वालियर रेंज ग्वालियर द्वारा 10000 रुपये का इनाम घोषित किया गया था को धराशायी करने में अदम्य साहस, शौर्य, सूझबूझ एवं अनुकरणीय पराक्रम का परिचय दिया गया है । अतः मैं पुलिस अधीक्षक शिवपुरी आरक्षक 119 भूपेन्द्र सिंह तोमर को उक्त साहसिक व सराहनीय कार्य के लिये कम से पूर्व पदोन्नति किये जाने की पुरजोर अनुशंसा करता हूँ ।

10. It would be germane to mention here that in the recommendation only the name of Bhupendra Singh Tomar was recommended but he has not been given out of turn promotion.

11. Here it is also pertinent to quote the relevant extract of the amended recommendation of the Superintendent of Police, Shivpuri as contained in Annexure R-2, which reads, thus:

“अब प्रकरण में श्रीमान के संदर्भित पत्र एवं दूरभाष पर हुई चर्चानुसार संशोधित प्रस्ताव भेजने हेतु निर्देशित किया गया है। अतः कृपया समीक्षा उपरांत मुठभेड़ में शामिल आर. 337 अरुण कुमार थाना सिटी कोतवाली शिवपुरी एडी स्क्वाड को कम से पूर्व पदोन्नति कि अनुशंसा की जाती है।”

12. The case of the present petitioner appears to be similar to that of constable Arun Kumar who has admittedly been given promotion out of turn. Hence. I am of the view that arbitrarily the case of the petitioner has been

rejected and he has not been given promotion out of turn.

13. So far as the availability of the post is concerned, it is not the case of the respondents that the posts of Head Constables are not lying vacant and even if they are lying vacant, within the limit of quota of 10% the name of the petitioner cannot be included.

14. For the reasons stated hereinabove, this petition succeeds and is hereby allowed. The respondents are hereby directed to consider the name of the petitioner to provide him promotion out of turn in terms of Regulation 70-A of the M.P. Police Regulations. Let the decision be taken on or before 30.04.2012.

15. This petition is accordingly allowed. No order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 1123

WRIT PETITION

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

W.P. No. 9000/2011 (Indore) decided on 27 January, 2012

HARI PRASAD MISHRA

...Petitioner

Vs.

DISTRICT MAGISTRATE, INDORE

...Respondent

National Security Act (65 of 1980), Section 3(2) – Detention Order – Activities of the detainee were prejudicial to public tranquility and even tempo of life in society – Detenue has taken a life of crime and has become a menace to society – Held – It justifies the detention order – Acquittal from criminal cases had no dampening effect on his criminal proclivity – Writ Petition dismissed. (Paras 5 & 7)

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – निरोध आदेश – निरुद्ध व्यक्ति के कार्यकलाप लोक शांति एवं समाज में जीवन की संयत लय पर भी प्रतिकूल प्रभाव डालते हैं – निरुद्ध व्यक्ति ने अपराध का जीवन चुना है और समाज के लिए खतरा बन गया है – अभिनिर्धारित – यह निरोध आदेश को न्यायोचित बनाता है – आपराधिक प्रकरणों से दोषमुक्ति का उसकी आपराधिक प्रवृत्ति पर कोई क्षीण करने वाला प्रभाव नहीं पड़ा – रिट याचिका खारिज।

Case referred :

AIR 1950 SC 27.

O R D E R

The Order of the Court was delivered by :
S.K. SETH, J. - Petitioner is challenging the detention order of his son Rajendra @ Bantu. The detention order was passed on 22.2.2011 under the provisions of the National Security Act, 1980.

2. In exercise of powers conferred by S. 3(2) of the Act, the District Magistrate Indore on 22.02.2011 ordered detention of petitioner's son Rajendra @ Bantu to prevent him from acting in any manner prejudicial to the maintenance of public order. Said order along with grounds of detention was duly served upon the detenu. The detention order was approved by the Advisory Board; therefore, State Government passed an order on 25.4.2011 directing detention of Rajendra @ Bantu for a period of twelve months ending on 21.2.2012. Both these orders are under challenge. The only ground urged in the petition and canvassed before us is that out of 19 criminal cases registered against the detenu, he has been acquitted in sixteen cases, therefore, there is no nexus between the ground and the detention order and as such orders impugned are unsustainable in law and deserve to be quashed.

3. A reply has been filed to oppose the petition. Record was also produced. After hearing rival submissions and going through record, we do not find any merit in the submission of counsel for the petitioner.

4. National Security Act, 1980 is a law enacted by the Parliament. Preamble of the Act shows that it is act to provide for preventive detention in certain cases. The object of preventive detention is not to punish a person for having done something but to intercept him before he does it. It has, therefore, to be understood in contradistinction to 'punitive detention' which follows a trial for an offence culminating in conviction.

5. The law of preventive detention has stood the test on the anvil of fundamental rights since *A.K. Gopalan v. State of Madras* (AIR 1950 SC 27) which was the first case that came up for consideration of the Supreme Court in the history of Independent India. Article 21 provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 21 presents an example of the fusion of procedural and substantive rights in the same provision. 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. The subjective satisfaction of the detaining Authority based on relevant material is sine qua non to the exercise of power. In the instant case, we are satisfied that the detaining authority on consideration of material made available to it, reached the conclusion to issue the detention order. The facts of unlawful activities of the detainee contained in the grounds were clearly relevant for the purpose of forming an opinion that the activities of the detainee were prejudicial to public tranquility and even tempo of life in society. From the facts of the case, it is clear that the detainee has taken a life of crime and has become a menace to society justifying the detention order. It is clear that acquittal from criminal cases had no dampening effect on his criminal proclivity.

7. In view of the foregoing discussion, we do not find any justification to interfere with the impugned orders. There is no merit and substance in the writ petition. It is therefore, dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 1125

WRIT PETITION

Before Mr. Justice Sheel Nagu

W.P. No. 7156/2011 (Gwalior) decided on 2 February, 2012

STATE OF M.P. & anr.

...Petitioners

Vs.

SHRI GOVIND GAUSHALA DATIA & anr.

...Respondents

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Temporary Injunction – A prima facie case made out and the ingredients of irreparable loss and balance of convenience were also existing in favour of the plaintiff – But the intervening public interest (construction of an Air Port on the suit property), is likely to be hampered, if the temporary injunction is granted – The plaintiff was not entitled to grant of any temporary injunction. (Paras 12, 15)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थायी व्यादेश – प्रथम दृष्टया प्रकरण बनता है और पूरी न हो सकने वाली हानी के घटक एवं सुविधा का संतुलन भी वादी के पक्ष में विद्यमान – परंतु मध्यवर्ती लोक हित (वाद सम्पत्ति पर हवाई अड्डे का निर्माण) में रुकावट होने की संभावना है, यदि

अस्थाई व्यादेश प्रदान किया गया – वादी किसी अस्थाई व्यादेश के लिए हकदार नहीं था।

Cases referred :

AIR 1960 SC 335, 1990 MPJR 177, 1992 (II) SN 10, 1985 CCLJ 306, AIR 1987 MP 85, 1988 JLJ 549, (2002) 10 SCC 260, AIR 2004 BOM 162(166), AIR 2003 ALL 34(42), AIR 2004 NOC 146, AIR 2003 NOC 386; [(2001) 91 CUT LT 584 (ORI)], AIR 2003 GUJ. 164(171), AIR 2002 ALL 198 (202), AIR 2002 NOC 90 (GAU).

MPS Raghuwanshi, Addl. A.G. for the petitioner/State.

Pratip Visoriya, for the respondents.

ORDER

SHEEL NAGU, J. - This writ petition has been filed under Article 227 of the Constitution of India against the final order dated 29.09.2011 passed in MCA No.02/2011 by the First Additional Judge to the Court of District Judge, Datia, whereby the first appellate Court has directed for maintenance of status quo in regard to the disputed land till the final disposal of the suit after disposing of the appeal filed by the plaintiff against the interlocutory order dated 25.02.2011 rejecting the application under Order 39 Rules 1 and 2 of the Code of Civil Procedure for temporary injunction filed by the plaintiff in Civil Suit No.2-A/2011.

2. The contention of the learned Additional Advocate General for the State is that despite finding the plaintiff not to be in possession and despite the plaintiff having failed to make out a prima-facie case, the first appellate Court has wrongly granted status quo, thereby prejudicing the case of the State, which was requiring the suit land for public purpose.

3. The trial Court while refusing temporary injunction to the plaintiff was of the view that since the land in question has already been transferred to the State and the plaintiff has failed to prima-facie prove his possession, the basic and foremost ingredient of “prima-facie case” has not been made out. It is further contended by the State that while testing the legality and validity of the order of the trial Court refusing temporary injunction, the first appellate Court by the impugned order was also of the view that the plaintiff prima-facie is not in possession, but concluded that irreparable loss will be occasioned to the plaintiff if status quo is not granted as the plaintiff still holds the right to revoke

the gift deed after passage of the period of three years since the date of execution of the gift deed and the plaintiff may after expiry of the said period, choose to revoke the gift deed.

4. Learned counsel for the respondent, on the other hand, has supported the order of the first appellate Court stating that the same is reasonable and it protects and preserves the property in question to be available for satisfaction of the decree, which may be passed in favour of the plaintiff and therefore deserves to be upheld. Counsel for respondent no.1 has placed reliance on various decisions, namely, *Mst. Rukhmabai Vs. Lala Laxminarayan & Others AIR 1960 SC 335*; *Kalyan Singh Vs. Vakil Singh & Others 1990 MPJR 177*; *Chhoté v. Pancham 1992 (II) MPWN, SN 10*; *1985 CCLJ 306*; *Mukesh Vs. Deonarayan & Others AIR 1987 MP 85*; *Preetpal Singh & Others Vs. State of MP & Others 1988 JLJ 549*; and *Gautam Nagar Residents Association Vs. Karmika & Others (2002) 10 SCC 260* in support of his contention.

5. The arguments of the learned counsel of the rival parties are heard and the record is perused.

6. A bare reading of the order of the trial Court refusing temporary injunction and also the impugned order of the first appellate Court disclose that both the Courts below had prima-facie come to the finding that the plaintiff is not in possession and, therefore no prima-facie case was held to be made out in his favour.

7. To establish a case of temporary injunction under Order 39 Rules 1 and 2 of CPC, three basic ingredients of prima-facie case, irreparable loss and balance of convenience in favour of the party seeking temporary injunction should not only exist, but should co-exist and the existence of only on ingredient will not satisfy the requirement for grant of temporary injunction unless all the three said ingredients exist simultaneously.

8. Moreover, the very basic ingredient for entitlement of temporary injunction is making out of a prima-facie case and it is only when a prima-facie case is made out that the Court concerned is required to ensure the co-existence of the other two ingredients, i.e., irreparable loss and balance of convenience.

9. In the instant case, it is to be seen that the gift deed executed by the plaintiff was revocable after three years on the failure of the beneficiary to

carry out the purpose of the gift deed and since the period of three years had expired without fulfilling the purpose, the gifted land automatically reverted to the plaintiff impelling the plaintiff to file the Civil Suit for claiming declaration of title of the said suit land in his favour and a permanent injunction against the defendant. It is further to be seen that the plaintiff in his suit stated that he was in possession, but both the Courts below have rightly held that the plaintiff has not established on a prima-facie basis that he was in possession as the documents available on record indicate that the possession was handed over by the plaintiff.

10. From the facts available before the Court below, it is evident that the plaintiff certainly had a prima-facie case in his favour, but could not establish the factum of possession over the suit land.

11. The element of irreparable loss, which has also been gone into by the Court below requires some consideration. The first appellate Court has held that irreparable loss may be caused to the plaintiff if the defendants are permitted to undertake the construction which they intend over the disputed land. The factual matrix involved in the case indicates that if the construction of Airport is permitted to proceed, the plaintiff may be put to irreparable loss as the property in question on account of the proposed construction might undergo irretrievable changes.

12. From the above detailed discussion, this Court is of the view that a prima-facie case having been made out by the plaintiff, the ingredients of irreparable loss and balance of convenience were also existing in favour of the plaintiff.

13. Having held so, this Court is further required to consider the aspect of public interest raised by the State which appears to be the main factor compelling the State to approach this Court under Article 227 of the Constitution of India.

14. The State contends that there is a proposal for construction or an Airport on the suit property, for which consent has already been accorded. The construction of the Airport is without doubt a public purpose, which involves urgency as the said public purpose has a direct bearing on the over all development of the area concerned. It is held by various decisions that if the grant of temporary injunction leads to adverse effect to any work involving public interest, then the temporary injunction should not be granted even if the said three basic ingredients for the same have been made out. The decisions

in the cases of *American President Lines Ltd. v. Board of Trustees, Bombay Port* AIR 2004 BOM 162, (166); *Nagar Nigam Aligarh v. Udai Singh* AIR 2003 All 34, (42); *Sambhu, Chandra Sarkar v. State of West Bengal* AIR 2004 NOC 146; *Simanchal Padhy and etc. v. State of Orissa* AIR 2003 NOC 386 : [2001 91 Cut LT 584 (Ori)] ; *Envision Engg. v. Sachin Infa Enviro Ltd.* AIR 2003 Guj 164 (171); *Satya Prakash v. Ist Additional District Judge, Etah*, AIR 2002 All 198 (202); and *Jokin Kurkalang Kseh v. Governing Body Upper Shillong College* AIR 2002 NOC 90 (Gau) can profitably be referred to for this purpose.

15. In the conspectus of the facts and the discussion made above, this Court is though of the view that a prima-facie case for grant of temporary injunction was made out by the plaintiff/respondent, but on account of the intervening public interest, which is likely to be hampered, if the temporary injunction is granted, the plaintiff was not entitled to grant of any temporary injunction and the first appellate Court, therefore fell in error to ignore the all important aspect of public interest.

16. Accordingly the impugned order dated 29.09.2011 passed in MCA No.02/2011 is hereby set aside and the order of the trial Court dated 25.02.2011 is upheld.

17. Before parting with this case, looking to the nature of the dispute and the anxiety of the plaintiff to establish his right over the property, this writ petition is allowed in terms of what has been said (Supra) with a direction to the trial Court to conclude the suit as expeditiously as possible preferably within six months from the date of receipt of certified copy of this order.

Petition allowed.

I.L.R. [2012] M.P., 1129

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 6078/2011 (Jabalpur) decided on 8 February, 2012

NITU AGRAWAL

...Petitioner

Vs.

SHIREESH AGRAWAL

...Respondent

Civil Procedure Code (5 of 1908), Order 7 Rule 10 – Territorial Jurisdiction – Marriage solemnized at New Delhi – Parties came to Bhopal to attend wedding reception – Thereafter they went to U.S.A.

and stayed there – Petition for divorce filed at Bhopal – Respondent admitted that even today both the parties are residing at USA – Facts which confer jurisdiction on the Court has to be pleaded clearly and specifically – Plaint do not disclose that where the parties had last resided together – It can not be inferred that parties had last resided together at Bhopal – Plaint directed to be returned for presentation of the same before Competent Jurisdiction. (Paras 9 & 10)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 10 – क्षेत्रीय अधिकारिता – विवाह नई दिल्ली में सम्पादित किया गया – पक्षकार शादी के रिसेप्शन में सम्मिलित होने के लिये भोपाल आये – उसके बाद वे यू.एस.ए. गये और वहां रुके – विवाह विच्छेद के लिये याचिका भोपाल में दायर की गई – प्रत्यर्थी ने स्वीकार किया कि आज भी दोनों पक्षकार यू.एस.ए. में निवासरत हैं – तथ्य, जो न्यायालय को अधिकारिता प्रदान करते हैं, का स्पष्ट और विनिर्दिष्ट रूप से अभिवाक् करना चाहिए – वादपत्र प्रकट नहीं करता कि पक्षकार अंतिम बार एक साथ कहाँ निवास कर रहे थे – यह निष्कर्ष नहीं निकाला जा सकता कि पक्षकार अंतिम बार भोपाल में एक साथ निवासरत थे – वादपत्र सक्षम अधिकारिता के समक्ष प्रस्तुत करने हेतु वापस करने के लिये निदेशित किया गया।

Cases referred :

AIR 1982 SC 3, AIR 1992 MP 260, AIR 2005 MADRAS 72, AIR 1967 KERALA 1, AIR 1963 SC 1521, W.P. NO. 1242/2010, (1991) 3 SCC 451, 2010(1) MPHT 429.

Amit Prasad, for the petitioner.

Nikhil Tiwari, for the respondent.

ORDER

ALOK ARADHE, J. - In this writ petition under Article 227 of the Constitution of India the petitioner has challenged the validity of the order dated 22.2.2011 passed by the trial Court by which the application preferred by the petitioner under Order 7 Rule 10 of the Code of Civil Procedure (for short the 'Code') has been rejected. In order to appreciate the petitioner's challenge to the impugned order, few facts need mention which are stated *infra*.

2. The marriage of the petitioner and respondent was solemnized at New Delhi on 27.11.2002 as per the Hindu rites. After the marriage, as per the averments made in the petition under section 13 of the Hindu Marriage Act

(hereinafter referred to as the 'Act'), parties came to Bhopal for wedding reception and stayed in Bhopal for about a week. It is averred in paragraph 7 of the petition under section 13 of the Act that thereafter the respondent and petitioner went to United States of America on 14.12.2002 and stayed there excepts for few vacation trips to India. It is further averred in paragraph 7 of the petition that during their stay in United States of America the petitioner gave birth to a daughter on 06.2.2005 out of the wedlock.

3. The respondent has filed a petition under section 13 of the Act seeking dissolution of marriage on 28.4.2010 before the Family Court at Bhopal. On receipt of summons of the suit the petitioner entered appearance and filed an application under Order 7 Rule 10 of the Code for return of the plaint on the ground that Family Court at Bhopal has no territorial jurisdiction to try the proceedings under section 13 of the Act. The trial Court vide order dated 12.1.2011 held that the question whether it has territorial jurisdiction to try the petition or not, can only be decided after recording of evidence. Accordingly, the application preferred by the petitioner was rejected.

4. The petitioner challenged the validity of the order of trial Court dated 12.1.2011 before this Court in a civil revision, namely, Civil Revision No.29/2011. This Court vide order dated 19.1.2011 directed that if fresh application under Order 7 Rule 10 of the Code or an application seeking review of the order dated 12.1.2011 is filed by the petitioner before the trial Court, the trial Court by taking into account the averments made in the plaint and without being influenced by the observations contained in order dated 12.1.2011 shall decide the same.

5. In pursuance of the order of this Court, the petitioner filed an application for review of the order dated 12.1.2011. Thereupon, the trial Court asked the petitioner to clarify its stand whether the application which has filed by the petitioner should be treated as an application for review or a fresh application under Order 7 Rule 10 of the Code. Learned counsel for the petitioner submitted before the trial Court on 21.2.2011 that the application filed by the petitioner should be treated as fresh application under order 7 Rule 10 of the Code. Thereafter, the trial Court vide order dated 22.2.2011 rejected the application preferred by the petitioner. The trial Court, inter alia, held that petitioner till date has not filed written statement and has not stated as to at which place the petitioner and respondent last resided together in India before leaving for United States of America. It was further held that the

petitioner in her application has not directly or indirectly denied the fact that after wedding reception took place at Bhopal and before leaving for United States of America, the parties resided in Bhopal as husband and wife. It was further held that in the marriage registration certificate produced by the respondent, the permanent address of the respondent is shown at Bhopal. It was further held that from the averments made in the plaint it is apparent that the respondent was working in United States of America before marriage. Accordingly, it was held that the Court at Bhopal has the jurisdiction to hear and decide the proceedings and the application was rejected.

6. Learned counsel for the petitioner submitted that the order passed by the trial Court is patently illegal and erroneous. From the averments made in the petition under section 13 of the Act it is apparent that the parties never had the intention to reside at Bhopal when they had visited at Bhopal for the purpose of wedding reception. It was further submitted that mere causal or flying visit to a place would not confer the jurisdiction on the Court. It was also submitted that from perusal of the averments made in the plaint that it is apparent that Family Court at Bhopal has no jurisdiction. It is also submitted that the petitioner has not complied with Rule 4(2) of Hindu Marriage (Madhya Pradesh) Rules, 1975. In support of his submission learned counsel has placed reliance on the decisions reported in AIR 1982 SC 3, AIR 1992 MP 260, AIR 2005 Madras 72, AIR 1967 Kerala 1, AIR 1963 SC 1521 and also on the decision rendered by High Court of Bombay in *Ms. Kashmira Kale vs. Mr. Kishorekumar Mohan Kale* W.P.No.1242/2010 decided on 04.3.2010].

7. On the other hand, learned counsel for the respondent submitted that in the plaint permanent address of the respondent has been described as Bhopal. The petitioner and the respondent have last resided together at Bhopal and, therefore, the matrimonial Court at Bhopal has the territorial jurisdiction to try the suit. It was further submitted that the order passed by the trial Court is perfectly just and legal and does not call for any interference in exercise of powers under Article 227 of the Constitution of India.

8. I have considered the submissions made on both sides. It is relevant to mention here that under section 19(i) of the Hindu Marriage Act, the respondent had the choice to file the petition at the place where the marriage was solemnized. However, the respondent has filed the petition before the Family Court at Bhopal on the ground that parties had last resided together in the jurisdiction of the Family Court at Bhopal. Section 19(iii) provides that

every petition under the Act shall be presented to the District Court within the local limits of whose ordinary original Civil jurisdiction of the parties to the marriage last resided together. In the case of *Smt Jeewanti Pandey* (AIR 1982 SC 3) (supra) while dealing with the expression "residence" in the context of section 19 of the Act it has been held by the Supreme Court that word "resides" must mean the actual place and not a legal or constructive residence. It has further been held that in order to give jurisdiction on the ground of residence something more than a temporary stay is required. It must be more or less of a permanent character, and of such a nature that the Court in which the resident is sued, is his natural forum: The expression "resides" means to make an abode for a considerable time, to dwell permanently or for a length of time to have a settled abode for a time. In *Y.Narsasimha Rao and others vs Y.Venkata Lakshmi and another*, (1991) 3 SCC 451 the Supreme Court has held that residence does not mean a temporary residence for purpose of obtaining a divorce but habitual residence or residence which is intended to be permanent for future as well. The respondent has filed the petition seeking dissolution of marriage before the Family Court at Bhopal on the ground that petitioner as well as respondent have last resided together within the territorial jurisdiction of Family Court at Bhopal.

9. Thus, in the backdrop of aforesaid well settled position the averments made in the petition under section 13 of the Act may be seen. In paragraph 3 of the petition the respondent has averred that marriage was solemnized at New Delhi on 27.11.2002. In paragraph 6 it is averred that after marriage the respondents as well as petitioner came to Bhopal and attended the wedding reception and stayed for about a week. In paragraph 7 it is averred that thereafter they went to United States of America on 14.12.2002 and stayed their only except few vacation trips to India. In paragraph 7 it is also averred that during their stay in America the petitioner gave birth to a daughter on 06.12.2005. In paragraph 37 it is averred that the respondent and petitioner last resided together within the jurisdiction of Family Court at Bhopal and, therefore, the Family Court has the jurisdiction to adjudicate the petition. It is pertinent to mention that in the reply to the application under Order 7 Rule 10 of the Code it is admitted that as on today neither the respondent nor the petitioner is residing in Bhopal and are presently living in United States of America. The facts which confer jurisdiction on the Court have to be pleaded clearly and specifically. If the averments made in the petition under section 13 of the Act are read carefully in its entirety it is apparent that respondent has

failed to disclose the particulars as to where the respondent and the petitioner last resided together. In paragraph 37 of the petition the respondent has merely stated that parties had last resided together within the territorial jurisdiction of the Court at Bhopal. However, again no particulars with regard to period of stay have been given. From the averments of the petition it cannot be inferred that parties to the marriage had last resided together at Bhopal. The case relied upon by the trial Court reported in *Anjali Shukla (Smt.) vs. Sunil Kumar Shukla, 2010 (1) MPHT 429* is of no assistance to the respondent as in that case the husband had taken an accommodation on rent and it was necessary to decide the question of intention to reside, therefore, it was held that question of territorial jurisdiction is a mixed question of law and fact and the same can be decided after recording evidence.

10. For the aforementioned reasons the Family Court at Bhopal has no territorial jurisdiction to try the suit. Accordingly, order dated 22.2.2011 is hereby quashed. The trial Court is directed to return the petition to respondent for presentation before the competent court. In the result the writ petition is allowed.

Petition allowed.

I.L.R. [2012] M.P., 1134

WRIT PETITION

Before Mr. Justice J.K. Maheshwari

W.P. No. 837/2009 (S) (Gwalior) decided on 8 February, 2012

RAMVEER SINGH TOMAR & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

Agriculture (Horticulture) Non-Gazetted (Non-Ministerial) Service recruitment Rules, M.P. 1987, Rule 11 – Civil Services (General Conditions of Service) Rules, M.P. 1961 – Rule 12(4) – Seniority –
Petitioners and respondent No. 3 were selected and the State Government issued the gradation list placing them at appropriate place observing the rules – Representation of various persons were also rejected as per the decision of the Committee formed by the State Government – Respondent No. 3 thereafter was made senior from the petitioner by Government ignoring the decision of committee– Held – Order, granting seniority to respondent No. 3, passed by respondents No. 1 and 2 is contrary to the provisions of the Rules which can not be

sustained in law – Order quashed.

(Para-10)

कृषि (उद्यान कृषि) अराजपत्रित (अननुसचिवीय) सेवा भर्ती नियम, म.प्र. 1987, नियम 11 – सिविल सेवा (सेवा की सामान्य शर्तें) नियम, म.प्र. 1961 – नियम 12(4) – ज्येष्ठता – याचीगण व प्रत्यर्थी क्र. 3 का चयन किया गया और राज्य सरकार ने नियमों का पालन करते हुए उन्हें उचित स्थान पर वरीयता सूची में रखा – राज्य सरकार द्वारा गठित समिति के निर्णयानुसार विभिन्न व्यक्तियों के प्रत्यावेदन भी अस्वीकार किये गये – प्रत्यर्थी क्र. 3 को तत्पश्चात सरकार द्वारा समिति के निर्णय की अवहेलना करते हुए याची से ज्येष्ठता प्रदान की गई – अभिनिर्धारित – प्रत्यर्थी क्र. 1 व 2 द्वारा प्रत्यर्थी क्र. 3 को वरिष्ठता प्रदान करने का आदेश नियमों के उपबंधों के विपरीत है जिसे विधि में कायम नहीं रखा जा सकता – आदेश अभिखंडित।

Cases referred :

(1990) 14 Administrative Tribunals Cases 833, (1990) 14 Administrative Tribunals Cases 836, (1990) 12 Administrative Tribunals Case 926, (1990) 14 Administrative Tribunals Cases 263, (1990) 14 Administrative Tribunals Cases 279, (1990) 13 Administrative Tribunals Cases 348, (1990) 13 Administrative Tribunals Cases 379, AIR 1990 SC 405.

Satish Chandra Sharma & Jitendra Sharma, for the petitioners.

Bhagwan Raj Pandey, G.A. for the respondents No. 1 & 2.

Ajay Bhargava, for the respondent No.3.

ORDER

J.K. MAHESHWARI, J. - The petitioners have filed this petition under Article 226 of the Constitution of India, seeking the following reliefs:

"i) It is, therefore, most humbly prayed that the impugned orders Annexure-P/1 and P/1-A may kindly be quashed with all consequential benefits.

ii) Cost of the petition be awarded.

iii) Any other order/direction deemed fit in the circumstances of the case may kindly be passed in favour of the petitioners"

2. The facts, in brief, are that M.P. Agriculture (Horticulture) Non-Gazetted (Non-Ministerial) Service Recruitment Rules, 1987 (hereinafter

referred to as 'the Recruitment Rules of 1987) has come into existence w.e.f. 5/2/1988 i.e. the date of its publication in the gazette. The services of the petitioners as well as respondent No.3 who are holding the post of Sr. Horticulture Development Officer (hereinafter referred to as the 'SHDO'), governed by the said rules. The respondent No.3 was initially appointed on ad-hoc basis as per order dated 5/2/1986 for a period of six months or till appointment by the Mini Public Service Commission (in short it be called as "Mini P.S.C.") whichever is prior. The ad-hoc appointment of respondent No.3 was not after following due process of law, however, grievance of petitioners is that seniority so granted to respondent No.3 over and above to them as per order Annexure-P/1 dated 15/1/2009 and Annexure-P/1-A dated 17/2/2009 by the respondents 1 and 2 is not in conformity. to the provisions of the Recruitment Rules of 1987 and also as per the M.P. Civil Services (General Conditions of Service) Rules, 1961 (hereinafter called as 'the Rules of 1961'). It is said that after commencement of the rules and after issuing an advertisement for the posts of SHDO, selection was made by the Mini P.S.C. The petitioners as well as respondent No.3 both have participated in the same process of selection for the said post. In the merit list published by Mini P.S.C. petitioners and respondent No.3 were found place. The description of the place of merit of petitioners and respondent No.3 as per the merit list of Mini P.S.C. and also specified in the appointment order dated 28.10.1989 Annexure-P/4 is as under :

**THE MERIT POSITION OF THE PETITIONERS AND
RESPONDENT NO.3 AS PER THE ORDER OF APPOINTMENT
ANNEXURE-A/3**

No.	Name of persons	Sr.No
01.	Shyam Singh Sikarwar was not found place because he was appointed through promotion from the post of AHDO.	-dead
02.	Ramveer Singh Tomar (Petitioner No.2)	02
03.	Pankaj Sharma (Petitioner No.3)	05
04.	Surendra Singh Tomar (Petitioner No.4)	41
05.	Roop Singh Bhadouriya (petitioner No.5)	01

3. The State Government has published gradation list showing the position as on 1/4/2005 wherein also the name of petitioners and respondent No.3 has been specified as per merit of Mini P.S.C. Because the petitioners found on a better position in merit, however, they were placed over and above to respondent No.3 in the seniority list so prepared in conformity of Rule 12 of the Rules of 1961. The details of the petitioners and respondent No.3 in the gradation list is reproduced here as under:

**SENIORITY LIST PUBLISHED IN THE YEAR 2006 SHOWING
THE POSITION AS ON 01/04/ 2005 ANNEXURE-P/5**

No.	Name of persons	Sr.No
01.	Shyam Singh Sikarwar (Petitioner No.1)	74 (dead)
02.	Ramveer Singh Tomar (Petitioner No.2)	105
03.	Pankaj Sharma (Petitioner No.3)	108
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Feeling aggrieved by grant of seniority as per the merit of Mini P.S.C. by the State Government, various employees appointed on ad hoc basis have submitted their representations claiming seniority of ad hoc period. To decide those representations State Government has constituted a committee of six persons. The said Committee on 14.9.2000 vide Annexure P-6 has resolved that the seniority of such SHDO's be granted in accordance with the Recruitment Rules of 1987 as per merit list of Mini P.S.C.. However, the representations filed by the ad hoc employees claiming seniority over and above the regular employees were rejected. Again on submitting a representation by the respondent No.3 a noting was put up by the Director,

thereon it was instructed by respondent No.1 to take a decision in accordance to the rules. Thereafter as per the order Annexure-P/1-A passed by respondent No.2, respondent No.3 was made senior in the gradation list granting seniority of the ad-hoc period.

4. It is urged by Mr. Sharma, learned counsel for the petitioners that the seniority so granted to respondent No.3 who was below in merit in the Mini P.S.C. is not in conformity to the Recruitment Rules, 1987 as well as to the Rules of 1961. To buttress the said contentions, reliance has been placed on the decisions of the Supreme Court in the cases of *Masood Akhtar Khan and others V. State of Madhya Pradesh and others*, (1990) 14 *Administrative Tribunals Cases* 833, *Chairman, School of Buddhist Philosophy, Leh, Lakakh J&K V. Makhan Lal Mattoo and another*, (1990) 14 *Administrative Tribunals Cases* 836, *D.N. Agrawal and another V. State of Madhya Pradesh and others*, (1990) 12 *Administrative Tribunals Cases* 926, *G.C. Pillai and others V. Union of India and others*, (1990) 14 *Administrative Tribunals Cases* 263, *Beer Singh V. Union of India and others*, (1990) 14 *Administrative Tribunals Cases* 279, *Direct Recruit Class II Engineering Officers' Association V. State of Maharashtra and others*, (1990) 13 *Administrative Tribunals Cases* 348, *Rameswar Deuri V. Union of India and others*, (1990) 13 *Administrative Tribunals Cases* 379. The Reliance has also been placed on the decision of the Supreme Court in the case of *P. Mahendran Malteesh Y. Annigeri V. State of Karnataka*, AIR 1990 SC 405, to advance the arguments that the amendment has been made in sub-rule (1) (4) of Rule 12 of the Rules of 1961 on 2/4/1998, however, until and unless it is expressly made applicable from the retrospective date, it would be applicable prospectively. In view of forgoing, it is urged that grant of seniority to respondent No.3 counting his ad hoc service and to place him over and above to the petitioners is not in conformity to the rules as well as the provisions of law, however, orders may be set aside and the gradation list may be corrected accordingly.

5. The respondents 1 and 2 by filing return has not disputed the appointment of respondent No.3 on ad hoc basis in the year 1986. It is also not disputed that the appointment of SHDO is required to be made by Mini P.S.C. as per the Recruitment Rules of 1987. It is said that respondent No.3 has continued regularly though on ad hoc basis, however, considering the amendment so introduced in Rule 12(A) and (B) of the Rules of 1961, seniority has been extended to him after his appointment on regular basis from the date

of initial appointment counting the period of ad hoc service. It is said that respondent No.3 continuously represented for grant the seniority to a proper place vide representations of the year 2000, 2001, 2002, 2003, 2004 and 2007 and on consideration and also by meticulous analysis of the record; the period of ad hoc service rendered by respondent No.3 from 1986 to 1989 has rightly been counted for the purpose of seniority to the post in the said cadre in view of the amendment made on 2.4.1998 in those Rules of 1961. Rules of 1998. Thus other averments so made in the petition have been denied by respondents 1 and 2 and prayed for dismissal of petition.

6. The respondent No.3, by filing return, has not disputed the date of appointment of the petitioners by Mini P.S.C. and stated that he was appointed on ad hoc basis in the year 1986 looking to the shortage of the officers after issuance of the advertisement and conducting a written examination and interview, therefore, the seniority has rightly been granted from the date of initial appointment. In support of the fact that any advertisement was issued for ad hoc appointments and a written examination or interview was conducted, no document i.e. call letter or admission card has been filed to show that his appointment was after following due process of law or by adopting fair procedure. It is said that seniority has rightly been assigned in view of Rule 12 (4) of the amended Rules of 1961, however, prayed that the petition filed by the petitioners may be dismissed.

7. After hearing learned counsel for the parties and on perusal of the record, it is not in dispute that respondent No.3 was initially appointed on ad hoc basis on 5.2.1986 for a period of six months or till selection or appointment by Mini P.S.C. whichever is prior, and continued in the same capacity. In the meantime Recruitment Rules of 1987 came into existence w.e.f. 5/2/1988. The post of Senior Horticulture Development Officer has been advertised through Mini P.S.C. as per rules. The petitioners as well as respondent No.3 both appeared in the said selection process and as per the merit of candidates, recommendations were made by Mini P.S.C. preparing the list of selected candidates for their appointment by the State Government, wherein petitioners found place over and above to respondent No.3 as apparent from the chart mentioned in para-2 of this order and also by Annexure P-4 dated 28.10.1989. However, it is a case in which appointment of respondent No.3 was initially made on ad hoc basis. He subsequently, applied through Mini P.S.C. for selection and appointment on the same post wherein he got selected and found place below in merit from the petitioners in the same selection. As

per rule 11 of the Recruitment Rules of 1987, after the procedure for direct recruitment, by rule 12 the list of candidates recommended by the Mini P.S.C. shall be forwarded to the appointing authority in order of merit of the candidates who may have qualified by such standards as determined by the Mini P.S.C.. It is made clear that the candidates belonging to the scheduled Castes and Scheduled Tribes who, though not qualified by the standard but are declared to be suitable for appointment to the service with due regard to the maintenance of efficiency of administration, the list is required to be published for general information. The appointment to the available vacancies from the list shall be in the order in which the names appear in the list after satisfaction of the appointing authority. Thus the Recruitment Rules, 1987 recognizes the list arranged in order of merit by the Mini P.S.C. and the appointments on the available vacancies shall be in the order in which the names appear in the list by the State Government. The inter se seniority of the persons so selected shall be determined after their appointment as per Rules of 1961. The unamended Rule 12 which is relevant in the facts of the present case is reproduced as under:-

"12. Seniority.- The seniority of the members of a service or a distinct branch or group of posts of that service shall be determined in accordance with the following principles, viz.-

(a) Direct recruits (i) The seniority of a directly recruited Government servant appointed on probation shall count during his probation from the date of his appointment:

Provided that if more than one person have been selected for appointment on probation at the same time, the inter se seniority of the persons so selected shall be according to the order of merit in which they were recommended for appointment by the Commission in those cases where the appointments are made after consulting the Commission, and according to the order of merit determined by the appointing authority at the time of selection. in other cases.

(ii) The same order of inter se seniority shall be maintained on the confirmation of the normal period of probation. If, however, the period of any direct recruits is extended, the appointing authority shall determine whether he should be assigned the same seniority as would have been confirmed on

the expiry of the normal period of probation or whether he should be assigned a lower seniority."

Bare reading of aforesaid, it is apparent that the seniority of directly recruited Government servant appointed on probation shall be counted from the date of his appointment. The proviso makes it clear that if more than one person has been selected for appointment on probation at the same time, the inter se seniority of the persons so selected shall be according to the order of merit in which they were recommended for appointment by the Commission. Thus, the joint reading of rule 12 of the Recruitment Rules of 1987 as well as Rules of 1961 makes it clear that the Commission is required to prepare a list of suitable candidates for appointment as per standard so determined and shall recommend for appointment to the available vacancies in order in which the names appear in the list. After issuance of the orders of appointments in order in which names appear in the select list, the appointment orders were issued and as per rule 12 of the Rules of 1961 while determining the inter se seniority of the persons so appointed by the same selection shall be in order of the merit of selection made by the Commission. The State Government has issued the gradation list showing the position as on 1.4.2005. In the said list the petitioner and respondent No.3 has been placed at appropriate place observing the aforesaid rules. The representations submitted by various persons have been rejected as per the decision of the Committee formed by the State Government vide Annexure P/6. In such circumstances, the changing of seniority by passing the order Annexure P/1 and P/1-A is not in conformity to the rules.

8. Surprisingly, after taking decision by the Government merely on a representation of respondent No.3, a note was put up by respondent No.2 before respondent No.1. On issuing instructions by respondent No.1, the respondent No.3 has been made senior from the petitioners ignoring the document Annexure P/6. The aforesaid conduct has not been explained by the State Government in their return. As per the judgment of the Apex Court in the case of *Masood Akhtar Khan* (supra) while interpreting the Rules of 1961, the Apex Court observed that the appointment has to be made in consultation with the Commission, the seniority is firstly from the date of selection by the Commission and secondly according to the order of merits given by the Commission for determination of inter se seniority. However, the aforesaid legal position cannot be disturbed by an arbitrary act of respondents making respondent No.3 senior from petitioners ignoring the Recruitment Rules

of 1987 and also the Rules of 1961.

9. As per the return filed by the respondents, it is apparent that the order Annexure P/1 and P/1-A has been passed in view of rule 12(4) of General Condition of Services Rules, 1961. The said amendment in Rules of 1961 which has come into existence on 2.4.1998. In the present case, the appointment of petitioner and respondent No.3 have been ordered as per Annexure P/4 dated 28.10.1989 following due procedure by Mini P.S.C. Thus rule 12(4) which has been amended in the year 1998 having no application for determination the seniority of the petitioners and respondent No.3 recruited in the year 1989. The amendment brought on on 2.4.1998 in the Rules of 1961 cannot be made applicable retrospectively. My view fortifies from the judgment of *P. Mahendran Malteesh Y. Annigeri* (supra). Thus it is to be held that passing an order Annexure P/1 and P/1-A making respondent No.3 senior from petitioners on the post of SHDO granting seniority of the period of ad hoc appointment is not in conformity to the Recruitment Rules of 1987 or the prevalent unamended Rules of 1961.

10. In view of forgoing discussion, I am of the considered opinion that the order granting seniority to respondent No.3 passed by respondents 1 and 2 is contrary to the provisions of the Rules which cannot be sustained in Law. Therefore, the order Annexure P/1 dated 15/1/2009 and order Annexure P/1-A dated 17/2/2009 passed by respondents 1 and 2 are hereby quashed. In the facts and circumstances of the case, parties to bear their own cost.

Order Accordingly.

I.L.R. [2012] M.P., 1142

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 10369/2011 (Jabalpur) decided on 14 February, 2012

ASHOK PATERIA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Khadya Padarath) Sarvajanic Nagrik Purti Scheme, M.P. 1991 – Clause 13 (5) – if any complaint is made against co-operative society, it is necessary to send a report to the committee of Cooperative Department who will have to make an enquiry and submit its report within 15 days – No such procedure was adopted - Action of cancellation

of fair price shop is illegal – Further if respondent no. 4 did not examine the witnesses SDO was not required to take action in this regard – Order passed by Collector in Appeal against the order passed by SDO by which complaint made against petitioner was rejected is quashed – Petition allowed. (Paras 1,2,6,7)

(खाद्य पदार्थ) सार्वजनिक नागरिक पूर्ति योजना, म.प्र. 1991 – खण्ड 13 (5) – को-ऑपरेटिव सोसायटी के विरुद्ध यदि कोई शिकायत की जाती है तो सहकारिता विभाग की समिति को प्रतिवेदन भेजना आवश्यक है। उसे जांच करनी पड़ेगी और 15 दिनों के भीतर अपना प्रतिवेदन सौंपेगी – ऐसी कोई प्रक्रिया नहीं अपनायी गयी – उचित मूल्य की दुकान के कार्य को रद्द करना अवैध है। आगे यदि प्रत्यर्थी क्रमांक 4 अपने साक्षियों का परीक्षण नहीं करता तो अनुविभागीय अधिकारी से यह अपेक्षित नहीं था कि वह इस बारे में कार्यवाही करे – अनुविभागीय अधिकारी के आदेश के विरुद्ध अपील की गई जिसके द्वारा याचिका के विरुद्ध शिकायत की गई थी, कलेक्टर ने आदेश खारिज कर दिया, आदेश अभिखण्डित – याचिका मंजूर।

R.K. Samaiya, for the petitioner.

J. Laxmi Aiyer, P.L. for the respondents No. 1, 2 & 3.

K.C. Ghildiyal & R.S. Khare, for the respondent No.4.

O R D E R

K.K. TRIVEDI, J. - The petitioner has come before this Court ventilating the grievance against the order dated 06.06.2011 (Annexure P-10) passed by the Collector in appeal filed by respondent No.4, against the order of Sub Divisional Officer, by which complaint made against the petitioner was rejected and the petitioner was permitted to run the fair price shop.

2. Brief facts giving rise of filing of this writ petition are that an enquiry was conducted on the basis of some complaint made against the petitioner and an order was passed cancelling the permit to run fair price shop granted to the petitioner under the Madhya Pradesh (Khadya Padarth) Sarvajanic Nagrik Scheme, 1991 (herein after 'Scheme' for brevity). Unsuccessful appeal was filed by the petitioner against the said order and after dismissal of the appeal, writ petition was filed before this Court. The writ petition was dismissed, therefore, a writ appeal was filed by the petitioner being W.A. No.335/2010. The said writ appeal came up for hearing before this Court on 20.10.2010 and after considering the validity of the scheme and the action taken by the respondents, the Division Bench of this Court reached to the conclusion that neither the order was properly passed by the Sub Divisional

Officer nor the appeal of the petitioner was considered in appropriate manner by the Collector. After quashing the orders so passed, the matter was remitted back to the Sub Divisional Officer for holding the enquiry afresh after affording an opportunity of hearing to the petitioner and the other persons. The Division Bench of this Court passed the following order :

“The matter is remitted back to the Sub Divisional Officer. The Sub Divisional Officer shall afford an opportunity of hearing to the appellant and shall pass a reasoned order. Needless to state that the Sub Divisional Officer shall afford an opportunity of hearing to the appellant and to adduce the evidence and shall hear respondent No.4 as well as the complainants. The aforesaid exercise shall be completed within a period of three months.”

Since during the pendency of the enquiry direction was given to make alternate arrangement, same was done and the fair price shop was attached to some other society.

3. The petitioner was given a show cause on 16.12.2010. The respondent No.4 was also issued the same show cause. On 28.12.2010, reply was submitted by the petitioner and all the documents relating to such complaint were produced. The petitioner also furnished a list of witnesses and certain affidavits before the enquiry officer. No reply whatsoever was submitted by the respondent No.4 pursuant to the show cause issued nor any list of witnesses was made available. The statements of witnesses were recorded in presence of respondent No.4 and such witnesses were also cross-examined. The statements of witnesses are available on record as Annexure P-7 collectively. The office bearers of respondent No.4 did not examine them as a witness. The matter was thereafter closed for hearing and vide order dated 23.03.2011 (Annexure P-8), the Sub Divisional Officer categorically held that the complaint made against the petitioner was not found proved and, therefore, no action was required to be taken. The fair price shops of Ward Nos.3, 4, 5 and 6 were again attached with the petitioner Society. This order of Sub Divisional Officer was called in question by filing an appeal by the respondent No.4 in which an interim stay was granted on 27.04.2011. The matter was thereafter heard and by the impugned order dated 06.06.2011 the appeal of the respondent No.4 has been allowed and the matter has been remitted back for holding the enquiry afresh, after categorically recording the finding that the

Sub Divisional Officer has not called the Food Officer or Junior Supply Officer for the purposes of proving the complaint made against the petitioner. Against this order, this writ petition is filed by the petitioner.

4. The scheme made by the State Government under the Control Order of 1960 has the force of law. The scheme contemplates an action to be taken against the cooperative societies running the fair price shops. In Clause 13(5) it is specifically provided that in case any complaint is made against the society running the fair price shop and if the said society is a cooperative society and is registered as such, it is necessary to send the report to the competent authority of the Cooperative Department, who will have to make an enquiry in that respect and submit a report within a period of 15 days. Only when such a report is received by the competent authority, i.e. the Sub Divisional Officer in case of a fair price shop situated in rural area, the enquiry is required to be conducted by issuing the show cause. On first occasion when the enquiry was initiated, this particular direction was not complied with and only because ex parte statements were recorded, the order was passed against the petitioner. The Collector, Tikamgarh, though tried to give benefit of hearing to the petitioner when the appeal was filed against the first order by the petitioner, but such a step taken by the respondent Collector was not found justified or in accordance to the scheme by the Division Bench of this Court where it has been categorically recorded that granting of such a post decisional hearing was of no consequence. In the second enquiry also after the remand by this Court, no steps were taken to get any complaint proved through the officers of the Cooperative Department and nothing was done in that respect. If the action was per se illegal in view of non-compliance of mandatory requirement, nothing was required to be done against the petitioner.

5. If the findings were categorically recorded after affording full opportunity of hearing to respondent No.4 by the Sub Divisional Officer, the Collector was not right in considering that certain persons were not examined as witnesses. The respondent No.4 was represented by a lawyer and an officer/office bearer of the society before the Sub Divisional Officer. If the statements of witnesses were recorded by the said officer, who were produced by the petitioner, and cross-examination of said witnesses was done by the respondent No.4, it was in the wisdom of respondent No.4 to examine any witness in support of its claim. If such a right was not exercised by the respondent No.4, the Collector was not right in holding that the Sub Divisional Officer was required to take action in that respect. Such a lacuna, which was created by

respondent No.4, was not to be fulfilled by making a remand order in such a manner.

6. In view of the aforesaid, finding that the order passed by the Collector is not in accordance to law or the scheme, the same is hereby quashed. The order of the Sub Divisional Officer is affirmed. Now the action be taken in accordance to the order of the Sub Divisional Officer.

7. The writ petition is allowed to the extent indicated herein above. There shall be no order as to cost.

Petition allowed.

I.L.R. [2012] M.P., 1146

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 91/2011 (S) (Jabalpur) decided on 21 February, 2012

ANIL BHATT & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

A. Service Law – Appointment – Non-Joinder of selected Candidates – Six posts were kept vacant in compliance of interim order – Even in absence of selected candidates, relief can be granted – Writ Petition do not suffer from vice of non-joinder of necessary party. (Para 7)

क. सेवा विधि – नियुक्ति – चयनित अभ्यर्थियों का असंयोजन – अंतरिम आदेश के अनुपालन में छः पद रिक्त रखे गये – चयनित अभ्यर्थियों की अनुपस्थिति में भी अनुतोष प्रदान किया जा सकता है – रिट याचिका आवश्यक पक्षकार के असंयोजन के दोष से ग्रसित नहीं।

B. Service Law – Recruitment Process – Criteria – Selection Criteria has to be prescribed in advance – After process of selection is over, criteria for selection can not be changed. (Para 8)

ख. सेवा विधि – भर्ती प्रक्रिया – मानदंड – चयन का मानदंड पहले से विहित किया जाना चाहिये – चयन प्रक्रिया समाप्त होने के पश्चात, चयन हेतु मानदंड बदले नहीं जा सकते।

Cases referred :

2008 AIR SCW 1850, (2001) 6 SCC 380, (2003) 4 SCC 712, (1997) 3 SC C 59, (2008) 3 SCC 512, (2008) 7 SCC 11, 2011 AIR SCW 3937.

Praveen Verma, for the petitioners.

Swapnil Ganguli, P.L. for the respondents No. 1 to 3.

Sarita Chourasiya, for the respondent No. 4.

ORDER

ALOK ARADHE, J. - With the consent of the learned counsel for the parties the Matter is finally heard.

1. In this writ petition, the petitioners seek quashment of the circular dated 28-01-2009 (Annexure-P/6) as well as the selection list contained in Annexure-P/8. In order to appreciate the petitioners challenge to the impugned orders, few facts need mention, which are stated infra.

2. The petitioners were working as Instructors in the Non-formal Education Centre which is run by the respondents. In exercise of powers conferred under Rule 14 of the *M.P. Nagriya Nikay Samvida Shala (Niyojan Evam Samvida ki Sharte), Rules, 2005* [hereinafter referred to as '2005 Rules'], it was decided to fill up the vacancies of contract teachers Grade-3 by conducting an examination for Gurujis working in M.P. Education Guarantee Schools and the Instructors/Supervisors working in Non-formal Education Centres. For the purposes of holding of the examination, the Rules were framed by the State Government which are known as *M.P. Nagriya Nikaya Samvida Shala (Niyojan Evam Samvida Ki Sharte), Rules 2005*. Admittedly, the examination was held by the Professional Examination Board as per the provisions of the aforesaid Rules on 3-8-2010. The petitioners admittedly clear the aforesaid examination and were declared successful, which is apparent from the select list (Annexure-P/4). Subsequently, the State Government issued a Circular (Annexure-P/6) which provides that the Instructors and Supervisors of erstwhile Government Non-formal Education Centres, who had worked continuously for one year as on 31st March, 2000 or worked continuously up to one year till any date in between the 31st March and 29 August, 2000, may be appointed on the post contract teacher Grade-3. In pursuance of the aforesaid circular fresh select list was prepared, vide Annexure-P/8 in which names of the petitioners were not included by applying the criteria which was prescribed in the Circular (Annexure-P/6). Subsequently, by a notification which was published in the gazette, dated 4th January, 2010, the M.P. Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract), Rules 2005 were amended and 'Rule 7-A' in the 2005 Rules was inserted and in Rule 7-A(2) the same criteria which was contained in Annexure-P/6

was prescribed. In the aforesaid factual background the petitioners have approached this Court.

3. Shri Praveen Verma, learned counsel for the petitioners submitted that once the process of selection had commenced as per the Rules in vogue at that point of time, the criteria for selection could not have been changed midway and the petitioners could not have been disqualified on the basis of the criteria for selection which was changed midway. In support of his submission, learned counsel for the petitioners has placed reliance on the decision of the Supreme Court reported in 2008A1R SCW 1850.

4. On the other hand, Shri Swapnil Ganguli, learned Panel Lawyer for the respondents No.1 to 3 submitted that the petitioner cannot be permitted to assail the select list contained in Annexure-P/8, as the selected candidates have not been impleaded as respondents in the writ petition. The writ petition suffers from the vice of non-joinder of necessary parties. In support of the aforesaid proposition learned Panel Lawyer for the State has placed reliance on the decision of the Supreme Court reported in (2001) 6 SCC 380. It is further submitted by him that the State Government had clear intention to amend the criteria for selection which is evident from the Circular (Annexure-P/6) which ultimately culminated in the Notification, dated 4-10-2001 by which the 2005 Rules were amended. It was also submitted that if there is an intention to amend the criteria pending selection process, the process of selection can be withheld by the authorities and the posts can be filled up in accordance with the amended criteria. In support of the aforesaid submission, learned Panel Lawyer for the respondents No.1 to 3 has placed reliance on the decisions of the Supreme Court reported in (2003)4 SCC 712 and (1997)3 SCC 59.

5. Learned counsel for the respondent No.4 adopted the submissions advanced on behalf of the respondents No.1 to 3.

6. I have considered the submissions made on both sides.

7. Before dealing with the matter on merit, I may deal with the primary objection which has been raised on behalf of the respondents No.1 to 3 that the writ petition suffers from the vice of non-joinder of necessary parties. It is relevant to mention that this Court while entertaining the writ petition vide order dated 7-1-2011 in view of the order passed by the Division Bench in W.P. No.1811/2010 had directed respondents to keep six posts for contract

teachers Grade-3 vacant. In view of the aforesaid order, six posts were directed to keep vacant. Even in the absence of selected candidates relief can be granted to the petitioners. Therefore, it cannot be said that the writ petition suffers from the vice of non-joinder of necessary parties. Besides, that it is not the case of the parties that all 372 posts in question in District; Chhatarpur have been filled up.

8. In *K. Manju Sree vs. State of Andhra Pradesh and another*, (2008)3 SCC 512 the Supreme Court has held that the selection criteria has to be prescribed in advance. It has further been held that after process of selection is over, the criteria for selection cannot be changed which would amount to changing the rules of the game. Similar view has been taken in *Hemani Malhotra Vs. High Court of Delhi*, (2008) 7 SCC 11 and *Barot Vijaykumar Balakrishna and others vs. Modh Vinaykumar Dashrathlal and others*, 2011 AIR SCW 3937. In the backdrop of well settled legal position facts of the case may be seen.

9. Admittedly, the examination in question was held under the 2005 Rules. Rules 4 and 5 deals with minimum educational qualification as well as prescribe minimum marks for qualifying examination. From a perusal of Rule 4 it is apparent that a candidate must have passed the Higher Secondary School Examination or an equivalent examination. Rule 5 provides that in the qualifying examination candidates belonging to SC/ST/OBC and disabled category should have secured a minimum 40% marks whereas cut-off marks in respect of other categories were fixed 50%. In pursuance of the notification of the vacancies, the examination was held on 31-8-2008 in which the petitioners appeared and they were declared successful. Admittedly, the petitioners were declared successful in the examination which was held on 31-8-2008. Thereafter, Annexure-P/6, i.e., the circular, dated 5-10-2009 was issued by which the criteria for selection was changed and the revised select list was issued which is contained in Annexure-P/8 which is legally impermissible. The contention of learned counsel for the respondents that the State Government could have withheld the process of selection and could have filled up subsequently in accordance with amended criteria need not be examined as no such plea in the return has been taken.

10. The amendment made in the Rules which was published in the gazette, dated 4-1-2010. It is well settled in law that prima facie every amendment is prospective unless there is clear indication in statute or rule that it would apply

with retrospective effect. It is not discernible from the amendment that it is retrospective in nature. Therefore, the amended rule would not apply retrospectively to the proceedings for selection which were already completed. For this additional reason also, the action of the respondents in excluding the names of the petitioners from consideration cannot be sustained in the eyes of law.

11. In the result, the Circular (Annexure-P/6) is quashed. The respondents are directed to consider the case of the petitioners for appointment on the post or contract teacher grade-3 in view of the unamended criteria and in the light of Annexure-P/5 and if the petitioners are found otherwise eligible for appointment, to issue order of appointment.

In the result, the writ appeal is allowed.

Appeal allowed.

I.L.R. [2012] M.P., 1150

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 4877/2010(S) (Jabalpur) decided on 27 February, 2012

JAGESHWAR PRASAD RAIDAS & ors.

...Petitioners

Vs.

M.P. STATE ELECTRICITY BOARD & ors.

...Respondents

A. Service Law – Recruitment Process – Qualifying Marks
– Qualifying marks can be prescribed for written examination as well as for interview – However, such marks have to be prescribed in advance before the commencement of selection process. (Para 5)

क. सेवा विधि – भर्ती प्रक्रिया – अर्हक अंक – अर्हक अंक लिखित परीक्षा तथा साक्षात्कार हेतु विहित किये जा सकते हैं – किन्तु ऐसे अंको को चयन प्रक्रिया आरंभ होने से पूर्व पहले से विहित किया जाना चाहिए ।

B. Service Law – Recruitment Process – Short listing of Candidates – Short listing can be done on the basis of administrative instructions and the minimum qualifying marks can be prescribed for written examination as well as for interview provided the action is bonafide and reasonable. (Para 5)

ख. सेवा विधि – भर्ती प्रक्रिया – अभ्यर्थियों को सूचीबद्ध करना – सूचीबद्ध करना प्रशासनिक अनुदेशों के आधार पर किया जा सकता है एवं न्यूनतम अर्हक अंक लिखित परीक्षा तथा साक्षात्कार हेतु विहित किये जा सकते हैं इस उपबंध के साथ कि कार्यवाही सद्भावपूर्ण और युक्तियुक्त है।

C. Service Law – Recruitment Process – Where Statutory Rules prescribe, the prescription of minimum qualifying marks for viva voce, the same should be mentioned in the advertisement. (Para 5)

ग. सेवा विधि – भर्ती प्रक्रिया – जहाँ कानूनी नियम में साक्षात्कार (वाईवा-वोस) हेतु न्यूनतम अर्हक अंक विहित करने के निदेश दिये गये हैं, उसे विज्ञापन में उल्लिखित किया जाना चाहिए।

D. Service Law – Recruitment Process – Minimum Qualifying Marks – Requirement of Minimum qualifying marks for written examination and interview was fixed by resolution which was passed before the commencement of selection process – Candidature of candidates was assessed on the basis of uniform criteria – Petitioners have not alleged any arbitrariness or bias in the process of selection – No prejudice caused to petitioners – No interference called for – Petition dismissed. (Para 7)

घ. सेवा विधि – भर्ती प्रक्रिया – न्यूनतम अर्हक अंक – लिखित परीक्षा एवं साक्षात्कार हेतु न्यूनतम अर्हक अंको की आवश्यकता चयन प्रक्रिया आरंभ होने के पूर्व पारित किये गये संकल्प द्वारा निश्चित की गई – अभ्यर्थियों की अभ्यर्थिता का निर्धारण समान मानदंड के आधार पर किया गया – याचीगण ने चयन की प्रक्रिया में कोई मनमानापन या भेदभाव का अभिकथन नहीं किया है – याचीगण को कोई प्रतिकूल प्रभाव कारित नहीं हुआ – हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Cases referred :

(1987) 4 SCC 646, (2000) 8 SCC 633, (2008) 3 SCC 512, (2008) 7 SCC 11, (2009) 1 SCC 768, (2009) 3 SCC 227, (1981) 4 SCC 159, (1992) Supp. 1 SCC 594, (1999) 1 SCC 465, (2006) 6 SCC 395, (2009) 5 SCC 1, 2008(1) MPLJ 325, (2011) 7 SCC 308.

K.C. Ghildiyal, for the petitioners.

Indira Nair with Rajas Pohankar, for the respondents No. 1 & 2.

A.T. Faridi, for the respondents No. 3, 5, 6 & 10.

Mukesh Pandey, for the respondents No. 4 & 8.

ORDER

ALOK ARADHE, J. - This order shall govern the disposal of W.P.No. 4877/2010(s) and W.P. No. 7925/2010(s). The core issue which arises for consideration in these writ petitions is whether in view of the fact that minimum qualifying marks which were prescribed for interview, were neither specified in the advertisement nor made known to the petitioners as well as other candidates, the process of selection for recruitment on the post of Security Sub Inspectors is vitiated in law. The petitioners in these writ petitions have, inter alia, challenged the validity of the order dated 22.1.2010 as well as order dated 23.1.2010 by which the respondents No.3 to 10 have been appointed on the post of Security Sub Inspectors. The petitioners also seek a direction to respondents No.1 & 2 to appoint them on the post of Security Sub Inspectors. In order to elucidate the controversy involved in the writ petitions, few facts need mention, which are stated infra.

2. A circular dated 20.8.2009 was issued directing recruitment on the post Security Sub Inspector from amongst the Departmental candidates. In the aforesaid circular minimum educational qualification as well as the standard of physical parameters were mentioned. The circular further prescribed that the candidates who qualify in the physical test shall be asked to appear in the written examination. The candidates who qualify in the written examination shall be called for interview. Thereafter, another circular dated 25.8.2009 was issued under which it was stated that total 26 posts of Security Sub Inspector shall be filled up. As per the schedule of recruitment, the last date of submission of applications was 15.10.2009. The physical test as well as written examination were scheduled to be held on 21.12.2009 and 11.1.2010 respectively. Admittedly, the petitioners in both the writ petitions cleared the physical test and were declared successful in the written examination. The petitioners were called for interview which was held on 22.1.2010. However, vide orders dated 22.1.2010 and 23.1.2010 the respondents No.3 to 10 were appointed on the post of Security Sub Inspectors. In the aforesaid factual background the petitioners have approached this Court.

3. Mr.K.C.Ghildiyal, learned counsel for the petitioners submitted that respondents No.1 & 2 while laying down the procedure for selection had not prescribed the condition of securing minimum qualifying marks i.e. 4 out of 10 marks in the interview. The minimum qualifying marks in the interview have

been prescribed in the midst of process of selection which is beyond the power of Selection Committee. It is further submitted, that document (Annexure-R-5) dated 01.8.2009 which prescribes minimum qualification marks for the written examination as well as interview has been prepared subsequently. It is also urged that condition of securing minimum qualifying marks in the interview was not notified to the candidates. It is further submitted that though 26 posts were initially advertised, yet only 8 posts were filled up and remaining posts were deliberately kept vacant which were filled up in the process of recruitment which was initiated subsequently. In support of his submission learned counsel for the petitioners has placed reliance on the decisions of Supreme Court reported in *Durgacharan Misra vs. State of Orissa and others*, (1987) 4 SCC 646, *Praveen Singh vs. State of Punjab and others*, (2000) 8 SCC 633, *K. Manjusree vs. State of Andhra Pradesh and another*, (2008) 3 SCC 512, *Himani Malhotra vs. High Court of Delhi*, (2008) 7 SCC 11, *Tridip Kumar Dingal and others vs. State of West Bengal and others*, (2009) 1 SCC 768 and *Amlan Jyoti Barooah vs. State of Assam and others*, (2009) 3 SCC 227.

4. On the other hand, Mrs. Indira Nair, learned senior counsel submitted that the criteria for selection was fixed prior to initiation of process of selection on 01.8.2009 under which it was prescribed that a candidate has to secure minimum qualifying marks i.e. 40 out of 100 in the written examination and 4 out of 10 in the interview. It was also submitted that the candidature of all the candidates was uniformly assessed on the basis of same criteria. Vide circular dated 25.8.2009 it was mentioned that 26 posts of Security Sub Inspector shall be filled up. On scrutiny of the applications submitted by the candidates, 102 candidates were found eligible who were called for medical and physical test on 21.12.2009. Out of 102 candidates, 88 candidates appeared in the medical and physical test. Thereafter, 20 candidates appeared in the written examination on 11.1.2010. All the candidates secured more than minimum marks in the written examination and cleared the written examination. Thereafter, aforesaid 20 candidates were called for interview on 21.12.2010. Eight candidates, namely, respondents No.3 to 10 were able to secure more than the minimum qualifying marks in the interview. Accordingly, their orders of appointment on the post of Security Sub Inspectors were issued. It was also submitted that interview is required to be held to assess the suitability of the candidate and the respondents no.1 & 2 were well within their right to fix the minimum qualifying marks for interview. It is submitted that proceeding of

selection on the post of Security Sub Inspector has been conducted in fair manner and the proceeding for selection do not suffer from any infirmity which may call for interference of this Court in exercise of powers under Article 226 of the Constitution of India. Lastly, it is also submitted that in the subsequent process of selection the petitioners No.1 and 4 in W.P.No.4877/2010 have been selected. In support of her submissions, learned senior counsel has placed reliance on the decision of Supreme Court in *Sahkari Ganna Vikas Samiti Ltd. vs. Mahabir Sugar Mills (P)Ltd.*, (1981) 4 SCC 159, *Mohan Kumar Singhania and others vs. Union of India and others*, (1992) Suppl. 1 SCC 594, *Orissa Small Industries Corporation Ltd. and another vs. Narasingha Charan Mohanty and others*, (1999) 1 SCC 465, *K.H.Siraj vs. High Court of Kerala and others*, (2006) 6 SCC 395, *Andhra Pradesh Public Service Commission vs. Balaji Badhavath and others*, (2009) 5 SCC 1 and also on the decisions of this Court reported in *Pannalal s/o Govind Shinde vs. Hindustan Petroleum Corporation Ltd.*, 2008 (1) MPLJ 325.

5. I have considered the submissions made on both sides. In *KManjusree* (supra) it has been held by the Supreme Court that minimum qualifying marks can be prescribed for written examination as well as for interview. However, such marks have to be prescribed in advance before the process of selection commences. Once the process of selection has commenced, the requirement of minimum qualifying marks for the written examination as well as interview cannot be introduced as the same would amount to changing the rules of game, after the game is played. In *Tridip Kumar Dingal* (supra) it has been held that in the absence of any provision in the Rule, short-listing of the candidates can be done on the basis of administrative instructions and the minimum qualifying marks can be prescribed for written examination as well as for the interview provided that action is bonafide and reasonable. In *Barot Vijaykumar Balakrishna & ors vs. Modh Vinaykumar Dasrathlal & ors.* (2011) 7 SCC 308 the Supreme Court has held that where statutory Rules prescribe, the prescription of minimum qualifying marks for viva voce, the same should be mentioned in the advertisement.

6. In the backdrop of aforesaid well settled legal position, I have perused the original record which is produced. Admittedly, in the instant cases there is no statutory requirement of prescription of minimum qualifying marks for the written examination as well as for the interview. The respondents No.1 & 2 by resolution dated 01.8.2009 have fixed the minimum qualifying marks for the written examination as well as for interview. Thus, the minimum qualifying

marks for written examination and interview have been prescribed before commencement of the process of selection. The advertisement was issued on 20.8.2009. Thus, it is not the case where the requirement of obtaining minimum qualifying marks in the written examination and in the interview was introduced after the process of selection was commenced.

7. In the circulars dated 20.8.2009 and 25.8.2009 the condition of securing minimum qualifying marks in the written examination as well as in the interview has not been mentioned. The candidature of the candidates was assessed on the basis of uniform criteria. The authority of the respondents to fix the qualifying marks for interview is not under challenge. In *Barot Vijaykumar Balakrishna & ors. vs. Modh Vinaykumar Dasrathlal & ors.*, (2011) 7 SCC 308 (supra) it has been held that where the Rule requires prescription of minimum qualifying marks for viva voce the same should be notified in the advertisement. Admittedly, as stated supra, there is no requirement of prescription of minimum qualifying marks for the written examination and for the interview in the statutory rules. The process of selection is fair and reasonable. It is not the case of the petitioners that there is any arbitrariness or bias in the process of selection. The petitioners have not been able to demonstrate any prejudice which has been caused to them by non-mentioning of minimum qualifying marks in the written examination and interview in the circulars. It is also not the case of the petitioners that any candidate who has not secured minimum qualifying marks in the interview has been given appointment. Thus, the petitioners have utterly failed to demonstrate the prejudice which has been caused to them on account of non-mentioning of minimum qualifying marks for the written examination as well as for the interview in the circulars. Besides that, the petitioners did not raise any objection before participating in the process of selection that minimum qualifying marks in the written examination and interview have not been mentioned in the circulars. The petitioners have participated in the process of selection. Thus, no case for interference with the process of selection, which has been undertaken by the respondents for recruitment on the post of Security Sub Inspectors, in exercise of powers under Article 226 of the Constitution of India is made out.

8. In the result, the writ petitions fail and are hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 1156

WRIT PETITION

Before Mr. Justice A.K. Shrivastava

W.P. No. 5192/1998 (Jabalpur) decided on 9 March, 2006

SANTOSH KUMAR VISHWAKARMA

...Petitioner

Vs.

M.P. HOUSING BOARD & ors.

...Respondents

Service Law – Regularization of Service – Petitioner was appointed as daily rated employee on the post of Chowkidar – Overwhelming material to hold that he is senior to respondent No. 5 who was regularized on 01.01.1990 – Held – Respondents No. 1 to 3 are directed to regularise the services of petitioner w.e.f. 01.01.1990 alongwith difference of wages to be paid to the petitioner – Petition allowed. (Paras 9 & 11)

सेवा विधि – सेवा का नियमितीकरण – याची को दैनिक वेतन कर्मचारी के रूप में चौकीदार के पद पर नियुक्त किया गया – यह धारणा करने के लिए प्रचुर सामग्री है कि वह प्रत्यर्थी क्र. 5 से वरिष्ठ है जिसे 01.01.1990 को नियमित किया गया था – अभिनिर्धारित – याची की सेवाओं को 01.01.1990 से प्रभावी रूप से याची को देय वेतन के अंतर के साथ नियमित करने के लिए प्रत्यर्थी क्र. 1 से 3 को निदेशित किया गया – याचिका मंजूर।

Editor's Note:-

The order passed by Hon'ble Single Judge was set aside by Division Bench in W.A. no. 1229/06 by order dated 23.04.07. However, Hon'ble Supreme Court by order dated 21-11-2011 passed in C.A. no. 10033/2011 has set aside the order passed by division bench in writ appeal, and has restored the order passed by Hon'ble Single Judge.

B.K. Bajpai, for the petitioner.

R.N. Shukla with *R.B. Tiwari*, for the respondents.

ORDER

A.K. SHRIVASTAVA, J. - By this petition under Articles 226 and 227 of the Constitution of India, the petitioner is seeking regularisation to the post of Chowkidar.

2. The case of the petitioner is that on 16/6/1984 he was appointed as

daily rated employee on the post of Chowkidar and since then he is serving on the said post. But though the junior co-employees have been regularised, he has not yet been regularised.

3. The petitioner along with other co-employees knocked the door of this Court earlier by filing petition which was registered as M.P.No.3251/87 (Raghvendra Prasad Pathak and others Vs. State of M.P.& others) wherein the present petitioner was figured as petitioner No.3. This Court on 28/11/1994 passed an order directing the present respondents to consider the case of the petitioner for his regularisation within a period of three months from the date of the order. However, the case was not considered by the respondents for regularisation, as a result of which the present respondents filed Misc. Civil Case before this court (MCC No.309/95-The Housing Commissioner and others Vs. Raghvendra Prasad Pathak and others) and prayed that the time be extended to comply the order passed by this Court in M.P.No.3251/87. This Court on 20/12/1995 extended the time to comply the order upto 31/1/1996. However, no order was passed as a result of which a contempt petition was filed by the present petitioner along with other persons and the present petitioner was figured as petitioner No.3. This contempt petition (Contempt Petition No.196/96) was decided on 7/11/1997 and the contempt proceedings were dropped by holding that the case of regularisation of the petitioners was duly considered on the basis of their qualifications and seniority and after giving opportunity of hearing to them. It was further held by this Court that the contemnors have shown their inability to grant necessary relief of regularisation to the petitioners on account of their meagre resources.

4. The present petitioner along with other persons filed review petition of the order dated 7/11/1997 passed in contempt petition and the review petition was registered as MCC No.1140/97. This Court on 23/2/1998 while disposing of the review petition observed that it would be open to the petitioners to agitate their rights on the basis of their claim for continuance by way of independent proceedings.

5. It has been contended by Shri Bajpai, learned counsel for the petitioner, assailing the order of respondent No.2 dated 11/8/1995 (Annexure P/6-B) that the services of the petitioner were not regularised on the ground that his name figured at serial no.62 in the merit list and the employees who were figured upto 42 in the said list have been regularised. The contention of learned counsel for the petitioner is that the merit list is prepared according to the length of service i.e.on the basis of seniority. The contention of learned counsel

is that the petitioner made entry in the department of the respondents on 16/6/1984 and respondent No. 5- Lalo Prasad is much junior to him as he was appointed on 1/10/1984 and if that is the position, the petitioner is entitled for regularisation from the date when respondent No.5 was regularised i.e. 1/1/1990.

6. On the other hand, shri R.N.Shukla, Sr.Advocate assisted by Shri R.B.Tiwari, Advocate, for the respondents, has submitted that the petitioner was not appointed on 16/6/1984. On the contrary he was appointed on 4/11/1984 and if that is the position, it cannot be said that petitioner is senior to respondent No.5 and, therefore, whenever the post would fall vacant, the services of the petitioner would be regularised in accordance to the merit list. In support of his contention, learned counsel has placed reliance on Annexure-R/1 which is Bio-data of the petitioner and it has been filed along with return.

7. By replying the argument of learned senior counsel for the respondents, it has been contended by learned counsel for the petitioner by inviting my attention to averments and the documents made in the second rejoinder, that factually it is incorrect that the petitioner was appointed on 4/11/1984, indeed, he was appointed on 16/6/1984 therefore, he is entitled for regularisation w.e.f.1/1/1990 when respondent No.5, who is junior to him, was regularised.

8. After having heard learned counsel for the parties, I am of the view that this petition deserves to be allowed.

9. One important fact which cannot be marginalised and blinked away is that the seniority list of the muster roll employees is filed as Annexure P/3 and in this list the date of appointment of the petitioner has been shown as 16/6/1984 on the post of Chowkidar. Apart from this, Executive Engineer of the respondents, vide its letter dated 24/6/2004 addressed to Chief Administrative Officer, Head Office, Bhopal enclosed the list of daily rated employees and in that list also the date of appointment of the petitioner has been shown as 16/6/1984. This letter of Executive Engineer along with list has been placed on record as Annexure-P/18 along with the second rejoinder of the petitioner. Thus, there is overwhelming material in order to hold that the date of appointment of the petitioner is 16/6/1984 and, therefore, he is senior to respondent No.5 who was regularised on 1/1/1990.

10. Much emphasis has been placed by learned senior counsel for the respondents on Annexure-R/1, as a matter of fact this is the foundation stone of the case of respondents that the petitioner is junior to respondent No.5. By

inviting my attention to Annexure- R/1 which is Bio-data of the petitioner, it has been submitted by learned senior counsel for the respondents. that the date of entry of the petitioner has been shown as 4/11/1984. The argument, so advanced, appears to be quite attractive, however, on deeper scrutiny of it, found to be devoid of any substance. If document Annexure-R/1 (Bio-data of the petitioner) is seen, it is gathered that the said form has been filled by the petitioner in Hindi and in the same hand-writing the date of entry has been mentioned as 16/6/1984. The month 'six' is written in Hindi and it can also be said that it may be read as 'seven. Even if the petitioner was appointed on 16/7/1984, he is senior to respondent No. 5 as admittedly respondent No.5 was appointed on 1/10/1984. The date of entry of the petitioner in service 16/6/1984 in Annexure-R/1 has been scored out and in English somebody has written 4/11/1984. It appears that in order to justify their action for not regularising the petitioner, since earlier the contempt petition was filed against the respondents, it cannot be ruled out that somebody else scored out the date of entry written as 16/6/84.

11. For the reasons stated herein above, this petition is allowed and respondents No.1 to 3 are hereby directed to regularise the services of the petitioner w.e.f. 1/1/1990 the date when the services of respondent No.5 Lalo Prasad were regularised. The difference of wages be paid to the petitioner from the said date. Let the difference of wages be paid to the petitioner on or before 31/8/2006. Looking to the facts and circumstances the parties are directed to bear their own costs.

Petition allowed.

I.L.R. [2012] M.P., 1159

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 9802/2010 (Jabalpur) decided on 6 March, 2012

ROOPA SINGH (SMT.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995 – Rule 7 – Security Deposit – Petitioner filed Election Petition on 22.02.2010 alongwith making the security deposit of Rs. 500/- – On 06.03.2010, the petitioner filed an application and withdraw the Election Petition without any

prayer of refund of security deposit – On same day i.e. 06.03.2010, the petitioner filed another Election Petition, but without making any deposit of security deposit – Held – The amount deposited with the first election petition can not be treated as deposit of security – Nothing could be done except dismissing the election petition – Petition dismissed. (Paras 1,5, 6 & 7)

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र. 1995 – नियम 7 – सुरक्षा निधि – याची ने 22.02.2010 के निर्वाचन पर्चे के साथ सुरक्षा निधि रुपये 500/- प्रस्तुत किया – 06.03.2010 को याची ने आवेदन प्रस्तुत किया और निर्वाचन पर्चा वापस लिया, सुरक्षा निधि की वापसी की बिना किसी प्रार्थना के – उसी दिन अर्थात् 06.03.2010 को याची ने अन्य निर्वाचन पर्चा प्रस्तुत किया परंतु कोई सुरक्षा निधि जमा किये बिना – अभिनिर्धारित – प्रथम निर्वाचन पर्चे के साथ जमा रकम को सुरक्षा की रकम नहीं माना जा सकता – निर्वाचन याचिका को खारिज करने के अलावा कुछ नहीं किया जा सकता – याचिका खारिज।

Case referred :

2004(2) J LJ 263,

V.K. Shukla, for the petitioner.

P.K. Kaurav, Dy. A.G. for the respondent No.1.

K.S. Baghel, for the respondent No. 2.

O R D E R

K.K. TRIVEDI, J. - By this petition under Article 226 of the Constitution of India, the petitioner has called in question the order dated 12.07.2010 (Annexure P-10) by which the election petition filed by the petitioner against the election of respondent No.2 has been dismissed holding that the same was not maintainable in view of non-compliance of the statutory provisions of the Rules governing the conduct of such election petition. It is contended by the petitioner that the election of respondent No.2 was called in question in an election petition earlier filed along with which a requisite deposit of security amount was made. It was found by the election petitioner that such an election petition was not properly drafted, there were certain necessary averments, which were left, therefore, a prayer was made for withdrawal of the said election petition on 06.03.2010, which was allowed. A fresh election petition was thereafter filed on the same date by the petitioner in appropriate manner within the limitation but an objection was raised that the deposit of the security amount was not made while presenting the second election petition and,

therefore, on the said objection the matter was heard. After hearing the parties, the Election Tribunal reached to the conclusion that the election petitioner has not deposited the amount of security, therefore, the election petition was dismissed. It is contended that the petitioner has annexed with the second election petition the security deposit made by her when the first election petition was submitted and that deposit should have been treated as security deposit in compliance of the provisions of Rule 7 of the Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 (herein after referred to as 'Rules'). It was grossly overlooked by the Election Tribunal that such a deposit was not withdrawn by the petitioner when the earlier election petition was withdrawn and the said deposit could have been treated as a deposit for the purposes of filing of a second election petition on the same subject matter. Thus, it is contended that the dismissal of the election petition on such a technical objection is not justified. It is claimed that the order impugned is liable to be quashed and the Election Tribunal is liable to be commanded to decide the election petition of the petitioner in accordance to law on merits.

2. Opposing the claim made by the petitioner, the respondent No.2, the returned candidate, has filed a return. Along with the return the respondent No.2 has placed the similar documents on record, which the petitioner had filed. Certain more order-sheets have been placed on record. It is contended that there was mandatory requirement of Rule 7 of the Rules that a deposit of security should be made while presenting the election petition. It is specifically provided in the said Rule that where the election of more than one candidate is called in question, a separate deposit of security in equal amount shall be required in respect of each such returned candidate. Therefore, it was necessary on the part of the petitioner to deposit the security amount afresh for the purposes of filing of a second election petition. It is further contended that no liberty was claimed for filing of the second election petition and by such simple withdrawal of the earlier election petition, the petitioner has lost the right to challenge the election of the returned candidate by way of filing another petition. It is contended that in view of this, the election petition of the petitioner was rightly dismissed as not maintainable and no wrong is committed by the Election Tribunal. Thus, it is contended that the petition being devoid of merits, is liable to be dismissed.

3. After hearing the rival submissions of learned Counsel for the parties, it is to be seen whether on such a technical ground, rejection of the election

petition was justified or not. The settled position of law is that if the specific provisions are made with respect to filing and conduct of an election petition, the said provisions of law are required to be fulfilled. If there is non-compliance of such mandatory provisions, the consequence is already provided in the Rules. The scheme of Rules prescribes that the election petition is to be presented as per Rule 3 of the Rules. The parties to the petition are prescribed in Rule 4 of the Rules. The contents of the petition are prescribed in Rule 5 of the Rules. The relief which may be claimed by an election petitioner is prescribed in Rule 6 of the Rules. In definite words under Rule 7 of the Rules, the procedure for deposit of the security for the purpose of filing of an election petition is provided, which read thus :

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

4. The consequence of non-compliance of any such provisions of Rule 3, Rule 4 or Rule 7 of the Rules has been provided in Rule 8 of the Rules where it is specifically provided that while receiving the election petition, the Election Tribunal is required to see whether the compliance of the provisions of Rule 3, Rule 4 or Rule 7 of the Rules has been made or not. In definite words it is provided that in case of non-compliance of the aforesaid provisions of the aforesaid Rules, the Election Tribunal shall dismiss the election petition. However, the only other provision made is that before dismissal of the election petition on such grounds or for such reasons, an opportunity of hearing is required to be granted. But it nowhere relaxes the default of non-compliance of aforesaid Rules and even no power is conferred on the Election Tribunal to condone such defaults.

5. It is seen that the petitioner has filed the election petition calling in question the election of respondent No.2 on 22.02.2010. Along with the said election petition the petitioner has made a deposit of Rs.500/- as security, which was deposited on 19th February, 2010. The said election petition was entertained on 22.02.2010 itself by the Election Tribunal and the direction was issued for issuance of notice of the said election petition. Instead of paying the process fees for issuing the notices of the said election petition, the petitioner

moved an application on 06.03.2010 categorically contending that the election petition filed on 22.02.2010 was not properly drafted, there were certain errors of law and, therefore, the petitioner was willing to file a fresh election petition duly constituted. For the said purpose it was also said that because of filing of such an election petition, the petitioner was willing to withdraw the earlier election petition filed on 22.02.2010. Such a permission was granted on 06.03.2010. In the application, placed on record as Annexure P-3, no prayer was made for refund of the security amount deposited by the petitioner along with the first election petition. If this was not done, the amount was not to be reclaimed nor could be adjusted for the purposes of filing of another election petition. Even when the withdrawal was not made, it was contended that the election petition was being filed by the petitioner afresh. It further appears that the election petition was prepared and filed on 06.03.2010. If that was the situation, in fact the petitioner was required to make a deposit of the amount of security for the purpose of filing of the election petition on 06.03.2010 and she could have claimed a refund of the security amount, which was already deposited along with the earlier election petition. She could not have said that the amount deposited with the first election petition may be treated as deposit of security as per the provisions of Rule 7 of the Rules for the purpose of entertaining the second election petition. In fact the same challan of deposit was annexed with the election petition filed on second occasion, which was in fact for the purpose of deposit of security when the first election petition was filed. This cannot be said to be the compliance of Rule 7 of the Rules.

6. The Division Bench of this Court has considered the effect of non-compliance of the aforesaid provisions of law and the Rules in the case of *Sarla Tripathi (Smt.) vs. Smt. Kaushilya Devi & others, 2004 (2) J.L.J. 263*. This has been categorically held by this Court that if any of the provisions of Rules 3, 4 or 7 of the Rules is not complied with, the only consequence of such non-compliance is nothing but the dismissal of the election petition in accordance to the provisions of Rule 8 of the Rules. In one of the cases where the deposit of security was made in cash, this Court has considered whether production of the receipt of deposit of security is required or not. This is not the case of the petitioner that she has made the deposit of security along with the second election petition filed by her in cash. Therefore, nothing was required to be done except dismissing the election petition of the petitioner and this has rightly been done by the Election Tribunal.

7. In view of the aforesaid, the order passed by the Election Tribunal is just and proper and need no interference by this Court in exercise of its power under Article 226 and Article 227 of the Constitution of India. The petition is wholly misconceived and deserves to be and is hereby dismissed. There shall be no order as to cost.

Petition dismissed.

I.L.R. [2012] M.P., 1164

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 3529/2011 (Jabalpur) decided on 7 March, 2012

MUMBI BAI (SMT.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122(2) – Limitation – The effective date for starting limitation is the date of notification of the election. (Para 7)*

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 (2) – परिसीमा – परिसीमा आरंभ होने की प्रभावी तिथि, निर्वाचन की अधिसूचना की तिथि है।

B.. *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122(2), Limitation Act (36 of 1963), Section 5 – Condonation of delay – Delay caused in filing of the election petition is not condonable as provisions of Section 5 of the Limitation Act would not be attracted at all. (Para 7)*

ख. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 (2). परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब क्षमा करना – निर्वाचन याचिका प्रस्तुत करने में विलम्ब क्षमा करने योग्य नहीं क्योंकि परिसीमा अधिनियम की धारा 5 के उपबंध किंचित भी आकर्षित नहीं होते।

C. *Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122(2) – Election Petition – Certificate of declaration of the result after notification was issued on 03.02.2010 – Limitation was to be counted from that date – Election Petition was filed on 19.03.2010 with an application for condonation of delay – Held – The only consequence of causing the delay in filing the election*

petition would be its dismissal and nothing else – The entire proceedings of election petition are thus vitiated. (Para 7)

ग. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 (2) – निर्वाचन याचिका – परिणाम की घोषणा का प्रमाण पत्र, 03.02.2010 को अधिसूचना जारी किये जाने के पश्चात जारी किया गया – परिसीमा की गणना उसी तिथि से की जानी चाहिये थी – निर्वाचन याचिका दिनांक 19.03.2010 को विलम्ब के लिए माफी के आवेदन के साथ प्रस्तुत की गई – अभिनिर्धारित – निर्वाचन याचिका प्रस्तुत करने में कारित विलम्ब का एकमात्र परिणाम उसकी खारिजी होगा और कुछ नहीं – अतएव, निर्वाचन याचिका की संपूर्ण कार्यवाहियां दूषित।

Case referred :

1998(1) MPWN 83, 2002(3) MPLJ 121.

Raghvendra Kumar with Kapil Patwardhan, for the petitioner.

J. Laxmi Aiyer, P.L. for the respondent/State.

Rahul Rawat, for the respondent No. 2.

ORDER

K.K. TRIVEDI, J. - This petition is filed under Article 226 of the Constitution of India calling in question the orders dated 07.02.2011 and 14.02.2011 passed by the Sub Divisional Officer, Revenue, Damoh, the prescribed authority of Election Tribunal, by which in an election petition filed by the respondent No.2, recounting of the votes was directed and after holding the recounting, the respondent No.2 was declared to be elected by one vote. It is contended that the election was rightly held. The petitioner herein was declared elected after the counting of the votes. Calling in question the said election, the respondent No.2 filed an election petition under Section 122 of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (herein after referred to as 'Act'). The Election Tribunal examined the case, recorded the evidence and thereafter holding that the counting of the votes was not rightly done, directed recounting of the votes. After conducting the recounting of the votes, recording the proceedings, the result of the counting was declared declaring respondent No.2 as elected by margin of one vote. It is contended that such a recounting was not done in appropriate manner and, therefore, there was illegality committed by the Election Tribunal in declaring the respondent No.2, election petitioner, as successful in the election. Thus, it is claimed that the entire proceedings are vitiated because of noncompliance

of mandatory provisions. It is contended that as per the settled law, recounting was not to be ordered in mechanical manner, which has been done and as such the order impugned are bad in law and are liable to be set aside.

2. Per contra, the respondent No.2, election petitioner, has contended that there was sufficient material to hold that the counting of the votes was not done rightly and, therefore, after recording the evidence, materially examining the facts with respect to the procedure followed in counting of the votes, on the basis of available evidence on record, the Election Tribunal reached to the conclusion that counting of votes was not rightly done and, therefore, order of recounting of votes was passed. After holding the recounting since it has been found that there was error in conducting the counting at the time of closer of voting, in fact by one vote the election petitioner, respondent No.2, was to be declared as elected, such orders have been passed and respondent No.2 has been declared as elected. Thus, it is contended that there is nothing wrong committed by the respondent-authority in ordering recounting or conducting the recounting and declaring respondent No.2 as elected Sarpanch.

3. The respondent State has also filed the return contending that the petitioner, who was a respondent in the election petition, was given full opportunity of hearing. Proper opportunity to produce evidence was granted. On the basis of the available evidence on record, the Presiding Authority of the Election Tribunal has rightly reached to the conclusion that there was irregularities committed in counting of the votes and rightly recounting was ordered. It is contended that on recounting it has been found that petitioner herein has secured 361 votes whereas respondent No.2 has secured 362 votes out of the total votes polled and, therefore, she was declared as elected Sarpanch. It is, thus, contended that the petition being devoid of any merit, is liable to be dismissed. The official respondents have also produced the entire record of the election petition and the recounting of the votes before this Court for perusal.

4. Heard learned Counsel for the parties at length and minutely examined the records.

5. On being notified, the elections were held in the month of January, 2010 for election of Sarpanch of Gram Panchayat, Bheelampur, District Damoh. The petitioner and respondent No.2 Smt. Ganeshi Bai, both were the candidates for such election. After closer of the voting, the counting of the votes was done and the petitioner was declared as elected Sarpanch of the

said Gram Panchayat. The notification in this respect was issued on 03.02.2010, allegedly on which date the certificate of election was given to the returned candidate. It is the contention of the respondent No.2 while filing the election petition that the same was not filed within 30 days of limitation as prescribed under sub-section (2) of Section 122 of the Act, therefore, she has moved an application for condonation of delay in filing the election petition. Such an objection was also raised by the petitioner, the returned candidate, in writing with respect to the maintainability of the election petition. The order-sheets of the record of election petition produced by the Panel Lawyer indicate that on 19.03.2010 the election petition was filed along with an application under Section 5 of the Limitation Act. The Election Tribunal thereafter issued notices for hearing on admission of the election petition as also for condonation of delay. The Election Tribunal vide order dated 12.04.2010 condoned the delay and proceeded to decide the election petition on merits. First of all this Court is required to examine whether the Election Tribunal was right in condoning the delay of the election petition vide order dated 12.04.2010 or not?

6. The election petitions are to be filed as provided under Section 122 of the Act, which reads thus :

“122. Election petition.-(1) An election under this Act shall be called in question only by a petition presented in the prescribed manner :-

(i) in case of Gram Panchayat or Gram Sabha to the Sub Divisional Officer (Revenue);

(ii) in case of Janpad Panchayat to the Collector; and

(iii) in case of Zila Panchayat to the Divisional Commissioner and not otherwise.

(2) No such petition shall be admitted unless it is presented within thirty days from the date on which the election in question was notified.

(3) Such petition shall be inquired into or disposed of according to such procedures as may be prescribed.”

Sub-section (2) of Section 122 of the Act specifically prescribes that no such petition shall be admitted unless it is presented within thirty days on

the date of which the election in question was notified. The election petitioner, respondent No.2, has shown as if the elections were notified on 05.02.2010. If that was the date of notification of the election, the competent authority was not justified in delivering the certificate of election to the returned candidate. As is contended, such certificate of declaration of the result after notification was issued on 03.02.2010. The limitation was to be counted from that date. It is prescribed under Rule 90 of the Madhya Pradesh Panchayat Nirvachan Niyam, 1995 that a notification is required to be issued by the Commission. The provisions of Rule 90 of the aforesaid Rules read thus :

“90. Manner of notifying election.- The Commission shall notify or cause to be notified -

- (a) every election of a Panch and Sarpanch of a Gram Panchayat, by affixing a notice in Form 26-A on the notice board in the office of the Gram Panchayat concerned and in the office of the Janpad Panchayat within such Gram Panchayat is situate;
- (b) every election of a member of a Janpad Panchayat, by affixing a notice in Form 26-B on the notice board in the office of the Janpad Panchayat concerned and in the office of the District Election Officer, and
- (c) every election of a member of a Zila Panchayat, by affixing a notice in Form 26- C on the notice board in the office of the Zila Panchayat and in the office of the District Election Officer.”

7. The effective date for starting limitation as prescribed in sub-section (2) of Section 122 of the Act is the date of notification of the election. Since no prescription is made under the Act itself, delay caused in filing of the election petition is not condonable as provisions of Section 5 of the Limitation Act would not be attracted at all. There is a statutory bar provided in admitting election petition beyond the period of thirty days from the notification of the election. It is the settled law that if a statutory bar is created by the legislature, by making it mandatory that an election petition is required to be presented within the period of limitation prescribed, without making any provision for condonation of delay or prescribing any discretion that the Election Tribunal may condone the delay in filing of the election petition, such an election petition

cannot be entertained beyond the period of limitation by the Election Tribunal. The only consequence of causing the delay in filing the election petition would be its dismissal and nothing else. This Court in case of *Kishan Singh vs. Harveer Singh*, 1998(1) MPWN 83 had held that the limitation prescribed for filing of the election petition under Section 122 cannot be extended. It has been held in the aforesaid case that the provisions of Limitation Act including the provisions of Section 5 had no application to such proceedings. The very same law has been considered by this Court in the case of *Kalka Prasad vs. Ramji Lal & others*, 2002(3) MPLJ 121 and in the said case it has been categorically held that in the light of the aforesaid enunciation of law, the petition was not maintainable as it was filed beyond the period prescribed in sub-section (2) of Section 122 of the Act. The Tribunal in the instant case has accepted the petition by condoning the delay. The reasons assigned for delay was that the election petitioner was collecting the documents and since the said documents were made available only on 19.02.2010, the election petition could not be filed within the period of limitation. By no stretch of imagination could it be said that after obtaining the documents on 19.02.2010, there was any justified reason for not filing the election petition up to 06.03.2010, which was the last date for filing of the election petition. Apparently the order passed by the Election Tribunal was not correct. The entire proceedings of election petition are thus vitiated.

8. Though the ground of delay in filing the election petition was the ground for opposing grant of any relief in the said petition, but unfortunately such a vital ground has not been raised in this writ petition. However, this Court has sent for the record of the Election Tribunal and after examining the said record, has found that the Election Tribunal has committed gross illegality in condoning the delay and hearing the election petition of respondent No.2 on merits. On this ground alone, this petition succeeds and is hereby allowed. The orders impugned passed by the Election Tribunal are hereby quashed. In fact the election petition of respondent No.2 is declared to be barred by limitation and is hereby dismissed. The petitioner will continue to act as Sarpanch of the Gram Panchayat concerned.

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

Petition allowed.

I.L.R. [2012] M.P., 1170

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 6978/2011 (Jabalpur) decided on 27 March, 2012

MANAGING COMMITTEE DARGAH SHARIF & anr ...Petitioners
Vs.

M.P. WAKF BOARD & ors. ...Respondents

Wakf Act (43 of 1995), Section 64 – Removal/appointment of Mutawali – If a Mutawali is to be removed, an enquiry is required to be conducted in the prescribed manner and then a decision is to be taken by majority of not less than 2/3rd members of the Wakf Board.

There is nothing on record to indicate that such a power could be delegated by the Board to the Chairman of the Wakf Board – Apart from this, if such a power was required to be exercised even by the Board, it was necessary on the part of the respondent Wakf Board to issue a show cause notice as is specifically prescribed in Section 64 of the Act.

(Para 5)

वक्फ अधिनियम (1995 का 43), धारा 64 – मुतावली को हटाया/नियुक्त किया जाना – यदि मुतावली को हटाया जाना है, तब विहित पद्धति में जांच की जाना अपेक्षित है और तब वक्फ बोर्ड के सदस्यों के 2/3 या उससे अधिक के बहुमत से निर्णय लेना होता है।

Case referred :

ILR (2012) MP 252.

Amit Khatri, for the petitioners.*Alok Bagrecha*, for the respondents No. 1 & 2.*S.D. Mishra*, for the respondents No. 3 to 11.**ORDER**

K.K. TRIVEDI, J. - This petition, by these two petitioners challenges the order dated 11.4.2011 issued by the respondent No.1, by which a Managment Committee/Mutawali appointment order has been issued for a period of one year, to manage the Wakf Majar Dargah Sharif, Pili Kothi, Bazar, Sagar, District Sagar (hereinafter referred to as Wakf for brevity) and

respondents No. 3 to 11 have been made the member of the said Committee. It is contended by the petitioners that such a Committee was appointed in complete violation of the Wakf Act, 1995 (hereinafter referred to as the Wakf Act for short). A Managing Committee was constituted under the Chairmanship of petitioner No.2 which was looking after the affairs of the Wakf. It is the contention that the registration of the said Wakf in the M.P. Wakf Board (hereinafter referred to as the Wakf Board for short) was on the instance of the petitioner No.2. A regular deposit of the contribution as per the provisions of the Wakf Act is being done by the Committee. There were no complaints whatsoever from any corner regarding the function of the petitioner Managing Committee, but all of a sudden such an impugned order was issued in complete violation of the Wakf Act as also the provisions of the Wakf Committee Scheme. Some of the persons who have been now named as member of the Committee have a bad record and as per the law, they cannot be included as member in the Managing Committee. It is further contended that as per the Notification, the Managing Committee is to be constituted and it has to remain in operation for the period prescribed. As the period for which the petitioner Managing Committee was appointed, was coming to an end, an application was made to the Wakf Board, but instead of considering the said application, in complete violation of the conditions stipulated under the Scheme formulated, without obtaining the recommendations of the District Wakf Committee, the order impugned has been issued and, as such, the order is bad in law and is liable to be quashed. Various allegations have been made against the members of the Committee so constituted by the respondent Wakf Board, but the only aspect which is highlighted is that the act of the respondent Wakf Board was violative of its own Scheme and there was no delegation of power in favour of the Chairman of the Wakf Board to issue such an order.

2. The response to the notices of the writ petition issued by this Court, have been filed by the respondents No. 1 and 2 and they have raised a preliminary objection with respect to maintainability of the writ petition. It is contended that there were complaints received with respect to receiving of the amount of donations or gifts which were required to be collected in a box kept in the Wakf and for the proper management of the same a three members Committee was required to be constituted under the chairmanship of a Deputy Collector at Sagar, of which Nazir and Assistant Grade-III of Collectorate Sagar were made members. Only two were the Non-Government members in the said Committee. This was required to be done to see whether the amount

so collected in the said box is properly managed or not. The respondents No.3 to 11 have also filed the similar return and have contended that there were complaints with respect to illegal acts of the President of the petitioner Managing Committee and in respect of such complaint actions were required to be taken. It is contended that keeping in mind all such facts, the Wakf Board was required to take action and order impugned was required to be passed. It is contended that such an act was done in accordance to the provisions of law and, therefore, interference in the order of the respondent Wakf Board was not called for. Though a rejoinder has been filed and many facts have been contended, allegations have been made with respect to the improper working of the Wakf Board itself, but all that are not required to be looked into or considered in view of the fact that this Court is required to examine whether there was a proper action on the part of the Wakf Board or not in removing the Managing Committee and constituting a new Committee.

3. The petitioners have placed on record a copy of the M.P. Gazette dated 23.6.1995 in which a Scheme for the purposes of constitution of the Managing Committee for looking after management of a Wakf is prescribed. It is categorically said that this Scheme is made under the provisions of Wakf Act, 1954. A question was raised whether such a Scheme is still in operation or a new Scheme has been made after coming into force of the Wakf Act, 1995 ? This has been categorically stated by learned counsel appearing for respondents that no new Scheme has been made after coming into force of the Wakf Act, 1995 nor any such Scheme has been published in the Gazette of Madhya Pradesh. Now to examine whether such a Scheme is still continue or the same has come to an end after coming into force of Wakf Act, the provisions of the Wakf Act are required to be examined. There is a special power conferred on the State Government to make Rules under the provisions of Wakf Act, in Section 109 wherein it is prescribed that the State Government by Notification in the Official Gazette, may make Rules to carry out the purposes of this Act other than those of Chapter-III. Chapter-III of the Wakf Act deals with Central Wakf Council. Since the appointment of Management Committee is not specifically dealt with, the same will fall within the purview of rule making power of the State Government under sub-clause (XXV) of Sub-section (2) of Section 109 of the Wakf Act. However, till such an act is done, the Rules are made, the operation of the corresponding previous law are saved by provisions of sub-section (3) of Section 112 of the Wakf Act. Therefore, if no Scheme was made under the provisions of the Wakf Act, the

previous Scheme as notified on 23.6.1995 in the Gazette was to remain in operation.

4. A perusal of this Scheme, makes it clear that there is a specific provision made for constitution of a Mutawali Committee or better to call a Management Committee. Subclause (1) of Para 4 of this Scheme specifically lays down that a Committee is to be constituted on the recommendation of the District Wakf Committee and in case there is failure to submit such a recommendation for more than a month's period, then only the Chairman Wakf Board would be competent to appoint Management Committee. The period of such a Committee is prescribed under the said Scheme which is three years. However, it is further provided that the said Committee will continue to function till a new Committee is constituted. The responsibilities are also prescribed. Paragraph 5 of this Scheme specifically lays down the eligibility conditions for being a member of the Management Committee of Mutawali Committee of the Wakf. There are conditions laid down that a person who is a tenant or is having a disputed right in the Wakf property will not be a member of the said Committee. If a person is a member of the District Wakf Committee, unless he resigns from the said Committee, he cannot become a member of the Mutawali Committee. Paragraph 6 of this Scheme lays down the ineligibility to become a member of the Committee. A person who is involved in a criminal case, cannot be a member of the Mutawali Committee. To this extent, now it is to be examined whether any of the members nominated in the said Committee, namely, the respondents No. 3 to 11 were ineligible or not. By application dated 8.3.2011 (Annex.P/4) allegations were made with respect to respondents No. 3 to 11 that they were ineligible to become a member of the Committee. Though specific allegations in this respect have not been made in the petition, but the application says that these persons were ineligible and in that respect the complaint was made with affidavit. To this, the Wakf Board has given no response and merely it is said that such allegations are false and misleading and are based on wrong interpretation of law. However, it is nowhere said that why the recommendations of the District Wakf Committee is not necessary at all or mandatory or binding on the Board. It is simply stated that the Rules quoted by the petitioners are not applicable to the present case. Such an argument of respondents No. 1 and 2 is not acceptable in view of the fact that the law is very clear. If a Scheme is made even under the old Act, for the purposes of appointment of Management Committee, the same has to remain in operation till a new Scheme is made

under the Wakf Act. Fairly it has been admitted by learned counsel appearing for respondents No. 1 and 2 that no new Scheme has been made and, therefore, the old Scheme will have to be followed as per the provisions of Section 112 of the Wakf Act. Thus, if such a fact is taken note of, it will be crystal clear that there was constitution of the Committee by the respondents No. 1 and 2 without the consultation of District Wakf Committee and those who were ineligible, were included in the said Committee. Such an order of the respondent Wakf Board is, thus, not acceptable in the eye of law.

5. Now the only question which is raised after this submission is that the Chairman of the Wakf Board was not competent to make a Committee under the provisions of the Rules. Of course, there is a provision made for appointment of a Wakf Committee, but in all such appointment of Mutawali or Wakf Committee, the power is conferred on the Wakf Board and not on the Chairman of the Board. There is nothing placed on record to indicate that such a power could be delegated by the Board to the Chairman of the Wakf Board. Apart from this, if such a power was required to be exercised even by the Board, it was necessary on the part of the respondent Wakf Board to issue a show cause notice as is specifically prescribed in Section 64 of the Wakf Act. If a Mutawali is to be removed, an enquiry is required to be conducted in the prescribed manner and then a decision is to be taken by majority of not less than 2/3rd members of the Wakf Board. If an enquiry is required to be conducted, opportunity of hearing is required to be granted. If this is not done, it will be nothing, but dictatorial power of the Wakf Board to pick any person or to remove any person from the management of the Wakf Committee. This cannot be allowed in this country which is governed by the Constitution of India. Though full respect is given to the personal Laws, but such powers cannot be conferred on any of the Community. This Court on many occasions has examined these aspects whether a removal of the Wakf Committee or a member of the Wakf Committee was proper or not. Recently also this has been examined and it has been found that all such actions are taken in complete violation of the provisions of law and the Wakf Act by the Wakf Board in appointing a Committee and removing the Mutawali. [Please see *Hazi Abdul Aziz Ansari Vs. M.P. Wakf Board Bhopal and another*, [ILR (2012) MP 252]. Thus, it is clear that the order impugned passed by the respondent No.2, in purported exercise of power of respondent No.1 is unsustainable in the eye of law and, deserves to be and is hereby quashed. The Wakf Board is directed to act according to the Scheme for appointment of Managing

Committee/Mutawali Committee in Majar Dargah Sharif Pili Kothi, Sagar, afresh after due consultation with the District Wakf Committee, Sagar. Till such a Committee is constituted, the petitioner No.1 to function as Committee.

6. The petition succeeds and is allowed to the extent indicated hereinabove. There shall be no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 1175

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 5367/2011 (Gwalior) decided on 3 April, 2012

VINOD JAYANT

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

Service Law – Appointment – Details of Criminal Case –
Petitioner provisionally appointed to post of Sub Inspector/Executive in CISF – On requiring to fill up the attestation form, the petitioner submitted complete details of the criminal case which was pending against him and reasons of acquittal, but he did not supply the copy of order of acquittal – Held – Verification form does not prescribe that document in this regard be also filed – Thus, merely because petitioner has not filed his acquittal order, this can not be said that petitioner has violated clause-8 of verification form– Reason assigned for rejecting the appointment order is arbitrary and capricious in nature - Petition allowed.

(Paras 2 & 6)

सेवा विधि – नियुक्ति – आपराधिक प्रकरण का विवरण – याची अनन्तिम रूप से सीआईएसआई में उप निरीक्षक/कार्यपालक के पद पर नियुक्त किया गया – सत्यापन प्रारूप को भरने की अपेक्षा के चलते याची ने आपराधिक प्रकरण का पूर्ण विवरण प्रस्तुत किया जो उसके विरुद्ध लंबित था और दोषमुक्ति के कारण, परंतु उसने दोषमुक्ति के आदेश की प्रति प्रदाय नहीं की – अभिनिर्धारित – सत्यापन प्रारूप विहित नहीं करता कि इस संबंध में दस्तावेज भी प्रस्तुत करने हैं – अतएव, मात्र इसलिये कि याची ने अपनी दोषमुक्ति का आदेश प्रस्तुत नहीं किया है, यह नहीं कहा जा सकता कि याची ने सत्यापन प्रारूप के खंड 8 का उल्लंघन किया है – नियुक्ति आदेश अस्वीकार करने के लिए दिये गये कारण मनमाने एवं अनुचित प्रकृति के हैं – याचिका मंजूर।

Case referred :

2011(4) SCC 644.

S.N. Gajendragadkar, for the petitioner.

Varun Kaushik, for the respondents.

ORDER

SUJOY PAUL, J. - In this petition filed under Article 226 of the Constitution petitioner has challenged the order Annexure-P/1 dated 09/06/2011 and prayed for a direction to the respondents to act on the offer of appointment (Annexure-P/16).

2. The petitioner submitted his candidature for the post of Sub-Inspector in Central Industrial Security Force (for short, "CISF"). The petitioner appeared in Central Police Organization Exam-2009 in this regard. The examination was conducted by Staff Selection Commission (for short, "SCC") at Raipur. After qualifying the written examination conducted by SCC, the petitioner received a called letter to undergo physical fitness test and medical examination. The petitioner successfully qualified in these examinations, copy of result of physical examination is filed by petitioner as Annexure-P/14. The petitioner was called for an interview by Annexure-P/15. After interview and due verification of his documents, the order dated 9th November, 2010 Annexure-P/16 was passed. In this order, petitioner was given offer of appointment and it was stated that the petitioner is provisionally appointed to the post of Sub-Inspector/Executive in CISF in the scale of 9300 – 34800 with grade pay of Rs. 4200. However, by Annexure-P/1, petitioner's appointment was cancelled/withdrawn. It is stated that petitioner was not found suitable for the post of Sub Inspector in CISF by issuing Annexure-P/1. The petitioner sent a legal notice dated 24/06/2011 through his counsel. In turn, the respondents replied the legal notice Annexure-P/19 dated 09/09/2011. In this reply it is stated that petitioner was involved in criminal case. His case was examined and he was not found suitable for the post of SI and, therefore, his provisional appointment was cancelled.

3. Petitioner was required to fill up attestation form Annexure- P/22. In Para 4 of attestation form, various information was desired from the petitioner. The relevant portion of the form and entries made by the petitioner reads as under:-

4.	क्या आपके खिलाफ पूर्व में कोई एफ.आई.आर. दर्ज की गई थी ? Was any FIR ever lodged against you in the past ?	हां yes
	क. यदि हां तो केस संख्या और एफ.आई.आर. किस धारा के अधीन दर्ज की गई है ? a. If yes, case No. and sections under which FIR was lodged ?	अ.पे.क.230 / 05 धारा 294,323,506 आई.पी.सी.
	ख. उस पुलिस स्टेशन का नाम जहां पर एफ.आई.आर. दर्ज की गई थी? b. Name of Police Station where FIR was lodged ?	थाना महगांव, जिला भिण्ड
	ग. क्या केस चार्जशीट किया गया था अथवा एफ.आर. में वापिस कर दिया गया था ? c. Was the case charge sheeted or returned in FR ?	हां
	घ. यदि केस चार्जशीट किया गया था तो न्यायालय में इसका क्या परिणाम रहा ? d. If case was charge sheeted, what was the outcome in Court ? क. दोषी ठहराया गया (i) Convicted ख. दोषमुक्त किया गया (ii) Acquitted ग. समझौता हुआ (iii) Compromised घ. उसका सामना किया (iv) Compounded ड. कोई अन्य कृपया उल्लेख करें । (v) Any other, please specify	राजीनामा द्वारा दोषमुक्त किया गया

4. The respondents have shown mainly two reasons for cancelling the offer of petitioner's appointment. In preliminary submission of the return, it is stated that in order dated 08/11/2010 Annexure-R/1 (Para 8), it was specifically mentioned that if answer to the questionnaire is "Yes", the petitioner must submit complete details of the case to the Directorate. It is stated that petitioner has not filed the copy of order of acquittal with his aforesaid verification form, this was one of the reason for cancelling the appointment of

the petitioner. The second reason is that in CISF which is an Armed Force of India, the post of SI is vital post. Considering the nature of the duties and responsibilities of SI, the petitioner is unfit for appointment.

5. I have heard learned counsel for the parties in this regard.

6. The basic question is whether the aforesaid reasons assigned by the respondents in passing Annexure-P/1 are justified. Para 8 of Annexure-R/1 dated 08/11/2010, makes it obligatory for a person to furnish complete details of the case. A bare perusal of reproduced portion of the questionnaire shows that petitioner has assigned various details including crime number, offence/sections under which case was registered, name of police station, district and reason for his acquittal. Thus, all details which were required to be furnished, were furnished by the petitioner. The only requirement of Annexure-R/1 (Para 8) was to furnish the details. The petitioner did so and furnished the relevant details. Para 8 of Annexure-R/1, does not prescribe that document in this regard be also filed. Thus, merely because petitioner has not filed his acquittal order, this cannot be said that petitioner has violated clause-8 of Annexure-R/1. In all fairness, respondents could have asked the petitioner to supply acquittal order and could have verified it before actually permitting the petitioner to join the services pursuant to offer of appointment. Thus, this reason assigned for rejecting the appointment order is arbitrary and capricious in nature. The Apex Court in 2011 (4) SCC 644 [Commissioner of Police and others Vs. Sandeep Kumar] held that the approach of the authorities should be to condone the minor indiscretions made by young people rather than branding them as criminals for rest of their lives. The relevant portion of the judgment reads as under:-

“8. We respectfully agree with the Delhi High Court that the cancellation of his candidature was illegal, but we wish to give our own opinion in the matter. When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often be condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives.

9. In this connection, we may refer to the character “Jean

Valjean” in Victor Hugo's novel *Les Miserables*, in which for committing a minor offence of stealing a loaf of bread for his hungry family Jean Valjean was branded as a thief for his whole life. The modern approach should be to reform a person instead of branding him as a criminal all his life.

10. We may also here refer to the case of Welsh students mentioned by Lord Denning in his book *Due Process of Law*. It appears that some students of Wales were very enthusiastic about the Welsh language and they were upset because the radio programmes were being broadcast in the English language and not in Welsh. They came up to London and invaded the High Court. They were found guilty of contempt of court and sentenced to prison for three months by the High Court Judge. They filed an appeal before the Court of Appeals. Allowing the appeal, Lord Denning observed:

“I come now to Mr Watkin Powell's third point. He says that the sentences were excessive. I do not think they were excessive, at the time they were given and in the circumstances then existing. Here was a deliberate interference with the course of justice in a case which was no concern of theirs. It was necessary for the Judge to show—and to show to all students everywhere—that this kind of thing cannot be tolerated. Let students demonstrate, if they please, for the causes in which they believe. Let them make their protests as they will. But they must do it by lawful means and not by unlawful. If they strike at the course of justice in this land—and I speak both for England and Wales—they strike at the roots of society itself, and they bring down that which protects them. It is only by the maintenance of law and order that they are privileged to be students and to study and live in peace. So let them support the law and not strike it down.

But now what is to be done? The law has been vindicated by the sentences which the Judge passed on Wednesday of last week. He has shown that law

and order must be maintained, and will be maintained. But on this appeal, things are changed. These students here no longer defy the law. They have appealed to this Court and shown respect for it. They have already served a week in prison. I do not think it necessary to keep them inside it any longer. These young people are no ordinary criminals. There is no violence, dishonesty or vice in them. On the contrary, there was much that we should applaud. They wish to do all they can to preserve the Welsh language. Well may they be proud of it. It is the language of the bards—of the poets and the singers—more melodious by far than our rough English tongue. On high authority, it should be equal in Wales with English. They have done wrong—very wrong—in going to the extreme they did. But, that having been shown, I think we can, and should, show mercy on them. We should permit them to go back to their studies, to their parents and continue the good course which they have so wrongly disturbed.” (Vide *Morris v. Crown Office*, QB at p. 125C-H.)

In our opinion, we should display the same wisdom as displayed by Lord Denning.

11. As already observed above, youth often commits indiscretions, which are often condoned.

12. It is true that in the application form the respondent did not mention that he was involved in a criminal case under Sections 325/34 IPC. Probably he did not mention this out of fear that if he did so he would automatically be disqualified. At any event, it was not such a serious offence like murder, dacoity or rape, and hence a more lenient view should be taken in the matter”.

(Emphasis Supplied)

7. In the considered opinion of this Court in the case of Sandeep Kumar (supra), the petitioner did not mention that he was involved in a criminal case under Section 325/34 IPC, yet the Apex Court directed to adopt a reformative

approach, whereas in the present case, the petitioner disclosed everything and there is no suppression of material facts on the part of the petitioner. On the cost of repetition, it is clear that as per Annexure-R/1 there was no requirement to file the relevant document. Since, necessary details were given by the petitioner, clause 8 of Annexure-R/1 by no stretch of imagination can be an impediment against the petitioner to get appointment.

8. Once petitioner is acquitted even on compromise, in the eyes of law, he cannot be said to be a convicted or accused. The allegations against the petitioner were of alleged offence of under Section 323/506 IPC. Once he is acquitted, it cannot be said that he is unfit for appointment in CISF. No enabling provision is shown by the respondents which debars the petitioner from right of consideration and appointment as Sub-Inspector despite his acquittal by the criminal Court. The fundamental principle of criminal jurisprudence is that a person or even an accused is innocent unless found guilty.

9. In this view of the matter, I have no hesitation to hold that reasons assigned by the respondents in not appointing the petitioner are based on extraneous consideration and are arbitrary and capricious in nature.

10. In the result, Annexure-P/1 dated 09/06/2011 is set aside. The respondents are directed to consider the petitioner and implement the appointment order Annexure-P/16 within 30 days. No costs.

Order accordingly.

I.L.R. [2012] M.P., 1181

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 916/2003 (Gwalior) decided on 10 April, 2012

RAM BHAROSE KAMAL

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Public Service (Promotion) Rules, M.P. 2002 – Rule 6 – Promotion – Seniority subject to suitability – Assessment of comparative merits of candidates is impermissible.* (Para 7)

क. लोक सेवा (पदोन्नति) नियम, म.प्र. 2002 – नियम 6 – पदोन्नति – उपयुक्तता के अधीन वरिष्ठता – अभ्यर्थियों के तुलनात्मक गुणदोषों का आंकलन अननुज्ञेय है।

B. Public Service (Promotion) Rules, M.P. 2002 – Rule 6(7)
– Power of D.P.C. to declare a candidate fit or not fit – Minute reading of rule shows that DPC is empowered to declare the candidate as *fit* or *not fit* on the basis of his service record. (Para 8)

ख. लोक सेवा (पदोन्नति) नियम, म.प्र. 2002 – नियम 6(7) – अभ्यर्थी को योग्य या अयोग्य घोषित करने की डीपीसी की शक्ति – नियम के सूक्ष्म अध्ययन से प्रकट होता है कि डीपीसी अभ्यर्थी को उसके सेवा अभिलेख के आधार पर योग्य या अयोग्य घोषित करने के लिये सशक्त है।

C. Service Law – Promotion – Right of Promotion – Seniority subject to suitability – One has only a right of consideration – Promotion depends on his suitability which is to be assessed by DPC. (Para 11)

ग. सेवा विधि – पदोन्नति – पदोन्नति का अधिकार – उपयुक्तता के अधीन वरिष्ठता – किसी को केवल विचार में लिये जाने का अधिकार है – पदोन्नति उसकी उपयुक्तता पर निर्भर होती है जैसे कि डीपीसी द्वारा निर्धारित किया जाता है।

D. Service Law – Promotion – Power of DPC to fix a criteria for assessment – DPC has power to fix a criteria to decide whether employee is *fit* or *not fit*. (Para 11)

घ. सेवा विधि – पदोन्नति – निर्धारण के लिए मानदंड तय करने की डीपीसी की शक्ति – डीपीसी को यह जानने के लिए कि क्या कर्मचारी योग्य है अथवा अयोग्य है, मानदंड तय करने की शक्ति है।

E. Service Law – DPC proceedings – Judicial Review – Scope of Judicial Review is limited to the extent of violation of statutory provision or where the proceedings are contrary to the *Wednesbury Principles*. (Para 11)

ड. सेवा विधि – डीपीसी कार्यवाहियां – न्यायिक पुनर्विलोकन – न्यायिक पुनर्विलोकन का क्षेत्र कानूनी उपबंध के उल्लंघन के विस्तार तक सीमित है या जहां पर कार्यवाहियां वेडन्सवरी सिद्धांत के प्रतिकूल हैं।

Cases referred :

(2000) 6 SCC 698, (2007) 14 SCC 641, (2007) 13 SCC 300

Alok Sharma, for the petitioner.

Nidhi Patanker, G.A. for the respondents.

ORDER

SUJOY PAUL, J. - In this petition filed under Article 226 of the Constitution, petitioner has challenged his supersession. The petitioner was appointed as Forest Guard and is admittedly senior to respondents No.4 and 5. The respondents have promoted certain juniors of the petitioner on the higher post of Vanpal in the pay scale of Rs.3500-5200/-by order dated 21.10.2002. After filing the representations, petitioner has challenged the said order and his supersession.

2. Shri Alok Sharma, learned counsel for the petitioner by placing reliance on M.P. Public Service (Promotion) Rules 2002 (in short '2002 Rules') submits that as per said rules, the criteria for promotion was 'seniority subject to fitness'. Learned counsel for the petitioner submits that where the petitioner is admittedly senior to the private respondents herein, question of considering the comparative merits of the candidates in the criteria of seniority subject to fitness' does not arise. He submits that ACR is never communicated to him, therefore, his supersession by DPC was impermissible and liable to be interfered.

3. Smt. Patanker, learned Government Advocate, on the other hand supported the order of promotion of juniors. It is stated that although petitioner was senior but his case was duly considered in DPC held on 29.11.2002, which was supplemented by DPC held on 10.12.2002. It is further stated that after due assessment of record of petitioner vis-a-vis other eligible candidates, the petitioner was not found fit for promotion as he could not secure minimum prescribed bench mark.

4. I have heard learned counsel for the parties and perused the record.

5. The stand taken by respondents in not promoting the petitioner is of two fold- (i) Petitioner's record was considered/compared by DPC vis-a-vis other eligible candidates and petitioner was not found fit. (ii) Petitioner was not found fit for promotion as he could not secure minimum prescribed bench mark as held by DPC. The relevant portion of return reads as under:-

"Petitioner was duly considered in the DPC held on 29.11.2002 which was supplemented to the DPC held on 10.12.2002 and in the aforesaid DPC after due assessment of the record of the petitioner vis-a-vis to other eligible candidate, petitioner was not found fit for promotion as he could not secure minimum

prescribed bench mark as laid down by DPC thus writ petition filed by the petitioner is without merit and deserves to be dismissed."

6. In support of second contention, proceedings of DPC are filed as Annexure R1, which shows that DPC has fixed the bench mark of 10 marks on the basis of ACR valuation. In other words, only those candidates whose service records are not poor and who have secured 10 marks on the basis of ACR gradings would be considered fit for promotion.

7. So far the first stand of the State is concerned, in the considered opinion of this Court, the said stand is impermissible. Rule 6(7) of 2002 Rules read as under:-

"(7) For filling up the posts by this method, the Departmental Promotion Committee shall consider the case of each public servants separately on the basis of his own merit, that is to say, that there shall be no need to make a comparative assessment of the merits of public servant The Departmental Promotion Committee shall consider the records of each public servant separately and shall categorise them as 'fit' or 'not fit'."

(Emphasis Supplied)

A minute reading of this rule shows that the DPC is equipped with power to consider the record of each employee separately and categorize them as 'fit' or 'not fit'. However, while doing so, the DPC cannot be permitted to make the comparative assessment of merits of public servant in the criteria of 'seniority subject to fitness'. Thus, the stand of respondents that the petitioner's service record was compared vis-a-vis other persons cannot be upheld as per sub Rule (7) aforesaid. The Apex Court in (2000) 6 SCC 698 (*Union of India and Others Vs. Lt. Gen. Rajendra Singh Kadyan and another*) in para 12 held as under:-

"There is no requirement of assessment of comparative merit both in the case of seniority-cum- fitness and seniority-cum-merit."

A conjoint reading of sub Rule (7) and para-12 of *Lt. Gen. Rajendra* (supra) would show that in the criteria of "seniority cum fitness" the DPC cannot consider the comparative merits of the candidates. To this extent, the stand of State cannot be upheld and is disapproved.

8. So far the second point aforesaid is concerned, the question is whether the DPC has power to fix the norms for the purpose of assessing the suitability of an employee and whether on the basis of such norms the employee can be termed as 'fit' or 'not fit'. A microscopic reading of sub Rule (7) aforesaid shows that the DPC is equipped with the power and may categorize employee as 'fit' or 'not fit'. Thus statutory provision itself gives an authority to the DPC to assess the fitness of an employee.

9. The Apex Court had an occasion to consider this aspect in (2007) 14SCC 641 (*Union of India & Another Vs. S. K. Goel & Others*). The Apex Court held as under:-

"The judgment of the Tribunal did not call for any interference inasmuch as it followed the well-settled dictum of service jurisprudence that there will ordinarily be no interference by the courts of law in the proceedings and recommendations of DPC unless such DPC meetings are held illegally or in gross violation of the rules or there is misgrading of confidential reports. No judicial review of DPC proceedings, which are ordinarily conducted in accordance with the standing government instructions and rules is warranted. The observations of the High Court were wholly unjustified inasmuch as the post of Commissioner of Customs and Central Excise was a post required to be filled up on selection made strictly on the basis of merit. DPC had made an overall assessment of all the relevant confidential reports of the eligible officers who were being considered. DPC considered the remarks of the reviewing officers. There was clear application of mind. Respondent 1 did fulfill the benchmark. Hence, the impugned direction of the High Court ought not to have been issued as the same would have the impact of causing utter confusion and chaos in the cadre of the Indian Revenue Service and Customs and Central Excise Service".

(Emphasis Supplied)

In para 31 the Apex Court held as under:-

"31. For the foregoing reasons, we hold that DPC enjoyed full discretion to devise its method and procedure for objective

assessment of suitability and merit of the candidate being considered by it. Hence, the interference by the High Court is not called for".

(Emphasis Supplied)

10. In (2007) 13 SCC 300 (*Diploma Engineers Sangathan Vs. State of U.P.*) the Apex Court has held that in criteria of seniority subject to fitness it does not mean that promotion is automatic on the basis of the seniority. It means that a list of all candidates in feeder post should be prepared in order of seniority and each candidate as per rank in seniority is considered on merits and whoever is found unfit is rejected.

11. On the basis of enabling provision of sub Rule (7) aforesaid and aforesaid two judgments of Supreme Court, it can be safely concluded that even in criteria of seniority-cum-fitness/suitability the DPC is empowered to assess and categorize the employees as 'fit' or 'not fit'. For such determination as fit or not fit, the DPC has power to fix the criteria. In the present case no malice is alleged against the proceedings of DPC. This is also settled in law that this Court cannot sit as an appellate authority over the finding of DPC/ Selection Committee. The DPC proceedings can be interfered with only if it runs contrary to the statutory rule or hits Wednesbury principles.

12. Thus, no interference is warranted in the findings of DPC whereby the petitioner was held to be unfit or not able to make the bench mark laid down by DPC. For the reasons stated above, no interference is warranted. Petition is devoid of merits and substance. It is accordingly dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 1186

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 4542/2011 (Gwalior) decided on 10 April, 2012

RAMJILAL KULSHRESTHA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Preparation and Revision of Market Value Guideline Rules (M.P.), 2000 – Rules 5 & 10 – Non Compliance of ingredients – Even if

ingredients of Rule 5 and Rule 10 are not strictly implemented, it will not render the ultimate determination of market value as illegal—A discretion is vested with the authority to consider the aspects and ingredients mentioned in Rule 5—In the absence of pointing out any violation of any mandatory, statutory provision, merely because another view is possible, no interference can be made—Petition dismissed.

A duly constituted committee under Rule 4 has considered various relevant ingredients and aspects for the purpose of valuation of the market value of the land in question and thereafter the said committee which was consisting of heads of 12 departments including two members of the Non-Government service, one local MLA and the President of District Panchayat, worked under the supervision of Collector, District Gwalior—The said committee considered the relevant aspects and gave its report to the Collector, which ultimately took shape in issuance of Annexure P/3.—Thus, on the basis of aforesaid analysis, I am unable to hold that there is any flaw in decision making process and “due process” was not followed.

(Paras 11, 12 & 19)

बाजार मूल्य की तैयारी और पुनरीक्षण मार्गदर्शक नियम (म.प्र.), 2000 — नियम 5 व 10 — घटकों का अनुपालन — यदि नियम 5 व नियम 10 के घटकों का कठोरता से पालन नहीं किया गया तब भी उससे बाजार मूल्य का अंतिम निर्धारण अवैध नहीं होगा — नियम 5 में उल्लिखित घटकों एवं पहलुओं पर विचार करने के लिए प्राधिकारी पर विवेकाधिकार निहित है — किसी आज्ञापक, कानूनी उपबंध का कोई उल्लंघन होना दर्शाये नहीं जाने से, मात्र इसलिए कि अन्य दृष्टिकोण संभव है, कोई हस्तक्षेप नहीं किया जा सकता — याचिका खारिज।

Cases referred :

(1999) 7 SCC 314, (2006) 8 SCC 502, (2007) 8 SCC 705, 2010 (3) MPLJ 29, AIR 2011 SCW 5636, 2010(1) MPHT 121, 1989 MPJR HC 71, (1998) 7 SCC 654, (2010) 11 SCC 433, (2002) 3 SCC 496,

V.K. Bharadwaj with Anand V. Bharadwaj, for the petitioner.
Nidhi Patankar, G.A. for the respondent/State.

ORDER

SUJOY PAUL, J. - In this petition filed under Article 226 of the Constitution, the petitioner has challenged the order dated 31.3.2011,

Annexure P/3, whereby the Collector and Chairman, District Valuation Committee has fixed the guidelines for the purpose of determination of the market value of the land.

2. The petitioner, who owns land in village Badagaon, Morar-Gwalior, is interested to sell the land by developing it. As per the contention of Shri Bharadwaj, learned senior counsel, the market value is to be fixed as per the procedure prescribed in Madhya Pradesh Preparation and Revision of Market Value Guideline Rules, 2000 (hereinafter referred to as the '2000 Rules'). These rules are made in exercise of powers conferred by Section 75 read with Section 47-A of Indian Stamp Act, 1899 (hereinafter referred to as the "Stamp Act"). Shri Bharadwaj has attacked the validity of Annexure P/3 on following grounds:-

(i) As per rule 5 of 2000 Rules, the Collector is obliged to take into account various factors for determining the market value whereas before issuing Annexure P/3 those mandatory ingredients were not taken into account.

(ii) As per rule 10 of 2000 Rules, the petitioner was not heard and his representation Annexure P/2 was not decided before issuance of Annexure P/3.

3. To elaborate, learned senior counsel submits that 2000 Rules are made under the Stamp Act and, therefore, the same are statutory, mandatory and binding in nature. He submits that if some thing is prescribed in the Statute and to be done in a proper manner, it has to be done strictly in the same manner and other methods are forbidden. He submits that Collector has failed to fix the market value after taking into consideration the relevant factors enumerated in rule 5 aforesaid. He placed reliance on following judgments:-

(a) (1999)7SCC 314 (*Union of India & others vs. Indian Charge Chrome & another*);

(b) (2006) 8 SCC 502 (*T Vijaya Lakshmi and others vs. Town Planning Member and another*);

(c) (2007)8SCC 705 (*Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke and Chemicals Ltd. and others*);

(d) 2010 (3) MPLJ 29 (*Ujjain Charitable Trust Hospital vs. State of MP and others*);

(e) *AIR 2011 SCW 5636 Asha Sharma vs. Chandigarh Administration*);

(f) *2010(1) MPHT 121 (Rajkumar Jain vs. Savitri Devi)*; and,

(g) *1989 MPJR HC 71 (G.L.Saxena vs. State of MP)*.

4. Second ground of attack on Annexure P/3 is by placing reliance on rule 10 of 2000 Rules. Shri Bharadwaj submits that as per said rule it is mandatory for the committee constituted under section 4, to serve notice and record statements of persons whereas in the present case the petitioner has not been heard. He submits that this runs contrary to principles of natural justice. By placing reliance on rule 11 it is further stated that if a representation is preferred against the rates shown for market value guidelines, the issue needs to be referred to the committee specified in sub-rule (1) of rule 4.

5. Per Contra, Smt. Nidhi Patankar supported the order Annexure P/3. She submits that the procedure prescribed in Section 47-A of Stamp Act read with 2000 Rules was followed in letter and spirit. By filing the documents and placing the original record for the perusal of this Court, the stand of the State Government is that there is no shift from the prescribed procedure and no case is made out for interference by this Court. It is further stated that fixation of market value is essentially an executive act in which interference can be made only if there is any statutory violation. Since there is no statutory violation, it is prayed that no interference be made.

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

7. It is profitable to quote relevant portion of rule 5 of 2000 Rules as under:-

"5. Principle for determination of market value.- The Colector shall as far as possible have also regard to the following points in arriving at [* *] market value -*

(a) the case of land -

(i) Classification of the land as dry, or wet and the like;

(ii) Classification under various categories in the settlement register;

(iii) *the rate of revenue assessment for each classification;*

(iv) *other factor which influence the valuation of the land in question;*

(v) *points, if any, mentioned by the parties to the instrument or any other person which require special consideration;*

(vi) *value of adjacent land or lands in the vicinity;*

(vii) *average yield from the land nearness to road and market, distance from village site, level of land, transport facilities, facilities available for irrigation in any form;*

(viii) *the nature of crops raised on the land."*

(Emphasis supplied)

The language of the rule shows that it is directory in nature. The words chosen by the Legislature are "as far as possible" in the said rules. The dictionary meaning of word "as far as possible" in "Judicial Dictionary" by justice L.P.Singh and P.K.Majumdar (Orient Publication) reads as under:-

"As far as possible" - The expression "as far as possible" provides for desired flexibility which should be said to be akin to a play in the joints of administrative machinery. [K. K. Sharma v. Union of India, 1989(2) SLJ 635]."

8. The Apex Court in the case reported in (1998) 7 SCC 654 (*Rajendra Singh and others vs. State of UP and others*) has considered the impact of words "as far as possible". In para 6 of the said judgment it is held that when those words are used, it shows that the words are not prohibitory in nature. They rather connote a discretion vested in the prescribed authority which can exercise that discretion.

9. Apart from this, the stand of the State Government is that the city of Gwalior is an important and potential hub where development is constantly going on in all the fields like education, business, information technology and other important sectors. Factories and colonies are being developed within the area of Municipal Corporation and even out of the area of Corporation.

The builders and investors are interested in developing colony and township in the city. The stand of the Government is that before making the guidelines for the year 2011-12. Sub-Registrar of the Registrar's office has called the objections and suggestions. Some persons including Shyam Sunder Baheti, Shiv Kumar Pande, Alok Raghuvanshi have filed their objections and suggestions. A duly constituted committee considered their suggestions and after taking into account the objections and suggestions the guidelines were finalised with proper application of mind. The objections and suggestions were filed as Annexure R/2 by the Government. It is further stated that with regard to Badagaon area for which the present petition is filed, no objections and suggestions have been received by the authorities within the stipulated time. It is stated that time limit was prescribed as per the rules for receiving objections from 25th March to 28th March, 2011. By referring to the date of Annexure P/2 it is stated that admittedly the objection sent by the petitioner (Annexure P/2) is much after the cut off date and, therefore, there was no question of considering the said objection. It is stated that the District Valuation Committee submitted its report on 29.6.2011 and thereafter matter was placed before the Collector on 13.7.2011. The said authority considered the report and rejected the representation submitted by the petitioner and the same was communicated to the petitioner on 19.7.2011 by post. It is further stated that Badagaon area is being developed for residential purpose and educational activities and, therefore, the rates of the area have been fixed accordingly. It is stated that rules and mandate of Stamp Act are duly followed.

10. The petitioner has not chosen to file any rejoinder to rebut the aforesaid stand of the State Government.

11. It is pertinent to notice the language employed in rule 10 of 2000 Rules which reads as under:-

"10. Summons to the public, public officers and recording statement by the committee.- The committee constituted under rule 4 after serving of the notice if it thinks fit to do so, record the statement of the person and for the purpose of enquiry -

(a) may call any information of record from any public office or officer or Authority under the State Government of any local authority;

(b) record statement from any member of the public officer or authority under the State Government or any local authority,

(C) may call the parties to be present on the date specified in the notice and on such other date as may be fixed by it."

(Emphasis Supplied)

In this rule, the rule making authority in its wisdom has included the words "if it thinks fit to do so". Thus, this also shows that in a given condition/situation the said authority may serve the notice to a person and may call any information, record statement or may call parties to present on the date specified in the notice. However, rule 10 aforesaid does not prescribe any mandatory duty on the authority to notice all the persons concerned. Thus, even if ingredients of rule 5 and rule 10 aforesaid are not strictly implemented, it will not render the ultimate determination of market value as illegal. A discretion is vested with the authority to consider the aspects and ingredients mentioned in rule 5.

12. In the present case, a duly constituted committee under rule 4 has considered various relevant ingredients and aspects for the purpose of valuation of the market value of the land in question and thereafter the said committee which was consisting of heads of 12 departments including two members of the non-Government service, one local MLA and the President of District Panchayat, worked under the supervision of Collector, District Gwalior. The said committee considered the relevant aspects and gave its report to the Collector, which ultimately took shape in issuance of Annexure P/3. Thus, on the basis of aforesaid analysis, I am unable to hold that there is any flaw in decision making process and "due process" was not followed. The petitioner is unable to show any mandatory provision which has been violated or any violation which has an impact of rendering Annexure P/3 as illegal.

13. So far the question of opportunity of hearing is concerned, on the cost of repetition it is made clear that even rule 10 contains a language which makes it discretionary for the authority to issue notice to the party. However, as stated in the return which is not rebutted by the petitioner, that objections were invited but petitioner has not filed his objection within the time prescribed, it is also stated that petitioner's objections were subsequently rejected. Thus, this ground of alleged violation of principles of natural justice is also of no

assistance to the petitioner in the aforesaid facts and circumstances.

14. During argument learned senior counsel has relied on Section 50-C of Income Tax Act, 1961 to submit that Annexure P/3 will have an adverse impact if read in context of section 50-C of the said Act. Since decision making process is not found to be polluted/vitiated, the said impact is inevitable. Apart from this, this issue has not been raised in the writ petition. Thus, the respondents had no opportunity to meet the same. The Apex Court in (2010) 11 SCC 433 (*Avinash Gaikwad vs. State of Maharashtra*) held that an issue which is not raised in the writ petition cannot be raised in argument. Thus for this reason also argument is rejected.

15. Shri Bharadwaj, learned senior counsel has relied on (1999) 7 SCC 314 (*Union of India & others vs. Indian Charge Chrome & another*). In the facts and circumstances of this case, the said case is of no assistance. The reliance is also placed in (2006) 8 SCC 502 (*T. Vijayalakshmi and others vs. Town Planning Member and another*). Para 15 of the said judgment reads as under:-

"15. The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision the same cannot be taken away. It is also a trite law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play."

A bare perusal of this para would show that the said finding given by Apex Court is in a different context and in a different fact and circumstance. The ratio aforesaid has no application in the present matter.

16. Next reliance is on (2007) 8 SCC 705 (*Chairman, Indore Vikas Pradhikaran vs. Pure Industrial Coke and Chemicals Ltd. and others*). In the said judgment the relevant facts were that a land situated in two villages was within the jurisdiction of Gram Panchayat under the Madhya Pradesh Gram Panchayat Act. The respondents submitted the application for grant of building plan in the year 1990 and the same was sanctioned on 5.4.1991.

Subsequently, Indore Vikas Pradhikaran published a draft development plan under section 18 of the Act on 26.7.2003 which had affected aforesaid two villages. A declaration of intention to prepare a town development scheme in terms of section 56 of the Act was issued on 24.8.2004. On 4.1.2005 the said draft development plan was returned by the State Government but the notification was ultimately issued by the State Government on 28.10.2005 bringing those villages within the area of operation of Appellate Authority which was challenged before the Single Bench of this Court. The learned Single judge dismissed the writ petition. In writ appeal preferred there against, the Division Bench allowed the appeal and struck down the declaration made under section 50(2) of the Act. It is held that unless a development plan for an area is published and comes into operation, a draft development scheme cannot be published under section 50(2) of the Act. The entire adjudication in this matter by Supreme Court is on the basis of those factual background. In paras 101 and 102 of this judgment it is held as under:-

"101. Admittedly, the villages in question had been included by the State in its notification issued on 28.10.2005. Prior thereto, the said villages having not been included within the area of operation of the appellant Authority, any action taken either by way of its intention to frame a town planning scheme or otherwise shall be wholly illegal and without jurisdiction. It would render its act in relation to the said villages a nullity.

102. It is, therefore, difficult for us to accept the submission of Mr. Venugopal and Mr. Gambhir that the Notification dated 13.11.2000 subsumes in the Notification dated 12.8.1977."

A bare perusal of the facts and circumstances on which the law laid down by Apex Court in Chairman, Indore Development Authority's case (supra) would show that the Apex Court was dealing with a totally different factual scenario and the legal rights accrued in favour of the persons on the basis of aforesaid fact situation. The said ratio has no application in the facts and circumstances of this case. No property right of the petitioner is infringed. Petitioner is not in a position to demonstrate that his fundamental or statutory rights are infringed.

17. The next reliance is placed on 2010 (3) MPLJ 29 (*Ujjain Charitable Trust Hospital vs. State of MP and others*) (at page 83). The legal principles

laid down in para 15 of the said judgment cannot be disputed but all the same it has no application in the facts and circumstances of this case. In *Mrs. Asha Sharma's* case (supra) the Apex Court held that executive and administrative function of the State has to be fair and in consonance with the statutory provisions and rules. Even if there is no rule on the subject, the executive action should be just, fair and transparent. Arbitrariness in State action is impermissible. In the present case the petitioner could not establish the violation of any mandatory statutory provision nor it could be demonstrated that petitioner's legal rights are infringed. This is settled in law that fixing of tax, its quantum, determining market value are essentially an executive Act and High Court in exercise of writ jurisdiction cannot sit as an appellate authority. This is also settled in law that an executive decision/ administrative order or a policy decision cannot be interfered with merely because another view is possible. In (2005) 5 SCC 181 (*State of NCT of Delhi and another vs. Sanjeev alias Bittoo*) the Apex Court held as under:-

"Administrative action is stated to be referable to broad area of governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. The scope of judicial review of administrative orders is rather limited. The consideration is limited to the legality of decision-making process and not legality of the order per se. The test is to see whether there is any infirmity in the decision-making process and not in the decision itself. Mere possibility of another view cannot be ground for interference."

The Apex Court in (2002) 3 SCC 496 (*Haryana Financial Corporation and another Vs. Jagdamba Oil Mills and another*) took this view as under:-

"Even so the extent of judicial scrutiny/ judicial review in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an Appellate Authority over the decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more

than one choice is available to the administrative authorities; they have a certain amount of discretion available to them."

18. Next reliance is placed on 2010(1) MPHT 121 (Rajkumar Jain vs. Savitri Devi) and 1989 MPJR 71 (G.L.Saxena vs. State of MP). In the considered opinion of this Court, both the aforesaid judgments and ratio laid down have no application in the present case.

19. On the basis of aforesaid analysis, the decision-making process in issuance of Annexure P/3 is found to be in order. In absence of pointing out any violation of any mandatory, statutory provision, merely because another view is possible, no interference can be made. More so, when the committee which recommended the market value was consisting of heads of 12 Government Departments including two members of the non-Government service, one local MLA and the President of District Panchayat. The Collector has acted on the basis of report of said committee constituted under rule 4.

20. Thus, I find no reason to interfere in an executive act of fixing the market value of land/property. The petition sans substance and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2012] M.P., 1196

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P. No. 21539/2011 (Jabalpur) decided on 18 April, 2012

RAJENDRA JAIN

...Petitioner

Vs.

STATE BAR COUNCIL OF M.P. & ors.

...Respondents

A. Service Law – State Bar Council M.P. Service Rules, 1975 – Writ of Mandamus – Termination of extended service – Misjoinder of parties – Chairman terminating the extended service of petitioner – Individual Members of the Bar Council impleaded as party – They were not required to be impleaded – But on said ground the petition can not be dismissed. (Para 6)

क. सेवा विधि – राज्य अधिवक्ता परिषद म.प्र. सेवा नियम 1975 – परमादेश रिट – बढ़ाई गई सेवा को समाप्त किया जाना – पक्षकारों का कुसंयोजन

— अध्यक्ष द्वारा याची की बढ़ाई गई सेवा समाप्त की गई — अधिवक्ता परिषद् के व्यक्तिगत सदस्य पक्षकार के रूप में जोड़े गये — वे जोड़े जाना अपेक्षित नहीं — परंतु उक्त आधार पर याचिका खारिज नहीं की जा सकती।

B. Service Law – Constitution – Article 226 – State Bar Council M.P. Service Rules, 1975 – Rule 5 – Writ of Mandamus – Termination of extended service – Petitioner attained the age of superannuation on 30th April, 2010 and was granted extension upto 30.04.2011 – On 30.04.2011 his extended service also came to an end and between 30th April, 2011 upto 04.09.2011, there was no order continuing him in service i.e. there was no contract of service subsisting as per law – Held – Once the contract of employment came to an end on 30.04.2011, the resolution of the Bar Council dated 04.09.2011 could not extend the service of the petitioner – The decision of the Council is a nullity and is unsustainable – The petitioner can not be deemed to be in service after 30.04.2011 – There could not be extension of a service which had already come to an end on 30.04.2011 – Court can not issue any mandamus for treating the petitioner to be in service – Petition dismissed. (Para 7)

ख. सेवा विधि – संविधान – अनुच्छेद 226 – राज्य अधिवक्ता परिषद् मप्र 1975 – नियम 5 – परमादेश रिट – बढ़ाई गई सेवा को समाप्त किया जाना – याची ने 30 अप्रैल 2010 को अधिवर्षता की आयु प्राप्त की और उसे 30.04.2011 तक बढ़ोत्तरी प्रदान की गई – 30.04.2011 को उसकी बढ़ाई गई सेवा भी समाप्त हो गई और 30 अप्रैल 2011 से 04.09.2011 के बीच उसकी सेवा जारी रखने के कोई आदेश नहीं है अर्थात् सेवा जारी रखने की कोई संविदा विधि अनुसार नहीं थी – अभिनिर्धारित – एक बार जब नियोजन की संविदा 30.04.2011 को समाप्त हो गई, अधिवक्ता परिषद् का संकल्प दिनांक 04.09.2011 याची की सेवा नहीं बढ़ा सकता – परिषद् का निर्णय अकृत है और कायम रखने योग्य नहीं है – याची को 30.04.2011 के पश्चात् सेवा में रहना नहीं माना जा सकता – उस सेवा को बढ़ाया नहीं जा सकता जो पहले ही 30.04.2011 को समाप्त हो चुकी है – याची को सेवा में मानने के लिए न्यायालय कोई परमादेश जारी नहीं कर सकता – याचिका खारिज।

Cases referred :

AIR 2002 MP 98, AIR 1965 SC 473, AIR 2011 SC 3182, AIR 2005 MP 110.

Rajendra Tiwari with Imtiaz Hussain, for the petitioner.

Siddhart Gulatee, for the respondents No. 1 & 28.

Brahmadatt Singh, for the respondent No. 2.

Respondents No. 3 to 27 by their respective counsels.

O R D E R

RAJENDRA MENON, J. - Petitioner who was Secretary to the M.P. State Bar Council has filed this writ petition challenging the order Annexure P/1 passed by respondent No.2 in his capacity as Chairman of the State Bar Council dispensing with the service of the petitioner. Challenge to the order is made mainly on the ground that the Chairman of the Council does not have any authority to take the impugned action and as the action taken without approval of the entire council through its general body, the same is illegal.

2. The facts in brief indicates that the petitioner was initially appointed as a Secretary to the State Bar Council of M.P. in the year 1984. Prior to his appointment as Secretary, he was working as Assistant Secretary/ Public Relation Officer and his appointment as Secretary in the year 1984 was after due selection, interview and approval of the General Body of the State Bar Council of M.P. Petitioner was to retire on attaining the age of superannuation i.e. 60 years on 30th April, 2010. However, before his retirement petitioner was granted extension of service by the General Body of the Bar Council for a period of one year i.e. upto 30th April, 2011 in accordance to the provisions of Rule 5 of the State Bar Council M.P. Service Rules, 1975 filed as Annexure R1/5. It is a case of the petitioner that the matter was placed before the General Body of the Council and the petitioner was granted extension of service for one year. This period for which extension was granted was to expire on 30th April, 2011. Before the period of extension could come to an end on 30th April, 2011, the Executive Committee of the State Bar Council passed a resolution Annexure P/2 on 2.1.2011 proposing to grant extension of service for a further period of one year and also suggested for continuing with the appointment after a period of two years extension is over. This resolution of the Executive Committee Annexure P/2 was to be placed before the General Body meeting to be held on 27.4.2011 but it is admitted position that in the meeting of the General Body which was to be held on 27.4.2011 the question of extension to the petitioner beyond 30.4.2011 was not considered and therefore, the then Chairman respondent No.7 passed an order Annexure P/3 on 30.4.2011 granting extension of service by one year or until further directions of the General Body. This order Annexure P/3 dated 30.4.2011

was placed for consideration before the General Body in its 18th meeting held on 4.9.2011 and the General Body granted extension of service by one year. Accordingly, the minutes were drawn as is evident from Annexure P/4 dated 4.9.2011. It is a case of the petitioner that by virtue of this resolution dated 4.9.2011 petitioner's services were extended upto 30.4.2012. In the meanwhile, petitioner fell ill, applied for medical leave on 23.11.2011, went to Delhi for check-up and treatment. He had expected to come back upto 4 to 5 days but the petitioner was required to remain in Delhi for a further period and returned back only on 5.12.2011, when he was informed about the impugned action taken on 3.12.2011. It is a case of the petitioner that in the impugned order Annexure P/1 dated 3.12.2011 the Chairman, respondent No.2, has terminated the extended service of the petitioner before 30.4.2012 without getting the approval of the General Body and on the reasons indicated therein i.e. ill health of the petitioner and his incapacity to work is also not correct, the same is unsustainable.

3. Shri Rajendra Tiwari, learned Senior Counsel assisted by Shri Imtiaz Hussain took me through the provisions of the Rules of State Bar Council, the powers and duties of Chairman and Vice Chairman as contained in Chapter 15 thereof and argued that the Chairman has no authority to take the impugned action. It is emphasized that the Secretary is appointed by the Council and therefore, it is only the Council which could terminate the contract of employment of the petitioner even during the extended period of service after the date of retirement. Contending that extension of service upto 30.4.2012 was granted vide resolution passed by the General Body of the Council on 4.9.2011 vide Item No.17 and this resolution could not be brought to an end by the Chairman in the manner done. Challenge to the resolution is made mainly on the ground that the impugned action taken by the Chairman is unsustainable, contrary to law and beyond the jurisdiction vested with the Chairman. That apart, it is stated that the impugned order is a result of the arbitrary and malafides of respondent No.2 who has exercised his power without authority of law. It is stated that in the order ill health of the petitioner is raised as a ground for terminating the extended service but while doing so the medical fitness of the petitioner was not got examined by any Medical Board nor was any notice issued nor was the procedure contemplated for termination as per the service rules followed. Accordingly, contending that the termination is illegal challenge is made to the impugned action. It was also emphasized by learned counsel for the petitioner that in the order of termination,

the only reason given for ending the extended service is the ill health of the petitioner but in the return filed various other grounds are raised which amounts to making allegations against the petitioner and as no show cause notice or opportunity of hearing is granted to explain these allegations the termination in violation of the principles of natural justice is said to be unsustainable.

4. Shri Siddharth Gulati, learned counsel appearing for the respondent Bar Council refuted the aforesaid contentions and raised three objections with regard to the claim made by the petitioner. The first objection raised by Shri Siddharth Gulati was that respondents No.3 to 27 are individual elected Members of the State Bar Council and they have been unnecessarily impleaded as parties only with a malafide intention of soliciting their opinion into the matter which is not permissible. It is stated that State Bar Council is a body corporate, creation of statute, it does not mean the Members or the Chairman but it is the whole body and an individual entity like the Member has no locus and give his opinion in the matter in a judicial proceeding. Placing reliance on a judgment rendered by a Bench of this Court in the case of Shri Radhelal Gupta Vs. State Bar Council of M.P. and others - AIR 2002 M.P. 98 it was emphasized by learned counsel that an individual Member respondents No.3 to 27 are unnecessary parties and they have no right to give their say in the matter in these proceedings. It is stated that the Bar Council respondent No.1 is required to justify the action and for the said purpose the individual opinion of each member is not required. Accordingly it is stated that the action of the petitioner in impleading respondents No.3 to 27 is wholly uncalled for and therefore, the petition is liable to be dismissed on this count alone. The second ground canvassed by learned counsel was to the effect that under Rule 5 of the State Bar Council of M.P. Service Rules 1975 Annexure R1/5, the age of retirement of the Members of the Staff including the Secretary is 60 years. Thereafter it is provided under the Rules that the Council may extend the age of retirement, if it thinks fit for a total period of two years in a particular case. It is emphasized that petitioner attained the age of superannuation on 30.4.2010 but before he attained the age of superannuation, he was granted extension in service for a period of one year i.e. upto 30.4.2011. Thereafter on or before 30.4.2011 no extension of service was granted by the Bar Council. Shri Siddharth Gulati points out that the order passed by the Chairman of the Bar Council vide Annexure P/3 on 30.4.2011 is not a legal order of extension as this order was passed without approval of the Council nor was there any decision of the council to extend the service and it was only decided by the

Bar Council vide Annexure P/4 on 4.9.2011. On 4.9.2011 when the Bar Council took a decision to extend the service of the petitioner, the contract of appointment had already come to an end on 30.4.2010 and therefore, a contract of appointment which had already been terminated could not be extended in the manner done by the Bar Council. In support of the aforesaid proposition, learned counsel invites my attention to the certain principles laid down by Constitution Bench of the Supreme Court in the case of State of Assam and others Vs. Padma Ram Borah - AIR 1965 SC 473 to contend that when the retirement of the petitioner had already been effected on 30.4.2011 then on 4.9.2011 the Bar Council had no authority to grant extension as the petitioner seized to be in service on 30.4.2011 and the order passed by the Bar Council for retaining him in service was in nullity and unsustainable. Finally it was argued that even if it is assumed that the petitioner was granted extension after due approval of the Council on 4.9.2011, then the resolution itself passed on 4.9.2011 is said to be illegal. It is argued that when the meeting of the Bar Council was held on 4.9.2011 even though the question of considering the extension of the petitioner's service was indicated as Item No.17 in the resolution and the minutes Annexure P/4 and the resolution is said to have been passed. Shri Siddharth Gulati points out that the resolution passed by the Bar Council has to be approved in the next meeting of the Council that is to be held after 4.9.2011, the next meeting of the Bar Council was held on 12.11.2011 at Gwalior and on the said date i.e. on 12.11.2011 the resolution passed on 4.9.2011 is not confirmed or approved. Inviting my attention to the agenda for the meeting to be held on 12.11.2011 Annexure R1/3 and the minutes of the meeting held on that date vide Annexure R1/4, it is stated that due to paucity of time the resolution dated 4.9.2011 was not approved or confirmed and therefore, it is stated that resolution dated 4.9.2011 is not passed in accordance with law and cannot be considered to be a proper resolution. Learned counsel invites my attention to the note sheet filed by the petitioner as contained in Annexure P/6 and points out that after the minutes of the meeting held on 4.9.2011 were recorded, one of the Member of the Bar Council submitted a complaint vide Annexure R1/6 on 11.11.2011 and in this complaint he pointed out that in the meeting held on 4.9.2011 at Jabalpur only matters upto item No.16 were considered and discussed and thereafter the meeting was adjourned by the Chairman and all the Members left the hall, it was the complaint of this Member that petitioner who was discharging the duties of Secretary on 4.9.2011 himself got an illegal resolution prepared on 4.9.2011 as Item No.17, interpolated it into the resolution was circulated it in

November 2011, therefore, the Member made the complaint. It is emphasized that because of this complaint Annexure R1/6 and due to the fact that resolution dated 4.9.2011 was not taken up for discussion and confirmation on 22.11.2011 at Gwalior. The very claim of the petitioner that a resolution was passed on 4.9.2011 becomes doubtful as in the eyes of law this resolution is seen to have been not passed as per rules. Accordingly, on the aforesaid three grounds, learned counsel prays for dismissal of this writ petition. It is also pointed out by him that as appointment of the petitioner itself after his extended service came to an end on 30.4.2011 is illegal, no mandamus can be issued for continuing him in service, as a mandamus for regularizing an illegality cannot be issued. That apart, it is stated that petitioner has already attained the age of superannuation. Grant of extension of service under Rule 5 cannot be claimed as a matter of right and therefore, petitioner does not have any legal right to seek his appointment/ extension of service. Placing reliance on the following two judgments in support of the aforesaid contention, learned counsel submits that the petitioner has no legal right to claim the benefit now from this Court. Judgment relied upon are a judgment of Supreme Court in the case of State of Jharkhand & Ors. Vs. Ashok Kumar Dangi & Others - AIR 2011 SC 3182 and judgment of this Court in the case of Bhasker Tiwari Vs. Jiwaji University, Gwalior & Anr. - AIR 2005 MP 110.

5. In rebuttal, Shri Rajendra Tiwari, learned Senior Counsel emphasized that the President of the Council on 30.4.2011 vide Annexure P/3 granted extension of service to the petitioner for a period of one year based on the recommendations made by the Executive Committee and the order of Chairman Annexure P/3 dated 30.4.2011 was approved by the Bar Council on 4.9.2011, therefore, the extension of service would have retrospective effect w.e.f. 30.4.2011 and therefore, the contention advanced by Shri Siddharth Gulati is said to be unsustainable. Shri Rajendra Tiwari, learned Senior Counsel emphasized that when the Executive Committee made a recommendation to the Chairman and when the resolution could not be taken up for consideration in the meeting of the General body on 27.3.2011 then the Chairman had the authority to pass the order Annexure P/3 and when the action of the Chairman is approved by the Bar Council in September 2011, the action of the Chairman gets ratified by the Bar Council and therefore, it is stated that there is no illegality in the matter.

6. I have heard learned counsel for the parties and perused the record. As far as preliminary objection raised by Shri Siddharth Gulati with regard to

dismissing the petition on the ground that respondents No.3 to 27 have been impleaded unnecessarily as party are concerned, it is not appropriate for this Court to dismiss the writ petition on such ground, even though Shri Siddhart Gulati is right in contending that the individual Members of the Bar Council are not to be impleaded as party but on the said ground the petition cannot be dismissed. On the basis of notice issued by this Court, some of the Members i.e. from 3 to 27 appeared and have filed their reply which indicates that some are supporting the cause of the petitioner and some are opposing the same. However, the individual Member as canvassed by Shri Siddhart Gulati, have no right either to support or to oppose the claim of the petitioner in these proceedings. The legal questions are to be considered by this Court based on the assertion made by the Bar Council, a body corporate and not on the basis of individual opinion of its Members. Respondents No.3 to 27 may place their opinion and grievance if any before the appropriate forum in the Council but not in these proceedings before this Court. If the individual members are permitted to voice their opinion in these proceedings and if based on their individual opinion any decision is to be taken, the same may run contrary to the submissions of the Bar Council, a body corporate and a legal entity and may also have the effect of converting this petition into the proceeding held for considering the majority view of the Bar Council, this is not permissible. Under such circumstances, finding respondents No.3 to 27 to be not necessary parties, their affidavits and pleadings are ignored and matter is being decided on the basis of legal ground canvassed and submissions made by the petitioner and respondent No.1 Bar Council.

7. The main contention of the petitioner is to the effect that extension of service was granted to the petitioner by the resolution passed by the State Bar Council and the Chairman, respondent No.1 has no authority to cancel the extension granted without due concurrence or approval of the Council. From the records it is seen that the Executive Committee of the Bar Council in its meeting held on 19.9.2009 Annexure R1/2 made a recommendation for granting extension of service to the petitioner in accordance to Rule 5 of the Service Rules of 1975. This recommendation of the Executive Council was placed in the General Body Meeting of the State Bar Council held on 30.1.2010 and resolution was passed on 30.1.2011 granting extension of service for a period of one year from the date of retirement. The extension was granted under Rule 5 of the Service Rules, 1975. Accordingly, even before the retirement of the petitioner on 30.4.2010 i.e. before the contract

of appointment could come to an end, the Bar Council resolved on 30.1.2010 to extend the service of the petitioner upto 30.4.2011. However, when the question of extending the service beyond 30.4.2011 was to be considered, the meeting of the General body of the Committee which was held on 20.3.2011 could not be held to take up the matter for consideration and on 30.4.2011 there was no resolution of the Bar Council extending the service of the petitioner. Accordingly, the extended service of the petitioner came to an end on 30.4.2011. It is a case of the petitioner that the extension of the petitioner on 30.4.2011 is by the Chairman vide Annexure P/3 and the decision of the Chairman was ratified by the Bar Council in its General Body Meeting held on 4.9.2011. The question is as to whether the Chairman could extend the service on 30.4.2011 and whether the extension granted by the Chairman on 30.4.2011 could be ratified by the Bar Council on 4.9.2011, thereby having the effect of granting extension retrospectively w.e.f. 30.4.2011. Admittedly, it is a case of the petitioner himself that the Chairman of the Bar Council is not authorized to take any action against the petitioner either for terminating the service or for appointment or extension. That being so, the order passed by the Chairman of the Bar Council on 30.4.2011 vide Annexure P/3 is beyond the powers vested with the Chairman. Once it is so held, the consequential question would be as to whether the resolution passed on 4.9.2011 will have the effect of extending the service retrospectively. At this point of time it would be appropriate to take note of the principles laid down in the case of *Padma Ram Borah* (supra) by the Constitution Bench. In the said case *Padma Ram Borah* was an employee working in the office of Registrar, Joint Stock Companies, Assam. While he was in service he was suspended. However, he was to retire in January 1961 on attaining the age of superannuation but before his retirement, his services were suspended for conducting an enquiry. It was assumed that he continues in service by virtue of provisions of Fundamental Rule 56, therefore, his service tenure was extended upto 30.3.61. The extension was for a period of three months and the three months period was to come to an end on 31.3.1961. According to the State Government the extended period of service came to an end on 30th March, 1961 but it was again extended subsequently i.e. on 9.5.1961, by giving retrospective effect by passing an order on 9th May, 1961 for extending the period of service by a further period of three months w.e.f. 1st April 1961. The question before the Supreme Court was as to whether the retrospective extension of service after the first extended period of service came to an end on 31.3.1961 was proper and by an order passed on 9.5.1961 retrospectively extension could be granted or not. After

taking note of certain principles laid down by the Privy Council in the case of *R. T. Rangachari Vs. Secretary of State* - AIR 1937 PC 27 and *Nripendra Nath v. Chief Secretary, Government of West Bengal* - AIR 1961 Cal. 1, the Supreme Court came to the conclusion that the employee concerned seized to be in service on 31.3.1961 as the first extended period of service came to an end on that date and therefore, an order passed by the State Government after a period of more than one month thereafter extending the service retrospectively is a nullity and cannot be sustained. It is therefore, a case where the Supreme Court has found that when a contract of service of an employee came to an end on 31.3.1961 then it could not be extended retrospectively by order passed on 9th May, 1961. In the present case also exactly similar factual scenario exists. As per Rule 5 of Service Rules of 1975, the petitioner attained the age of superannuation on 30th April, 2010. However, in January 2010 he was granted extension upto 30.4.2011. On 30.4.2011 his extended service also came to an end and between 30th April, 2011 upto 4.9.2011 i.e. for a period of more than 4 months, there was no order continuing him in service i.e. there was no contract of service subsisting as per law. The resolution of the Bar Council dated 4.9.2011 therefore could not extend the service of the petitioner once the contract of employment came to an end on 30.4.2011 in the light of principles laid down by the Supreme Court in the case of *Padma Ram Borah* (supra). The decision of the Council taken on 4.9.2011 is a nullity and is unsustainable and therefore, by virtue of the said illegality committed by the Bar Council the petitioner cannot be deemed to be in service after 30.4.2011. There could not be extension of a service which had already come to an end on 30.4.2011. Petitioner's services came to an end on 30.4.2011 and therefore, in the light of the legal principles as laid down by the Supreme Court by operation of law the petitioner's extended period of service came to an end on 30.4.2011, now this Court cannot issue any mandamus for treating the petitioner to be in service and permit him to work upto 30.4.2012, once by operation of law as indicated herein above the service of the petitioner had come to an end on 30.4.2011. A mandamus of the nature prayed for can be granted only to enforce a legal right of the petitioner, it cannot be issued to perpetuate a illegality. Grounds raised by the petitioner with regard to the powers of the Chairman to terminate his services need not to be looked into now as continuance of petitioner's service after 30.4.2011 is found to be a nullity and non existing in the eyes of the law.

8. Contention of Shri Rajendra Tiwari, learned Senior Counsel to the effect that the order passed by the Chairman vide Annexure P/3 on 30.4.2011

is ratified retrospectively by the Bar Council cannot be accepted for the simple reason that on 30.4.2011 by operation of law and the statutory rules i.e. Rule 5 of the Rules of 1975, petitioner's services came to an end and when the Chairman of the Bar Council on petitioner's own showing had no right to pass an order continuing the petitioner in service after 30.4.2011, the order Annexure P/3 dated 30.4.2011 is an order which is held illegal, is a nullity and cannot be taken cognizance of for granting any benefit to the petitioner. Once the services of the petitioner came to an end on 30.4.2011 by efflux of time and by operation of law then in the light of the principles laid down in the case of Padma Ram Borah (supra) the State Bar Council had no jurisdiction or authority to extend the service which already stood terminated on 30.4.2011. Accordingly, petitioner cannot now claim any benefit for continuing in service after 30.4.2011 when this Court is of the considered view that his services came to an end on 30.4.2011 by virtue of provisions of law.

9. Having held so, it may not be necessary to go into any other question but the third ground advanced by Shri Siddhart Gulati is also to be taken note of as it has some force. According to the petitioner the resolution was passed on 4.9.2011 vide Annexure P/4 as Item No.17 by the General Body of the Bar Council proposing to grant him extension for a period of one year. From the material available on record, it is seen that whenever a resolution is passed by the Bar Council the same is ratified in the subsequent meeting of the Bar Council and therefore, after 4.9.2011 the next meeting of the Bar Council was to be held at Gwalior on 12.11.2011 and when the agenda of this meeting was circulated on 21.3.2011, agenda No.1 was with regard to approval and confirmation of the minutes of the 18th General Body Meeting held on 12.11.2011. Minutes of the meeting held at Gwalior on 4.9.2011 Annexure R1/4 indicates that the minutes of 4.9.2011 with regard to extension of petitioner's service was never discussed or confirmed. What was discussed and confirmed was the decision taken on 4.9.2011 with regard to various other items and not the minutes with regard to extending the service of the petitioner. It is therefore, clear that decision taken on 4.9.2011 to extend the service of the petitioner was not confirmed in the subsequent meeting held on 12.11.2011 and in between in the light of objection raised by one of the Members as contained in Annexure R1/8 on 11.11.2011 the fact as to whether the resolution with regard to extension of service itself was passed on 4.9.2011 becomes doubtful. It may be taken note of that on 4.9.2011 petitioner had discharged the functions of Secretary and the Minutes of the meetings were

drawn by the petitioner and he was present in the meeting as Secretary of the Council. According to the complaint Annexure R1/8 on 4.9.2011 only matters upto item No.16 were discussed and thereafter, the meeting was adjourned and it is alleged that the petitioner misused his powers as Secretary and manipulated the minutes of the meeting by incorporating Item No.17 in the resolution even though no such resolution was passed by the Bar Council. In the light of this complaint confirmation of the minutes held on 4.9.2011 in the subsequent meeting held at Gwalior on 12.11.2011 becomes necessary and therefore, a serious doubt arises with regard to contention of the petitioner to the effect that his services was extended by the General Body of the Bar Council on 4.9.2011 vide resolution at Item No.17. There is a serious dispute in this regard and once such a dispute is found to be existing, then on the ground that the petitioner was granted extension of service on 4.9.2011, this Court does not deem it appropriate to issue any mandamus. Even though learned counsel for some of the Members tried to emphasize that they have filed an affidavit to show that the meeting was held on 24.9.2011 and question of petitioner's extension was granted, rival affidavits in this regard filed by the members cannot be taken cognizance of to arrive at a decision in this regard. This is the matter to be discussed in the meeting or in the floor of the Council and not in these proceedings. In the present case once prima facie material available indicates that the fact of passing of resolution on 24.9.11 becomes doubtful, it is not a fit case where the discretionary jurisdiction of interfering into the matter in a petition under Article 226 of the Constitution is called for.

10. Accordingly in the light of findings as are recorded herein above, no interference is called for. Petitioner has already attained the age of superannuation and was working on the basis of extension of service granted and as the extension of service itself is found to be not in accordance to law, indulgence into the matter is not called for.

11. Accordingly, in the facts and circumstances of the case and based on the totality of the circumstances, this Court does not find any ground to interfere in the matter.

12. Petition is therefore, dismissed.

No order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 1208

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No.3060/2012 (Jabalpur) decided on 19 April, 2012

AJAY JHA & ors.

...Petitioners

Vs.

LATE SHRI BISAMBHAR DAYAL AGRAWAL & ors.

...Respondents

Criminal Procedure Code, 1973 (2 of 1974), Sections 195 & 340 – Press and Registration of Books Act, (25 of 1867), Section 8-B – Jurisdiction under – A Magistrate while discharging his function under part II of the PRB Act which is executive in nature has no power to take cognizance of offence under Section 195 and entertain an application under Section 340 of Cr.P.C. in a course of proceedings under Section 8-B of P.R.B. Act.

(Para 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 195 व 340 – प्रेस और पुस्तक रजिस्ट्रीकरण अधिनियम (1867 का 25), धारा 8बी – के अंतर्गत अधिकारिता – मजिस्ट्रेट जब प्रेस और पुस्तक रजिस्ट्रीकरण अधिनियम के भाग II के अंतर्गत अपने कर्तव्य का निर्वहन करता है जो कि कार्यपालिक स्वरूप का है, तब उसे धारा 195 के अंतर्गत अपराध का संज्ञान लेने की एवं प्रेस और पुस्तक रजिस्ट्रीकरण अधिनियम की धारा 8बी के अंतर्गत कार्यवाहियों के दौरान, दण्ड प्रक्रिया संहिता की धारा 340 के अंतर्गत आवेदन ग्रहण करने की शक्ति नहीं है।

Rohit Arya with Paritosh Gupta, for the petitioners.

Sankalp Kochar, for the respondents No. 1 to 5.

Pushpendra Singh Yadav, for the respondents No. 6.

Piyush Dharmadhikari, G.A. for the respondent No.7.

ORDER

SANJAY YADAV, J. - With consent of the parties, matter is heard finally.

2. The relief, i.e., direction to the District Magistrate, Jabalpur to decide the application filed by the petitioner under Section 340 of the Criminal Procedure Code, 1973 before deciding the preliminary objection an application under Section 8 B of the Press And Registration of Books Act, 1867 (hereafter referred as PRB Act) though looks innocuous but is frantically resisted by the respondent Nos. 1 to 5. Objection to the extent of the District Magistrate having locus to entertain an application under Section 340 Cr. P.C has also been raised.

3. The controversy emanates with the petitioner filing an application under Section 8 B of PRB Act. This Section provides for :

8B. Cancellation of declaration. - If, on an application made to him by the Press Registrar or any other person or otherwise, the Magistrate empowered to authenticate a declaration under this Act, is of opinion that any declaration made in respect of a newspaper should be cancelled, he may, after giving the person concerned an opportunity of showing cause against the action proposed to be taken, hold an inquiry into the matter and if, after considering the cause, if any, shown by such person the matter and if, after considering the cause, if any, shown by such person and after giving him an opportunity of being heard, he is satisfied that-

- (i) the newspaper, in respect of which the declaration has been made, is being published, in contravention of the provisions of this Act or rules made there under; or
- (ii) the newspaper mentioned in the declaration bears a title which is the same as, or similar to, that of any other newspaper published either in the same language or in the same State; or
- (iii) the printer or publisher has ceased to be the printer or publisher of the newspaper mentioned in such declaration; or
- (iv) the declaration was made on false representation or on the concealment of any material fact or in respect of a periodical work which is not a newspaper;

the Magistrate may, by order, cancel the declaration and shall forward as soon as possible a copy of the order to the person making or subscribing the declaration and also to the Press Registrar.

4. In furtherance to the application preferred by the petitioner an inquiry is being caused and on being noticed the respondent Nos. 1 to 5 have raised preliminary objection as to maintainability of the application under Section 8 B of the PRB Act at the instance of the petitioner. Along with the preliminary objections the respondent Nos. 1 to 5 have filed documents and have made

avermments on oath. Some of these are alleged to be false and, therefore, the petitioner moved an application under Section 340 Cr.P.C. alleging that (i) in the preliminary objection filed on oath, most of the statements and produced documents are false and the false statements and documents have been filed to mislead the Court, to get dismissal of the pending cases of the application on the false grounds with an object to prove the case; (ii) that the false statements and documents filed by the respondent No. 1 has been filed with object to damage the applicant's application and also to prove their case; (iii) that the production of false documents and information before District Magistrate is offence under Section 195 of Indian Penal Code.

5. The District Magistrate on receiving the application under Section 340 Cr.P.C has tendered the same to the opposite side, viz., the respondent Nos. 1 to 5 and posted the matter by order dated 15.2.2012 for arguments on the preliminary objections. The petitioner is aggrieved by the procedure adhered by the District Magistrate.

6. It is contended that, in a course of enquiry caused on an application under Section 8 B, and in the event of preliminary objection raised, as in the present case, if there is an allegation regarding the preliminary objections being raised on the basis of fabricated documents and false statements has been made, it would be for the District Magistrate to first dwell upon the same and then proceed to hear the preliminary objection.

7. The respondent Nos. 1 to 5 on their turn besides raising an objection regarding the competence of the District Magistrate to entertain an application under Section 340 Cr. P.C urged that on merit also the petitioner has no case. It is urged that the documents filed along with the preliminary objection are the orders by various courts including the Supreme Court, High Court and it being not the case of the petitioner that these orders are forged and fabricated, the District Magistrate cannot be compelled to first deal with complaint under Section 340 Cr.P.C before even formulating an opinion while dealing with the preliminary objection. It is urged that the petition is wholly misconceived and deserves to be dismissed.

8. Heard the counsel for the parties at length.

9. The merit of the matter and more particularly the allegations in application under Section 340 Cr.P.C are not gone into, what is being examined is whether it will be lawful for the District Magistrate to first dwell upon an

application under Section 340 Cr.P.C independently and then set out to hear the preliminary objections raised against applicant under Section 8 B of PRB Act.

10. Before answering that, it is first to be seen whether the District Magistrate can entertain such application.

11. "Magistrate" vide Section 1 (1) of the PRB Act has been interpreted to mean "any person exercising the full powers of a Magistrate, and includes a Magistrate of police". The Magistrate under the PRB Act is empowered vide Part IV to inflict penalties.

12. Sub-section (4) of Section 3 of Criminal Procedure Code, 1973 deals with construction of references, which stipulates that:-

"(4) Where, under any law, other than this code, the functions exercisable by a magistrate relate to matters-

(a) which involve the appreciation or shifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court, they shall, subject to the provisions of this code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an executive Magistrate."

13. Thus, even if the Magistrate under PRB Act, if construed to be a class of criminal court under Section 6 Cr. P.C, the same is still qualified by sub-section (4) of Section 3 Cr.P.C. Thus, to the extent where the function of Magistrate under PRB Act is administrative or executive in nature as under Part II of PRB Act it is exercisable by the Magistrate. But when called upon for appreciation or shifting or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court, as is vide application under Section 340 of the Cr.P.C the

same would be exercisable by a Judicial Magistrate.

Section 340 Cr. P.C provides for:

“(1) When upon an application made to it in this behalf or otherwise any court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) Record a finding to that effect;

(b) Make a complaint thereof in writing;

(c) Send it to a Magistrate of the first class having jurisdiction;

(d) Take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the court thinks it necessary so to do send the accused in custody to such Magistrate; and

(e) Bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a court by sub-section (1) in respect of an offence may, in any case where that court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the court to which such former court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed, -

(a) where the court making the complaint is a High Court, by such officer of the court as the court may appoint;

(b) in any other case, by the presiding officer of the court or by such officer of the Court as the Court may authorise in writing in this behalf.

(4) In this section, "court" has the same meaning as in section 195."

Section 195 (1) (b) and (3) stipulates:

195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.

(1) No court shall take cognizance-

(b) (i) Of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that court, or of some other court to which that court is subordinate.

except on the complaint in writing of that Court by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.

(3) In clause (b) of sub-section (1), the term "court" means a Civil, Revenue or Criminal Court; and includes a tribunal constituted by or under a Central, provincial or State Act if declared by that Act to be a court for the purposes of this section.

14. In the considered opinion of this Court, a Magistrate when discharging his function under Part II of the PRB Act which is executive in nature has no power to take cognizance of offence under Section 195 and entertain an

application under Section 340 Cr.P.C in a course of proceedings under Section 8 B of P.R.B. Act.

15. In view whereof the relief as sought for by the petitioner cannot be granted.

In the result petition fails and is dismissed. Parties to bear their own costs.

Petition dismissed.

I.L.R. [2012] M.P., 1214

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 13937/2008 (Jabalpur) decided on 19 April, 2012

MAYA DEVI (SMT.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Panchayats (Appeal and Revision) Rules, M.P. 1995 – Rule 5 – Power of Collector – Revision against order of Sub-Divisional Officer filed before Collector, mentioning it as an appeal – Held – Merely because the challenge was nomenclatured as an appeal, will not denude the Collector of the power to hear the same. (Para 9)

क. पंचायत (अपील और पुनरीक्षण) नियम, म.प्र. 1995 – नियम 5 – कलेक्टर की शक्ति – अनुविभागीय अधिकारी के आदेश के विरुद्ध कलेक्टर के समक्ष उसे अपील उल्लिखित करते हुए पुनरीक्षण प्रस्तुत किया गया – अभिनिर्धारित – मात्र इसलिए कि चुनौती को अपील का नाम दिया गया, उसे सुनने की कलेक्टर की शक्ति को नहीं निकाल देगा।

B. Service Law – Appointment of Panchayat Karmi – Selection of respondent No. 8 as Panchayat Karmi by the Panchayat on basis of majority was not in consonance of the policy of the State Government – The order of Collector setting aside the appointment can not be faulted with. (Para 11)

ख. सेवा विधि – पंचायत कर्मों की नियुक्ति – बहुमत के आधार पर पंचायत द्वारा प्रत्यर्थी क्रं. 8 का पंचायत कर्मों के रूप में चयन राज्य सरकार की नीति के अनुरूप नहीं था – नियुक्ती अपास्त करने के कलेक्टर के आदेश में कोई त्रुटि नहीं पाई जा सकती।

Cases referred :

2008 (4) MPLJ 647, 2011 (4) MPLJ 71.

Sushil Mishra, for the petitioner...

L. Joglekar, G.A. for the respondents No. 1 to 5.

R.K. Tiwari, for the respondents No. 6 & 7.

R.M. Singhraol, for the respondent No. 8.

ORDER

SANJAY YADAV, J. - With consent of learned counsel for the parties the matter is heard finally.

2. Petitioner questions the correctness of the order dated 31.7.08 passed by Additional Commissioner Sagar, Division Sagar; whereby, revision preferred by respondent No.8 against an order dated 9.7.07 passed by Collector Panna, has been set aside and the order dated 3.2.06 passed by Sub Divisional Officer Panna, was restored being facilitating the appointment of respondent No.8 as Panchayat Karmi, Gram Panchayat Ranjurpura, Janpad Panchayat Shahnagar, District Panna.

3. The appointment of Panchayat Karmi Gram Panchayat Ranjurpura, was in pursuance to the Advertisement dated 19.5.06 issued by Chief Executive Officer Janpad Panchayat Shahnagar. In pursuance thereto 20 applications were received and proceedings were drawn by Gram Panchayat and merit list was prepared wherein the petitioner with 49% was placed at serial No.1 and respondent No.8 with 48% at serial no.2. Gram Panchayat vide resolution dated 20.6.02 on the basis of majority appointed respondent No.8 on the basis of Panchayat Karmi. The appointment was assailed by the petitioner before Sub Divisional Officer who negatived the challenge by order dated 3.2.06.

4. In a revision before Collector, (though mentioned as Appeal) Collector by his order dated 9.7.07 set aside the order passed by Sub-Divisional Officer as well as the order of appointment of respondent No.8 on recording a finding that the Gram Panchayat committed an error in giving appointment to respondent No.8 on the basis of majority, accordingly, Collector remitted the matter to the Gram Panchayat to reconsider the appointment on the post of Panchayat Karmi on the basis of merit.

5. Respondent No.8 being aggrieved by order passed by Collector filed a revision before Additional Commissioner, Panna, who by reviving the order passed by Sub Divisional Officer, directed for the appointment of respondent

No.8 on the post of Panchayat Karmi. Commissioner dismissed the appeal on the technical ground that the Collector was not competent to hear Second Appeal against an order passed by Sub-Divisional Officer in an appeal preferred against the resolution passed by Gram Panchayat.

6. The order dated 31.7.08 is being challenged on the ground that since it was within the competence of Collector to hear revision against the order passed by Sub Divisional Officer in an appeal, a wrong mention of the provision did not disentitled him to hear the revision and the Additional Commissioner fell into patent error in holding that the order passed by Collector was without any jurisdiction.

7. In the considered opinion of this Court there is a considerable force in the submissions put forth by learned counsel for the petitioner.

8. Admittedly, a resolution and an appointment order passed by Gram Panchayat appointing a Panchayat Karmi is assailable under M.P. Panchayat (Appeal and Revision) Rules 1995, (hereinafter to be referred to as Rules of 1995). (Please see 2008 (4) MPLJ 647 : Devi Dayal Raikwar vs. State of M. P.).

Rule 5 of Rules of 1995 stipulates that

“5-The Collector may on its/his own motion or on the application by any party, at any time for the purpose of satisfying itself/himself as to the legality or propriety of any order passed by or as to the regularity of the proceeding of the authority subordinate to it/him call for and examine the record of any case pending before, or disposed of by such authority and may pass such order in reference thereto as it/he may this fit.”

9. Therefore, the Additional Commissioner was not justified in holding that it was beyond the competence of Collector, to have considered the challenge to an order passed by Sub Divisional Officer. Merely because the challenge was nomenclature as an appeal will not in the considered opinion of this Court denude the Collector of the power to hear the same as it was well within its power under Rule 5 of the Rules of 1995.

10. The next question is as to whether the Gram Panchayat was justified in selecting respondent No.8 on the basis of majority of votes. The issue need not detain us, as the same has been settled at rest by Division Bench of this Court in Suresh s/o Laxman Rathod v. Chief Executive Officer, Zila Panchayat

2011 (4) MPLJ 71; wherein it is held-

“9- So far as the appellant’s contention that he could have been appointed as Panchayat Karmi on the basis of the majority of votes in view of the Circular dated 27-1-2006 which was prevailing at the time of making of his appointment is concerned, we find no merit in this submission. In the circular dated 27-1-2006 it was provided that the list of all the applications received by the Gram Panchayat for the said post was to be prepared by the Gram Panchayat on the basis of seniority and merit. It further provided that after preparation of such list, the eligible candidate, as per seniority of such list, was to be appointed. Therefore, in our considered view as per the Scheme of appointment of Panchayat Karmi the merit was required to have been observed even as per the Circular dated 27-1-2006 which was in vogue when the appellant was appointed. The contention of the learned Senior Counsel for the appellant that in making the appointments prior to the Circular dated 13-8-2007 there was no necessity of observing of merit is, therefore, wholly misconceived. We find that in the present case ignoring the merit the appointment was made by the Gram Panchayat only on the basis of majority of votes. In such circumstances the appellant’s appointment which was made giving complete go bye to the merit could not have been sustained and the same has rightly been set aside by the learned Single Judge and the matter has rightly been remanded to the Gram Panchayat for passing fresh resolution on the basis of merit.

11. In view whereof, the conclusion drawn by the Collector that the selection of respondent No.8 on the basis of majority was not in consonance of the policy of the State Government, cannot be faulted with. Therefore, vide setting aside impugned order dated 31.7.08 passed by Additional Commissioner Sagar, Division Sagar, respondent No.6 is directed to comply with the direction given by the Collector by his order dated 9.7.07. It is further directed that respondent No.6 shall adhere to the time schedule as is prescribed under Section 85 of the M. P. Panchayat Raj Avam Gram Swaraj Adhiniyam 1993.

12. The petition is allowed to the extent above. However, no costs.

Petition allowed.

I.L.R. [2012] M.P., 1218

WRIT PETITION

Before Mr. Justice A.K. Shrivastava & Mr. Justice J.K. Maheshwari

W.P. No.55/2006(S) (Indore) decided on 19 April, 2012

RAJESHWAR RAO

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

Service Law – Punishment – In departmental enquiry, the petitioner was found guilty of concealing the fact that he was under detention (jail) for a week and he also submitted false medical certificate for this period – The order of dismissal from the service would not be said to be shockingly disproportionate – Petition dismissed. (Para 10)

सेवा विधि – शास्ति – विभागीय जांच में याची को इस तथ्य के छिपाव का दोषी पाया गया कि वह एक सप्ताह के लिए अभिरक्षा (जेल) में था और उसने इस अवधि के लिए मिथ्या चिकित्सीय प्रमाण पत्र भी प्रस्तुत किया – सेवा से बर्खास्तगी का आदेश गंभीर रूप से अननुपातित होना नहीं कहा जा सकता – याचिका खारिज।

Vandana Kasrekar, for the petitioner.

Vivek Sharan, Asst. Solicitor General, for the respondents.

ORDER

The Order of the Court was delivered by :
A.K. SHRIVASTAVA, J. - Assailing the order dated 19.10.2005 passed by the Central Administrative Tribunal, Jabalpur Bench, Circuit sitting at Indore (hereinafter referred to as 'the Tribunal') in Original Application No.755/2004 upholding the order of dismissal of petitioner, this petition under Articles 226 and 227 of the Constitution of India has been filed by the employee praying to quash the order of Tribunal and to quash the order of dismissal passed by the appellate authority as well as the disciplinary authority.

2. The petitioner was serving on the post of Fatigueman. A departmental enquiry was conducted against him in which he did not remain present as a result of which an ex-parte order of dismissal was passed against him on 5.4.1995 (Annexure P/3). However, later on a departmental appeal was filed by the delinquent which was allowed and the matter was sent back to the disciplinary authority/enquiry officer to hold a de novo enquiry after providing opportunity of hearing to the employee. Resultantly, the petitioner appeared

in the departmental enquiry.

3. The disciplinary authority on 3.9.1998 (Annexure P/8) found that another charges are required to be framed, eventually another charge sheet framing two additional charges were framed on 3.9.1998. Those additional charges are as under :-

(i) The applicant had not intimated school about the fact of his arrest and detention in custody from 17.3.95 to 24.3.95.

(ii) That the applicant had submitted false medical certificate on account of his illness when he was actually in jail.

4. Earlier two charges were framed against the petitioner which are reproduced as under:-

(i) Absent from duty without proper authority w.e.f. 26.10.94.

(ii) Habitual offender of absenting himself from duty without proper authority.

5. After holding a detailed departmental enquiry, all the charges were found to be proved. Eventually the petitioner was punished by the order of dismissal from service. The filing of appeal met the same result as a result of which original application was filed by the petitioner before the Tribunal. The learned Tribunal came to hold that the charge with regard to habitual offender of absenting himself from duty without proper authority, is not proved, however the charge that the applicant was acquitted by the competent criminal court vide order dated 11.8.1997 was found to be proved and it was found that the petitioner concealed this fact that he was under detention with effect from 17.3.1995 to 24.3.1995 and not only this he also submitted false medical certificate for this period. Eventually, the original application was dismissed.

6. In this manner this petition has been filed by the petitioner assailing the order of Tribunal as well as the order of dismissal passed by the disciplinary authority affirmed by the appellate authority.

7. The contention of learned counsel for the petitioner is that the order of disciplinary authority, appellate authority as well as the order of the Tribunal

are perfunctory and arbitrary in nature. Learned counsel submits that despite having come to a conclusion that the charge that the petitioner was a habitual offender in remaining absent in duty was not found to be proved, the other charge in regard to criminal case has been found to be proved but this fact has been totally blinked away from the eyes of the learned Tribunal as well as the departmental authorities that the delinquent was acquitted from the criminal court and if that would be the position, he ought to have been taken back in service.

8. On the other hand, Shri Sharan, learned Assistant Solicitor General argued in support of the impugned order and submitted that cogent reasons have been assigned by the learned Tribunal dismissing the original application and, therefore, this petition be dismissed.

9. Having heard learned counsel for the parties, we are of the considered view that this petition deserves to be dismissed.

10. True, the charges levelled against the delinquent in the first charge sheet were not found to be proved by the Tribunal but another charge sheet framing two other charges which we have already mentioned herein above were found to be proved. We do not find any merit in the contention of learned counsel for the petitioner that because the petitioner was seriously ill and he has submitted the medical certificate of M. Y. Hospital, it cannot be questioned that he was not ill. According to us, if the veil is uplifted from the scene, the hidden idea to conceal the fact that petitioner was under detention for the period from 17.3.1995 to 24.3.1995 becomes quite visible and exposed and further it would reveal that he was in custody during this period in jail. It was incumbent upon the delinquent employee to inform this vital fact to his employer. Having failed to intimate so, according to us, the view taken by the disciplinary authority and appellate authority as well as the Tribunal cannot be set aside, looking to the limited scope of judicial review. The order of punishment of dismissal from the service also would not be said to be shockingly disproportionate.

11. We do not find any merit in this petition and accordingly this petition is dismissed with no order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 1221

WRIT PETITION

Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice M.A. Siddiqui

W.P. No. 5413/2010 (Jabalpur) decided on 24 April, 2012

AMBIKA REFINERY (M/S)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Vanijyik Kar Adhiniyam (M.P.), 1994 (5 of 1995), Section 2(r) – Exemption from payment of Entry Tax – If an exemption was granted by the State Government by issuing continuous two notifications, then the aforesaid exemption could not have been withdrawn by the State Government with retrospective effect. (Para 12)

वाणिज्यिक कर अधिनियम (म.प्र.), 1994 (1995 का 5), धारा 2(आर) – प्रवेश कर के भुगतान से छूट – यदि राज्य सरकार द्वारा लगातार दो अधिसूचनाएं जारी कर छूट प्रदान की गई थी, तब राज्य सरकार द्वारा उपरोक्त छूट को भूतलक्षी प्रभाव से वापस नहीं लिया जा सकता था।

Case referred :

AIR 2007 SC 2123.

Vivek Dalal, for the petitioner.

Jaideep Singh, Dy. G.A. for the respondents.

ORDER

The Order of the Court was delivered by :
KRISHAN KUMAR LAHOTI, J. - The petitioner has challenged validity of Notification (Annexure P/1) dated 12.04.2007 issued by Govt. of M.P., Commercial Tax Department, Bhopal, by which exemption to crude edible oil from payment of entry tax was extended for the period between 1st of October, 1997 to 31st of March, 2004.

2. The case of petitioner is that vide Annexure P/5, the petitioner, who was manufacturing vegetable and edible oil was exempted from payment of entry tax on all the raw material as defined under Section 2(r) of M.P. Vanijyik Kar Adhiniyam, 1994. The contention of the petitioner is that crude edible oil was used for manufacturing of vegetable and edible oil, and under Notification (Annexure P/5) which was extended up to 31st of March, 2007 was restricted

vide Annexure P/1 up to 31st of March,2004 ,meaning thereby that the petitioner was liable to make payment of entry tax from 1st of April,2004 for which earlier he was granted exemption.

3. Shri Vivek Dalal, learned counsel appearing for petitioner submitted that such notification (Annexure P/1),issued on 12.04.2007 withdrawing the exemption with retrospective effect from 1.4.2004, is liable to be quashed as it was issued without any authority of law and is contrary to Section 10 of the Entry Tax Act.

4. Shri Jaideep Singh, learned Deputy Govt. Advocate, appearing for the State, supported the Notification (Annexure P/1) by saying that by this notification exemption was granted to crude edible oil from payment of entry tax between 1st of October, 1997 and 31st of March,2004, so it does not have any effect on Annexure P/5 and cannot be quashed mainly on the ground that under Annexure P/1, petitioner is liable to make payment of entry tax from 1st of April,2004. It was submitted by Shri Jaideep Singh that nowhere Annexure P/1 says that by this earlier notification, Annexure P/5 was withdrawn or modified, in absence of which, Annexure P/1 dated 13.04.2007 cannot be quashed.

5. To appreciate the rival contentions of the parties, it would be appropriate if the factual position of the case is stated. Petitioner is a manufacturer of vegetable and edible oil. Petitioner is required crude edible oil as raw material for manufacture of the aforesaid goods. Vide Notification dated 6th of September, 2001 (Annexure P/5), the State Government, exercising powers under Section 10 of Entry Tax Act had allowed exemption on raw material used for manufacturing vegetable and edible oil. For ready reference, we quote Annexure P/5 which reads thus :-

“Notification under Section 10 of Entry Tax allowing exemption on raw material.

No.A-3-10-2000-ST-V (82) dated 6th September, 2001 –

In exercise of the powers conferred by Section 10 of the Madhya Pradesh Sthaneya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No.52 of 1976), the State Government hereby exempts the class of goods specified in column (11) of the schedule below from payment of entry tax under the said Adhiniyam for the period from the date of the publication of

this notification * (31st March,2005) to the extent specified in column (2) of the said schedule :-

Class of Goods	Restrictions and Conditions subject to which exemption is granted
Raw material as defined in Section 2(r) of the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 (No.5 of 1995)	1. When the entry of the goods specified in column (1) is effected into a local area by a registered dealer: (a) for use in the manufacture of following goods; or (b) for sale and such goods are accordingly sold b7y the dealer to another such dealer against a declaration in the appended form for use in the manufacture of following goods :- (i) All kinds of yarn including blended yarn or staple yarn, but excluding sewing thread (ii) Hydrogenated Vegetable Oil (iii) Vegetable & Edible Oil (iv) Ceramic Tiles 2. The goods manufactured are sold in the State of Madhya Pradesh or in the course of inter-State trade or commerce or in the course of export out of the territory of India.

6. To understand the complete effect of Annexure P/5, it would be appropriate if relevant provision, as contained in Section 2(r) of M.P. Vanijyik Kar Adhiniyam, 1994 is also referred which reads thus :-

“2(r) : Raw material means an article used as an ingredient in any manufactured goods, or an article consumed in the process of manufacture and includes fuel and lubricants required for the process of manufacture”.

7. The aforesaid provision defines raw material used as an ingredient in any manufactured goods ,meaning thereby, that the crude edible oil which was used for manufacturing of vegetable edible oil could be treated as raw

material, and under Notification (Annexure P/5) it was exempted from payment of entry tax.

8. Vide Annexure P/5, aforesaid exemption was given up to 31st of March,2005, and by a subsequent Notification dated 31.03.06 bearing no.FA-3-60-05-1-V(14) such exemption was extended up to 31st of March,2007 by Entry No.9 of such notification. Net result of the aforesaid two notifications was that up to 31st of March,2007, petitioner was not liable to make payment of entry tax on the raw material used for manufacturing of vegetable edible oil.

9. On 12th April,2007, the State Government had issued another notification under Section 10 of the M.P.Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam,1976 (hereinafter referred to as "Entry Tax Act") by which exemption on crude oil, when the crude oil is brought into a local area by a registered dealer for use in refining and after refining, the refined edible oil is sold in the course of inter-State trade or commerce or transferred outside the State of M.P. for sale, the exemption was granted/restricted for the period between 1st of October, 1997 and 31st of March,2004 ,meaning thereby, that the earlier exemption which was available to the petitioner vide Annexure P/5 up to 31st of March,2007 was restricted up to 31st of March,2004, and petitioner was liable to make payment of entry tax from 1st of April,2004 till 31st of March,2007.

10. The contention of the petitioner is that when the State Government had granted exemption to the petitioner under Section 10 of Entry Tax Act till 31st of March,2007 then such exemption could not have been restricted vide another Notification dated 12th of April,2007 till 31st of March,2004, that too with retrospective effect. Reliance is placed by the petitioner to a judgment of Apex Court in *State of U.P. & Ors. Vs. Deepak Fertilizers & Petrochemical Corporation Ltd. AIR 2007 SC 2123* and submitted that such notification may be quashed.

11. Section 10 of the Entry Tax Act provides thus :-

"Power to exempt : The State Government may, by notification, and subject to such restrictions and conditions as may be specified therein, exempt, whether prospectively or retrospectively, in whole or in part :

(i) any class of dealers or persons, or any goods or class of goods, from the payment of entry tax under this Act in respect of all or any of the local areas, for such period as may be specified in the notification;

(ii) any dealer or class of dealers, from any provision of the Act as may specified in the notification :

Provided that in respect to the period during which the Ordinance repealed under Section 24 was in force, the retrospective effect may be given from the date of the commencement of the said Ordinance as if the liability to pay tax arose under this Act and for that purpose it shall and shall always be deemed that the provisions of this Act to the extent they correspond to the provisions of the said Ordinance were in force during the material times.”

The aforesaid provision specifically provides that State Government may exempt whether prospectively or retrospectively any goods or class of goods from payment of entry tax by issuing a specific notification. The State Government was empowered to exempt such goods from payment of entry tax. It is apparent that vide Annexure P/5 initially such exemption was granted up to 31st of March, 2005, and thereafter the State Government had extended such benefit by another notification dated 31.03.2006 up to 31st of March, 2007. On issuance of such a notification, a manufacturer could very well assess his liability in respect of payment of entry tax and could have assessed the cost for manufacturing of the goods, and during the period when the aforesaid notification remains in vogue, the petitioner could not have included entry tax to ascertain the cost of finished goods, meaning thereby, for assessing cost of manufactured goods, the entry tax part could not have been taken into consideration. The Apex Court in *State of U.P. & Ors. Vs. Deepak Fertilizers & Petrochemical Corporation Ltd. (supra)*, considering the similar position, held thus :-

“10. For this aspect, proviso to Section 25 of the Act is important. A bare perusal of the proviso to Section 25 of the Act would clearly show that no notification having the effect of increasing the tax liability shall be issued with retrospective effect under the aforesaid section. In our view,

the High Court was justified in holding that exemption could not be withdrawn with retrospective effect by issuance of subsequent notification dated 10th April, 1995, superseding the notification dated 2nd November, 1994. Restricting the exemption of tax to certain fertilizers in the same class of chemical fertilizers certainly amounted to increasing the liability to tax of the dealer with retrospective effect, which in our opinion, cannot be issued in view of the proviso to Section 25 of the Act. Accordingly, we hold that the notification dated 10th April, 1995, denying exemption to NPK 23:23:0 retrospectively is illegal and invalid and are in agreement with the view expressed by the High Court on this question.”

12. The position of the present case is similar. The exemption which was granted vide earlier notifications was available to the petitioner up to 31st of March, 2007, but vide notification dated 12th April, 2007 it was restricted up to 31st of March, 2004, meaning thereby, for a period near about 3 years, petitioner has been held liable for payment of entry tax for which, there was no power with the State Government to withdraw such exemption with retrospective effect. If an exemption was granted by the State Government by issuing continuous two notifications, then the aforesaid exemption could not have been withdrawn by the State Government vide Annexure P/1 with retrospective effect. Issuance of Notification (Annexure P/1) is having far reaching consequences on the petitioner, and in such a situation, the State Government could not have withdrawn such exemption with retrospective effect.

13. In the result, this petition is allowed. Notification (Annexure P/1) in so far as it relates to the petitioner only restricting the exemption of Notification (Annexure P/5) till 31st of March, 2004 is not sustainable under the law and is hereby quashed. Petitioner who was extended benefit of exemption from payment of entry tax till 31st of March, 2007 vide Notification (Annexure P/5) shall be entitled to get the aforesaid exemption. With the aforesaid directions, this petition is allowed with no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 1227

WRIT PETITION

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

W.P. No.7303/2011 (Jabalpur) decided on 3 May, 2012

G.V.P.R. ENGINEERS LIMITED (M/S)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Building and Other Construction Workers' Welfare Cess Act (28 of 1996), Section 3 – Building and Other Construction Workers' Welfare Cess Rules, 1998 – Rule 3 – Levy of Cess – Respondent No.3 proposed and awarded contracts for construction to the petitioners on TOTAL TURN-KEY BASIS – The contract broadly included the supply, transportation to work site, storage, insurance, erection, assembling, testing and commissioning of the lines and line equipments – The break up of contract price was also provided for supply portion and for erection portion – Respondent No.3. deducted the Cess levied at source on the bill furnished by the petitioners – Petitioners challenging the deduction by referring the price clause of the contract and contending that they are not liable to pay Cess attributable for supply portion – Held – The cost of construction can not be divided in parts into supply portion and erection portion – Even the cost for supply portion is incurred by the petitioners and can not be separated from the total cost incurred – The Cess is on the total cost of construction – Respondent No. 3 is entitled to deduct one per cent Cess on the total contract price mentioned in the contract – Petitioners are liable to pay Cess even for supply portion – Petition dismissed. (Paras 3 &14)

भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर अधिनियम (1996 का 28), धारा 3 – भवन तथा अन्य संनिर्माण कर्मकार कल्याण उपकर, नियम 1998 – नियम 3 – उपकर लगाया जाना – प्रत्यर्थी क्रं. 3 ने प्रस्ताव दिया और याचीगण को 'टोटल टर्न की बेसिस' पर संनिर्माण के लिए संविदायें प्रदान की – संविदा में विस्तीर्ण रूप से प्रदाय, निर्माण स्थल पर परिवहन लाईनों का व लाईन उपकरणों का संग्रहागार, बीमा, निर्माण, संयोजन, परीक्षण व कमिशनिंग समाविष्ट था – संविदा मूल्य का विघटन भी प्रदाय भाग एवं निर्माण भाग हेतु उपबंधित करता है – प्रत्यर्थी क्रं. 3 ने याची द्वारा प्रस्तुत बिल पर लगाया गया उपकर का कटौती किया – याचीगण ने संविदा के मूल्य खंड का संदर्भ देते हुए और यह तर्क करते हुए कि वे प्रदाय भाग के लिए देय उपकर का भुगतान करने के लिए दायी नहीं है –

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अभिनिर्धारित – संनिर्माण की लागत प्रदाय भाग और निर्माण भाग में विभाजित नहीं की जा सकती – प्रदाय भाग हेतु लागत भी याचीगण द्वारा उठाई जायेगी और पूर्ण लागत से अलग नहीं की जा सकती – उपकर संपूर्ण निर्माण लागत पर है – प्रत्यर्थी क्र. 3 संपूर्ण संविदा मूल्य पर एक प्रतिशत उपकर की कटौती करने के लिए हकदार है – याचीगण प्रदाय भाग के लिए भी उपकर अदा करने के लिए दायी हैं – याचिका खारिज।

Manoj Sanghi, for the petitioner.

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

ORDER

The Order of the Court was delivered by :
AJIT SINGH, J. - This order shall also govern the disposal of Writ Petition Nos.3226/2010, 9871/2010, 5173/2011, 15906/2011 and 2893/2012. All these writ petitions involve a common issue and were heard together.

2. The petitioners are companies and registered under the Companies Act. They are contractors of electrical works. Respondent no.3 is also a company registered under the Companies Act. It is wholly controlled by the State Government.

3. The Ministry of Power, Government of India, has launched Rajiv Gandhi Gramin Vidyutikaran Yojna (RGGVY) (in short, "the Scheme") for Rural Electricity Infrastructure and House Hold Electrification for the attainment of the National Common Minimum Programme Goal of providing access to electricity to all house holds. Respondent no.3 has proposed for Rural Electricity Infrastructure and House Hold Electrification by construction of New 11 KV line, LT line, 25 & 16 KVA, 11/0.4 KV Distribution transformer S/Ss and Extension of Service Lines including house wiring for Below Poverty Line (BPL) house holds under the Scheme. And to execute this work, respondent no.3 has awarded contracts to the petitioners on TOTAL TURN-KEY BASIS which broadly includes the supply, transportation to work site, storage, insurance, erection, assembling, testing and commissioning of the lines and line equipments.

4. The relevant Clause 6.2 of the contract, which deals with the contract price, reads as under:

"6.2 CONTRACT PRICE

(i) For supply portion

The total Contract Price inclusive of all taxes and duties for the entire scope of work of supply portion under the Contract shall be Rs.55,47,09,386.98/- (In words Rs. Fifty Five crores Forty Seven lakhs Nine thousands Three hundreds Eighty Six and paisa Ninety Eight only)

Detailed break-up of the Contract Price for entire supply portion of New 11KV line, LT line, 25 & 16 KVA, 11/0.4 KV Distribution Transformer S/Ss and Extension of Service Lines including house wiring for BPL house holds are given in **Schedule-1** (including schedule-1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8 & 1.9) enclosed with this award. The schedule for FP (Four Pole) structure, protective guarding for 11KV line and fixing of 11KV AB switch on Tapping DP are attached as schedule 1.7, 1.8 & 1.9 for utilizing the schedule, if required. However, the costs of these schedules are not included in the contract price of this package.

(ii) For erection portion

The total Contract Price inclusive of all Insurance & all applicable for the entire scope of work of erection portion under the Contract shall be Rs.4,20,76,732.61/- (In words Rs. Four Crores Twenty lakhs Seventy Six thousands Seven hundreds Thirty Two and paisa Sixty One only)

Detailed break-up of the Contract Price for entire erection portion of New 11KV line, LT line, 25 & 16 KVA, 11/0.4 KV Distribution Transformer S/Ss and Extension of Service Lines including house wiring for BPL house holds are given in **Schedule-2** (including schedule-2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8 & 2.9) enclosed with this award. The schedule for FP (Four Pole) structure, protective guarding for 11KV line and fixing of 11KV AB switch on Tapping DP are attached as schedule 2.7, 2.8 & 2.9 for utilizing the schedule, if required. However, the costs of these schedules are not included in the contract price of this package.

(iii) Total Contract Price

The total Contract Price inclusive of all taxes and duties for the entire scope of work (supply + erection portion)

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under the Contract shall be Rs.59, 67, 86, 119.59/- (In words Rs. Fifty Nine Crores Sixty Seven lakhs Eighty Six thousands One hundreds Nineteen and paisa Fifty Nine only)."

5. The Parliament has enacted The Building And Other construction Workers' (Regulation Of Employment And Conditions of Service) Act, 1996 (in short, "the main Act") to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and for other matters connected therewith or incidental thereto. Section 18 of this Act mandates every State Government to constitute a Welfare Board so as to provide and monitor social security, schemes and welfare measures for the benefit of building and other construction workers.

6. The Parliament also considered necessary to levy a cess on the cost of construction incurred by the employer on the building and other construction works for ensuring sufficient funds for the Welfare Board to undertake the social security schemes and welfare measures. The Parliament has, therefore, enacted the Building And Other Construction Workers' Welfare Cess Act, 1996 (in short, "the Cess Act"). Section 14 of this Act empowers the Central Government to make rules by notification in the official gazette for carrying out its provisions. In exercise of the powers so conferred, the Central Government has made the Building And Other Construction Workers' Welfare Cess Rules, 1998 (in short, "the Cess Rules").

7. Under section 3 of the Cess Act the Central Government has issued a notification to levy and collect a cess at the rate of one per cent of the cost of construction incurred by the petitioners. One of the modes prescribed to collect the cess levied is deduction at source.

8. When respondent no.3 deducted the cess levied at source on the bills furnished by the petitioners they filed the present petitions by referring to the above quoted Clause 6.2 of the contract contending that they are not liable to pay cess attributable for supply portion i.e. 6.2(i). According to the petitioners, under the Cess Act they are liable to pay cess only on the cost price attributed to erection portion i.e. 6.2(ii). The petitioners submit that the deduction of one per cent cess by respondent no.3 on the entire contract price mentioned in Clauses 6.2(i) and 6.2(ii) is illegal. On the other hand, the State Government in its separate return has justified the action of deducting one per cent cess on the entire contract price as mentioned in Clause 6.2(iii).

9. Therefore, the sole question which calls for determination in this bunch of petitions is that whether respondent no.3 is entitled to deduct one per cent cess on the entire contract price mentioned in Clause 6.2(iii) or only in respect to 6.2(ii) [and not 6.2(i)].

10. The expressions “building and other construction work”, “employer” and “establishment” are defined in sub-sections (d), (i) and (j) of section 2 of the Main Act. They read as under:

“2(d) “building or other construction work” means the construction, alteration, repairs, maintenance or demolition, of or, in relation to buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and distribution of power, water works (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or other construction work to which the provisions of the Factories Act, 1948 or the Mines Act, 1952 apply.

(i) “employer”, in relation to an establishment, means the owner thereof, and includes,-

- (i) in relation to a building or other construction work carried on by or under the authority of any department of the Government, directly without any contractor, the authority specified in this behalf, or where no authority is specified, the head of the department;
- (ii) in relation to a building or other construction work carried on by or on behalf of a local authority or other establishment, directly without any contractor, the chief executive officer of that authority or establishment.
- (iii) in relation to a building or other construction work carried on by or through a contractor, or by the

employment of building workers supplied by a contractor, the contractor.

(j) "establishment" means any establishment belonging to, or under the control of, Government, any body corporate or firm, an individual or association or other body of individuals which or who employs building workers in any building or other construction work and includes an establishment belonging to a contractor, but does not include an individual who employs such workers in any building or construction work in relation to his own residence the total cost of such construction not being more than rupees ten lakhs."

11. By reading the above quoted definitions it is clear that the construction, in relation to buildings, generation, transmission and distribution of power and electric lines, is very much included within the meaning of "building and other construction work". It is also clear that respondent no.3, being an establishment under the control of Government, falls within the meaning of "establishment" and the petitioners as contractors are employers in respect to the building or other construction work. There is, thus, no dispute with regard to the applicability of the provisions of the Main Act, Cess Act and the Cess Rules on the petitioners.

12. Section 3 of the Cess Act is the charging section. It reads as under:

"3. Levy and collection of cess. - (1) There shall be levied and collected a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Services) Act, 1996, at such rate not exceeding two per cent, but not less than one per cent, of the cost of construction incurred by an employer, as the Central Government may, by notification in the Official Gazette, from time to time specify." "

13. Likewise, Rule 3 of the Cess Rules deals with levy of cess and it reads as under:

"3. Levy of cess. - For the purpose of levy of cess under sub-section (1) of section 3 of the Act, cost of construction shall include all expenditure incurred by an employer in connection with the building or other construction work but shall not include-

-cost of land;

-any compensation paid or payable to a worker or his kin under the Workmen's Compensation Act, 1923."

14. A joint reading of the above quoted Section 3 and Rule 3 shows that cess levied not less than one per cent of the cost of construction incurred by the petitioners as employers is payable by them. The cost of construction cannot be divided in parts, as argued by the petitioners, into supply portion and erection portion. Even the cost for supply portion is incurred by the petitioners and cannot be separated from the total cost incurred mentioned in Clause 6.2(iii). The cess is on the total cost of construction. The definition of cost of construction in Rule 3 excludes only cost of land and any compensation paid or payable to worker or his kin under the Workmen's Compensation Act, 1923. The expression "expenditure" in Rule 3 does not obviously include cost of land even so it is specifically excluded in the proviso to the Rule. If the intention of the Cess Act and Cess Rules was to exclude the cost of supply part, it would have been referred in Rule 3 where exceptions are provided. We, therefore, hold that respondent no.3 is entitled to deduct one per cent cess on the total contract price mentioned in Clause 6.2(iii) and that the petitioners are liable to pay cess even for supply portion.

15. The petitions fail and are dismissed with costs of Rs.1,000/- to each petitioner.

Petition dismissed.

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WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 4322/2007 (Gwalior) decided on 3 May, 2012

TORAN SINGH

...Petitioner

Vs.

IMRAT SINGH & ors

...Respondents

A. Civil Procedure Code (5 of 1908), Order 21 Rule 32 (1)(5) read with explanation – Execution of Decree – Decree for declaration and permanent injunction was passed – No prayer or decree was made for possession – The said decree was sought to be executed under aforesaid provision – Court below declined it – Held – The trial Court in judgment gave specific finding that allotment was made in petitioner's

favour and he is in possession with further direction that his possession be not disturbed – This order attained finality till High Court – If contrary to this, possession is disturbed, it is the duty of the Court to set the wrong right and not allow the perpetuation of the wrong doing.
(Para 13)

क. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 32 (1)(5) सहपठित स्पष्टीकरण – डिकी का निष्पादन – घोषणा एवं स्थायी व्यादेश हेतु डिकी पारित की गई – कब्जे और डिक्री के लिए कोई निवेदन नहीं किया गया – उक्त डिकी को उपरोक्त उपबंध के अंतर्गत निष्पादित किया जाना चाहा गया – निचले न्यायालय ने इससे इंकार किया – अभिनिर्धारित – विचारण न्यायालय ने निर्णय में विनिर्दिष्ट निष्कर्ष दिया कि आवंटन याची के पक्ष में किया गया था और वह उसके कब्जे में है और आगे निदेशित किया कि उसके कब्जे में बाधा न डाली जाये – उच्च न्यायालय तक इस आदेश ने अंतिम रूप प्राप्त किया – यदि इसके विपरीत कब्जे में बाधा डाली गई तब न्यायालय का कर्तव्य होगा कि जो गलत हुआ है उसे सही करे और अनुचित कार्य जारी रखने को मंजूरी न दे।*

B. Civil Procedure Code (5 of 1908), Order 21 Rule 32 (1)(5) read with explanation – Execution of Decree – Even a decree of permanent prohibitory injunction needs to be enforced as per the said explanation – If the judgment-debtor had gained possession on the decree holder's property by violating decree, said judgment-debtor needs to be expelled by the executing Court by exercising powers under Order 21 Rule 32 or by exercising inherent powers under Section 151 of C.P.C. – Law Commission Report pursuant to which Explanation was inserted is taken note of.

The Executing Court is not justified in closing the matter about delivery of possession on a hyper technical ground that decree for prohibitory injunction can not be enforced in the manner prayed by the decree holder – The decision is bad in law and if this decision is permitted to stand, it will lead to a situation of lawlessness and the decree holder will be compelled to file another suit for possession – This is not the intention of Order Rule 32(5) and the explanation – The duty of the Court is to see that the inherent powers are exercised when needs to be exercised, otherwise the litigant will loose faith in Courts and they may resort to other illegal short cuts than approaching the Civil Court.
(Paras 12 & 15)

ख. *सिविल प्रक्रिया संहिता (1908 का 5) आदेश 21 नियम 32(1)(5)* सहपठित स्पष्टीकरण – डिक्री का निष्पादन – स्थाई निषेधात्मक व्यादेश की डिक्री का प्रवर्तन भी उक्त स्पष्टीकरण के अनुसार किया जाना आवश्यक है – यदि निर्णित ऋणी ने डिक्रीदार की सम्पत्ति का कब्जा, डिक्री के उल्लंघन में प्राप्त किया है, उक्त निर्णित ऋणी को निष्पादन न्यायालय द्वारा नियम 32 आदेश 21 के अन्तर्गत शक्तियों के प्रयोग द्वारा या सि.प्र.सं. की धारा 151 के अन्तर्गत अन्तर्निहित शक्तियों के प्रयोग द्वारा हटाया जाना चाहिए – विधि आयोग की रिपोर्ट जिसके अनुसरण में स्पष्टीकरण समाविष्ट किया गया था उसे ध्यान में लिया गया है।

C. *Civil Procedure Code (5 of 1908), Section 115 – Revision* –Petitioner filed the petition under Article 227 against the order passed by the Executing Court whereby the objection of judgment-debtor was upheld – If aforesaid objection would have been dismissed, the execution proceedings would have been continued – Thus, civil revision is not the remedy. (Para 19)

ग. *सिविल प्रक्रिया संहिता (1908 का 5) – धारा 115 – पुनरीक्षण* – याची ने निष्पादन न्यायालय द्वारा पारित आदेश जिसमें निर्णित ऋणी के आक्षेप की पुष्टि की गई है, के विरुद्ध अनुच्छेद 227 के अंतर्गत याचिका प्रस्तुत की – यदि उपरोक्त आक्षेप को खारिज किया गया होता तब निष्पादन कार्यवाहियां जारी रहती – अतएव सिविल पुनरीक्षण उपचार नहीं है।

D. *Land Revenue Code, M.P. (20 of 1959), Section 250 – Alternative Remedy* – Petitioner has a remedy of restitution of possession under the Land Revenue Code – He also has a valuable right to get the decree executed under the Code of Civil Procedure – Merely because the remedy under the Land Revenue Code is also available, his petition can not be thrown. (Para 20)

घ. *भू राजस्व संहिता मध्य प्रदेश (1959 का 20), धारा 250 – वैकल्पिक उपचार* – याची को भू-राजस्व संहिता के अंतर्गत कब्जे के प्रत्यास्थापन का उपचार उपलब्ध है – उसके पास सिविल प्रक्रिया संहिता के अंतर्गत डिक्री प्राप्त करने का मूल्यवान अधिकार भी है – मात्र इसलिए कि भू-राजस्व संहिता के अंतर्गत भी उपचार उपलब्ध है, उसकी याचिका नामंजूर नहीं की जा सकती।

Cases referred :

1983 AP 64, (1998) 2 SCC 510, 2011(4) MPLJ 656, AIR 1978 CAL 193, AIR 1975 AL. 48, AIR 1963 RAJ. 3, AIR 1986 CAL. 220, (1996) 4 SCC 622, AIR 1996 SC 2005, (2004) 2 KER. LT. 48, AIR 1975 MAD. 270, (1988) 1 KER. LT. 883, AIR 1968 SC 647, AIR 1954 TRAV

CO. 117, 1985 KER LT. 1010 (AIR 1986 KER. 63), 1986 KER. LT. 134, AIR 1962 SC 527, (1995) 2 KER LT. 326 (1995) ALHC 6153, (1984) 4 SCC 216 (AIR 1984 SC 1826), AIR 2005 KER. 328, AIR 1986 CAL. 220, AIR 1975 ALL. 482, AIR 2007 P & H 54,

Amit Lahoti, for the petitioner.

Yogesh Chaturvedi, for the respondents.

ORDER

SUJOY PAUL, J. - In this petition filed under Article 227 of the Constitution, the petitioner has challenged the order dated 12.7.2007 (Annexure P/5), whereby the execution proceedings are closed by the court below.

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

(1) The petitioner filed a suit for declaration and permanent injunction against the respondents. The said suit was registered as Case No. 57A/1995. The court below decided it by judgment dated 22.4.1999 (Annexure P/1). The court below declared the petitioner as "Bhumiswami" of land in question and issued a permanent injunction in favour of the petitioner restraining the respondents with the direction that they shall not interfere in the possession of the petitioner. The respondents assailed the said judgment by filing an appeal before the District Judge, Guna which was registered as Appeal No.66A/1999. The appellate court affirmed the order passed by the trial Court. The respondents unsuccessfully assailed it by filing second appeal before this Court which was registered as Second Appeal No.14/2000. The second appeal was dismissed by Annexure P/3.

(2) The petitioner filed an application for execution of decree on 19.5.2007 (Annexure P/4). The respondents filed their reply, Annexure P/9. The court below by order dated 12.7.2007 closed the execution proceedings for following reasons:-

No.(i) : As per Khasra entries from 1998-99 to 2002-2003 (Col.No.12) it is admitted fact that the competent revenue court had cancelled the allotment in favour of the petitioner on which judgment and decree was passed.

No. (ii) : The petitioner had filed the suit for declaration and permanent injunction. He did not pray for any relief of grant of

possession. Thus, executing court cannot travel beyond the judgment and decree.

(3) Shri Amit Lahoti, learned counsel for the petitioner by placing reliance on various provisions of Code of Civil Procedure and judgments of various courts, submits that the order passed by the Executing Court is bad in law and is perverse in nature.

(4) On the contrary, *Shri Yogesh Chaturvedi* by placing reliance on AIR 1983 ANDHRA PRADESH 64 (*P. Venkata Kasi Viswanadam vs. Vallabha Vyas*) and (1998) 2 SCC 510 (*State of MP vs. Mangilal Sharma*), submits that the order passed by the executing court is in accordance with law. He submits that this is settled in law that executing court cannot add, alter or travel beyond the relief claimed and granted in the judgment and decree. He submits that the petitioner had not chosen to file the suit for possession and, therefore, he cannot claim possession by filing execution proceedings. By placing reliance on 2011 (4) MPLJ 656 (*Anil Kumar vs. Afzal Anees*), Shri Chaturvedi submits that this petition is not tenable and petitioner has a remedy under section 115 of the Code of Civil Procedure to file a revision. The contention of Shri Yogesh Chaturvedi is that under section 250 of M.P. Land Revenue Code the petitioner has a remedy for restitution of possession. Thus, an alternative remedy is available to the petitioner. By relying on the language of section 51 CPC it is further argued that power to enforce execution is there where the court has "specifically ordered to do something". In the present case, as argued, since there is no direction to hand over possession, execution proceeding was not tenable.

(5) I have heard learned counsel for the parties and perused the record.

(6) So far reason No.(i) aforesaid is concerned, the khasra entry, Annexure P/10, shows that the petitioner's allotment is cancelled pursuant to S.D.O.'s order passed in Case No. 42 अ.स.-/87-88 dated 29.11.1995. The stand of the respondents before the trial Court was that by Ex.D/6 in Case No. 42 अ.स.-/87-88 dated 29.11.1995 the S.D.O. cancelled the allotment, which were in favour of six persons, which includes the allotment in favour of present petitioner. The trial court gave a specific finding that the aforesaid allotment order Ex.D/6 does not contain the name of present petitioner. The allotment was made in favour of petitioner by a separate order dated 27.9.1987 Ex.D/7. A specific finding was given by the trial court that the allotment in favour of present petitioner is not cancelled and is still in existence. This finding

of fact given by the trial court was unsuccessfully challenged by the present respondents before the appellate court and then before this court in second appeal. As stated above, both the courts have affirmed the judgment of trial court on merits and, therefore, the said finding, in absence of any further challenge, has attained a finality. In khasra entries of Annexure P/10, the entry was made on the basis of S.D.O.'s order, Ex.D/6. Once in the judgment of trial court it is made clear that Ex.D/6 does not deal with the allotment with regard to petitioner, the said entry cannot have any adverse impact on the petitioner. Even if it is erroneously mentioned in the khasra entries, it will not have any effect of wiping out of the finding of the trial court affirmed by this court. Thus, in my considered opinion, the executing court has committed an error in relying on Col.No.12 of entry of the khasra. Thus, this point needs to be decided in favour of the petitioner. This Court is of the considered opinion that the point No.(i) is decided by the executing court in an erroneous manner and said finding runs contrary to the specific finding given in the judgment of the civil suit. Accordingly, I have no hesitation to hold that this finding of executing court is perverse in nature and cannot be a reason to close the execution proceeding. As per Order 21 Rule 28, CPC, the order of the court by which decree is passed is binding upon the court to which the decree was sent for execution.

(7) Reason No. (ii) : So far the contention that the petitioner had chosen to file a suit for declaration and permanent injunction and not a suit for possession, the executing court cannot travel beyond the judgment is concerned, it would be profitable to refer to certain relevant provisions of the Code.

(8) Order 21 Rule 32-(1)(5) reads as under:-

“(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction) by his detention in the civil prison, or by the attachment of his property, or by both.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court

may, in lieu of or in addition to all or any of the process aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.”

(9) By amendment dated 1.7.2002 (Act 22 of 2002), the explanation is added below Order 21 Rule 32 C.P.C., which reads as under:-

“Explanation.-For the removal of doubts, it is hereby declared that the expression “the act required to be done” *covers prohibitory as well as mandatory injunctions.*”
(Emphasis supplied).

(10) The main defence of the judgment-debtor is that the suit was only for declaration and permanent injunction and it was not for possession and, therefore, in execution proceedings the trial Court cannot travel beyond what had been prayed and granted.

(11) It is relevant to notice here that the trial Court in its judgment has given a specific finding that petitioner is in possession and accordingly directed that his right and possession be not disturbed and a permanent injunction in this regard was issued. On the cost of repetition, it may be noticed that this finding of trial Court was affirmed till this Court. Thus, this fact cannot be disputed that the allotment with regard to the petitioner was not disturbed and petitioner was in possession. Thus, in view of the aforesaid findings with regard to allotment and possession in favour of the petitioner, if petitioner claims enforcement of judgment and decree, the question is, whether he can seek enforcement of this nature of decree in execution proceedings. Before dealing with the matter any further, it is profitable to notice the report of Law Commission which persuaded the parliament to include the aforesaid explanation in C.P.C. The relevant portion of recommendation of Law Commission reads as under:-

“8.1.12 Recommendation—Clarification is obviously needed on the point at issue. It is suggested that as a matter of legislative amendment. It is preferable to incorporate the wider view (though the majority of the High Courts have taken a contrary view) and to provide that the words “act required to

be done” cover prohibitory (as well as mandatory) injunctions. This would also be in conformity with S.3(2). General Clauses Act, 1987 which provides that in all Central Act, the words “act” includes illegal omissions. Besides this, on the merits, there is also justification why a decreeholder should be driven to a separate suit for getting relief in the nature of enforcement of a decree which he must have obtained after considerable expenditure of time, labour and money”.

(12) A bare perusal of the recommendation shows that the intention was to adopt a wider view to cover prohibitory as well as mandatory injunctions. Interestingly, this recommendation was made by Law Commission even contrary to the views taken by various High Courts before such recommendation. It was felt necessary to include that explanation in the interest of justice so that decree holder should not be driven to a separate suit for getting relief in the nature of enforcement of a decree which will ultimately save his time, labour and money. Once the said recommendation is translated in reality by including it in C.P.C. by way of explanation, the basic question is whether petitioner can succeed on the strength of existing provision, i.e., Order 21 Rule 32 (1)(5), read with explanation. In the opinion of this Court, the executing Court has power and jurisdiction to pass any order to see that the decree is enforced and implemented and it is obeyed by the judgment-debtor. Even a decree of a permanent prohibitory injunction needs to be enforced as per the said explanation. If the judgment-debtor had gained possession on the decree holder's property by violating decree, said judgmentdebtor needs to be expelled by the executing court by exercising powers under Order 21 Rule 32 or by exercising inherent powers under Section 151 of C.P.C.

(13) In my considered opinion, the Court below has given specific finding regarding allotment of land in favour of the petitioner which had not been cancelled, coupled with the finding that the petitioner is in possession. On the strength of these findings, the permanent injunction was granted with further direction to not to disturb the petitioner from the possession. If contrary to aforesaid judgment and decree, judgment-debtor had disturbed and gained possession, it amounts to defeating the decree passed by the Court below. Thus, it has to be held that the judgment-debtor forcibly dispossessed the plaintiff in violation of order of injunction and took possession of the property. The executing court has ample jurisdiction to prevent the decree being flouted and to do justice to the plaintiff by putting back the plaintiff in possession of

the property. This Court finds support from the following judgments:-

(i) *Ram Charan Sikarwar v. Smt. Jogamaya Casu*, AIR 1978 Cal 193.

(ii) *Hari Nandan Agrawal and another v. S.N. Pandita*, AIR 1975 Al 48.

(iii) *Magna v. Rustam*, AIR 1963 Raj. 3.

(iv) *Surjit Pal v. Prabir Kumar Sun*, AIR 1986 Cal 220.

(v) *Delhi Development Authority v. kipper Construction Co. (P) Ltd.* (1996) 4 SCC 622. (AIR 1996 SC 2005).

(vi) *Ajayakumar v. Damayanthi* (2004) 2 Ker Lt 48.

(vii) *Century Flour Mills Ltd. v. S. Suppiah*, AIR 1975 Mad. 270 (FB).

(viii) *Parukutty Amma v. Thankamma Amma* (1988) 1 ker LT 883.

(ix) *State of Orissa v. Sudhansu Sekhar Misra*, AIR 1968 SC 647.

(x) *Thukalan Poulo Avira v. Mar Basselios Gheevarghese*, AIR 1954 Trav Co. 117.

(xi) *Krishna v. Joseph Desouza*, 1985 Ker LtT 1010 (AIR 1986 Ker 63).

(xii) *Mohammad v. Mohammed Haji*, 1986 Ker LT 134.

(xiii) *Manohar Lal Chopra v. Raj Bahadur Rao Raja Seth Hiralal*, AIR 1962 SC 527.

(xiv) *Hamsa v. George* (1995) 2 Ker LT 326 (1995) AIHC 6153).

(xv) *Mohd. Idris v. Rustam Jehangir Bahuji* (1984) 4 SCC 216 (AIR 1984 SC 1826).

(xvi) *Thazhapattathillath Krishnan Namboodiri and others v. Thazhapattathillath Damodaran Namboodiri (Died) by L.R. and etc.*, AIR 2005 Ker 328.

(14) In *AIR 1975 Madras 270 (FB)*, the Full Bench of the High Court held that Order 39 of C.P.C. should not be considered as placing any limit on the scope of inherent power under Section 151 which are wide and not subject to any limitation. Whenever there is any violation of an order or injunction against party, or something has been done in disobedience, it will be the duty of the Court to put the clock back to set the wrong right and not allow the perpetuation of the wrong doing. The inherent power of the Court will not only be available in such cases, but it is bound to be exercised in that manner in the interest of justice. The same view was taken in *Surjit Pal v. Prabir Kumar Sun AIR 1986 Calcutta 220 and Hari Nandan Agrawal and another v. S.N. Pandita AIR 1975 Allahabad 482*.

(15) I will be failing in my duty if I do not mention that there were conflicting views expressed in various decisions of various High Courts regarding applicability of Order 21 Rule 32 in respect of decrees of prohibitory injunction. Some of the High Courts took a view that Sub Rule (5) of Rule 32 of Order 21 cannot be invoked to enforce a decree of prohibitory injunction, while some courts have taken contrary view. However, the controversy can be said to be put to rest by bringing the explanation below Sub Rule (5). The statement of objects and reasons of C.P.C. (amendment) Act, 2002 makes the position clear that the explanation to Rule 32 was added on the basis of the report of Law Commission. Thus, the intention of the parliament and legal mandate is to implement the prohibitory injunctions in execution proceedings.

(16) On the basis of principles of law laid down by various High Courts, there is no doubt that the executing court is not justified in closing the matter about delivery of possession on a hyper technical ground that decree for prohibitory injunction cannot be enforced in the manner prayed by the decree holder. The decision is bad in law and if this decision is permitted to stand, it will lead to a situation of lawlessness and the decree holder will be compelled to file another suit for possession. This is not the intention of Order 21 Rule 32 (5) and the explanation. The duty of the Court is to see that the inherent powers are exercised when needs to be exercised, otherwise the litigant will loose faith in Courts and they may resort to other illegal short cuts than approaching the civil court.

(17) Same view is taken by Punjab and Haryana High Court in judgment reported in *AIR 2007 Punjab and Haryana 54 (Banwarilal v. Municipal Committee, Kanina)*. On the basis of aforesaid analysis, I am unable to uphold reason (ii) given by the Court below. Thus, this reason is liable to be disallowed.

(18) So far the issue regarding maintainability of this petition on the basis of 2011 (4) M.P.L.J. 656 (*Anil Kumar Vs. Afzal Anees*) is concerned, proviso to Section 115 C.P.C. reads as under:-

Proviso "Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

(19) In the present case, the execution proceedings is dismissed on the objection filed by the judgment-debtor and against this order writ petition is preferred. If the objection of the judgment-debtor before the executing court would have been rejected, the effect would be continuance of the execution proceedings. In other words, upon rejection of objections of judgment-debtor, execution proceedings would have remained pending and some consequential orders like notice for attachment or imprisonment etc. would have been passed. Thus, execution proceedings, in any case, would have remained pending if objections of judgment-debtor would have been rejected. Thus, the judgment in *Anil Kumar* (supra) makes it clear that it was filed by judgment-debtor against rejection application under Section 47 of C.P.C. The objections were turned down by the executing court and therefore, he filed the writ petition. Had those objections been decided in favour of the judgment-debtor then the executing proceedings would have been finally terminated or disposed of and under those circumstances the revision was rightly held to be maintainable by this Court, whereas in the present case if the order of executing court would have been made in favour of the present petitioner, it would not have the effect of finally disposing of the suit or other proceedings. Thus, for petitioner, I am unable to hold that remedy is under Section 151 C.P.C. and accordingly unable to hold that writ petition is not maintainable.

(20) So far the maintainability under the M.P.L.R.C. is concerned, even if that remedy is available, petitioner had a valuable right to file execution and such execution proceeding was legally maintainable and, therefore, petitioner cannot be thrown out on this issue.

(21) Shri Yogesh Chaturvedi, learned counsel for the respondents relied on certain judgments wherein it is held that the executing court cannot travel beyond the scope of decree. Those judgments are passed in peculiar facts

and circumstances of those cases. In the present case, as discussed in detail, in the light of the explanation and provisions of the C.P.C., it is clear that even the permanent and prohibitory injunctions can be enforced in this matter. This interpretation, in my considered opinion, is in consonance with the recommendation of Law Commission, aim and object of the explanation pursuant to which parliament thought it proper to bring the explanation in the C.P.C. On the basis of above cumulative reasons, I have no hesitation to set aside the order impugned (Annexure P-5) dated 12.7.2007.

(22) Consequently, the said order is set aside. The executing Court is directed to proceed further in the matter in accordance with law. The petition is allowed. No cost.

Petition allowed.

I.L.R. [2012] M.P., 1244

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 17466/2010 (Jabalpur) decided on 8 May, 2012

SURENDRA SHRIVASTAVA

...Petitioner

Vs.

THE GENERAL MANAGER & ors.

...Respondents

A. Succession Act (39 of 1925), Section 372 – Succession Certificate – Validity of marriage – 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.

(Para 16)

क. उत्तराधिकार अधिनियम (1925 का 39), धारा 372, – उत्तराधिकार प्रमाण पत्र – विवाह की मान्यता – उत्तराधिकार न्यायालय से यह अपेक्षित नहीं कि पहले पक्षकार को विवाह की वैधता के बारे में या उसके शून्य होने के संबंध में घोषणा चाहने के लिए निदेशित करे जैसी स्थिति हो और फिर प्रमाण पत्र प्रदान करे।

B. Service Law – Compassionate appointment – Succession Court answered the legitimacy of petitioner No.1's marriage with the deceased employee, in her favour – The petitioner gets priority right for appointment on compassionate ground – Appointment given to

I.L.R.[2012]M.P. Surendra Shrivastava Vs. The Gen. Manager 1245
respondent No. 4 (Son of Second Wife) is illegal. (Para 17)

ख. सेवा विधि - अनुकम्पा नियुक्ति - उत्तराधिकार न्यायालय ने याची क्र. 1 के मृतक कर्मचारी के साथ विवाह की धर्मजता को, उसके पक्ष में निर्धारित किया - याची को अनुकम्पा आधार पर नियुक्ति के लिये प्राथमिकता का अधिकार मिलता है - प्रत्यर्थी क्र. 4 (द्वितीय पत्नी के पुत्र) को दी गई नियुक्ति अवैध है।

Case referred :

AIR 1976 MADRAS 138.

J. Tiwari, for the petitioner.

Indira Nair with Anoop Nair, for the respondents No.1 & 2.

R.S. Yadav, for the respondents No. 3 & 4.

ORDER

SANJAY YADAV, J. - Heard.

1. Being aggrieved by non settlement of terminal dues in lieu of death of Mahesh Shrivastava employed as Timber man with the respondents Western Coal fields limited last posted at Damua Colliery Chindwara, petitioner has preferred this petition, alleging that despite of her being the legally married wife all dues have been settled in favour of respondents no.3 and 4.

2. Facts unfurled from respective pleadings reveals that Mahesh Shrivastava died on 19.11.2006. The respondents no.1 and 2 on the basis of nomination in favour of respondents no.3 and 4 settled all the terminal dues in their favour. The petitioner filed a succession case which though was dismissed because of disbursement of retiral due however, a specific finding in regard to issue no.1 as to whether the petitioner is a legally wedded wife of Mahesh Shrivastava was recorded in favour of the petitioner by the succession Court vide order dated 8.4.2010. The issue no.1 answered in favour of the petitioner is "क्या आवेदकगण मृतक स्व. श्री महेश श्रीवास्तव के वैध उत्तराधिकारी है?". The Succession Court answers it that : "अतः आदेश में की गई उपरोक्त विवेचना से स्पष्ट है कि आवेदकगण मृतक श्री महेश श्रीवास्तव के वैध उत्तराधिकारी है"

3. These findings having not been questioned by the respondents have attained finality. That during pendency of succession case respondent No.4 filed a petition W. P. No.9334/08 (s) seeking direction to the authorities of

the Western Coalfields Ltd. to accord him compassionate appointment in lieu of the death of said Mahesh Shrivastava which was denied by order dated 6.2.08. The petitioners herein were not impleaded as respondents in said writ petition.

4. The order which was challenged in W. P. No.9334/08 (s) had declined to extend any retiral benefits for the reason that the petitioner i.e. respondent No.4 in this petition was not a legitimate child. It was said "in this regard this is to inform that the matter was placed before competent authority who observed that ex-employee had two wives i.e. Smt. Shobha and Smt. Maya. The claimant is the son of the second wife. Ex-employee had married the second wife, without legal separation from first wife. The second marriage being void under Section 5 (1) and Section 11 of the Hindu Marriage Act, 1955 competent authority has not agreed for offering employment to Shri Manish Shrivastava son of second wife of ex-employee."

5. The petition was finally decided on 19.3.10 with the direction:

"The aforesaid provision specifically provides that even if the second marriage is null and void, even then the child born out of the second marriage shall be legitimate and shall be entitled to rights in the property of his father. In view of the special provision as contained in Section 16 (supra), the claim of the petitioner was wrongly turned down by the respondents while order is not sustainable under the law and is hereby quashed. The matter is remanded back to the respondent No.2 who shall re-examine the case of the petitioner in the light of the provisions as contained under Section 16 of the Hindu Marriage Act and to decide the application of the petitioner for compassionate appointment in accordance with law and the policy of the respondents for compassionate appointment expeditiously as far as possible within a period of 90 days from the date of communication of this order."

6. That besides settling the terminal dues to the tune of Rs.9,50,000/- in favour of respondents No.3 and 4 and appointment on compassionate ground was also accorded to the respondent under the shelter of order dated 19.3.10 passed in W. P. No.9334/08 (S).

7. Question is, in view of the specific finding recorded by the Sectional

Court that the petitioner No.1 is the legitimate wife and successor to Mahesh Shrivastava whether respondents No.1 and 2 were justified in settling the dues in favour of respondents No.3 and 4 alone.

8. “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.

9. 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."

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

11 Clause 9.3.3 delineate the line of succession being wife/husband, as the 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.

12. The petitioner being the legally wedded wife and legitimate son have the priority right over others in respect of employment in lieu of the death of the employee.

13. The question next is whether the finding recorded by the succession court in respect of the marriage would have a binding effect.

14. 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.”

15. 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.

16. 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.

17. In the case at hand, the succession court answered the issue no.1 which was regarding legitimacy of petitioner No.1's marriage with Mahesh Shrivastava in her favour, the petitioner gets priority right for appointment on the compassionate ground. The appointment given to respondent no.4 in lieu of death of Mahesh Shrivastava is illegal.

18. The petition is thus, allowed with a direction to the respondents no.1 and 2 to consider the claim of the petitioner no.1 for appointment on compassionate ground in lieu of the death of his father.

19. Regarding share in terminal benefits since the same has already been disbursed the petitioners would be at liberty to recover their share of retiral dues from respondents no.3 and 4 in accordance with law.

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

Petition allowed.

I.L.R. [2012] M.P., 1251

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 1824/2002 (Jabalpur) decided on 11 May, 2012

CHAKRESH KUMAR JAIN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law – Cancellation of Appointment – On the basis of the enquiry report against the petitioner the Collector recorded findings and cancelled the appointment as Contract Teacher – Petitioner challenged the order and submitted that he was condemned and visited

with an adverse order, without affording him an opportunity of hearing – Held – Incumbent has failed to prove the prejudice caused for non affording an opportunity of hearing – No interference is evincible – Petition dismissed.

Report reveals that the marks were got interpolated in the tabulation sheet – The petitioner had complete liberty and the opportunity as well, to have disclosed the material to contradict the allegation that the tabulation sheet was got interpolated – No cogent material on record to substantiate that the document where on the additional marks were allotted to the petitioner at the time of interview and not after the final list is prepared, the report can not be doubted. (Paras 3,6 & 8)

सेवा विधि – नियुक्ति का निरस्त किया जाना – याची के विरुद्ध जांच प्रतिवेदन के आधार पर कलेक्टर ने निष्कर्ष अभिलिखित किये और संविदा शिक्षक के रूप में नियुक्ति निरस्त कर दी – याची ने आदेश को चुनौती दी और निवेदन किया कि उसकी निंदा की गई और उसे सुनवाई का अवसर प्रदान किये बिना प्रतिकूल आदेश दिया गया – अमिनिर्धारित – पदाधिकारी सुनवाई का अवसर प्रदान नहीं किये जाने से कारित प्रतिकूल प्रभाव साबित करने में विफल रहा – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Cases referred :

(2004) 2 SCC 105, AIR 1999 SC 2583, (2000) 7 SCC 529.

Nilesh Kotecha, for the petitioner.

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

R.K. Thakur, for the respondent No.5.

ORDER

SANJAY YADAV, J. - Order dated 24-10-2001 passed by Chief Executive Officer, Janpad Panchayat, Baldeogarh, is principally challenged vide this writ petition. By impugned order appointment of petitioner and three others as Contract Teacher Grade-2 in Arts Faculty has been cancelled. The cancellation of appointment is on the basis of the enquiry conducted on the complaint regarding irregularity committed in the process of selection wherein it was found that though the credentials by the petitioner of having the experience of teaching in non-formal education were not attached with the application; yet subsequently in the tabulation sheet marks towards experience

were interpolated. On the basis of the enquiry report Collector recorded the following finding vide his order dated 17-09-2001. In paragraph 8 the English translation whereof reads thus :-

“8. Other irregularities reported by the investigation team were also examined point wise along with the present case. Ten posts of Contract Teacher Grade-II in Arts faculty were advertised for unreserved category. Shri Chakresh Kumar Jain submitted an application for one of the said posts; in that regard the investigation team has reported in Para – 2 of its report that a certificate about experience of teaching in informal schools was not enclosed with the application form and in the merit list prepared on that basis marks for experience of informal teaching were not shown eve. Later, at the time of selection, undue advantage has been extended after increasing and entering 20 marks in the column ‘marks obtained’ for aforementioned informal teaching experience before interview and he was selected. It is found on perusal of the record received together with the investigation report that name of Chakresh Kumar Jain is shown at roll no.-24 in the merit list published for male contract teachers Grade-II for Arts faculty under unreserved category, as per which he has obtained 22.95 marks against graduation and 5 against B.T.I./B.Ed. Examination. Whereas total marks obtained before the interview have been shown as 47.95 in column 4 of selection list submitted before the Selection Committee at the time of interview and 5.10 marks have been obtained in the interview. As such, he was selected by awarding 53.05 marks in aggregate. It is found on the perusal of on line record that certificate of experience of informal education was not included; it was later obtained by forgery, appended to a certificate of Instructor; Informal Education and he was selected by awarding 20 extra marks. No marks have been shown in the Merit List for want of the said certificate because it was not enclosed and the Merit List had been published. It's clear that having obtained the said certificate and added certificate of informal education to the acknowledgment by counterfeiting later aggregate 47.95 mark have been shown

before Selection Committee after increasing 20 marks. Once the selection committee awarded marks in the merit list and published the merit list finally, the Selection Committee had no right to revise any error in it, if any. But, the Revising Officer or Appellate Officer had that right of revision and accordingly aggrieved person could move to the Appellate Authority for seeking relief. But the Selection Committee's proceeding to his selection by increasing 20 marks in the sheet it prepared at the time of interview is totally wrong and unacceptable. Thus, Chakresh Kumar Jain obtains 27.95 marks as per merit list and 5.10 marks in the interview, in total 33.05 marks. The highest and the lowest marks obtained by male individuals for contract teacher Grade-II in Art faculty under unreserved category are 64.05 and 37.73 respectively. Hence, as per rule, there is no ground for Chakresh Kumar Jain to secure any place in the Selection List and he cannot be appointed on the said post, as he has obtained 33.05 marks. Accordingly, it is prayed that steps be taken for appointment of the aspirant next in order of merit list after the Candidate-obtaining 37.73 marks at 10th place after removing name of Chakresh Kumar Jain from the selection list."

(emphasis supplied)

2. Aggrieved whereby, petitioner filed a revision before the Commissioner who by order dated 25-02-2002 affirmed the order passed by Collector.
3. The petitioner submits that he has been condemned and visited with an adverse order, without affording him an opportunity of hearing. It is no doubt true that a person cannot be condemned without being heard as it is the basic principle of natural justice that in case where an adverse action is contemplated a person must be given an opportunity of hearing.
4. But whether in a case as the present one where the selection sought is on the basis of the fraud committed while getting the marks interpolated in the tabulation sheet an opportunity of hearing would be a hallmark of the proceedings.
5. In *R. Vishwanatha Pillai v. State of Kerala and others* : (2004) 2 SCC 105, it is held :

“15. Wherein an appointment in a service has been acquired by practicing fraud or deceit, such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all.”

6. Regarding non affording of opportunity of hearing trite it is that principle of natural justice is not set in straight jacket formal. True it is that in case of an action leading to adverse order an incumbent is entitled for reasonable opportunity of hearing, but in a case as the present one, where on the basis material on record the only conclusion is drawn and the incumbent has failed to prove the prejudice caused for non affording an opportunity of hearing an order cannot be interfered with. No material is brought on record to contradict the finding recorded in the enquiry regarding interpolation of marks.

7. In *M. C. Mehta v. Union of India and others* : AIR 1999 SC 2583, the Apex Court observed :-

“20. Learned Senior Counsel for Bharat Petroleum contended that once natural justice was violated, the Court was bound to strike down the orders and there was no discretion to refuse relief and no other prejudice need be proved.

21. It is true that in *Ridge v. Baldwin*, 1964 AC 40, it has been held that breach of principles of natural justice is in itself sufficient to grant relief and that no further de facto prejudice need be shown. It is also true that the said principles have been followed by this court in several cases, but we might point out that this court has not laid down any absolute rule. This is clear from the judgment of Chinnappa Reddy, J., in *S. L. Kapoor v. Jagmohan* 1980 (4) SCC 379. After stating (page 395) that ‘principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed’ and that ‘non-observance of natural justice is itself prejudice to a man and proof of prejudice independently of proof of denial of natural justice is unnecessary’, Chinnappa Reddy, J., also laid down an important qualification (page 395) as follows :

“As we said earlier, where on the admitted or

indisputable facts, only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice, but because courts do not issue futile writs.”

22. It is, therefore, clear that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the court need not issue a writ merely because there is violation of principles of natural justice.”

In *Aligarh Muslim University and others v. Mansoor Ali Khan* : (2000) 7 SCC 529 it is observed :-

“21. As pointed recently in *M.C. Mehta Vs. Union of India*: (1999) 6 SCC 237, there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in *Gadde Venkateswara Rao vs. Government of Andhra Pradesh* : (AIR 1966 SC 828), it is not necessary to quash the order merely because of violation of principles of natural justice.”

8. In the case at hand as the report reveals that the marks were got interpolated in the tabulation sheet. The petitioner had complete liberty and the opportunity as well, to have disclosed the material to contradict the allegation that the tabulation sheet was got interpolated. There being no cogent material on record to substantiate that the document where on the additional marks were allotted to the petitioner at the time of interview and not after the final list is prepared, the report cannot be doubted. In view whereof no interference is evincible.

9. In the result petition fails and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2012] M.P., 1257

WRIT PETITION

Before Mr. Justice J.K. Maheshwari

W.P.No. 13847/2010 (Jabalpur) decided on 15 May, 2012

SUJJET KUMAR NIGAM

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Municipalities Act, M.P. (37 of 1961), Section 94(4) – Municipal Employees (Recruitment and Conditions of Service) Rules, M.P. 1968 – Rule 51 – State Municipal Service (Executive) Rules (M.P.), 1973 – Appointment of the petitioner is made by the Municipality subject to confirmation by the State Government – Rules 1973 are not applicable to the petitioner who is holding the post of Sub-Engineer – He shall be governed by the Rules 1968 being municipal employee – President-in-council is having no power to impose the penalty on him – Resolution imposing penalty passed by President-in-council and the order communicating the same passed by the Chief Municipal Officer, are without jurisdiction and per se illegal. (Paras 5 & 6)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 94(4) – नगरपालिका कर्मचारी (भर्ती तथा सेवा की शर्तें) नियम, म.प्र., 1968 – नियम 51 – राज्य नगरपालिका सेवा (कार्यपालिक) नियम (म.प्र.), 1973 – नगरपालिका द्वारा याची की नियुक्ति राज्य सरकार द्वारा पुष्टिकरण के अधीन की गई – नियम 1973 याची को लागू नहीं होते जिसने उप अभियंता के पद को धारण किया है – नगर पालिका का कर्मचारी होने के नाते वह नियम 1968 द्वारा शासित होगा – परिषद के समापति को उस पर शास्ति अधिरोपित करने की कोई शक्ति नहीं है – परिषद के समापति द्वारा शास्ति अधिरोपित करते हुए पारित किया गया संकल्प एवं उसे सूचित करते हुए मुख्य नगरपालिका अधिकारी द्वारा पारित आदेश बिना अधिकारिता के है और इस प्रकार अवैध है।

K.C. Ghildiyal, for the petitioner.*B.P. Pandey, G.A.* for the respondents No. 1 to 3.*Anshuman Singh*, for the respondents No. 4 & 5.

O R D E R

J.K. MAHESHWARI, J. - Being aggrieved by the order Annexure-P/5 passed by Chief Municipal Officer, Municipal Council, Damoh imposing the penalty of withholding one increment with non-cumulative effect as per the

resolution of President-in-council, the petitioner filed the present petition.

2. Shri Ghildiyal, learned counsel for the petitioner, contends that the petitioner is a person appointed on the post of Sub Engineer as per sub-section (4) of Section 94 of Municipalities Act, 1961 (hereinafter referred to as 'the Act of 1961'). Such employees are governed by the rules which are known as M.P. Municipal Employees Recruitment and Conditions of Service Rules, 1968 (hereinafter referred to as 'the Rules of 1968'). As per Rule 51, a person appointed under sub-section (4) of Section 94 of the Act, the Municipal Council is having power to impose the penalty so specified under Rule 49 of the Rules of 1968. Being Sub Engineer and appointed under sub-section (4) of Section 94 of the Act, order imposing penalty so passed by the President-in-council of Municipal Council, Damoh is without jurisdiction and the order Annexure-P/5 is illegal and void-ab-initio.

3. Per contra, Shri Anshuman Singh, learned counsel for respondents 4 and 5, by filing return has stated the fact that the petitioner is governed by the rules which are known as M.P. State Municipal Service (Executive) Rules, 1973 (hereinafter referred to as 'the Rules of 1973'). Proceedings have been initiated under the said rules and after participation without raising any objection, order of penalty has rightly been passed by the Chief Municipal Officer, Municipal Council, Damoh on the resolution of President-in-council imposing penalty against the petitioner, however, the action so taken by President-in-council is under the provisions of the said rules. During the course of hearing attention of this Court has been drawn to rule making power of the Rules of 1973 as well as the Rules of 1968 referring the provisions of Section 95 and 355 of the Act of 1961 and it is urged that being an employee of State Municipal Service, the petitioner shall govern by the provisions of Section 88 of the Act and the Rules of 1973 have its application. In such circumstances, the order has rightly been passed by the authority competent.

4. After hearing learned counsel for the parties and to deal with the rival contentions, relevant provisions of the Act and the rules is required to be reproduced which reads as under:

"94. Appointment of Staff.-(1) Every Council having an annual income of five lakhs of rupees or more shall, subject to rules framed under Section 95, appoint a Revenue Officer and an Accounts Officer and may appoint such other officers and servants as may be necessary and proper for the efficient

discharge of its duties.

(2) Every Council not falling under sub-section (1) shall, subject to rules framed under Section 95, appoints a Sanitary Inspector, a Sub-Engineer, a Revenue Inspector and an Accountant and may appoint such other officers and servants as may be necessary and proper for the efficient discharge of its duties:

Provided that such Council may appoint a part-time Health Officer or an Engineer on such terms and conditions as the State Government may approve in this behalf.

(3) The State Government may -

(i) in case of any Council, relax the provisions of sub-section (1) or sub-section (2) as the case may be, subject to such conditions as it may think fit to impose; or

(ii) grant permission to any Council to appoint whether temporarily or otherwise one person to discharge the duties of any two or all such officers.

(4) The appointment of Revenue Officer, Accounts Officer, Sanitary Inspector, Sub-Engineer, Revenue Inspector and Accountant shall be subject to confirmation by the State Government and no such post or the post of any other officer or servant as may be specified by the State Government in this behalf shall be created or abolished and no alteration in the emoluments thereof shall be made without the previous approval of the State Government, and every appointment to, and dismissal from such post, shall be subject to a like approval.

(5) No order of suspension for a period exceeding one month shall be passed against any officer mentioned in or specified under sub-section (1) and no resignation tendered by any such officer shall be accepted without previous approval of the State Government.

(6) Unless the State Government otherwise directs the power of appointing Municipal Officers and servants other

than those mentioned in or specified under sub-section (4) shall vest in the President-in-council.

(7) The State Government may transfer any officer or servant of a Council mentioned in sub-sections (1) and (2) and in receipt of total emoluments exceeding one hundred rupees to any other Council.

(8) The State Government may prescribe the classes or grades of officers and servants who shall have the right to appeal from any decision of the Chief Municipal Officer, the President-in-council, the prescribed authority or any other authority empowered in his behalf, inflicting any departmental punishment other than censure.

(9) The authority hearing an appeal made under sub-section (8) shall have power to set aside or reduce the punishment against which the appeal is preferred.

Simultaneously, Rule 2(e), 2(f) and 51 of the Rules of 1968 are also relevant which are also reproduced as under :-

"2(e) "Municipal Employee" means a person appointed to or borne on the cadre of the Municipal staff other than a member of the State Municipal Service (Executive):

"2(f) "Municipal service" means the service or group of posts in connection with the affairs of the Municipality other than the State Municipal Service (Executive):

51. Disciplinary authorities.- Subject to the provisions of the Act and these rules the Municipal Council shall have the powers to impose any of the penalties specified in rule 49 on any municipal employee holding post specified in sub-section (4) of section 94 of the Act and in the case of other municipal employees the Standing committee shall have the power to impose any of the said penalties on him.

As the respondents have taken the stand that the petitioner is governed by the Rules of 1973, however, relevant provisions of the rules of 1973 are reproduced as under:

"2(b) "Appointing Authority" means State Government in

respect to Select Grades, Class I, Class II and Class III Chief Municipal Officers;

2(f) "Member of the Service" means a member of the State Municipal Service (Executive).

2(i) "Service" means the Municipal Service for the State constituted under sub-section (1) of Section 86 of the Act.

On bare reading of the aforesaid, it is apparent that under sub-section (4) of Section 94 of the Municipalities Act, it is clear that appointment of Revenue Officer, Accounts Officer, Sanitary Inspector, Sub Engineer, Revenue Inspector and Accountant shall be made subject to confirmation by the State Government. As per sub-section (6) of Section 94, it is clear that unless the State Government otherwise directs the power of appointment of Municipal employees and servants other than those mentioned in or specified under sub-section (4) shall vest in the President-in-council. However, it is clear that appointment of the aforesaid post is under sub-section (4) of Section 94 and it may be made by the Municipal Council subject to confirmation by the State Government. The appointment on the said posts cannot be made by President-in-council.

5. On perusal of the return and the submission so made by the counsel for the respondents, petitioner is not a person appointed in the cadre of State Municipal service constituted under sub-section (1) of Section 86 of the Act. As per rule 2(b) of the Rules of 1973, the appointing authority is the State Government to Class I, Class II and Class III of the Chief Municipal Officer. As per the Schedule of Rules of 1973, only the post of Municipal Officer has been specified. Simultaneously, the petitioner has made out a case that he was appointed under sub-section (4) of Section 94 of the Act and he is the Municipal Employee in the cadre of Municipal Service. In such circumstances, it is to be held that the Rules of 1973 are not applicable to the petitioner who is holding the post of Sub Engineer. It is to be further held that he shall be governed by the Rules of 1968 being municipal employee.

6. In that view of the matter, the appointment of the petitioner is made by the Municipality subject to confirmation by the State Government. Under the Rules of 1968, penalties have been specified in Rule 49 and Rule 51 deals with the disciplinary authority. On reading, it is clear that the Municipal Council have the power to impose any of the penalties so specified under Rule 49 on any of the employees holding the post as specified under sub-section (4) of

Section 94 of the Act of 1961 and in the case of other municipal employees the standing committee shall have the power to impose any of the said penalties on them. Thus, on conjoint reading of the aforesaid provisions, it is apparent that President-in-council can impose the penalty on other municipal employees except of those who were appointed under sub-section (4) of Section 94 of the Act. The petitioner has been appointed under sub-section (4) of Section 94 of the Act, however, President-in-council is having no power to impose the penalty on him. In the opinion of this Court, the resolution Annexure-P/6 dated 18/5/2010 imposing penalty passed by President-in-council and the order communicating the same Annexure-P/5 passed by the Chief Municipal Officer, Municipal Council, Damoh are without jurisdiction and per se illegal therefore, quashed.

7. In view of forgoing, this petition succeeds and is hereby allowed. The resolution Annexure-P/6 dated 18/5/2010 imposing penalty passed by President-in-council and the order communicating the same Annexure-P/5 passed by the Chief Municipal Officer, Damoh are hereby quashed. As the order was passed without having jurisdiction by the President-in-council, however, petitioner is also entitled for the cost of this petition which is quantified Rs. 2,500/-

Petition allowed.

I.L.R. [2012] M.P., 1262

APPELLATE CIVIL

Before Mr. Justice J.K. Maheshwari

F.A. No. 437/2011 (Jabalpur) decided on 10 October, 2011

BHARAT KUMAR PATEL

...Appellant

Vs.

SHRI RAM JANKI HANUMAN MANDIR

...Respondents

A. *Public Trust Act, (M.P.) (30 of 1951), Sections 26(2), 27*
– Power of Court – On receiving rival application/objection for appointment of Managing Trustee and Trustee and proper management of trust property the Registrar Public Trust, made a reference to the Court on three issues – The Court there upon passed the order appointing /nominating the trustees and regarding management of property – Held – Such direction is akin to the provisions of sub section 2(b) of Section 27.

(Para 8)

क. लोक न्यास अधिनियम म.प्र. (1951 का 30), धाराएँ 26(2), 27 — न्यायालय की शक्ति — प्रबंधक न्यासी और न्यासी की नियुक्ति के लिए तथा न्यास संपत्ति के उचित प्रबंधन के लिए विरोधी आवेदन/आक्षेप प्राप्त करने पर रजिस्ट्रार लोक न्यास ने न्यायालय को तीन विवादों पर निर्दिष्ट किया — तत्पश्चात् न्यायालय ने न्यासी की नियुक्ति/नामांकन व संपत्ति के प्रबंधन संबंधी आदेश पारित किये — अभिनिर्धारित — ऐसे निर्देश धारा 27 की उपधारा 2 (बी) के उपबंधों के समान हैं।

B. Public Trust Act, (M.P.) (30 of 1951), Section 27, Land Revenue Code, (20 of 1959), Section 248 – Trespasser of Trust Property – Even the trespasser can not be evicted forcibly without following due process of law – Direction issued by the reference court is modified to the extent that the Registrar Public Trust shall initiate the action against the appellant under Section 248 of the Code and take over the possession of the immovable property by affording an opportunity.
(Para 10)

ख. लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 27, मू राजस्व संहिता (1959 का 20), धारा 248 — न्यास संपत्ति का अतिचारी — अतिचारी को भी विधि की सम्यक प्रक्रिया का अनुपालन किये बिना बलपूर्वक बेदखल नहीं किया जा सकता — निर्देश न्यायालय द्वारा जारी किये गये निर्देश इस सीमा तक परिवर्तित किये गये कि रजिस्ट्रार लोकन्यास अपीलार्थी के विरुद्ध संहिता की धारा 248 के अंतर्गत कार्यवाही आरंभ करेगा और अवसर प्रदान करके अचल संपत्ति का कब्जा ले लेगा।

Cases referred :

AIR 1961 SC 1570, (2010) 8 SCC 383, 2011(3) MPHT 4 (CG), 2003(2) MPLJ 448, 1973 MPLJ 659.

A.K. Jain, for the appellant.

Umesh Tripathi, for the respondent No.1.

S.P. Rai, P.L. for the respondent No.2.

ORDER

J.K. MAHESHWARI, J. – Challenging the order dated 6.7.2010 passed by II Additional District Judge, Jabalpur in M.J.C. No.57/2004 on a reference made by the Registrar, Public Trust, Jabalpur under Section 26(2) of the M.P. Public Trusts Act, 1951 (in short 'the Act'), the appellant has filed this appeal.

2. The facts in brief are that Shri Ram Janki Hanuman Mandir Purena

Kaladumar is a registered Public Trust as per order dated 29.9.1998. The original trustee of the said Trust were Harsh Kumar Pateriya (Managing Trustee), Chandra Prabha Pateriya, Surendra Kumar Choudhary and Rajendra Tiwari. The object of the said Trust is religious, social and educational and to expand all the said fields. The land having area 12.01 hectare situated in village Kaladumar, 2.77 hectare in village Purena and 0.21 hectare in village Jaitana is the immovable property of the Trust along with the shop situated in the premises of Hanuman Mandir. Before the Registrar, Public Trust an application was filed by the Mahant Shyamdas to join his name and to delete the name of Harsh Kumar Pateriya, Chandra Prabha Pateriya, Surendra Kumar Choudhary and Rajendra Tiwari on the ground that some of them have died and some have resigned. It is said that the earlier trustees have appointed Mahant Shyam Das to join as Managing Trustee and Jagat Guru Ramanand Acharya Swami Ram Naresh Acharya, Shri Shyam Sunder Tiwari and Narmada Prasad Pandey as trustees on 12.2.2002 and 19.1.2003 respectively. On such application the notice was issued whereupon the appellant filed objection on the ground that the trustees were not looking after the properties of the trust. He has also submitted an application under Section 26 of the Act for direction to manage or administer the properties of the Trust, however requested till decision on his application, the application filed by Mahant Shyam Das should not be decided. In the application filed before the Registrar, Public Trust by Bharat Kumar Patel, it was contended that trustees are the residents of Jabalpur while the temple and the land is situated in the village area where they are not residing, the Gram Panchayat has also passed a resolution to that effect, however they may be removed. It is also stated that the Gram Panchayat has prepared a Committee and intimation to that effect has been given to the Sub-Registrar, however reference may be made to the Court.

3. On filing objection to the said application, the Managing and Founder Trustee Harsh Kumar Pateriya has submitted the objection and stated that the Trust is performing their duties well and managing the affairs. The application filed by Bharat Kumar Patel is only to grab the property of the Trust. It is also stated that earlier he has filed the application which was rejected on 27.1.2011, however subsequent application on the same ground is not maintainable. It is further stated that the appellant is in illegal possession of the land and getting benefit therefrom without giving the accounts of earning since 1999. It is further stated that the Gram Panchayat is having no right to prepare a Committee to manage the affairs of the Trust. As per the deed of the Trust, the appointment

of the trustees is by the majority of the opinion, however the application may be dismissed. The applications filed by Mahant Shyam Das and Bharat Kumar Patel have been considered simultaneously by the Registrar Public Trust and while holding enquiry he also made a spot inspection on 12.12.2003 and prepared a Panchanama. It was found that since 1999 the land attached to the temple has been given for cultivation by Bharat Patel as Chairman of the Samiti prepared by the Gram Panchayat and getting money from them. The accounts are not being maintained by him. It was also found that in the year 2003 the account of the Trust was opened in Mahakaushal Kshetriya Gramin Bank wherein an amount of Rs.72,474/- was found as balance which is still in the account and Rs.98,000/- is in fixed deposit. As per the villagers, the said Trust was under the control of Chandra Prabha Pateriya up to 1997. It is also alleged that the Pateriya family is not looking forward to the affairs of the Trust, however the appropriate action may be taken.

4. The Registrar Public Trust vide order dated 12.2.2004 made a reference in exercise of the powers under Section 26(2) of the Act on three issues to the District & Sessions Judge whereupon the order impugned has been passed and it was directed that Mahant Shyam Das, Shri Shyam Sunder Tiwari and Narmada Prasad Pandey along with Panch of Gram Panchayat Kaladumar and Purena and the Sarpanch of village Kaladumar and one nominee of the Registrar Public Trust shall be the trustees and accordingly the Registrar shall constitute a Trust and assign all the work to Manage and administer the property of the Trust. It has further been directed that the Registrar Public Trust shall take over all the movable and immovable properties from both the parties and till constitution of the Trust, the Registrar shall manage the affairs. The immovable property be registered in the name of the Trust in Government record. The immovable property shall be kept in the current or saving accounts and the FDR be renewed in the name of the Trust. After assigning the work the Trustees shall make the audit by every year and irregularity, if any, is found then action be taken in accordance to law. It has further been observed that if any of the parties is not co-operating or dis-obeying the order, the action be taken in accordance to law thereby the property of the Trust should not be misutilized.

5. Shri Jain, learned counsel for the appellant contends that the order passed by the learned Additional District Judge while answering the reference is beyond the scope of reference appointing the trustees and also giving right of nomination to the Registrar Public Trust which is in violation to Section 22

of the Act. It is further contended that the direction as issued of election of the trustees while constituting the Trust is contrary to the spirit of the Trust deed, however such directions are unsustainable in law. Lastly it is contended that the property of the Trust cannot be taken away from the appellant under the orders of the Court without following due process of law. It is said that the appellant is in possession of the immovable property which can only be taken by following the procedure as prescribed under Section 248 of the M.P. Land Revenue Code (in short 'the Code'). In support of the said contention, reliance has been placed on a judgment of the Apex Court in the case of *Bishan Das and others Vs. State of Punjab and others*, AIR 1961 SC 1570. It is submitted by him that relying upon the said judgment and also the judgment in the case of *Meghmala and others Vs. G. Narasimha Reddy and others*, (2010) SCC 383, the Chhattisgarh High Court in the case of *Tejram Dewangan Vs. State of C.G. and others*, 2011 (3) M.P. H.T. 4 (CG) issued the directions that the possession on the property of the Trust cannot be taken without following due process of law, however the direction as issued to the Registrar Public Trust to take over the property from the parties is not in conformity to law. On the analogy that the Court cannot direct the Registrar Public Trust to appoint one nominee on his behalf, reliance has been placed on a judgment of this Court in the case of *Shri Deo Janki Raman Mandir Trust, Gora Khurd Vs. State of M.P. and others*, 2003(2) MPLJ 448, it is submitted by him that the appointment of the trustee may be made by the Court and not by the Registrar. In view of the foregoing, prayer is made to allow the appeal and to set aside the order impugned.

6. Per contra Shri Umesh Tripathi, learned counsel appearing on behalf of respondent No.1 contends that the order impugned has rightly been passed in reply to reference made by the Registrar Public Trust. By filing various documents, it is submitted by him that the Registrar Public Trust has acted upon the direction as issued by the Trial Court and the Trust has been constituted as per order dated 18.04.2011 and the Naib Tehsildar has been directed to take over the possession of the properties. As per sub-clause (f) of Section 27 of the Act, the direction of the Court to take over the property is in compliance to the order of the Court, however it cannot be said that the action taken by the S.D.M. through the Naib Tehsildar to take over the possession of the property from the appellant is not in accordance to law. In addition to such argument, he has argued in support of the finding as recorded by the Trial Court.

7. After having heard learned counsel for the parties and on perusal of the record, it is apparent that Shri Shri Ram Janki Hanuman Mandir Public Trust Purena Kaladumar was established on an application submitted by Chandra Prabha Pateriya, Harsh Kumar Pateriya, Surendra Kumar Choudhary and Rajendra Tiwari. The temple and the property was belonging to the Pateriya family and initially it was a private Trust. On their application it was registered as a Public Trust and Harsh Kumar Pateriya became the Managing Trustee and the number of trustees are seven which is required to be filled up with the majority or by common consensus. In the facts of the present case, it is apparent that Mahant Shyam Das who was appointed by Harsh Kumar Pateriya has applied before the Registrar Public Trust to declare him managing trustee along with three others. At the same time, it is further clear that the appellant has applied before the Registrar Public Trust to declare him the trustee and to allow him to manage the affairs of the Trust. On receiving two applications, the Registrar found that the Trust property is not being properly managed or administered, however in exercise of the power under sub-section (2) of Section 26 of the Act reference was made to the District Court to answer three questions. While passing the reference order an enquiry was conducted on the spot by the Registrar Public Trust. In the reference order, it was mentioned that Bharat Kumar Patel made various allegations showing mis-management of the Trust and the trustees are not residents of the local areas. While Mahant Shyam Das stated that Chandra Prabha Pateriya, Harsh Kumar Pateriya, and Rajendra Tiwari have submitted their resignation while Surendra Kumar Choudhary has died. As per the meeting held on 6.1.2002 in place of Surendra Kumar Choudhary, Mahant Shyam Das Premanand Ashram Jilehari Ghat, Jabalpur as appointed as trustee which was approved in the meeting dated 12.5.2002. In the meeting dated 18.8.2002 and 24.11.2002 Acharya Ram Naresh Jagad Guru Ramanandacharya Swami Shri Ram Naresharya, Shri Narmada Prasad Pandey and Shyam Sunder Tiwari were proposed which was approved as per meeting dated 9.1.2003. In the meeting dated 9.3.2002 Harsh Kumar Pateriya submitted his resignation and Mahant Shyam Das has been appointed as a Managing trustee. It was also found that the accounts are not being maintained properly by the Samiti of the chairmanship of Bharat Patel, who is giving the land on lease and earning money therefrom, however the reference was made on three questions which are as under:-

- (1) न्यास की कही जाने वाली भूमि शासकीय अभिलेखों में सर्वराहकार प्रबंधक कलेक्टर दर्ज है इस स्थान पर मठप्रलोक न्यास अधिनियम अंतर्गत

किसी ट्रस्टी का नाम दर्ज करने का कोई प्रावधान नहीं है अतः इस संपत्ति का प्रबंधन किस प्रकार कराया जाय ?

(2) न्यास को सृजन करने वाले सभी ट्रस्टियों द्वारा इस्तिफा एक एक कर दिया एवं उन व्यक्तियों को न्यास का न्यासी नियुक्त कर दिया गया है जो कि न्यास के मंदिर एवं भूमि पर काबिज नहीं है अथवा नियंत्रण नहीं है । दोनों ही पक्षों के पास न्यास की राशि होना पाई जाती है एवं न्यास का संचालन न्यास के पास न होकर अन्य निर्मित अपंजीकृत संस्था के पास होना पाया गया है अतः नवीन न्यास मंडल का नाम न्यास पंजी में किस हैसियत से दर्ज किया जावे?

(3) न्यास की चल अचल संपत्ति एक अपंजीकृत समिति के पास है अतः न्यास की चल अचल संपत्ति का उचित प्रबंधन किस प्रकार किया जावे ।

8. The reference court has recorded the statement of Mahant Shyam Das, Saryu Prasad Sachan, Kashi Giri, Maiyadeen Tiwari, Bharat Patel, Rajendra Prasad, Mahendra Kumar Tiwari, Ramcharan Soni and perused the record filed by both the parties and found that there is mis-management of the Trust and the property is not being administered, however the direction is necessary for the administration of the Public Trust. In furtherance thereto it was also found that the Committee of the Chairmanship of Bharat Patel is improper, however Mahant Shyam Das appointed by the original trustee along with three others who are the residents of local area, namely, Shyamsunder Tiwari and Narmada Prasad Pandey, Panch and Sarpanch of Kaladumar and the Panch of Purena and one one person nominated by the Registrar Public Trust shall be the trustees. The constitution of the Trust by the Court is as per the provisions contained under Section 27 of the Act. Section 27 of the Act specifies the powers of the Court whereby it is clear that the Court may pass an order as it may consider appropriate or as it deems fit for appointment of new trustee. It is further clear that the Court while passing such order may remove any trustee, may pass an order in the interest of the trust looking to its object, the scheme for management of the trust property and to utilize the funds of public by issuing appropriate directions. Thus, in the opinion of this Court the direction issued by the Court to appoint seven trustees which has been executed by the Registrar Public Trust vide order dated 18.4.2011 appointing Mahant Shyam Das Premanand Ashram Jilehari Ghat Jabalpur, Shri Shyam Sunder Tiwari Garha, Jabalpur, Narmada Prasad Pandey, Gorakhpur Jabalpur, Sarpanch Kaladumar Smt. Sushila Bai ex-officio, Panch Kaladumar Smt. Meera Gaund ex officio, Panch of Purena Hanuman Mandir area Smt. Pyari Bai ex officio and nominated person Radheyshyam Choubey by the Registrar Public Trust appears to be in accordance to the spirit of the

said provision and as per the law laid down by this Court in the case of *Shri Deo Janki Raman Mandir Trust, Gora Khurd* (supra). The contention as advanced by Shri Jain that the issuance of the direction to nominate one person by the Registrar Public Trust in the trust is contrary to the spirit of Section 22 of the Act and which may amount to appointment of the trustee by the Registrar in the light of the Division Bench decision of this Court in the case of *Phoolchand Jain and others Vs. Registrar, Public Trusts, Satna, Madhya Pradesh and others*, 1973 MPLJ 659 is of no help to him because Section 22 confers powers to the Registrar to enter on and inspect or cause to be entered on and inspected any property belonging to a Public Trust; to call for or inspect may inspect extract from and proceedings of the trustees of any public trust or any book or account in the possession of or under the control of the trustee; and to call for any return, statement, account or report which he may think fit from the trustee or any person connected with a public trust. Such powers are supervisory for the smooth functioning of the Trust. As per Section 25 the vacancies may be filled up by the Registrar Public Trust not in consistent with the instrument of trust. In the present case, on finding mismanagement of the Trust and having no administration of the property of the Trust, a reference was made by the Registrar thereupon in exercise of the power under Section 27 of the Act, the Court directed for appointment of a trustee whereby a nominee of the Public Trust has been appointed as one of the trustee, such direction is akin to the provisions of sub-section 2(b) of Section 27 of the Act. Thus the argument as advanced by Shri Jain is liable to be repelled.

9. Now coming to the issue regarding taking over of the possession by the Registrar Public Trust in lieu of the direction issued in the order impugned without following the procedure as prescribed under Section 248 of the Code is concerned, it is seen that as per the direction issued by the reference court the Trustees have been appointed and in furtherance to the subsequent direction to take over the property in the light of the judgment of the Apex Court in the case of *Bishan Das and others* (supra), the Apex Court held as thus :

“that the petitioners could not be held to be trespassers in respect of the dharamsala, temple and shops; nor could it be held that the dharamsala, temple and shops belonged to the State, irrespective of the question whether the trust created was of a public or private nature. A trustee even of a public trust can be removed only by procedure known to law. He

cannot be removed by an executive fiat. A person who bona fide puts up constructions on land belonging to others with their permission would not be a trespasser, nor would the buildings so constructed vest in the owner of the land by the application of the maxim *quicquid plantatur solo, solo cedit*. Hence, in respect of the dharamsala, temples and shops the State had not acquired any rights whatsoever merely by reason of their being on the land belonging to the State. If the State thought that the constructions should be removed or that the condition as to resumption of the land should be invoked, it was open to the State to take appropriate legal action for the purpose. Even if the State proceeded on the footing that the trust was a public trust it should have taken appropriate legal action for the removal of the trustee. It is well recognised that a suit under S. 92, Civil Procedure Code, may, be brought against persons in possession of the trust property even if they claim adversely to the trust, that is, claim to be owners of the property, or against persons who deny the validity of the trust. The State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts. The executive action taken in this case by the State and its officers was destructive of the basic principle of the rule of law."

10. In the judgment of the Apex Court in the case of *Meghmala and others (supra)* referring various judgment of the Apex Court it is held that even the trespasser cannot be evicted forcibly without following due process of law. In such circumstances the direction issued by the reference court is modified to the extent that the Registrar Public Trust shall initiate the action against the appellant under Section 248 of the Code and take over the possession of the immovable property by affording an opportunity. The direction issued by the reference court shall be applicable in the case of movable property and it be implemented by the Registrar Public Trust in favour of the newly constituted Trust. After following the procedure as per Section 248 of the Code the possession of the immovable property be taken over and delivered to the newly constituted trustees who may act upon to manage the affairs of the Trust and to administer the property attached to the Trust. The action under Section 248 of the Code shall be expedited by the Registrar Public

Trust and the appellant shall not make unnecessary delay causing mismanagement of the administration of the Trust and its properties during pendency to such proceedings.

11. Accordingly the order passed by the reference court is hereby upheld to the extent indicated herein above to the modification that the possession of the immovable property shall be taken by the Registrar Public Trust in accordance with the provisions contemplated under Section 248 of the M.P. Land Revenue Code expediting the same not later than three months and be delivered to the newly appointed trustees. In the facts and circumstances of the case, there is no order as to costs.

Order accordingly.

I.L.R. [2012] M.P., 1271

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 771/1997 (Jabalpur) decided on 1 March, 2012

BABULAL & ors.

...Appellants

Vs.

RAMKALI BAI & ors.

...Respondents

Hindu Succession Act (30 of 1956), Section 8 – Property owned by a male Hindu – Would devolve in his heir only after his death – ‘J’ was the owner of the suit property, who was alive on date of filing of suit – Plaintiff, the daughter of pre deceased son of ‘J’ can not file a suit for partition. (Para 10)

हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 8 – पुरुष हिन्दू के स्वामित्व की सम्पत्ति – उसके वारिसों को केवल उसकी मृत्यु पश्चात न्यायगत होगी – ‘जे’ वाद सम्पत्ति का स्वामी था, जो वाद प्रस्तुत करने की तिथि को जीवित था – वादी, ‘जे’ के पूर्व मृतक पुत्र की पुत्री विमाजन के लिए वाद प्रस्तुत नहीं कर सकती।

Case referred :

2002(3) MPLJ 576.

Ajay Kumar Jain, for the appellants.

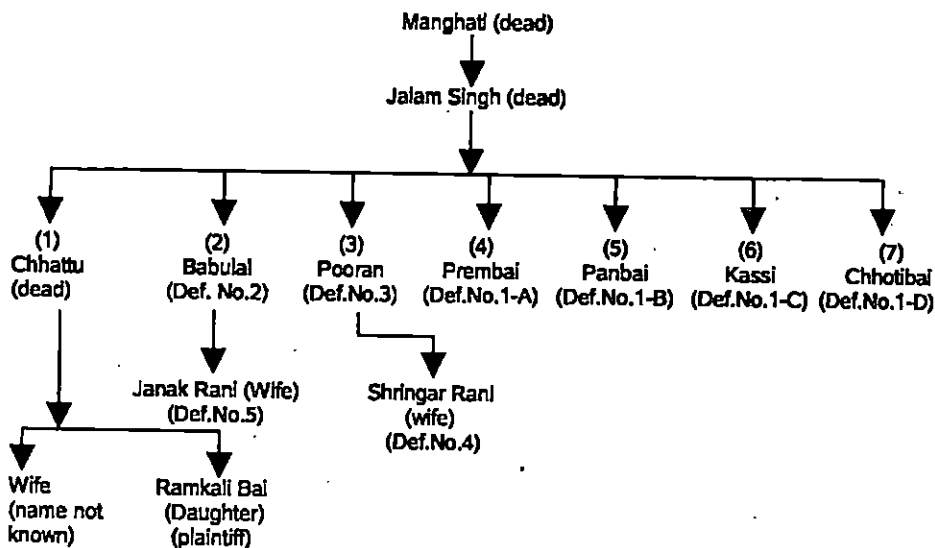
V.K. Upadhyay, for the respondent No.1.

None for the other respondents.

ORDER

A.K. SHRIVASTAVA, J. - This is defendants' second appeal having lost from learned two Courts below.

2. A suit for partition of agricultural land, the description whereof has been mentioned in the plaint and which is the suit property, has been filed by the plaintiff praying that she is having $\frac{1}{3}$ rd share in the suit property and it be delivered to her by effecting partition and accordingly a separate possession of that share be also provided to her. According to the plaintiff, the suit property was owned by Manghat whose son is Jalam (first defendant). After the death of Manghat, first defendant Jalam became the owner of the suit property and because plaintiff Ramkali is the daughter of deceased Chhattu who was the son of Jalam and who died during the lifetime of his father Jalam, she is deriving title from Chhattu and is praying that since in the entire suit property she is having $\frac{1}{3}$ rd share, the property of HUF be devolved and possession of $\frac{1}{3}$ rd share be given to her. The family tree which has been mentioned in para-1 of the plaint is as under:-



3. The first defendant Jalam before his death filed written-statement along with other defendants and denied the plaint averments. According to the

defendants, the suit property is the self-acquired property of first defendant Jalam. During the pendency of the suit Jalam had died and his L.Rs were brought on record.

4. Learned Trial Court framed necessary issues and after recording the evidence of the parties decreed the suit of plaintiff holding that she is entitled to 1/4th share in the suit property and is also entitled for partition and separate possession.

5. The first appeal which was filed by defendants has been dismissed by the impugned judgment and decree.

6. In this manner, this second appeal has been filed by the defendants which was admitted on 3.9.2004 on the following substantial question of law:

'Whether Ramkali Bai is entitled to get 1/4th share of essential (*sick*, indeed, it should be "ancestral") property of Manghati?'

7. The contention of Shri Ajay Kumar Jain, learned counsel for the appellants is that looking to the admission of the plaintiff in her plaint that suit property was of Jalam, hence, during the lifetime of first defendant Jalam, the suit for partition could not have been filed by Chhattu (father of plaintiff) if he would have been alive and therefore, the plaintiff who stepped into the shoes of her father also cannot file the suit for partition. It has been further contended by him that irrespective of the fact that first defendant Jalam died during pendency of the suit, since the suit itself was premature and not maintainable during his lifetime, therefore, it ought to have been dismissed.

8. On the other hand, Shri V.K. Upadhyay, learned counsel for the plaintiff-respondent No.1 argued in support of the impugned judgment and submitted that learned two Courts below have arrived at a finding that the suit property was ancestral property and if that would be the position, no error has been committed by learned two Courts below decreeing the suit of plaintiff upto the extent of 1/4th share. Hence, it has been prayed that this appeal be dismissed.

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

Regarding Substantial Question of Law framed:

10. On bare perusal of the plaint averments it is gathered that Manghat was the owner of the suit property and after his death it vested in first defendant Jalam. It is also not in dispute that Jalam was alive when the suit was filed and he was arrayed as first defendant. Since as per plaintiffs own showing Jalam was the owner of the suit property, according to me, in terms of Section 8 of the Hindu Succession Act, 1956 (in brevity "the Act") his property would devolve in his heir only after his death. Hence, according to me, when Jalam was alive, his son Chhattu (deceased-father of plaintiff) during his lifetime could not have filed the suit for partition, if he would have been alive, and hence, the plaintiff also cannot file suit for partition, because she is stepping into the shoes of her deceased-father Chhattu. After the commencement of the Act, under Section 8 thereof the property of Hindu male would devolve in his heir and they can claim partition only after the death of male Hindu and not during his lifetime and therefore, according to me, during the lifetime of first defendant Jalam the property which was owned by him could not have been partitioned. In this context, I may profitably place reliance on the Single Bench decision of this Court, *Chandrakanta and another v. Ashok Kumar and others*, 2002 (3) MPLJ 576.

11. The substantial question of law is, thus, answered that plaintiff Ramkali Bai was not entitled to get 1/4th share of the property in dispute of Jalam during his lifetime.

12. Resultantly, this appeal succeeds and is allowed. The impugned judgment and decree passed by learned two Courts below is set aside and the suit of plaintiff is hereby dismissed with no order as to costs throughout. However, the plaintiff-respondent No.1 Ramkali Bai shall now be free to file suit for partition because during the pendency of the suit Jalam had died. If such a suit is filed, it may be decided on its own merit determining her share.

Appeal allowed.

I.L.R. [2012] M.P., 1275

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A.No. 1664/2008 (Jabalpur) decided on 29 March, 2012

ASHISH KUMAR

...Appellant

Vs.

SMT. RUKMANI DEVI & ors:

...Respondents

A. Specific Relief Act (47 of 1963), Sections 16 & 20 – Readiness and Willingness – Agreement containing a stipulation that to get the sale deed executed it is necessary that plaintiff should obtain permission from the Gram Panchayat for construction and should raise some construction – The plaintiff neither obtained any permission from the Gram Panchayat for construction nor raised any construction on the plot – Nearly after a period of three years from the date of execution of the agreement, the plaintiff for the first time sent a notice – No averment in plaint that plaintiff made any effort for execution of the sale-deed from the date of execution of the agreement till notice was sent – In plaint, the plaintiff has merely stated that he is ready and willing to deposit the balance of amount of sale consideration in the CCD as and when the Court passes an order in this regard – Held – Plaintiff has neither pleaded his readiness and willingness to perform his part of the contract nor has proved the same – Merely because maximum part of the sale consideration has been paid by the plaintiff, it can not be inferred that plaintiff is ready and willing to perform his part of the contract.

(Para 10)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धाराएँ 16 व 20 – तैयारी और रजामंदी – अनुबंध में यह शर्त समाविष्ट कि विक्रय विलेख निष्पादित कराने के लिये आवश्यक है कि वादी को ग्राम पंचायत से निर्माण हेतु अनुमति प्राप्त करनी चाहिए और कुछ निर्माण खड़ा करना चाहिए – वादी ने न तो ग्राम पंचायत से निर्माण की कोई अनुमति अभिप्राप्त की और न ही भूखंड पर कोई निर्माण खड़ा किया – अनुबंध के निष्पादन की तिथि से करीब तीन वर्ष की अवधि के पश्चात वादी ने प्रथम बार नोटिस भेजा – वाद पत्र में कोई प्रकथन नहीं कि अनुबंध के निष्पादन की तिथि से नोटिस भेजने तक विक्रय विलेख के निष्पादन हेतु वादी ने कोई प्रयत्न किया – वाद पत्र में वादी ने मात्र यह अभिकथन किया कि वह सीसीडी में विक्रय प्रतिफल की बकाया रकम जमा करने के लिये तैयार व रजामंद है, जब कभी न्यायालय इस संबंध में आदेश पारित करेगा – अभिनिर्धारित – वादी ने न तो

संविदा का अपना भाग पूरा करने के लिए तैयारी व रजामंदी का अभिवचन दिया और न ही उसे साबित किया – मात्र इसलिए कि वादी द्वारा विक्रय प्रतिफल का अधिकतम भाग अदा किया गया है, यह निष्कर्ष नहीं निकाला जा सकता कि वादी संविदा का अपना भाग पूरा करने के लिये तैयार व रजामंद है।

B. Civil Procedure Code (5 of 1908), Section 100 – Second Appeal – High Court can not interfere with the concurrent finding of fact until or unless the same is perverse or contrary to material on record – High Court in exercise of power under Section 100 of the Code can not re-appreciate evidence. (Para-12)

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – उच्च न्यायालय तथ्य के समवर्ती निष्कर्ष में हस्तक्षेप नहीं कर सकता जब तक कि वह विकृत अथवा अभिलेख पर उपलब्ध सामग्री के विपरीत नहीं है – उच्च न्यायालय संहिता की धारा 100 के अंतर्गत शक्ति के प्रयोग में साक्ष्य का पुनः अवलोकन नहीं कर सकता।

Cases referred :

(2005) 3 SCC 342, (2000) 6 SCC 402, (2000) 6 SCC 420, (1995) 2 SCC 31, 1993 MPLJ 889, AIR 1997 P & H 260, AIR 1985 ORISSA 84, AIR 2011 PATNA 89, AIR 1995 SC 945, AIR 2000 SC 860, AIR 1928 PC 208, (2011) 1 SCC 657, (2010) 7 SCC 717, (2008) 12 SCC 145, (2006) 11 SCC 587, (2007) 1 SCC 546, (2004) 5 SCC 140, (2004) 5 SCC 762, (2009) 5 SCC 264, (2000) 7 SCC 409, (1999) 3 SCC 722, (2002) 1 SCC 134, (2008) 3 SCC 120, (2007) 12 SCC 774, (2001) 4 SCC 262, (2001) 7 SCC 189, (2010) 11 SCC 483.

A.K. Jain, for the appellant.

B.M. Dwivedi, for the respondent No.1.

V.K. Shrivastava, 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 plaintiff. This Court vide order dated 01.5.2009 while admitting the appeal had formulated following substantial questions of law:-

“(i) *Whether the Courts below erred in dismissing the suit against the evidence and the agreement to sale Ex.P/1 on this point that the plaintiff was not ready and willing to perform part of contract as provided under Section*

16(1)(c) of the Specific Relief Act even though he had paid the maximum part of consideration?

(ii) Whether the Courts below erred in accepting the plea of bonafide purchasers in respect of defendant nos. 2 to 4 against the evidence of defendants?"

2. Facts giving rise to filing of the appeal, briefly stated, are that the plaintiff filed a suit seeking relief of specific performance of contract as well as permanent injunction on the ground that on 06.1.1998 the defendant No.1 entered into an agreement to sell the suit plot admeasuring 4271 sq.ft. for a consideration of Rs.15,000/-. At the time of execution of the agreement a sum of Rs.13,000/- was paid. It was agreed between the plaintiff and defendant No.1 that on receipt of balance amount, for which no time limit was prescribed, the defendant No.1 would execute the sale-deed in favour of the plaintiff. It is the case of the plaintiff that under the agreement, the possession of the plot in question was handed over to the plaintiff. However, on 15.1.2001 the defendant No.2 informed the plaintiff that the construction which has been raised by him on the plot in question is unauthorized. Thereupon the plaintiff informed him about the agreement dated 06.1.1998. The plaintiff got a notice published on 21.1.2001 in daily 'Dainik Bhaskar' and sent a telegraphic notice to defendant No.1 on 21.1.2001. Thereafter, the plaintiff filed the suit seeking relief of specific performance of contract and permanent injunction restraining the defendant No.1 from alienating the suit plot.

3. The defendant No.1 filed written statement in which, inter alia, it was pleaded that agreement was executed by way of security for loan. It was further pleaded that plaintiff was never placed in possession of the suit plot and the possession of the suit plot continued with the defendant No.1. The defendant No.1 executed the sale deeds on 16.1.2001 and 17.1.2001 in favour of defendants No.2 to 4 had handed-over possession to them. It was further pleaded that market value of the suit plot was Rs.30/- per sq.ft. and, therefore, the question of selling the same for Rs.15,000/- does not arise. It was further held that defendant No.1 sold the plot for a consideration of Rs.1.28 lacs. It was further pleaded that the suit is barred by limitation. The defendants No.2 to 4 filed their written statement in which, inter alia, it was pleaded that defendants No.2 to 4 had made an enquiry and found out that defendant No.1 is the owner. They got the plot in question demarcated on 13.1.2001. The defendants No.2 to 4 are bonafide purchasers for valuable

consideration without any notice of previous agreement.

4. The trial Court vide judgment and decree dated 17.8.2006, inter alia, held that in the sale deed (Exhibit-P-1) no time limit was prescribed for payment of remaining sale consideration. It was further held that execution of the agreement (Exhibit-P-1) was duly proved. However, the defendant No.1 failed to prove that agreement was executed by way of security for loan. The trial Court further held that there is no plea with regard to readiness and willingness of the plaintiff to perform his part of the contract in the plaint. It was also held that plaintiff after execution of the agreement did not make any effort to obtain permission from the Gram Panchayat and only sent a notice (Exhibit-P-2) on 21.1.2001. Accordingly, it was held that the plaintiff failed to prove his readiness and willingness to perform his part of the contract. It was also held that there is no material on record to show that defendants No.2 to 4 had notice of previous transaction. The trial Court further held that the plaintiffs are bonafide purchasers for valuable consideration and that the possession of the plot in question was not handed over to the plaintiff. Accordingly, the suit was dismissed.

5. Being aggrieved by the decree passed by the trial Court the plaintiff preferred an appeal. The respondent No.1 filed cross objection with regard to findings on issues No.1 & 7. The lower appellate Court vide judgment and decree dated 31.10.2008, inter alia, held that agreement was not executed by way of security for the loan. It was further held that from the date of execution of the agreement dated 06.1.1998, on 21.1.2001 i.e. the date when the plaintiff sent notice, there is no documentary evidence on record to suggest that plaintiff ever asked the defendant No.1 to execute the sale deed. Accordingly, it was held that plaintiff has failed to prove his readiness and willingness. The lower appellate Court further held that plaintiff is entitled to refund of Rs.13,000/- alongwith interest at the rate of 6% p.a. Accordingly, the decree passed by the trial Court was modified. The lower appellate Court, however, affirmed the findings of the trial Court on Issues No.1 & 7 and dismissed the cross objection filed by the defendant No.1.

6. Shri A.K.Jain, learned counsel for the appellant submitted that in the instant case since the defendant no.1 has taken a stand that agreement is executed by way of security for the loan, therefore, he is not entitled to take advantage of provisions of Specific Relief Act, 1963. It was further submitted that under the agreement the plaintiff had paid the substantial amount i.e. a

sum of Rs.13,000/- out of total sale consideration of Rs.15,000/-, therefore, the finding recorded by the courts below that plaintiff is not ready and willing to perform his part of contract is perverse. It was further submitted recital contained in the agreement does not prescribe time for making payment of sale consideration and, therefore, time was not the essence of the contract. It was further submitted that subsequent purchaser cannot raise a plea that plaintiff has failed to prove his readiness and willingness. While inviting the attention of this Court to the statement of subsequent purchasers, namely, Ms.Lalita and Surendra it was submitted that defendants did not make any inquiry prior to execution of the sale deed with regard to previous agreement with the plaintiff. The courts below, therefore, grossly erred in holding that defendants No.2 to 4 were bonafide purchasers for valuable consideration without notice of the previous transaction. In support of his submissions, learned counsel for the appellant has placed reliance on the decisions reported in (2005) 3 SCC 342, *R.K.Mohammed Ubaidullah and others vs. Hajee C.Abdul Wahad (D) by L.Rs. and others*, (2000) 6 SCC 402, *Motilal Jain vs. Ramdasi Devi (Smt.) and others*, (2000) 6 SCC 420, *Jugraj Singh and another vs. Labh Singh and others*, (1995) 2 SCC 31, 1993 MPLJ 889 and *Nirmal Singh (deceased by L.Rs.) and others vs. Smt.Gejo d/o Mihan Singh and another*, AIR 1997 P & H 260.

7. On the other hand learned counsel for the respondent No.1 while inviting attention of this Court to the agreement (Exhibit-P-1) submitted that for execution of the sale deed it was necessary to obtain permission from the Gram Panchayat. However, the plaintiff failed to even obtain permission from the Gram Panchayat and did not take steps nearly for a period of three years. The notice in the newspaper as well as telegraphic notice were sent to defendant No.1 after execution of the sale deed. It was further submitted that concurrent findings of fact have been recorded against the appellant by the courts below that he has failed to prove his readiness and willingness to perform his part of the contract. Accordingly, it was urged that plaintiff is not entitled to decree for specific performance of contract. In support of his submissions learned counsel has placed reliance on the decisions reported in AIR 1985 Orissa 84, *Smt.Sundari Devi vs. Deo Narayan Prasad*, AIR 2011 Patna 89, *Jugraj Singh and another vs. Labh Singh and others*, AIR 1995 SC 945 and *Ram Awadh (dead) by L.Rs. And others vs. Achhaibar Dubey and another*, AIR 2000 SC 860.

8. Learned counsel for respondents No.2 to 4 submitted that defendants

No.2 to 4 are bonafide purchasers for valuable consideration without any previous transaction and finding in this regard has been recorded by the courts below on meticulous appreciation of evidence and, therefore, the same does not call for any interference by this Court in exercise of jurisdiction under Section 100 of the Code of Civil Procedure.

9. I have considered the submissions made on both sides. In *Ardeshir H.Mama vs. Flora Sassoon*, AIR 1928 Privy Council 208 it has been held that where the plaintiff claims a decree for specific performance of contract it is necessary for him to prove his readiness and willingness to perform his part of contract. Section 16(c) of the Specific Relief Act, 1963 provides that plaintiff must plead and prove that he is ready and willing to perform his part of the contract. The continuous readiness and willingness at all stages from the date of agreement till the date of filing of the suit need to be proved. [See: *Raj Kishore (Dead) by L.Rs. vs. Prem Singh and others*, (2011) 1 SCC 657, *Laxman Tatyaba Kankate and another vs. Taramati Harishchandra Dhatrak*, (2010) 7 SCC 717, *Jugraj Singh* (supra). It is well settled in law that by virtue of section 20 of Specific Relief Act the relief of specific performance of contract lies in the discretion of the Court and the Court is not bound to grant decree of specific performance of contract merely because it is lawful to do so. [See: *Taramati Harishchandra Dhatrak* (supra) and (2008) 12 SCC 145].

10. In the instant case the agreement (Exhibit-P-1) was executed on 06.1.1998. The agreement contained a stipulation that to get the sale deed executed it is necessary that plaintiff should obtain permission from the Gram Panchayat for construction and should raise some construction. The plaintiff neither obtained any permission from the Gram Panchayat for construction nor raised any construction on the plot. Nearly after a period of three years from the date of execution of the agreement, the plaintiff for the first time sent a notice on 21.1.2001. There is no averment in the plaint that plaintiff made any effort for execution of the sale-deed from the date of execution of the agreement till notice Exhibit-P-2 was sent. In paragraph 9 of the plaint, the plaintiff has merely stated that he is ready and willing to deposit the balance of amount of sale consideration i.e. Rs.2000/- in the CCD as and when the Court passes an order in this regard. Thus, the plaintiff has neither pleaded his readiness and willingness to perform his part of the contract nor has proved the same. Merely because maximum part of the sale consideration has been paid by the plaintiff, it cannot be inferred that plaintiff is ready and willing to

perform his part of the contract. For the aforementioned reasons, first substantial question of law is answered in the negative and against the appellant.

11. Both the courts have concurrently recorded a finding that the defendants No.2 to 4 are bonafide purchasers for valuation consideration. Patwari, namely, Krishna Manoranjan Shrivastava has been examined as DW.3. In his statement, the aforesaid witness had stated that he has carried out demarcation on 13.1.2001. It has further been stated by him that he found the defendant No.1 to be in possession of the suit plot and suit plot was vacant. It has also been stated by him that possession of the defendant No.1 was recorded in the revenue records. The respondent No.4, Smt.Lalita, who has been examined as defendant witness in paragraph 6 of her statement had stated that her son made enquiry from Patwari and it was found that defendant No.1 is the owner and in possession of the suit plot. It has further been stated that demarcation was also carried out. Similarly, the respondent No.2 who has been examined as defendant witness has stated in paragraph 5 as well as 8 of his statement that he had made enquiry on the spot and found out that defendant No.1 is the owner and is in possession of the suit plot. It has further been stated by him that he got the suit land demarcated. Even otherwise, the question whether or not the person is bonafide purchaser for valuable consideration is a question of fact.

12. jurisdiction of this Court to interfere with the findings of fact under Section 100 of CPC is limited to the case where the finding is either perverse or based on no evidence. This Court cannot interfere with the concurrent finding of fact until or unless the same is perverse or contrary to material on record. [See: *Sugani (mst.) v. Rameshwar Das and another*, (2006) 11 SCC 587, *Gurdev Kaur v. Kaki*, (2007) 1 SCC 546, *Praksah Kumar V.State of Gujrat*, (2004) 5 SCC 140, *Thiagarajan and Others v. Sri Venugopalaswamy B. Koil and Others*, (2004) 5 SCC 762 and *Narayanan Rajendran and another v. Lekshmy Sarojini and Others*, (2009) 5 SCC 264] It is equally well settled that this Court in exercise of power under Section 100 of the Code of Civil Procedure cannot re-appreciate evidence. [See: *Thimmaiah and Others v. Ningamma and Another*, (2000) 7 SCC 409] It is equally well settled that where on appreciation of evidence, even if two views are possible, this Court in exercise of powers under Section 100 of the Code of Civil Procedure would not interfere. [See: *Kondiba Dagadu Kadam v. Savitribai Sopan Guzar and others*, (1999) 3 SCC 722 and *Veerayee Ammal v. Seeni Ammal*, (2002) 1 SCC 134]. It has further been

held by the Supreme Court that interference with a question of fact is not permissible. [See: *Basayya I. Mathad v. Rudrayya S. Mathad and Others*, (2008) 3 SCC 120] In *S.Appadurai Nadar & another v. A. Chokalinga Nadar and Another*, (2007) 12 SCC 774 it has been held by the Supreme Court that in exercise of power under Section 100 the Courts should be slow in reversing the finding of fact. The finding of fact even if erroneous would not be disturbed in second appeal unless the finding is shown to be perverse and based on surmises and conjectures. [See: *Kulwant Kaur and others v. Gurdial Singh Mann and others*, (2001) 4 SCC 262, *Hafazat Hussain v. Abdul Majeed and others*, (2001) 7 SCC 189 and *Bharath Matha v. R. Vijay Rengandathan*, (2010) 11 SCC 483].

13. The finding recorded by the trial Court as well as lower appellate Court that defendants no. 2 to 4 are bonafide purchases for valuable consideration without notice of precious transaction, by no stretch of imagination, can either be said to be perverse or based on no evidence. This Court in exercise of powers under section 100 of the Code of Civil Procedure cannot re-appreciate the evidence. For the aforementioned reasons, the second substantial question of law is also answered in the negative and against the appellant.

14, In the result, the appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2012] M.P., 1282

APPELLATE CIVIL

Before Mr. Justice Sheel Nagu

S.A. No. 568/2009 (Gwalior) decided on 11 April, 2012

NAGAR PALIKA PARISHAD MIHONA & anr.
Vs.

...Appellants

RAM NATH & anr.

....Respondents

Municipalities Act, M.P. (37 of 1961), Section 319(1) – Notice under – Suit of the plaintiff was for declaration of title and perpetual injunction which falls squarely within the type of suit contemplated under Section 38 of Specific Relief Act 1963 – The bar contained in Section 319(1) has no application – Appeal dismissed. (Para 9)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 319(1) – के अंतर्गत

नोटिस - वादी का वाद-हक की घोषणा एवं स्थाई व्यादेश हेतु था जो पूर्णतः विनिर्दिष्ट अनुतोष अधिनियम, 1963 की धारा 38 के अंतर्गत परिकल्पित वाद के प्रकार में आता है - धारा 319(1) में अंतर्विष्ट वर्जन की कोई उपयोग्यता नहीं - अपील खारिज।

Cases referred :

2006(1) MPHT 276, 1973 J LJ SN 13, 1991 MPLJ, 933, 2001(4) MPHT 269.

Sangam Jain, for the appellants.

Aniket Naik, for the respondents.

J U D G M E N T

SHEEL NAGU, J. - This second appeal under Section 100 of CPC assails the concurrent findings of both the courts below whereby the suit filed for declaration of ancestral title and possession over the suit land with permanent injunction restraining the defendants from interfering with the easementary rights of the plaintiff, has been allowed and the appeal filed against which has been rejected.

2. The sole contention raised by the counsel for the Municipal Council, Mihona, District Bhind is that the trial court and the first appellate court failed to see that the suit was barred by Section 319 (1) of Municipalities Act, 1961 (Act of 1961 for brevity) on account of failure of the plaintiff to give notice of two months as provided therein. In support of his contention learned counsel for appellants Municipal Council has relied upon the decision of Division Bench in the case of *Municipality Vs. Gas Authority of India Limited and other* 2006(1) MPHT 276.

3. Per contra learned counsel for respondent/ plaintiff has contended that the bar contained in Section 319(1) of the Act, 1961 cannot come in the way of plaintiff to maintain his suit as the said bar comes into operation only when the suit in question is for something done or purported to be done under the Act of 1961 and not otherwise. The further contention of the learned counsel for the plaintiff/ respondent herein is that suit in question was saved by the provision of sub-Section (3) of Section 319 of the Act of 1961 from the rigor of bar contained in Section 319(1) of the Act of 1961. In support of this contention reliance has been placed on the decisions in the cases of *Nagar Palika Parishad, Mandsaur Vs. Sarva*

Daman 1973 J.L.J. SN. 13, *Buddiprakash Sharma Vs. Nagar Palika, Jaura* 1991 MPLJ, 933 & *Hari Ram Vs. Nagar Palika Prashashak* 2001(4) MPHT 269.

4. Bare perusal of the provision of Section 319(1) of the Act of 1961 makes it clear that the prohibitive implication contained therein can be invoked only when the suit in question seeks a remedy arising from the Act of 1961.

5. In the instant case prayer in the plaint indicates that the suit was instituted seeking a decree for declaration of ownership and possession of property and for permanent injunction against the defendants.

6. The Act of 1961 does not contemplate the Municipal Council or any officer or servant of the Council to grant or refuse the prayer as sought in the plaint by the plaintiff. Thus the grant or refusal of the declaration of title, possession and permanent injunction in respect of a particular land is not contemplated as an act which can be done or purported to be done under the Act of 1961 by the council or any of the authority constituted under the Act.

7. It is further relevant to consider the submission of the counsel of the plaintiff/ respondent herein regarding the connotation of sub-Section 319 of the Act of 1961.

8. Sub-Section (3) of Section 319 is an exception to the extent of excluding the bar in Section 319(1) in cases of suits instituted under Section 54 of the Specific Relief Act, 1877 which is equivalent to Section 38 of the Specific Relief Act, 1963 (Act of 1963 for brevity). Section 38 of the Act of 1963 pertains to suit for perpetual injunction.

9. The suit of the plaintiff was for declaration of title and perpetual injunction which falls squarely within the type of suit contemplated under Section 38 for declaratory decree. Thus the nature of suit of the plaintiff being inter alia of perpetual injunction absolved the plaintiff from the requirement of Section 319(1) of the Act, 1961 and therefore, the bar contained in Section 319(1) has no application.

10. The statutory provision contained in Section 319(1) of the Act, 1961 being crystal clear and in favour of the plaintiff/ respondent herein, this court deems it appropriate to consider the Division Bench Decision in the case of *Municipality Vs. Gas Authority of India Limited and other* 2006(1) MPHT 276 on which heavy reliance is placed by the counsel for appellant.

11. The said Division Bench decision pertains to a suit for declaration and perpetual injunction in respect of recovery of "external development fee" filed by the Gas Authority of India Limited (GAIL) against the Director, Town and Country Planning and SADA, Raghogarh. Though this case holds in paragraph 19 that serving of statutory notice under Section 319 is mandatory, non compliance of which renders the suit not maintainable; but the reading of the said Division Bench decision elicits that implication of provision of Section 34 of the Specific Relief Act, 1963 and the exclusionary clause under Section 319(3) of Act of 1961 and also the fact that the suit of permanent injunction not being a suit contemplated under Section 319(1) of Act of 1961 to invite the rigor of the bar contained therein, have neither been placed for consideration and therefore nor considered. The Division Bench in the said case was analysing the implication of the bar contained in Section 319 of the Act of 1961 vis-a-vis the provision of Section 80 of CPC. Accordingly, with utmost humility at my command I hold that the said Division Bench decision in the case of *Municipality Vs. Gas Authority of India Limited and other* 2006(1) MPHT 276(supra) is distinguishable on facts and therefore, is of no avail to the appellant herein.

12. The decision cited by learned counsel for the plaintiff/ respondent herein in the case of *Nagar Palika Parishad, Mandsaur Vs. Sarva Daman* 1973 JLSN. 13(supra) squarely applies to the fact situation prevailing in the instant case. Moreover, the view taken by this court in the cases of *Buddiprakash Sharma Vs. Nagar Palika, Jaura* 1991 MPLJ, 933 & *Hari Ram Vs. Nagar Palika Prashashak* 2001(4) MPHT 269 (supra) also supports the case of the plaintiff/ respondent herein.

13. In view of the above factual and legal position, this court is of the view that concurrent findings of both the courts below in respect of the above said legal position do not invite any interference and therefore in this appeal no substantial question of law including the ones proposed by the appellants arises for consideration.

14. Consequently this second appeal deserves to be and is therefore, dismissed in limine.

Appeal dismissed.

I.L.R. [2012] M.P., 1286

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 616/1995 (Jabalpur) decided on 26 April, 2012

VIRENDRA KUMAR DWIVEDI & anr.

...Appellants

Vs.

TIRATH PRASAD & ors.

...Respondents

Hindu Succession Act (30 of 1956), Section 8 – Rewa Revenue and Tenancy Code 1935, Section 48(1) and The Hindu Law of Inheritance (amendment) Act 1929, Section 2 – Succession – Male Hindu died in 1946 leaving behind real sister (mother of defendant No.1) and cousins (plaintiffs) – Held – Neither the plaintiffs nor the defendant No. 1 are entitled to succeed to the property of the deceased – In view of the provisions of Section 2 of the Act of 1929, the property of the deceased would devolve on his sister, namely, mother of the defendant No.1.

(Paras 8 & 9)

हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 8 – रीवा राजस्व और किरायेदारी संहिता 1935, धारा 48(1) व हिन्दू विरासत की विधि (संशोधन) अधिनियम 1929, धारा 2 – उत्तराधिकार – पुरुष हिन्दू की मृत्यु 1946 में हुई और वह अपने पीछे सगी बहिन (प्रतिवादी क्रं. 1 की माँ) व चचेरे/ममेरे भाई बहिन (वादीगण) को छोड़ गया – अभिनिर्धारित – न तो वादीगण और न ही प्रतिवादी क्रं. 1 मृतक की सम्पत्ति के उत्तराधिकार के लिए हकदार हैं – अधिनियम 1929 की धारा 2 के उपबंधों को दृष्टिगत रखते हुए, मृतक की सम्पत्ति उसकी बहिन अर्थात् प्रतिवादी क्रं. 1 की माँ को मिलेगी।

G.S. Baghel, for the appellants.

None for the respondents.

J U D G M E N T

ALOK ARADHE, J. - This appeal has been preferred by the plaintiffs. This Court vide order dated 28.11.1995 while admitting the appeal had framed the following substantial questions of law:-

“(1) Whether the learned first appellate Court was right in dismissing the suit despite holding that Shobhnath died prior to 1956, i.e. before coming into force of the Hindu

Succession Act?

(2) Whether under the facts and in the circumstances of the case, the first appellate Court was justified in holding that the sister of Shobhnath would succeed to the property of the deceased after his death?"

2. Facts giving rise to filing of the appeal, briefly stated, are that the plaintiff filed the suit seeking relief of declaration and permanent injunction. The claim in the suit was based on the ground that plaintiff No.1 & 2's father was the owner of the half share in the suit lands situated at village Dudatola, District Rewa whereas the remaining half share belonged to Shobhnath. After the death of Shobhnath in the year 1946, his share in the lands devolved on the plaintiffs. The plaintiffs got their names mutated in the revenue records vide order dated 30.12.1967. Thereafter, the deceased Shobhnath's sister raised objection. Thereupon, on 07.12.1981 an order of mutation was passed in favour of defendant No.1, namely, the son of sister of Shobhnath. The mother of the defendant No.1, however, without any authority sold the share of Shobhnath in the suit lands to defendants No.2 & 3 vide registered sale deed dated 29.8.1970 and 27.8.1974. It was further pleaded in the plaint that defendants no.2 & 3 got their names mutated in the revenue records and initiated proceedings for partition under section 178 of the M.P. Land Revenue Code. . It was also pleaded that the plaintiffs were in possession of the suit lands after the death of deceased Shobhnath. The defendants No.2 & 3 were never in possession of the suit lands. Accordingly, the suit seeking the reliefs as aforesaid was filed and in the alternative the relief of possession was sought.

3. The defendants filed written statement in which it was, inter alia, pleaded that the deceased Shobhnath was not the member of joint family. It was further pleaded that partition between the father of the plaintiff and deceased Shobhnath had taken place prior to 1921. Shobhnath died in the year 1960 and was in separate cultivating possession of the land belonging to him. After his death the suit lands devolved on his sister. It was also pleaded that the order of mutation was passed in favour of the defendant No.1 on 07.12.1981. The suit lands have been sold by mother of the defendant No.1 in favour of defendants No.2 & 3. The plaintiffs are neither the owners nor in possession of the suit lands.

4. The trial Court vide judgment and decree dated 08.8.1988, inter alia, held that the plaintiffs' father and deceased Shobhnath were not members of

joint family. It was further held that the deceased Shobhnath died sometime in the year 1946 i.e. prior to commencement of Hindu Succession Act, 1956 and after the death of the deceased Shobhnath the suit lands devolved on the plaintiffs. The order of mutation in favour of defendant No.1 was held to be illegal. It was further held that mother of the defendant No.1 had neither any authority to execute the sale deed in favour of defendants No.2 & 3 nor she had handed over the possession of the suit lands to defendants No.2 & 3. It was also held that the order of mutation dated 31.8.1975 was not passed with the consent of the plaintiffs. Accordingly, the suit was decreed.

5. Being aggrieved by the aforesaid decree the defendant preferred an appeal. The lower appellate Court vide judgment and decree dated 21.7.1995 by placing reliance on the entries in Khasras of the year 1954-55 as well as on the basis of oral evidence on record, inter alia, held that Shobhnath had died prior to 1956 i.e. in 1946. It was further that in view of Section 48(1) of Rewa Land Revenue and Tenancy Code, 1935 (for short "Code of 1935") the suit lands did not devolve on the plaintiffs as the same would devolve only on the real brothers. The plaintiff No.1 was the cousin of Shobhnath and not the real brother. On the basis of entries in Exhibits-D-13 to D-25 i.e. revenue records of 1975-76 onwards, it was further held that the defendants No.2 & 3 are in possession of the suit lands. Accordingly, the decree passed by the trial Court was reversed and the suit filed by the plaintiff was dismissed.

6. Shri G.S.Baghel, learned counsel for the appellant submitted that the first appellate court grossly erred in dismissing the suit despite holding that Shobhnath died prior to commencement of the Hindu Succession Act, i.e. in the year 1946. It was further submitted that under section 48(1) of the Code of 1935 the plaintiffs were entitled to succeed the property of deceased Shobhnath, therefore, finding recorded by the lower appellate Court that sister of Shobhnath would succeed to the property of deceased after his death is perverse.

7. I have considered the submission made by learned counsel for the appellant and have perused the record. Section 48(1) of Code of 1935 reads as under:-

" 48(1) When a pattereddar tenant dies, his interest in the holding shall devolve in accordance with the order of succession given below:-

ORDER OF SUCCESSION

- (a) *Male lineal descendants in the male line of descent.*
- (b) *Widow till her death or re-marriage.*
- (c) *Father.*
- (d) *Mother being widow.*
- (e) *Daughter-in-law, being widow and dependent on the deceased tenant at the time of his death.*
- (f) *Brother, being a son of the same father as the deceased.*
- (g) *Brother's son.*
- (k) *Daughter's son.*
- (I) *Brother's son's son."*

8. From the Order of Succession which has been mentioned in Section 48(1) of the Code of 1935 it is apparent that neither the plaintiffs nor the defendant No.1 are entitled to succeed to the property of the deceased Shobhnath. Therefore, the devolution of the property of male Hindu dying intestate would devolve as per the law which was in force prior to commencement of Hindu Succession Act, 1956. The Hindu Law of Inheritance (Amendment) Act, 1929 (for short the 'Act') came into force on 21.2.1929. The aforesaid Act was enacted to alter the order in which certain heirs of a Hindu male dying intestate were entitled to succeed to his estate. Section 2 of the Act deals with the order of succession of certain heirs, which reads as under:-

"2. A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's father

Provided that a sister's son shall not include a son adopted after the sister's death."

9. Thus, in view of section 2 of the aforesaid Act it is son's daughter, daughter's daughter and the sister ranked as heir in all parts of India where

Miktakshra law prevails. Therefore, in view of the provisions of section 2 of the Act the property of the deceased-Shobhnath would devolve on his sister, namely, mother of the defendant No.1. Accordingly, the first and second substantial questions of law are answered.

10. In the result, the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

I.L.R. [2012] M.P., 1290

APPELLATE CRIMINAL

Before Mr. Justice R.C. Mishra

Cr. A. No. 1478/1995 (Jabalpur) decided on 22 November, 2011

BETU

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 376 & 450, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi)(xii) – Rape – Dehati Nalishi was recorded at the house of Pradhan, in which factum of rape was not disclosed by prosecutrix – Medical examination after 15 days of the incident – Prosecutrix version was not in consonance with her earliest version – Maxim “falsus in uno falsus in omibus” not applicable in India – Held – Offence of outraging modesty of prosecutrix established – Accordingly conviction under section 450 converted into 454 – Appeal partly allowed – Conviction under Section 376 read with section 3(i)(xii) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 set aside, conviction under section 3(i)(xi) maintained. (Para10 & 11)

दण्ड संहिता (1860 का 45), धाराएँ 376 व 450, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi)(xii) – बलात्कार – प्रधान के घर पर अभिलिखित की गई, देहाती नालिसी जिसमें अभियोक्त्री द्वारा बलात्कार का तथ्य प्रकट नहीं किया गया – चिकित्सीय परीक्षण घटना के 15 दिन पश्चात – अभियोक्त्र का कथन उसके पूर्वतर कथन के अनुरूप नहीं था – सूत्र “एक बात में मिथ्या तो सब बात में मिथ्या” भारत में प्रयोज्य नहीं – अभिनिर्धारित – अभियोक्त्र का शील भंग किये जाने का अपराध स्थापित – तदनुसार, धारा 450 के अंतर्गत दोषसिद्धि धारा 454 में संपरिवर्तित – अपील अंशतः मंजूर – धारा 376 भा.द.सं. सहपठित धारा 3(i)(xii) अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम के अंतर्गत दोषसिद्धि अपास्त –

धारा 3(i)(xii) के अंतर्गत दोषसिद्धि कायम रखी गई।

Cases referred :

AIR 1983 SC 753, AIR 2005 SC 643, AIR SCW 5845.

S.K. Dixit, for the appellant.

Amit Kumar Sharma, P.L. for the respondent/State.

J U D G M E N T

R.C. MISHRA, J. - This appeal has been preferred against the judgment-dated 10/10/95 passed by the Sessions Judge [designated as Special Judge under the Scheduled Castes and Scheduled Tribe (Prevention of Atrocities) Act, 1989] (for short 'the Act'), Chhatarpur in Special Case No.18/95, whereby the appellant was convicted and sentenced as under:-

Convicted under Section	Sentenced to
376 of IPC read with 3(1)(xii) of the Act	undergo R.I. for 7 years and to pay fine of Rs.1000/- & in default, to suffer R.I. for 6 months.
450 of IPC	undergo R.I. for 5 years and to pay fine of Rs.1000/- & in default, to suffer R.I. for 6 months.
3(1)(xi) of the Act	undergo R.I. for 1 year and to pay a fine of Rs.500/- & in default, to suffer R.I. for 3 months.

with the direction that custodial sentences shall run concurrently

2. Prosecution story, in short, may be narrated thus -

(i) At the relevant point of time, the prosecutrix (PW1), a married woman aged about 20 years and a member of Scheduled Caste i.e. Kori, was residing in her matrimonial home situated in Village Urdipurva Majra, the native place of the appellant, who belongs to Gadariya (shepherd) caste.

(ii) On 12.1.95 at about 10 a.m., the prosecutrix had gone to Bakhri (cottage) used as the cattle-shed located at the outskirts of the village, to throw cow-dung. After doing the work, as she was taking out pieces of firewood for cooking from the heap collected in the cottage, the appellant suddenly entered thereinto and forcibly subjected her to sexual intercourse. Alarms raised by the prosecutrix attracted

attention of Dasua (PW3), Ramkaran, Shivram and other inhabitants of the locality, who were able to see the appellant running away from the Bakhri.

(iii) Since husband of the prosecutrix as well as his elder brother namely Barra @ Barelal (PW2) had gone out, it was upon return of Barra that she informed the police about the incident. Recording the information as Dehati Nalishi (Ex.P-1), ASI G.L. Singh (PW8) registered a case under Sections 354 of the IPC and 3(1)(xi) of the Act.

(iv) In her statement, under Section 161 of Code of Criminal Procedure, the prosecutrix disclosed that in fact, she was ravished by the appellant. The case was, accordingly, converted into one under Section 376 of the IPC and Section 3(1)(xii) of the Act.

(v) On 27th of January, 1995, the prosecutrix was sent to the Civil Hospital at Chhatarpur for medical examination. Dr. Smt. Sangeeta Choubey (PW6), while expressing her inability to give any definite opinion as to rape, prepared two slides from vaginal smear of the prosecutrix for chemical analysis.

(vi) During investigation, although the appellant was apprehended on 13.1.1995 only yet, he was subjected to medical examination on 9.2.95. Dr. R.P. Gupta (PW7) found the appellant capable of performing sexual intercourse.

3. On being charged with the offences punishable under Sections 450 & 376 of IPC and 3(1)(xi) & 3(1)(xii) of the Act, the appellant pleaded false implication due to prevailing animosity in view of dispute as to agricultural land.

4. Legality and propriety of the conviction have been challenged on the under-mentioned grounds –

(i) Non-disclosure of the factum of rape in the Dehati Nalishi (Ex.P-1) by ASI C.L. Singh (PW8) at the instance of the prosecutrix.

(ii) Improbability of the story regarding rape at a place referred in the spot map (Ex.P-2) as situated near the residences

of Ramkaran, Bhavanidin, Buddhu etc.

(iii) Absence of corroborative medical or forensic evidence as to rape.

(iv) Probability of the defence.

In response, learned Panel Lawyer, while making reference to the incriminating pieces of evidence, has contended that the convictions are well founded.

5. As per statement of the prosecutrix (PW1), at about 10 a.m. when she was picking up pieces of jungle wood stored in the Bakhri, the appellant came from behind; caught hold of her hands; threatened to kill her in case she raised alarm; put his hands on her breasts, felled her down and committed rape on her. According to her, she raised alarm only after the appellant had left the spot and on arrival of persons in the neighbourhood namely Dasua, Shivram, Raje Budhua and Horilal, narrated the incident to them. Amongst these persons, only Dasua and Shivram were named in the Dehati Nalishi (Ex.P-1).

6. Dasua (PW3), related as maternal uncle-in-law to the prosecutrix, corroborated her version but Shivram (DW1) came forward to support the defence of false implication due to animosity arising out of land dispute between the appellant and husband/Jeth of the prosecutrix. Moreover, the following inconsistencies in the evidence of other witnesses clearly indicated as to how a false case of rape was cooked up from the occurrence that had taken place in a different manner -

(i) The prosecutrix (PW1) was emphatic in saying that on the date of the incident only at about 4 p.m., the report (Ex.P- 1) was recorded by the Police Inspector who had come to the house of Gram Pradhan in the presence of her Jeth Barra whereas Barra (PW1) clearly admitted that he had returned to the village on the following day of the incident i.e. 12.1.95 at 10 a.m. and on being informed about the incident, had gone to lodge report at Police Outpost but, instead of scribing the information, the Inspector had proceeded to the village where the report was ultimately recorded at the house of the Pradhan.

(ii) As per the version given in the report recorded as

Dehati Nalishi (Ex.P-1), the appellant had only caught hold of the prosecutrix with intent to outrage her modesty but was not able to subject her to sexual assault as her screams had attracted attention of the neighbours, who had immediately rushed to the spot.

(iii) ASI G.L. Singh (PW8), the scribe of Dehati Nalishi, candidly acknowledged that since the factum of rape was not disclosed by the prosecutrix, the investigation could not be proceeded with accordingly. This admission gathered more support from the circumstances enumerated below -

- (a) Upon the report, initially a case under Sections 354 IPC and 3(1)(xi) of the Act was registered.
- (b) Even though, the appellant was arrested on 13.1.95 yet, he was subjected to medical examination, by way of letter of request (Ex.P-10) on 9.2.95.
- (c) The prosecutrix was referred to District Hospital, Chhatarpur for her medical examination on 27.1.95, as reflected in letter of request (Ex.P-8).
- (d) Sari said to have been worn by the prosecutrix at the time of the incident was seized on 25.1.95, by way of seizure memo (Ex.P-4).

7. Medical examination of the prosecutrix, a married woman, nearly 15 days after the incident was a futile exercise and that of the appellant nearly a month after the incident, was also inconsequential. A bare perusal of the Dehati Nalishi would reveal that last four lines containing the allegations to the effect that after finding the prosecutrix all alone, the appellant had subjected her to rape were added subsequently. This inference drew strength from the fact that no offence of rape was registered upon recitals of the Dehati Nalishi.

8. The proposition of law that no corroboration is necessary to act upon the evidence of victim of rape is well settled (*Bharwada Bhoginbhai Hirjibhai v. State of Gujarat AIR 1983 SC 753 referred to*). But, the approach that a married lady would not 'put her character at stake' by making a false charge of rape cannot be applied universally as each case has to be determined on the touchstone of the factual matrix thereof (*Pandurang Sitaram Bhagvat v.*

State of Maharashtra AIR 2005 SC 643 relied on).

9. In the facts and circumstances of the case as projected above, probability factor favoured the defence and, therefore, it was not possible to act upon testimony of the prosecutrix, so far as it related to the offence of rape, simply because it was not in consonance with her earliest version and the corresponding lines of investigation pursued by the police (*Radhu v. State of Madhya Pradesh 2007 AIR SCW 5845* referred to).

10. It is well settled that the maxim 'falsus in uno falsus in omnibus' has no application in India, but while discharging its solemn duty to separate grain from the chaff, the Court is further required to ascertain as to whether the residue left after discarding major portion of the prosecution evidence, would be sufficient to prove guilt of the accused in respect of any offence.

11. In the instant case, though the rape did not appear to have been committed but the offence of outraging modesty of the prosecutrix, a member of Scheduled Caste, punishable under Section 3(1)(xi) of the Act, was clearly established from the prosecution evidence comprising of sworn testimony of the prosecutrix, contents of the Dehati Nalishi (Ex.P-1) lodged by her and corroborative evidence of Dasua (PW3). Accordingly, the conviction under Section 450 of the IPC also deserves to be converted into the one under Section 454 of the IPC.

12. Coming to the question of sentence, it may be observed that a considerable period of more than 16 years has already elapsed after the incident in question and meanwhile, the appellant has already suffered imprisonment for a period of more than 5 months. In these circumstances, interests of justice would be met if substantive term of custodial sentence is reduced to 6 months, which is the minimum prescribed for the offence under the Act, and a fine of Rs.1,250/- is imposed.

13. Consequently, appeal is partly allowed. In the result –

(i) The impugned conviction of the appellant for the offence under Section 376 read with Section 3(1)(xii) of the Act and consequent sentence are hereby set aside.

(ii) The conviction of the appellant for the offence under Section 3(1)(xi) of the Act is also maintained but the period of custodial sentence is reduced from 1 year to 6 months and

the sentence of fine is enhanced from Rs.500/- to Rs.1250/- and in default of payment of fine, he would undergo R.I. for 2 months.

(iii) The conviction of the appellant for the offence under Section 450 of the IPC is converted into one under Section 454 of IPC and he is sentenced to undergo R.I. for 6 months.

With the direction that jail sentences shall run concurrently

14. The appellant is on bail. He is directed to appear before the trial court on 21.2.12 for being committed to custody for undergoing the remaining part of sentence and also to deposit the fine amount, if not deposited so far.

Appeal partly allowed.

**I.L.R. [2012] M.P., 1296
APPELLATE CRIMINAL**

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 237/1996 (Jabalpur) decided on 4 January, 2012

STATE OF MADHYA PRADESH

...Appellant

Vs.

NAND KISHORE & anr.

...Respondents

Forest Act (16 of 1927), Section 33(1)(d), Criminal Procedure Code, 1973 (2 of 1974), Section 376 – Appeal against acquittal – If two views are possible and out of them, if view favourable to the accused has already been adopted by the trial court, then in routine manner by appreciation of the evidence the another view should not be replaced by the appellate court – Appeal Dismissed. (Paras 10 & 14)

वन अधिनियम (1927 का 16), धारा 33(1)(डी), दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 376 – दोषमुक्ति के विरुद्ध अपील – यदि दो दृष्टिकोण संभव है और उनमें से यदि विचारण न्यायालय द्वारा अभियुक्त के पक्ष के दृष्टिकोण को स्वीकार किया जा चुका है तब अपीली न्यायालय द्वारा साक्ष्य का मूल्यांकन कर नैतिक ढंग से अन्य दृष्टिकोण प्रतिस्थापित नहीं किया जाना चाहिए – अपील खारिज।

Cases referred :

AIR 2011 SC 1585, AIR 2011 SC 2218, AIR 1979 SC 1408.

Rakesh Kesharwani, P.L. for the appellant.

Subodh Kathal, for the respondents.

J U D G M E N T

U.C. MAHESWARI, J. - On behalf of the State of M.P. this appeal is preferred under Section 378 of Cr.P.C. being aggrieved by the judgment dated 17.6.1994 passed by the Judicial Magistrate, 1st Class, Betul in Criminal Case No. 3828/1993 extending acquittal to the respondent no. 1, so also the respondent no. 2 (since deceased) from the charge of Section 435 of IPC and Section 33 (1) (d) of the Indian Forests Act, in short "The Act".

2. The facts giving rise to this appeal in short are that on dated 8.4.1990 at about 8 o'clock in the night in the Reserved Forests of village Padhar with some fire took place, on which with the assistance of some Panch witnesses the respondents were caught hold from the place of such Incident of fire. The statement of concerning Panchs as well as of the respondents were recorded by the official of the Forests Department. Some Panchanama were also prepared and after registering the POR in respect of the forest offence, a report in writing for registration of the offence was sent to SHO, P.S. Ranipur, district Betul, on which a Crime No 12/90 was registered at such Police Station against the respondents for the offence of Sections 435, 447 of IPC and Section 33 (1) (d) of the Act. After holding investigation the respondents were charge sheeted for the aforesaid offence. On framing the charge of Section 435 of IPC and Section 33 (1) (d) of the Act against the respondents, they abjured the guilt, on which the trial was held, in which as many as eight prosecution witnesses were examined. On appreciation the respondents were acquitted from the alleged charge, on which the State has come forward to this court with this appeal.

3. Shri Rakesh Kesharwani, learned appearing counsel on behalf of the State, after taking me through the record of the trial court including the evidence led by the prosecution as well as defence argued that the prosecution has successfully proved its case against the respondents setting fire by them in the Reserved Forests, and thereby the property of the Forests Department has been damaged and destroyed. But contrary to such evidence, the respondents have been acquitted by the trial court. In continuation he said that on proper appreciation of the same, the respondents ought to have been convicted by the trial court in the alleged offence. He based his arguments mainly on the

depositions of Chandrabhan (PW-1), Shamlu (PW-2) and Rammi; (PW-3), so also on documents, Panchanama, (Ex. P-i), seizure memo, (Ex.P-2) and POR, (Ex. P-3) registered by Chandrabhan (PW-1) under the Act regarding offence of the forests property and prayed to convict the respondent no. 1 by setting aside the impugned judgment of acquittal by allowing this appeal.

4. On the other hand, responding the aforesaid arguments by justifying the impugned acquittal the respondents' counsel, Shri Subodh Kathar said that the same being based on proper appreciation of evidence, does not require any interference at this stage. In continuation he said that taking into inter se inconsistencies between the depositions of the departmental witnesses of the Forests Department and the independent witnesses, the respondents have been acquitted by the trial court and there is no occasion at this stage to interfere in such findings by this Court. He said that as per settled proposition of the criminal law whenever and wherever on appreciation of the evidence if two views are possible, out of them one goes in favour of the prosecution while another goes in favour of the accused, then the Court should adopt the view which is favourable to the accused and extent its benefit to him. With these submissions prayed for dismissal of this appeal.

5. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the record of the trial court including the evidence led by the prosecution, so also the marked papers of the charge sheet alongwith the impugned judgment.

6. True it is that as per available evidence on the date of the incident some fire took place in the alleged Reserved Forests, in which some property of the Forests Department has been damaged. In order to prove the case against the respondents the appellant -prosecution agency has examined the departmental witness, Chandrabhan, (PW-1), who in his deposition categorically stated that initially at about 8 o'clock on the date of the incident, he saw the alleged fire In Reserved Forests some check post. Thereafter he accompanied with the Watchman Santosh, Gajraj Singh and some other villagers went to the site of fire and saw the respondents there while they were setting such fire. On which he brought the respondents to the check post, from where the deceased respondent no. 2 fled away while a matchbox was recovered from the possession of the respondent no.1. He also said that after preparing the Panchanama, (Ex.P-1) and Seizure Memo, (Ex.P-2), a POR No. 21253/8 (Ex.P-3) with respect of the Forests Offence was registered.

against the respondents by him. On scrutinizing the depositions of in chief of this witness. It is apparent that he went to the place of fire after seeing the same from the check post and, therefore, before reaching this witness to the place of the Incident, the alleged fire had already taken place. So it could not be assumed that in presence of this witness the respondents or any of them were setting fire in the Forests. So the deposition of this witness does not say specifically whether he saw the first fire in the Forests which had already taken place or he saw the respondents while they were setting such fire in the alleged Forests. Mere on seizure of the matchbox from the respondent no. 1, although such seizure memo has not been proved by the independent witnesses of the same, no inference could be drawn against the respondents or any of them that the alleged fire was made by them. So in such premises mere on the testimony of this witness, the respondents could not be convicted for the alleged offence. So far other examined prosecution witnesses Samli, (PW-2) and Rammi, (PW-3) are concerned, any of them has not made any direct allegation against any of the respondents saying the alleged fire was set by any of them. Even otherwise the depositions of these witnesses are also on the same line as the deposition of Chandrabhan. So such evidence of said Forests Officials, should not be said to be sufficient to hold conviction against the respondents.

7. Apart the above the other examined prosecution witnesses namely Mannelal, (PW-5), Hannu, (PW-6), Bhagga, (PW-7) and Munna (PW-8) on recording their deposition any of them have not supported to the prosecution case. One official of the Forests Department, namely Tulsi Das Dubey, (PW-4) has also not made any direct allegation against any of the respondents for setting alleged fire by them in the Reserved Forests.

8. True it is that with respect of the alleged Forests Offence a POR, (Ex.P-3) under the Act was registered by Chandrabhan but subsequently what happened of the case of such POR has not been proved on record. Whether any of the respondents was held guilty under such offence or not. Thus, merely on the basis of POR (Ex. P-3), no inference could be drawn against any of the respondents.

9. On going through the impugned judgment, it is apparent that considering the aforesaid all circumstances, the trial court has after holding that the prosecution has utterly failed to prove the case against the respondents beyond reasonable doubt, acquitted them. In the available circumstances, as discussed

above, such approach does not appear to be contrary to available evidence or any existing law.

10. It is settled proposition of law that on appreciation of evidence if two views are possible and out of them, if view favourable to the accused has already been adopted by the trial court, then in routine manner by appreciation of the evidence the another view should not be replaced by the appellate courts laid down by the Apex Court in the matter of Rukia Begum Vs. State of Karnataka with Issag Salt and anr. Vs. State of Karnataka with Nasreen Vs. State of Karnataka reported in AIR 2011 SC 1585 in which it was held as under:-

"8.....It is trite that where two views on the evidence are reasonably possible and the trial court has taken a view favouring acquittal, the High Court in an appeal against acquittal should not disturb the same merely on the ground that if it was trying the case, it would have taken an alternative view and convicted the accused. The High court while hearing appeal against the judgment of acquittal is possessed of all the power of appellate court and nothing prevents it to appraise evidence and come to a conclusion different than that of the trial court but while doing so it shall bear in mind that presumption of innocence is further reinforced by acquittal of the accused by the trial court. The view of the trial Judge as to the credibility of the witness must be given proper weight and consideration. There must be compelling and weighty reason for the High Court to come to a conclusion different than that of the trial court. The view taken by the trial court was justified in the facts and circumstances of the case and a possible view and, therefore in our opinion, the High Court erred in setting aside their acquittal....."

11. The aforesaid view has been further reiterated by the Apex court in the matter of Bhaiyamiyan @ Jardar Khan & anr, Vs. State of MP reported in AIR 2011 SC : 2218 in which it was held as under :-

"5. At the very outset we must remark that the High Court's interference in an appeal against acquittal is somewhat circumscribed and if the view taken by the trial court was

possible on the evidence, the High Court should stay its hands and not interfere in the matter in the brief that if it had been in trial court, it might have taken a different view. In other words if two views are possible and the trial court has taken one, the High Court should not interfere in the judgement of the trial court."

So in view of the aforesaid principle also the impugned judgement is not found to be faulted.

12. Apart the above, if apparent inconsistency is found in the deposition of the witness recorded in the trial as one stage he has stated something about such fact and at other stage of the same deposition, he stated contrary to such earlier version, then the deposition of such witness is not safe to hold the conviction against the accused as laid down by the Apex Court in the matter of *Suraj Mal Vs. The State (Delhi Administration)* reported in AIR 1979 SC 1408, in which it was held as under-

".....it is well settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two states, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses....."

13. In view of the aforesaid on examining the case at hand, it is apparent that Chnadrabhan, (PW-1) has made contradictory statement at different stage of same deposition, as discussed above, then in view of the cited case the deposition of this witness could not be a foundation to hold the conviction against the respondents.

14. In view of the aforesaid, I have not found any perversity, infirmity or any illegality in the impugned judgment of the trial court extending acquittal to the respondents from the charge of aforesaid offence. Consequently by affirming the judgment of the trial court, this appeal being devoid of any merits, is hereby dismissed.

Appeal dismissed.

**I.L.R. [2012] M.P., 1302
APPELLATE CRIMINAL**

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 1860/1996 (Jabalpur) decided on 5 January, 2012

RAM SINGH & 2 ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 326 & 325/34 – Simple or Grievous Injury – Complainant in the morning accompanied with his son and others went to plough his field – Appellant with farsa and other co-accused lashed with sticks and asked to stop ploughing – Appellant gave blow of farsa in the occipital region to the complainant – Held – Injuries are simple in nature as no bony injury was found, hence offence u/s 326 IPC not made out – Injuries not grievous in nature hence 325 not made out – Appellant convicted under section 324/34 IPC – Appeal allowed in part.

(Paras 8,9,13,16)

दण्ड संहिता (1860 का 45), धाराएँ 326 व 325/34 – साधारण अथवा गंभीर क्षति – शिकायतकर्ता सुबह अपने पुत्र एवं अन्य के साथ अपने खेत पर हल चलाने के लिये गया – अपीलार्थी ने फरसे से और अन्य सह-अभियुक्त ने लाठियों से हमला किया और हल चलाना रोकने को कहा – अपीलार्थी ने शिकायतकर्ता के भस्तिष्क के पिछले भाग पर फरसे का प्रहार किया – अभिनिर्धारित – क्षतियां सामान्य प्रकृति की हैं क्योंकि कोई अस्थि चोट नहीं पाई गयी अतएव धारा 326 भा.द.सं. के अंतर्गत अपराध नहीं बनता – क्षतियां गंभीर स्वरूप की नहीं इसलिए 325 गठित नहीं होता – अपीलार्थी को धारा 324/34 भा.द.सं. के अंतर्गत दोषसिद्ध किया गया – अपील अंशतः मंजूर।

Jagtendra Prasad, for the appellants.

Rakesh Kesharwani, P.L. for the respondent.

J U D G M E N T

U.C. MAHESWARI, J. - This appeal is directed by the appellants under Section 374(2) of the Cr.P.C. being aggrieved by the judgment dated 9.10.96 passed by the IInd Addl. Sessions Judge, Katni in S.T.No.45/91 convicting the appellant No.1 under section 326 and 325/34 of the IPC while appellants No.2 and 3 under section 326/34 and 325/34 of IPC for RI 5 years with fine of Rs.250 in the earlier sections and RI 2 years with fine of Rs.250/- in the later. In default of depositing the fine amount further RI one month has been

awarded on each of the count.

2. The facts giving rise to this appeal in short are that on dated 16.10.90 at about 11.20 AM, complainant Vishambhar Singh lodged the FIR Crime No.215/90 at P.S Barhi contending that today in the morning at about 10 O' Clock he accompanied with his son Tejbhan and his harwaha, Dhanu Kol and Satiya Kol went to plow his field. At about 10 O' Clock, when he was sitting in the field while the aforesaid other three persons were plowing the field, appellant No.1 Ram Singh lashed with Farsa, a sharp edged weapon, and appellants No.2 and 3 Ranjeet Singh and Jagdish Singh lashed with sticks, came and stood in front of the plower and asked to stop plowing. In continuation, they also pulled the plower of Sataiya. Thereafter appellant No.1 Ram Singh gave one blow of Farsa on the occipital region while two other blows on waist and hand of Tejbhan Singh resultantly he sustained injuries and fell down and also became unconscious. Thereafter Ram Singh gave a blow of Farsa on the head of victim Vishambhar Singh resultantly he sustained injury and fell down. Appellants No.2 and 3 Ranjeet Singh and Jagdish Singh also gave the beating to Vishambhar Singh and Tejbhan Singh by means of sticks with a threatening to kill and bury them in such field. On hearing the noise of shouting of Vishambhar Singh, the villagers, namely, Dhanu Kol, Sataiya Kol, Gopal Singh and Sewak Kol came to rescue them, on which, the appellants fled away from the place of incident. Thereafter, both the victims were brought to Police Station by the aforesaid villagers where after lodging the report of Vishambhar Singh (Ex.P/26), they were sent to the hospital Barahi where after medical examination their MLC reports were prepared. For some of the injuries sustained by the victim, they were referred for x-ray. On carrying out the x-ray (Ex.P/34), the fracture of Tibia bone of the left leg was revealed. On completion of the investigation, the appellants were charge sheeted for the offence of section 307 and 341/34 of the IPC. After committing the case to the Sessions Court, on evaluation of the charge sheet, the charge of section 307 and 307/34 of IPC respectively was framed against appellants No.1,2 and 3.

3. They abjured the guilt, on which, the trial was held. On appreciation of the evidence, all the appellants, instead the aforesaid section, were held guilty for the offence under section 326 and 326/34 of the IPC with respect of injury sustained by Vishambhar Singh while under section 325/34 of IPC with respect of the injury sustained by Tejbhan Singh and each of them were punished with the above mentioned punishment against which, they have come

forward to this court with this appeal.

4. Shri Jagtendra Prasad, learned counsel for the appellants after taking me through the record of the trial court, without challenging the findings holding guilty to the appellants for the alleged incident has made his limited submission saying that in view of the available medical evidence, the MLC reports, x-ray reports and also the depositions of the concerning doctor, it is apparent that none of the victim has sustained any such injury which is made punishable under section 326 of the IPC. By referring the MLC report of victim Vishambhar Singh (Ex.P/10) prepared by Dr. D.K.Swarnakar (PW 4), he argued that such victim did not sustain any injury on any vital part of his body and whatsoever injury has been sustained by him, on proper appreciation, the case is not made out against the appellants more than section 325 of the IPC as he sustained some fracture of Tibia bone in the left leg besides the other injuries. On carrying out the x-ray, such fracture was found in injury of swelling and not the incised wound. So, in such premises also it was not the case of more than section 325 of the IPC and conviction of the appellant under section 326 or 326/34 of the IPC is not sustainable. In continuation, by referring the MLC report of victim Tejbhan (Ex.P/11), he argued that he sustained two simple incised wound in the head but no fracture was found on any of such injuries. Besides this, one swelling and one abrasion was found on his person. So, in such premises, appellants have not committed any offence of section 325 of the IPC with respect of victim Tejbhan Singh. According to his submission for these injuries, the case was not more than section 324 of the IPC and prayed to modify the conviction of the appellants from section 326 or 326/34 IPC into section 325 or 325/34 IPC and for the injuries of Tejbhan from section 325/34 into section 324/34 of the IPC. In continuation, he said that after such modification, taking into consideration the circumstance that the appellants did not had any criminal antecedent or history and the alleged incident took place because of some property dispute between the complainant party and appellants in the year 1990 and thereafter in last 21 years no further criminal activity has been reported against any of the appellants, in such premises they being first offender, be extended the benefit of Probation of the Offenders Act. He further argued that, in any case, if the court does not want to extend such benefit then instead to send them again in jail, they be punished with the jail sentence already suffered by them during pendency of the trial by enhancing some amount of fine under the discretion of the Court. In this connection by referring para-36 of the impugned judgment he said that each

of appellants have suffered the judicial custody between 18.10.90 to 11.12.90 i.e one month and 25 days, and prayed to allow this appeal accordingly.

5. Responding the aforesaid arguments, Shri Rakesh Kesharwani, learned Panel Lawyer by justifying the impugned conviction and sentence said that the same is based on proper appreciation of the evidence. It does not require any interference at this stage and prayed for dismissal of this appeal. However, he fairly conceded that the alleged fracture of Tibia bone in the left leg of victim Vishambhar Singh was not found in any incised wound and as per the statement of radiologist Dr. Manoj Pandey (P.W.18) except the aforesaid fracture of Tibia bone, no other fracture was found.

6. After hearing the counsel at length, keeping in view their arguments, I have carefully gone through the record of the trial court, the impugned judgment, the depositions of victims Vishambhar Singh and Tejbhan Singh along with the depositions of other examined prosecution witnesses, I have not found any perversity in appreciation of the evidence for giving the findings to hold guilty to the appellants for committed the alleged incident. So, in such premises, the approach of the trial court holding guilty to the appellants for committing the alleged incident do not require any interference at this stage. So, such findings of the impugned judgments are hereby affirmed.

7. Now, I proceed to consider the conviction of the appellants under section 326 or 326/34 of the IPC with respect of the injuries sustained by Vishambhar Singh and the conviction under section 325/34 of the IPC with respect of the injuries of Tejbhan Singh whether the same is sustainable or it requires some modification. Before proceeding further, as ready reference, I would like to reproduce the injuries sustained by the aforesaid victims as stated by the Dr. D.K.Swarnakar (P.W.4) in their respective MLC reports :-

A. As per MLC report Ex.P/10 following injuries were found on the person of victim Vishambhar Singh :-

1. Lacerated wound over left frontal area of scalp size 3"x ½" x scalp deep, clotted blood. Longitudinal cut 2" above the nasal bridge upward direction linear caused by hard and blunt object. Duration within 24 hours.

Advised X-ray skull {AP/ Lat}. Referred to V.H. Jabalpur for x-ray and admission.

2. Contusion 6"x ½" linear cut over left scapular area

caused by hard and blunt object. Simple injury. Duration within 24 hours. Injury healed in 7 to 10 days in absence of any complication.

3. Contusion 5"x4" over left lateral aspect of left leg upper 1/3 part, swelling present, tenderness present.
4. Contusion 4"x3" over left lower part of left leg.

Duration of all within 24 hours. No.3 and 4 caused by hard and blunt object and for both injuries advised x-ray left leg {AP/late}. Referred to V.J.Jabalpur for radiologist opinion and admission.

B. As per MLC report Ex.P/11 following injuries were found on the person of victim Tejbhan :-

1. Incised wound 4 ½ x 2" x 3/4" deep over right zygomatic area of face is present extend from 2" away from right Ear to base of the right nostril, obliquely placed, well defined, bleeding present. Incised like wound, muscle, tissue are torn. Duration within 24 hours caused by sharp object. The nature of injury grievous. Advised xray of skull {AP/Lat} suspicion of bony injury to right zygomatic area adjoining bone of the right side of face. Referred to V.H. Jabalpur for x-ray and for further needful opinion, treatment and repair.

2. Contusion 5"x3" over anterior lateral aspect of right forearm- 3" away from right wrist joint. Duration within 24 hours caused by hard and blunt object. Advised x-ray right forearm {AP/Lat}. Referred to VH Jabalpur.

3. Abrasion 1"x ½" over middle of right lateral aspect of forearm.

4. Contusion 3"x2" over right uppermost lateral aspect of right thigh.

No.3 and 4 are within 24 hours of duration caused by hard and blunt object. Simple injury. No.3 and 4 be healed in 10-12 days in absence of any complication.

5. Lacerated wound 2"x ½ "x ¼" over left frontal area of

scalp. Duration 24 hours caused by hard and blunt object. Injuries be healed in 7 to 10 days in absence of any complication. The injury is simple in nature.

Patient is referred to V.H. Jabalpur for admission, radiologist expert and needful opinion and for further treatment.

The aforesaid MLC reports were proved by the aforesaid doctor on recording his deposition. Under the advise in MLC report, on carrying-out the x-ray (Ex.P/34) of the victim Vishambhar Singh, as per deposition of Dr. Manoj Pandey (P.W.18) who proved such reports, fracture of left fibula at upper end at side of neck of Fibula was found while no any other fracture was found on the person of Vishambhar Singh. As per record, no fracture was found on the person of Tejbhan Singh.

8. It is apparent from the aforesaid MLC report that the alleged fracture was not sustained by the victim Vishambhar Singh in any incised wound. The same was found in some injury of swelling in left leg and so far sustaining other injuries are concerned, in the lack of any fracture in such other injuries, the same could be treated to be simple in nature and not more than that. So the injury sustained by victim Vishambhar Singh does not fall under section 326 of the IPC. As such, the same is falling under section 324 and 325 of the IPC and, as section 325 IPC being major section of the same category of section 324 IPC in which the higher punishment has been provided thus, no separate conviction could be held against the appellants under section 324 IPC if they are held guilty under section 325 of the IPC.

9. So far the injuries sustained by Tejbhan is concerned, as per aforesaid medical evidence, he did not sustain any fracture in any part of his person. So with respect of his injuries, the appellants could not have been convicted by the trial court for the offence of section 325 or 325/34 of the IPC. On proper appreciation of the medical evidence and other available circumstances of the case, the above-mentioned injuries of this victim could not be held to be grievous in nature. It is a matter of fact on record that any injury of this victim has not been proved to be grievous in nature as per requirement of section 320 of the IPC. Thus mere on some language of MLC report, the alleged injury could not be deemed to be grievous in nature. In such premises, in the lack of any positive and admissible evidence showing that the alleged injuries or any of them was covered under the definition of grievous hurt defined under section 320 of the IPC, the alleged incised wound, hence the appellants

could not be convicted under section 324/34 of the IPC as they have caused the alleged injuries to this victim in furtherance of their common intention.

10. In view of the aforesaid discussion, the approach of the trial court holding guilty to the appellants under section 326/34 IPC with respect of the injury of Vishambhar Singh and under section 325/34 IPC with respect of the injuries caused to Tejbhan, being not sustainable, is hereby set aside and, instead such sections, in view of the aforesaid discussion and keeping in view that the alleged offence was committed by the appellants in furtherance of their common intention, they are held guilty for the offence of section 325/34 IPC for causing the alleged injury to victim Vishambhar Singh and under section 324/34 IPC with respect of causing the injuries to victim Tejbhan Singh.

11. Coming to consider the prayer for extending the benefit of Probation of the Offenders Act to the appellants is concerned, looking to the nature of the offence and the manner in which it was committed by the appellants, even after 21 years of the incident, I am not inclined to extend such benefit to the appellants, hence such prayer of the appellants counsel is hereby rejected.

12. So far the prayer of the appellants counsel for adopting lenient view in imposition of the sentence against the appellants is concerned, I have found some substance in it. It is apparent from the record that any of the appellants, except the present case, did not have any criminal antecedent or history and, in such premises, they appear to be the first offender and after happening the alleged incident near about 21 years have passed. So, in such premises, I do not find fit to send them against (sic.again) to jail. Instead it, I deem fit to punish them with the sentence for which they have already suffered between 18.10.90 to 11.12.1990 i.e one month and 24 days by imposing some amount of fine, with a direction to pay the same to the victims, to sub-serve the justice with them also.

13. Therefore, by affirming the findings of the trial court holding guilty to the appellants for committing the alleged incident, this appeal is allowed in part and the conviction and sentence awarded by the trial court under section 326 or 326/34 and 325/34 of the IPC is hereby set aside. In view of the aforesaid discussion, with respect of the injury caused to victim Vishambhar Singh, the appellants are convicted under section 325/34 IPC and with respect of the injuries caused to victim Tejbhan, they are convicted under section 324/34 of the IPC.

14. So far imposition of the sentence is concerned, they are punished with the jail sentence suffered by them near about one month and 25 days between

18.10.90 to 11.12.90 in judicial custody in pendency of the trial but by imposing fine of Rs.2000/- against each of the appellants for the offence under section 325/34 and Rs.1500/- for the offence under section 324/34 IPC. The aforesaid fine amount is to be deposited by them within sixty days from today, failing which, the concerning appellant has to suffer further six months RI. The amount of fine, if deposited by the appellants in connection of the impugned judgment of the trial court then the same be adjusted in the aforesaid imposed fine amount.

15. On depositing the aforesaid sum of fine, out of it, Rs.4000/- be given to the victim Vishambhar Singh and Rs.3000/- be given to victim Tejbhan Singh by calling them in the trial court through summons. The bail bonds of the appellants are hereby discharged.

16. The appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2012] M.P., 1309

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 1810/2001 (Jabalpur) decided on 10 January, 2012

PILLU ALIAS PYARELAL

...Appellant

Vs.

STATE OF M.P.

....Respondent

A. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) – Prosecution failed to prove the caste of victim by any cogent and reliable document issued by competent authority – By mere oral deposition of witness, this fact would not be deemed to be proved – Appellant acquitted from charge under Section 3(1)(x) of Act, 1989. (Para 5)

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) – अभियोजन सक्षम प्राधिकारी द्वारा जारी किसी प्रबल एवं विश्वसनीय दस्तावेज द्वारा पीड़ित की जाति साबित करने में असफल रहा – साक्षियों के मात्र मौखिक अभिकथन द्वारा इस तथ्य का सिद्ध होना नहीं माना जा सकता – अपीलार्थी अधिनियम 1989 की धारा 3(1)(x) के अंतर्गत आरोप से दोषमुक्त।

B. Penal Code (45 of 1860), Section 323 – Sentence –

Incident took place in the year 2000 – Appellant do not possess any criminal antecedent – Being first offender entitled to some lenient view in imposition of sentence – Sentence reduced to period already undergone.
(Paras 7 & 8)

ख. दण्ड संहिता (1860 का 45), धारा 323 – दण्डादेश – घटना वर्ष 2000 में घटित हुई – अपीलार्थी का कोई आपराधिक पूर्ववृत्त नहीं – प्रथम अपराध होने से दण्ड में कुछ उदार दृष्टिकोण का हकदार – भुगताई जा चुकी अवधि तक दण्डादेश घटाया गया।

Pradeep Naveriya, for the appellant.

Rakesh Kesharwani, P.L. for the respondent.

J U D G M E N T

U.C. MAHESWARI, J. - This appeal is directed by the appellant under section 374 of the Cr.P.C being aggrieved by the judgment dated 18.10.2001 passed by the Special Judge, Chhatarpur (constituted under the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act (in short 'the Act') in Special case No.9/01 whereby he has been convicted under section 323 of the IPC and under Section 3(1)(x) of the Act with a direction to undergo for RI six months with fine of Rs.250/- separately in each of such section, in default of depositing the fine, additional jail sentence of 15 days on each count has been awarded. The sentences are directed to run concurrently.

2. The facts giving rise to this appeal in short are that on dated 23.9.2000 at about 6.30 in the evening at P.S. Gulganj, complainant Mohan (P.W.1) lodged the FIR contending that yesterday night, he accompanied with Bhajju Kondar and the appellant, went to village Gulganj to see the 'Notanki' (Drama). After viewing the same, at about 6 O' Clock in the morning when they were returning, on the way near river Paniyari of village Majgava, some hot talk took place between Bhajju and the appellant in which one said to another that "you are my son and I am your father", on which appellant became angry and said to Bhajju that he being from lower caste how could be his father and, in continuation, he gave a blow of stick on the head of Bhajju resultantly, he sustained the injury with bleeding. Thereafter, he accompanied with Kallu and Kurra Gadariya came to the police station for lodging the report. It is also stated that on account of simple thing appellant has beaten to Bhajju. On such factual matrix the offence of section 307 of the IPC and section 3(1)(x) of the Act was registered against the appellant. The injured was sent to hospital where his MLC report was prepared. On completion of investigation the

appellant was charge sheeted for the offence of section 307 of the IPC and section 3(2)(v) of the Act. On evaluation of the same, on framing the charge of section 307 of the IPC and in alternate section 3(ii)(v) and section 3(1)(x) of the Act, the appellant, abjured the guilt, on which, the trial was held. On appreciation of the evidence, by acquitting the appellant from the offence of section 307 of IPC and section 3(ii)(v) of the Act, he was held guilty for the offence of section 323 of the IPC and section 3(1)(x) of the Act and punished with the above-mentioned sentence. Being dissatisfied with such conviction and sentence, the appellant has come to this court with this appeal.

3. Shri Pradeep Naveria, learned counsel for the appellants after taking me through the record of the trial court, without challenging the findings holding guilty to the appellant for causing the alleged incident has made his limited submission to extend acquittal to the appellant from the offence of section 3(1)(x) of the Act. In support of such contention, by referring the evidence, available and exhibited papers of the charge sheet, he said that on proper appreciation it is apparent that the alleged incident did not take place because of the caste of the complainant Bhajju covered under the Act. In continuation, he said that Bhajju accompanied with appellant and other person went to see the Notanki (drama) and while returning in the morning, on account of some small dispute the alleged hot talk took place between them and, in such premises, the alleged incident was happened. In such scenario, it could not be deemed that appellant had committed such act to humiliate the complainant on account of his caste covered under the Act and prayed to extend acquittal to the appellant. So far the charge of section 323 of the IPC is concerned, he said that looking to the nature of the incident and the injury sustained by the victim and also taking into consideration the circumstance that such incident took place long before in the year 2000 and thereafter no criminal antecedents has been reported against the appellant. Besides this, he did not had any criminal antecedents or history so he being first offender, by adopting some lenient view, his jail sentence under such section be reduced from six months upto the period of 17 days suffered by the appellant in judicial custody between 4.10.2000 to 20.10.2000 by enhancing some amount of fine under the discretion of the court and prayed to allow this appeal accordingly.

4. Responding the aforesaid arguments, Shri Rakesh Kesharwani, learned Panel Lawyer by justifying the impugned conviction and sentence said that the same is based on proper appreciation of the evidence. It does not require any interference at this stage either for acquittal for the offence under the Act

or for reducing the jail sentence under section 323 of the IPC and prayed for dismissal of this appeal.

5. After hearing the counsel at length, keeping in view their arguments, I have carefully gone through the evidence led by the prosecution as well as the exhibited papers of the charge sheet so also the impugned judgment. It is apparent fact in the FIR itself that on the way near some river on account of some simple dispute some hot talk took place between the appellant and the victim Bhajju due to that the alleged incident was happened otherwise it is apparent that the appellant accompanied with victim went to see the Notanki (drama) and they were also returning accompanied each other. So, in such premises, prima facie it could not be deemed that there was any disputed (sic. dispute) between them on account of caste of the victim which is covered by the Act. Keeping in view this prima facie story of the prosecution, on examining the evidence of Bhajju (PW2) as well as Mohanlal (PW1) then it appears from the deposition of victim Bhajju that the alleged incident was not committed by the appellant with intention to humiliate him on account of his caste covered under the Act. It is apparent fact that the complainant Mohanlal has not supported the prosecution case as well as the averment of the FIR (Ex.P/1). On the contrary he turned hostile. So firstly in such circumstance conviction of the appellant under section 3(1)(x) of the Act is not sustainable. Such conviction is also not sustainable on the count that the prosecution has utterly failed to prove the caste of the victim by any cogent and reliable document issued by the competent authority like Caste Certificate or the order of any such authority. In the lack of such evidence, in the available factual matrix, mere on the oral deposition of the witness, such fact could not be deemed to be the proved fact. So, the benefit of such thing also goes to the appellant. In such premises, the appellant is acquitted from the charge of section 3(1)(x) of the Act.

6. So far the conviction of the appellant under section 323 of the IPC is concerned, on perusing the available record including the deposition of the witnesses and the exhibited papers, I have found sufficient prima facie circumstance against the appellant for committing such offence and in such premises it is held that the trial court has not committed any error in holding guilty to the appellant for such offence. In such premises, the finding of the trial court till this extend are hereby affirmed.

7. Coming to consider the prayer of the appellants counsel for reducing the jail sentence under section 323 of the IPC, I have found some substance

in it. It is undisputed fact that the alleged incident took place in the year 2000 and the appellant did not possess any criminal antecedent or history and, in such premises, he being first offender, is entitled to adopt some lenient view in imposition of the punishment. It is apparent fact on record that out of the awarded jail sentence between 4.10.2000 to 20.10.2000 till release on bail, the appellant had already suffered 17 days in judicial custody during trial. Thus, in the available factual matrix, instead to send him again in jail, in the above mentioned circumstances, I deem fit to reduce his jail sentence under section 323 of the IPC from six months to the aforesaid period suffered by him in jail by enhancing some amount of fine with a direction to pay the same to the victim Bhajju to sub serve the justice with him also.

8. In the aforesaid premises, by affirming the conviction of the appellant under section 323 of the IPC, this appeal is allowed in part and his conviction and sentence under section 3(1)(x) of the Act is set aside and he is acquitted from such charge. His jail sentence under section 323 of the IPC is hereby reduced from six months to the aforesaid period of 17 days suffered by him in the judicial custody by enhancing amount of fine from Rs.250/- to Rs.1000/- . The fine amount deposited under section 3(1)(x) of the Act shall be adjusted in the above-mentioned enhanced fine amount and the remaining is to be deposited by the appellant within 45 days from today, failing which, the appellant has to suffer further three months simple imprisonment. On depositing the aforesaid fine amount, Rs.500/- be given to victim Bhajju by calling him in the trial court through summons. The bail bonds of the appellant are hereby discharged.

9. The appeal is allowed in part as indicated above.

Appeal partly allowed.

**I.L.R. [2012] M.P., 1313
APPELLATE CRIMINAL**

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 249/1996 (Jabalpur) decided on 10 January, 2012

SUNDERLAL & 3 ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3, Penal Code (45 of 1860), Section 304 Part II – Eye Witness attributed the role of causing

injury on the head of deceased by co-accused – However, in Court evidence he alleged that such injury was caused by appellant No.3 – Held – Any material fact or circumstance which is projected by prosecution at the initial stage of the case is not proved in the same manner and some other thing contrary to such material fact comes in evidence, then such subsequent version could not be considered to hold conviction against the accused – Appellant No. 3 acquitted for charge under Section 304 Part II and convicted under Section 323/149 of I.P.C. (Paras 5 & 6)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता (1860 का 45), धारा 304 भाग II – प्रत्यक्षदर्शी साक्षी के अनुसार मृतक के सिर पर चोट सह-अभियुक्त द्वारा कारित की गई – किन्तु न्यायालीन साक्ष्य में उसने आरोप लगाया कि ऐसी क्षति अपीलार्थी क्र. 3 द्वारा कारित की गई – अभिनिर्धारित – कोई महत्वपूर्ण तथ्य या परिस्थिति जिसे अभियोजन द्वारा प्रकरण के प्रारंभिक प्रक्रम पर प्रक्षेपित किया गया उसे उसी प्रकार साबित नहीं किया गया और ऐसे महत्वपूर्ण तथ्य के विपरीत कुछ अन्य बात साक्ष्य में आती है, तब ऐसे पश्चातवर्ती कथन को अभियुक्त के विरुद्ध दोषसिद्धि के लिये विचार में नहीं लिया जा सकता – अपीलार्थी क्र. 3 धारा 304 भाग II के अंतर्गत आरोप से दोषमुक्त और मा.द.स. की धारा 323/149 के अंतर्गत दोषसिद्ध किया गया।

B. *Penal Code (45 of 1860), Sections 147, 323/149 – Sentence* – Incident took place about 19 years back – Appellants are suffering the mental agony of the present case and also do not have any criminal antecedents – Sentence reduced to period already undergone. (Para 12)

ख. दण्ड संहिता (1860 का 45), धाराएँ 147, 323/149 – दण्डादेश – घटना करीब 19 वर्ष पहले घटित हुई – अपीलार्थीगण वर्तमान प्रकरण की मानसिक पीड़ा सहन कर रहे हैं और उनका कोई आपराधिक पूर्ववृत्त भी नहीं है – मुगताई जा चुकी अवधि तक दण्डादेश घटाया गया।

Case referred :

AIR 1969 GUJ. 69.

Sankalp Kochar, for the appellants.

Yogesh Dhande, Dy. G.A. for the respondent/State.

ORDER

U.C. MAHESHWARI, J. - On behalf of the appellants/ accused this appeal has been directed under Section 374(2) of Cr. P. C. being aggrieved by the judgment dated 17.1.1996 passed by 1st Additional Sessions Judge Balaghat Camp at Waraseoni in S. T. No.67/93 whereby appellant No.1, 2 and 4 were convicted under Section 147 and 323/149 of IPC for RI one year separately in both sections with a direction to run the same concurrently while the appellant No.3 has been convicted under Section 304-II and 147 of IPC for RI seven years in earlier section while RI one year in later with a direction to run the sentence concurrently.

2. The facts giving rise to this appeal in short are that on 15.11.1992 at about 20.00 O'clock Yograj (P.W. 10) lodged the FIR at Police Station Katangi against the appellants and some other persons contending that today at about 9.00 O'clock in the morning his father Chhotelal (deceased) was taken by accused Pendhari to his residence where Panda Khubilal and other persons were also present. They asked his father Chhotelal to remove his witchcraft created on Raganbai, the wife of Pendhari on which Chhotelal said that he had not carried out such activity. On which the appellants and the co-accused along with the persons present at such place started the beating of said Chhotelal by means of fists and kicks. The same was seen by complainant Yograj and his son Nandkishor, as they were also called. Subsequent to such beating Chhotelal was thrown away on the road where he died in the evening. On the aforesaid information a crime for the offence of Section 148, 302 and 342 of IPC was registered against the appellants and some other named in the FIR. On completion of investigation the appellants along with co-accused were charge sheeted. After committing the case to the Sessions Court, on evaluation of charge sheet the charge of Section 147, 148 r/w section 302 and 302/34 of IPC were framed against the appellants and co-accused while the charge of Section 109 r/w section 302 of IPC was framed against co-accused Raganbai. All the accused abjured the guilt on which the trial was held. On appreciation of evidence by acquitting the co-accused Pitamlal, Raganbai and Chainlal from the alleged charges the appellant No.3 Dhaniram @ Karu was held guilty for the offence of Section 304-II and 147 of IPC while the other co-accused including the appellants were held guilty for the offence of Section 147 and 323/149 of IPC and they were punished with the above mentioned sentence. Being dissatisfied with such conviction and sentence, appellants have come to this Court with this appeal.

3. Shri Sankalp Kochhar learned appearing counsel of the appellants after taking me through the record of the trial Court argued that the prosecution has utterly failed to prove the alleged charges against any of the appellants by cogent and reliable evidence. The material omissions and contradictions between the case diary statements and the depositions of the examined witnesses have not been considered by the trial Court with proper approach. In continuation he said that the conviction of the appellant No.3 Dhaniram@Karu under Section 304-II of IPC being contrary to the record is not sustainable. By referring the case diary statement of alleged eyewitnesses Nandkishor (P.W.9) Ex. D/2 and Yograj (P.W.10) Ex. D.3, he said that none of them had stated in such statements that the head of the deceased Chhotelal was forcefully pressed on some wall by the appellant No.3 Dhaniram by which he sustained the head injury and due to that he died later. In fact in the aforesaid interrogatory statements Ex.D.2 and Ex. D.3 the name of co-accused Khubilal was stated as culprit to cause the aforesaid injury to Chhotelal by pressing his head. But on appreciation such Khoobilal was convicted along with appellant No.1, 2 and 4 only under Section 147 and 323/149 of IPC as stated above. The trial Court by relying on some part of cross- examination of Yograj (P.W.10) which came on record in response of suggestive question asked by the defence counsel, which was also contrary to the case diary statement of such witness, held guilty to appellant No.3 under Section 304-II of IPC. According to him firstly such version being contrary to the initial case of the prosecution and the case diary statement of the said witness could not be relied on to hold the conviction against appellant No.3 under Section 304-II of IPC. Secondly he said that any answer which come in the deposition in response of some suggestive question asked by the defence counsel could not be a foundation for holding conviction against the accused like appellant No.3. In support of such argument he also placed his reliance on a reported case of *Koli Trikam Jivraj and another v. The State of Gujarat*, reported in *AIR 1969 Guj. 69*. He further argued that on taking into consideration the entire evidence led by the prosecution as accepted on its entirety even then the material ingredients of formation of unlawful assembly and of common object are not made out against any of the appellants or other convicted co-accused. In such premises the conviction of the appellants under Section 147 and/or 323/149 of IPC is also not sustainable. It was also argued that as per depositions of the above named eyewitnesses more than two hundred persons were present on the spot, out of them none has supported the prosecution case as independent witness and whosoever witnesses have been examined

by the prosecution, except the aforesaid Yograj and Nandkishor no other witness has supported the case of the prosecution. With these submission he prayed for acquittal of the appellants from the alleged charge by setting aside the impugned judgment of the trial Court by allowing this appeal.

4. On the other hand by justifying the conviction and sentence of the appellants State counsel Shri Yogesh Dhande said that same being based on proper appreciation of evidence led by the prosecution do not require any interference at this stage. In continuation he said that only on account of minor discrepancies in the inter-se deposition of witnesses or some minor contradictions and omissions between case diary statement Ex.D.2 and Ex.D-3 and depositions of Nandkishor (P.W.9) and Yograj (P.W.10) the benefit of acquittal could not be extended to the appellants. However, he fairly conceded that while recording the case diary statement, Yograj and Nandkishor had not made any direct allegation against appellant No.3 for causing the head injury to the deceased Chhotelal. In fact such allegation was made by them against Khubilal in their case diary statements but on recording the deposition of such witnesses such fact was not stated by them in their inchief but in response of some suggestive questions put by defence counsel, it has come in the cross-examination of said Yogiraj that alleged head injury was sustained by the deceased due to the act of appellant No.3 Dhaniram @ Karu. In this regard he said that mere ommission of such fact in the case diary statement could not be a ground to discard such part of the deposition of Yograj.

5. Having heard the counsel at length keeping in view their arguments, I have carefully gone through the record of the trial Court along with the impugned judgment. It is apparent fact on record that the deceased Chhotelal was taken from his residence by Pendhari the husband of acquitted co-accused Raganbai to his residence where besides the appellants and co-accused various other persons were also assembled and in their presence the deceased Chhotelal was asked by Pendhari and Panda Khubilal along with some other persons to get rid of witchcraft created by him on Raganbai, till then no incident was happened but on giving reply by Chhotelal that he could not get rid the same as it was not carried out by him then he was subjected to beating by fists and kicks not only by the appellants but by some other persons also and in such beating deceased Chhotelal sustained the alleged injuries. As per case of the prosecution Yograj and Nandkishor were also present at the place of incident and saw the beating of Chhotelal, their father and grand father respectively. It is also apparent that such incident was happened between 9.00 am

to 4.00 p. m. and as per medical evidence during such period the alleged injuries were sustained by Chhotelal. In such premises one thing is apparent that appellant along with so many persons including the convicted co-accused were present on the place of the incident and they also participated in the same. In order to prove the participation of the appellants co-accused and other persons in the alleged incident the prosecution has examined said Nandkishore (P.W.9) and Yograj (P.W.10) on recording their depositions they categorically made allegations regarding beating of deceased Chhotelal against the appellants as well as the other implicated co-accused. But neither in the FIR lodged by Yograj nor in the case diary statements of any of the aforesaid witnesses the allegations against appellant No.3 Dhaniram @ Karu for causing the head injury to the deceased Chhotelal was made, on the contrary such allegation was made in the case diary statement of Yograj against Khubilal (Panda). But at trial on recording the deposition, Yograj has not made such allegation against any specific accused in his inchief but in cross examination in response of suggestive questions of defence in paragraph 13 of his deposition it has come that head injury was caused to Chhotelal by appellant No.3 Dhaniram @ Karu.

6. It is settled proposition of law that any material fact or circumstance which is projected by the prosecution at the initial stage of the case is not proved in the same manner and at trial contrary to such material fact some other thing comes in the evidence then such subsequent version being contrary to the initial case of the prosecution could not be considered to hold conviction against the accused like appellant No.3. In other words the same could not be a foundation to hold guilty to the appellant No.3 for the offence of section 304-II of 1PC. It is apparent fact on record that co-accused Khubilal against whom the allegation for causing the head injury was made in the case diary statement of Yograj on appreciation he has been convicted only for the offence of Section 147, 323/149 of IPC and he was acquitted from the charge of Section 304-II of IPC. It appears from the record that he had already suffered the awarded jail sentence during pendency of trial in judicial custody and in such premises he has not filed any appeal. On the other hand the State has also not filed any appeal against acquittal of these appellants and/or other co-accused from the charge of Section 302 of IPC as well as the acquittal of appellant No.1, 2 4 and other co-accused from the charge of Section 302 and/or 304-II of IPC. So in absence of any such appeal on behalf of the State after nineteen years from the date of the incident, I do not find fit to interfere

in such findings of the trial Court or to remit back the matter to the trial Court in this regard.

7. In view of aforesaid discussion, it has been established that appellant No.3 Dhaniram Karu was also situated in the similar circumstances on which the other appellants and co-accused are situated. As per available recorded evidence said Khubilal is also situated in the similar situation while as per case diary statement of Yograj he was situated in some different position but such case diary statement could not be a foundation to draw any inference against him, contrary to the evidence led by the prosecution.

8. Apart the above, it is apparent from the evidence led by the prosecution and other available papers on the record that initially the alleged incident was not happened due to any act of the present appellants on the contrary the same was happened because of Pendhari the convicted co-accused and his wife Raganbai who has been acquitted by the trial Court. In such premises the Court has to answer the question whether there was any meeting of mind between the appellants and co-accused to cause the alleged injury to the deceased Chhotelal in furtherance of their common object, if answer is positive then Court has to consider further sustainability of impugned conviction of the appellants, whether the same is correct or it requires any modification.

9. In view of aforesaid discussion, it is apparent that present appellants accompanied with other convicted co-accused so with some other persons had participated in the alleged incident in which the deceased Chhotelal sustained the injuries but in the available evidence it could not be deemed that any of them has participated in the alleged incident having knowledge that due to their any act Chhotelal may die. In such premises, they or any of them could not have been convicted either under Section 302 or 304-II of IPC. In the available circumstances taking into consideration the available ocular evidence and the nature of injury sustained by the deceased the trial Court has not committed any error in holding guilty to the appellant No.1, 2 and 4 and some other co-accused for the offence under Section 147 and 323/149 of IPC. Hence findings of the trial Court in this regard are hereby affirmed.

10. In view of aforesaid discussion the conviction of appellant No.3 Dhaniram@ Karu under Section 304-II of IPC being perverse and contrary to the available evidence is not sustainable, hence the same is hereby set aside and instead it he is also held guilty under Section 323/149 of IPC by maintaining his awarded conviction under Section 147 of IPC. Till this extent

the impugned conviction of the appellant No.3 is hereby modified.

11. Although the appellants did not have any criminal antecedents or history, as such they are first offender but in the available facts and circumstances even after 19 years of the alleged incident, I am not inclined to extend them the benefit of Probation of Offenders Act, hence the same is not being extended to them.

12. So far oral prayer of the appellants' counsel for reducing the jail sentence of the appellant No.1, 2 and 4 under Section 147 and 323/149 of IPC up to the period for which they have already suffered is concerned, I have found some substance in it. As per record he appellant No.1 Sunderlal suffered the judicial custody in pendency of trial between 17.11.1992 to 20.7.1993 while appellant No.2 Ram Prasad suffered such custody between 17.11.1992 to 26.7.1993 and appellant No.4 Mehtarlal suffered such custody between 17.11.1992 to 26.7.1993. Besides this they also suffered the awarded jail sentence between 17.1.1996 the date of the impugned judgment till passing the order for suspending their jail sentence by this Court vide 12.2.1996. So in such premises, considering the circumstances that alleged incident was happened in the year 1992 and since then the appellants are suffering the mental agony of the present matter and they also did not have any criminal antecedents or record, I deem fit to reduce their awarded jail sentence in both the sections up to the period for which they have already undergone i. e. more than eight months as stated above by imposing some amount of fine with a direction to pay the same to Yograj the son of the deceased Chhotelal.

13. So far imposition of sentence to the appellant No.3 is concerned, he had suffered judicial custody in pendency of the trial between 17.11.1992 to 27.1.1994 i.e. near about one year and three months. Therefore, I deem fit to punish him under Section 147 and 323/149 of IPC with the same punishment as awarded to other co-appellants i. e. one year RI in each count separately with a direction to run concurrently and no fine is imposed against this appellant because he has already suffered the jail sentence for more than one year as stated above.

14. In view of aforesaid discussion, by affirming the conviction of the appellant No.1, 2 and 4 under Section 147, 323/149 of IPC so also the conviction of appellant No.3 under Section 147 of IPC, this appeal is allowed in part and by setting a side the conviction and sentence of appellant No.3

under Section 304-II of IPC he is held guilty for the offence under Section 323/149 of IPC and besides the punishment awarded by the trial Court under Section 147 of IPC he is sentenced for one year RI with a direction to run both the sentence concurrently and considering the circumstance that he has already suffered more than one year in the jail custody, no fine is being imposed against him while the jail sentence of appellant No.1, 2 and 4 awarded under Section 147 and 323/149 is hereby reduced up to the period for which they have already suffered i. e. more than eight months, as stated above by imposition of fine Rs. 1,000/- on each of the aforesaid offence against each of the appellant No.1, 2 and 4. The amount of fine is to be deposited by them within sixty days from today in the trial Court, failing in depositing the fine the concerning appellant has so suffer further three months RI and on depositing the fine amount within the aforesaid period the same be given to Yograj (P.W. 10) son of the deceased Chhotelal by calling him in the trial Court through summons. Till this extent the impugned judgment is modified while other findings of the same are hereby affirmed.

15. Appeal is allowed in part as indicated above.

Appeal Partly allowed.

I.L.R. [2012] M.P., 1321

APPELLATE CRIMINAL

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

Cr. A. No. 188/2010 (Indore) decided on 11 January, 2012

CHANDRASHEKHAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 157 – Incident witnessed by mother of first informant who immediately informed her son on telephone – Son immediately reached on the spot and found his father dead – F.I.R. lodged by son is admissible in view of the provisions of Section 157 of the Act, 1872. (Para 10)

क. साक्ष्य अधिनियम (1872 का 1), धारा 157 – प्रथम सूचनाकर्ता की माँ ने घटना देखी, जिसने तुरंत टेलीफोन पर अपने पुत्र को सूचित किया – पुत्र तुरंत घटनास्थल पर पहुंचा और अपने पिता को मृत पाया – पुत्र द्वारा दर्ज कराई गई एफ.आई.आर. अधिनियम 1872 की धारा 157 के उपबंधों की दृष्टि में ग्राह्य है।

B. Penal Code (45 of 1860)] Section 302 or 304 Part I –

Murder or Culpable Homicide not amounting to murder – Deceased used to offer pooja and was also blowing conch shell during dawn hours which was disliked by appellant – On the date of incident appellant came out with an iron rod and dealt a blow when the deceased was coming back after offering pooja – There appears no previous enmity and the incident had occurred all of a sudden on account of the blowing of conch shell – Act of appellant falls within the ambit and scope of Section 304 part I – Sentenced to 10 years R.I. (Para-15)

ख. दण्ड संहिता (1860 का 45), धारा 302 या 304 भाग I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक बहुधा पूजा किया करता था और सुबह के समय शंख बजाया करता था, जिसे अपीलार्थी द्वारा नापसंद किया जाता था – घटना दिनांक को अपीलार्थी लोहे की राड के साथ आया और मृतक जब पूजा करके लौट रहा था उसे चोट कारित की – यह प्रतीत होता है कि कोई पूर्व शत्रुता नहीं थी घटना अचानक शंख बजाने के कारण हुई – अपीलार्थी का कृत्य धारा 304 भाग I की परिधि और क्षेत्र के अंतर्गत आता है – 10 वर्ष के सश्रम कारावास से दण्डादिष्ट किया गया।

Cases referred :

AIR 1985 SC 1268, 1998 CrLJ1416, AIR 1952 SC 54, 2007(3) MPHT 485, AIR 2006 SC 201.

Yashpal Rathore, 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 12.1.2010 passed by learned Second Additional Sessions Judge Mhow District Indore, in Sessions Trial No. 806/2008 acquitting the appellant under Section 302 IPC and thereby sentencing him to suffer life imprisonment and fine of Rs. 1,000/- in default further R.I of one year, this appeal has been filed by appellant under Section 374 (2) of the Criminal Procedure Code, 1973.

2. In brief, the case of prosecution is that Radhesingh (hereinafter referred to as the deceased) was a retired employee of the Police Department. He used to offer pooja (prayer) during the dawn hours. On the fateful day i.e. 28.8.2008 during the dawn hours at 5.45 after taking his bath the deceased was offering pooja nearby the tree of pipal at that juncture, appellant who is

the neighbour of the deceased armed with an iron rod came and dealt one blow on the head of the deceased as a result of which, he had died.

3. The FIR was lodged by son of the deceased Mohansingh (PW-2) on the basis of which a criminal case was registered under Section 302 IPC against the appellant. The Investigating Agency after completion of the investigation, submitted a charge sheet in the committal Court which committed the case to the Court of Session and from where it was received by the Trial Court for trial. The learned Trial Judge on the basis of record came to hold that offence is punishable under Section 302 IPC which appellant denied and requested for the trial. The prosecution thereafter examined its witnesses and also proved some documents. The defence of the appellant is of false implication and the same defence he set forth in his statement recorded under Section 313 of Cr.P.C. However, he did not choose to examine any witness in support of his defence.

4. The learned Trial Judge on the basis of evidence placed on record came to hold that charge under Section 302 IPC has been proved against the appellant and eventually convicted and passed the sentence to suffer life imprisonment and fine of Rs. 1,000/- in default further RI of one year.

5. In this manner this appeal has been filed by the appellant assailing the judgment of conviction and order of sentence.

6. Shri Yashpal Rathore, learned Counsel for the appellant submits that looking to the testimony of sole eyewitness Jeewanti Devi (PW-5) it cannot be said that appellant has dealt the blow of iron rod on the head of the deceased resulting into his death. Learned Counsel further submits that this witness is the wife of the deceased and, therefore, her evidence should not be relied upon.

7. An alternative submission has also been put forth by him that if this Court comes to the conclusion that on account of giving the blow of iron rod on the head of the deceased he had died, since there is no previous enmity and because the deceased happens to blow conch shell (shankh) in high tone in his house during the dawn hours which was not being liked by the appellant, if he had given the single blow of iron rod at the most the case would rest within the sphere of Section 304 Part-I IPC.

8. On the other hand, Shri Yadav, learned Public Prosecutor argued in support of the impugned judgment and submitted that looking to the unimpeachable testimony of the wife of the deceased, coupled with the injury

which was sustained by the deceased, learned Trial Court has rightly convicted the appellant under Section 302 IPC and, therefore, this appeal sans substance and same be dismissed.

9. Having heard learned Counsel for the parties we are of the considered view that this appeal deserves to be allowed in part.

10. In the present case the FIR Ex.P/2 has been lodged by the son of the deceased namely Mohansingh (PW-2) but he is not an eyewitness and he was informed on phone about the incident by his mother Jeewanti Devi (PW-5) who had seen the incident and without wasting any time rang to this witness to come immediately at the spot as a result of which, this witness arrived at the spot and found that his father is dead having injury on his head. Thereafter this witness went to lodge the report and has also proved the FIR Ex.P/2 lodged by him. According to this witness, the cause of committing injury to the deceased was that while offering the pooja (prayer) the deceased happens to blow the conch shell (*shankh*) which made annoyance to the appellant. According to us although this witness is not an eyewitness but his testimony is relevant piece of evidence and is admissible under Section 157 of the Evidence Act because soon after the incident immediately the eyewitness Jeewanti Devi (PW-5) telephonically informed this witness about the incident and immediately thereafter he rushed to the place of occurrence. The ambit and scope of Section 157 of the Evidence Act has been taken into account by the Supreme Court in some decisions. They are *Smt. Chander Kala v. Ram Kishan and another* AIR 1985 Supreme Court 1268 para 9 and *State of Tamil Nadu v. Suresh and another* 1998 CRI.L.J.1416. In the case of *Smt. Chander Kala* the Supreme Court has held as under:-

9. In our view the reasoning and appreciation suffer from a legal error and almost sound perverse. Assuming that the complainant's conduct in narrating all that transpired on 10th March to three of her colleagues is not *res gestae* and hence inadmissible under sec. 6 of the Evidence Act, the same when corroborated by the three witnesses is clearly admissible under sec. 157 of the Evidence Act and therefore ignoring such crucial and relevant evidence has led the court to give undue importance to the so-called delay in lodging the report with the police. In fact it could not be regarded as a case of any delayed report, for, it should have been appreciated that it was the second incident when the accused actually assaulted

the complainant by catching hold of her arm and tried to outrage her modesty that the culminating point was reached and immediately the same evening (of 18th March) she lodged her complaint with the police. It is surprising that the High Court without paying any attention to this legal error implied confirmed the Sessions Court's view about the inadmissibility of that evidence. It is thus clear that such subsequent conduct on the part of the complainant in narrating all that transpired at the accused's residence to three of her colleagues on the following day (supported as it was by the three witnesses) lent ample corroboration to her story.

Similarly in Suresh (supra), in para 28 the Supreme Court has held as under:-

28. We think that the expression "at or about the time when the fact took place" in Section 157 of the Evidence Act should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in Section 157 of the Act. The test to be adopted, therefore, is this: Did the witness have the opportunity to concoct or to have been tutored? In this context the observation of Vivian Bose, J. in *Rameshwar v. State of Rajasthan*, AIR 1952 SC 54 is apposite:

"There can be no hard and fast rule about the 'at or about the' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction."

(Emphasis supplied)

11. Yet there is another decision of the Supreme Court *Rameshwar s/o Kalyan Singh v The State of Rajasthan* AIR 1952 Supreme Court 54 which has been relied by the Apex Court in Suresh (supra). In this decision the Supreme Court has held while placing reliance on this type of witness the Court should first ascertain that did the witness have opportunity to concoct or to have been tutored?. These three decisions have been relied upon by the Division Bench of

this Court in *Chander Singh Chamar vs. State of M.P.* 2007(3) M.P.H.T. 485. According to us there can be no hard and fast rule about "it or about" condition in Section 157 of the Evidence Act. The main test is whether the statement was made as early as can reasonably be exposed in the circumstances of the case and before there was opportunity of tutoring or concoction. In the present case the deceased was the father of the author of the FIR Mohansingh (PW-2) and the eyewitness Jeewanti Devi (PW-5) is the wife of the deceased was present at the spot at the time of occurrence and because without wasting any time immediately she rang to her son PW-2 and informed him on telephone about the incident, according to us the testimony of Mohansingh (PW-2) is quite relevant and admissible in evidence as envisaged under Section 157 of the Evidence Act although he is not an eyewitness. In a later pronouncement the Supreme Court in *Ramashray Yadav & Ors. v. State of Bihar* AIR 2006 Supreme Court 201 has laid down the same proposition of the law.

12. On going through the testimony of the eyewitness Jeewanti Devi (PW-5) we find that at 6 in the morning when the deceased was offering pooja in the Shiv Temple and was coming back the appellant came out from his house having an iron rod in his hand and dealt its blow on the head of the deceased and this she saw from her house which is not far away. On receiving the injury by iron rod the deceased fell down on the ground and on seeing the scene by the witness she started screaming and on hearing her shriek, the neighbours assembled at the place of occurrence thereafter the appellant fled from the place of occurrence and she found that the deceased was having injury on the head and he was besmeared in the blood. Nothing has been carved out from her testimony in order to disbelieve her and, therefore, according to us looking to her unimpeachable testimony it is as clear like a noon day that it was appellant who caused the blow of iron rod on the person of the deceased as a result of which he had died.

13. The evidence of the eyewitness Jeewanti Devi (PW-5) and son of the deceased Mohansingh (PW-2) is further also medically corroborated. Dr. Hemant Patel (PW-1) has found the following injuries on the person of the deceased which are also mentioned in the Post Mortem Report Ex.P/1:-

(1) Brain matter seen out of the skull cavity fracture of the parietal, occipital frontal vault are crushed.

(2) Lacerated wound 5" x 1" bone deep from the palmer aspect of the Left Little finger to the dorsal aspect of

the left right finger.

(3) Fracture left 4th & 5th interphalangeal joint.

(4) Fracture 9th, 10th, 11th, rib in left side of chest on the front part.

14. On examining the testimony of Jeewanti Devi (PW-5) and Mohansingh (PW2) vis-a-vis to the evidence of Autopsy Surgeon Dr. Hemant Patel (PW-1), the Post Mortem Report of the deceased Ex.P/1 we do not have any doubt in our mind in holding that it was appellant who dealt the iron rod blow on the person of the deceased as a result of which, he had died.

15. We shall now advert ourselves to the alternative submission put forth by learned Counsel for the appellant. It has been proved by the evidence of wife and son that because during the dawn hours the deceased used to offer pooja and was also blowing the conch shell (shankh) which was disliked by the appellant who is his neighbour it made annoyance to him, hence, on the date of incident when the deceased was coming back after offering pooja the iron rod blow was dealt by the appellant. Since, there appears to be no previous enmity and the incident had occurred all of a sudden on account of the blowing of conch shell (shankh). The case of appellant would come within the ambit and scope of Section 304 Part-I IPC and accordingly the conviction of appellant is altered from Section 302 IPC to 304 Part-I IPC and is, hereby, sentenced to 10 years RI and fine as directed by the Trial Court with defaulting clause.

16. Resultantly, this appeal succeeds in part to the extent indicated hereinabove.

Appeal partly succeeds.

I.L.R. [2012] M.P., 1327

APPELLATE CRIMINAL

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

Cr. A. No. 985/2000 (Indore) decided on 2 February, 2012

PRAVEEN KUMAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 302 – Minor injuries – Death due to asphyxia – Hanging – Two doctors performed post mortem, no opinion given for homicidal death – Oral and documentary

evidence not support the charge u/s 302 IPC – No cogent evidence – Conviction u/s 302 set aside. (Paras 30 & 31)

क. दण्ड संहिता (1860 का 45), धारा 302 – छोटी चोटें – स्वांसावरोध के कारण मृत्यु – फाँसी लगाना – दो चिकित्सकों ने शव परीक्षण किया, मानव वध के लिए कोई मत नहीं दिया गया – मौखिक और दस्तावेजी साक्ष्य मा.द.सं. की धारा 302 के अंतर्गत आरोप का समर्थन नहीं करते – कोई प्रबल साक्ष्य नहीं – धारा 302 के अंतर्गत दोषसिद्धि अपास्त।

B. *Medical Jurisprudence, – Evidence Act (1 of 1872), Sections 45 & 46 – Opinion of Expert* – It can not be presumed that doctor is always a witness of truth – Autopsy surgeon, experience of 25 years not noticed the condition of changes in dead body (in eyes, skin, regormortis & muscular elasticcity) after six hours of death – Nothing stated by Doctor in postmortem report – Opinion given by the Doctor that the death is homicidal not acceptable. (Paras 28 & 29)

ख. चिकित्सीय विधिशास्त्र – साक्ष्य अधिनियम (1872 का 1), धाराएँ 45 व 46 – विशेषज्ञ की राय – यह उपधारणा नहीं की जा सकती कि चिकित्सक सदैव सत्य का साक्षी होता है – शव परीक्षण सर्जन जिसे 25 वर्षों का अनुभव है, वह शव में मृत्यु के छः घंटे पश्चात बदलाव (आंखों में, त्वचा पर अकड़न व मांसपेशियों का लचीलापन) की स्थिति को नहीं देख पाया – चिकित्सक ने शव परीक्षण प्रतिवेदन में कुछ नहीं बताया – चिकित्सक द्वारा दिया गया मत कि मृत्यु मानव वध स्वरूप की है स्वीकार्य नहीं।

Cases referred :

AIR 1983 SC 66, 2010(4) MPHT 386, AIR 2010 SC 806, (1992) SC 2186, AIR 1975 SC 2161.

Surendra Singh & S.K. Vyas with Atul Shreedharan & Ashish Gupta, for the appellant.

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

J U D G M E N T

The Judgment of the Court was delivered by :
A.K. SHRIVASTAVA, J. - Feeling aggrieved by the judgment of conviction and order of sentence dated 28.08.2000 passed by learned Additional Sessions Judge, Narsinghgarh, Distt. Rajgarh (Biaora) convicting the appellant under Section 302 IPC and thereby sentencing him to suffer life imprisonment and fine of Rs.25,000/-; in default further RI of 3 years, the appellant has knocked

the doors of this Court by preferring this appeal under Section 374(2) Cr.P.C. 1973.

2. Before narrating the facts of case it is relevant to mention here that 5 persons were made accused and they were tried by learned Trial court for the charges punishable under Section 302 IPC, in the alternative Sections 304 B, 177, 498-A and 201 IPC however, the learned Trial Court did not find any of the charges to be proved against the accused Mishrilal, Surendra Kumar, Manju Mehta and Pradeep Kumar alias Mintu as a result of which they have been acquitted. Learned Trial Court also did not find the charge under Sections 304-B, 177, 498-A and 201 IPC to be proved against the appellant, however he has been found to be an uxoricide and holding him to be the guilty of the charge under Section 302 IPC convicted him and passed the sentence as mentioned herein above.

3. In brief, the case of the prosecution is that appellant got married to Rashmibai alias Reshma (hereinafter referred the deceased). The parents of the deceased according to their capacity gave the dowry. After his marriage the appellant along with the deceased went to his nuptial house where he stayed up to 24.2.91. During the period 22.2.91 to 24.2.91 the deceased told her mother that the items which were given to her they are not being liked by her in-laws. Thereafter on 25.2.91 appellant as well as the deceased again went back to Nagpur and from there they returned back to their home at Narsingharh. Thereafter on 11.3.91 the deceased again went to her parents house at Hinganghat (Maharashtra), where she completed her annual examination which ended on 30.4.91. During this period she was not happy and all the time she was weeping. It is said that she was being ill-treated by her in-laws for and in respect of the dowry. On this, her mother told the deceased that because she has solemnised two marriages, therefore their economic condition has become weak and at present they are not in position to give more dowry. After 17.4.91 when the examination of the deceased was over, the mother of the deceased sent her along with her another daughter Sonali on 30.4.91 at Narsingharh. On 17.5.91 again deceased came back to her parental house at Hinganghat. At that juncture she again complained to her mother that her in-laws are disliking the items which they provided to her in the dowry.

4. It is the further case of the prosecution that on 21.6.91 at Raipur the maternal uncle of the deceased had gone to attend the marriage of his maternal

uncle to Raipur, where she was also accompanied by the appellant and in Raipur also she made complaint to her mother that why she has been married at an early age and has been pushed from her parents house. She also told that she would like to undergo her studies further. It is said that on 22.6.91 the deceased insisted her mother to take her back to her parents house at Hinganghat and she do not want to go to her husbands house because she was being ill-treated there. It was also told by her that sometime her mother-in-law also co-operate with the appellant when the dowry demand was being made. However, the mother of the deceased did not think it proper to accompany the deceased with her and she was given understanding that on 14.7.91 she (the mother) had to go to Narsinghgarh in a marriage, but she will come two days earlier to the date of marriage and at that juncture she will interact with the in-laws of the deceased. Thereafter the deceased again came back to her in-laws house at Narsinghgarh.

5. It is further case of the prosecution that in the night of 6.7.91 on the occasion of the marriage of one Rajesh Bhandari a party was organised by Banshilal Gupta in the garden of one Prahalad Das Bihani which is known as Nazarbagg. In this party the appellant and the deceased also assembled. The dance etc also took place in that party where appellant danced with a girl which was not liked by the deceased. After taking the dinner etc in the party the deceased came back to home in a car along with the appellant.

6. According to the prosecution immediately after the dawn hours at 7.30 AM on 7.7.91 acquitted co-accused Pradeep alias Mintu went to the house of Dr. U.K. Gujarati who was present at Narsinghgarh, although he was posted at Bhopal, and informed him that some unhappening has occurred to the deceased and insisted him to examine her. Resultantly, the said Dr. Gujarati along with acquitted co-accused Pradeep Kumar alias Mintu went to his house where in a room at second floor he found that the deceased was lying on a bed. On examining the deceased, Doctor found her to be alive but her condition was serious. Her pulse was quite weak. The said doctor advised to shift the deceased immediately to the hospital and thereafter he telephonically informed Dr. P.S. Pal who was posted in Civil Hospital at Narsinghgarh informing that one lady patient is in serious condition and she is being brought to him. Thereafter the appellant along with acquitted co-accused Pradeep Kumar alias Mintu carried the deceased in his car to Civil Hospital to Narsinghgarh where Dr. Pal tried his best to save the life of the deceased. Thereafter when she did not survive, the doctor sent an information to the Police Station

Narsinghgarh.

7. On receiving information in the Police Station, the Sub Inspector V.S. Rajput immediately arrived at the Civil Hospital at Narsinghgarh and found the deceased to be dead as a result of which sent her dead body for the postmortem at Medical Legal Cell, Bhopal. The forensic medicine expert Dr. D.S. Badkur and the lecturer of Forensic Medicine Department of Gandhi Medical College, Bhopal Dr. B.P. Dubey on 8.7.91 at 11 AM conducted the postmortem of the deceased and according to these doctors, the deceased had died on account of hanging due to asphyxia.

8. The parents of the deceased arrived at Narsinghgarh in the night of 7.7.91 and after the cremation was over they went back to Hinganghat.

9. However on 14.7.91 i.e. after 7 days of the death of the deceased, the father of the deceased namely Nirmalchand Kothari created certain doubt that his daughter has been murdered as a result of which he lodged a written report at the P.S. Narsinghgarh. On the basis of this written report the criminal law was triggered and set into motion. The investigating agency registered the case under Sections 302 and 304-B IPC at Crime No.186/91 and the matter was handed over to C.I.D. and the rest of the investigation was made by C.I.D.

10. After completion of the investigation the charge-sheet was filed before the committal court which committed the case to the Court of Session from where it was received by the Trial Court for trial.

11. The learned Trial Judge on the basis of the allegations made in the charge-sheet, framed charges for offences punishable under Sections 304 B, 177, 498-A and 201 IPC. In the alternative charge under Section 302 IPC was also framed. All the accused persons denied the charges and requested for the trial.

12. In order to bring home the charges, the prosecution examined as many as 26 witnesses (P.W.1 to P.W.26) and also proved some of the documents.

13. The defence of the accused persons including the appellant is of false implication which they also set forth in their statements recorded under Section. 313 Cr.P.C. and in support of their defence they examined 7 defence witnesses, they are Krishan Mohan Upadhyay (D.W.1), Mahesh Kumar Soni (D.W.2), Keshav Kumar Biyani (D.W.3), Madan Mohan Nema (D.W.4);

Kushal Chaganraj Jain (D.W.5), Anju Jain (D.W.6) and Amita Bhandari (D.W.7).

14. The learned Trial judge on the basis of the evidence placed on record came to hold that charges are not proved against the other accused persons, resultantly they have been acquitted from all the charges. The learned Trial Court also came to hold that all the other charges except Section 302 IPC are also not proved against the appellant and he too has been acquitted from those charges. However on the basis of the evidence learned trial Court came to the conclusion that the appellant has committed the offence under Section 302 IPC and eventually convicted him and passed the sentence which is mentioned in the impugned judgment.

15. In this manner, this appeal has been filed by the appellant assailing his judgment of conviction and order of sentence.

16. The contention of Shri Surendra Singh, learned Senior Counsel for the appellant is that if the entire case of the prosecution is considered in toto, since there is no definite evidence against the appellant therefore only on the basis of the conjecture, surmises and assumptions he cannot be convicted. By inviting our attention to the testimony of postmortem doctor D.S. Badkur (P.W.21) it has been submitted by learned Counsel that if his testimony is considered in true perspective the entire scene would become clear like a noon day that the deceased breathed her last on account of suicide and there is no iota of evidence of the homicidal death. In this context learned Counsel has also invited our attention to the postmortem report Ex.P/18 and has further invited our attention to the most important document Ex.P/3 which according to the learned Senior Counsel is the turning point of the case because in this document specifically it has been mentioned by Dr. Pal (P.W.20) that when the deceased was brought to the hospital she was alive and was in gasping condition and if that would be the position why several queries were made by police to the doctor as a result of which Dr. Pal issued letters Ex.P/15, P/16 and P/17 on different dates to the police and therefore although the investigating agency tried its best to have favourable report in its favour that the death was not suicidal and was homicidal, but despite full efforts the hallmark of the naked truth that deceased committed suicide has not at all been somersaulted. Learned Senior Counsel further submits that although Dr. Pal (P.W.20) has stated in his testimony that the deceased already died 6 hours earlier when she was brought to him, but if his testimony is tested on the touchstone and the

anvil of his own letter Ex.P/3 and other important evidence it would become clear that the deceased was alive and this witness tried his best to save her life, therefore it can be inferred that under pressure such statement has been given by this doctor in the Court and in this context learned Counsel has invited our attention to para-7 of the cross-examination of this doctor. Hence, according to learned Senior Counsel if the statement of Dr. Pal is taken to be true that he examined the dead body of the deceased, no prudent man would accept his evidence. In this context, learned Counsel has invited our attention to page 423 of *Dr. Modi's Medical Jurisprudence and Toxicology* 23rd edition, wherein duration of a dead body and its condition etc are mentioned. To bolster his submission learned Counsel has placed heavy reliance on the decision of the Supreme Court in the matter of *Mayur Panabhai Shah vs. State of Gujrat* [AIR 1983 SC 66] and has argued that doctor always do not say the true version and hence learned Counsel submits that after giving look to the entire gamut it would be difficult to say that the death was homicidal and was not suicidal.

17. By inviting our attention to the testimony of Damodar Bihani (P.W.1) who is the person in whose lawn a party was arranged a day earlier to the incident, it has been submitted that because in the said party the appellant was dancing with another girl, the deceased became little jealous and it was a cause to commit suicide.

18. Learned Senior Counsel further submits that Dr. D.K. Satpathi (P.W.22) on the basis of the postmortem report, other necessary information supplied by the police to him has opined in his report Ex.P/19 that the death was homicidal and not suicidal. According to learned Senior Counsel unless and until a dead body is seen by a doctor and was present through out during the autopsy, only on the basis of postmortem report and other material and even on the basis of photographs of the dead body, his opinion would be nothing but would be the guess work. According to learned Senior Counsel before arriving at the conclusion whether the death was homicidal it was incumbent to see the dead body and also should have conducted the postmortem. In this context heavy reliance has been placed on the Division Bench of this Court in the matter of *Anil Kumar Singhal Vs. State of M.P.* [2010(4) M.P.H.T. 386] wherein the situation arose that on the basis of certain photographs and the postmortem report etc it was opined that the death was not suicidal and it was partial hanging and was homicidal. The said opinion was turned down by the Division Bench by acquitting the accused.

19. Hence according to learned Senior Counsel since the prosecution has utterly failed to prove its case beyond all reasonable doubt that the death was homicidal, by allowing this appeal the appellant be acquitted from the charge under Section 302 IPC for which he has been convicted and sentenced.

20. Per contra, Shri Bohra, learned Public Prosecutor has argued in support of impugned judgment and submitted that for no rhyme or reason the testimony of Dr. Satpathi (P.W.22) and his report Ex.P/19 should be somersaulted. According to learned Public Prosecutor since the doctor is having long experience his report should be relied upon wherein he has opined that the death of the deceased was homicidal. By putting deep dent on the argument of learned Senior Counsel for the defence it has been put forth by the learned Public Prosecutor that the submission put forth by him that on account of jealousy the deceased committed suicide should be visualised, from another angle also that it was a cause for the appellant to become an uxoricide because she did not like his attitude dancing with another girl in the party, and therefore there was a motive for the appellant to kill her and looking to the material evidence of Dr. Satpathi the learned trial Court did not commit any error in convicting the appellant, hence it has been prayed that this appeal sans substance and the same be dismissed.

21. Having heard learned Counsel for the parties, we are of the considered view that this appeal deserves to be allowed.

22. Damodar Bihani (P.W.1) who organised the party has categorically stated that in his party dance was going on and the appellant was dancing with another girl although his wife (the deceased) was also dancing, but on seeing appellant dancing with the other girl she sat down.

23. The statement of this witness is further corroborated by another witness Shantilal (P.W.2) who was also present in the said party and was there up to late night. One more very important evidence is carved out from his testimony that on the next day when he come to know that in the night the deceased has fallen seriously ill and has been admitted in the hospital, this witness went to the hospital in the morning to see her and he found that the drip bottle was injected to her.

24. In the present case certain evidence which have been carved out from the testimony of the witnesses, documentary evidence and the finding given by learned trial Court are as under:-

1. The deceased and appellant got married on 27.1.91;
2. a party was arranged by Damodar Bihani (P.W.1) in Nazarbag garden where the deceased and appellant were also invited;
3. while enjoying the party the appellant was dancing with a girl;
4. the appellant did not offer his own wife (deceased) to dance with him [see Damodar Bihani (P.W.1) and Shantilal (P.W.2)].
5. in the late night the appellant and deceased came back to their home;
6. during dawn hours on 7.7.91 the condition of the deceased was found to be serious;
7. Dr. U.K. Gujarati (P.W.19) was called but after examining the deceased he directed to shift her to the hospital.

25. On the basis of the aforesaid evidence the grain has been taken out from the chaff that the deceased was brought to the Civil Hospital at Narsingharh when she was alive and Dr. Pal (P.W.20) tried his best to save her life but failed and ultimately on account of her death the information was sent by him to the concerning police station.

26. Much emphasis has been put forth by the learned Public Prosecutor that indeed the dead body was brought to the Civil Hospital and Dr. Pal examined only a dead body and in this regard our attention has been drawn to Ex.P/15, P/16 and P/17 which are replies of the queries wherein doctor Pal (P.W.20) has stated that he examined only a dead body. How far his statement is correct, on close of the testimony of this witness the hidden truth is exposed that under pressure he has been forced to say so that he examined a dead body but before marshalling the testimony of this witness and examining the document Ex.P/3 dated 7.7.91 which is the turning point of the case, it would be relevant to mention here that this doctor is in medical line and is serving on the post of Assistant Surgeon for last 25 years. At this juncture only it would be condign to quote the entire document Ex.P/3 dated 7.7.91 written by this

doctor which is as under:

To,

The T.I.,

Police Station Narsinghgarh.

Sub: Information about Smt. Rashmi W/o. Pravin Kumar Jain, R/o. Bada Bazar.

It is informed that a young woman Smt. Rashmi was brought to hospital for treatment in gasping condition.

She collapsed during treatment. It appears to be a suspected case.

You are requested for needful. Please in continuation of information already furnished by messenger at 10.15 A.M. Dt. 7/7/91.

11 A.M.

7/7/91

Astt. Surgeon

C.H. Narsinghgarh.

27. If we accept the contention of the learned Public Prosecutor that according to Dr. Pal (P.W.20) he had examined only a dead body and whose testimony is also corroborated by Dr. Satpathi (P.W.22) and his opinion Ex.P/19, several big question marks are carved out creating heavy doubt to digest and swallow, this argument and these big questions are:-

1. Why Dr. Pal in its report Ex.P/3 dated 7.7.91 at 11 A.M. has stated that the patient was in gasping condition?
2. Was she alive and therefore messenger was sent to the Police Station at 10.15 AM as contained in Ex.P/3?
3. And if she was already dead for last 6 hours, whether this doctor injected the drip to a dead body? [See para-2 of Shantilal (P.W.2)]
4. Why witness Shantilal (P.W.2) who is not a hostile witness is saying that when he came to the hospital in the morning he saw a drip was injected to the deceased and she was being treated by the doctor in the hospital?

5. Why the symptoms of the death of the deceased was not noticed by the same autopsy surgeon Dr. Pal (P.W.20) which are mentioned on pages 423 to 432 of Modi's Medical Jurisprudence and Toxicology (23rd Edition) particularly to the changes in the eyes, changes in the skin, rigor mortis and muscular elasticity etc.

28. It be seen that Autopsy Surgeon doctor Pal (P.W.20) is an Asst. Surgeon serving for last 25 years in the hospital and therefore since he did not notice the condition of the changes in the eyes, skin, rigor mortis and muscular elasticity etc on the dead body which normally is found after 6 hours of the death, therefore the statement of this doctor saying that he examined only a dead body cannot be accepted. In his postmortem report Ex.P/18 the duration of death 6 hours has not at all been stated. If we further scrutinise para 7 of the testimony of this we find that 15 to 20 queries were made to him by the Police one after the other, after he submitted his postmortem report and not only this the S.D.O.(P.) also summoned him to the Police Station and asked several questions there. Normally a doctor is never summoned in the Police Station to give answers and if any doubt is carved, out in the mind of Investigating Agency it should be clarified by queries and its reply which is given by the doctor. Thus it appears and it could be inferred that the doctor was pressurised to say that indeed he examined a dead body and the death had occurred 6 hours earlier when he examined the deceased. According to Dr. Modi, in India the changes in the eyes, skin, rigor mortis, muscular elasticity, etc takes place within 1 and 2 hours after the death, but no such symptoms were noticed and opined by the doctor in the postmortem report. Apart from this in the postmortem report Ex.P/18 also it has not been opined that the death was homicidal. On the internal page-7 of the postmortem report it has been opined that death was due to asphyxia as result of hanging.

29. At this juncture it would be relevant to place reliance on the decision of the Supreme Court *Mayur Panabhai Shah vs. State of Gujrat* (supra) wherein it has been held that there cannot be any presumption that the doctor is always a witness of truth and the judgment of the the Gujarat High Court was reversed. At this juncture it would also be profitable to place reliance on another decision of the Supreme Court in the matter of *Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors.* [AIR 2010 SC 806] wherein the Apex Court has laid down the law that the query report should be supported by the documents. Undisputedly no such material was sent along with the

queries put by the police and therefore whatever clarification he has given can not be accepted and if it is accepted it would only be the conjectures and surmises.

30. Now we shall examine the testimony of Doctor Satpathi (P.W.22) and his report Ex.P/19 as well as the contention made by the learned Senior Counsel and learned Public Prosecutor. Admittedly this Doctor has not conducted the Postmortem nor he was present when the postmortem was going on and only on the basis of the postmortem report and the other material sent to him, he straightway gave opinion that the death was homicidal and not suicidal. According to us in absence of the examination of the dead body and in absence of conducting the postmortem it would be hazardous for a Doctor to say only on the basis of the postmortem report and other material or even on the basis of the photographs of the dead body that the death was not suicidal but it was homicidal. On this point at length the Division Bench of this Court in the matter of *Anil Kumar Singhal Vs. State of M.P.* (supra) has dealt the point. In that case also on the basis of the report of the doctor who did not conduct the postmortem or even did not see the dead body on the basis of the material placed to him, opined that death was homicidal and his opinion was not accepted by the Division Bench and the same was turned down by acquitting the accused of that case. The decision of the Division Bench (supra) is based on Supreme Court decision *Mafabhai Nagarbhai Raval v. State* (1992 SC 2186) and in the matter of *Mohan Singh v. State of Punjab* (AIR 1975 SC 2161). In the decision of *Mafabhai* (supra) the Supreme Court has held as under:-

"It is needless to say that the Doctor who has examined the deceased and conducted the post-mortem is the only competent witness to speak about the nature of injuries and the cause of death. Unless there is something inherently defective the Court cannot substitute its opinion to that of the Doctor."

Similarly in *Mohan Singh* (supra) the Supreme Court has laid down the law in para 7 as under:-

"The expert stated that he came to the conclusion that the injuries on Dial Singh and Swaran Kaur were probably caused by one gun-fire only. It must first of all be noted that he is not categorical about it. The reason for his conclusion are the dimensions of

the injuries. He had not seen the injuries and it would need super-human ability to come to a conclusion on this subject by merely looking at the description of the injuries or even the photographs given by the doctors."

What has been held by the Division Bench of this Court in Anil Kumar Singhal (*supra*) is fully applicable in the present case. True certain minor injuries are found on the person of the deceased, but on account of those injuries the deceased did not die. At the most it can be inferred that on the point of dancing with a girl some marpit might have taken place but no stretch of imagination it can be inferred that the death was homicidal particularly when the two doctors jointly performed the postmortem and did not give any opinion about the homicidal death and the duration of the death. Even otherwise looking to the symptoms found by two autopsy surgeons on the dead body it cannot be said that the death was homicidal.

31. Judging from all the angles the oral evidence and documentary evidence, we unable to uphold the conviction of the appellant since the charge of Section 302 IPC is not at all proved by any cogent evidence and it is hereby held that appellant is not an uxoricide.

32. By allowing this appeal the judgment of conviction passed by the Trial Court for convicting the appellant under Section 302 IPC is hereby set aside. Appellant is on bail. His bail bonds are hereby discharged. Fine amount if deposited, be refunded to appellant.

Appeal allowed.

I.L.R. [2012] M.P., 1339

APPELLATE CRIMINAL

Before Mr. Justice M.A. Siddiqui

Cr. A. No. 585/2004 (Gwalior) decided on 10 February, 2012

SANTOSH SINGH & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 304-B – Dowry Death – Proof – Unless there is evidence to show that soon before death, victim was subjected to cruelty by husband or in-laws in connection with demand of dowry, conviction can not be based. (Para 8)

क. दण्ड संहिता (1860 का 45), धारा 304बी, - दहेज मृत्यु - सबूत - जब तक यह दर्शाने के लिए कोई साक्ष्य नहीं है कि पीड़िता के साथ मृत्यु से तुरंत पूर्व पति या ससुरालवालों द्वारा दहेज की मांग से संबंधित क्रूरता का व्यवहार किया गया, दोषसिद्धि आधारित नहीं की जा सकती।

B. Evidence Act (1 of 1872), Sections 3 & 32 - Dying Declaration - Proof - Dying declaration recorded by Naib Tahsildar and Doctor certified it at the bottom - Doctor stating in court that the deceased was throughout conscious while giving her statement - Held - The trial Court was erroneous in disbelieving the Dying declaration on the ground that Doctor has not certified in the beginning and in the end. (Para 10)

ख. साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 32 - मृत्युकालिक कथन - सबूत-नायब तहसीलदार द्वारा मृत्युकालिक कथन अभिलिखित किया गया और चिकित्सक ने नीचे उसे प्रमाणित किया-चिकित्सक ने न्यायालय में कथन किया कि मृतिका अपना कथन अभिलिखित किये जाने के दौरान पूरे समय होश में थी-अभिनिष्ठ गिरित-विचारण न्यायालय ने मृत्युकालिक कथन पर इस आधार पर अविश्वास करने में भूल की कि चिकित्सक ने आरंभ में तथा अंत में उसे प्रमाणित नहीं किया है।

C. Penal Code (45 of 1860), Section 498-A - Cruelty - Specific allegation that within 2 years of marriage, deceased was subjected to cruelty by appellants for demand of dowry - Though trial Court has not convicted the accused persons under Section 498-A IPC separately but the High Court found them guilty and punished the accused persons under Section 498-A. (Para 11)

ग. दण्ड संहिता (1860 का 45), धारा 498ए - क्रूरता - विनिर्दिष्ट आरोप कि विवाह के दो वर्ष के भीतर मृतिका के साथ अपीलार्थीगण द्वारा दहेज की मांग के लिए क्रूरता का व्यवहार किया गया - यद्यपि विचारण न्यायालय ने आरोपीगण को पृथक रूप से धारा 498ए मा.द.सं. के अंतर्गत दोषसिद्ध नहीं किया है परंतु उच्च न्यायालय ने उन्हें दोषी पाया और आरोपीगण को धारा 498ए के अंतर्गत दंडित किया।

Cases referred :

2001 CR.L.J. 4700, (2010) 9 SCC 73, AIR 2001 SC 2828, (2008) 1 SCC (CRI.) 172.

S.K. Tiwari, for the appellants.

A.K. Shrivastava, P.L. for the respondent/State.

J U D G M E N T

M.A. SIDDIQUI, J. - This appeal has been preferred by the appellants against the judgment dated 15.9.04 delivered by the then 3rd Addl. Sessions Judge (Fast Track), Guna in Sessions Trial No. 214/98 whereby each of the appellants have been convicted under Sections 304-B of IPC and sentenced to undergo R.I. for ten years and fine of Rs. 1,000/-; in default of payment of fine, the appellants were directed to undergo further R.I. for 6 months. No sentence under Section 498-A was imposed being a lesser offence of Section 304-B IPC according to Section 71 of IPC.

2. In short, the prosecution case is that Kamlesh Bai (since dead) was married to Chandrapal on 2.6.96 and she started living with Chandrapal (husband), Santosh Singh (father-in-law) and Rabadbai (mother-in-law). They were residing at Village-Nagda. It is alleged the accused persons were demanding Rs.50,000/- in cash as dowry and they started beating and ill treating Kamlesh Bai. Even demand was made from the family members of Kamlesh Bai. On 29.4.98 Kamlesh Bai met her father Badal Singh (PW. 1) and made complaint that accused persons were demanding cash and dowry and they were doing *Marpeet* with her and they were also not providing her food and clothes. On 3.7.98 at 7 PM, Kamlesh Bai was brought in burnt condition to the District Hospital, Guna. On the request of police, on 4.5.98 at 1.45-2 AM dying declaration of Kamlesh Bai (Ex.D/2) was recorded by Naib Tahsildar which was found to be under the influence of accused persons. On 4.5.98 Kamlesh Bai expired. So, her death was intimated vide Ex.P/3, and the Police Station-Kotwali, Guna recorded Marg (P/7). Marg Case No. 044/98 was sent to Police Station-Sirsi where on 6.5.98 Marg (P/4) was recorded. On 5.5.98 dead body of Kamlesh Bai was sent for postmortem examination and postmortem report vide Ex.P/1 was received. On 6.5.98, spot map (P/9) was prepared and burnt pieces of blouse and an iron *chimney* were seized vide Ex.P/10 from accused Chandrapal. After investigation, PS-Sirsi registered FIR (P/6) vide Crime No.17/98 under Sections 304-B and 498-A IPC against the accused persons. Accused persons were arrested and after usual investigation, charge sheet was filed. On 11.12.98, charges under Section 304-B and 498-A were framed against the accused persons by the then learned Sessions Judge, Guna.

3. Accused persons abjured the guilt contending that they have been falsely implicated. It was pleaded by them that the incident was accidental and deceased herself made dying declaration (Ex.D/2) to Naib Tahsildar

Lachhiram (DW.4). In defence other witnesses Brajbhan Singh (DW. 1), Shivcharan (DW.2) and Krapan Singh (DW.3) were examined.

4. To substantiate its case, prosecution examined Badal Sirigh (PW. 1) father of deceased, Bhura (PW.2) cousin of deceased, Shishupal (PW.3) brother of deceased, Anita (PW.4) elder sister of deceased, Dr.Sudhir Rathore (PW.5), Krapan Singh (PW.6), Dr. Y.S.Raghuvanshi (PW.7), Banwarilal (PW.8) Head Constable, Mahesh Chandra Shukia (PW.9) Asstt. Sub-Inspector of Police, Bhagwan Singh (PW. 10) neighbour of accused persons, Hazarilal Verma (PW. 11) Head Constable and Pankaj Shrivastava (PW. 12) SDOP and Investigating Officer of the case.

5. I have heard both the sides and perused the record of trial Court.

6. Badal Singh Yadav (PW. 1), Bhura (PW.2), Shishupal (PW.3) and Anita (PW.4) stated that accused persons were treating deceased Kamlesh Bai with cruelty and they were not providing her food and clothes, they were beating and ill treating her and were also demanding Rs.50,000/- in cash, though they have stated that no demand was made at the time of marriage, but demand was started after the marriage. According to Badal Singh (PW. 1), on 22.12.97 accused Santosh asked him to give Rs.50,000/-but as he was not in a position to fulfill the demand of dowry, he could not bring his daughter with him. At that time, accused Chandrapal gave beating to Kamlesh Bai and accused Santosh was also there. After about 2-3 months from this incident, Kamlesh Bai came to the house of the witness and made complaint that accused persons were demanding money from her. Bhura (PW.2) also stated that demand of Rs.50,000/- was made from Kamlesh. Though Shishupal (PW.3) has not stated the figure of Rs.50,000/- in his statement, but he stated that demand of money was made.

7. Learned counsel for appellants submitted that the statements of these witnesses are omnibus and it is very much clear from their statements that demand was not made soon before death of Kamlesh Bai, though as per their statements it was made some months before her death. Counsel submitted that according to Section 304-B IPC where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative

shall be deemed to have caused her death under this section. He relied upon the decisions of Apex Court in *Sunil Bajaj vs. State of M.P.* 2001 Cri.L.J.4700, *Durga Prasad and another vs. State of M.P.* (2010) 9 SCC 73, *Satvir Singh and others vs. State of Punjab and another* AIR 2001 SC 2828 and in *Biswajit Halder alias Babu Halder and others Vs. State of W.B.* (2008)1 SCC (Cri.)172. It has been held in the aforesaid decisions that basic ingredients to attract the provisions of Section 304-B IPC are necessary before presumption could be drawn under Section 113-B of Evidence Act.

8. It is not disputed that incident had taken place within seven years of marriage. According to prosecution, it was a dowry death and according to defence, it was an accidental death. From perusal of prosecution evidence, it appears that though there are omnibus statements of demand of dowry, but there is no specific allegation that soon before death of Kamlesh Bai, she was subjected to demand of dowry. Though it was alleged that Shishupal (PW.3) visited the house of deceased and accused persons just few days before her death, but on this point Shishupal has not stated anything and he gave statement only to the extent that demand of dowry was there. Time may be certainly in months and not in days. Unless there is evidence to show that soon before death, victim was subjected to cruelty by husband or in-laws in connection with demand of dowry, conviction cannot be based.

Moreover, it is pertinent to note that dying declaration(D/2) was recorded by Lacchiram (DW.4) on request of police on 4.5.98 in which Kamlesh Bai narrated that Chimney was lightening and as Chimney was not functioning, to keep it in proper place, she extended her hand and during this process, the Chimney fell on her by which her clothes started burning and her in-laws took her to Guna hospital.

9. Learned counsel for appellants submitted that Brajbhan Singh (DW. 1) also stated that Kamlesh burnt accidentally as Chimney fell down and he and Chandrapal tried to save her by throwing water. Shivcharan (DW.2) stated that when he reached at the house of accused Santosh Singh, he asked Kamlesh Bai how she burnt, on which Kamlesh replied to the witness that she was burnt accidentally by fall of Chimney. Same is the version of Krapan Singh (DW.3).

10. In my opinion there is no justification for disbelieving the dying declaration (D/2) recorded by a Naib Tahsildar. Learned trial Court has

disbelieved the dying declaration recorded by Naib Tahsildar on the ground that statement was not properly certified by the doctor, while Dr. Sudhir Rathore (PW.5) stated in para 6 of his cross-examination that Tahsildar recorded the dying declaration (Ex.D/2) before him and Smt.Kamlesh was through out conscious while giving her statement. He had certified this at the bottom of Ex.D/2. Learned trial Court has rejected this dying declaration on the ground that doctor has not certified in the beginning and in the end.

Learned counsel for appellants submitted that there is no specific proforma for certifying the dying declaration and when the doctor had certified it at the end about the consciousness and capability of giving statement, it ought not to have been disbelieved and trial Court was erroneous in disbelieving it. I am fully agree with the above submission made by learned counsel for appellants.

11. As far as dowry death is concerned, the case of prosecution is not proved beyond reasonable doubt, but so far as case under Section 498-A IPC is concerned, there is specific allegation that within 2 years of marriage of Kamlesh Bai, she was subjected to cruelty by appellants for demand of dowry. Though trial Court has not convicted the accused persons under Section 498-A IPC separately, but the Court has found them guilty. By applying Section 71 of IPC, the trial Court has convicted and sentenced the appellants for 10 years' R.I. and fine of Rs. 1,000/- under section 304-B IPC only.

12. Looking to the circumstances of the case, the accused-appellants are acquitted of the offence punishable under Section 304-B IPC, but they are held guilty under Section 498-A IPC. The incident is of the year 1998. Accused Santosh Singh remained in jail from 29.5.98 to 24.6.98(27 days), and accused Mst. Rambai alias Rabadbai and Chandrapal Singh remained in jail from 28.5.98 to 24.6.98(28 days) . So, they are punished for the period already undergone by them and fine of Rs. 1,000/-each under Section 498-A IPC. Fine of Rs. 1,000/- on each appellant has already been imposed under Section 304-B IPC, but as the appellants are acquitted of the offence punishable under Section 304-B IPC, that fine amount of Rs. 1,000/-imposed on each appellant may be adjusted towards the fine amount imposed under Section 498-A IPC. In case the amount of fine is not deposited by the appellants, they will have to undergo R.I. for three months.

13. Appeal is partly allowed to the aforesaid extent.

Appeal partly allowed.

**I.L.R. [2012] M.P., 1345
APPELLATE CRIMINAL**

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 1742/1996 (Jabalpur) decided on 21 February, 2012

SUKHDEO

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 376 – Rape – Promise of marriage – Prosecutrix already married – No divorce taken place therefore, she can not remarry during subsistence of first marriage – She developed physical relations with appellant voluntarily having the knowledge that she being married with some other person could not get marry with appellant – Prosecutrix was consenting party. (Para 10)

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – विवाह का वचन – अभियोक्त्री पहले से विवाहित – विवाह विच्छेद नहीं हुआ है इसलिए, वह पहले विवाह के चलते पुनः विवाह नहीं कर सकती – उसने अपीलार्थी के साथ स्वेच्छापूर्वक शारीरिक संबंध विकसित किया यह जानते हुये कि उसका किसी अन्य व्यक्ति के साथ विवाह के चलते, अपीलार्थी के साथ वह विवाह नहीं कर सकती – अभियोक्त्री सम्मत पक्षकार थी।

B. Penal Code (45 of 1860), Section 376 – Age – Father of prosecutrix did not say about age – Ossification report says that prosecutrix was found to be between 15-17 years – When two probable circumstances are available, the Court is bound to adopt the view which is favorable to the accused – Prosecutrix was aged about 17 years – No offence under Section 376 of I.P.C. made out as prosecutrix was consenting party. (Paras 9 & 10)

ख. दण्ड संहिता (1860 का 45), धारा 376 – उम्र – अभियोक्त्री के पिता ने उम्र के बारे में कुछ नहीं कहा – ओसीफिकेशन रिपोर्ट कहती है कि अभियोक्त्री 15-17 वर्ष के बीच की पाई गई – जब दो संभाव्य परिस्थितियां उपलब्ध हैं, न्यायालय वह दृष्टिकोण अपनाने के लिये बाध्य है जो अभियुक्त के पक्ष में है – अभियोक्त्री की उम्र लगभग 17 वर्ष थी – भा.द.सं. की धारा 376 के अंतर्गत कोई अपराध गठित नहीं होता क्योंकि अभियोक्त्री सम्मत पक्षकार थी।

Ashok Sinha & Alok Wagrecha, for the appellant.

Rakesh Keshernwani, P.L. for the respondent State.

J U D G M E N T

U.C. MAHESWARI, J. - The appellant/accused has preferred this appeal being aggrieved by the judgment dated 19.9.1996 passed by IInd Additional Sessions Judge, Katni in Sessions Trial No.380/92, convicting him under Section 376 of I.P.C. for RI seven years with fine of Rs. 1000/- and in default of depositing the same, further six months RI has been awarded.

2. The facts giving rise to this appeal in short are that, on dated 15.3.1992, at about 11.30, the prosecutrix Rubban Bhumia (PW-1) D/o Girwar Singh, aged about 15 years, lodged the First Information Report at Police out-post Salaiya, Police Station Rithi, District Katni, contending that she along with her younger sister residing with the parents at village Chargawan. Her father being Railway employee is working at Sagar, while she along with her mother is cultivating their agricultural field of the village. Before one year, she alone went to the field in connection of harvesting the crop where the appellant came and asked her to perform the intercourse with her. She refused, on which, by giving the criminal threat to burry her in the field, after throwing her on the floor, committed bad act on her. Due to fear of the life from the appellant, she did not narrate such incident to anyone. Subsequent to this in next for 5-6 days, whenever she went to the field, on seeing her alone there, the appellant repeated such act on such occasions. Besides this, whenever she visited the Forest for bringing the firewood, there also on various occasions under criminal threat, appellant committed such act with her. But due to fear of the appellant such incident was also not mentioned to anyone. On some occasion, appellant told her that if anything is happened with her then, he will make arrangement for her treatment or, in any case, he will keep her as his wife. The appellant was used to say her that if his aforesaid act is stated by her to anyone then, he will kill her. On a day the mother of the posecutrix after seeing her pregnant asked the name of person from whom she became pregnant ? On which, she apprised her mother with the entire act of the appellant. Thereafter, she accompanied with her father came to Police out-post and lodged the aforesaid report. After registering the offence of Section 376 of IPC against the appellant, she was sent to hospital where after medical examination her M.L.C. report was prepared and to ascertain her age, the Ossification test was also carried out, in which her age was found between 15-17 years. On completion of the investigation, the appellant was charge-sheeted for the abovementioned offence.

3. After committing the case to the Sessions Court on framing the charge of Section of 376 of I.P.C., against the appellant, he abjured the guilt on which, the trial was held. On appreciation, the appellant was held guilty of such offence and was punished with the above mentioned punishment, on which, this appeal has been preferred.
4. Learned appearing counsel of the appellant after taking me through the record of the trial Court by referring the deposition of the prosecutrix Rubban Bhumia (PW-1) and her father Girwar Singh (PW-2) argued that on proper appreciaiton of the same, it was a out right case of consent between the appellant and the prosecutrix. In continuation he said that, as per depositions of the prosecutrix and her father, long before committing the alleged act by the appellant on the prosecutirx, she got married with some other person with whom she was not residing and in such premises, from the day first on which firstly she was subjected to intercourse by the appellant upto lodging the First Information Report, it was well known to the prosecutrix that she being married with some other person, could not get re-marry with the appellant unless the decree of divorce is passed between her and her husband with whom she is married. Keeping in view such thing if the entire case is examined, then for the sake of argument for one or two occasion, it could be deemed that under the alleged threat or any other type of the undue pressure, the alleged act could have committed by the appellant with the prosecutrix, but in the regular course for month's together or more than one year without implied consent of the prosecutrix the same could not be committed on her by the appellant. So, apparently, it is a case of consent. Even after holding the case of consent, the Court has to ascertain the age of the prosecutrix, if the same is found more than 16 years, then the impugned conviction of the appellant, in view of, aforesaid consent of prosecutrix, could not be sustained and if her age is found to be below 16 years, then even on holding that the alleged intercourse was committed by the appellant with her consent, the appellant could not be acquitted from the alleged charge. By referring the deposition of Dr. Shobha Sahu (PW-11), who carried out the Ossification Test of the prosecutrix and gave her report (Ex.P-19) on the basis of X-ray plates marked as (Ex.P.19-A and Ex.P.19-B), he argued that according to this witness on the date of examination, the prosecutrix was of the age between 15 to 17 years. Besides this, Dr. Rupa Lalwani (PW-6), who medically examined the prosecutrix and prepared her MLC report (Ex.P.15), in cross-examination, categorically stated that probable age of the prosecutrix was between 15 to

16 years. So, in such premises, there was no occasion before the trial Court to hold the age of the prosecutrix less than 16 years. With these submissions, he said that the impugned conviction of the appellant being unsustainable by setting aside the same, he be acquitted from the aforesaid charge by allowing this appeal.

5. On the other hand, responding the aforesaid arguments Shri Rakesh Keshewani, learned Panel Lawyer by justifying the impugned conviction and sentence of the appellant said that such approach of the trial Court being based on proper appreciation of the evidence, do not require any interference at this stage either for holding the age of the prosecutrix below 16 years or to hold that it was a case of consent. In continuation he said that, looking to the testimony of the prosecutrix even on holding her age more than 16 years, the impugned case could not be treated to be a case of consent because under the assurance of the marriage, the alleged act were committed by the appellant with her, so, in such premises, the impugned appeal being devoid of any merit, deserves to be dismissed and prayed for the same.

6. Having heard the counsel, keeping in view their arguments, I have carefully gone through the record of the trial Court along with the findings of the impugned judgment.

7. The prosecutrix Rubban Bhumia (PW-1) on recording her deposition in para 4 of her cross-examination categorically stated that before happening the alleged incident, she got married but was not residing with her husband. She further stated that her husband has not committed any intercourse with her. She categorically admitted in her deposition that the alleged intercourse were happened between the appellant and her on various occasions. True it is that simultaneously she stated that such act were committed by the appellant by giving threat to kill her, but in para 6 of the cross-examination, she stated that due to aforesaid act of the appellant, she got pregnancy and gave a birth to a girl, who died later on. She also stated that when appellant refused her to keep with him as his wife, then only, the matter was reported to the police otherwise, she did not want to report the matter. This conduct of the prosecutrix reflects that from the day first upto the date of lodging the First Information Report, on every alleged occasion the alleged intercourse was carried out by the appellant with the prosecutrix with her consent. But on disclosing the fact of pregnancy before her mother and thereafter, on refusing by the appellant before the Community Panchayat to get marry with the prosecutrix, the matter

was reported to the police and the appellant was implicated in the matter. Besides this deposition of the prosecutrix, her father Girwar (PW-2) on recording his deposition categorically stated that after coming to know that her daughter Rubban Bhumla, has become pregnant from the appellant then, he requested to his Community Panchayat to resolve such dispute, on which a Panchayat of the Community was also scheduled and carried out, in which, appellant refused to get marry with the prosecutrix, on which, he accompanied with the prosecutrix went to the Police Station and lodged the report.

8. After going through the depositions of aforesaid both the witnesses, I have not found single line or the word showing that before holding the aforesaid Community Panchayat or during the course of such Panchayat, the prosecutrix had got divorced from her husband with whom she was married. Thus, in the lack of such divorce between the prosecutrix and her husband even on giving the consent by the appellant before the Community Panchayat to get marry with the prosecutrix, such marriage between the appellant and the prosecutrix was not possible because during subsisting the earlier marriage of prosecutrix, she could not get remarry with the appellant. In ushc premises, on taking into consideration the entire scenario of the case, it appears that from the day first she developed the physical relations with the appellant voluntarily having the knowledge that she being married with some other person, could not get marry with the appellant; continued such relations with the appellant for a long period by which she also got pregnancy. Thereafter, only on coming to know such relations of her with the appellant by her parents, then at the first time the allegation of criminal threat and intimidation were alleged against the appellant by the prosecutrix and her parents. It is apparent fact on record that before lodging the report, at any point of time, either at the field or in the Forest where there the alleged intercourse/rape were committed by the appellant on the prosecutrix, no shouting was made by the prosecutrix. This circumstances also shows that such act were carried out between the appellant and the prosecutrix with their consent.

9. Now, I proceed to examine the record to ascertain the correct age of the prosecutrix on the date of the alleged incident as well as on the date of lodging the impugned First Information Report. True it is on recording the deposition of the prosecutrix Rubban Bhumia (PW-1) on dated 21.12.1993, she recorded her age 15 years, but her father Girwar (PW-2), on recording his deposition has not stated the exact or the approximate age of the prosecutrix. So, in such premises, it is apparent fact on record that the parents

of the prosecutrix has not proved the date of birth and age of the prosecutrix. When the father of the prosecutrix has not stated any thing regarding her age then mere on deposition of the prosecutrix, her age could not be determined to be 15 years at the time of alleged incident or, in any case, on the date of registration of the offence. So, at this stage Court has to consider the available medical evidence to ascertain the age of the prosecutrix.

10. Dr. Rupa Lalwani (PW-6) who after examining the prosecutrix, prepared her MLC Report (Ex.P-15), on recording her deposition in paragraph 3 of her cross-examination, categorically stated that she shown the probable age of the prosecutrix between 15 to 16 years and to find out her correct age, she advised for X-ray. It is apparent that on such advise, the X-ray and Ossification test was carried out by Dr. Shobha Sahu (PW-11), who after carrying out the X-ray (Ex.P.19-A) and (Ex.P.19-B), of the prosecutrix gave her report (Ex.P.19). The same have been proved by her in her deposition. According to which, the age of the prosecutrix was found to be between 15 to 17 years. It is settled proposition of law that where there are two views or two probable circumstances are available on the record and out of them, if the Court has to adopt one view or circumstance, then the Court is bound to adopt the view which is favourable to the accused. In such premises, if the upper side age of the prosecutrix as stated by Dr. Shobha Sahu (PW-11) is taken into consideration, then her age comes to 17 years. The same is hereby held.

11. After holding the age of the prosecutrix 17 years i.e. more than 16 years, in view of the aforesaid elaborate discussions, in which the alleged act of the appellant with the prosecutrix was found to be with her consent, the approach of the trial Court holding conviction against the appellant under Section 376 of I.P.C. being perverse to the available record, is not sustainable hence, the same is hereby set aside.

12. In view of the aforesaid, by allowing the appeal, the impugned judgment holding conviction against the appellant under Section 376 of I.P.C., is hereby set aside. Pursuant to it, the awarded punishment is also set aside and the appellant is acquitted from such charge. The amount of fine if deposited by the appellant then after proper verification, the same be refunded to him. The ball bond of the appellant is discharged.

13. Appeal is allowed as indicated above.

Appeal allowed.

**I.L.R. [2012] M.P., 1351
APPELLATE CRIMINAL**

Before Mr. Justice Rakesh Saxena & Mr. Justice N.K. Gupta
Cr. A. No. 2310/2005 (Jabalpur) decided on 28 February, 2012

VRIJLAL GHOSI & anr.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 3, Criminal Procedure Code, 1973 (2 of 1974), Section 154 – F.I.R. – Witness, who lodged the F.I.R. could not be examined before the trial Court – F.I.R. was not proved in a proper manner – Can not be read against accused – But being prosecution document it can be read in favour of the accused. (Para 12)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना रिपोर्ट – साक्षी जिसने प्रथम सूचना रिपोर्ट दर्ज की, उसका परीक्षण विचारण न्यायालय के समक्ष नहीं किया जा सका – प्रथम सूचना रिपोर्ट उचित ढंग से साबित नहीं की गई – अभियुक्त के विरुद्ध पढ़ी नहीं जा सकती – परंतु अभियोजन दस्तावेज होने के नाते उसे अभियुक्त के पक्ष में पढ़ा जा सकता है।

B. Evidence Act (1 of 1872), Section 3 – Appreciation of Evidence – Circumstantial Evidence – If any criminal Court comes to the conclusion that ocular evidence is not believable, then the remaining evidence can not be left unconsidered – It is the duty of the Criminal Court to assess the remaining circumstantial evidence so as to ascertain whether chain of circumstantial evidence is complete and accused may or may not be held guilty on the basis of such evidence. (Para 16)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्ष्य का मूल्यांकन – परिस्थितिजन्य साक्ष्य – यदि कोई दण्डिक न्यायालय इस निष्कर्ष पर पहुंचता है कि चक्षु साक्ष्य विश्वसनीय नहीं तब शेष साक्ष्य बिना विचार किये नहीं छोड़ा जा सकता – दण्डिक न्यायालय का यह कर्तव्य है कि शेष परिस्थितिजन्य साक्ष्य का निर्धारण करे जिससे सुनिश्चित हो सके कि क्या परिस्थितिजन्य साक्ष्य की श्रृंखला पूर्ण है और ऐसी साक्ष्य के आधार पर अभियुक्त के दोषी अथवा निर्दोष होने की धारणा की जा सकती है।

C. Evidence Act (1 of 1872), Section 3, Penal Code (45 of 1860), Section 302 – Murder – Proof – No circumstance of last seen – No blood stained weapon or cloths were seized – Not seen with the

deceased before or after the incident – Only motive is well established – Chain of circumstantial evidence is not complete – No final conclusion can be drawn that the deceased was killed or assaulted by the present appellants /accused – Appeal allowed. (Para 21)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3, दण्ड संहिता (1860 का 45), धारा 302 – हत्या – सबूत – अंतिम बार देखे जाने की कोई परिस्थिति नहीं – रक्त के दाग वाले किसी हथियार या कपड़ों को जब्त नहीं किया गया – मृतक के साथ घटना से पूर्व या पश्चात देखा नहीं गया – केवल उद्देश्य मलिमांति स्थापित – परिस्थितियों की श्रृंखला पूर्ण नहीं होती – कोई अंतिम निष्कर्ष नहीं निकाला जा सकता कि मृतक को उपस्थित अपीलार्थीगण /अभियुक्त द्वारा मारा या हमला किया गया – अपील मंजूर।

Cases referred :

(2010) 4 SCC (CRI) 104, AIR 1952 SC 343, AIR 1984 SC 1622.

V.K. Shukla, for the appellants.

Amit Pandey, P.L. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by : **N.K. GUPTA, J.** - The present appellants have preferred this criminal appeal being aggrieved by the judgment dated 5/10/2005 passed by the Second Additional Sessions Judge, Tikamgarh in ST No.26/2000, whereby the appellants are convicted for commission of offence punishable under Section 302 of Indian Penal Code and sentenced for life imprisonment with fine of Rs.500/- each, in default of payment of fine, an additional RI for 30 days.

2. The prosecution case, in short, is that on 19/9/1999 at about 10:00 A.M. Laxman was with his grazing cattle in the jungle, which was situated behind Jagdamba temple. When Upendra Singh (PW-12) and Durg Singh (PW-4) went to the spot to provide tiffin to the deceased Laxman, they heard the sound of a fire, which was done by accused Kalyan Singh by a country made pistol. Thereafter accused Mansingh, Dheeraj, Ranjeet, Prabhu, Majulla, Vrijlal, Achchhan, Rajaram and Pooran assaulted the deceased Laxman by lohangi, ballam, farsa, sticks, stones and axes respectively. Appellant Achchhan had an axe whereas appellant Vrijlal had assaulted the deceased Laxman by stone. On shouting of witness Upendra, so many people came to the spot and thereafter the assailants ran away. The deceased was taken to the hospital.

Ramnath Singh, father of witness Upendra had lodged an FIR Ex.P-19 at Police Station Jatara District Tikamgarh. The deceased was referred to the Community Health Centre, Jatara for his medical examination.

3. Dr. H.N. Nayak (PW-5) examined the deceased and prepared the MLC report Ex.P-10. He found one penetrated wound on the centre of forehead and six incised wounds on the deceased. Out of those incised wounds, three were situated on the right parietal region and right occipital region and remaining three incised wounds were adjacent to each other on the left cheek. He also found six lacerated wounds on the deceased at the right parietal region, right face, back of skull, just above the left eyelid and the left forehead respectively. Swelling was found on both the eyelids and victim could not open his eyes. The patient was referred for X-ray and other examinations to the District Hospital, Tikamgarh. Ultimately the deceased died at District Hospital, Tikamgarh. Dr. S.K.Khare (PW-9) had performed the postmortem on the body of the deceased Laxman and found 13 wounds on his body. Wounds were found on head, face, back, right paw, right thigh and so many other parts of the body. Both the parietal bones were found broken. The deceased died due to head injuries caused on his head. All other internal organs were found healthy but congested. The clothings of the deceased were sealed and sent for chemical examination to FSL, Sagar. Vinayak Shukla (PW-11) examined various witnesses under Section 161 of Cr.P.C. He seized one axe from accused Rajaram. On his intimation various weapons were seized from various accused persons. Nothing has been seized from the accused Vrijlal, whereas one axe was seized from accused Achchhan vide seizure memo Ex.P-6. After due investigation, the challan was filed before the concerned Magistrate. The case was committed to the Sessions Court and then transferred to Second Additional Sessions Judge, Tikamgarh.

4. The appellants-accused abjured their guilt before the trial Court. No specific defence was taken by them, however it was stated that they were not involved in the incident and they were falsely implicated in the matter. No defence evidence was adduced by the appellants.

5. In the trial nine accused persons were implicated but the learned Additional Sessions Judge vide judgment dated 5.10.2005 acquitted seven accused persons but convicted the present appellants-accused for commission of offence punishable under Section 302 of IPC and sentenced as mentioned above.

6. Heard the learned counsel for the parties at length.

7. Learned counsel for the appellants-accused have submitted that the complainant Ramnath Singh is a harden criminal, who has falsely implicated so many accused persons by lodging the FIR Ex.P-19 and thereafter no witnesses have stated against the seven accused persons and ultimately they were acquitted by the trial Court. Intentionally the witnesses have stated against the present appellants because one of the appellants was father of main accused Puran and another is brother of accused Puran. However, looking to the overt-acts of various witnesses from very beginning upto the examination in the Court, they should be disbelieved. There was no eye-witness at all. No circumstantial evidence is conclusive against the present appellants. They were falsely implicated in the matter. They are in custody since the year 2005 without any substantial reason. Therefore, it is prayed that the present appellants may be acquitted.

8. On the other hand, learned counsel for the State has supported the impugned judgment. He submits that witness Upendra is a trustworthy witness, who has clearly stated that except the accused Puran, present appellants were also involved in the alleged crime, therefore due to his fairness the trial Court has acquitted seven accused persons. Under such circumstances, the evidence of witness Upendra is acceptable and role of the present appellants accused is very well established.

9. Looking to the injuries caused to the deceased Laxman as stated by the Dr. H.N.Nayak (PW-5), the death of deceased Laxman appears to be homicidal. Learned counsel for the appellants-accused did not challenge this fact, and therefore no fresh discussion relating to this fact is required.

10. As far as the participation of the present appellants-accused is concerned, there are four eye witnesses examined by the prosecution. Out of them Ramsingh (PW-1), Mahesh Prasad (PW-6) were the Officers of the Forest Department and they saw absconding accused Puran holding the deceased Laxman who had threatened these two witnesses to leave and thereafter they went away. However, they heard the sound of fire and they were informed that Laxman was killed. 100 men and 50 women from Chandrapura locality had come at the spot after the death of the deceased Laxman. However, these two witnesses are said to be the eye-witnesses in the case, but fact remains that no incident took place before them. At the most they could prove the fact of last seen of accused Puran with the deceased.

Ramsingh (PW-1) and Mahesh Prasad (PW-6) did not say about the presence of the present appellants at that time, and therefore these two witnesses could not connect the present appellants with the alleged crime.

11. Durg Singh (PW-4) and Upendra (PW-12) were examined as eye-witnesses. They claimed that they went to the spot to provide tiffin to the deceased Laxman. They also concentrated the entire incident towards absconding accused Puran. They have stated before the trial Court that various accused persons participated in the crime. Appellant Vrijlal provoked the accused Puran to kill the deceased Laxman, whereas both the appellants-accused assaulted the deceased Laxman on his head. But in the cross examination, substantial contradictions came out in their statements. Durg Singh has admitted that he did not tell the name of seven accused persons in his case diary statement Ex.P-9. It appears that appellant Vrijlal is father of main accused Puran, and therefore he was implicated, whereas there is no specific allegation against appellant Achchhan that he assaulted the deceased by any weapon. Upendra (PW-12) has stated that he went to the spot and he waited for his uncle Laxman. Thereafter he saw some buffaloes coming, and therefore he went to the spot and found that accused Puran and present appellants-accused were running from the spot. He found that his uncle Laxman was alive but he sustained so many injuries. Thereafter he has admitted that some women were present near a temple, and therefore he told to those women that his uncle was killed by Puran etc. Those women went to Chandrapura locality and some persons came to the spot. Thereafter his father Ramnath Singh and uncle Durg Singh came to the spot. By such statement of Upendra (PW-12), it would be clear that Durg Singh was not at all an eyewitness, because he came to the spot much after the incident.

12. The conduct of Ramnath Singh is very strange in this case, though he claimed to be an eye-witness, who lodged the FIR Ex.P-19. In the FIR, he implicated as many as 11 persons in the case and that information was given without any basis. Investigating Officer Vinayak Shukla (PW-11) has admitted in his cross examination that Ramnath Singh is a known criminal and he is required in so many cases. He was absconding, hence he could not be examined before the trial Court to prove the FIR Ex.P-19, and therefore the FIR was not proved in a proper manner. It is a settled principle of law that document, which is not proved by the prosecution cannot be read against the accused, but since it is a prosecution document, then it can be read in favour of the accused. Under such circumstances, the FIR Ex.P-19 may be read in favour

of the accused persons. Hence FIR Ex.P-19 will be read only for that limited purpose. In the FIR Ramnath Singh has stated the overt-acts of each accused person, but in the Court neither Upendra nor Durg Singh confirmed the overt acts of so many accused persons, and therefore they were acquitted. The conduct of Ramnath Singh indicates that all the accused persons were implicated due to enmity. Durg Singh (PW-4) in para 5 and 6 has admitted that there was previous dispute between Durg Singh and his family members and accused Puran and thereafter remaining accused persons took up a quarrel with Durg Singh etc. He has also admitted that accused Puran, appellant Achchhan and Suresh had kidnapped his nephew and a case relating to that offence is pending. Under such circumstances, it is apparent that there was an enmity between both the parties, and therefore there was possibility of false implication of various accused persons.

13. Under such circumstances, the testimony of eyewitnesses should be considered with great caution. As stated above, it would be clear that neither the witness Ramsingh (PW-1) nor Mahesh Prasad (PW-6) was the eyewitness. On the contrary, no gun shot injury was found on the body of the deceased Laxman as per their statements. Similarly, Durg Singh himself admitted in para 7 that when he reached to the spot, so many persons of Chandrapura locality were present where such people reached to the spot only because information of such incident was given to them by various women of that locality and witness Durg Singh reached to the spot much after the incident, and therefore he is not an eye-witness. Ultimately, it is to be seen as to whether Upendra (PW-12) can be relied upon.

14. Initially Upendra (PW-12) could not say anything as to whether accused Achchhan or Vrijlal assaulted the deceased by any weapon or not. On the contrary, he had admitted in his examination-in-chief that when he reached the spot, accused persons started running from the spot. In para 8 of his cross examination, he has admitted that he saw accused persons running from 40 ft. away. He did not say that the appellants-accused had any weapon in their hands or not. His statement was contradictory to his previous statement Ex.D-1. In his case diary statement, he had stated that so many persons assaulted the deceased Laxman. Accused Mansingh armed with lohangi, Dheeraj armed with ballam, Ranjeet armed with farsa, Prabhu armed with stick. Accused Achchhan and Rajaram armed with axes, whereas accused Mujulla and Vrijlal had stones in their hands. They were assaulting his uncle. However, in his statement before the Court he stated that when he reached

the spot, all the accused persons ran away except accused Vrijlal and Achchhan. Now before the Court, this witness took a big somersault. He admitted that he saw the accused Achchhan, Vrijlal and Puran running from the spot from a distance of 40 ft. He could not tell about the weapons kept by the accused persons. He took a change with his previous statement. In his case diary statement, he had stated that he heard a sound of firing, but in the Court he refused about having heard such type of sound. In para 10 he has stated that he met Chowkidar in the midway but thereafter he changed his version that no Chowkidar met him. Looking to the contradictions to the statement of this witness before the trial Court and statement before the police, it appears that he is speaking about the accused persons according to his own wishes and wishes of his father Ramnath Singh, who is a criminal and who was absconding, and therefore he could not be examined in the Court.

15. Looking to the entire statements of witness Ramsingh (PW-1) and Mahesh Prasad (PW-6), the accused Puran took the deceased with him. After the incident some women of Chandrapura came to the spot, who called other villagers of Chandrapura and thereafter family members of the deceased came to the spot. These witnesses were not declared hostile, which indicates that prosecution relies upon their testimony. According to the story mentioned by these two witnesses, it appears that the story told by Upendra (PW-12) seems to be fake. There was no ground for Upendra to visit the spot at the time of incident. He has stated that he went to the spot to supply tiffin to his uncle Laxman, but that was not stated in the FIR. If witness Upendra was directed to give tiffin to his uncle, then it was not possible for other two persons namely Durg Singh and Ramnath Singh to reach to the spot with Upendra. In the FIR Ex.P-19, it is mentioned that Ramnath Singh went to the spot with Upendra and Durg Singh and they saw the incident. There is no story in the FIR that Upendra was sent earlier to provide a tiffin to his uncle, and therefore story of providing a tiffin appears to be an after thought, which was created in the statement of Upendra after two days of the incident. The FIR was lodged on 19.9.1999 whereas statement of witness Upendra under Section 161 of Cr.P.C. was taken on 20.9.1999. Under such circumstances, where initial story as per the FIR was that Upendra went to the spot with his father Ramnath Singh and uncle Durg Singh and it is established that Durg Singh reached the spot much after the incident, then it appears that witness Upendra was also not an eye-witness. He reached to the spot with his uncle Durg Singh and father Ramnath Singh. Under such circumstances, the statement of witness

Upendra cannot be considered as an eye-witness and his testimony cannot be relied upon.

16. On the basis of above discussion, it would be clear that there was no eye-witness in the case and the entire case hinges upon the circumstantial evidence. It is settled principle of criminal law that crime is to be brought to its home, and therefore if any criminal Court comes to the conclusion that ocular evidence is not believable, then the remaining evidence cannot be left unconsidered. It is the duty of the criminal Court to assess the remaining circumstantial evidence so as to ascertain whether chain of circumstantial evidence is complete and accused may or may not be held guilty on the basis of such evidence.

17. The first circumstance is clearly settled that the death of the deceased was homicidal. There was enmity between the appellants-accused and Ramnath Singh with reference to Durg Singh (PW-4) and therefore presence of motive may be accepted. The second circumstance in the case is motive which was present between the parties. However, the enmity is a double edged weapon. Due to enmity, someone may assault the opposite party, whereas someone may be falsely implicated on the basis of enmity. However, enmity may be taken as a motive in the case of circumstantial evidence, and therefore first circumstance was present between the parties that the appellants-accused had some motive to kill the deceased Laxman.

18. Regarding the fact of last seen of the accused persons with the deceased, Ramsingh (PW-1) and Mahesh Prasad (PW-6) have stated that they saw the accused Puran with the deceased, but these witnesses could not implicate the appellants so as to prove the fact of last seen. Witness Upendra has stated that when he saw the deceased for the first time, present appellants and Puran were running from the spot. But as discussed above, it would be clear that Upendra was not an eye-witness at all, and therefore his statement relating to the fact of last seen cannot be believed, and therefore it is not established that the appellants-accused were found with the deceased soon before the incident.

19. The fourth circumstance which was partially established by the police that some weapons were seized from the present appellants. However, the Investigating Officer Vinayak Shukla (PW-11) could not show any seizure against the appellant Vrijlal, and therefore seizure of any weapon was not proved against the appellant Vrijlal. Head Constable Ram Prasad (PW-8)

has stated in his statement that by information given by appellant Achchhan, one axe was seized. Witness Ram Prasad proved the memo Ex.P-15 as well as seizure memo Ex.P-16. However, the independent witnesses relating to the seizure were not examined. The weapons were not sent for forensic science examination, therefore no FSL report was filed during the trial. Head Constable Ram Prasad (PW-8) has admitted that various agriculturists keep such type of axe with them for agricultural purposes, therefore by seizure of axe from the appellant Achchhan no circumstance is created against the appellant Achchhan.

20. For consideration of circumstantial evidence, the judgment passed by the Hon'ble Apex Court in the case of "*State of Goa Vs. Pandurang Mohite*", [(2010) 4 SCC (Cri) 104] may be referred, in which the Hon'ble Apex Court quoted the previous judgments of the Hon'ble Apex Court. The Hon'ble Apex Court in the case of "*Hanumant Govind Nargundkar Vs. State of Madhya Pradesh*" (AIR 1952 SC343) has held as under:-

"10.....It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

Similarly, quotations from the judgment passed in the case of "*Sharad Birdhichand Sarda Vs. State of Maharashtra*" (AIR 1984 SC 1622) was cited, which is as under:-

"The conditions precedent for conviction on the basis of circumstantial evidence should as under:-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances

concerned 'must' or 'should' and not 'may be' established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

21. In the light of the judgments of the Hon'ble Apex Court, if entire bunch of circumstances of the present case is looked into, then it would be clear that there is no circumstance of last seen against the present appellants. No blood stained weapon or cloths were seized from any of the appellants. They were not seen with the deceased before or after the incident. Only motive is well established against the present appellants. In such circumstances, it is apparent that chain of circumstantial evidence is not complete. No final conclusion can be drawn that the deceased was killed or assaulted by the present appellants-accused.

22. On the basis of the aforesaid discussion, it is apparent that neither there is any trustworthy eye-witness nor the chain of circumstantial evidence is complete. Under such circumstances, it cannot be held that the present appellants-accused were involved in killing the deceased Laxman. There is no iota of evidence that they assaulted the deceased Laxman by any weapon. Therefore, the present appellants could not be convicted for commission of offence punishable under Section 302 of IPC or for any inferior offence of the same nature either directly or with the help of Section 34 of IPC. The learned Additional Sessions Judge has committed an error in convicting the present appellants in the case. There was no clear basis for their conviction. The learned Additional Sessions Judge has wrongly believed the testimony of witness Upendra. Under such circumstances, where the present appellants cannot be convicted for commission of offence punishable under Section 302 of IPC or :

any lesser offence of the same nature, conviction and sentence directed by the trial Court cannot be sustained. Therefore, the present criminal appeal filed by the appellants-accused deserves to be allowed.

23. Consequently, the present criminal appeal filed by the appellants-accused is hereby allowed. The conviction and sentence directed by the trial Court for commission of offence punishable under Section 302 of IPC are hereby quashed. The present appellants are acquitted from all the charges appended by the trial Court including the charge of offence under Section 302 of IPC.

24. The appellants are in jail. They be released forthwith, if not required in any other case. Office is directed to issue release warrant in this regard as early as possible.

Appeal allowed.

**I.L.R. [2012] M.P., 1361
APPELLATE CRIMINAL**

Before Mr. Justice Rakesh Saxena & Mr. Justice M.A. Siddiqui

Cr.A. No. 2127/2007 (Jabalpur) decided on 15 March, 2012

HYDER @ MUNDA

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 302 or 304-II – Murder or Culpable Homicide not amounting to murder – Deceased rushed to the place of incident in order to save his son who was being assaulted by fists by the appellant – Appellant gave solitary knife blow in the abdomen of the deceased – Held – Act of appellant can be held to be abrupt and sudden – It can not be held with certainty that he intended to cause death of the deceased – Doctor has also not stated that injury was sufficient in ordinary course of nature to cause death – Case falls within the ambit of offence under Section 304-II – Appeal allowed accordingly. (Para 19)

दण्ड संहिता (1860 का 45), धाराएँ 302 व 304 II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक घटनास्थल पर अपने पुत्र को बचाने के लिए दौड़ा जिस पर अपीलार्थी द्वारा घूसों से हमला किया जा रहा था – अपीलार्थी ने मृतक के पेट पर चाकू का एकमात्र घाव किया – अभिनिर्धारित –

अपीलार्थी का कृत्य अप्रत्याशित तथा अचानक होना माना जा सकता है – यह धारणा नहीं की जा सकती कि उसका आशय मृतक की मृत्यु कारित करना था – चिकित्सक ने भी यह कथन नहीं किया है कि चोट प्रकृति के सामान्य क्रम में मृत्यु कारित करने के लिए पर्याप्त थी – प्रकरण द्वारा 304 भाग II के अंतर्गत अपराध की परिधि में आता है – तदनुसार अपील मंजूर।

Case referred :

AIR 2006 SC 2531.

R.K. 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 25th August, 2007 passed by Sessions Judge, Jabalpur in Sessions Trial No.11/2007, convicting the appellant under Sections 302 and 323 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.1000/- and rigorous imprisonment for 2 ½ months, on each count respectively.

2. In short, the prosecution case is that on 27.11.2006, when complainant Sajjad was sitting in his house with his father Khaju Usman and elder brother Mohd. Afaq, at about 9.30 P.M. Nadira Bano reached there and informed that accused Hyder @ Munda, Sabir and Babloo were assaulting his brother Abbu @ Abrar. They all rushed to that spot and saw accused persons assaulting Abbu with fists. Accused Sabir was armed with sword. When they tried to save Abrar, accused persons scuffled with them. When accused Sabir started beating Sajjad, his father Khaju Usman came to rescue him. Accused Hyder @ Munda then dealt a knife blow in the abdomen of his father, as a result his intestine protruded out. On their shouting, people from the village gathered there. Sajjad went to police station Hanumantal and lodged the report Ex. P/ 1 at 9.45 P.M.. Police sent Khaju Usman to Victoria Hospital, Jabalpur. Dr. Gopal Tirthani (PW13) examined his injuries. When Khaju Usman was being shifted to a private hospital, he succumbed to his injuries.

3. Dead body of Khaju Usman was then brought to police station. Police conducted inquest proceedings and referred the body for postmortem examination to Medical College, Jabalpur. Dr. Mukesh Agrawal (PW14)

performed postmortem examination of the body and found one stab injury on the left side of abdomen of deceased. Intestine was protruding out from the wound. He opined that cause of death of deceased was internal haemorrhage because of the stab injury. The injury was ante-mortem in nature.

4. During investigation, police prepared the spot map, seized plain and blood stained earth from the spot and arrested the accused persons. On the information given by accused Hyder, a Knife was recovered and seized vide seizure memo Ex. P/12. After completion of the investigation, charge sheet was filed against three accused persons and the case was committed for trial.

5. Accused persons abjured their guilt and pleaded false implication due to enmity.

6. On trial, after appreciation of evidence learned Sessions Judge held accused/appellant Hyder @ Munda guilty, convicted and sentenced him as mentioned above. Finding the evidence insufficient to hold co-accused Sabir and Babloo guilty under Sections 302 and 324 of the Indian Penal Code, learned Sessions Judge acquitted them of those charges. However, they were convicted under Section 323 of the Indian Penal Code. Aggrieved by his conviction and sentence, appellant has filed this appeal.

7. Learned counsel for the appellant submitted that the learned Sessions Judge did not appreciate the evidence properly. He committed error in relying upon the evidence of Sajjad (PW1) and Abbu @ Abrar (PW2), who were close relatives of the deceased. Other witnesses Karim Ansari (PW7), Nadira Bano (PW8) and Hero @ Munna (PW16) did not support the prosecution case, therefore, they were declared hostile. Learned counsel further submitted that even if the evidence adduced by the prosecution was accepted, learned trial Judge committed further error in holding the appellant guilty under Section 302 of the Indian Penal Code. In the facts and circumstances of the case, the appellant could have been held liable under Section 304-II of the Indian Penal Code only. He pointed out that appellant was arrested on 28.11.2006; since then he is continuously in custody. He has thus remained in jail for a period of about 5 years and 4 months. On the other hand, learned counsel for the State, submitted that appellant stabbed deceased when he tried to save his son Sajjad from being beaten. The injury was inflicted on the vital part like abdomen due to which intestines of deceased protruded out. Incident was witnessed by Sajjad, Abbu @ Abrar and Afaq, who categorically stated about the act of appellant. According to him, the conviction of appellant under Section 302 of

the Indian Penal Code was justified and called for no interference.

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 the deceased died of homicidal injuries. It was stated by Sajjad (PW1) and Abbu @ Abrar (PW2) when accused Sabir and Babloo were assaulting them, deceased tried to rescue Sajjad, then appellant Hyder took out a knife from his trousers and dealt its blow in his abdomen, as a result of which, his intestines came out. Deceased was sent to Victoria Hospital, Jabalpur where his injuries were examined by Dr. Gopal Tirthani (PW13). Dr. Gopal found a stab injury/incised wound on the left side of his umbilicus having omentum prolapse. Injury was caused with hard and sharp object. Injury report Ex. P/15 was written and signed by him.

10. When deceased was being shifted to some private hospital, he succumbed to his injuries on way. His dead body was brought to police station where Investigating Officer Mahendra Kumar Verma (PW20), in presence of Sajjad (PW1), conducted inquest proceedings and recorded memorandum Ex. P/13. Dead body was sent for postmortem examination to Medical College, Jabalpur. Dr. Mukesh Agrawal (PW14) conducted postmortem examination and found- (i) stab wound situated 2" lateral to umbilicus on left side, 2.5 cm in length x ½ cm width. Intestines were protruding out. The wound was elliptical with clean cut margins. On opening abdomen, intestines were found perforated through and through. Inferior vena cava was also found cut. About one liter blood was found filled in abdominal cavity. Depth of wound was 9 cm. In the opinion of doctor, cause of death was syncope due to internal hemorrhage. The postmortem report Ex. P/17 was written and signed by him. From the above evidence, it stands amply established that deceased died due to ante-mortem homicidal stab injury.

11. Next question before us is whether appellant caused injury to deceased which resulted into his death. Sajjad (PW1), the son of deceased stated that at about 9 O' clock in the night on 27.11.2006 when he, his father and elder brother Afaq were sitting inside their house, Nadira Bano came there and informed that appellant, Babloo, Sabir and Ranu were assaulting Abrar. They rushed to 'Madar-chhalla' ground and saw accused persons beating Abrar. When they tried to rescue Abrar, accused persons indulged in scuffle with them. When Sabir and Babloo started assaulting him, his father tried to save him then suddenly appellant took out a Chhuri from his trousers and stabbed

it into the abdomen of his father due to which his intestines protruded out. On a shouting, accused persons ran away. He took his father to police station and lodged the report Ex. P/1. His father was taken to Victoria Hospital, Jabalpur for Medico Legal Examination. When he was being shifted to a private hospital, on way, he expired. The same story was repeated by Abbu @ Abrar (PW2). According to him, on 27.11.2006 accused persons started beating him. On the point of knife and sword, they carried him to 'Madar-chhala' ground. Hyder assaulted him with a knife. When this information reached to his brother and father Khaju Usman, they came there and tried to rescue him. In the course of scuffle, suddenly appellant took out a Kattar which he had kept in his shoes and stabbed in the abdomen of his father. On hearing their screams, when people assembled there, accused persons ran away. As a result of injuries, his father died. Both these witnesses were subjected to a lengthy cross examination, but they remained firm and consistent through out.

12. Mohd. Afaq (PW5), who is also a son of deceased stated that while he was sitting with his father and brother, Nadira Bano informed them that appellant and other accused persons were beating his brother Abbu. When he, his brother and father went there and tried to intervene, accused persons started beating Sajjad. When his father tried to save Sajjad, appellant took out a Kattar and inflicted its blow in the stomach of his father.

13. Mohd. Sarafraj (PW3) another son of deceased stated that immediately after the occurrence when he reached police station, he came to know that appellant and other accused persons had assaulted his father.

14. The evidence of Sajjad (PW1) finds sufficient corroboration from the evidence of Abbu (PW2) and Mohd. Afaq (PW5). His evidence finds further support from the first information report Ex. P/1 lodged by him within 15 minutes after the occurrence and by the medical evidence of Dr. Gopal Tirthani (PW13) and Dr. Mukesh Agrawal (PW14).

15. It is true that the aforesaid prosecution witnesses happened to be the close relatives of deceased, being his son, but merely on that ground their evidence cannot be discarded. There appear absolutely no reason for them to have falsely implicated the appellant. Of course, evidence of such witnesses required a closer scrutiny keeping the factor of their relationship in mind. Normally a close relative of the deceased would be most reluctant to spare real assailant and falsely mention the names of other persons as those responsible for causing injuries to deceased. Since, on a close scrutiny we

find their evidence cogent, consistent and reliable, we hold that it has been established that appellant caused knife injury to deceased, as a result of which, he died.

16. The next question would be whether learned trial Judge was justified in holding the appellant guilty of the charge under Section 302 of the Indian Penal Code.

17. Learned counsel for the appellant placing reliance on the case of *Bunnilal Chaudhary Vs. State of Bihar-AIR 2006 SC 2531* submitted that there was no evidence from which it could be inferred that appellant intended to cause death of deceased. The stab injury was caused in the abdomen and only one blow was inflicted, at the most appellant could be held liable for culpable homicide not amounting to murder, especially in the circumstances when suddenly deceased intervened in the quarrel.

18. In case of *Bunnilal Chaudhary* (supra), the Apex Court observed in paras 10 and 11:

“10. We have given our thoughtful and anxious consideration to the rival contentions of the learned counsel. The next question is what is the offence which is brought home to Bunnilal Chaudhary (A1)? It is not in dispute that the injury inflicted on the left side of the chest of the deceased is single one. On examination, Dr. Vijay Kumar found the injury situated above nipple on the left side of the chest extending 1” x 1/2” penetrating wound. On dissection, left lung was found penetrated. Dr. Vijay Kumar has not opined that the injury was sufficient in the ordinary course of nature to cause death. That was not even stated to be likely to cause death. No attempt was made by Bunnilal Chaudhary to cause serious injury on any vital part of the body of the deceased. There was no motive or intention of Bunnilal Chaudhary to have murdered Shambhu Raut. Therefore, the question is whether be offence can be said to be covered by clause (iii) of section 300 of the IPC.

11. That section requires that the bodily injury must be intended and the bodily injury intended to be caused must be sufficient in the ordinary course of nature to cause death. This clause is

in two parts: the first part is a subjective one which indicates that the injury must be an intentional one and not an accident one; the second part is objective in that looking at the injury intended to be caused, the Court must be satisfied that it was sufficient in the ordinary course of nature to cause death. We think that the first part is complied with, because the injury which was intended to be caused was the one which was found on the person of Shambhu Raut. But the second part, in our opinion, is not fulfilled because but for the fact that the injury caused had penetrated the lung, death might not have ensued. In other words, looking at the matter objectively, the injury, which Bunnilal Chaudhary intended to cause, did not include specifically the cutting of the left lungs but to wound Shambhu Raut in the neighbourhood of the nipple on left side of chest. Therefore, we are of the opinion that clause (iii) of section 300 does not cover the case. Inasmuch as death has been caused, the matter must still come within at least culpable homicide not amounting to murder. There again, section 299 is in three parts. The first part takes in the doing of an act with the intention of causing death. As we have shown above, Bunnilal Chaudhary did not intend causing death and the first part of section 299 does not apply. The second part deals with the intention of causing such bodily injury as is likely to cause death. Here again, the intention must be to cause the precise injury likely to cause death and that also, as we have shown above, was not the intention of Bunnilal Chaudhary. The matter, therefore, comes within the third part. The act which was done was done with the knowledge that Bunnilal Chaudhary was likely by such act to cause the death of Shambhu Raut. The case falls within the third part of section 299 and will be punishable under the second part of section 304, IPC as culpable homicide not amounting to murder."

19. In the light of above propositions, if we examine the facts of the instant case, we find that originally the incident of beating was going on between accused persons and Abrar. On receiving information about his beating, when deceased and other prosecution witnesses reached at the place of occurrence, accused persons indulged in scuffle with Sajjad (PW1). With a view to rescue

Sajjad, when deceased intervened, appellant suddenly took out a knife and dealt its blow in his abdomen. Admittedly, the assault was not repeated on the deceased. The act of appellant could be held to be abrupt and sudden. In these circumstances, it cannot be held with certainty that he intended to cause such injury as was objectively found on the body of deceased. Apart from it, it was not stated by the doctor that injury was sufficient in ordinary course of nature to cause the death of deceased. Dr. Mukesh Agrawal (PW14), who conducted postmortem examination stated that by the injury death of deceased was possible. In these circumstances, we are of the opinion that the case of appellant falls within the ambit of offence of culpable homicide not amounting to murder punishable under Section 304 of the Indian Penal Code. However, since the appellant wielded weapon like knife, it can be inferred with certainty that he knew that his act was likely to cause death of deceased making him liable to be punished under Section 304-II of the Indian Penal Code.

20. We, accordingly, alter the conviction of appellant Hyder @ Munda from Section 302 of the Indian Penal Code to Section 304-II of the Indian Penal Code and in lieu of sentence of imprisonment of life imposed on him, sentence him to rigorous imprisonment for seven years and to pay fine of Rs. 1000/- with default stipulation of two months simple imprisonment. The conviction and sentence of appellant under Section 323 of the Indian Penal Code is affirmed.

21. The appeal is partly allowed to the extent indicated above.

Appeal partly allowed.

I.L.R. [2012] M.P., 1368

APPELLATE CRIMINAL

Before Mr. Justice Tarun Kumar Kaushal

Cr.A. No. 1318/1996 (Jabalpur) decided on 3 April, 2012

PHOOL 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)(iv) and (x) – Insult and dispossession* – Nothing has been stated by complainant that abuses were hurled on the basis of caste – Further there is no evidence to show that a member of SC/ST was dispossessed from the field – Nothing

has come on record to show that the appellants have acquired or cultivated the land owned or possessed by complainant – No offence under Section 3(1)(iv)&(x) of Act, 1989. (Para 7)

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(iv) व (x) – अपमान व बेकब्जा – शिकायतकर्ता ने कोई कथन नहीं किया कि जाति के आधार पर गाली गलौज की गई – इसके अतिरिक्त यह दर्शाने के लिए कोई साक्ष्य नहीं कि अनु.जाति/अनु.जनजाति के सदस्य को खेत से बेदखल किया गया – अभिलेख पर कुछ नहीं आया जो यह दर्शाता हो कि अपीलार्थीगण ने शिकायतकर्ता के स्वामित्व या कब्जे की मूभिं उपार्जित की या उस पर खेती की – अधिनियम 1989 की धारा 3(1)(iv) व (x) के अंतर्गत कोई अपराध नहीं।

B. Penal Code (45 of 1860), Section 323 – Sentence – Incident occurred about 18 years ago – Compromise has also been arrived at between the parties – Sentence reduced to period already undergone and fine amount is enhanced from Rs. 500 to Rs. 1000/-. (Para 12)

ख. दण्ड संहिता (1860 का 45), धारा 323 – दण्डादेश – घटना करीब 18 वर्ष पूर्व घटित हुई – पक्षकारों के मध्य समझौता भी हो गया है – दण्डादेश भुगताई जा चुकी अवधि तक घटाया गया और अर्धदण्ड की राशी रुपये 500 से बढ़ाकर रुपये 1000/- की गई।

Sarita Chaurasiya, for the appellants.

Rakesh Kumar Kesharwani, 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 11/08/1996 passed by Special Judge (SC/ST Act) Chhatarpur in Special Case No. 121/1994, convicted and sentenced the appellants as below:-

Conviction u/s	Sentence
447 IPC	Fine of Rs.200/- each
323 IPC	6 months R.I. and fine of Rs.500/- each
3(1)(4) SC/ST Act	1 year R.I. and fine of Rs.500/- each
3(1)(10) SC/ST Act	6 months R.I. and fine of Rs.500/- each

2. Facts of the case in short are that on 11/09/1994 at about 5.00 pm appellants forceably entered in the field owned, possessed and cultivated by Gilla (PW-2) and assaulted with him lathi. In this incident Gilla (PW-2) sustained 7 injuries on his person. Appellants belonged to caste 'Yadav' and Gilla (PW-2) belonged to caste "Chamar". Gilla (PW-2) lodged FIR Ex.P-2 at police station Chandla, District-Chhatarpur. A case at Crime No. 94/1994 under section 323/34, 447 IPC along with under section 3(1)(4)/3(1)(10) of The Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short SC/ST Act) was registered against the appellants. Gilla (PW-2) was sent for his medical examination to Public Health Centre, Chandla. Dr. R.C. Malara (PW-7) examined injuries of Gilla (PW-2) and found following injuries: -

- (i) *Contusion 2X2 cm on left side of the head.*
- (ii) *Contusion 4.5X4 cm on left forearm.*
- (iii) *Abrasion 2X2 cm on left forearm.*
- (iv) *Contusion 2X2 cm on palm of left hand.*
- (v) *Contusion 3X2 cm on right forearm.*
- (vi) *Contusion 8X2 cm on right side of chest.*
- (vii) *Contusion 4X2 cm on right knee.*

3. During investigation police prepared spot map Ex.P-3 and Patwari also prepared map and submitted a report. After completing investigation, police Chandla submitted a charge sheet against the appellants in the concerned court.

4. Trial court framed charges under section 447, 323/34 IPC and under section 3(1)(4) and 3(1)(10) SC/ST Act. Appellants abjured guilt. Defence of the appellant was that of false implication on the basis of property dispute. In support of the allegations statements of Rambabu (PW-1), Gilla, injured (PW-2), Bucha (PW-3), Shivilal (PW-4), Siyaram (PW-5), Kripal, son of injured (PW-6), Dr. R.C. Malara (PW-7), Rameshwar Tiwari, ASI (PW-8) and Shyamlal, son of injured (PW-9) were recorded.

5. Appreciating the aforesaid evidence, trial court convicted and sentenced the appellants as above.

6. This appeal has been preferred by the appellants on the grounds that appreciation of evidence is not proper. No evidence is available on record to prove the caste of the complainant and the accused persons. No independent corroboration to the testimony of witness is available on record. Conviction is based on doubtful and insufficient 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.

7. On careful perusal of evidence of Gilla (PW-2), it is revealed that appellants reached on the field, which he was cultivating for about more than 10 years. Appellants started abusing him and assaulted him thereby PW-2 sustained 7 injuries on his person. Thereafter, appellants ran away from the spot. In his entire statement nothing has been stated to the effect that abuses were hurled on the basis of caste. There is a contradiction in his statement regarding his dis-possession from the field. In police statement Ex.D-1 Gilla stated to have been dispossessed by the appellants wherein in the court statement this fact has been denied. Meaning thereby there is no evidence to show that a member of SC/ST was dispossessed from the field by the appellants. Nothing has come on record to show that appellants have acquired or cultivated the land owned or possessed by Gilla (PW-2).

8. Similarly, nothing has come on record to show that Gilla (PW-2) was intimidated or humiliated as a member of SC/ST. Rather it appears to be property dispute between the parties where appellants are saying that they are owner of land and on the other hand, Gilla (PW-2) was saying he is the owner and possession holder of the land.

9. Evidence of Gilla (PW-2) is corroborated by evidence of his two sons only. It is true that merely being sons, evidence will not be discredited. Their credibility has to be assessed on the basis of merit of the statements. Similarly independent corroboration is not a matter of rule, if evidence is worthy of credence then without independent corroboration the witness can be believed.

10. In view of the medical evidence of Dr. R.C. Malara (PW-7) and MLC report Ex.P-6, it is apparently clear that there had been 7 injuries on the person of Gilla (PW-2). Evidence of Gilla (PW-2) stands duly corroborated by medical evidence. PW-2 has narrated the same version in the FIR also. In so far as conviction of appellants under section 447, 323 IPC, I see no infirmity in the findings and there appears no ground to interfere in this regard. However,

in so far as conviction of appellants under section 3(1)(4) and 3(1)(10) SC/ST Act is concerned, as discussed above, ingredients are completely missing in the evidence of Gilla (PW-2). Trial court has failed to appreciate evidence in correct prospective in that respect.

11. As discussed above, this appeal deserves to be and is hereby allowed in part. Conviction of appellants under section 3(1)(4) and 3(1)(10) SC/ST Act deserves to be and is hereby set aside. Conviction of appellants under section 447, 323 IPC is affirmed. Under section 447 IPC only fine has been imposed by the trial court, hence sentence under section 447 IPC is also affirmed.

12. At this stage it is submitted by learned counsel for the appellants that pending appeal, appellants suffered custody period from 14/09/1994 to 22/09/1994 and this incident occurred about 18 years ago and outside court compromise has been arrived at between the parties. Hence, no useful purpose would be served in sending the appellants back to jail after such long period.

13. In view of the totality and facts and circumstances of the case, for an offence under section 323 IPC, undergone period of 8 days seems to be just, proper and sufficient. However, fine amount is enhanced from Rs.500/- to Rs.1000/- each. In default of payment of fine the appellants shall undergo 1 month simple imprisonment.

14. Appellants are directed to remain present in the trial court on or before 16th July, 2012 to deposit the balance fine amount or to undergo default sentence as the case may be.

Appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2012] M.P., 1372

APPELLATE CRIMINAL

Before Mr. Justice Tarun Kumar Kaushal

Cr.A. No. 154/1998 (Jabalpur) decided on 11 April, 2012

STATE OF M.P.

Vs.

RUBAI SINGH & anr.

...Appellant

...Respondents

Penal Code (45 of 1860), Section 306 – Abetment to commit

suicide – Deceased died all of a sudden in suspicious circumstances in her matrimonial house – Fact of death was informed by respondents to parents of deceased – Any instance saying a lady *Kali, Kaluti and Jungali* or such like words can not be said to be abetment – Appeal dismissed. (Para 11)

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – मृतिका की संदिग्ध परिस्थितियों में अचानक ससुराल में मृत्यु हो गई – प्रत्यर्थांगन ने मृतिका के माता-पिता को मृत्यु के तथ्य से अवगत कराया – किसी महिला को उदाहरणार्थ काली, कलूटी और जंगली कहना या किन्हीं ऐसे शब्दों का प्रयोग दुष्प्रेरण नहीं कहा जा सकता – अपील खारिज।

Pushpraj Singh, P.L. for the appellant.

Manish Awasthi, for the respondents.

J U D G M E N T

T.K. KAUSHAL, J. - This appeal has been preferred under section 378(1) of Criminal Procedure Code by the State against the judgment dated 25/09/1997 passed by Sessions Judge, Damoh in S.T No. 172/1996, acquitting the respondents of the charge under section 306 IPC.

2. Facts of the case in short are that during three years of married life of deceased Jamuna Bai @ Abhilash, she was always disliked by respondent no.1 Rubai Singh, husband and respondent no.2 Mannu, Dewar for her so called ugly looks. She was mentally tortured by the respondents stating that respondent Rubai Singh will leave her for ever and will marry some other lady. Having felt harrassed by above acts of respondents, on 12/06/1996 deceased ended her life by hanging herself in her matrimonial house.

3. Deceased while was taken to the hospital by Baliram (Jeth) and Kanchhedi Singh (uncle) (PW- 1) expired on the way. On the basis of information furnished by Ginni, father of deceased (PW-4) at police station Tendukheda District- Damoh marg Ex.P- 12 was registered. Naksha Panchnama of the lash Ex.P-2 was prepared. Post mortem was conducted by Dr. S.N.Gupta (PW-3), who prepared post mortem report Ex.P-7 showing cause of death as asphixya (sic. Asphyxia) by hanging. On 13/06/1997 police Tendukheda registered a case at Crime No. 56/1996 against the respondents under section 306/201 IPC. During investigation Spot Map Ex.P-3 was prepared. A Nylone rope was seized from the house of the respondents at the instance of respondent no.1 Rubai Singh. Respondents were arrested vide

Ex.P- 10 and Ex.P- 11 on 4th July, 1996. After completing investigation, police submitted a charge sheet against the respondents under section 306/201 IPC in the concerned court.

4. Trial court framed charges against the respondents under section 306 IPC. Respondents abjured guilt and pleaded innocence. To substantiate case of the prosecution, statements of Kanchhedi Singh, uncle of the deceased (PW-1), Shivraj Singh brother of the deceased (PW-2), Dr. S.N. Gupta (PW-3), Ginni, father of the deceased (PW-4), Awadh Rani, mother of the deceased (PW-5), M.K. Pachouri, Sub Inspector (PW-6), RR. Uike Additional S.P. (PW-7), Akhilesh Tiwari, SHO (PW-8), Asha Thakur, aunt of deceased (PW-9) were recorded.

5. Appreciating the aforesaid evidence, trial court holding that ingredients of abatement of suicide has not been proved by the prosecution extended benefit of doubt and acquitted respondents of the charge.

6. This appeal has been preferred by the State on the grounds that appreciation of evidence is not proper. There is sufficient evidence available on record against the respondents regarding acts of cruelty and harassment of the deceased by saying her "kali Kalluti and Jungali" etc amounts to abatement resulted in her suicide. On the other hand, learned counsel for the respondents supported the findings of acquittal given by the trial court and opposed this appeal.

7. Kanchhedi Singh, Uncle of the deceased (PW- 1) stated that he received information of death of deceased through his brother-in-law Prakash Singh. Though it was stated to him that cause of death was some ailment but he could not believe this story. While deceased was taken to hospital for treatment, PW- 1 accompanied her. It is evident from Post mortem report Ex.P-7 in which this fact has been mentioned that deceased tried to say something to him on the way. In para 9 of his statement, he stated that somebody told that deceased died by hanging but from dead body it was difficult to ascertain.

8. Ginni, father of the deceased (PW-4) and Awadh Rani, mother of the deceased (PW-5) along with Kanchhedi Singh, uncle were the punch witnesses of lash panchnama (Ex.P-2) also. In lash Naksha Panchnama Ex.P-2 there is no mention of death to be a case of suicide by hanging. In view of the aforesaid circumstances it appears that response and conduct of the respondents

regarding death of the deceased was not suspicious rather it was natural conduct and they kept maternal family members of the deceased well informed with everything.

9. In so far as evidence of harassment and cruelty is concerned Awadh Rani (PW-5) stated that she heard 3-4 days prior to the incident that deceased was crying on account of some incidents of misbehaviour of respondents and their other family members in matrimonial house. Asha Thakur (PW-9) stated that deceased told her that she was not happy in her matrimonial house. This fact has been informed by her to PW-5 also. Any such incident of 3-4 days prior to the suicide can be termed as abatement or not is to be seen.

10. Abatement is defined in Section 107 IPC which reads as below: -

"107. Abetment of a thing--A person abets the doing of a thing, who-

First.- Instigates any person to do that thing; or

Secondly.-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1

A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2

Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

11. Prosecution has failed to prove any specific date and place of act of alleged harassment of deceased amounts to instigation by the respondents. Version of the deceased of such incidents was narrated to PW-9 at some

point of time, thereafter 3-4 days of such narration, deceased died all of a sudden in suspicious condition in her matrimonial house. Prima facie her death was not considered to be a death by hanging. Fact of death has been informed by respondents to her parents immediately. In view of the aforesaid, any such instances of saying a lady "Kali Kalluti and Jungali" or such other alike words, in my considered opinion, cannot be said to be abatement as required under section 107 of IPC.

12. Trial court has appreciated the evidence in right perspective minutely. There appears no perversity and illegality in appreciation of the evidence as done by the trial court in this regard. Merely on the basis of fact that a married lady died untimely in suspicious condition, in absence of specific evidence of abatement, offence under section 306 IPC cannot be presumed or said to be proved. I concur the findings of acquittal given by the trial court. On the basis of evidence available on record, no case under section 306 IPC or any other offence whatsoever is made out against the respondents.

13. This appeal is devoid of merits and as discussed above, deserves to be and is hereby dismissed for want of merits.

Appeal dismissed.

I.L.R. [2012] M.P., 1376

APPELLATE CRIMINAL

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

Cr.A. No. 876/2003 (Jabalpur) decided on 17 April, 2012

NARAYAN

Vs.

STATE OF M.P.

...Appellant

...Respondent

Penal Code (45 of 1860), Sections 302 & 304 – Murder or Culpable Homicide not amounting to murder – No enmity or motive on the part of appellant to cause murder – Incident was sudden and none of the witness has spoken about the genesis of incident – However, the circumstance indicates that the deceased had abused the appellant and therefore, he picked up axe and assaulted him. – As the appellant dealt only one blow on the neck – Case falls within the ambit of Section 304 Part II – Appeal partly allowed. (Para 17)

दण्ड संहिता (1860 का 45), धाराएँ 302 व 304 – हत्या या हत्या की कोटि

में न आने वाला आपराधिक मानव वध – अपीलार्थी की ओर से हत्या कारित करने का कोई उद्देश्य या कोई वैमनस्यता नहीं – घटना अचानक हुई और घटना की शुरुआत के बारे में किसी भी साक्षी का कथन नहीं – किन्तु, परिस्थिति दर्शाती है कि मृतक ने अपीलार्थी के साथ गाली-गलौज की थी और इसलिए, उसने कुल्हाड़ी उठायी और उस पर हमला कर दिया – चूंकि अपीलार्थी ने गर्दन पर केवल एक बार किया था – प्रकरण धारा 304 भाग II की परिधि में आता है – अपील अंशतः मंजूर।

Durgesh Gupta, for the appellant.

Umesh Pandey, G.A. for the respondent/State.

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 27th August, 2002 passed by Additional Judge to the Court of First Additional Sessions Judge, Katni in Sessions Trial No. 819/2001, convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs. 2000/-. In default of payment of fine, further rigorous imprisonment for six months.

2. In short, the prosecution case is that on 22.10.2001 when Gariba, the deceased returned to his house after working on a kiln and sat for taking bath near his house, appellant/accused reached there and dealt a blow with an axe on his neck causing his instantaneous death. Kishori Lal, Kotwar (PW1) on getting information from wife of Fakru reached there and snatched the axe from the hand of accused. Kishori Lal went to police station, Vijayraghgarh and lodged the first information report Ex. P/1.

3. Sub Inspector Ramkishore Goutam (PW6) went to the spot, conducted inquest proceedings and sent the body of Gariba for postmortem examination to Community Heath Centre, Vijayraghgarh. Dr. B.K.Sahu (PW9) conducted postmortem examination and found that the death of Gariba was caused by an incised injury on his neck.

4. On 22.10.2001, appellant was arrested. On his information, an axe was seized. After completion of investigation, police filed charge sheet in the Court of Magistrate. The case was, thereafter committed for trial. Appellant was charged under Section 302 of the Indian Penal Code. He abjured his guilt and pleaded false implication.

5. Learned trial Judge relying mainly on the evidence of Kishorilal (PW1),

Bittan Bai (PW7), Deepak (PW8), Dr. B.K.Sahu (PW9) and Investigating Officer Ramkishore Gautam (PW6) held the appellant guilty for committing murder of Gariba, convicted and sentenced him as mentioned above. Aggrieved by his conviction, appellant has filed this appeal.

6. Learned counsel for the appellant submitted that learned trial Judge mis-appreciated the evidence on record. There was no direct evidence in the case. Neither Kishorilal (PW1), nor Bittan Bai (PW7) and Deepak (PW8) saw the incident, therefore, merely on the basis of their evidence, the conviction of appellant was not justified. The evidence of extra judicial confession made by appellant to Kishorilal (PW1) was not reliable. The recovery of axe on the alleged information of appellant was fabricated. In the alternative, learned counsel for the appellant submitted that there was no past enmity between the appellant and the deceased. The incident occurred all of a sudden, therefore, appellant, at the most could have been held liable under Section 304-I or II of the Indian Penal Code. On the other hand, learned counsel for the State submitted that the evidence adduced by the prosecution was sufficient to prove the charge against the appellant. Trial Court committed no error in holding the appellant guilty on the basis of evidence of Kishorilal (PW1) and Bittan Bai (PW7).

7. We have heard the learned counsel for the parties, perused the impugned judgment and the evidence on record carefully.

8. It has not been disputed by the appellant that Gariba has died. From the evidence of Kishorilal (PW1), Bittan Bai (PW7) and Deepak (PW8), it has been established that Gariba has died. Investigating Officer Ram Kishore Goutam (PW6), after recording the first information report reached at the spot, conducted inquest proceedings before the witnesses and recorded memorandum Ex. P/9. He sent the dead body for postmortem examination. Dr. B.K.Sahu (PW9) of Community Health Centre, Vijayraghgarh conducted postmortem examination of the body of deceased and found one incised wound on the left side of his neck. It's size was 2" x 2.5" deep and 1/2" wide. The great vein (juglar) (sic. Jugular) of the neck was cut by this injury. In his opinion, the cause of death of deceased was this injury of neck which resulted into neurogenic shock due to excessive bleeding and that his death was homicidal in nature. Postmortem examination report Ex. P/15 was written and signed by him. Aforesaid evidence has not been challenged. Thus, it has been established beyond doubt that deceased died a homicidal death.

9. The next question before us is whether learned trial Judge rightly held appellant guilty for causing death of Gariba. The only eye witness of the occurrence Ramrati (PW4) did not support the prosecution case. She was declared hostile. Therefore, the case rested on the circumstantial evidence.

10. Bittan Bai (PW7), the mother of deceased stated that when her son Gariba was taking bath near the house, appellant reached there and dealt a blow with an axe on his neck, due to which his neck got cut and Gariba died. When she shouted, appellant intimidated her that he will cut her into three pieces. Kishorilal, Ramdas and Radha also reached at the spot. They caught hold of the appellant. In cross examination, this witness admitted that her mental condition was not sound, but in our opinion, this was not sufficient to discard her evidence altogether. She, however, admitted that she did not see appellant assaulting Gariba with axe because she was inside her house. According to her, when she heard some sound, she immediately rushed out and saw appellant standing near the body of her son having an axe in his hand. Appellant did not leave the place of incident.

11. Deepak (PW8) also deposed that he saw appellant assaulting deceased, but from his cross examination, it appeared that he reached at the spot after the occurrence was over and he came to know from the people present at the spot that appellant killed the deceased. Evidence of this witness does not go to help the prosecution.

12. Another important witness Kishorilal (PW1), who happened to be the Kotwar of the village, and who lodged the first information report, stated that the wife of Fakru informed him that appellant killed Gariba with an axe. Immediately, when he reached at the place of occurrence, he saw appellant present with an axe and Gariba lying there tossing and squirming. He snatched the axe from the hand of appellant. When he asked appellant as to why he did so, he could say nothing; but said he thought it fit. He took Narayan to the house of Sarpanch and informed the incident to Sarpanch. He then went to police station and lodged the report Ex. P/1.

13. Investigating Officer Ram Kishore Goutam (PW6) recorded the first information report and went to spot. According to him, on the same day, he arrested the appellant and on his information Ex. P/3 recovered and seized the axe from the bushes in front of the house of the appellant.

14. Learned counsel for the appellant submitted that the evidence of

recovery of the axe at the instance of appellant was not reliable since Kishorilal (PW1) stated that he took the axe from the hand of appellant and that carried him to the house of Sarpanch. Independent witnesses about the information and the consequent recovery of the axe from the appellant viz. Sonelal (PW3) and Badri Prasad (PW10) did not support the prosecution story. In our opinion, learned Court below committed error in relying on the sole evidence of Inspector Ram Kishore Goutam (PW6) in this regard. It seems suspicious when the axe was taken by Kishorilal then how it could have been recovered at the instance of appellant.

15. The evidence of Kishorilal (PW1) and Bittan Bai (PW7) finds corroboration from the medical evidence of Dr. B.K.Sahu (PW9), who found an incised injury on the neck of Gariba. Evidence of Kishorilal (PW1) finds further corroboration from the first information report Ex. P/1 lodged by him soon after the occurrence. It is true that Sarpanch to whom appellant was said to have been taken by Kishorilal was not examined in the Court, but merely by his non examination, the evidence of Kishorilal was not rendered unreliable. Kishorilal (PW1) is an independent witness. Bittan Bai (PW7) is a rustic village woman. Her evidence appeared to be very simple, natural and consistent, smacking of no embellishment. She fairly admitted in cross examination that she did not see appellant assaulting the deceased with axe, but she saw appellant standing just near her injured son having an axe in his hand. She stated that there was no enmity between her son and the appellant, therefore, she could say nothing as to why appellant killed her son.

16. After a careful appraisal of the evidence of Kishorilal (PW1) and Bittan Bai (PW7), we find that the trial Court committed no error in holding that it was appellant, who caused death of Gariba by assaulting him with axe on his neck.

17. The next question before us is whether the conviction of appellant under Section 302 of the Indian Penal Code was justified. Learned counsel for the appellant submitted that there was no enmity or motive on the part of appellant to have committed murder of deceased. The incident was sudden. None had witnessed or spoken about the genesis of the incident. Kishorilal (PW1), who reached the spot soon after the occurrence, though stated in the Court that on his asking, appellant stated that he thought it fit, but in the first information report Ex. P/1 lodged by him, he mentioned that when he asked appellant why he did so, appellant told that Gariba abused him, therefore, he

picked up axe from the house of Gariba and assaulted him. This piece of evidence is in the nature of an extra judicial confession to Kishorilal (PW1). It is true that Kishorilal (PW1) was not confronted with the first information report Ex. P/1, but he admitted that he lodged the said report at the police station and admitted his signature. Since this fact was disclosed by Kishorilal in the first information report, a document tendered by prosecution in the case, giving some indication about the genesis of the occurrence and throwing light on the mental condition of appellant, it could be taken into consideration for appreciating the situation under which the incident occurred. In the above fact situation, in our opinion, it could be gathered that appellant dealt one axe blow to deceased on being abused by him, suddenly by picking up the axe from the house of deceased itself. In these circumstances, in our opinion, the act of appellant fell within the ambit of the offence of culpable homicide not amounting to murder. However, since the appellant wielded a weapon like axe and dealt its blow on the neck of deceased, it can be held with certainty that he assaulted deceased with an intention of causing death or of causing such bodily injury as was likely to cause his death making him liable to be punished under Section 304-I of the Indian Penal Code.

18. Accordingly, the conviction of appellant under Section 302 of the Indian Penal Code as awarded by the trial Court is modified to Section 304-I of the Indian Penal Code and his sentence is reduced to the period of sentence already undergone by him. Sentence of fine is set aside. Appellant is said to be in jail since 22.10.2001. He be released forthwith, if not required in any other case.

19. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2012] M.P., 1381

APPELLATE CRIMINAL

Before Mr. Justice S.K. Gangele & Mr. Justice Brij Kishore Dube

Cr. A. No. 282/2005 (Gwalior) decided on 17 May, 2012

PREMDAS AHIRWAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 25, Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Confessional Statement –

Appellant/accused came to police station and made a confessional statement to Sub-Inspector, who recorded the F.I.R. – Held – This would be inadmissible against the accused. (Para 22)

क. साक्ष्य अधिनियम (1872 का 1), धारा 25, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – संस्वीकृति कथन – अपीलार्थी/अभियुक्त थाने में आये और उपनिरीक्षक को संस्वीकृति कथन दिया जिसने प्रथम सूचना रिपोर्ट दर्ज की – अभिनिर्धारित – यह अभियुक्त के विरुद्ध अग्रह्य होगा।

B. Evidence Act (1 of 1872), Sections 3 & 27 – Penal Code (45 of 1860), Section 302 – Murder – Seizure of blood stained article (axe) from accused – Chemical Examiner only opined about the presence of blood on the article – Held – Unless and until the chemical examiner opined about the presence of human blood on the article and that too belongs to the group of the deceased, no inference can be drawn that the appellant/accused caused the death of the deceased. (Para 23)

ख. साक्ष्य अधिनियम (1872 का 1), धाराएँ 3 व 27 – दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अभियुक्त से रक्त रंजित वस्तु (कुल्हाड़ी) की जप्ती – रसायनिक परीक्षक ने केवल वस्तु पर रक्त की उपस्थिति के बारे में मत दिया – अभिनिर्धारित – जब तक कि रसायनिक परीक्षक वस्तु पर मानव रक्त की उपस्थिति के बारे में मत नहीं देता और यह भी कि वह मृतक के रक्त समूह का भी है, कोई निष्कर्ष नहीं निकाला जा सकता कि अपीलार्थी/अभियुक्त ने मृतक की मृत्यु कारित की

Cases referred :

2006(1) ACQUITTAL 252, 2010(2) CRIMES 441(DEL.), (1994) 2 SCC 467, 1966 SC 119, (1996) 11 SCC 133.

N.P. Dwivedi, S.K. Tiwari & Gagan Sharma, for the appellant.
Prabal Solanki, P.P. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
BRIJ KISHORE DUBE, J. - Feeling aggrieved by the judgment of conviction and order of sentence dated 12/04/05 passed by the learned Sessions Judge, Guna in Sessions Trial No.193 of 2004 (State of Madhya Pradesh Vs. Premdas Ahirwar), convicting the appellant under Section 302 of IPC and thereby sentencing him to suffer rigorous imprisonment for life with fine of

Rs.1,000/- and in default of payment of fine to suffer additional rigorous imprisonment for six months, the appellant has preferred this appeal under Section 374 of Code of Criminal Procedure, 1973.

2. The undisputed facts are that the deceased, Radha Bai was wife and Girdhari (P.W.1) and Kala Bai (P.W.2) are the parents of the appellant/accused, Premdas Ahirwar.

3. The prosecution case, in brief, may be narrated as under:

(i) That, on 29/05/04 at 08.30 A.M., the appellant/accused Premdas Ahirwar having blood stained axe reached to the Police Station, Aron and lodged report to the effect that about 10 years back he got married with the daughter of Aman Singh Ahirwar, Radha (since deceased). He was living separately from his parents in the same house alongwith his wife. No issue was born out of the wedlock and even after taking medical treatment, his wife has not begotten. On this, his wife off and on quarrels with him as well as his parents. She used to say to him that 10 Bigas of land be got transferred in her name and she further used to say to cut off his mother & father or herself (the deceased). On account of repeated quarrel, about 8-10 months prior to this happening, she herself poured kerosene on her body and set her ablaze as a result of which she sustained serious burn injuries for which about Rs.50,000/- was spent by him for her treatment and he was compelled to sold his agricultural land for the said purpose. One day prior to this occurrence, she (deceased) made a quarrel with his parents for constructing a house for her and also abused him (accused). He fed up with his wife and at the time of sleeping in the night he planned to put an end to the story of his wife and slept besides her but he was unable to sleep in the whole night except for an hour. At about 04.00 A.M., he raised from bed and by taking kulhadi dealt two blows on the neck of Radha as a result of which she had died on the spot. He has no regret of the act done by him. The report was recorded at Crime No.181/04 under Section 302 of IPC (Exhibit P/21) by R.S.Tomar, Station House Officer (P.W.10) against the appellant/accused himself. R.S. Tomar (P.W.10) seized blood

stained axe (Exhibit P/19) from the accused and also arrested him (Exhibit P-20). The criminal law was triggered and set in motion.

(ii) That, the investigating agency reached to the spot, prepared spot map (Exhibit P/10), seized necessary articles including blood stained earth etc. Prepared inquest (Exhibit P/2) on the dead body and sent it to for post mortem. Investigating agency also recorded the statements of the witnesses who were acquainted with the facts of the offence. Dr. S.P.Sharma Senior Scientist, Scene of Crime Mobile Unit, Guna (P.W.8) was also called whereupon he reached and inspected the place of occurrence, prepared spot map and taken photographs (Exhibit P/11 to P/16) and prepared C.D, (Exhibit P/17);

(iii) That, on 29/05/04 at 01.30 P.M., Dr.V.S.Raghuvanshi (P.W.6) Medical Officer, Community Health Centre, Aron conducted the post mortem of the deceased and vide report (Exhibit P/7) opined that death was due to shock (neurogenic) on account of injury to spinal cord at the level of cervical vertebrae. Blood stained cloths worn by the deceased were also seized and;

(iv) That, on completion of the investigation, a charge sheet was filed against the appellant/accused before the Judicial Magistrate, First Class, Aron, who on its turn, committed the case to the Court of Sessions, Guna from where the accused was tried.

4. The learned Trial Judge on the basis of the material placed on record framed charge punishable under Section 302 of IPC against the appellant/accused, The appellant denied the charge and claimed to be tried. The defence of the accused person is of false implication, he did not kill his wife and he neither lodged report nor kulhadi was seized from him. He was taken in custody by the police and committed marpeet upon him and forcibly obtained his signature on some papers and the same defence, he set forth in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973.

5. To bring home the charge, the prosecution has examined as many as 11 witnesses and placed Exhibits P/1 to P/24, the documents on record. The

accused has not examined any witness in his defence.

6. The learned Trial Judge on the basis of evidence placed on record came to hold that charge under Section 302 of IPC has been proved against the appellant as a result of which convicted him and passed the sentence as mentioned hereinabove.

7. In this manner, this appeal has been preferred by the appellant assailing the judgment of conviction and order of sentence passed by the learned Trial Court.

8. Legality and propriety of the impugned judgment of conviction has been challenged by the appellant on the ground of mis-appreciation of the evidence on records as well as misapplied the law to the case. Learned counsel for the appellant, Shri N.P.Dwivedi, has submitted that the appellant has been falsely roped in the case. There was no direct evidence against the accused/appellant. The chain of the circumstances which prove the guilt of the accused was not complete. The FIR, which is alleged to have been lodged by the appellant himself, being confessional statement of the accused is hit by Section 25 of the Evidence Act and, hence, cannot be used against the maker of it i.e., the appellant and is totally inadmissible in evidence. There was no cogent evidence to establish the ingredients of offence under Section 302 of IPC against the appellant. The learned Trial Court erred in convicting the appellant, hence, this appeal be allowed and the appellant be acquitted from the charge. The learned counsel has placed reliance on the case of *Sanwat Ram v. State of Rajasthan*, 2006(1) *Acquittal* 252, *Rajasthan High Court*, *Mukesh v. State*, 2010(2) *Crimes* 441 (Del.) and *Bheru Singh S/o Kalyan Singh v. State of Rajasthan*, (1994) 2 *SCC* 467.

9. On the contrary, Shri Prabal Solanki, learned Public Prosecutor supported the impugned judgment and findings arrived at by the learned Trial Court and submitted that the conviction in question is well merited.

10. In order to appreciate the merits of the rival contentions in a proper perspective, it would be necessary to advert to the evidence available on record.

11. According to Sub-Inspector, R.S. Tomar (P.W.10), he performed inquest (Exhibit P/2), on the dead body of Radha Bai and then sent it to the hospital for post-mortem examination. Autopsy Surgeon, Dr. V.S. Raghuvanshi (P.W.6) by proving the post-mortem report (Exhibit P/7) of the deceased,

Radha Bai, found the following injuries on her person:-

"1. Incised wound right upper part of neck having dimensions 8 cm x 3 cm x 4 cm (horizontally placed) (Bony deep) caused by sharp and hard object, having duration 12-24 hrs. Upper IIIrd & IVth cervical vertebrae fractured on right side with injury to spinal cord.

2. Incised wound lower one cm below the above one, horizontally placed, dimensions 4 cm x 1½ cm x ½ cm, caused by sharp and hard object duration within 12-24 hrs."

According to Dr. V.S. Raghuvanshi (P.W.6), the death was due to shock (neurogenic) on account of injury to spinal cord at the level of cervical vertebrae. The nature of death was homicide.

12. Admittedly, Ghirdharilal (P.W.1) is father, Kala Bai (P.W.2) is mother, Sukhram (P.W.4) is brother and Hanumant Singh (P.W.3) is the uncle of the appellant/accused, Premdas Ahirwar, while, Alam (P.W.7) is father of the deceased, Radha Bai.

13. Girdharilal (P.W.1), Kala Bai (P.W.2), Hanumant Singh (P.W.3), Sukhram (P.W.4) and Mannulal (P.W.5) have not supported the prosecution case and, therefore, they were declared hostile.

14. Alam (P.W.7) deposed that on receiving the information from the police that his daughter Radha Bai has been killed, he went to in-laws house of his daughter and found dead body of his daughter having wounds over her neck. People present there told him that Premdas Ahirwar killed Radha Bai by inflicting axe injuries on her neck and gone to Police Station. Alam (P.W.7) has failed to disclose the name of person/people from whom he got the aforesaid information, therefore, the aforesaid statement of Alam (P.W.7) comes within the purview of hearsay evidence.

15. Learned counsel for the appellant, Shri N.P. Dwivedi contended that the approach of the learned Trial Court by dividing F.I.R. (Exhibit P/21) into 20 parts and except part No.17, which has been treated as confession and self exculpatory in nature, treating other parts of the FIR as admission of the appellant, is against the well settled principle of law and is totally bad in law. According to settled principle of law when the statement in the FIR given by an accused contains incriminating material and it is difficult to shift the

exculpatory portion therefrom, the whole of it must be excluded from evidence.

16. There is no eye-witness of the occurrence. The main evidence against the appellant/accused consists of the FIR (Exhibit P/21) which contains a full confession of guilt by the appellant/accused. If this FIR is excluded, the other evidence on record is insufficient to convict the appellant. The core question in this appeal is whether the appellant's statement (FIR) or any part of it is admissible in evidence.

17. The FIR (Exhibit P/21) reads as under:-

“मेरी शादी करीब 10 वर्ष पूर्व रूसल्ली साहू के अमानसिंह अहिरवार की लड़की राधा से हुई थी। मैं अपने मां, बाप से अलग होकर उसी मकान के बगल के हिस्से में पत्नी राधा के साथ रहता हूँ। मेरे कोई संतान नहीं हुई मैंने अपनी पत्नी का इलाज भी कराया इसी बात पर मेरी पत्नी राधा आए दिन मेरे मां बाप से लड़ती रहती थी और मुझसे भी लड़ती रहती थी कहती थी कि 10 बीघा जमीन मेरे नाम करो और मुझसे कहती थी कि मैं या तो अपने मां, बाप को काट डालू या मुझे काट डालो। इसी बात पर करीब 8-10 महीने पहले उसने अपने ऊपर तेल डाल कर आग लगा ली थी इलाज में करीब 50 हजार रुपये खर्च हुए जमीन बेचनी पड़ी। कल दिन से ही वह मेरे मां बाप से इस बात पर लड़ रही थी कि उसे मकान बना कर दो और रात को मुझे भी गाली देती रही। मैं अपनी पत्नी राधा से तंग आ चुका था रात को सोते समय मैंने सोचा कि आज इसकी कहानी हमेशा के लिए खतम कर दूँ और राधा भी बगल से लेट गयी मुझे रात में नींद नहीं आई केवल 1 घंटा सोया था सुबह करीब 4 बजे में उठा और कुल्हाड़ी उठा कर राधा की गरदन पर दो बार मारी राधा मौके पर ही मर गई और मैं चुपचाप कुल्हाड़ी लेकर पैदल चलकर थाने रिपोर्ट करने आया हूँ मुझे अपने किए पर कोई पछतावा नहीं है।

18. In the case of *Aghnoo Nagesia v. State of Bihar*, AIR 1966 SC 119, a three-Judge Bench of the Apex Court held that where the First Information Report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25 of the Evidence Act. The confession includes not only the admission of the offence, but all other admissions of incriminating facts relating to the offence contained in the confessional statement. No part of the confessional statement is admissible in evidence except to the extent that the ban of Section 25 is lifted by Section 27 of the Evidence Act. The observations made in para Nos. 18 and 21 of the judgment reads as under:-

“18. If the first information report is given by the accused to a

police officer and amounts to a confessional statement, proof of the confession is prohibited by S. 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of S. 25 is lifted by S. 27.

... ..

21. Section 27 applies only to information received from a person accused of an offence in the custody of a police officer. Now, the Sub-Inspector stated he arrested the appellant after he gave the first information report leading to the discovery. Prima facie, therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was then in constructive custody. On the question whether a person directly giving to police officer information which may be used as evidence against him may be deemed to have submitted himself to the custody of the police officer within the meaning of Section 27, there is conflict of opinion. See the observations of Shah, J. and Subba Rao, J. in 1961 (1) SCR 14, AIR 1960 SC 1125. For the purposes of the case, we shall assume that the appellant was constructively in police custody and, therefore, the information contained in the first information report leading to the discovery of the dead bodies and the tangi is admissible in evidence. The entire evidence against the appellant then consists of the fact that the appellant gave information as to the place where the dead bodies were lying and as to the place where he concealed the tangi, the discovery of the dead bodies and the tangi in consequence of the information, the discovery of a blood-stained chadar from the appellant's house and the fact that he had gone to Dungi Jharan Hills on the morning of 11.08.1963. This evidence is not sufficient to convict the appellant of offences under Section 302 of the Indian Penal Code."

19. In *Bheru Singh* (supra), the Apex Court has observed as under:-

“17. Where the first information report is given by an accused himself to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25 of the Evidence Act. No part of the confessional statement can be proved or received in evidence, except to the extent it is permitted by Section 27 of the Evidence Act. The first information report recorded under Section 154 CrPC is not a substantive piece of evidence. It may be used to corroborate the informant under Section 157 of the Evidence Act or to contradict him under Section 145 of the Evidence Act in case the informant appears as a witness at the trial. Where the accused himself lodges the first information report, the fact of his giving the information to the police is admissible against him as evidence of his conduct under Section 8 of the Evidence Act and to the extent it is non-confessional in nature, it would also be relevant under Section 21 of the Evidence Act but the confessional part of the first information report by the accused to the police officer cannot be used at all against him in view of the ban of Section 25 of the Evidence Act.”

20. Reiterating the same principle in the case of *Bandlamuddi Atchuta Ramaiah and others v. State of A.P.*, (1996) 11 SCC 133, the Apex Court has held as under:-

“A statement in an FIR can normally be used only to contradict its maker as provided in Section 145 of the Evidence Act, 1872 or to corroborate his evidence as envisaged in Section 157 of the Act. Neither is possible in a criminal trial as long as its maker is an accused in the case, unless he offers himself to be examined as a witness (vide *Nisar Ali v. State of U.P.*, AIR 1957 SC 366) Kapoor J. speaking for the three- Judge Bench in that decision has observed:

“A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 157, Evidence Act, or to contradict it under Section 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to

corroborate or contradict other witnesses. In this case, therefore, it is not evidence.”

21. In *Sanwat Ram* (supra), it has been held that FIR given by accused to police amounts to confession if accused/informant pleaded guilt in it and would be admissible under Section 27 of Evidence Act. In *Mukesh* (supra), the Delhi High Court has also held that report lodged by accused with police which was confession would not be admissible against him.

22. In the instant case as already discussed, the appellant/ accused came to the Police Station Aron and made a confessional statement to Sub-Inspector R.S. Tomar (P.W.10) which would be inadmissible under Section 25 of the Evidence Act against him.

23. On bare perusal of the evidence of Head Constable Harnam Singh (P.W.9), Sub-Inspector R.S. Tomar (P.W.10) and seizure memo Exhibit (P/ 19), we find that a blood stained axe which was brought by the appellant/ accused at Police Station was seized by R.S. Tomar in the presence of Head Constable Harnam Singh and Constable Rajendra from appellant/accused after recording FIR on 29.05.2004 at 8.40 AM. According to FSL report (Exhibit P/24), it is apparent that the concerned chemical examiner has only opined about the presence of blood on the article i.e. on an axe alleged to be seized from the possession of the appellant. Unless and until the chemical examiner opined about the presence of human blood on the article and that too belongs to the group of the deceased, Radha Bai, then only any inference against the appellant/accused can be drawn that it is the appellant/accused who had caused the death of the deceased, Radha Bai.

24. For the reasons stated here-in-above and the principle laid down by the Apex Court, we are unable to uphold the findings recorded by the learned Trial Court convicting the appellant under Section 302 of IPC and we set-aside the same.

25. Resultantly, this appeal succeeds and is hereby allowed. The judgment of conviction and order of sentence passed by the learned Trial Court is set-aside. The appellant is acquitted from the charge under Section 302 of IPC. The appellant is in jail, he be set at liberty forthwith, if not, required in any other case. The amount of fine, if deposited be refunded to the appellant.

Appeal allowed.

I.L.R. [2012] M.P., 1391

CIVIL REVISION

Before Mr. Justice R.C. Mishra

C.R. No. 368/2010 (Jabalpur) decided on 17 January, 2012

AZIZ KHAN

...Applicant

Vs.

AKRAM HUSSAIN & ors.

...Non-applicants

Municipalities Act, M.P. (37 of 1961), Sections 26 & 22(a)(d)(i), Civil Procedure Code (5 of 1908), Order VII Rule XI – Revision under Section 26 – Election petition rejected as no cause of action disclosed – Revision – Held – Rejection of nomination paper on the ground of furnishing of wrong information or suppressing material information is not enforceable – Can not be a sufficient ground to challenge validity of the election of a returning candidate – No interference require – Revision dismissed. (Paras 12 & 13)

नगरपालिका अधिनियम, म.प्र. (1961 का 37) धाराएँ 26 व 22(ए)(डी)(i), सिविल प्रक्रिया संहिता (1908 का 5), आदेश VII नियम XI – धारा 26 के अंतर्गत पुनरीक्षण – निर्वाचन याचिका अस्वीकार की गई क्योंकि कोई वाद कारण प्रकट नहीं किया गया – पुनरीक्षण – अभिनिर्धारित – गलत जानकारी प्रस्तुत करने या तात्त्विक जानकारी का छिपाव करने के आधार पर नामांकन पत्र की अस्वीकृति प्रवर्तनीय नहीं – चयनित प्रत्यर्थी के निर्वाचन की वैधता को चुनौती देने का पर्याप्त आधार नहीं हो सकता – कोई हस्तक्षेप की आवश्यकता नहीं – पुनरीक्षण खारिज।

Cases referred :

AIR 2006 SC 1828, AIR 2003 SC 2363, AIR 2002 SC 2112, 2011(4) MPLJ 689, 2008 (5) MPHT 95, AIR 1956 SC 140.

R.B. Patel, for the applicant.

Sankalp Kochar, for the Non-applicants.

ORDER

R.C. MISHRA, J. - This revision, under Section 26 of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as the 'Act'), has been preferred against rejection of the election petition on the ground that it does not disclose any cause of action. Corresponding order-dated 7.9.2010 passed in MJC No.8/10 by Third Additional Sessions Judge, Begumganj, Distt Raisen is the subject matter of challenge.

2. The petitioner, an elector of Ward No.1 of Municipal Corporation, Begumganj, called in question election of respondent no.1 to the seat of Councillor representing the Ward on the grounds specified in Section 22(a) and (d)(i) of the Act.

3. According to the petitioner, the respondent no.1 was disqualified for election as Councillor by virtue of Section 35(j) of the Act in view of the fact that he was member of a Society namely Haddi Evam Chamra Udyog Shahkari Samiti, Begumganj against which a sum of Rs.1,05,739/- payable to the Municipality, was outstanding. Moreover, nomination paper of the respondent no.1 was improperly accepted as the affidavit filed in support thereof contained incomplete information as to his criminal antecedents.

4. In the written statement, the respondent no.1 denied the allegation concerning disqualification asserting that he had remained a member of the Society only upto 25.03.2006, the day on which his resignation was duly accepted. He further pleaded that the affidavit filed in support of his nomination paper contained true and complete information disclosing his criminal antecedents.

5. On the date fixed for framing of issues, respondent no.1 moved an application, under Order VII Rule 11 of the Code of Civil Procedure, for rejection of the petition on the premise that it does not disclose a cause of action or a triable issue. As indicated already, for the reasons recorded in the order in question, the prayer was granted by the trial Court.

6. Placing reliance on *Mayar (H. K.) Ltd. v. Owners and Parties, Vessel M. V. Fortune Express AIR 2006 SC 1828*, learned counsel for the petitioner has contended that the petition could not be rejected on the basis of explanation furnished by the respondent no.1 in his written statement.

7. However, fact of the matter is that even from the averments made in the election petition, the ground contemplated under Section 22(a) of the Act was not made out. For this, reference may be made to clause (j) of Section 35 of the Act. It reads as under -

“35. Disqualification of candidates. – No person shall be eligible for election or as a President or election or nomination as a Councillor if he -

(j) has not paid all taxes due by him to the Municipality

at the end of the financial year immediately preceding that in which the election or nomination is held or made within thirty days of receipt of a notice of demand made in this behalf of the Chief Municipal Officer; or”

8. As per allegations, an amount of Rs.1,05,739/- payable to the Municipality was outstanding against the Society of which the respondent no.1 was a member. But, it is well settled that a member's liability to make good the debts of a Society does not arise till liquidation. In this view of the matter, the respondent no.1 had not incurred disqualification for the reason that the Society had not paid up all arrears of Municipal Taxes etc.

9. Adverting to the other ground, it may be observed that the affidavit filed by respondent no.1 in support of his nomination paper was characterized by the petitioner as incomplete inasmuch as it did not contain information as to (a) preventive action taken against him under Section 110 of the Code of Criminal Procedure (for short 'CrPC') (b) case no.43/94 and (c) the appeals preferred against convictions and the sentences in the criminal cases mentioned therein. Excerpts of Rule 24-A of the Madhya Pradesh Nagarpalika Nirvachan Niyam, 1994, which are relevant, may be reproduced thus-

“24-A.(1) Each candidate shall furnish the information relating to. – Declaration of Criminal antecedent, ... –

(i) any pending criminal case in which he is charged and any disposed criminal case in which he has been convicted

.....
(2) The nomination paper shall be rejected, if the affidavit is not enclosed”.

10. A bare perusal of the record would reveal that accompaniments of the affidavit included copies of the appellate judgments setting aside the convictions and consequent sentences awarded to the respondent no.1 in the criminal cases mentioned therein as well as that of the order dropping proceedings under Section 110 of the CrPC. Nevertheless, as admitted by him, he was not able to disclose information regarding only one criminal case bearing No.43/94 as, at the relevant point of time, he was a minor:

11. The Supreme Court in *Peoples Union for Civil Liberties (PUCL)*

v. *Union of India* AIR 2003 SC 2363, disapproved the instructions (issued by the Election Commission of India in pursuance of the judgment in *Union of India v. Association for Democratic Reforms* AIR 2002 SC 2112) to the effect that –

“Furnishing of any wrong or incomplete information or suppression of any material information by any candidate in or from the said affidavit may also result in the rejection of his nomination paper where such wrong or incomplete information or suppression of material information is considered by the returning officer to be a defect of substantial character, ..”

12. Accordingly, the Commission, by way of a fresh order-dated 27.03.2003, clarified that its earlier direction as to rejection of nomination paper on the ground of furnishing of wrong information or suppressing material information by a candidate is not enforceable.

13. In *Ashok Jaiswal v. Sudhir* 2011 (4) MPLJ 689, a co-ordinate Bench of this Court, while considering effect of Rule 24-A, has also held that furnishing of false or incorrect information would not afford a ground to challenge validity of the election of a returned candidate.

14. Further, decision of another single Bench of this Court in *Mehboob Khan v. Lallu Bhai* 2008 (5) MPHT 95 is of no avail to the petitioner as, in that case, nomination paper of the returned candidate was accepted even in absence of compliance with Rule 31-A of M.P. Panchayat Nirvachan Niyam, 1995, which is in pari materia with Rule 24-A (above). While holding that Rule 31-A is mandatory, the Court proceeded to consider effect of its non-compliance in the light of following observations made by the Apex Court in *Pratap Singh v. Krishna Gupta* AIR 1956 SC 140 -

“We do not think that is right and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some are vital and to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the legislature does not itself state which

is which judges must determine the matter and, exercising a nice discrimination, sort out one class from the other along broad based, commonsense lines."

15. Learned trial Judge, therefore, did not commit any error of jurisdiction in holding that there was no improper acceptance of the nomination paper in view of the fact that mandatory provision of Rule 24-A (supra) was substantially complied with.

16. For these reasons, the order under challenge does not require interference under the revisional jurisdiction.

17. In the result, the revision stands dismissed. The impugned order-dated 7.9.2010 is hereby affirmed.

Revision dismissed.

I.L.R. [2012] M.P., 1395

CIVIL REVISION

Before Mr. Justice R.C. Mishra

C.R. No. 522/2010 (Jabalpur) decided on 16 February, 2012

JAGDISH KAPOOR (MAMAJI)

...Applicant

Vs.

DILIP ALIAS BANTINAGORI & ors.

...Non-applicants

A. Municipal Corporation Act, M.P. (23 of 1956), Section 11(5) – Requisite Qualification – Caste – Petitioner, a returned candidate belongs to Khatri by Caste – In view of explanation appended to Section 11A, only such castes as are notified under M.P. Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan), Adhiniyam, 1994 can be recognized for the purpose of election to the seat of a Municipal Councillor – Khatri does not find place in notification – Election rightly set aside. (Para 3)

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 11(5) – आवश्यक अर्हता – जाति – याची, एक चुना गया प्रत्याशी खत्री जाति का है – धारा 11ए के साथ संलग्न स्पष्टीकरण को दृष्टिगत रखते हुए केवल ऐसी जातियों को जो कि म.प्र. लोक सेवा (अनुसूचित जातियों, अनुसूचित जन जातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) अधिनियम, 1994 के अंतर्गत अधिसूचित की गई है, नगर पालिक पार्षद की सीट पर निर्वाचन के प्रयोजन हेतु मान्यता दी जा सकती है – अधिसूचना में खत्री को स्थान प्राप्त नहीं – निर्वाचन उचित रूप से अपास्त।

B. Municipal Corporation Act, M.P. (23 of 1956), Section 11(5) – Caste – Respondent No.1 belonged to Mali Caste – Saini which is a sub-caste of Mali is included in the notification – Plea that respondent No.1 being the member of Mali Caste is entitled to benefits of reservation for Saini sub-caste not permissible – No evidence to show that enlisted caste included some other caste would have been accepted – Finding that respondent No.1 not entitled to seek his election from reserved seat also affirmed. (Para 10)

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 11(5) – जाति – प्रत्यर्थी क्रं. 1 माली जाति का था – सैनी जो कि माली जाति की उपजाति है, अधिसूचना में सम्मिलित है – अभिवाक् कि प्रत्यर्थी क्रं. 1 माली जाति होते हुए सैनी उपजाति के लिये आरक्षण के लाभों का हकदार है अनुज्ञेय नहीं – यह दर्शाने के लिये कोई साक्ष्य नहीं कि सूचीबद्ध जाति में कुछ अन्य जाति समाविष्ट है स्वीकार किया जा सकता था – निष्कर्ष कि प्रत्यर्थी क्रं. 1 आरक्षित सीट से भी अपना निर्वाचन चाहने का हकदार नहीं अभिपुष्ट किया गया।

Cases referred :

AIR 1969 SC 604, (2010) 1 SCC 466, AIR 1956 SC 593.

R.N. Singh with A.J. Pawar, for the applicant.

M.S. Bhatti & Y.M. Tiwari for the non-applicants.

ORDER

R.C. MISHRA, J. - This order shall govern disposal of both the revisions as they have arisen out of the same judgment delivered on 7/12/10 by First Additional District Judge, Burhanpur in Misc. Judl. Case No.1/2010.

2. Jagdish Kapoor, the petitioner in Civil Revision No.522/2010, is the Returned Candidate whose election to the Seat of Councilor of Ward No.6 of Municipal Corporation, Burhanpur has been set aside on the ground that he was not having the requisite qualification within the meaning of Section 11(5) of M.P. Municipal Corporation Act, 1956 (for short "the Act") for contesting on the Seat that is reserved for OBC candidate of Madhya Pradesh whereas the petitioner in Civil Revision No.15/2011 namely Dilip alias Banti Nagori (hereinafter referred to as 'Dilip') is the sole rival candidate who, while challenging the validity of the Election, has also prayed for a further declaration that he himself stands duly elected.

3. No serious dispute was raised as to contents of Caste certificate (Ex.D/6) issued by Sub-Divisional Officer, Burhanpur, reflecting that Jagdish Kapoor

is "Khatri" by caste. Another certificate (Ex.D/11) submitted by Jagdish to support his candidature indicated that the caste is notified as an OBC for the purpose of reservation in Civil Posts and Services under the Central Government. However, in view of the explanation appended to Section 11-A of the Act, only such castes as are notified under the M.P. Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994, can be recognized as OBCs for the purpose of election to the seat of a Municipal Councillor and "Khatri" does not find place in the corresponding notification issued on 26/12/1984. The reservation for Backward Classes in employment falls under Clause (4) of Article 16 of the Constitution of India whereas enabling provision for reservation of Wards in Municipal Election is the Article 243-T of the Constitution. In this view of the matter, the certificate (Ex.D/11), which served an altogether different purpose, was rightly ignored to hold that Jagdish was not eligible to contest the election as a candidate of OBC for the reserved seat.

4. Now, the question arises as to whether Dilip, being the only rival candidate, was entitled to be declared as elected ?

5. As explained by a Constitution Bench in Vishwanatha Reddy v. Konappa Rudrappa Nadgouda AIR 1969 SC 604 -

"The general rule of election law, which prevailed in the British Courts for a long time, that the votes cast in favour of a person who is found disqualified for election may be regarded as thrown away only if the voters had notice before the poll of the disqualification of the candidate cannot be extended to the trial of disputes under Indian election law, for it is not consistent with the Indian Statute Law and in any case the conditions prevailing in India do not justify the application of that rule".

Accordingly, if there are only two contesting candidates and one of them is found to be under statutory disqualification at the date of filing nomination paper, the other contesting candidate can be declared elected.

6. A bare perusal of the impugned judgment would reveal that such a declaration was not made in favour of Dilip for the reason that he was also not found eligible to stand as a candidate for the election from the reserved seat. Assailing the legality and propriety of the finding, learned counsel appearing on behalf of Dilip has contended that it is based on the evidence

beyond the pleadings that could not be looked into. To buttress the contention, reliance has been placed on the decision of the Supreme Court in *Kattinokkula Murali Krishna v. Veeramalla Koteswara Rao* (2010) 1 SCC 466).

7. Per contra, learned Senior Counsel, while making extensive reference to paragraph nos.1, 10 and 15 of the written statement filed by Jagdish and admissions made by Dilip as PW1 in Paragraph nos.21 to 25 of his cross-examination, has supported the finding.

8. It is well settled that where the parties understand the real implication of the point in dispute and lead evidence thereon, the evidence cannot be ruled out merely for want of a formal issue and the finding would not be vitiated on that ground (*Nagubai Ammal v. B. Shama Rao* AIR 1956 SC 593 referred to).

9. Moreover, Rule 10 of the Madhya Pradesh Municipal Corporation (Election Petition) Rules, 1963 is in pari materia with sub-section (1) of Section 97 of the Representation of the People Act, 1951 except for the proviso appended to the sub-section. Thus, the Rule unconditionally permits a returned candidate to lead any evidence raising any plea against the validity of the claim of the election petitioner, who prays not only for setting aside the election but also for declaring himself as elected.

10. The caste certificate (Ex.P/1) filed by Dilip along with his nomination paper could only prove that he belongs to other backward class viz. "Mali". However, fact of the matter is that "Saini" sub-caste of caste "Mali" is included in the list of OBCs recognized as per Notification dated 26/12/1984 and an enquiry in respect of the plea that being the member of "Mali" caste, Dilip was entitled to benefits of reservation for "Saini" sub-caste, was not permissible. In other words, no evidence to show that the enlisted caste included some other caste would have been acceptable. As such, the finding that Dilip was not entitled to seek election from the reserved seat also deserves to be affirmed as well merited. The question posed above is, therefore, answered in the negative.

11. For these reasons, no interference with the judgment under challenge is called for under the revisional jurisdiction.

12. In the result, both the revisions stand dismissed. However, nothing contained herein shall be treated as an observation that Dilip alias Banti does not belong to "Saini" sub-caste of "Mali" caste.

Copy of this order be retained in the connected revision.

Revision dismissed.

I.L.R. [2012] M.P., 1399

CIVIL REVISION

Before Mr. Justice R.C. Mishra

C.R. No. 792/2004 (Jabalpur) decided on 21 February, 2012

PURSHOTTAM CHOUBEY

...Applicant

Vs.

SMT. GAYATRI BAI

...Non-applicant

Civil Procedure Code (5 of 1908), Order 9 Rule 13 – Setting aside of ex-parte divorce decree – No attempt was made to effect the service by general mode – Endorsement as to refusal of envelope was not signed or initialled by the postman whereas the earlier endorsement indicating that the addressee was expected to come back from Hatta after 3 days did bear his signature – On 09.08.1997, observing that the envelope was not received back served or unserved, trial Judge directed issuance of fresh summons by registered post and fixed 09.09.1997 as the next of hearing but no follow up action was taken – On 09.09.1997, the Presiding Judge was on leave and it was the Reader, who adjourned the case to 15.09.1997 – Held – Impugned order allowing respondent's application for setting aside ex parte divorce decree, does not suffer from any error of jurisdiction. (Paras 4, 5 & 7)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 – एकपक्षीय विवाह विच्छेद की डिक्री अपास्त की जाना – सामान्य ढंग से तामीली करने का कोई प्रयत्न नहीं किया गया – लिफाफे की अस्वीकृति के बारे में पृष्ठांकन पर पोस्टमेन द्वारा हस्ताक्षर या अद्योहस्ताक्षर नहीं किये गये जबकि पूर्वतर, पृष्ठांकन पर उसके हस्ताक्षर थे यह दर्शाते हुए कि पाने वाले की हट्टा से 3 दिनों पश्चात लौटने की संभावना है – 09.08.1997 को विचारण न्यायाधीश ने यह संप्रेक्षण करते हुए कि लिफाफा तामील होकर या तामील न होकर वापस प्राप्त नहीं हुआ है रजिस्ट्रीकृत डाक द्वारा नये समंस जारी करने के लिए निदेशित किया और अगली सुनवाई 09.09.1997 नियत की, परंतु कोई फॉलोअप कार्यवाही नहीं की गई – 09.09.1997 को पीठासीन न्यायाधीश अवकाश पर थे और वह रीडर था जिसने प्रकरण 15.09.1997 को प्रस्थागित किया – अमिनिघारित – एकपक्षीय विवाह विच्छेद की डिक्री अपास्त किये जाने हेतु प्रत्यर्थी के आवेदन को मंजूर करने वाला आक्षेपित आदेश अधिकारिता की किसी त्रुटि से ग्रसित नहीं।

Cases referred :

(2002) 7 SCC 531, 1991 JLJ 45, AIR 2011 SC 1150.

Anand Kumar Jain, for the applicant.

Vishal Dhagat, for the non-applicant.

ORDER

R.C. MISHRA, J. - Arguments heard.

1. This revision is directed against the order-dated 16.11.2004 passed by First ADJ, Damoh in MJC No.26/2000, allowing respondent's application, under Order 9 Rule 13 of CPC, for setting aside ex parte divorce decree passed against her on 22.10.1997 in Civil Suit No.84-A/97.
2. The background facts giving rise to the revision may be summarized thus –
 - (i) Marriage of the petitioner was solemnized with respondent on 13.5.1981. He filed a petition for divorce on the ground mentioned in Section 13(1)(i) of the Hindu Marriage Act, 1955 in the Court of First Additional District Judge at Damoh. It was registered as Civil Suit No.84-A/97. On 15.9.1997, the respondent was proceeded against ex parte for the reason that the envelope containing summons for 9.8.1997 and sent by registered post with acknowledgment due was received back with an endorsement purporting to have been made by the postman to the effect that she had refused to receive the same.
 - (ii) The application for setting aside the ex parte decree was made on the premise that the summons of the petition was not duly served on her and she could acquire knowledge of the decree only on 19.2.1998, the date on which its copy was filed by the petitioner in the proceedings initiated by her for grant of maintenance under Section 125 of the Code of Criminal Procedure and registered as MJC No.10/97 in the Court of JMFC, Hatta.
3. Learned counsel for the petitioner, while making reference to the decision of the Apex Court in *Basant Singh v. Roman Catholic Mission* (2002) 7 SCC 531, has submitted that learned trial Judge did not commit any error in placing reliance on the report suggesting that defendant/respondent had refused to receive envelope containing summons for 9.8.1997.

4. A bare perusal of the impugned order would reveal that ex parte decree was set aside not only on the ground that summons was not duly served but also for the reason that even otherwise, the service of summons by registered post did not assume any significance as no attempt was made to effect the service thereof by general mode. The reasoning was justified in view of settled legal position that service by registered post is an additional/simultaneous mode of service and, therefore, cannot be adopted without taking recourse to ordinary mode (See. *Electric Construction and Equipment Co. Ltd. (M/s) v. Permali Wallace Ltd.* 1991 J LJ 45). Further, as rightly pointed out by learned counsel for the respondent, the endorsement as to refusal of envelope was not signed or initialled by the postman whereas the earlier endorsement indicating that the addressee was expected to come back from Hatta after 3 days did bear his signature.

5. There is yet another aspect of the matter. On 9.8.1997, observing that the envelope was not received back served or unserved, learned trial Judge had directed issuance of fresh summons by registered post and fixed 9.9.1997 as the next of hearing but no follow up action was taken. Moreover, on 9.9.1997, the Presiding Judge was on leave and it was the Reader, who adjourned the case to 15.9.1997. In such a situation, on 15.9.1997, the trial Judge ought to have ensured compliance with the direction contained in the order-dated 9.8.1997 and to notify another date but, instead of doing so, he proceeded ex parte against the respondent on the basis of unsigned endorsement as to refusal of the envelope containing summons for 9.8.1997 whereas the date given by the Reader could not be validly treated as a date of hearing. Thus, viewed from any angle, the order-dated 15.9.1997 was not sustainable in law.

6. In *Basant Singh's* case (supra), the summons were sent by registered post on 24.2.1996 and ex parte proceedings were ordered on 22.8.1996 and one of the defendants namely Hari Singh came forward to depose that he did not receive the registered envelope. On these facts, the Supreme Court opined that the proviso to sub-Rule (2) of Rule 19-A of Order-5 was rightly invoked. However, facts of the present case, as highlighted above, are clearly distinguishable and, therefore, the ruling in *Basant Singh's* case is of no avail to petitioner.

7. Taking into consideration the aforesaid facts & circumstances of the case and the well-settled position of law, as reiterated in *Parimal v. Veena*

AIR 2011 SC 1150 that the expression 'sufficient cause' occurring in Order 9 Rule 13 CPC, is the cause for which defendant could not be blamed for his absence, I am of the view that the impugned order does not suffer from any error of jurisdiction.

8. In the result, the revision stands dismissed. As an obvious consequence, the stay order passed on 17.12.2004 is hereby vacated.

9. As the petition was filed as far back as in the year 2004, it is directed that the trial Court shall decide the case expeditiously; as far as possible, within a period of six months from the date of receipt of copy of this order. Parties shall appear before the trial Court on 29.3.2012.

Records of the Courts below be returned forthwith.

Revision dismissed.

I.L.R. [2012] M.P., 1402

CIVIL REVISION

Before Mr. Justice R.C. Mishra

C.R. No. 259/2011(Jabapur) decided on 7 March, 2012

RAVINDRA CHOURASIA

...Applicant

Vs.

RAMASHANKAR & ors.

...Non-applicants

Municipalities Act, M.P. (37 of 1961), Sections 26(2), 29(2), Limitation Act (36 of 1963), Section 5 – Election Petition – Section 5 of the Limitation Act does not apply to the filing of an election petition under the Act.
(Para 7)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धाराएँ 26(2), 29(2), परिसीमा अधिनियम (1963 का 36), धारा 5 – निर्वाचन याचिका – परिसीमा अधिनियम की धारा 5 अधिनियम के अंतर्गत निर्वाचन पत्रा प्रस्तुत करने के लिये लागू नहीं होती।

Cases referred :

(1976) 1 SCC 392, (2002) 3 SCC 130, AIR 1974 SC 480.

Siddharth Gupta, for the applicant.

Sanjay Sarvate, for the non-applicant No.1.

R.S. Dubey with Vijay Pandey, for the non-applicant No.3.

ORDER

R.C. MISHRA, J. - With consent, the matter is finally heard.

1. This revision, under Section 26(2) of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as the 'Act'), has been preferred against order-dated 27.4.2011 passed by Second Additional District Judge, Khurai, Distt Sagar in Civil Suit No.19-A/11, rejecting petitioner's application under Section 5 of the Limitation Act, 1963 (for short 'Limitation Act'), for condonation of delay of only one day in filing of the petition calling in question election of respondent no.1 to the seat of Councillor of Ward No.14 in Municipal Council at Khurai.

2. Placing reliance on the decisions of the Supreme Court in *Manguram v. Delhi Municipal Corporation* (1976) 1 SCC 392 and *Shaik Saidulu v. Chukka Yesu Ratnam* (2002) 3 SCC 130, learned counsel for the petitioner has submitted that provision of Section 5 of the Limitation Act is applicable to the election petition, presented under Section 20 of the Act.

3. In *Hukumdev Narain Yadav v. Lalit Narain Mishra* AIR 1974 SC 480, the Apex Court laid down the following guidelines –

"Even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. What the Court has to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete Code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act."

4. Relevant excerpts of sub-section (3) of Section 20 of the Act read as under –

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

- (i) it is presented within thirty days from the date on which the result of such election or nomination was notified in the Gazette; and*
- (ii) it is accompanied by a Government Treasury receipt showing a deposit of two hundred rupees, in the case of election or nomination to Municipal Councils and one hundred rupees in the case of election or nomination to Nagar Panchayats."*

5. Accordingly, non-filing of the election petition under the Act within the prescribed period of limitation visits the penalty of the petition being dismissed. Thus, provisions of Limitation Act would not become applicable, even by virtue of Section 29(2) thereof, to an Election Petition under the Act, which itself is a self-contained Code.

6. Further, the Act does not contain any provision corresponding to Section 671 of Hyderabad Municipal Corporations Act, 1955, that formed basis of the decision rendered in *Shaik Saidulu's* case (supra). For these reasons, none of the decisions cited at the bar is of any avail to the petitioner.

7. To sum up, Section 5 of the Limitation Act does not apply to the filing of an election petition under the Act.

8. As an obvious consequence, no interference with the impugned order is called for under the revisional jurisdiction.

The revision, therefore, stands dismissed.

Revision dismissed.

I.L.R. [2012] M.P., 1404

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R. No. 395/2011 (Jabalpur) decided on 27 March, 2012.

NARAYAN SINGH

Vs.

BABULAL & ors.

...Applicant

...Non-applicants

Civil Procedure Code (5 of 1908), Section 11 – Res-judicata –
In first suit, the plaintiff failed to produce evidence and the suit was

dismissed, drawing a decree – A second suit was then filed by the plaintiff impleading some other parties and on basis of subsequent sale deed – Upon service the defendant/petitioner opposed the suit with an objection regarding res-judicata – Held – The merit of the claim made in the first suit was never assessed – Suit was dismissed for default of appearance of the witnesses of the plaintiff – Mere drawing a decree will not satisfy the consideration of merit of the suit in the first instance – The first Civil Suit was not decided on merits – This itself will not attract the provisions of Section 11, as there was no merit dismissal. (Paras 6 & 8.)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व निर्णय – प्रथम वाद में वादी साक्ष्य प्रस्तुत करने में असफल रहा और वाद खारिज कर डिक्रीत किया गया – द्वितीय वाद तब वादी द्वारा कुछ अन्य पक्षकारों को आलिप्त करते हुए तथा पश्चातवर्ती विक्रय विलेख के आधार पर प्रस्तुत किया गया – तामीली उपरांत प्रतिवादी/याची ने पूर्व निर्णय के संबंध में आक्षेप के साथ वाद का विरोध किया – अभिनिर्धारित – प्रथम वाद में दावा किये गये गुणदोषों का निर्धारण कमी भी नहीं किया गया – वादी के साक्षीगण की अनुपस्थिति के व्यतिक्रम में वाद खारिज किया गया – मात्र डिक्रीत किये जाने से प्रथम वाद के गुणदोषों के विचारण की संतुष्टि नहीं होगी – प्रथम सिविल वाद गुणदोषों पर निर्णित नहीं किया गया था – मात्र इससे धारा 11 के उपबंध आकर्षित नहीं होते, क्योंकि खारिजी गुणदोषों पर नहीं की गई थी।

Cases referred :

AIR 2000 SC 1238, AIR 2009 SC 713, AIR 2008 SC 1272, AIR 1977 SC 789.

Sankalp Kochar, for the applicant.

None for the non-applicants though served.

ORDER

K.K. TRIVEDI, J. - This revision is directed against the order dated 24.8.2011, by which the preliminary objection raised by the petitioner/defendant with respect to the dismissal of the suit, as hit by res judicata has been rejected by the trial Court.

2: The controversy in short is that a Civil Suit was filed by the respondent No.4 against the petitioner and two others in the Court of V Additional District Judge, Bhopal, seeking a declaration that the sale deed dated 6.10.2001 is

void and is not binding on the said plaintiff and a decree of permanent injunction was also claimed. The said suit was contested by the petitioner herein. Written statement was filed. The issues were framed and the case was fixed for recording of the evidence of the parties. The respondent No.4/plaintiff failed to produce his witnesses, sought an adjournment by making application and considering all such facts on 4.5.2005, the trial Court reached to the conclusion that there was no evidence available to the respondent No.4/plaintiff and, therefore, his witnesses were not present before the Court despite granting opportunities on 2.12.2004, 17.12.2004, 17.1.2005, 14.2.2005 and on 13.3.2005. The trial Court thereafter dismissed the suit and directed drawing of a decree. Since the suit was said to be dismissed for want of evidence and not for want of prosecution, same was to be treated as dismissal of the suit under the provisions of Order 17 Rule 2 of the Code of Civil Procedure. It is contended that since no appeal was preferred against such a judgment and decree, it has attained finality and, thus, it was to be held that the respondent No.4/plaintiff had no merits whatsoever to challenge the sale deed. However, fraudulently, in connivance with others, a second suit was filed in the Court of VIII Additional District Judge, Bhopal, by the respondent No.4/plaintiff along with respondents No. 1 to 3 for the very same relief, but further alleging that on 27.6.2008, the cause of action accrued to the respondents for filing of the suit and on the basis of subsequent sale deed dated 27.6.2008, the suit was valued at Rs.6,48,000/- and filed by the respondents. Upon service of the notice, a written statement was filed by the petitioner opposing the suit and the preliminary objection with respect to res judicata of the suit was raised. The application to this effect was also made, but the same has been dismissed, therefore, the present Civil Revision is required to be filed.

3: This Court has entertained the revision, has issued the notices to the respondents and Registry has indicated that all the respondents are served. This fact is duly recorded, but neither anybody has appeared on behalf of respondents to oppose the revision petition nor any reply to the I.A., for grant of interim relief has been filed. The service report indicates that all the notices were served on one person Shri Babulal Gond. The service of notice of revision petition is to be held good as said Babulal himself is respondent before this Court and if, he has been served with the notice of the revision, he is aware of the proceedings.

4: Learned counsel for the petitioner has, vehemently, contended that since on first occasion when the suit filed by the respondent No.4/ plaintiff

was being tried, categorical facts were recorded by the Court that despite granting opportunity the respondent No.4/plaintiff in the first suit was unable to produce the evidence, the suit was liable to be dismissed. However, the Court has drawn a decree and, therefore, it is to be treated as if the suit of the plaintiff/ respondent No.4 was dismissed on merit and, as such, the second suit would be barred by *res judicata*. Placing reliance in various law laid down by the Apex Court, it is contended vehemently that if such a situation is pointed out to the Court, it was necessary to examine the law, the provisions and the decisions of the Apex Court and then to decide whether the *res judicata* would be applicable or not.

5: It is contended by the learned counsel for the petitioner that nothing has been discussed in this respect by the trial Court that as per the law laid down by the Apex Court, the passing of a judgment and decree would amount to *res judicata* or not. Relying in the case of *Sajjadanashin Sayed Md. B.E. Edr. (D) by L.Rs. V. Musa Dadabhai Ummer and others (AIR 2000 SC 1238)*, learned counsel for the petitioner has contended that the test laid down by the Apex Court has to be kept in mind. It is contended that while applying the principle of *res judicata* the test as laid down by the apex Court is required to be applied. First and foremost it is to be seen that the suits contain the same issue directly and substantially, the parties are identical and that adjudication of the issue has been done or not. Though in the claim made in the first suit, it was said that there was an agreement to sell in favour of the plaintiff in the said suit by the vendor with respect to the suit property and that the plaintiff in the said suit was put in possession of the land, yet that issue was to be decided only with respect to the respondent No.4/plaintiff in the first suit. The respondents No. 1 to 3 were not at all made a party in the said suit as is abundantly clear from perusal of the plaint filed in the first suit Annx.A/ 1. Of course, the plaintiff/respondent No.4 in the said suit has said that a sale deed executed in favour of petitioner herein by the vendor in the said suit was not binding on the said plaintiff, but other issue which has been raised with respect to the transfer of a land of Scheduled Tribe in favour of a non-tribe person was not at all raised. Therefore, there is a difference in the two suits.

6: Apart from that how the earlier suit was dealt with and whether could it be said that merely because of drawing a decree, the suit was said to be dismissed on merit which would attract the principle of *res judicata* in a subsequent suit or not, is to be examined. Order 17 Rule 1 of Code of Civil Procedure prescribes for the power of Court to grant time and adjournment

of hearing. Sub-rule (2) of Rule 1 of Order 17 of Code of Civil Procedure prescribes that a cost of adjournment can also be imposed. Rule 2 of Order 17 of Code of Civil Procedure prescribes for the procedure if parties fail to appear on the day fixed. If a suit is dismissed under the provisions of Order 17 Rule 2 of the Code of Civil Procedure, then any of the mode available under Order 9 of Code of Civil Procedure are to be adopted. Order 17 Rule 2 of Code of Civil Procedure simply prescribes that Court may proceed notwithstanding either parties failed to produce evidence etc. In a case, if partially the evidence is recorded, the same is to be taken into account by the trial Court and issues are to be decided on the basis of availability of the evidence. In absence of the party, the suit is required to proceed as per the provisions of Rule 2 of Order 17 of Code of Civil Procedure. Now Order 9 of Code of Civil Procedure prescribes the manner as to how the Court is required to pronounce orders in accordance to attendance of parties or what procedure is required to be adopted if parties fail to appear as the same is only for the appearance of the parties and consequence of non- appearance. If a suit is dismissed under Order 9 Rules 1, 2 and 3 of Code of Civil Procedure the rights of a plaintiff are saved under Rule 4 of Order 9 of Code of Civil Procedure to bring a fresh suit or to make an application for restoration. The decree is to be drawn only if a suit is dismissed under Order 9 Rule 8 of Code of Civil Procedure and that will make available a ground for filing of an appeal. However, Order 17 of Code of Civil Procedure nowhere prescribes for passing of a decree except under Rule 3 of the said Order if the procedure as prescribed under Rule 2 of Order 17 of Code of Civil Procedure is to be followed. Therefore, merely because a decree is passed, can it be said that there was a consideration of the merit of the suit and, as such, the same would operate as res judicata in a subsequent suit ? In the considered opinion of this Court, if we go through the order passed by the Court while dismissing the first Civil Suit, the merit of the claim made in the said suit was never assessed. On the other hand, the Court has categorically said that the suit is dismissed for default of appearance of the witnesses of the plaintiff. The application made for adjournment under Order 17 Rule 1 and 2 of Code of Civil Procedure, was rejected by the Court and consequently the suit was said to be dismissed, but not as per the provisions of Order 17 Rule 2 of Code of Civil Procedure. Mere drawing of a decree will not satisfy the consideration of merit of the suit made in the first instance.

7: Learned counsel for the petitioner has placed his reliance in the case

of *Ramesh Chandra Sankla Vs. Vikram Cement etc.* (AIR 2009 SC 713) and has taken this Court to the findings recorded by the Apex Court in paragraphs 38 to 51 and has contended that even if a writ petition is withdrawn without the liberty, the principles of constructive res judicata are applicable and in such a case a fresh petition is said to be barred. Similarly, it has been contended that if an objection could have been raised, but has not been raised at the relevant time, subsequent raising of such an objection is said to be hit by constructive res judicata, as per the law laid down by the Apex Court in the case of *Barkat Ali and another Vs. Badri Narayan (D)* by L.Rs (AIR 2008 SC 1272). Learned counsel for the petitioner has further placed the reliance in the case of *Lal Chand (Dead) by L.Rs and others Vs. Radha Kishan* (AIR 1977 SC 789), and has contended that issues in this respect have been considered at length and the Apex Court has already held that even if the former proceedings were not the suit, but issues have been decided even that would operate as res judicata.

8: After going through all the laws pointed out by the learned counsel for the petitioner and taking note of the provisions of law, this Court is of the considered opinion that there was no error on the face of record committed by the trial Court in rejecting the application of the petitioner made under Section 11 of Code of Civil Procedure. It is to be seen that in the first suit only the respondent No.4/plaintiff had come against the sale deed said to be executed by the petitioner herein and the vendors were not the party. Now the vendors have come before the Court categorically contending that they belong to a particular caste and there is a provision prescribed under the M.P. Land Revenue Code for transfer of the land of the said caste to a person of other caste and that without obtaining any permission from the Collector, no such transfer could have been made, yet such a transfer has been affected. Further, the first Civil Suit was not decided on merits. From the order sheets, it is clear that the same was dismissed for non-production of the evidence and instead of drawing a scheduled of caste, a decree was drawn. This itself will not attract the provisions of Section 11 of Code of Civil Procedure as there was no merit dismissal. Had it been a case of dismissal on account of withdrawal, it could be said that the withdrawal was because there was no material evidence available, but even that would have been applicable only with respect to the respondent No.4/ plaintiff. The merit with respect to the claim made by respondents No. 1 to 3 in the subsequent suit was never tried. In view of this, in the considered opinion of this Court, the trial Court was just

and proper in rejecting the application of the petitioner. The written statement has already been filed by the petitioner in the Civil Suit and it has to be tried as per the law.

9. In the result, the revision fails and is hereby dismissed. However, looking to the controversy involved and the fact that the suit itself was filed in the year 2008, it is directed that expeditious disposal of the suit be done and the same be decided within a period of one year as far as possible from the date of communication of the order to the trial Court. There shall be no order as to costs.

Revision dismissed.

I.L.R. [2012] M.P., 1410

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R. No. 38/2012 (Jabalpur) decided on 3 April, 2012

ARUNA GAUTAM (SMT.) & ors
Vs.

...Applicants

SMT. ARTI & ors.

...Non-applicants

A. *Specific Relief Act (47 of 1963), Section 6 – Suit for recovery of possession* – Provisions of Section 6 are attracted only if a person is dispossessed of immovable property of which he is legal owner or is in possession of the said property by virtue of law. (Para 5)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – कब्जा वापसी हेतु वाद – धारा 6 के उपबंध केवल तब आकर्षित होते हैं यदि व्यक्ति को अचल सम्पत्ति से बेकब्जा कर दिया गया हो जिसका वह विधिक स्वामी है या विधि द्वारा उक्त सम्पत्ति का कब्जा धारक है।

B. *Specific Relief Act (47 of 1963), Section 6 – Suit for recovery of possession* – Plaintiff/respondent claimed title on the basis of an unregistered sale deed – Provisions of Act, 1963, Registration Act, Indian Stamp Act, and Contract Act are not to be ignored – Nothing on record that respondent No.1 was in lawful possession of the property – No decree can be drawn in her favor. (Paras 6 & 7)

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – कब्जा वापसी हेतु वाद – अरजिस्ट्रीकृत विक्रय विलेख के आधार पर वादी/प्रत्यर्थी ने हक का दावा किया – अधिनियम 1963, रजिस्ट्रीकरण अधिनियम, भारतीय स्टाम्प अधिनियम व संविदा अधिनियम के उपबंधों को अनदेखा नहीं किया जा सकता –

अमिलेख पर कुछ नहीं कि सम्पत्ति प्रत्यर्थी क्रं. 1 के विधिपूर्ण कब्जे में थी - उसके पक्ष में कोई डिक्री नहीं बनाई जा सकती।

Case referred :

2009(4) MPLJ 315.

Atul Upadhyay, for the applicants.

T.K. Modh, for the non-applicant No.1.

ORDER

K.K. TRIVEDI, J. - This Revision is directed against the judgement and decree dated 11/01/2012 passed in Civil Suit No.34A/2011 by the First Additional District Judge, Shahdol. The controversy in short involved in this Revision is that the respondent no.1/plaintiff filed a Civil Suit u/s 6 of Specific Relief Act, 1963 (hereafter referred as Act) against the petitioners-defendants no.1 to 7 and the respondent no.2 for restoration of possession of the house situated at Burhar General, 739, Patwari Halka No. Budhar 101, Revenue Inspector Circle Burhar, Tehsil Sohagpur, District Shahdol allegedly constructed on land of Khasra No. 1186/2 of Ward no.15 and also claimed compensation of Rs.1,000/- per month. It was alleged that the said property was recorded in the name of the respondent no.2/defendant no.8, Abhayraj which was sold to the father of respondent no.1/plaintiff by said respondent no.2/defendant no.8 for a consideration of Rs. 27,000/- . After the sale the said house and the land was given in possession of the father of the respondent no.1. However, the sale deed of the said house and land could not be registered. The respondent no.2/defendant no.8 executed an acknowledgement to this effect before the Notary on 22/04/2006 and delivered it to the father of the respondent no.1. A house was constructed over the said land by the father of the respondent no.1 after obtaining permission from the Nagar Panchayat, Burhar. The electricity connection was also obtained by the father of the respondent no.1. The marriage of the respondent no.1-plaintiff was performed on 18/06/2002 at Paraswar and she was residing in matrimonial home. As the respondent no.1-plaintiff was the only living legal heir of her father, she was looking after her father. The father of the plaintiff died on 16/06/2009. It was alleged that in the intervening period between 19 and 20th June 2009, taking advantage of the absence of respondent no.1/plaintiff, petitioners have taken forceful possession over the land in suit and have stolen valuable property. A complaint was lodged in the police but since nothing was done and since petitioners were having good hold in the society no action was

taken against them, therefore, she was required to file the present suit. The relief claimed in the suit was that petitioners-defendants no.1 to 7 be dispossessed from the suit property and the possession of the said property be restored to the respondent no.1/ plaintiff. She also claimed damages at the rate of Rs.1,000/- per month from the petitioners.

2. Such a suit of the respondent no.1 was contested by petitioners and they filed their detailed written-statement contending categorically that the suit property was purchased jointly by Girja Shankar and petitioner no.1/ defendant no.1 from the respondent no.2 by unregistered sale deed. The father of the respondent no.1 Girja Shankar has paid only Rs. 17,000/- and rest of Rs. 10,000/- was paid by the petitioner no.1. Infact, the wife of said Girja Shankar had died and his daughter respondent no.1/plaintiff was married in other village, therefore, he was living with respondents in the same house. The respondents were looking after Girja Shankar and he was so much pleased with their services that he made declaration before the members of the societies on many occasion that after the death of Girja Shankar, only the petitioners no.5 to 7 will be his legal representatives and legal heirs and will succeed him in the suit property. It is also contended that this fact was admitted by the respondent no.2-defendant no.2 and because of such fact the sale deed was never executed. Thus, entire claim made by the respondent/plaintiff was misconceived and the suit was liable to be dismissed.

3. The Trial Court framed issues recorded the evidence of the parties and thereafter came to the conclusion that the claim made by the respondent no.1-plaintiff was proved and therefore decreed the suit in favour of respondents, only with respect to the possession of the property in suit and refuse to grant the relief of damages as claimed as the same was not maintainable in view of the provisions of Section 6 of the Specific Relief Act. The petitioners are aggrieved by this judgement and decree and therefore have come before this Court in this Revision.

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

5. Undisputedly, the provisions of Section 6 of the Act are attracted only if a person is dispossessed of immovable property of which he is legal owner or is in possession of the said property by virtue of law. To establish such fact it is necessary to be examined whether the claim made by the respondent no.1/plaintiff in this respect was sustainable in the eye of law or not. Undisputedly, as both the parties have contended, the property was said to be purchased from the respondent no.2/defendant no.8 by an unregistered

sale deed. The value of the said property is also categorically set forth which is Rs. 27,000/-. If that being so, whether any claim could have been made on the basis of such unregistered document in the Court of law, as per the provisions of the Registration Act, 1908 or not, which infact confers right title or interest on a person claiming such benefits. If an instrument of transfer of immovable property of more than Rs.100/- is not duly stamped, and is registered, is inadmissible in evidence. If the said document could not have been admitted in the evidence, no claim could have been made on the basis of such document. It is the case of the respondent no.1 that land in dispute was purchased by her father by unregistered document. It is also the provisions of Transfer of Property Act that a document of transfer if the immovable property is required to be transferred of more than Rs. 100/- of value should be registered otherwise no right can be claimed on the basis of such a document. This what specifically provided in section 49 of the Registration Act. The Apex Court in case of *Suraj Lamp and Industries Pvt Ltd Vs. State of Haryana and another*, 2009 (4) MPLJ 315 was categorically held that such unregistered document of transfer confers no rights. Thus, admittedly the plaint as submitted by the respondent no.1 was not to be accepted at all unless the document of sale was impounded under the Stamp Act and the same was admitted in evidence by the Court below merely because a claim of possession was made u/s 6. These important aspects of law of the Specific Relief Act, the Registration Act, the Indian Stamp Act and Contract Act were not to be ignored. The Court below was not right in not considering the aforesaid aspects of the claim made by the respondent no.1/plaintiff. It was to be seen by the Court below whether the claim made by the respondent no.1/plaintiff was in accordance to the law or not. The restoration of possession of property can be ordered under the provisions of Section 6 of the Specific Relief Act, only if the said person was in lawful possession of the property and was dispossessed unlawfully by the persons against whom the claim is made, not otherwise.

6. Now it is necessary to examine the evidence to this effect available on record. The respondent no.1 has not examined herself in the court, on the other hand she executed a power of attorney in favour of her husband who was examined in the Court. He himself has admitted that all such information had come to his knowledge from other sources and no transaction had taken place between Girja Shankar and the respondent no.2/defendant no.8 in his presence. There was no other witnesses examined to this effect except one Ram Shankar who too was not aware of such transaction. The claim of the

respondent no.1/plaintiff was that the house in dispute was having only two rooms whereas her own witness has deposed that there were four rooms in the said house out of which three were having tiles on the floor. He simply said that on 19th June 2010 he came to know that possession of house was taken by the petitioners. He was not in a position to depose as to how the respondent no.1/plaintiff was put in lawful possession of the disputed house.

7. On the other hand the petitioners have examined the respondent no.2/defendant no.8 as a witness who has deposed that the house was sold to Girja shankar and petitioner no.1 herein, jointly by him. Nothing more has been placed before the Court below but the statement of DW-2, Abhay Raj further indicates that father of respondent no.1/plaintiff and petitioner no.1 both were put in joint possession of the land in dispute. From such evidence also it is not proved whether the respondent no.1/plaintiff was at any point of time in lawful possession of the disputed property and therefore no decree under the provisions of Section 6 of Specific Relief Act could have been granted in favour of the respondent no.1/plaintiff.

8. Consequently this Revision is allowed. Impugned Judgement and Decree dated 11/01/2012 passed in Civil Suit No. 34-A/2011 by the First Additional District Judge, Shahdol is hereby set aside. The suit filed by the respondent no.1/plaintiff is hereby dismissed. However the parties to the suit will bear their own costs.

Revision allowed.

I.L.R. [2012] M.P., 1414

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R. No. 122/2011 (Jabalpur) decided on 3 April, 2012

KASHI BAI (SMT.) & ors.

...Applicants

Vs.

STATE OF M.P. & ors.

...Non-applicants

A. Land Acquisition Act (1 of 1894), Section 18 – Limitation – Provisions of Limitation Act do not apply to the application for making a reference to the Court. (Para 4)

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 18 – परिसीमा – परिसीमा अधिनियम के उपबंध, न्यायालय को निर्दिष्टित करने हेतु आवेदन को लागू नहीं होते।

B. Land Acquisition Act (1 of 1894), Section 18 – Starting point of limitation – Limitation starts running from the date of knowledge of the essential contents of award – Date of award can not be construed to be the date mentioned by the Land Acquisition Officer – Application for reference rejected by Collector being barred by time but at the same time Reference was made on the applications of other applicants – Application for reference rejected by Collector being barred by time without asserting the date of knowledge of award – Rejection of application for reference not just and proper – Order of Collector quashed – Reference with respect to the claim of the petitioners be made to the Civil Court. (Para 6)

ख. भूमि अर्जन अधिनियम (1894 का 1), धारा 18 – परिसीमा के आरंभ होने का समय – परिसीमा, अवार्ड के आवश्यक घटकों की जानकारी होने की तिथि से आरंभ होती है – अवार्ड की तिथि का अर्थ भूमि अर्जन अधिकारी द्वारा उल्लिखित तिथि नहीं निकाला जा सकता – निर्देश हेतु आवेदन, समय द्वारा वर्जित होने के कारण, कलेक्टर द्वारा अस्वीकार किया गया परंतु उसी समय अन्य आवेदकों के आवेदनों पर निर्देश दिया गया – अवार्ड की तिथि के ज्ञान का प्राख्यान किये बिना कलेक्टर द्वारा निर्देश हेतु आवेदन समय द्वारा वर्जित होने के कारण अस्वीकार किया गया – निर्देश हेतु आवेदन की खारिजी न्यायपूर्ण एवं उचित नहीं – कलेक्टर का आदेश अभिखंडित – याचीगण के दावे के संबंध में निर्देश सिविल न्यायालय में किया जाये।

Case referred :

2010(3) MPLJ 251.

R.P. Khare, for the applicants.

Pratibha Mishra, P.L. for the non-applicants.

O R D E R

K.K. TRIVEDI, J. - By this revision under Section 115 of the Code of Civil Procedure, the petitioners have assailed the order dated 22.3.2010, passed in Reference Case No.10-A/1982/2005-06, by the Collector, Bhopal. The petitioners have contended that they made an application for making a reference to the Civil Court under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act for brevity) before the Collector, categorically stating the fact that the award as calculated of the land, said to be acquired by the Notification dated 3.11.2006 and with respect to which, the award was passed on 28.11.2007, was not proper. In fact, the assessment

of compensation should have been done in appropriate manner and, therefore, the matter was required to be referred to the Civil Court for deciding such an objection. Since the application under Section 18 of the Act aforesaid was not made within time, explaining the delay, an application under Section 5 of the Limitation Act was filed by the petitioners categorically contending that the petitioners could know about the award effectively when certain persons have made an application for making the reference. They also moved the applications on 13.10.2008 and 1.11.2008. The reference itself was made on 22.3.2010 in respect of certain other applications, but the application of the petitioners was rejected saying that the same was not filed within the time. It is contended by the petitioners that if the reference could have been made with respect to some of the applicants, who too were aggrieved by the very same award, condoning the delay, the reference in respect of the claim of the petitioners could have also been made. It is contended that since this was not done, the District Court where the reference has already been registered as M.J.C. No.357/2010 is not considering the claim of the petitioner.

2 : Learned Panel Lawyer, appearing for the respondents/State, has contended that provisions of Section 18 of the Act specifically prescribes a limitation and, if, an application is not made within the time prescribed, the Collector cannot make a reference under the provisions of the Act aforesaid. Since the petitioners have not made the application for reference under Section 18 of the Act within time, the Collector was right in rejecting the application of the petitioners holding that the same was barred by limitation. The provisions of Section 5 of the Limitation Act are not attracted in such a case. Therefore, it is contended that the revision is devoid of any merit and deserves dismissal.

3 : Considered the arguments of learned counsel for the parties.

4 : It is not disputed that there is a provision of making an application for reference to the Civil Court under the Act in Section 18, and a limitation is also prescribed for the said purposes. It is to be seen that a limited enquiry is required to be conducted by the Collector to the effect whether there is prima facie material available to make a reference to the Civil Court for determination of the quantum of compensation in the award, for the purposes of acquisition of the land of any person or not. The said enquiry cannot be said to be an enquiry as is required to be conducted by the the Civil Court where the reference is to be made. Thus, it is to be seen that for the said purposes if certain applications were received within time and some sort of enquiry was

being conducted, the Collector could have conducted an enquiry with respect to the claim made by the petitioners also. Apart from that it was the case of the petitioners that they have come to know about the award or the essential contents of the award and from the date of knowledge within time they have applied for making a reference to the Civil Court. The Apex Court in the case of *Bhagwan Das and others Vs. State of U.P. And others* [2010(3) MPLJ 251] has categorically held that in view of the specific provisions made under Section 18 of the Act, Section 29(2) of the Limitation Act cannot be applied to the provisions of the aforesaid Section 18 of the Act and, therefore, the benefit of Section 4 to 24 of the Limitation Act, 1963, would not be applicable in regard to the application under Section 18(1) of the Act. It is also held by the Apex Court that the Collector is not a Court when he discharges his function as a statutory authority under Section 18(1) of the Act and, therefore, Section 5 of the Limitation Act, 1963 cannot be invoked for extension of the period of limitation prescribed under the proviso to Section 18(2) of the Act. As Limitation Act itself is not applicable to the proceedings before the Collector, in the considered opinion of this Court if the application under Section 5 of the Limitation Act filed by the petitioners was dismissed by the Collector, no wrong was committed.

5 : However, the fact remains that the effective date of knowledge of the essential contents of the award is to be treated to be the date from which the limitation prescribed under Section 18 of the Act would start running. It was categorically stated by the petitioners that they were not present when the award was passed. It is not the case of the respondents also that any of the petitioners was present when the award was made. Now it is to be considered whether the petitioners came to know about the award and the essential contents of the award on what particular time and from that date whether the application was made within the limitation or not? This particular aspect was required to be examined by the Collector. However, this was not done. The claim of the petitioners as was stated in the application for condonation of delay in filing the application for making the reference was that the proceedings of acquisition were initiated by issuance of a Notification under Section 4 of the Act and the moment the Notification was issued, the claim was made for grant of appropriate compensation for the land sought to be acquired. It is stated in the application that the petitioners and other villagers were going to the office of the Land Acquisition Officer and they were intimated that such objections are being considered and necessary orders would be passed. It is

stated that the petitioners were never intimated about passing of the award nor any information/notice under Section 12(2) of the Act was served on them. It is stated by them in their application that when they went to the office of the Land Acquisition Officer on 4.4.2008, they could know that some award was passed and immediately an application for grant of certified copy of the award was made. The certified copy of the award was made available on 19.9.2008 and from that day they are making the application for making a reference within the limitation.

6 : As has been pointed out in the case of *Bhagwan Das* (supra), the Apex Court has categorically held that the limitation would start running from the date of knowledge of the essential contents of the award and not from the date of award as is required because in a case the notice is not served or the award is not made in the presence, the date of award cannot be construed to be the date mentioned by the Land Acquisition Officer in the award the date from which limitation for filing application would start, but it should be construed from the date, the essential contents of the award came to the notice of the person concerned or the claimants. At length considering all such aspects, the Apex Court has held in case of *Bhagwan Das* (supra) that in case such an assertion is made by the person interested making an application for reference, the Collector is required to take into consideration such facts and then make a reference to the Civil Court in exercise of his power under Section 18 of the Act.

7 : In the case in hand, a unique thing has been done. There were other claimants who have made the application for making the reference before the Collector under Section 18 of the Act. The award was the same and passed in their respect also on the same date. Their applications were considered and reference has been made to the Civil Court. However, without conducting any enquiry with respect to the assertion of the date of knowledge of award, the Collector has refused to make reference of the claim of the petitioners to the Civil Court. This unique fact is proved from the certified copy of the note sheet produced before this Court in this revision. The application with respect to these petitioners along with eight more has been said to be rejected by the impugned order.

8 : In the considered opinion of this Court, such proceedings done by the Collector in exercise of his power under Section 18 of the Act cannot be said to be just and proper. In view of the law laid down by the Apex Court in

Bhagwan Das (supra), such course was not open to the Collector. Consequently, the revision is allowed. The impugned order dated 22.3.2010 in so far as it relates to rejection of the application of petitioners for making a reference of their claim to the Civil Court, is hereby set aside. It is directed that the reference with respect to the claim of petitioners under Section 18 of the Act be made to the Civil Court immediately. Since the Civil Court has already registered MJC No.357/2010 with respect to the reference of the claim made by certain more persons and the proceedings have been initiated in this respect, if the said proceedings are pending consideration before the Civil Court, the claim of the petitioners be also considered along with the said proceedings. If the proceedings in the earlier reference have come to an end, the District Court will proceed in accordance to law to answer the reference made to it by the Collector with respect to the petitioners. The Collector to pass the appropriate orders in the application of the petitioners within a month from the date of receipt of certified copy of the order passed today.

9 : The revision stands allowed to the extent indicated herein above. There shall be no order as to costs.

Revision allowed.

I.L.R. [2012] M.P., 1419

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R. No. 306/2010 (Jabalpur) decided on 3 April, 2012

OLIYA BEGUM (SMT.) & ors.

...Applicants

Vs.

ABDUL RASHID & anr.

...Non-applicants

Succession Act (39 of 1925), Section 372 – Mohemmedan Law, Sections 63, 65 – Succession Certificate – Female died leaving husband and other heirs – Parties governed by Hanafi Law of Inheritance – Husband would be entitled to ½ share and rest ½ share will be devolved in between the mother and other legal heirs treating it as residuary share. (Para 7)

उत्तराधिकार अधिनियम (1925 का 39), धारा 372 – मुस्लिम विधि, धाराएँ 63, 65 – उत्तराधिकार प्रमाणपत्र – पति एवं अन्य वारिस पीछे छोड़ते हुए महिला की मृत्यु हो गई – पक्षकार विरासत की हनफी विधि द्वारा शासित – पति 1/2 हिस्सा का हकदार तथा बाकी 1/2 हिस्सा माँ एवं अन्य विधिक वारिसों के बीच

अवशिष्ट हिस्से के रूप में न्यायगत होंगे।

Imtiaz Huasain, for the applicants.

Smita Arora, for the non-applicant No.1.

ORDER

K.K. TRIVEDI, J. - This revision is directed against the order dated 21.07.2010 passed in Misc. Civil Appeal No.96/2010 by the IX Additional District Judge, Bhopal by which reversing the order dated 11.05.2010 in M.J.C. No.30/2004 of the I Additional Judge to the Court of I Civil Judge, Class-I, Bhopal, direction has been issued to issue a succession certificate under Section 372 of the Indian Succession Act to the respondent No.1.

2. The facts giving rise for filing of this revision are that the petitioners No.1 and 1(a), 1(b) and 1(c) herein have made an application for grant of succession certificate on account of death of one Abida Sultan, who was said to be the daughter of petitioner No.1 and sister of petitioners No.1(a), 1(b) and 1(c). It was contended that on account of a motor accident on 19.10.1997, said Abida Sultan had died. She was an employee in the Madhya Pradesh Laghu Udyog Nigam Limited on the post of Lower Division Clerk and she was to be granted certain benefits accrued to her on account of such service. She was to be granted Rs.1,00,000/- as Insurance amount, Rs.80,000/- being Provident Fund and Rs.45,000/- being gratuity and a total sum of Rs.2,25,000/- was required to be paid to her. Since the petitioners were the only succeeding heirs of said Abida Sultan because her husband, the respondent No.1, had given her divorce (Talaq) three months before the date of death, therefore, a succession certificate be granted to the petitioners. The objections were filed in the said claim made by the petitioners by the respondent No.1. The other petitioners in this case were also named as respondents in the said succession case. The objection of the respondent No.1 was considered and in view of the law laid-down by the Apex Court, taking into account the fact relating to personal law, the Trial Court held that the petitioners were entitled to grant of such succession certificate and passed an order on 11.05.2010. The respondent No.1 preferred a Misc. Appeal against such an order before the Court of IX Additional District Judge, Bhopal and since the said appeal has been allowed and it has been directed that the succession certificate be issued in favour of respondent No.1, this revision is required to be filed.

3. Learned Counsel for the petitioners has drawn attention of this Court

to the order passed by this Court in Misc. Appeal in which the claim for enhancement of compensation was made by the respondent No.1. Drawing attention of this Court to the specific finding recorded that the factum of divorce cannot be disbelieved, it is contended by the learned Counsel for the petitioners that if respondent No.1 was a divorced husband, he was not entitled to grant of a succession certificate as per the provisions of Mohammedan Law as a divorcée husband has no right to claim the benefits in the property of a divorced wife. It is also contended that there was material evidence available on record to this effect, which was not taken into account by the Court below and if proper appreciation of evidence, as was done by the Trial Court, would have been done by the lower Appellate Court, the entire claim of respondent No.1 would not have been accepted at all. It is also contended that as per the Mohammedan Law even if it is accepted that there was no divorce (Talaq) proved, the entire share of the property of the deceased Abida Sultan was not to be given to the husband as the right of other sharers as defined in Chapter-VII of Mohammedan Law relating to Hanafi Law of Inheritance, the petitioners would have been entitled to $\frac{1}{2}$ share. This particular aspect has not been considered by the lower Appellate Court and, therefore, the order impugned is bad in law.

4. Per contra, it is contended by the learned Counsel for respondent No.1 that it was amply proved by the respondent No.1 that there was no divorce in between the respondent No.1 and said Abida Sultan. From the evidence available on record, it has been tried to point out that even the statements were recorded in which it was categorically stated that the deceased was going to her husband at Indore when she met with an accident and ultimately died in M.Y. Hospital at Indore. It is contended that if this piece of evidence is taken into account, it will be clear that the finding recorded by the lower Appellate Court was just and proper. It is also contended that the last rites etc. of the deceased were performed by the respondent No.1. Even in the claim case the compensation was granted to the respondent No.1. The fact relating to divorce was specifically denied by the respondent No.1 in his court statement and, therefore, the lower Appellate Court was right in granting the succession certificate in favour of respondent No.1 only. It is also put forth by learned Counsel for respondent No.1 that in a case under Section 372 of the Indian Succession Act, there is no rôle of personal law and as such the objection raised in this respect by the learned Counsel for the petitioners is not acceptable. However, learned Counsel for respondent No.1 could not

point out as to how the respondent No.1 only was entitled to all the claims in the property of deceased Abida Sultan, but it is contended that in view of the facts aforesaid, there is no force in the revision petition and the same deserves to be dismissed.

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

6. True it is that allegations are made with respect to the divorce of said Abida Sultan with respondent No.1. It is also true that an observation is made by this Court in a Misc. Appeal filed by the respondent No.1 for enhancement of the award amount. However, cursory observations made by this Court will not prove the fact of divorce in between late Abida Sultan and respondent No.1. The entire evidence adduced in this respect is marshalled. There may be an oral divorce (Talaq) as per the provisions of the Mohammedan Law but proof of the same is also required to be given as is prescribed under the law. There is nothing on record to indicate that such a fact was proved. On the other hand, the documentary evidence with respect to the marriage and the oral evidence of the parties indicate that the fact of divorce was specifically denied by respondent No.1 and the alleged divorce was not successfully proved by the petitioners by adducing any evidence in this respect. Therefore, finding in this respect given by the Court below cannot be said to be perverse. If the evidence of respondent No.1 recorded in the trial Court is scrutinized, he has categorically pointed out the fact relating to divorce in paragraph 13. He was aware of the procedure as to how the divorce under the Mohammedan Law is required to be given. There was an admission to the effect made by the witness of petitioners that late Abida Sultan was visiting respondent No.1 at Indore occasionally and even on the date of accident she was going to Indore to meet her husband when she met with an accident. If this is the evidence, it cannot be said that the fact of divorce of said Abida Sultan by the respondent No.1 is proved. In view of this, the finding given by the lower Appellate Court in this respect requires no interference.

7. Now the next aspect is whether the respondent No.1 alone was entitled to grant of succession certificate. As has been pointed out herein above, there are three classes of legal heirs as per the Mohammedan Law. Section 61 prescribes the classes of legal heirs. It is not disputed by the respondent No.1 that the parties are governed by Hanafi Law of Inheritance. Section 63 of the said part of Mohammedan Law prescribes the sharers. Admittedly the husband is given $\frac{1}{2}$ share in the property of the wife. If any residuary property is left,

that is to be devolved in the manner indicated in the said provision. Accordingly, the mother is also entitled to 1/6 share in the said property. Of course ½ is required to be given to the husband and remaining ½ will go in the residuary, which is to be devolved in accordance to the provisions of Section 65 of the Mohammedan Law. Thus, the lower Appellate Court was not right in granting the succession certificate for the entire money to the respondent No.1 only. The respondent No.1 would be entitled to ½ share and rest of ½ share will be devolved in between the petitioners and other legal heirs of said Abida Sultan as per the provisions of Section 65 of Mohammedan Law treating it as residuary share. The succession certificate is required to be issued in this respect by the Court below. The share in the aforesaid amount of claim is required to be distributed accordingly.

8. The revision succeeds to this extent and is allowed with a direction that the respondent No.1 would be entitled to only ½ share in the property of deceased Abida Sultan and rest of the ½ share will be devolved in between the petitioner and others as per the provisions of Section 65 of the Mohammedan Law treating the said share as residuary share. The succession certificate be issued accordingly to this extent.

9. Parties to bear their own cost.

Revision allowed.

I.L.R. [2012] M.P., 1423

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 1767/2010 (Jabalpur) decided on 25 November, 2011

BADRI PRASAD TIWARI & anr.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Section 304 Part-II – Culpable homicide not amounting to murder – Temporary bridge of an inferior quality was constructed on a river by the contractor under the supervision of the applicant and others – Bridge fell down as Jeep was passing through it – Seven persons died due to drowning – Offence under Section 304 Part-II made out – Revision dismissed. (Para 2)

दण्ड संहिता (1860 का 45), धारा 304 भाग II – हत्या की कोटि में न आने

वाला आपराधिक मानव वध – आवेदक तथा अन्य के पर्यवेक्षण में ठेकेदार द्वारा नदी पर निम्न स्तर के अस्थायी पुल का निर्माण किया गया – जब जीप उस पर से गुजर रही थी पुल नीचे गिरा – सात व्यक्तियों की डूबने से मृत्यु हुई – धारा 304 भाग II के अंतर्गत अपराध बनता है – पुनरीक्षण खारिज।

Cases referred :

AIR 1965 SC 1616, AIR 1964 SC 1263, AIR 1976 SC 1012, (1987) 3 SCC 400, 1976 STPL(LE-CRIM) 18606 SC, (1996) 6 SCC (CRI) 1124, (2000) 8 SCC 568, (2004) 1 SCC 525.

A.P. Singh, for the applicants.

Nirmala Nayak, G.A. for the non-applicant.

ORDER

U.C. MAHESHWARI, J. - The applicants/accused have directed this revision under Section 397/401 of Cr.P.C. being aggrieved by the order date 4.5.2010 passed by Ist Additional Sessions Judge Rewa, in Sessions Trial No. 276/09 framing charges against each of them for the offence under Section 304-II of IPC (for seven counts).

2. The facts giving rise to this revision in short are that, on 24.5.2006 at Police Station Sohagi, the information regarding unnatural death of seven persons was received, on which under Sections 174 of Cr.P.C the inquest intimations bearing nos. 5, 6, 7, 8, 9, 10 and 11 of 2006 were registered. In their enquiry by R.B. Sharma, the then Station House, Officer of such Police Station., it was revealed that on the river of Tamas at Teothar, a Pipa Pul (temporary bridge) was constructed by the Contractor Shrikant Tiwari under the guidance, supervision and observation of the Officers of the Public Works Department namely; the applicants Badri Prasad Tiwari, Jagannath Tiwari, posted as Sub-Engineers and Ramanand Tiwari, the time keeper, deputed to look after the construction and maintenance of such pipa bridge but in the lack of their devotion in performing the duties to look after the construction of such bridge, with their connivance the aforesaid contractor made the alleged Pipapul by the material of lower quality and contrary to the prescribed norms. Resultantly, on the aforesaid date 24.6.2006, on passing the alleged jeep bearing registration no. MP-17-B-4691, having the various passengers driven by co-accused Pramod Kumar Gupta in a rash and negligent manner, on breaking such Pipa bridge fell down in the river and seven persons out of the persons traveling in such jeep had died with downing death. Initially, a

crime for the offence of Section 304-A of I.P.C. was registered against Pramod Kumar Gupta, the driver of the jeep. But in further investigation, the applicants Badri Prasad Tiwari, Jaggnath Tiwari and also the Ramanand Tiwari, C.K. Verma, Hari Sumiran Dwivedi, Baidyanath Singh and the contractor Shrikant Tiwari were also found involved in the alleged crime. Besides this the Magisterial enquiry of the incident was also held. In such enquiry, it was established that the aforesaid bridge was not constructed with proper and specified material as such the lower quality iron, guarder and the wood and it's sleepers contrary to the prescribed norms and standard were used in making such bridge, and without verifying such position and completing all formalities the traffic was started on it by the applicants as administrative Officers of the PWD and due to their such act the alleged incident had taken place. In such enquiry, it was also found that the aforesaid administrative Officers of the PWD have not placed the proper sign board at both side of the bridge showing the directions of security norms which was also one of the reasons of happening the alleged incident. Simultaneously the co-accused Pramod Kumar Gupta the Jeep driver, was also found to be negligent in driving the alleged vehicle in which the deceased were traveling. Inter-alia the main cause of the alleged accident was found to be the lack of performing the duties by the applicants and some co-accused in looking after the construction of such bridge when the same was being constructed with lower quality material by the contractor Shrikant Tiwari and also the negligence of such Officers towards their duty subsequent to construction of such bridge in it's maintenance, as the alleged road of the place of incident being very busy road having the huge traffic was required proper maintenance. At the time of making the construction of the bridge with lower quality material, the applicants being Offices of PWD and other accused, except Pramod Kumar Gupta, the driver of the jeep, had knowledge of their Act that due to such act they are creating the situation to cause the death of any human being passing on such pipa bridge. Accordingly, in investigation on establishing the prima facie ingredients of the offence of Sections 304-II, 120-B and 34 of I.P.C., against the applicants and the co-accused mentioned above, they all were charge-sheeted for the same.

3. After committing the case to the Sessions Court, on evaluation of the charge-sheet, the charge of Section 304-II of IPC was framed against the applicants, they abjured the guilt and being aggrieved by such order, have come forward to this Court with this revision.

4. Shri A.P. Singh, learned appearing counsel of the applicants after taking

me through papers of the charge-sheet and other papers placed on the record along with impugned order and the charge framed said that, on taking into consideration the face value of the evidence collected by the investigating agency as accepted in it's entirety, even then the ingredients of the offence of Section 304 Part-II of I.P.C. are not made out against the applicants for framing such charge. According to him, in any case, this was not the case of more than 304-A of I.P.C. for framing the charge. In such premises, the trial Court has not evaluated the charge-sheet with proper approach and committed error in framing the charge of Section 304-II of I.P.C. In support of his arguments, he placed his reliance on the decisions of the Apex Court in the matter of *Kurban Hussein Mohamedalli Rangawalla vs. State of Maharashtra* reported in AIR 1965 SC 1616, in the matter of *Afrhim Sheikh vs. State of West Bangal*, reported in AIR 1964 SC 1263, in the matter of *State of Gujarat vs. Haidarali Kalubhai*, reported in AIR 1976 SC 1012 and in the matter of *S. Vedantacharya vs. Highways Deptt. of South Arcot* reported in (1987) 3 SCC 400 and prayed for modification of the charge accordingly by admitting and allowing this revision.

5. Having heard at length to the applicants' counsel on admission, keeping in view his arguments, I have carefully gone through the papers of the charge-sheet placed with the police report filed under Section 173 of Cr.P.C. and also the case laws cited by the counsel. In the available circumstances before proceeding further to consider the submission of the applicants' counsel as ready reference, I deem fit to reproduce the provision of Section 299 along with one illustration of it and of Section 304-A of I.P.C., because this Court has to consider the question involved in this revision in the light of such provision of I.P.C. The same are read as under:-

"299. Culpable homicide.- Who ever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) A lays sticks and turf over a pit, with the intention of there by causing death, or with the knowledge that death is likely to be thereby caused. Z believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b)

Section 304-A of I.P.C. is read as under:-

"[304-A. Causing death by negligence.- Whoever causes the death of any person by doing any rash and negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both]"

6. Undisputedly, the scope of aforesaid both the Sections of I.P.C. are different. Section 299 of I.P.C. defines the 'culpable homicide' while, Section 304-A of I.P.C. speaks about accidental death of the person because of the 'negligent Act' of the accused. So, in the available set of evidence collected by the investigation agency, this Court has to consider this case.

7. As per available evidence in the charge-sheet, after happening the alleged incident in which above mentioned seven persons had died, initially a crime was registered against one Pramod Kumar Gupta, for the offence of Section 304-A of I.P.C. and investigation was started. Besides the investigation the Magisterial enquiry of such incident was also ordered by the State. On holding the same, it was found that the aforesaid Contractor Shrikant Tiwari, has made and constructed the alleged Pipa bridge under the guidance, supervision and observation of the applicants contrary to the norms with lower quality material. At any point of time such type of construction was not objected by the present applicants for the reasons best known to them which is yet to be considered and adjudicated by the trial Court after recording the evidence. Accordingly, the alleged bridge was not made in accordance with the norms provided under the rules. In spite of such deformities of the bridge the applicants have recommended the completion report of the same, submitted by the Contractor, on which the alleged bridge was opened for passing the traffic of such road. Using the lower quality material contrary to the norms in making such bridge, was very well in the knowledge, of the Contractor, his deployed staff as well as the present applicants and of Ramanand Tiwari, the Time Keeper of the Public Works Department.

8. As per charge-sheet, the report of Magisterial enquiry has also been placed with it, so the same could be taken into consideration at the stage of framing the charges.

9. As per evidence available in the charge-sheet, the applicants with the

knowledge that they are likely by violating of their assigned duties to look after the construction work of the alleged bridge permitted the contractor to construct such bridge contrary to the norms with lower quality material to cause death of human being and subsequently because of such type of the construction after starting the traffic by them the aforesaid jeep while passing on such bridge on breaking the bridge was fell down in the river and seven persons of such jeep had died. In such premises, the applicant are also prima facie responsible for the alleged incident.

10. In the aforesaid premises, the alleged act of the applicants with the contractor and co-accused being squarely covered by the abovementioned illustration of Section 299 of I.P.C. and accordingly the applicants have also committed the offence of culpable homicide. So the aforesaid act could not be treated to be their negligent act only defined under Section 304-A of I.P.C.

11. In investigation of the impugned case carried out by the police, the applicants, the Contractor Shrikant Tiwari and other co-accused, were also found to be involved in making the bridge contrary to the norms with lower quality material. It is also apparent from the charge-sheet that the applicants in discharging their duties had not placed the requisite notice/sign Board at both the side of such bridge showing necessary caution/direction for using the bridge. In all these factual matrix of the charge-sheet there was sufficient material before the trial Court for framing the impugned charge of Section 304 Part-II of I.P.C. because as per evidence of charge-sheet the aforesaid culpable homicide of seven persons comes under the purview of culpable homicide not amounting to murder. As aforesaid alleged act was not carried out by the applicants with intention to cause the death of any specified person or human being, therefore, the case of Section 302 of I.P.C. is not made out but for framing the charge of Section 304-II of I.P.C., so also of Section 304-A of I.P.C., sufficient prima facie evidence is available in the charge sheet as stated above. In such premises, the trial Court has not committed any error in passing the impugned order and framing the charge of Section 304-II of I.P.C. against the applicants.

12. So far as the case laws cited on behalf of the applicants are concerned, the same being distinguishable on facts with the facts of the case at hand, are not helping to the applicants. The same are being taken into consideration one by one.

A. The case laws in the matter of *State of Gujarat vs. Haidarali*

Kalubhai reported in 1976 STPL(LE-Crim) 18606 SC = AIR 1976 SC page 1012, was decided by the apex Court on some different scenario relating to cause death of a person by the accused while driving the alleged truck in a rash and negligent manner at some Kachha Road near some hotel and also the same was decided after holding the trial by recording the evidence at the stage of appreciation of the same and not at the stage of framing the charge. While, in the case at hand, the alleged incident had taken place because of using the lower quality material in making the bridge, due to which while passing the alleged jeep from such bridge the same was fell down in the river. So cited case being based on different scenario and was also decided after recording the evidence, is not helping to the applicants.

B. So far as the case law in the matter of *Meshub Mahindra vs. State of M.P.*, reported in (1996) 6 SCC (Cri) 1124 is concerned, the same was decided taking into consideration that the alleged gas was escaped due to equipment failure, operating problems or maintenance problem, but was not decided taking into consideration that the alleged construction of the place in which the alleged gas was kept in a stock, was made by the lower quality material or contrary to the norms. In cited case considering the peculiar facts and circumstances by modifying the charge of Section 304-II, 326 and 324 and 429 read with Section 35 of I.P.C., framed by the trial Court, the charge of Section 304-A of I.P.C. with or without the aid of Section 35 of I.P.C. was directed to be framed, against the concerned accused. Which is not a situation here in the case at hand, in which the alleged incident was not happened because of only equipment failure, operating problems or maintenance problems, but was happened because of using the lower quality material contrary to the norms in making the Pipa bridge in the knowledge of the applicants. As such they did not object or make any complaint in this regard to the Department. In such premises, this cited case being distinguishable on facts, is also not helping to the applicants.

C. So far as the case law in the matter or *Shamsher Khan vs. State (NCT of Delhi)* reported in (2000) 8 SCC 568 is concerned, the same was decided taking into consideration the different scenario relating to place of manufacturing the explosive substances like bombs and was also decided after framing the charge and recording the evidence on appreciation of the same and not at the stage of framing the charge. So the same being distinguishable on facts and the stage is also not helping to the applicants.

D. So far as the case law in the matter of *State of Maharashtra vs. Salman Salim Khan*, reported in (2004) 1 SCC 525, is concerned, the same was decided taking into consideration that under the influence of liquor, the concerned accused while driving the car in a rash and negligent manner run over one person and caused grievous injury to four persons who all were sleeping on the foot-path, and in that premises, by deleting the charge under Section 304-II of I.P.C., the charge of Section 304-A of I.P.C. was framed which is not the situation in the case at hand. As per available facts stated above, the alleged seven persons had not died because of running over the alleged vehicle on them but alleged incident was happened because of breaking the bridge made with the lower quality material and also till some extent of rash and negligent driving of alleged jeep by co-accused Pramod Kumar Gupta. In such premises, this cited case is also not helping to the applicants.

So far as the principles laid down by the apex Court in the aforesaid cited cases are concerned, this Court did not have any dispute, but in the available scenario of the case at hand, the same are not helping to the applicants.

13. In view of the aforesaid, I have not found any perversity, infirmity, illegality or anything against the propriety of law in the impugned order framing the charge of Section 304-II of I.P.C. against the applicants. Consequently, this revision being devoid of any merit, is hereby dismissed at the stage of motion hearing. Pursuant to it, I.A. No. 10394/10, an application for grant of stay against further proceedings of the trial Court, is also dismissed. However, it is made clear that the trial Court shall be at liberty to consider the matter for framing the additional or alternate charge of Section 304-A of I.P.C. also.

14. Revision is dismissed as indicated above.

Revision dismissed.

I.L.R. [2012] M.P., 1430

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 475/2011 (Jabalpur) decided on 16 December, 2011

SANJAY MEHRA & anr.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Sections 302, 304-B & 306 – Murder or Dowry death – Deceased died an unnatural death by hanging – No

evidence that any injury was caused to deceased during her life time leading to her death – Death of deceased could not be said to be covered under Section 299 of IPC – Order framing charge under section 302 set aside – Charges under sections 304-B, 306 of IPC have rightly been framed – Revision partly allowed. (Paras 7, 8 and 9)

दण्ड संहिता (1860 का 45), धाराएँ 302, 304-बी व 306 – हत्या या दहेज मृत्यु – मृतिका फांसी लगाकर अप्राकृतिक रूप से मरी – कोई साक्ष्य नहीं कि मृतिका को उसके जीवन काल में कोई चोट कारित की गई जो मृत्यु की ओर ले जाती है – मृतिका की मृत्यु भा.द.सं. की धारा 299 के अंतर्गत होना नहीं कहा जा सकता – धारा 302 के अंतर्गत आरोप विरचित किये जाने का आदेश अपास्त-भा.द.सं. की धारा 304-बी, 306 के अंतर्गत आरोप उचित रूप से विरचित किये गये – पुनरीक्षण अशतः भर्जूर।

Amit Dubey, for the applicants.

Yogesh Dhande, Dy. G.A. for the non-applicant.

ORDER

U.C. MAHESHWARI, J. - This revision is directed on behalf of the applicants/accused being aggrieved by the order dated 3.1.2011, passed by Sessions Judge, Hoshangabad in S. T. No.314/2010 framing the charge against each of the them for the offence punishable under Section 304-B, 302, 306 and 498-A of IPC.

2. The facts giving rise to this revision in short are that on receiving the information at P. S Kotwali, Hoshangabar on 23.10.2009 from informer Dilip Mehra regarding unnatural death of Deepa wife of applicant No.1 while daughter in-law of applicant No.2 by hanging, on inquest intimation No.110/09 under Section 174 of Cr. P. C. was registered. In the course of it's inquiry after preparing the Panchnama of dead body, the same was sent to hospital for its postmortem, the same was carried out in which it was revealed that she died by mode of asphyxia by hanging. In subsequent inquiry of merg interrogatory statements of witnesses belonging to the parental family and other relatives of the deceased were recorded, in which it was revealed that the deceased got married with applicant No.1 on 27.1.2008, as per rite and rituals of the community. But subsequent to such marriage near about after five months the deceased on account of demand of ornaments and cash in dowry was subjected to harassment and cruelty in her matrimonial home by the applicant. Pursuant to such act of the applicants the deceased was abated

and proceeded to commit suicide and committed the same by hanging. As the alleged suicide was committed within seven years from the date of her marriage, hence in the above mentioned circumstances a crime No.742/10 for the offence of Section 304-B, 498 and 34 of IPC and $\frac{3}{4}$ of Dowry Prohibition Act was registered against the applicants. In its investigation interrogatory statements of witnesses were recorded, the applicants were arrested and on completion of investigation they were charge sheeted for the offence of Section 304-B, 306, 498-A and 34 of IPC.

3. After committing the case to the Sessions Court on evaluation of charge sheet the charge of offence punishable under Section 304-B, 302, 306 and 498-A of IPC were framed against the applicants. They abjured the guilt and being dissatisfied with such order have come to this Court with a prayer to discharge them from the above mentioned charges.

4. Shri Amit Dubey learned counsel of the applicants' after taking me through the copy of the charge sheet along with the impugned order and framed charges without assailing the charge of Section 304-B, 306 and 498-A of IPC framed by the trial Court has made his limited submission to discharge the applicant from the charge of Section 302 of IPC. In this regard by referring the FIR as well as interrogatory statements of all the witnesses along with other papers he said that even on taking into consideration the face value of the same as accepted in its entirety even the ingredients of offence punishable under Section 302 of IPC are not made out against any of the applicants and prayed to discharge them from the charge of such offence by allowing this revision..

5. On the other hand Shri Yogesh Dhandey, learned State counsel by justifying the impugned order and charges framed against the applicants argued that the same being inconsonance with the evidence available in the charge sheet does not require any interference at this stage. In continuation, he said that trial Court had a right to frame the alternate or probable charge in the available factual matrix of the case and in such premises the impugned order could be held to be faulted. However, in response of some query he fairly conceded that on perusing the FIR as well as interrogatory statements of the witnesses the ingredients of offence punishable under Section 302 of IPC are not made out against any of the applicants even for framing the charge of such section. So far the charge of other sections are concerned he said that there was sufficient material on record and till this extent the trial Court has not committed any error in framing such charges.

6. Having heard the counsel at length keeping in view their arguments I have carefully gone through the copy of the entire charge sheet as well as the impugned order along with framed charges.

7. On going through the merg intimation dated 23.10.2009, FIR dated 28.8.2010, postmortem report of the deceased, and interrogatory statements of the witnesses namely, Devendra Mehra Ku. Simpi Mehra Dinesh Kumar Tiwari Dinesh Sharma, Smt. Malti Malviya and Ashok Yadav and also the other with the charge sheet, I have not found any factual matrix showing that any of the applicants during life time of the deceased Deepa caused her any injury causing her death. In such premises the death of said deceased Deepa could not be said to be covered under the terminology of culpable homicide defined under Section 299 of IPC and in such premises, the impugned case could not be said to be a case covered under any of the part of section 300 of IPC either culpable homicide amounting to murder or culpable homicide of not amounting to murder. Although aforesaid interrogated witnesses of parental family as well as the relatives of the deceased have categorically stated that deceased Deepa got married with the applicant No.1 on 27.1.2008 and subsequent to marriage after some time on account of demand of dowry she was subjected to harassment and cruelty in her matrimonial home by the husband and mother in law of the deceased/ the applicants and pursuant to such instigation and abatement she committed suicide within seven years of her marriage. It also appeared from the case diary statement that soon before her death she was subject to cruelty and harassment give by the applicants. In such premises, I am of the considered view that the ingredients to frame the charge of Section 304-B, 306 and 498-A IPC are prima-facie available in the charge sheet but for framing the charge of Section 302 of IPC there was no material even for framing such charge as alternative. So it is held that the charge of Section 302 of IPC framed by the trial Court against the applicants is contrary to the police report filed under Section 173 of Cr. P. C. as well as the evidence collected by the investigating agency in the matter.

8. In view of the aforesaid discussion, the impugned order is found to be perverse till the extent of framing the charge of Section 302 of IPC against the applicants while the same is found to be in accordance with law for framing the charge of Section 304-B in alternate 306 and 498-A of IPC.

9. Therefore, the impugned order for framing the charge under Section 304-B in alternate 306 and 498-A of IPC against the applicants is hereby

affirmed while by allowing this revision in part the charge framed for the offence of Section 302 of IPC against the applicants is hereby quashed. Till this extent the impugned order of framing the charge is modified.

10. Revision is allowed in part as indicated above.

Revision partly allowed.

I.L.R. [2012] M.P., 1434

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 1903/2011 (Jabalpur) decided on 4 January, 2012.

BANKELAL SONI & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Sections 107 & 306 – Abetment to commit suicide – Applicants, the in-laws of the deceased used to abuse her and harass her although after partition, the deceased was living separately in the same house along with her husband – Deceased committed suicide by pouring kerosene oil – Just before the incident, she was abused and beaten by the applicants – Held – Due to alleged acts committed by applicants, the deceased committed suicide - Due to alleged harassment, beating, abuse and torture, the deceased was instigated and abetted to commit suicide – Charges were rightly framed – Revision dismissed. (Para 10)

दण्ड संहिता (1860 का 45), धाराएँ 107 व 306 – आत्महत्या कारित करने का दुष्प्रेरण – आवेदकगण मृतक के ससुराल वाले हैं, जो उसे गाली देते थे और तंग करते थे, यद्यपि बंटवारे के बाद, मृतिका उसी मकान में अपने पति के साथ अलग रहती थी – मृतिका ने मिट्टी का तेल उड़ेलकर आत्महत्या कारित की – घटना के तुरंत पहले, आवेदकगण द्वारा उसे गाली दी गई और पीटा गया – अभिनिर्धारित – आवेदक गण के अभिकथित कृत्य से मृतिका ने आत्महत्या कारित की – अभिकथित तंग करने, पीटने, गाली देने व यातना देने के कारण मृतिका उत्तेजित हुई और आत्महत्या कारित करने के लिए दुष्प्रेरित हुई – आरोप उचित रूप से विरचित किये गये – पुनरीक्षण खारिज।

Cases referred :

(2002) 5 SCC 371, (2001) 9 SCC 618, (2010) 8 SCC 628, (2010) 1 SCC 750, 2003(4) MPLJ 195, 2005(3) MPLJ 23, 2003(2) MPLJ 44.

A.P. Singh, for the applicants.

Yogesh Dhande, Dy. G.A. for the non-applicant.

ORDER

U.C. MAHESHWARI, J. - The applicants/accused have filed this revision under section 397/401 of the Cr.P.C, being aggrieved by the order dated 23.9.2011 passed by the Sessions Judge, Singrauli in S.T.No.52/11 framing the charge against each of them for the offence of section 306 and 306/34 of the IPC.

2. The facts giving rise to this revision in short are that on 12.9.2010 at about 1.50 O' clock in the night at the instance of one Kanhiyalal Soni a Marg intimation regarding unnatural death of Asha Devi Soni was registered at P.S. Waidhan district Singrauli contending that yesterday on 11.9.2010 at about 11 O' Clock in the morning, Smt Asha Devi Soni w/o Shyam Babu Soni, the daughter-in-law of his elder brother Late Munnilal Soni, after bolting the door of the room from inside and pouring kerosene, set fire on herself. On coming to know about such incident, Vishnu Soni S/o Pyarelal Soni, Dipak S/o Munnilal and Upendra Soni, the servant of the shop, opened the door where said Asha Devi, after sustaining the burn injuries, was lying on the floor. Immediately thereafter she was taken to the Nehru hospital for treatment where her dying declaration was recorded and after providing initial treatment, looking to the nature of the injuries, she was referred for further treatment to Banaras. On the way, she died, on which, her dead body was brought back and kept in the mortuary of the Govt. Hospital, Waidhan. She died because of the burn injuries. Why she committed such act, he does not know anything about it. In the course of its inquiry, after preparing the Panchnama of the dead body, the postmortem was carried-out. Besides the dying declaration of the deceased the interrogatory statements of her husband Shyam Babu and her daughter Ku. Jyoti were recorded, on which, it was revealed that after partition between said Shyambabu and other members of the family, they were residing separately in the same house but in separate rooms. In regular course the deceased was subjected to harassment and torture by her elder brother-in-law Shivbabu, sister-in-law Sunita Soni, brother-in-law Banke Soni, sister-in-law Anita Soni and nephew Amit Soni, and on the aforesaid date of incident 11.9.2010 at about 9 O' Clock, deceased was subjected to abuse and quarrel by said Anita Soni, Banke Soni, Shivbabu Soni and Amit Soni. Due to such harassment and torture of the applicants, the deceased was abetted and

instigated to commit suicide and, pursuant to that by pouring kerosene and setting fire on herself, sustained burn injuries and succumbed to the same, on which, Crime No.62/10 was registered against the applicants on dated 16.9.2010 against the applicants for the offence under section 306/34 of the IPC. After making interrogation of the witnesses and preparing the requisite papers, on completion of the investigation, prima facie it was revealed that the deceased committed suicide due to abetment given by the applicants in furtherance of their common intention. Consequently they were charge sheeted for the aforesaid offence.

3. After committing the case to the Sessions Court, on evaluation of the charge sheet the charges of section 306 and 306/34 of the IPC was framed against the applicants. They abjured the guilt and being aggrieved by such order, framing the charges, they have come to this court with this revision.

4. Shri A.P.Singh, learned counsel for the applicants after taking me through the papers of the charge sheet along with the impugned order and the charges framed argued that taking into consideration the face value of the entire charge sheet including the interrogatory statements of the witnesses as accepted in its entirety, the ingredients of the alleged offence of section 306 of the IPC or the ingredients defined under section 107 of the IPC are not made out against any of the applicants but contrary to the evidence collected by the investigating agency, mere on imagination and assumption, the aforesaid charge has been framed against the applicants under wrong premises. In continuation, he said that after partition of the family and division of the property, the applicants and the family branch of the deceased were residing separately in some part (rooms) of the same premises, given to the concerning member and branch of the family. So, there was no any inter-se relations between the applicants and the deceased family in regular course of the life and, in such premises, there was no occasion to give any harassment, torture, instigation or any abetment to the deceased by the applicants, on which it could be assumed that due to any such act of the applicants, the deceased committed suicide. He further argued that due to inimical relations between different branch of the family, subsequent to committing suicide by Asha Devi, the applicants have been implicated on the false pretext. With these submissions, he said that the impugned charge framed by the trial court is not sustainable under the law and in such premises prayed to set aside the impugned order and discharge the applicants by allowing this revision.

5. After committing the case to the Sessions Court on evaluation of the

charge sheet, the charge of the aforesaid offence of section 306 of the IPC was framed against the applicants and other co-accused. They abjured the guilt and thereafter the applicants have come to this court with this revision.

6. On the other hand, responding the aforesaid arguments, by supporting the impugned order and the framed charges, learned state counsel Shri Yogesh Dhande said that there is sufficient evidence in the charge sheet collected by the investigating agency to frame the alleged charge against the applicants and, in such premises, the above-mentioned charges were framed in consonance with the evidence available in the charge sheet. The same does not require any interference at this stage. In continuation, he said that at the stage of framing the charge, the court has not to express the opinion whether on holding the trial the case would be culminated in conviction or not. If prima facie ingredients of the alleged offence of section 306 read with section 107 of the IPC are made out then there was no option with the trial court except to frame the charge of such section against the applicants and, in such premises, the trial court has not committed any error and prayed for dismissal of this revision.

7. Having heard the counsel at length, keeping in view the arguments advanced by the counsel, after perusing the copy of the charge sheet placed on the record along with the impugned order and also the case law cited on behalf of the applicants, I am of the considered view that in the available circumstances the trial court has not committed any error in framing the impugned charges against the applicants.

8. True it is that as per available evidence in the charge sheet, before happening the alleged incident, the partition in respect of the property had taken place between the different branch of the family including the branch of Shyambabu Soni, the husband of the deceased and they were residing in the separate part/premises of the same house allotted to the concerning branch in the aforesaid partition. It is apparent from the dying declaration of the deceased Smt Asha Soni recorded by B.L.Bihari, the Naib Tehsildar Singrauli on dated 1.11.2010, that she was instigated and proceeded to commit suicide because of beating given by the applicants. In such dying declaration, she categorically stated that the family members were used to abet her, the elders abuse her while the brothers-in-law and sisters-in-law used to beat her, on which, by pouring kerosene, she set fire on herself. Even on recording her statement by the police officials before her death on dated 11.9.2010, in presence of the

witnesses Amit Singh, Santosh Soni and Manju Devi, she categorically stated that all her in-laws, used to harass her except her husband. She further stated that although her mother-in-law Kamla Soni did not harass her but was always taking the side of other members of the in-laws family. My brothers-in-law Banke and Shivbabu and sisters-in-laws Anita and Sunita have tortured me and given harassment. My uncle-in-law Jaiprakash was also giving harassment, on which, by pouring kerosene I set fire on me. It is also stated that today in the morning said Anita and Banke came to beat her while she was abused by Shivbabu and Anita. Due to such harassment and torture I set the alleged fire. Besides the aforesaid dying declaration, from the interrogatory statements of Ku. Jyoti Soni the daughter of the deceased, Shyambabu Soni husband of the deceased, Smt Shakuntala mother of the deceased, Tarachand Kariwal the neighbor and independent witness, Smt Kamla Devi the mother-in-law of the deceased and Abdul Kalam recorded under section 161 of Cr.P.C, it is apparent that in regular course of the life, deceased Asha Devi was subjected to harassment and torture of the applicants and on the date of the incident also on account of dispute regarding some pet dog of the deceased family, some dispute took place between applicant Anita and deceased and due to that the other applicants also came to such place of incident and abused the deceased and also tried to beat her. Due to such harassment and torture from the elders and other members of the family, deceased Asha Devi was abetted and proceeded to commit suicide and pursuant to that after bolting the door of the room from inside, after pouring the kerosene, set fire on herself and received burn injuries. Although, immediately thereafter she was taken to the hospital but after getting her dying declaration recorded by the Tehsildar and police authorities, she succumbed to such burn injuries. On going through the aforesaid all the interrogatory statements, prima facie it is revealed that the deceased was subjected to harassment and torture by the act of the applicants in regular course of the life and soon before the incident, on account of some small dispute between the applicant Anita and the deceased, the all applicants gathered at the place of the incident and not only abused but also given her beating and due to such instigation, she was abetted and proceeded to commit the alleged act of suicide and commit the same.

9. True it is in order to frame the charge of abetment to commit suicide defined under section 306 of the IPC, the ingredients of abetment defined under section 107 of the IPC prima facie should be made out. It is settled proposition that when ever the word "abetment" stated in section 306 IPC

requires any interpretation then in this regard section 107 of the IPC is always taken into consideration which defines "abetment of things". The same reads as under :-

"The ingredients are; A person abets the doing of a thing, who
(a) instigates any person to do that thing or, (b) Engages with one or more person or persons in any conspiracy for the doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or
(c) intentionally criminal aids by any act or illegal omission the doing of that thing."

10. In view of the aforesaid, on examining the case at hand then in the above mentioned factual matrix if before happening of the alleged incident if the deceased was not subjected to any abuse, quarrel, beating, harassment or torture by the applicant or any of them then certainly she could not have proceeded to commit the suicide. So, one thing is certain that due to alleged acts committed by the applicants in furtherance of their common intention with the deceased, she was proceeded to commit suicide. If such thing was not happened then she could not have gone to commit suicide. So, due to the alleged harassment, beating, abuse and torture of the applicants, the deceased was instigated and abetted to commit suicide and pursuant to that the alleged incident was happened. So, in such premises, the impugned case is squarely covered by first part of section 107 of the IPC and, in such premises, it is held that prima facie for framing the charge of section 306, 306/34 of the IPC are made out against the applicants and in such premises, the trial court has not committed any error in framing such charge against the applicants.

11. Although on behalf of the applicants in support of their case the reliance was placed on some decisions of the Apex Court as well as of this Court. The same are taken-up for consideration one by one. The case of Apex Court in the matter of *Sanju alias Sanjay Singh Sengar Vs. State of MP- (2002) 5 SCC 371* was decided taking into consideration some different scenario in which there was some strain relations between the deceased and his wife who was staying with the appellant and when the deceased went to the place of the appellant to bring back his wife, then there some quarrel took place between the appellant and the deceased who came back alone. In such quarrel the deceased was said by the appellant to go and die and on that basis the deceased committed suicide. That is not the situation here in the case at hand.

As per aforesaid factual matrix the deceased Asha Devi was subjected to harassment, abuse and beating in the regular course and soon before the incident she was subjected to harassment and torture by the applicants. So, the cited case being distinguishable on facts is not helping to the applicant.

12. The another case law of the Apex Court in the matter of *Ramesh Kumar Vs. State of Chhatisgarh*-(2001) 9 SCC 618 is also based on the factual matrix of some matrimonial dispute between the husband and wife. So, the principle laid down in such case being distinguishable on facts of the case at hand, is not helping to the applicant. So far the principle laid down by the Apex Court in this case is concerned, this court did not have any dispute.

13. The case law in the matter of *Madan Mohan Singh Vs. State of Gujarat and another*-(2010) 8 SCC 628 was decided taking into consideration the relationship of the master and servant because the concerning employee at grudge against his superior officer and committed suicide on account of such grudge even on honestly feeling that he was wrong. So, considering such situation and on different facts and circumstances, the case of the concerning appellant was quashed which is not the situation here in the case at hand. As per aforesaid factual matrix due to regular harassment and torture of the applicants, deceased Asha Devi committed suicide. The stated case being distinguishable is not helping to the applicants.

14. The case law in the matter of *Gangula Mohan Reddy Vs. State of Andhra Pradesh*-(2010) 1 SCC 750 was decided by the Apex Court taking into consideration that some allegations of theft was alleged against the servant on which such servant committed suicide and considering that scenario the concerning appellant was acquitted in the case. So, firstly being distinguishable on facts such case is not helping to the applicants and secondly such case was decided after recording the evidence and not at the stage of framing the charge. Hence on this ground also this case law is not helping to the applicants.

15. The case law in the matter of *Ajay Patodia*-2003(4) MPLJ 195, *Vishnu Prasad Vs. State of MP*-2005(3) MPLJ-23 and *Mangleshwar Singh Vs. State of MP*-2003(2) MPLJ 44 being distinguishable on facts with the available factual scenario in the case at hand are also not helping to the applicants.

16. In view of the aforesaid discussion, this revision being devoid of any merits is hereby dismissed at the stage of admission.

Revision dismissed.

I.L.R. [2012] M.P., 1441

CRIMINAL REVISION

Before Mr. Justice Sujoy Paul

Cr. Rev. No.32/2012 (Gwalior) decided on 2 February, 2012

DEEPAK SAHU & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401, High Court Rules, M.P. 2008, Rule 48 – Declaration as to custody – Unless Criminal Revision contains declaration that convicted person is in custody or has surrendered after conviction, criminal revision is not tenable.

(Paras 9 &10)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397 व 401, उच्च न्यायालय नियम, म.प्र. 2008, नियम 48 – अभिरक्षा के संबंध में घोषणा – जब तक अपराधिक पुनरीक्षण में यह घोषणा अंतर्विष्ट नहीं होती कि दोषी व्यक्ति या तो अभिरक्षा में है या उसने दोषसिद्धि के पश्चात स्वयं को अभ्यार्पित कर दिया है, अपराधिक पुनरीक्षण पोषणीय नहीं है।

Cases referred :

(2000) 10 SCC 346, 2009 Cr.L.R. MP 801, AIR 1992 SC 1981.

Rajesh Shukla, for the applicants.

Sangeeta Pachauri, P.P. for the non-applicant/State.

V.K. Saxena with Aditya Singh, for the complainant.

ORDER

SUJOY PAUL, J. - On 19.1.2012 a question arose before this Court whether this Criminal Revision is tenable despite the fact that petitioners have not surrendered before the Court below at the time of judgment and are still not in custody. In other words, if the convicted person is not in custody or has not surrendered after his conviction and his sentence is not suspended by Court below, whether revision would be tenable.

2. Shri Rajesh Shukla, learned counsel for the petitioners by placing reliance on the language of Section 397 of Cr.P.C. and judgment of Apex Court in (2000) 10 SCC 346 (*Bihari Prasad Singh Vs. State of Bihar and Another*) submits that there is no prohibition/requirement under the Cr.P.C. which compels the accused to surrender before filing of a revision. He also

placed reliance on a judgment of this Court reported in 2009 (Cr.L.R.) M.P. 801 (*Kishore Virvani Vs. V.N.Gangrade*). On the basis of these judgments, the learned counsel submits that there is no compulsion and requirement to surrender after conviction for entertaining the criminal revision.

3. Per contra, Mrs. Sangeeta Pachauri, learned P.P. and Shri V.K.Saxena, learned Senior Advocate for the complainant submit that Chapter 10, Rule 48 of High Court of M.P. Rules, 2008 makes it obligatory for the accused to surrender and only then revision would be tenable.

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

5. In *Bihari Prasad* (supra) the Apex Court held in para 3 as under:-

"3. Under the provisions of the Criminal procedure Code, there is no such requirement though many High Courts in this country have made such provision in the respective rules of the High Court. But it is stated to us that there is no such rule in the Patna High Court Rules. In that view of the matter the High Court was not justified in rejecting the application for revision solely on the ground that the accused has not surrendered."

(emphasis supplied).

6. A bare perusal of this paragraph shows that the Apex Court opined that there is no requirement in the Cr.P.C. which makes it necessary for the accused to surrender after the conviction. However, the Apex Court opined that certain High Courts have made such provisions in their rules. In *Kishore Virvani* (supra) this Court held that undoubtedly there is no rule which compels the petitioner to surrender before filing the revision in the High Court. However, a microscopic reading of this judgment shows that the relevant provision of High Court Rule was not specifically brought to the notice of this Court. Rule 48 reads as under:-

"48. A memorandum of appeal or revision petition against conviction, except in cases where the sentence has been suspended by the Court below, shall contain a declaration to the effect that the convicted person is in custody or has surrendered after the conviction."

(emphasis supplied).

7. The basic question is whether as per Rule 48 aforesaid, it is obligatory for the person to surrender on his conviction before filing of the revision.

8. In the considered opinion of this Court, the language employed in Rule 48 makes it crystal clear that a declaration is mandatory for the accused to the effect that he is in custody or has surrendered after the conviction. The only exception provided in the rule is where the sentence has been suspended by the Court below. In other words, except in cases where a sentence was suspended by the Court below itself, in all other cases there has to be a declaration to the effect that the convicted person is in custody or has surrendered after the conviction. Thus, the intention of rule makers is unambiguous and clear regarding giving of such declaration. Needless to mention that an accused can give such declaration only if he is in custody or surrendered after the conviction. Thus, undoubtedly, the intention of rule is that one has to surrender after conviction or should be in custody except in those cases where sentence has been suspended by the Court. The word "shall" is used to make it mandatory. This is salutary principle of statutory interpretation that when the words of a statute are clear, plain and unambiguous, the Courts are bound to give effect to that meaning irrespective of consequences. (*Nelson Motis Vs. Union of India*), AIR 1992 SC 1981.

9. The Apex Court also held that "if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver." (page 50 Principles of Statutory Interpretation) (12th Edition 2010 by Justice G.P.Singh). The Apex Court also opined that when language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, the Act speaks for itself. In the light of this legal position, I have no hesitation to hold that Rule 48 makes it mandatory for the accused to give declaration about his surrender after the conviction or about the fact regarding his remaining in custody.

10. Since Rule 48, in specific, was not brought to the notice of this Court in Kishore (supra), the said judgment is clearly distinguishable on this aspect. On the basis of aforesaid analysis, it is held that a revision petition against conviction is tenable only when it contains a declaration to the effect that the convicted person is in custody or has surrendered after the conviction except in cases where the sentence has been suspended by the Court below.

11. The matter be posted before the regular bench on Thursday (9.2.2012) for further consideration.

Order accordingly.

I.L.R. [2012] M.P., 1444

CRIMINAL REVISION

Before Mr. Justice M.C. Garg

Cr. Rev. No. 1171/2011 (Jabalpur) decided on 13 April, 2012

NAVAL KISHORE SHARMA

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 226, 227, Penal Code (45 of 1860), Section 306 – Abetment to commit suicide – Deceased in suicide note alleged that his pay was not being paid and has been denied promotion although his juniours have been promoted – Contents of suicide note also corroborated by witness ‘C’ – merely because applicant has taken over charge of Head Master only one month before the death of deceased would not be a good ground to discharge – Revision dismissed. (Paras 4 & 5)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 226, 227, दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – मृतक ने आत्महत्या की चिट्ठी में अभिकथित किया कि उसके वेतन का भुगतान नहीं किया जा रहा था और पदोन्नति से इंकार कर दिया गया यद्यपि उसके कनिष्ठों को पदोन्नत किया गया – साक्षी ‘सी’ ने भी आत्महत्या की चिट्ठी की विषयवस्तु पुष्टि की है – केवल इसलिये कि याची ने मृतक की मृत्यु से केवल एक माह पूर्व हैड मास्टर का कार्यभार ग्रहण कर लिया है उसे आरोप मुक्त करने का अच्छा आधार नहीं होगा – रिवीजन खारिज।

Sharad Verma, for the applicant.

Prakash Gupta, P.L. for the non-applicant/State.

ORDER

M.C. GARG, J. - All these petitions arise out of order of framing of charge against the petitioners under Section 306/34 of IPC based upon suicide note left by the deceased which reads thus :-

निवेदन है कि प्रार्थी चन्द्रपाल सिंह श. हाईस्कूल में शिक्षक पद पर कार्य कर रहा है। प्रार्थी माह अक्टूबर 2007 से आज मार्च 08 तक बाबू (लिपिक) एवं पूर्व प्रभारी प्राचार्य नवल किशोर शर्मा की हठ धर्मिता एवं मुझसे व्यक्तिगत द्वेष रखनेसे वेतन नहीं निकाल रहे हैं जबकि माह अक्टूबर 07 का अर्जित अवकाश आवेदन एवं पुष्ट प्रमाण पत्र कार्यालय लिपिक के पास जमा कर दिया हूँ। जिला शिक्षा अधिकारी

सतना से भी कई बार लिखित अनुरोध किया हूँ हर जगह पैसे की मांग की जाती है इसी कारण 7000/-रु. चांदी की करधन रहन झाली में रामपाल सिंह के यहां के रखकर मध्यस्थ जेनेन्द्र वागरी झाली के माध्यम से शैलेन्द्र त्रिपाठी के द्वारा जिला शिक्षाधिकारी को दिया गया है लेकिन ज्ञानानी डी.ई.ओ. एवं हर्षनारायण सिंह के द्वारा नहीं मेरी पदोन्नति की गई और न ही वेतन निकाला जा रहा है जबकि अभी प्रधानाध्यापक की पदोन्नति सूची जो जारी की गई है सभी मेरे से कनिष्ठ हैं । मैंने सन् 1983 अगस्त का उच्च श्रेणी शिक्षक हूँ एवं 1995 तक की सूची जारी हो गई है।

आज पैसे के अभाव में इतना ज्यादा कर्जदार हो गया हूँ कि भूखों मरने की नौबत आ गई है मैं बहुत ही कुष्ठित एवं आभाव ग्रस्त जीवन जी रहा हूँ रात दिन एवं दम चिंता में सोना व जीना हराम है, इस संबंध में अपर संचालक शिक्षा संचालक श्रीमान मुख्य कार्यपालन अधिकारी जिला पंचायत सतना को भी लिखित मनोगत करा चुका हूँ सभी अभिलेख मेरे घर में मौजूद है अब नहीं सहा जा रहा । अतएव मैं अपनी जिंदगी जो भार बन गई है समाप्त कर रहा हूँ । परिवार का आन्तरिक कष्ट नहीं देखा जा रहा । मेरा सभी स्वत्वों का निराकरण करपत्नी को दिया जावे एवं उचित न्याय किया जावे । जिला शिक्षा अधिकारी से 7000 एवं ब्याज रामपाल सिंह की है दिलाया जावे ।

चन्द्रपाल सिंह शिक्षक 31.3.08

मैं शाला प्रांगण में ही इहलीला समाप्त कर रहा हूँ। अब मेरी सोचने समझाने की शक्ति जबाब दे चुकी है खाली पैर रहकर असाद का जीवन नहीं जी पा रहा हूँ। आपको यह आवेदन जिले में मुखिया होने के नाते लाल फीताशाही खत्म करने के लिये लिख रहा हूँ कि कोई अन्य कर्मचारी इसी तरह असमय काल के गाल में न चला जावे। मैं अब कहां कहां हाथ पांव जोड़ूँ बहुत ही लाचार एवं मजबूर होकर यह कदम उठाना पड़ रहा है लिपिक रामावतार पटेल एवं पदोन्नत शिक्षक नवल किशोर शर्मा जो मेरे से कनिष्ठ हैं प्राचार्य का पद लेने हेतु जिला शिक्षाधिकारी ज्ञानानी जी से ले देकर मेरे विरुद्ध यह कार्य किया गया है। माह मार्च 08 में कर्मचारी उपस्थिति पंजी को भृत्य ब्रजभान सिंह एवं लिपिक द्वारा हेरा फेरी कर नई पंजी का संधारण किया गया है इस पंजी को मंगया जावे। मुझे परेशान करने के लिए।

चन्द्रपाल सिंह

30.3.08.

2. Petitioners submit that even if the allegations as made in the suicide note are taken at their face value, they do not constitute abetment under. Section 107 of IPC for the purpose of framing of charge under Section 306 of IPC.
3. So far as the Government Pleader is concerned while he admits that though

suicide note does not make out a case against other petitioners, the suicide note clearly reflects role of the petitioner Naval Kishore Sharma. In so far as. withholding the pay of the petitioner is concerned, learned counsel for the petitioner submits that he was 'the Head Master only one month prior to the date of death of the deceased and thus cannot be fastened with such a serious liability whereas the learned Government Pleader' submits that besides the suicide note there is also an evidence of Chandrabhan Tripathi who has made statement under Section 161 of Cr.P.C. wherein he has stated as under:-

स्कूल में उस समय के प्रभारी प्राचार्य नवल किशोर शर्मा रामवतार वर्मा काछ रामवतार पटेल चपरासी बृजभान सिंह मास्टर सा. चन्द्रपाल सिंह को हाजिरी रजि. में दस्तखत नहीं करने देते थे दि. 15/3/08 को मैं नो.सा. से चन्द्रपाल सिंह मास्टर सा. को गौहानी स्कूल गया था स्कूल पहुंचा तो प्रभारी प्राचार्य रामावतार वर्मा रामावतार पटेल चपरासी बृजभान सिंह स्कूल में थे चन्द्रपाल सिंह मास्टर सा. चपरासी बृजभान सिंह से हाजिरी रजि. मांगे तो बृजभान सिंह रजि. देने से मना किये बोले कि प्रभारी प्राचार्य महो. ने मना किये हैं किये हुए हैं बाबू रामवतारपटेल भी कहे कि प्रभारी प्राचार्या आर.डब्ल्यू. वर्मा के आदेश के बाद भी दस्तखत कि लिये रजि. दिया जायेगा तब मैंने भी कहा कि जब मास्टर सा. नियमित रूप से विद्यालय आते हैं तो आप लोग उनसे दस्तखत क्यों नहीं कराते हैं तब मेरे कहने पर प्रभारी प्रचार्य महोदय वर्मा जी ने चन्द्रपाल सिंह मास्टर सा. से उपस्थिति रजि. में दस्तखत कराया था मैं उस दिन दिन भर स्कूल में रहा स्कूल बंद होने के बाद मास्टर सा. को साथ लेकर बांधी वापस आया मास्टर सा. बतलया कि मेरी छुट्टी का निकाल नहीं हुआ।

4. This statement of Chandrabhan Tripathi corroborates the allegations made by the deceased in his suicide note against the petitioner Naval Kishore Sharma.

5. The statement of learned counsel for the petitioner that Naval Kishore Sharma had taken over the charge as Head Master of the School only one month before the date of death of the deceased would not be a good ground to discharge the petitioner at this stage. This may be a good ground for final judgment but this has to be seen only after trial is completed.

6. In these circumstances, Criminal Revision No.1214/2011 filed by petitioner Ramavtar Verma and Criminal Revision No. 1319/2011 filed by petitioner Shailendra Kumar Tripathi are allowed while Criminal Revision No.1171/2011 filed by petitioner Naval Kishore Sharma is dismissed. It is however made clear that anything stated by this Court while passing this order will not cause any aspersion on the merits of the case.

7. The bail bonds of petitioners, namely, Ramavtar Verma and Shailendra Kumar Tripathi will stand discharged while petitioner Naval Kishore Sharma will be required to continue appearing before the Trial Court to face the trial.

8. Let a copy of this order be sent to the Trial Court.

Revision dismissed.

I.L.R. [2012] M.P., 1447

CRIMINAL REVISION

Before Mr. Justice Sheel Nagu

Cr. Rev. No. 367/2011 (Gwalior) decided on 13 April, 2012

RAGHU THAKUR

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228, Evidence Act (1 of 1872), Section 27 – Disclosure Statement – Implication of accused solely on the disclosure statement of co-accused recorded under Section 27 of Act, 1872 is unsustainable. (Paras 16 & 17)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228, साक्ष्य अधिनियम (1872 का 1), धारा 27 – प्रकटन कथन – अभियुक्त की सलिप्तता 1872 के अधिनियम की धारा 27 के अंतर्गत सह अभियुक्त के प्रकटन कथन के अभिलिखित किये जाने मात्र से कायम रखे जाने योग्य नहीं है।

Cases referred :

1994(II) SN 72, 2002 SCC (Cri) 310, 2008(2) MPLJ (Cri) 271, 1995 JLJ 444.

R.K. Sharma, for the applicant.

R.K. Shrivastava, P.L. for the non-applicant.

ORDER

SHEEL NAGU, J. - Both these criminal revisions filed under Section 397 and 401 of Cr.P.C. assail the rejection of an application under Section 227 of Cr.P.C. filed by the petitioner for discharging him of the offences punishable under Section 489A, 489B & 489C of IPC, in which common set of facts are involved, after being heard analogously are being decided by this common order.

2. The sole ground of challenge raised by the petitioner is that except for the statement under Section 27 of Indian Evidence Act made by the coaccused Jagdish, there is no evidence on record to support the case of the prosecution qua the petitioner even for the purpose of framing of charge in the above said offence.

3. Perusal of the charge sheet filed by the petitioner indicates that a person named Jagdish S/o Bhagwan Lal Khatik was arrested by the police who was in possession of several counterfeit currency notes of denomination of Rs. 500/- for the purpose of circulating the same in the market. In the statement of said Jagdish recorded under Section 27 of Indian Evidence Act, the name of the petitioner was disclosed.

4. Counsel for petitioner has placed reliance on a single Bench decision of this Court in the case of *Prakash Singh V. State of M.P.* 1994(II) SN 72 in support of his contention that naming of a person by co-accused in a statement under Section 27 of Indian Evidence Act cannot enable the prosecution to bring that person within the domain of suspicion much less grave suspicion for enabling the court to frame charge of an offence for which no other evidence is collected by the prosecution. In sums and substance the said decision lays down that the statement under Section 27 of Indian Evidence Act for disclosure of fact by an accused cannot be used to implicate another person against whom there is no other piece of evidence collected by the prosecution.

5. Analysing the statutory provision, it is seen that Section 27 of Indian Evidence Act reads thus:

"27. How much of information received from accused may be proved.-Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

6. A plain reading of Section 27 of Indian Evidence Act indicates that the statement under Section 27 of Indian Evidence Act is an exception to the ban imposed upon the courts to utilize the confessional statement made under Section 25 & 27 of Indian Evidence Act, so as to protect a person making disclosure from being falsely implicated by the police in whose custody that person remains at the time of making disclosure. The provision of Section 27 of Indian Evidence Act further indicates that the facts disclosed under Section 27 of Indian Evidence

Act can be used only against the person making disclosure and not against any other person.

7. The present case relates to the stage of framing of charges under Section 228 of the Cr.P.C. which for convenience is reproduced below:-

“228.Framing of charge.(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, a [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate”] shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

8. Section 228 of Cr. P. C. requires formation of “presumption of the accused having committed an offence” as a prerequisite for framing of charge. The said presumption of commission of an offence is required to be arrived at by the court concerned after due consideration of the material and evidence place by the prosecution on record, followed by formation of just, fair and legal opinion about the commission of offence, on a prima facie basis.

9. The framing of charge is an important stage of trial. At the time of framing of charge, the court concerned for the first time applies it's mind in a judicious manner to the tenability and triability of the allegations made in the charge sheet put-up by the prosecution. At this stage the court can either frame charge if the evidence and material made available by the prosecution is sufficient to presume

commission of an offence or discharge the accused by invoking the provision of Section 227 of Cr.P.C. on finding absence of sufficient ground to proceed by recording reasons in that regard.

10. The crux of matter which falls for consideration is that in what manner the presumption of commission of offence, which Section 228 of Cr.P.C. contemplates, is required to be arrived at and when can it be said that the material and evidence made available in the charge sheet is not enough to form that presumption.

11. An insight into the above said question of availability and sufficiency of presumption has been shown by the Apex Court in the case of *Dilawar Balu Kurane Vs. State of Maharashtra* reported in 2002 SCC (Cri.) 310 by holding that not mere suspicion but a grave suspicion of commission of offence is required to exist in the mind of the Judge to frame charge on the strength of the prosecution material.

12. This court is of the considered view that sufficiency of presumption of commission of an offence or existence of grave suspicion of commission of an offence can very well be deciphered from the allegation made in the prosecution story by testing the said allegation on the anvil of the basic ingredients which constitute a particular offence as defined in the Indian Penal Code or any other piece of legislation as the case may be.

13. Reverting back to the present case, it is seen that the offences alleged by the prosecution in the charge sheet are punishable under Section 489A, 489B & 489C of IPC which relate to counterfeit of currency notes or bank notes knowing or having reason to believe the same to be forged or counterfeit note being in possession of accused for which different punishments have been provided. Thus the primary offence is of counterfeit which is defined in Section 28 of IPC thus:

“28. Counterfeit: A person is said to “counterfeit” who cause one thing to resemble another thing. Intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.”

14. A perusal of the entire evidence and material placed by the prosecution before the court in shape of chargesheet/ final report, it is evident as day light that the implication of the petitioner is based solely on the statement made by co-accused Jagdish under Section 27 of Indian Evidence Act without there being any other piece of evidence/ allegation against the petitioner to satisfy the requirement of the basic ingredients of the offence of counterfeit.

15. Learned counsel appearing for the respondent is State also unable to point out any evidence against the petitioner in the charge sheet except the statement of the co-accused Jagdish made under Section 27 of Indian Evidence Act.

16. Considering the submission of counsel of the rival parties and material available on record which after being tested on the anvil of the statutory provisions as stated above, this court is of the considered view that the statement of co-accused Jagdish made under Section 27 of Indian Evidence Act can be used only against co-accused Jagdish and not against the petitioner, in the absence of any other piece of evidence available on record against the petitioner. Thus, no charge could have been framed against the petitioner as is held by the decision of this court in the case of *Prakash Singh vs. State of M.P.* (supra) and also in the case of *Bhoorelal Vs. State of M.P.* 2008(2) M.P.L.J. (Cri.) 271 & *Sushil Kumar Sharma v. State of M.P.* 1995 J.L.J. 444.

17. In view of the above, it is held that there was no evidence at all against the petitioner much to frame charges against the petitioner for offence punishable under Section 489A, 489B & 489C of IPC. Resultantly, these criminal revisions are allowed and the charge framed against the petitioner for offence punishable under Section 489A, 489B & 489C of IPC is set-aside. The petitioner is accordingly discharged of the offences alleged against him u/Ss. 489A, 489B & 489C of IPC.

Certified copy as per rules.

Revision allowed.

I.L.R. [2012] M.P., 1451

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sheel Nagu

M.Cr.C. No. 1968/2012 (Gwalior) decided on 19 March, 2012

INDAR SINGH & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Section 307, Criminal Procedure Code, 1973 (2 of 1974), Section 227 – Attempt to murder – Framing of Charge – Lacerated wound inflicted on the head from blunt side of Pharsi – Doctor certified the injury as dangerous to life – Framing of charge under Section 307 of I.P.C. upheld as grave suspicion of commission of offence is prima facie made out. (Paras 9 & 10)

दण्ड संहिता (1860 का 45), धारा 307, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 – हत्या का प्रयत्न – आरोप विरचित किये जाना – फरसी के मौथरे हिस्से से सिर पर फटा घाव कारित किया गया – चिकित्सक ने चोट को जीवन के लिए घातक होना प्रमाणित किया – मा.द.सं. की धारा 307 के अंतर्गत आरोप विरचित करने को अभिपुष्ट किया गया क्योंकि प्रथम दृष्ट्या अपराध कारित किये जाने का गंभीर संदेह उत्पन्न होता है।

Cases referred :

2006(II) MPJR 368, 2004 Cr.L.J. 2990, 2011Cr.L.R.(MP)493, 2011 Cr.L.R. (MP) 314, 2002 SCC (Cri) 310.

Rajmani Bansal, for the applicants.

R.K. Shrivastava, P.L. for the non-applicant.

ORDER

SHEEL NAGU, J. - Heard.

1. This M.Cr.C. under Section 482 of the Criminal Procedure Code seeks quashment of the order dated 15.12.2011 passed by the Third Additional Sessions Judge, Guna in Sessions Trial No.339/2011 framing charge under Section 307/149 of IPC after rejecting the application for discharge filed by the petitioners under Section 227 of the Criminal Procedure Code.
2. The challenge to the framing of charge under Section 307 of IPC is primarily based on the ground that since no incised wound was inflicted by the accused-petitioners and all the injuries sustained by Kumer Singh are simple in nature coupled with the fact that a counter-case alleging offence punishable under Section 302 of IPC has been registered against the complainants, the framing of charge under Section 307 of IPC against the petitioners is unwarranted for being an act of vendetta.
3. Counsel for petitioners has placed reliance on the decision of *Peerushah alias Peer Mohammad & Anr. Vs. State of MP* reported in 2006 (II) MPJR 368 to contend that absence of corroboration of the overt act of knife blow with the medical evidence renders framing of charge u/S.307 of IPC unsustainable in law. Another decision of *Prabhu Dayal and another Vs. State of MP* reported in 2004 Cri. L. J. 2990 has been cited to contend that causing of axe blows from the blunt side resulting in simple injury will not justify framing of charge under Section 307 of IPC.

4. The factual matrix elicited from reading of the FIR is that the accused-petitioners alongwith other co-accused with an intent to commit murder assaulted Kumer Singh on the head with pharsi leading to a lacerated wound measuring 6 x 1.5 cm on the left parieto temporal region as per the MLC of injured Kumer Singh. The Doctor on the very same day when MLC was prepared, certified that the said injury was dangerous to life as injured Kumer Singh was unable to speak and therefore was referred to the District Hospital, Guna for better treatment.

5. It is common knowledge that a pharsi, which is a weapon with sharp cutting edge, if used from the sharp edged side, will in all probability cause an incised wound. Since a lacerated wound has been inflicted on the head of injured Kumer Singh by the accused-petitioners, it is quite possible that the blunt side of the said weapon was used to assault Kumer Singh on his head. The documents on record do not indicate as to whether any X-ray was conducted and, therefore it cannot be ascertained at this point of time as to whether any fracture was sustained or not?

6. The infliction of a lacerated wound by the blunt side of pharsi at first blush appears to entitle the petitioners to the benefit of the case law reported in 2004 Cri. L.J.2990, wherein in ostensibly similar set of circumstances, the Court held that framing of charge under Section 307 of IPC was unsustainable.

7. The factual matrix available in the present case is not identical to the factual matrix attending the case reported in 2004 Cri. L.J.2990. The distinguishing feature, which stands out in the present case, is the certification of the medical authority that the injury on the head sustained by Kumer Singh was dangerous to life. A reading of the decision in the case of *Prabhu Dayal and another Vs. State of MP* reported in 2004 Cri. L. J. 2990 indicates that no such material was available about the injury being dangerous to life in that case and, therefore the said case of *Prabhu Dayal* is distinguishable on facts and thus of no avail to the petitioners.

8. Further reliance has been placed on the decision of *Bhanwar & Anr. Vs. State of MP* reported in 2011 Cr.L.R. (MP) 493 and the case of *Chandrabhan & Ors. Vs. State of MP* reported in 2011 Cr.L.R. (MP) 314.

9. From a perusal of the abovesaid decisions of Bhanwar and Chandrabhan, it is seen that the said cases are further distinguishable on facts as the Court in the said cases was considering the sustainability of the evidence and material on record

for the purpose of conviction/acquittal and not for the purpose of discharge. Thus, the said two cases are further not relevant to the factual matrix of the present case.

10. Before parting, it is essential to deal with the reliance placed by the petitioners on the case of *Dilawar Balu Kurane Vs. State of Maharashtra* reported in 2002 SCC (Cri) 310 in support of the contention that while exercising power of discharge under Section 227 of Cr.P.C., the Judge should discharge the accused if, on the given facts and circumstances, two prima-facie views are equally possible and evidence gives rise to some suspicion but not a grave one. The facts that are available in the instant case specially the allegation of assaulting with an intent to commit murder as mentioned in the FIR corroborated by the injury inflicted on the head which is certified as dangerous to life, there is no occasion for existence of two equal views. The evidence collected by the prosecution on a prima-facie basis at this stage leaves no scope for doubt that there is only one view raising grave suspicion of commission of offence alleged against the accused.

11. From the facts and material available on record, it is crystal clear that the framing of charge under Section 307 of IPC of attempting to murder, for which the allegations in the FIR categorically exist alongwith the certificate of the Medical Authority of the injury being dangerous to life, this Court is of the considered view that no interference is called for with the impugned order of framing charge under Section 307 of IPC, which is, thus, upheld. Consequently, this M.Cr.C. deserves to be and therefore dismissed without any order as to costs.

Petition dismissed.

I.L.R. [2012] M.P., 1454

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No. 12665/2011 (Jabalpur) decided on 22 March, 2012

PRAHLAD GATTANI & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Prevention of Food Adulteration Act (37 of 1954), Section 13(2) – Forwarding of Report of Public Analyst – Sample of ‘Tomato Ketchup’ was found adulterated vide Public Analyst Report dated 23.02.2010 – The declaration made on label of Ketchup disclosed that the Ketchup was ‘best before 6 months’ from January 2010, the months of manufacture – Notice u/s 13(2) was sent to the petitioner only after filing of the complaint before

the Court on 29.07.2011 – Held – Notice U/S 13(2) of the Act along with the copy of the report of the Public Analyst was forwarded to the petitioner a year after the expiry of the shelf life of the sample – In such a situation, where no order of conviction can be recorded on the basis of the report, the proceedings are liable to be interfered with – Petition allowed. (Para 11)

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 13(2) – लोक विश्लेषक की रिपोर्ट को अग्रहित किया जाना – लोक विश्लेषक की रिपोर्ट दिनांक 23.02.2010 द्वारा 'टमाटो केचअप' का नमूना अपमिश्रित पाया गया – केचअप के लेबल पर दी गई घोषणा प्रकट करती है कि केचअप उत्पादन के माह जनवरी 2010 से '6 माह के भीतर बेहतर' – याची को धारा 13(2) के अंतर्गत नोटिस केवल न्यायालय के समक्ष 29.07.2011 को शिकायत प्रस्तुत करने के पश्चात भेजी गई थी – अभिनिर्धारित – अधिनियम की धारा 13(2) के अंतर्गत नोटिस, लोक विश्लेषक की रिपोर्ट की कॉपी के साथ याची को नमूने की बने रहने की अवधि समाप्त होने के एक वर्ष पश्चात भेजा गया – ऐसी स्थिति में, रिपोर्ट के आधार पर दोषसिद्धि का कोई आदेश अभिलिखित नहीं किया जा सकता, कार्यवाहियां हस्तक्षेप किये जाने योग्य – याचिका मंजूर।

Cases referred :

1967 SC 970, 2011(1) FAC 41, 2010 (2) FAC 239, (2007) 7 SCC 71, 2006(1) FAC 58, AIR 1998 SC 2327, AIR 2010 SC 2829, AIR 1992 SC 604.

Surendra Singh with Shivam Singh for the applicants.

Rahul Jain, G.A. for the non-applicant/State.

ORDER

R.C. MISHRA, J.- This petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), has been moved for having the proceedings, pending as Criminal Case No.7619/11 before Shri Sanjay Singh, JMFC, Jabalpur, quashed.

2. In that case, cognizance of the offences punishable under Section 7(i) & (v), Rule 32(b)(2)(v) of the Prevention of Food Adulteration Rules, 1955 read with Section 16(1)(a)(i) and (ii) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the 'Act'), has been taken upon a complaint filed by Amrish Dubey, Food Inspector, on behalf of respondent-State to the effect that the sample of Crosse and Blackwell (Snack Dressing) Tomato Ketchup (for brevity 'Ketchup') manufactured by respondent no.5 M/s Nestle India Limited and stored for sale by petitioner no.1, the proprietor of M/s Ratan Sales in its shop located at 12, Gujarati Colony, Jabalpur, was found to be adulterated.

3. Amongst the other petitioners, petitioner no.2, being Manager (Sales) and In-charge of the Depot at Mangliya, Indore, is nominated by the Manufacturing Company under sub-Section (2) of Section 17 of the Act whereas petitioner no.3 and 4 are respectively the Chairman and Managing Director and Vice President/ Company Secretary of the Company.

4. Following facts are not in dispute -

“One of the samples of Ketchup drawn by Amrish Dubey was forwarded for analysis to Public Analyst, State Food Laboratory, Bhopal and the corresponding report dated 23.2.2010 indicated that sample does not conform to the standard prescribed despite declaration made on label that Ketchup was ‘best before 6 months’ from January, 2010, the month of its manufacture”.

5. Learned Senior Counsel has strenuously contended that the prosecution of the petitioners is an abuse of process of the Court in view of the fact that they have been deprived of their right to get the sample re-analyzed by Central Food Laboratory as contemplated under sub-section (2) Section 13 of the Act. For this, attention has been invited to the fact that the notice, under Section 13(2) of the Act, was sent to the petitioners only after filing of the complaint before the Court on 29.7.2011 whereas the report of the Public Analyst was received in the month of February 2010. According to him, this indifferent and lethargic attitude of the authorities concerned in not taking appropriate action to ensure that valuable right conferred by Section 13(2) is exercised by the petitioners before the expiry of shelf life of the sample, has not only caused a serious prejudice to them but has also resulted in a failure of justice. To buttress the contention, reference has been made to decisions of the Supreme Court in -

(i) *Municipal Corporation of Delhi v. Ghisa Ram* AIR 1967 SC 970

(ii) *State of Maharashtra v. Shivkumar* 2011 (1) FAC 41 (wherein the view taken by Division Bench of the Bombay High Court in *Shivkumar v. State of Maharashtra* (2010 (2) FAC 239 that the prosecution based on the complaint instituted after more than a reasonable period counted from the date of taking of a sample and much after the expiry of the shelf life of the article of food had become worthless due to loss of right under Section 13(2) of the Act was affirmed.

6. While opposing the prayer for quashing the prosecution, learned Govt. Advocate has submitted that no interference under the inherent powers is called for to stifle or scuttle a legitimate prosecution.

7. It is well settled that forwarding the report of public analyst to the accused is not a ritual but a statutory requirement to be mandatorily observed. Way back in 1967, in *Ghisa Ram's* case (supra), the Apex Court (speaking through V. Bhargava, J) had explained significance of the right under Section 13(2) in the following terms -

"It appears to us that when a valuable right is conferred by S.13(2) of the Act on the vendor to have the sample given to him analysed by the Director of the Central Food Laboratory, it is to be expected that the prosecution will proceed in such a manner that right will not be denied to him. The right is a valuable one, because the certificate of the Director supersedes the report of the Public Analyst and is treated as conclusive evidence of its contents. Obviously, the right has been given to the vendor in order that, for his satisfaction and proper defence, he should be able to have the sample kept in his charge analysed by a greater expert whose certificate is to be accepted by the Court as conclusive evidence. In a case where there is denial of this right on account of the deliberate conduct of the prosecution, we think that the vendor, in his trial, is so seriously prejudiced that it would not be proper to uphold his conviction on the basis of the report of the Public Analyst, even though that report continues to be evidence in the case of the facts contained therein.

We are not to be understood as laying down that in every case where the right of the vendor to have his sample tested by the Director of the Central Food Laboratory is frustrated, the vendor cannot be convicted on the basis of the report of the Public Analyst. We consider that the principle must, however, be applied to cases where the conduct of the prosecution has resulted in the denial to the vendor of any opportunity to exercise this right. Different considerations may arise if the right gets frustrated for reasons for which the prosecution is not responsible."

8. It is true that Section 13(2) of the Act has been substituted by Act 34 of

1976 but, under the new Section, the right conferred on the accused to make an application to the court for sending the second part of the sample to the Central Food Laboratory, remained unaffected (See: *State of Gujarat v. Shaileshbhai Mansukhlal Shah* (2007) 7 SCC 71).

9. Significance of the declaration "Best Before" in relation to the right under Section 13(2) of the Act has been explained by a learned Single Judge of the Bombay High Court in *Shri Rohit Mull v. State of Goa* 2006 (1) FAC 58 and the decision was quoted with approval by a Division Bench in *Shivkumar v. State of Maharashtra* (supra). The relevant observations made in *Rohit Mull's* case may be reproduced as under -

"6. ... 'Best Before Date' shown on the label is in terms of Rule 32(i) of the Prevention of Food Adulteration Rules, 1955 and in terms of Explanation VII below the said Rule it means the date which signifies the end of the period under any stated storage conditions during which the product will remain fully marketable and will retain any specific qualities for which tacit or express claims have been made. The explanation also states that however, provided that beyond the date the food may still be perfectly satisfactorily.

....

15. *By now there is unanimity of judicial opinion that when a valuable right is lost to the accused to get the sample reanalysed from the Director, Central Food Laboratory, he can very well claim that prejudice has been caused to him and this is because the report of the Director, Central Food Laboratory, supersedes that of the Public Analyst. Section 13(2) of the Act confers a valuable right on the seller of the article of food to get the sample analysed by the Central Food Laboratory, and while it is in a condition fit for such analysis and in our case that would be on or before the 'Best Before Date'. ...*

....

21. *As already noted in the case of the two of the purchases the notice given to the petitioners/accused was given much after the 'Best Before Date' and in cases of the third purchase, the notice was given just before two days of the said 'Best Before*

Date' thereby making it impossible for the Petitioners, even if they were stationed in this State, to exercise the said right of making an application to the Court concerned to get the sample of the article of food kept by the Local Health Authority analysed by the Central Food Laboratory. Even if the petitioners had made such an application immediately after receiving the said report of the Public Analyst, it would have been impossible for the petitioners to have exercised the said right given to them in such a short period. In other words, the Complainants made it impossible for the accused to exercise the right under Subsection 2 of Section 13 of the Act. In such a situation no conviction against the accused would be possible and therefore no useful purpose would be served by continuing with the prosecutions under Sections 7/16 of the Act.

10. This Court is not oblivious of the decision of the Apex Court in *State of Haryana v. Brij Lal Mittal* AIR 1998 SC 2327, laying down that delay in filing complaint till expiry of shelf life of drugs can not be treated as a ground to quash the prosecution. However, the case is not only distinguishable on facts but also on law. In that case, manufacturers' right, under sub-Section (4) of Section 25 of the Drugs and Cosmetics Act, 1940, to get the sample tested by the Central Drugs Laboratory, had expired four months before the expiry of the shelf life upon their failure to notify intention, in accordance with sub-section (3), to adduce evidence in controversion of report of Government Analyst within the prescribed period of twenty eight days from the receipt of the copy thereof. Further, in a subsequent decision rendered in *Northern Mineral Limited v. Union of India* AIR 2010 SC 2829, the Supreme Court, while dealing with Section 24(3) of the Insecticides Act, 1968, which is in pari materia with S.25(3) of the Drugs and Cosmetics Act, proceeded to discharge the appellant on the premise that no step could be taken for analysis of the sample by Central Insecticides Laboratory due to sheer inaction on the part of the authorities concerned resulting in expiry of its shelf life despite the fact that the accused had notified its intention to adduce evidence in controversion of the report of Insecticide Analyst.

11. Adverting to the facts of the case, it may be observed that the notice under Section 13(2) of the Act along with the copy of the report of the Public Analyst was forwarded to the petitioner no.1 on 29.7.2011 i.e. nearly a year after the expiry of the shelf life of the sample. In such a situation, where no order of conviction can be recorded on the basis of the report, the proceedings are liable

to be interfered with. Moreover, the alleged violation of Rule 32(b)(2)(v) [ibid] also would not assume any significance. It is relevant to note that the Ketchup was not declared as misbranded as defined in Clause (ix) of Section 2 of the Act.

12. To sum up, even if the allegations made against the petitioners in the complaint, are taken at their face value and accepted in their entirety, no offence under the Act would be made out. As such, the case against the petitioners fall under category (1) and (6) of the cases, as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting interference under the inherent powers.

13. Although, adulteration of food is a menace to public health and the Act has been enacted with an aim of eradicating that antisocial evil and ensuring purity in the articles of food yet, the authority concerned are duty bound to ensure that the valuable right conferred by Section 13(2) of the Act is not defeated due to inefficiency and ineptitude.

14. For these reasons, the petition is allowed and the proceedings in Criminal Case No. 7619/11 (above) are hereby quashed. However, the District Magistrate, Jabalpur is directed to identify the officials responsible for not launching the prosecution immediately after receipt of the report of Public Analyst and for allowing the shelf life of the sample to expire, and take appropriate action against them after affording opportunity of being heard.

Petition allowed.

I.L.R. [2012] M.P., 1460

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No. 12835/2010 (Jabalpur) decided on 28 March, 2012

ANNU @ ANIL

...Applicant

Vs.

RAJESH & ors.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 203, 197(3) & 482 – Inherent powers of High Court – Direction to issue process – Complaint filed impleading 7 persons as accused – The Magistrate proceeded to ascertain whether sufficient grounds for initiating action against the respondents for all the offences, existed – The question was answered in the negative for the reasons as recorded in order sheet – Addl. Sessions Judge affirmed the order of Magistrate – The scope of

interference under Section 482 of the Code, with a revisional order is limited in view of the rider placed by sub-Section (3) of Section 397 of the Code — Held — High Court may correct any mistake committed by the revisional Court only where, on examination of the record, it finds that there is grave miscarriage of justice or abuse of the process of the Court or the required statutory procedure has not been complied with or there is failure of justice — No such case is made out — Petition dismissed.

(Paras 2 & 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 203, 197(3) व 482 — उच्च न्यायालय की अन्तर्निहित शक्तियाँ — प्रोसेस जारी करने के लिए निदेश — 7 व्यक्तियों को अभियुक्त के रूप में आरोपित करते हुए शिकायत प्रस्तुत की गई — मजिस्ट्रेट ने यह सुनिश्चित करने के लिए कार्यवाही की कि क्या प्रत्यर्थागण के विरुद्ध सभी अपराध के लिए कार्यवाही आरंभ करने के लिए पर्याप्त आधार मौजूद हैं — प्रश्न का नकारात्मक उत्तर दिया गया जिसके आदेश पत्र में कारण अभिलिखित किये गये हैं — अतिरिक्त सत्र न्यायाधीश ने मजिस्ट्रेट के आदेश की पुष्टि की — संहिता की धारा 397 की उप धारा (3) द्वारा लगाई गई शर्त को दृष्टिगत रखते हुए संहिता की धारा 482 के अंतर्गत पुनरीक्षण आदेश में हस्तक्षेप की व्याप्ति सीमित है — अभिनिर्धारित — उच्च न्यायालय, पुनरीक्षण न्यायालय द्वारा कारित किसी गलती को केवल तब सुधार सकता है जब अभिलेख के परीक्षण उपरांत वह पाता है कि न्याय की घोर हानी हुई है या न्यायालयीन प्रक्रिया का दुरुपयोग हुआ है या आवश्यक कानूनी प्रक्रिया का पालन नहीं किया गया है या न्याय नहीं हुआ है — ऐसा कोई मामला नहीं बनता — याचिका खारिज।

Case referred :

(2012) 3 SCC 383.

Bhoop Singh, for the applicant.

Alok Vaghecha, for the non-applicants.

ORDER

R.C. MISHRA, J. - With consent, the matter is finally heard.

1. This is a petition, under Section 482 of the Code of Criminal Procedure, for a direction to issue process against all the three respondents. In this regard, the petitioner is aggrieved by order dated 28.10.2010 passed by Sixth Addl. Sessions Judge, Sagar, in Criminal Revision No.195/2010, affirming rejection of his complaint against the respondents in respect of the offences punishable under Sections 147, 148, 149, 294, 323, 324, 307 and 392 of the IPC.

2. The complaint was filed on 31.8.2009, impleading as many as 7 persons including the respondents as accused. However, in view of the fact that after due investigation, charge-sheet for the offences under Sections 294, 506B and 307 read with 34 of the IPC had already been submitted by the police against the other 4 persons arraigned as accused in the complaint, learned Magistrate proceeded to ascertain whether sufficient grounds for initiating action against the respondents for all the offences, existed. The question was answered in the negative for the reasons recorded in the order-dated 16.8.2010, that formed subject matter of the revision.

3. According to the petitioner, at the time of lodging of the FIR, although he had stated that all the seven persons including the respondents were involved in attempting to kill him by inflicting injuries with various weapons yet, the scribe only recorded the names of Sattu @ Satyanarayan Kesharwani, Sunnu @ Sohan, Avinash Kesharwani and Chhota @ Akash Kesharwani. Thereafter, on 13.8.2009, he made a representation to the Superintendent of Police against non-registration of case against the respondents, while inviting attention to the aforesaid misconduct of the writer of the first information as well as to the fact that in the statement recorded by the Executive Magistrate as his dying declaration, their names and respective roles were clearly mentioned.

4. In support of the allegations made in the complaint, the petitioner subjected himself to examination and also produced 8 other witnesses including the Executive Magistrate and Medical Experts.

5. A bare perusal of the order-dated 16.8.2010 (supra) would reveal that the complaint was dismissed for the following reasons –

(i) At the time of recording of the so-called dying declaration, condition of the petitioner was not so critical as to justify need for calling of the Executive Magistrate for the purpose.

(ii) Gopal Singh, the Executive Magistrate, was not able to explain as to whether he was called to the hospital by the treating doctor or by the investigating officer.

(iii) In the statement recorded by the Executive Magistrate, on 5.8.2009, the respondent nos.1 and 3 were not specifically named as offenders.

(iv) No cogent explanation was furnished by the petitioner for not mentioning the names of the respondents in the FIR as well as in the case diary statement recorded on 5.8.2009 only.

(v) There was no medical opinion suggesting that while lodging the report or giving statement before the investigating officer, the petitioner was not in a fit mental condition.

6. Learned counsel for the petitioner has submitted that in his examination, Gopal Singh, the Executive Magistrate, clearly stated that he had recorded the dying declaration upon receipt of letter of request from the investigating officer. However, it is well settled that a person should not be dragged into Court merely because a complaint has been filed against him.

7. All the material aspects of the matter whether legal or factual have been considered by learned ASJ in a right perspective while affirming the order-dated 16.8.2010 (above). The scope of interference, under Section 482 of the Code, with a revisional order is limited in view of the rider placed by sub-Section (3) of Section 397 of the Code. Accordingly, this Court may correct any mistake committed by the revisional Court only where, on examination of the record, it finds that there is grave miscarriage of justice or abuse of the process of the Court or the required statutory procedure has not been complied with or there is failure of justice. But, no such case is made out.

8. There is yet another aspect of the matter. As pointed out already, after due investigation, charge-sheet in respect of the aforesaid offences has already been presented against four persons named as co-accused in the complaint and in such a situation, in the course of trial, on the basis of the evidence if it appears to the trial Judge that any person not being the accused in the trial has committed the offence and the case is made out for exercise of power under Section 319 of the Code for proceeding against such person, it will be open to him to proceed accordingly and the present order will not come in the way in exercise of his power under Section 319 of the Code (See, *Jile Singh v. State of U.P.* (2012) 3 SCC 383).

For these reasons, the petition stands dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 1464

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice R.C. Mishra*

M.Cr.C. No. 5705/2011 (Jabalpur) decided on 30 March, 2012

LAKHPATI PRASAD

...Applicant

Vs.

RAJNI GUPTA

...Non-applicant

Penal Code (45 of 1860), Section 498 – Procedure – Trial Court initially adopted the procedure prescribed for a warrant case instituted otherwise than on a police report – Recorded evidence of respondent and her witnesses at pre-charge stage – Instead of framing charge only explained particulars of offence and thereafter converted the warrant trial into summons trial – Held – Order explaining particulars of offence set aside – Trial Court directed to frame charge of the offence and afford them an opportunity to further cross examine the respondent and her witnesses.

(Paras 4 & 5)

दण्ड संहिता (1860 का 45), धारा 498 – प्रक्रिया – विचारण न्यायालय ने आरम्भ में पुलिस रिपोर्ट को छोड़कर अन्य संस्थित वारंट प्रकरण की प्रक्रिया का अवलंब लिया – आरोप-पूर्व प्रक्रम पर प्रत्यर्थी एवं उसके साक्षियों की साक्ष्य अभिलिखित की गई – आरोप विरचित करने की बजाये केवल अपराध की विशिष्टियां स्पष्ट की गई और तत्पश्चात वारंट विचारण को समंस विचारण में संपरिवर्तित किया – अभिनिर्धारित – अपराध की विशिष्टियां स्पष्ट करने का आदेश अपास्त – विचारण न्यायालय को अपराध के आरोप विरचित करने के लिये और उन्हें प्रत्यर्थी एवं उसके साक्षियों को आगे प्रतिपरीक्षण करने का अवसर प्रदान करने के लिये निदेशित किया गया।

Case referred :

AIR 1997 SC 987.

*Rajesh Dubey, for the applicant.***ORDER****R.C. MISHRA, J. - Arguments heard.**

1. This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'). The petitioners are aggrieved by the order-dated 19.4.2011 passed by IIIrd ASJ, Sidhi in Cri. Revision No.31/08, affirming the order-dated 3.1.2008 passed by CJM, Sidhi in Cri. Case No.470/07, whereby particulars of

the offence under Section 498 of the IPC were explained to them for the purpose of recording their plea.

2. In that case, cognizance of the offence was taken against the petitioners only upon respondent's complaint, that also contained allegations as to offences punishable under Sections 496 and 498 of the IPC against his wife Shashi Gupta.

3. Main grievance of the petitioners centres around rejection of their application said to have been moved, under Order 41 Rule 27 read with 151 of Code of Civil Procedure, for bringing additional documents on record. However, considering the scope of interference under the revisional jurisdiction, rejection of prayer for taking additional documents does not call for any interference.

4. There is yet another aspect of the matter, though not highlighted by learned counsel for the petitioners before the revisional Court or this Court. Although, the offence, being punishable with imprisonment extending to 2 years, is triable by summons procedure yet, learned Magistrate proceeded to follow the procedure prescribed for a warrant-case instituted otherwise than on a police report and recorded evidence of the respondent and his witnesses at the pre-charge stage. However instead of framing a charge, he only explained particulars of the offence, presumably under Section 251 of the Code, which is applicable to a summons trial. Further, by a subsequent order passed on 6.4.2008, he proceeded to convert the warrant trial into summons trial. This glaring irregularity of the procedure deserves to be corrected in exercise of the power of superintendence under Section 483 of the Code (See. *Krishnan Vs. Krishnaveni* AIR 1997 SC 987).

5. In such a situation, the order-dated 3.1.2008 (supra), explaining the particulars of the offence and the order-dated 6.4.2008 are hereby set aside and the CJM is directed to frame charge of the offence under Section 498 of the IPC against each one of the petitioners and to afford them an opportunity to further cross-examine the respondent and his witnesses with reference to their statements recorded at the pre-charge stage and to proceed with the trial in accordance with the procedure prescribed for a warrant case.

6. Needless to say that in the post-charge cross-examination, the petitioners, if they so desire, may also ask questions with reference to any relevant document sought to be tendered in evidence.

7. Copy of this order be forwarded to Sessions Judge, Sidhi for information and necessary action on the administrative side.

Order accordingly.

I.L.R. [2012] M.P., 1466
MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.D. Saxena

M.Cr.C. No. 8065/2011 (Gwalior) decided on 9 April, 2012

AVNEESH

...Applicant

Vs.

STATE OF M.P. & ors.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 323 – Committal – Cross cases arising out of the same incident – One trial has commenced before the Court of Judicial Magistrate and another trial after committal has commenced before the Sessions Court – Held – It would be desirable for the trial Magistrate to commit the case pending before him to the Court of Sessions to be tried by the same court alongwith cross case – However, the judgments shall be delivered separately on merits of each case by the Court. (Paras 3 & 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 323 – उपार्पण – एक ही घटना से प्रतिप्रकरण उत्पन्न हुए – एक विचारण प्रकरण न्यायिक मजिस्ट्रेट के न्यायालय के समक्ष आरंभ हो चुका है और अन्य विचारण उपार्पण पश्चात् सेशन न्यायालय के समक्ष आरंभ हुआ है – अभिनिर्धारित – विचारण मजिस्ट्रेट के लिए उसके समक्ष लंबित प्रकरण सेशन न्यायालय के समक्ष उसी के साथ प्रतिप्रकरण उसी न्यायालय द्वारा विचारण किये जाने हेतु उपार्पित करना वांछनीय होगा – किन्तु, न्यायालय द्वारा प्रत्येक प्रकरण के गुण दोषों पर पृथक निर्णय दिया जाएगा।

Case referred :

2001 SC 826.

V.K. Saxena with Aditya Singh, for the applicant.

R.K. Shrivastava, P.L. for the non-applicant No.1/State.

ORDER

G.D. SAXENA, J. - This petition under Section 482 of the Code of Criminal Procedure Code 1973 has been preferred by the petitioner against an order dated 30th September, 2011 passed by the Additional Sessions Judge, Jaura, district Morena in Cri. Rev.No. 176/20.

(2) A bare reading of the documents filed and the orders impugned passed by the two courts-below, indicated that on 7th November 2011 at about 2 p.m., in front of the house of Avnish Sharma (petitioner), all the accused/respondents

having armed with guns and country-made pistols reached the house of complainant and with an intention to endanger the human life, opened fire in the air. The accused were also shouting to drag the petitioner and his family-members out from their house to kill them. An FIR of the incident was lodged at the police station concerned. The counter report of the incident occurred on a same day before the house of Ramdeen Sharma, was also lodged by Om Prakash, the accused against the complainant-party on the basis of which an offence under Section 307/34 of I.P.C. was lodged. As per spot map prepared in both the matters shows that the place was in between the houses of petitioner Avinash Sharma and Ramdeen Sharma. After investigation, the charge-sheets were filed before criminal courts. One trial is commenced before the Court of Judicial Magistrate and another trial after committal is commenced before the Sessions Court at Jaura.

(3) By the impugned order, the learned revisional court has refused to entertain prayer of the petitioner for trial of both cases by one court. It is submitted by the learned counsel appearing for the petitioner that there are two cross-cases arise out of the same incident, firstly was registered at Crime No.162/10, for the offence punishable under Section 307/34 of I.P.C. and the other was registered at Crime No.163/10 which is pending before the Judicial Magistrate First Class, Jaura, district Morena. Since one of them is exclusively triable by the Sessions court while the other is not, therefore, by moving an appropriate application under Section 323 of Cr.P.C., it was prayed that both the cases be heard together by the same court. But this application was rejected up to the stage of revisional court by the court of Sessions.

(4) Heard the learned counsel appearing for the petitioner as well as learned Panel Lawyer for the respondent No.1/State. Also perused the relevant papers available on the record.

(5) On perusal of the provision of Section 323 of the Code, what could be found is that the jurisdiction, created by this section as regards the committal of a case, could be exercised by a Magistrate at any stage of the proceeding before signing of the judgment. The consideration under which the powers under section 323 of the Code could be exercised by a Magistrate is that the "case" should appear to him to be one which ought to be tried by the court of Sessions. Here, again, the word "appears" has been used by the legislature.. and that amply indicates that it could not be permissible for the Magistrate to commit each and every case to the court of Sessions unless he has applied his judicial mind to the facts which might be in the form of the evidence which could have been received by him

during the course of the trial that he had formed an opinion that the case required to be committed to the court of Sessions.

(6) The difference in the provision of sections 209 and 323 of the Code appears very clear. For exercising the powers to commit the case to the court of Sessions, the consideration for a Magistrate under section 209 of the Code is the nature of offence and its trial forum. The forum of trial of different offences have been prescribed by the legislature in the first schedule of the Code which classifies the offences under the Penal Code in various ways and also indicates as to by which court a particular offence could be triable. For reaching the conclusion that the offence is exclusively triable by the court of Sessions, the Magistrate has to go to the first schedule of the Code but, before that, he has to read and consider the facts of the case for finding out as to whether ingredients of an offence were constituted by facts presented by the police so that he could record a finding that an offence exclusively triable by the court of Sessions was made out on facts. If he could not record a finding of the above nature, then the Magistrate does not have the jurisdiction under section 209 of the Code to commit the case to the court of Sessions.

(7) So far as the jurisdiction vested under section 323 of the Code is concerned, the very provision does not indicate that the consideration for the Magistrate so as to acting under the above provision, could be as to what offence was really constituted by the facts of a case. He has simply to consider the nature of the case. It is plain from the above provision that a Magistrate can never try an offence which could not be triable by him or which he thinks be tried by other courts. There are provisions in the Code requiring the Magistrate to part with the trial of a case if he finds that he has no jurisdiction to try a case or he does not have the jurisdiction either to commit it for trial and further if he finds that the case was one which should be tried or committed for trial by some other Magistrate in the district. He may also find that the case could be tried by the Chief Judicial Magistrate. What action the Magistrate has thereafter to take is provided by section 322 of the Code. Likewise, on conclusion of the trial, if the Magistrate finds that he cannot pass sufficient sentence, then there is a provision under section 325 of the Code under which he has to part with the case and refer the matter back to the Chief Judicial Magistrate who could act as per the provision of that particular section. But, when the Magistrate comes to a conclusion that the case was one which ought to be tried by the court of Sessions, then he has never to consider the nature of offence. Therefore, in my considered view, the Magistrate could record a finding to the effect that the case was one which ought to be tried by the court of

Sessions if he considers not only the evidence led in proof of the commission of the offence, but also the attending circumstances under which the offence was committed.

(8) At this juncture, it would be relevant to refer the decision in the case of *In Sudhir Vs. State of M.P. (AIR 2001 SC 826)* the Hon. Apex Court held as under:-

“The practical reasons for adopting a procedure that such cross-cases shall be tried by the same Court, can be summarized thus : (1) It staves off the danger of an accused being convicted before his whole case is before the Court. (2) It deters conflicting judgments being delivered upon similar facts; and (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.”

(9) On consideration of the above, in the opinion of this court, had the Magistrate read the circumstances and facts correctly and the law governing the case, the position would have been different, but unfortunately both the courts have left to consider. Hence, in the light of the judgment of the Apex court in the case of *Sudhir* (supra), and considering the factual aspects, noticed above, it would be desirable to direct the trial Magistrate to commit the case pending before him to the court of Sessions being Criminal Case No.1149/10, arising out of FIR No.163/10 to be tried by the same court alongwith S.T.No.176/11, being Criminal Case No.1148/10, arising out of FIR No.162/10. However, the judgments shall be delivered separately on merits of each case by the court.

(10) As a sequel of the above, the petition stands allowed dismissing the order impugned dated 30/9/11 passed by the revisional court, in the manner aforesaid.

Petition allowed.

I.L.R. [2012] M.P., 1469

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C. No. 1676/2012 (Jabalpur) decided on 13 April, 2012

CHANDA BAI (SMT.)

Vs.

STATE OF M.P.

...Applicant

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 320, Penal Code (45 of 1860), Section 498-A – Compounding – Order of conviction

can not be quashed in exercise of power under Section 482 – However, factum of compromise can be taken into account while determining the quantum of sentences. (Para 4)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320, दण्ड संहिता (1860 का 45), धारा 498-ए – शमन करना – धारा 482 के अंतर्गत शक्ति के प्रयोग में दोषसिद्धि के आदेश को अभिखंडित नहीं किया जा सकता – किन्तु, समझौते के तथ्य को दण्डादेश की मात्रा का निर्धारण करते समय विचार में लिया जा सकता है।

Cases referred :

2004(2) MPHT 278, AIR 2003 SC 1386, (2008) 5 SCC 794.

V.K. Rishi, for the applicant.

Akhilesh Singh, P.L. for the non-applicant/State.

ORDER

R.C. MISHRA, J. - Arguments heard.

1. This is a petition, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), for quashing the judgment-dated 24.11.2011 passed by Shri Ahmad Raja, Judicial Magistrate First Class, Narsinghpur in Criminal Case No.3400/2010, whereby each one of the respondent nos.2, 3 and 4, respectively husband, brother-in-law and mother-in-law of the petitioner, have been convicted and sentenced as under -

Convicted under Section	Sentenced to
498A of the IPC	undergo R.I. for 3 years and to pay fine of Rs.300/- and in default, to suffer R.I. for 1 month.
4 of the Dowry Prohibition Act, 1961	undergo R.I. for 1 year and to pay fine of Rs.500/- and in default, to suffer R.I. for 1 month

with the direction that the sentences shall run concurrently.

2. According to the petitioner, all the disputes prevailing between her and the respondent nos.2, 3 and 4 have been settled amicably and therefore, she is not interested in making them to suffer the sentences. However, the compromise application filed in the corresponding criminal appeal no.221/11 has been rejected vide order-dated 1.2.12 passed by First ASJ, Narsinghpur on the ground that none of the offences is compoundable.

3. Learned counsel for the petitioner, while placing reliance on the decision of this Court in *Kamlakar Mahadevrao Patil v. State of M.P.* 2004 (2) MPHT 278, has submitted that the judgment of conviction is liable to be set aside in the

light of the pronouncement of the Supreme Court in *B.S. Joshi v. State of Haryana* AIR-2003 SC 1386. But, the fact remains that in *B.S. Joshi's* case, it was the FIR relating to the offences including the one under Section 498A of the IPC, that was quashed with the observation that in view of the compromise, chance of an ultimate conviction was bleak whereas, as pointed out already, in the instant case, the respondent nos.2, 3 and 4 have already been convicted upon a full trial.

4. Further, the Apex Court, in *Arvind Barsaul (Dr.) v. State of M.P.*, (2008) 5 SCC 794, did not interfere with the order passed by a co-ordinate Bench of this Court, rejecting an identical prayer made in almost a similar situation and proceeded to quash the criminal proceedings in exercise of the discretionary jurisdiction, under Article 142 of the Constitution of India, to do complete justice whereas no such power is available to this Court. As an obvious corollary, order of conviction and sentence cannot not be quashed in exercise of inherent powers under Section 482 of the Code.

5. The petition, therefore, stands dismissed. Needless to say that factum of compromise can be taken into account while determining the quantum of sentences, in case the appellate Court finds the convictions to be well merited.

Petition dismissed.

I.L.R. [2012] M.P., 1471

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice G.D. Saxena

M.Cr.C. No. 1439/2010 (Gwalior) decided on 18 April, 2012

LML LIMITED & ors.

...Applicants

Vs.

SHRI KAILASH NARAIN RAI & anr.

...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Inherent Powers – Exercise of the inherent power to quash the proceeding instituted on complaint is called for only where the complaint does not disclose any offence or is frivolous, vexatious or oppressive.

While considering whether allegations in the complaint and the initial deposition and the documents relied upon by the complainant *prima facie* establish the offence alleged, the Court is not bound to accept allegations which are even opposed to common sense and broad probabilities. (Paras 13, 35)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित

शक्तियाँ — शिकायत पर से संस्थित कार्यवाही को अभिखंडित करने के लिए अंतर्निहित शक्तियों के प्रयोग की आवश्यकता केवल तब होती है जब शिकायत कोई अपराध प्रकट नहीं करती या ओछी है, तंग करने वाली या दमनकारी है।

यह विचार करते समय कि क्या शिकायत के अभिकथन एवं आरंभिक कथन तथा शिकायतकर्ता द्वारा जिन दस्तावेजों पर विश्वास किया गया प्रथम दृष्ट्या अभिकथित अपराध स्थापित होता है या नहीं, न्यायालय ऐसे अभिकथनों को स्वीकार करने के लिए बाध्य नहीं है जो सहज बुद्धि एवं विस्तृत संभावनाओं के भी विरुद्ध हैं।

B. Penal Code (45 of 1860), Section 420 – Accusation –
Except vague allegations lacking in material particulars, there is nothing in the complaint to constitute the offence of conspiracy – Allegations in the complaint are patently absurd and inherently improbable – Complainant failed to make out a prima facie case – Dispute is of civil nature and the impugned criminal proceeding appears to be frivolous, vexatious and mala fide initiated with the oblique motive – Criminal proceeding against the petitioners is quashed.

(Paras 39, 40 & 41)

ख. दण्ड संहिता (1860 का 45), धारा 420 – दोषारोपण – शिकायत में मात्र अस्पष्ट अभिकथन तात्त्विक विशिष्टियों के अभाव में षड्यंत्र का अपराध गठित करने के लिए कुछ नहीं है — शिकायत के अभिकथन स्पष्टतः असंगत है तथा अंतर्निहित रूप से असंभाव्य है — शिकायतकर्ता प्रथम दृष्ट्या प्रकरण साबित करने में विफल रहा है — विवाद सिविल प्रकृति का है और आक्षेपित दाण्डिक कार्यवाहियाँ ओछी, तंग करने वाली और दुराशयपूर्ण प्रतीत होती हैं जो अस्पष्ट उद्देश्य के साथ आरंभ की गई हैं — याचीगण के विरुद्ध दाण्डिक कार्यवाहियाँ अभिखंडित।
Cases referred :

AIR 1975 SC 1002, AIR 1949 CAL. 586, 1974 CRN 403, (1949) 19 COMP CAS 46 ; AIR 1949 CAL 689, (1987) 1 CHN 359, (1960) 3 SCR 388; AIR 1960 SC 866, AIR 1976 SC 1947, (1977) 4 SCC 551, (1978) 4 SCC 58, (1981) 2 SCC 454, (1990) SUPP.SCC 686, (1977) 2 SCC 699, AIR 1998 SC 709, 1992 SUPP.(1) 335, (1982) 1 SCC 466, 1991 AIR SCW 1353, AIR 1982 SC 949, (1979) 2 CHN 198, (1988) 2 CRIMES 694, AIR 1941 SIND 198.(2011) 13.SCC 412.

R. Santhanam with Rajeev Upadhyaya, for the applicants.

R.D. Agrawal, for the non-applicant No.1/Complainant.

R.K. Shrivastava, P.L. for the non-applicant No.2/State

ORDER

G.D. SAXENA, J.:- Seeking indulgence of this court under inherent jurisdiction, the petitioners have come up challenging the validity of the order dated 15th February, 2010 passed in Criminal Revision No.19/08 by the Second Additional Sessions Judge (Fast Track) Datia. By the said order, the learned Sessions Judge has dismissed the revision of the petitioners and uphold the order dated 9th January 2007 of the learned trial Magistrate passed under Section 204 Cr.P.C. upon the complaint of respondent No.1. It is thus requested to set aside both the impugned orders dated 15th February 2010 and 9th January 2007 passed by the two courts for issuing the process against the petitioners on the complaint and also to quash the complaint of the respondent No.1 registered by the learned trial Magistrate.

(2) The facts as emerged out of the record of the courts below and the complaint of the respondent No.1 and as per the averments contained in the petition are the petitioner LML Limited is a Public Limited Company incorporated under the Companies Act 1956, having its own Registered Head Office at C-3 Panki Industrial Estate Kanpur U.P. The petitioner No.1-company was engaged in manufacture of two wheeler scooters and of its components and spare parts from its factory situated at C-6 to C-10 at Panki Industrial Estate Kanpur U.P. For smooth functioning, the company had appointed dealers and sub-dealers for sale of its vehicles as well as parts thereof in various cities in India on the agreed terms and period. Under that policy, the petitioner had appointed the complainant/respondent No.1 as a dealer in the name and style of "M/s Rai Motors at Datia" for sales, service and spares of LML range of two wheelers. In compliance to the said agreement executed between the company and the dealer, the appointed dealer/complainant was required to deposit a sum of Rs. 50,000/- (Rs. Fifty Thousand) towards security deposit in the form of a demand draft in favour of LML Limited payable at Kanpur, which shall carry interest @ 12% per annum. This agreement came into force on and with effect from 1/4/09 and the term of the same was for a period of three years commencing from the effective date. As per the duties and obligations assigned in the agreement, the dealer was required from time to time to buy from the company in wholesale such number of scooters as may be offered to it by the company at such prices specified by the Company by making arrangements for payment for the said scooters as per the policy and procedure of the petitioner No.1-company. It

is alleged that during the period of trade fair held at Gwalior, on the demand of the complainant, the requisite number of two wheeler vehicles were not supplied to the complainant in consequence of which, the respondent No.1 was compelled to purchase the vehicles from other authorized dealer at Gwalior for making available vehicles to the costumers. The response of the officials on phone was not healthy and satisfactory. Accordingly, a complaint was filed against the petitioner No.1-company and its officers on which the learned trial Magistrate took cognizance and issued process.

(3) The submissions of the petitioners are that the relationship between the petitioners-company and the respondent No.1-complainant is still in existence. So, unless the dealership of the company is in existence, the company is entitled to retain the security amount deposited by the complainant on which the complainant is getting interest regularly from the company. It is contended that there was no such intention to cheat and commit breach of contract. The goods could not be supplied due to supervening factors which were beyond the control of the company, which was the result of illegal strike by workmen in January 2006. The factory re-started its production in April 2006. During this period, there was no production or clearance of twowheelers which was wholly beyond the control of the company and the company became Sick Industrial Undertaking before BIFR from September 2006 till May 2007. It is submitted that the complainant had taken undue advantage of the unavoidable problems and circumstances by filing a complaint on dated 22nd December 2006 on false grounds against the company and its officers. It is submitted that the complainant was well aware of the facts that till the continuity of his dealership with the company, he was not entitled for getting back the security amount. He was also aware of the facts that due to aforesaid circumstances, the company was not in a position to make good the demands of the complainant. Hence, he levied totally false allegations against the company and its employees. The complainant as per terms of the agreement could not avail of the settlement of dispute through Arbitrators at Kanpur. It is submitted that the alternative remedy was available to the complainant but he did not avail of the same and the contract of dealership not having been terminated by the company, the complainant resorted to an illegal and malicious action by circumventing section 22 of the said Act which by itself was not permissible in law. The learned counsel for petitioner submitted that in case the complainant suffered any loss despite of depositing the money with the company, the only remedy for the complainant was to pursue the civil claim in the appropriate

forum. It is submitted that the company and its officers were always willing and ready for amicable settlement with its authorized selling agents working in various cities for any financial uncomfortable in past bad days of the company. It was also contended that the trial Magistrate had no territorial jurisdiction to entertain the complaint. At relevant time of presenting the complaint in criminal court and taking cognizance against the company, the company was sick industry company so the actions against the petitioner No.1-company was expressly barred by the provisions contemplated in Section 22 (1) of SICA, as stated above. The accused company and its officers had no opportunity to raise the grounds as above before the trial Magistrate. It is submitted that the petitioners-company in revision filed raised the grounds above before the learned revisional court but the revisional court did not consider the legal aspect and confirmed the order of issuance of process for attendance of the accused/petitioners. Therefore, it is prayed that by allowing the petition, the order of trial Magistrate for issuance of process for attendance of the accused/petitioners under Section 204 of Cr.P.C. be set aside and the cognizance taken on the complaint be quashed. A series of judgments of the Apex court have been relied upon by the petitioners in support of the submissions put forth above.

(4) Per contra, the learned counsel for the respondent No.1 denied that the transaction in question is purely of civil nature and this question can be ascertained after investigation. It is submitted that the learned trial Magistrate did not commit any error in taking cognizance upon the complaint after going through the statements recorded under Sections 200 and 202 of Cr.P.C. and the documents filed for taking cognizance under Section 420 of I.P.C. against the company and its officers/employees. As regards protection under Section 22(1) SICA, same is not available for criminal acts of the company or its directors/officers/employees. It is submitted that the powers of inherent jurisdiction vested in Section 482 of Cr.P.C. may be exercised by the High court which is an exceptional provision. It is submitted that in a given case, the contentions raised by the petitioners can not be considered and the petitioners may raise their grievance during the proceedings of trial. Hence, it is stated that quashing of criminal proceedings is not proper especially when prima facie case is made out against the accused. The counsel for respondent No.1 also contended that in the light of the order dated 18th January 2008 in Misc. Cri. Case No. 1260/2007 and looking to the entire facts and circumstances and the proposition of law laid down by the Apex Court, it

would not be appropriate to interfere in the impugned orders because the petitioners have an alternative remedy available and they may contest the criminal proceedings in the trial court. Apart from the above, it is also submitted that the order dated 18th January, 2008 is binding on the parties and the subsequent petition seeking same relief is not maintainable being hit by the principles of res judicata as the objections raised in the case at hand were already considered at earlier point of time by this court. To support his contention, a series of judgments decided by Apex Court and High Court were relied upon by the learned counsel for respondent No.1/complainant.

(5) I may take up the last contention of the learned counsel appearing for the complainant/respondent No.1 first for consideration that the subsequent petition under Section 482 of Cr.P.C. is not maintainable because same would be tantamount to a re-view of its earlier order dated 18th January 2008 passed by this court in Misc. Cri. Case No. 1260/2007.

This contention has no force in the light of the observations made in the case of *Superintendent and Remembrancer of Legal Affairs, W. B. Vs. Mohan Singh (AIR 1975 SC 1002)* and there is no bar to entertain the subsequent petition under Section 482 of Cr.P.C. by this court.

(6) Keeping the above in mind, let me now consider whether the impugned proceeding is liable to be quashed.

(7) Let me first consider the alleged offence of cheating. It is well-settled that the offence of cheating is established only when all the following ingredients are present :

“(a) that the representation made by the accused was false ;

(b) that the accused knew that the representation was false at the very time when he made it ;

(c) that he made the false representation with the dishonest intention of deceiving the person to whom it was made ;

(d) that he thereby induced that person to deliver any property or to do something which would otherwise not have been done or omitted.”

(8) The question whether the evidence discloses only a breach of civil

liability or a criminal offence under Section 420 of the Penal Code, depends upon whether the complainant in parting with his money acted on the representations of the accused and in belief of the truth thereof and whether those representations when made were in fact false to the knowledge of the accused and whether he had a dishonest intention from the outset.

(9) In *Matilal Chakravarty v. King* (AIR 1949 Cal 586), it was observed by Harries C. J.:-

"In order to constitute an offence under Section 420, it must be shown that the person who parted with the property was cheated and thereby dishonestly induced to deliver the property ... to cheat a person there must be a dishonest and fraudulent intent. A person may be deceived quite innocently, but such deception can never amount to cheating. Where, however, a person is deceived knowingly, then the deception might well amount to cheating. A man may be induced to do something on a false representation made to him. If the person making the representation honestly believed the representation to be true, there can be no question of cheating. But if he knew that the representation was false and he made it with a view that the other person should act upon it, then that would amount to cheating".

(10) The offences alleged in the complaint under Sections 420, 405, 406/34 of the Indian Penal Code are all offences having mens rea as one of the essential ingredients thereof. The accused committing the offences must have a guilty mind and as such a juristic person such as a body corporate cannot be prosecuted for the said offences.

(11) In *Champa Agency v. R. Chowdhury* [1974] CRN 403, the question that arose for consideration was whether a company or a corporate body can be prosecuted for an offence under the Indian Penal Code where mens rea is an essential ingredient. It was held that mens rea is an essential ingredient of the offence of criminal breach of trust including criminal breach of trust by carriers. The accused-petitioner No. 1 being a corporate body cannot be said to have the necessary mens rea and as such it cannot be prosecuted for an offence under the Indian Penal Code. The same view was taken in *Sunil Chandra Banerjee v. Krishna Chandra Nath* [1949] 19 Comp Cas 46;

AIR 1949 Cal 689. It has been held as follows (at page 49 of 19 Comp Cas) :

"The bank is a person, but it is a juridical person and not an actual person. The bank is such that it cannot be said to have mens rea requisite for the offence of cheating. The bank as such cannot be punished for cheating because it has no physical body."

(12) Another test was applied in respect of the prosecution of the body corporate in *Adding Machines India (P) Ltd. Vs. State [1987] 1 CHN 359*. It was held that in respect of offence where the sentence prescribed is mandatory imprisonment and the court has no discretion to impose any other punishment, such as fine, a company cannot be prosecuted in respect of such an offence.

(13) Now coming to the case, learned counsel for the petitioners contended that the allegations in the petition of complaint are patently absurd and inherently improbable and the basic ingredients of the offences alleged are not prima facie made out by the allegations in the complaint and initial evidence produced before the learned trial Magistrate. It has further been contended that the impugned proceeding is frivolous, vexatious and mala fide which would degenerate into a weapon of harassment or persecution if allowed to continue having regard to the veiled object of the lame prosecution. It has further been contended that the dispute is really of civil nature and the present criminal proceedings has been launched with the oblique motive of exerting pressure upon the petitioners to make some concessions and pecuniary benefits to the complainant. It has been contended that further continuance of the impugned proceedings would be an abuse of the process of the court and for the ends of justice, the impugned proceedings should be quashed even at this initial stage.

(14) Controverting the same, learned counsel appearing for the respondent No.1/complainant, submitted that the petition of complaint and the initial deposition prima facie disclose commission of the offences alleged and at this initial stage when only process has been issued the impugned proceedings are not liable to be quashed. As the complaint and the initial deposition prima facie reveal the essential ingredients of the offence alleged; the complainant-opposite party should be allowed to prove the allegations by adducing evidence. It has further been contended that the court cannot at this stage look into the materials produced by the petitioners and annexed with the petition

which were not before the learned Magistrate and the consideration of the court is confined only to the question whether the petition of complaint and the initial deposition taken on their face value, without any addition or subtraction, prima facie made out any offence. As the petition of complaint and initial deposition taken on their face value disclose prima facie commission of the offences alleged, the impugned proceedings cannot be quashed at this stage in exercise of the power under Section 482 of Cr.P.C., contends learned counsel for respondent No.1.

(15) In the light of the contentions raised by the parties, it has to be first determined what is the nature and scope of the inherent power of this court under Section 482 of the Code of Criminal Procedure for quashing a proceeding at this initial stage and what are the materials which the court can look into for exercising such power. Section 482 of the Criminal Procedure Code empowers the High Court to exercise its inherent power to prevent abuse of the process of the court for ends of justice. It is well settled that the exercise of the inherent power to quash the proceeding instituted on complaint is called for only where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. One of the earliest decisions of Hon. Supreme Court on the scope of Section 561A of the old Code (corresponding to Section 482 of the new Code) is the case of *R.P. Kapoor v. State of Punjab* (1960) 3 SCR 388: AIR 1960 SC 866 wherein it was held that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction.

(16) Some of the categories of the cases where the inherent jurisdiction to quash proceedings can and should be exercised are :

- (i) where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may, for instance, furnish cases under this category ;

(ii) where the allegations in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises ; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not ;

(iii) where the allegations made against the accused person do constitute an offence alleged but there is neither no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge.”

(17) In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under Section 561A (corresponding to Section 482 of the new Code), the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. The categories as indicated in this case are not, however, exhaustive.

(18) In *Smt. Magawwa Vs. Veeranna* (AIR 1976 SC 1947), the Apex Court has observed as follows (at page 1948) :

"The scope of the enquiry under Section 202 is extremely limited-only to the ascertainment of the truth or falsehood of the allegations made in the complaint--

(i) on the materials placed by the complainant before the court;

(ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out ; and

(iii) for deciding the question purely from the point of view of the complainant without at all advertng to any defence that the

accused may have. In fact it is well settled that in proceedings under Section 202, the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

(19) It has been observed that at this stage the Magistrate has absolutely no jurisdiction to go into any material or evidence which may be produced by the accused. It has been held that the order issuing process may be set aside or the proceedings may be quashed where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused. It is, however, necessary to point out that in this case the Supreme Court was really concerned with the scope of the jurisdiction of the Magistrate under Section 202 of the Code and the observations made by the Supreme Court in paragraph 5 of the said decision are to be understood in that background. The said observations are relevant in the context of the exercise of revisional powers of the High Court relating to the correctness, legality or propriety of the order of the Magistrate.

(20) As it appears from paragraph 1 of the said decision, the accused petitioners in that case challenged the order of the Magistrate issuing process under Section 204(1)(b) of the Code and prayed for setting aside the order of the Magistrate. As such the court was called upon to decide as to whether the Magistrate had been right in issuing process or not and as to whether the High Court while exercising its revisional jurisdiction should have interfered with the discretion of the learned Magistrate in issuing process. It does not appear that the matter was at all considered from the angle of the ends of justice or the prevention of the abuse of the process of the court. When the High Court exercises the revisional powers only to ascertain whether the impugned order of the inferior criminal court is legal, proper or correct, the High Court has to consider the matter only in the context of the power and the jurisdiction of the inferior court. But, when the High Court is called upon to exercise its inherent power the scope is more expansive in that the court can quash a proceeding for the ends of justice, even though the order of the Magistrate may be otherwise legal, proper or correct. In this connection, reference may be made to the case of *N.C. Nagpal v. State* [1979] 2 CHN 198, where it has been observed that in exercising the inherent power, the scope is much more expansive in that this court can quash a proceeding for the ends of justice or to prevent the abuse of the process of the court. That

necessarily means that while exercising inherent power this court need not confine itself to the propriety, illegality or correctness of the order of the Magistrate and for that matter the materials on which such order was passed.

(21) In *Madhu Limaye Vs. State of Maharashtra* (1977) 4 SCC 551, the Hon. Supreme Court pointed out the difference between the revisional jurisdiction of the High Court and its inherent powers under the Code of Criminal Procedure, 1973. Under Section 397(1) of the Code, the revisional power has been conferred on the High Court to call for the record of any proceeding before any inferior criminal court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of such proceedings of such inferior court. But, apart from the said revisional power "the High Court possessed and possesses, the inherent powers to be exercised *ex debito justitiae* to do the real and the substantial justice for the administration of which alone the courts exist". It has further held that one such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction.

(22) In the case of *Hareram Satpathy Vs. Tikaram Agarwala* (1978)4 SCC 58, the Hon. Supreme Court held as follows :

"Now as the Magistrate was restricted to finding out whether there was a *prima facie* case or not for proceeding against the accused and could not enter into detailed discussion of the merits or demerits of the case and the scope of the revisional jurisdiction was very limited the High Court could not in our opinion launch on a detailed and meticulous examination of the case on merits."

(23) In the case of *Drugs Inspector Vs. Dr. B.K. Krishnajah* (1981) 2 SCC 454, it was held that in quashing a proceeding the High Court has to see whether the allegations made in the complaint petition if proved, make out a *prima facie* offence and that the accused has *prima facie* committed the offence. In *Delhi Municipality Vs. Ram Kishan Rohtagi*, the Supreme Court reiterated this view and held that the proceedings against an accused in the initial stages can be quashed only if on the face of the complaint or the papers accompanying the same no offence is constituted. In other words, the test is that taking the allegations and the complaint as they are, without adding or subtracting

anything, if no offence is made out then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 of the present Code.

(24) In *Dhanalakshmi Vs. R. Prasanna Kumar* (1990) Supp. SCC 686, the Hon. Supreme Court again considered the nature and scope of the powers of the High Court under Section 482 of the Code and observed as follows:

"Section 482 of the Code of Criminal Procedure empowers the High Court to exercise its inherent powers to prevent abuse of the process of court. In proceedings instituted on a complaint exercise of the inherent power to quash the proceedings is called for only in cases where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance is taken by the Magistrate, it is open to the High Court to quash the same in exercise of inherent powers under Section 482. It is not, however, necessary that there should be a meticulous analysis of the case before the trial to find out whether the case would end in conviction or not. The complaint has to be read as a whole. If it appears on a consideration of the allegations, in the light of the statement on oath of the complainant that the ingredients of the offence/offences are disclosed, and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court."

(25) In *State of Karnataka Vs. L. Muniswamy* (1977) 2 SCC 699, the Hon. Supreme Court has held that in the exercise of the wholesome power under Section 482, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. For the purpose of determining whether there is sufficient ground for proceeding against an accused, the court possesses comparatively wider discretion in the exercise of which it can determine the question whether the material on the record, if unrebutted, is such on the basis of which a conviction can be said reasonably to be possible.

(26) In *Madavrao Jiwaji Rao Vs. Sambhajirao Chandrojourao Angre* (AIR 1998 SC 709), the Hon. Supreme Court had similarly held that 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. The Apex Court has further observed that 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 the justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are 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 will be at a preliminary stage.

(27) In *State of Haryana Vs. Bhajanlal* (1992 Supp (1) 335), the Supreme Court mentioned by way of illustration seven categories of cases which are by no means exhaustive, in which the High Court would be justified in quashing the criminal proceedings at the initial stage. One of them is where a criminal proceeding is manifestly attended with mala fides and or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. It has been specifically observed by the Supreme Court that it is not possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of the myriad kinds of cases where such power should be exercised.

(28) In *Chandrapal Singh Vs. Maharaj Singh* (1982) 1 SCC 466, it was observed by the Hon. Supreme Court as follows :

"... Chagrined and frustrated litigants should not be permitted to give vent to their frustration by cheaply invoking the jurisdiction of the criminal court. The complainant herein is an advocate. He lost in both courts in the rent control proceedings and has now rushed to the criminal court. This itself speaks volumes. Add to this the fact that another suit between the parties was pending from 1975. The conclusion is inescapable that invoking the jurisdiction of the criminal court in this background is an abuse of the process of law and the High

Court rather glossed over this important fact while declining to exercise its power under Section 482."

(29) Reference may be made to a next decision of the Apex Court in *Bal Kishan Das Vs. P.C.Nayar* (1991 AIR SCW 1353). In this case, an application for quashing made by the accused on the ground that the liability is of a civil nature was rejected by the High Court on the ground that reading the complaint petition, it cannot be said that the essential ingredients of Section 406 of the Indian Penal Code, have not been alleged. This could ultimately be a matter to be thrashed out in the trial. When the matter went to the Apex Court, the Hon. Supreme Court in a short judgment held as follows :

"After hearing counsel for both the parties and perusing the documents, we are of the opinion that this matter is purely of a civil nature. As pointed out earlier there were arbitration proceedings and further the matter is pending for more than 17 years. Having regard to all the circumstances, particularly that the matter is purely of a civil nature, we feel that it is a fit case in which the proceedings taken by the Chief Judicial Magistrate are to be quashed. Accordingly, the entire proceedings now pending on the file of the Chief Judicial Magistrate, Ganjam, are quashed. The appeal is accordingly allowed."

(30) This, decision shows that there, is no hard and fast rule, no strait-jacket formula, no rigid test laid down by the Hon. Supreme Court which must invariably apply to every application under Section 482 of the Criminal Procedure Code. In this case, on consideration of documents and all the circumstances the Apex Court quashed the proceeding on the ground that the dispute was purely of a civil nature even though there were allegations in the complaint as to the ingredients of the offence. This decision also shows that in exercise of the inherent power under Section 482, the High Court may also take into consideration all the attending circumstances appearing from the materials placed before it in order to ascertain whether the impugned proceeding is fit to be quashed.

(31) In *State of West Bengal Vs. Swapan Kumar Guha* (AIR 1982 SC 949), the Hon. Supreme Court has similarly held that in appropriate cases, the court may take into consideration the relevant facts and circumstances of

the case. While considering the question whether a first information report giving rise to investigation by the police should be quashed, the Hon. Supreme Court observed in paragraph 65 as follows (at page 972 of AIR 1982 SC and at page 153 of 53 Comp Cas) :

"In considering whether an offence into which an investigation is made or to be made, is disclosed or not, the court has mainly to take into consideration the complaint or the first information report and the court may in appropriate cases take into consideration the relevant facts and circumstances of the case. On a consideration of all the relevant materials, the court has to come to the conclusion whether an offence is disclosed or not."

(32) It would appear from paragraph 67 of the above judgment (at page 154 of 53 Comp Cas) that the court took into consideration not only the allegations in the first information report but also the other materials which were contained in the affidavit filed by the parties as also an article published in the newspaper Business Standard dated November 16, 1980. A copy of the said article was enclosed with an affidavit filed on behalf of the State. It would further appear from paragraph 49 (at page 139 of 53 Comp Cas) of the judgment that the copies of the correspondence between the State Finance Minister, the Union Finance Minister and the Deputy Governor of the Reserve Bank of India which had been disclosed by an affidavit filed on behalf of the Reserve Bank of India were also taken into consideration by the Hon. Supreme Court. In this connection, reference may be made to the judgment of the Calcutta High Court in *Sanchaita's case*. The decision in the case of *Madhav Rao Jiwaji Rao Scindia*, (supra), would also suggest that the High Court may take into consideration materials placed before it which were not before the Magistrate to consider whether it is expedient and in the interest of justice to permit a prosecution to continue and whether the court is sought to be utilised for any oblique purpose and whether chances of an ultimate conviction are bleak.

(33) In the case of *N. C. Nagpal* [1979] 2 CHN 198, it has been held that, while exercising inherent power for quashing a proceeding, the court can look into the materials besides those which were before the learned Magistrate for issuing process. The court made the following observation :

"While setting aside an order of a Magistrate issuing process in exercise of the revisional jurisdiction this court has to confine itself to the materials from which he obtained satisfaction that there were sufficient grounds to issue process against the accused ; and those materials necessarily will be the statement of the complainant and the witnesses recorded under Section 202. The High Court exercises revisional powers only to ascertain whether the impugned order of the inferior criminal court is correct, legal or proper and the fact that the record can be and is called for from the concerned court is only indicative of the fact that materials from which the inferior court obtained satisfaction to pass the order were required to be looked into for such ascertainment. But, in exercising inherent power, the scope is much more expansive in that the court can quash a proceeding for the ends of justice or to prevent an abuse of the process of the court. That necessarily means that while exercising inherent powers the court need not confine itself to the propriety, legality or correctness of the order of the Magistrate and for that matter the materials on which such order was passed.

To cite an example. On the basis of a complaint and examination of the complainant under Section 200, the Magistrate issues process against an accused. Against such issuance of process the accused invokes the jurisdiction of this court for exercising both revisional and inherent powers. While so invoking, the accused produces incontrovertible materials before this court to indicate that previously a complaint was filed on the same allegations which after trial ended in acquittal in his favour and contends that the prosecution is barred under Section 300 of the Code. In such a case, if the materials placed before the Magistrate disclose an offence this court by exercising revisional power cannot set aside the order, which is proper, correct and legal. But, in such a case, this court fails in its duty if it does not exercise its inherent power to quash the proceeding relying on the further materials placed before it regarding the previous complaint. The position, therefore, is clear that while exercising inherent

power for quashing a proceeding the court can look into materials, besides those which were before the learned Magistrate for issuing process". The court has further observed "... while exercising its inherent power for quashing a proceeding in which process has only been issued, this court can look into and rely upon materials, besides those on which process was issued, which can be translated into admissible and relevant evidence, but it should not embark upon an enquiry in which an appreciation of the materials may be necessary to support or dislodge the accusation".

(34) In *Harnath Mukherjee Vs. State* [1988] 2 Crimes 694, a Division Bench of the court quashed a criminal proceeding relating to offences of criminal trespass, intimidation and theft on the ground of complete suppression of the fact of delivery of possession of the suit premises to the petitioner by the court bailiff in execution of the writ of delivery of possession issued by a competent civil court which makes the allegations of trespass, intimidation and theft untenable. In that case, the court relied upon the certified copy of the writ of delivery of possession and the bailiff's return which were produced by the petitioners. Relying upon the same the court has held that the proceeding was a mala fide one based on suppression of a material fact and that the court had been sought to be utilised for an oblique purpose and the chances of an ultimate conviction were bleak and further continuance of the impugned proceeding would be a mere abuse of the process of the court and on that ground quashed the impugned criminal proceeding against the petitioners. Similarly, this court quashed a criminal proceeding under Section 448/427 of the Indian Penal Code, on the ground of suppression of materials within the knowledge of the complainant in the case of *Ashutosh Sarkar v. Nathuram Das alias Rajah* [1990] C Cr Lr 174 (Cal). Relying upon the materials produced by the petitioners the court held that if these materials were disclosed in the complaint the court would have been slow to issue process. When the materials have been suppressed before the court, the High Court to prevent the abuse of the process of the court can interfere and quash the proceedings as the court would not have issued process against the accused if the said materials were disclosed.

(35) From the above, it is clear that while considering whether allegations in the complaint and the initial deposition and the documents relied upon by

the complainant prima facie establish the offence alleged the court is not bound to accept allegations which are even opposed to common sense and broad probabilities. In appropriate cases the High Court may look beyond the complaint and initial deposition of the complainant and his witnesses and the documents relied on by the complainant and take an overall view of all the surrounding and related facts and circumstances on the basis of the materials placed before it in order to ascertain whether the impugned proceedings are lame, frivolous, vexatious or mala fide commenced with a veiled object and whether the proceedings are likely to degenerate into a weapon of harassment and persecution so as to call for interference by the court. Because of the special features in a case, if the court is of the opinion that chances of an ultimate conviction are bleak and no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court while taking into consideration the special facts of a case may quash the proceeding even though at a preliminary stage. The court may also quash a proceeding if the dispute is of civil nature and there is suppression of material facts which, if disclosed, would make the prosecution untenable. The categories of cases in which the High Court can invoke its inherent powers under Section 482 of the Criminal Procedure Code to quash the proceeding as catalogued in some of the Supreme Court decisions are merely illustrative and not exhaustive. There is no hard and fast rule, no strait-jacket formula and no rigid rest which must apply to every application under Section 482. Every case is to be decided in the context of its peculiar facts and circumstances and the predominant concern of the court is to secure the ends of justice and to prevent an abuse of the process of the court (see *Muniswamy's case*). Though the court may look into the uncontroverted and incontrovertible documents placed before it in order to decide whether the continuation of the criminal proceeding would be an abuse of the process of the court, it cannot embark upon a detailed enquiry by thorough appreciation of evidence which can be done at the stage of trial.

(36) The undisputed facts prima facie show after perusal of the complaint and statement of complainant recorded under Section 200 of Cr.P.C. as well as Kamleshrai, brother of complainant under Section 202 of Cr.P.C. that the firm named 'M/s Rai Motors Datia was authorized sales dealer from 1st April 1999 date of complaint. Agreement of appointment of authorized sales dealership was executed by the complainant and authorized signatory on behalf of the company on 21st October 1999 and subsequently on 8th September 2005 for period of five years. As per terms of agreement the complainant had

deposited Rs 50,000/- (Rs. Fifty thousand) by way of security. As per terms of agreement for supply of two wheeler vehicles manufactured by the company on oral invoice or written invoice and on depositing the sale price, the requisite vehicles were delivered to the authorized sales agents. If the vehicles as per requirement for which the selling price is deposited are not supplied to the dealer in that case the remaining amount sent by the authorized dealer was to be adjusted in future deal. The company during the period in question on request of the complainant despite deposit of sufficient money did not deliver the requisite number of two wheeler vehicles to the complainant, the authorized selling agent. On contact on phone, the responsible officer/servant did not response properly. The company neither delivered the requisite two wheeler vehicles nor returned the amount of deposit with the company, nor tendered the agreed interest to the complainant. As a result, the complainant instead of choosing the civil recourse, adopted the easy way of filling the complaint against the company. It is well known fact that the company was due to labour problems arose became sick unit and from March 2006 to April 2007, the production of motor vehicles was adversely affected. For theses reasons the supply in market by the petitioners-company was stopped. During the period when the company became Sick Industrial Undertaking, a scheme for revival and rehabilitation of its business was before the BIFR under the Sick Industrial Companies (Special Provisions) Act 1985. It is stated that the complainant had taken undue advantage of these unavoidable problems and circumstances and filed a complaint on 22nd December 2006 against the company and its officers. He has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with the Company by any hook or crook after initiating the criminal prosecution against the Chairperson, Directors and Senior Managerial Personnel of petitioner No.1-Company, who did not have any concern in the claims of the complainant. There is also no specific allegation with regard to their role. No ingredients of Section 420 of I.P.C. is made out against the accused. In the light of the law laid down by the Apex Court and the factual aspects of the present scenario, it appears that neither the trial Magistrate nor the revisional court dealt with a case in a proper manner.

(37) In *Muhammad Ibrahim Haji Moula Baksh v. T.C.R. Naitghton* (AIR 1941 Sind 198), the complainant, on high hopes being held out by the Managing Director of a business, entered into partnership with him and invested a large sum of money. The complainant had at all times access to the business

books and also participated in the management of the business. The high hopes held out by the Directors were not fulfilled and the business ended in considerable loss. On a charge of cheating by the complainant against the accused, it was held that no offence of cheating was committed.

(38) Recently, in *Thermax Limited and others Vs. K.M. John and others* (2011) 13 SCC 412, the Apex Court held:-

“the complaint must disclose relevant material ingredients of Sections 405, 406, 420 read with Section 34 IPC. If there is a flavour of civil nature, the same cannot be agitated in the form of criminal proceeding. If there is huge delay and in order to avoid the period of limitation, it cannot be resorted to as a criminal proceeding.

It is settled law that the essential ingredient for an offence under Section 420, which we have already extracted, is that there has to be dishonest intention to deceive another person. We have already quoted the relevant allegations in the complaint and perusal of the same clearly shows that no such dishonest intention can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligations between the parties. Since the very ingredients of Section 420 are not attracted, the prosecution initiated is wholly untenable. Even if we admit that allegations in the complaint do make out a dispute, still it ought to be considered that the same is merely a breach of contract and the same cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction. Inasmuch as there are number of documents to show that the appellant Company had acted in terms of the agreement and in a bona fide manner, it cannot be said that the act of the appellant Company amounts to a breach of contract.

Though Respondent 1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with the appellant Company by initiating the criminal prosecution, it is pointed out that Appellants 2 to 8 are the ex-

Chairperson, ex-Directors and senior managerial personnel of Appellant 1 Company, who do not have any personal role in the allegations and claims of Respondent 1. There is also no specific allegation with regard to their role.

Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of "vicarious liability" is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant Company.

The entire analysis of the complaints with reference to the principles enunciated above and the ingredients of Sections 405, 406, 420 read with Section 34 IPC clearly show that there was inordinate delay and laches, the complaint itself is inherently improbable and contains the flavour of civil nature and taking note of the closure of earlier three complaints that too after thorough investigation by the police, we are of the view that the Magistrate committed a grave error in calling for a report under Section 156(3) of the Code from the Crime Branch, Pune.

In view of those infirmities and in the light of Section 482 of the Code, the High Court ought to have quashed those proceedings to safeguard the rights of the appellants. For these reasons, the order passed by the Judicial Magistrate, First Class, Pimpri in CC No. 12 of 2002 on 20-8-2007 and the judgment of the High Court dated 11-1-2008 in Criminal Writ Petition No. 1622 of 2007 are set aside. The complaint filed by Respondent 1 herein is quashed. "

(39) As discussed above, in the present case, except vague allegations lacking in material particulars, there is nothing in the complaint to constitute the offence of conspiracy to which the accused are alleged to be parties. Where the accusations are based on documents, the documents themselves must be produced and mere oral evidence will not be sufficient. There is not

even oral evidence about the basic facts from which conspiracy may be inferred. It is not enough for the complainant to merely allege that the offence has been committed. The complainant is required to produce the evidence before the Magistrate at least for the purpose of satisfying the Magistrate that the allegations are not empty accusations but that sufficient evidence is there in support of the accusations which will be proved in course of trial. In *R.P. Kapur's case* (supra), while laying down the categories of the cases in which the proceeding should be quashed at the initial stage, the Hon. Supreme Court pointed out that there may be a category of cases in which even though the allegations made against the accused do constitute an offence alleged, there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge.

(40) Thus, the special features and the related facts and circumstances as referred to above would manifestly show that the allegations in the complaint are patently absurd and inherently improbable and that the complainant has failed to make out a prima facie case. The dispute is of civil nature and the impugned criminal proceeding appears to be frivolous, vexatious and mala fide initiated with the oblique motive of exerting pressure upon the petitioners to pay a huge amount of money and make other concessions for the alleged loss suffered by the complainant. Further, continuation of the proceeding would be an abuse of the process of the court and for the ends of justice the impugned proceeding should be quashed.

(41) The petition is, therefore, allowed and the impugned criminal proceeding against the petitioners is quashed, however, with no order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 1493

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sheel Nagu

M.Cr.C. No. 2025/2012 (Gwalior) decided on 4 May, 2012

RAKESH KUMAR DHINGRA

...Applicant

Vs.

MADHYA PRADESH POLLUTION CONTROL BOARD

& ors.

...Non-applicants

A. *Criminal Procedure Code, 1973 (2 of 1974), Sections 211 & 240 – Framing of Charge – Framing of Charge is an important step in*

the process of trial as it informs the accused of the exact provision of law which the accused violated by describing the allegations in a precise and concise manner – If charge is in-accurately framed, then serious adverse consequences may ensue to either the prosecution or the accused who are unable to initiate conduct and conclude the trial in absence of the defined parameter of the exact offence/offences for which the trial is being held.

(Para 9)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 211 व 240 – आरोप विरचित किये जाना – आरोप विरचित किये जाना विचारण की प्रक्रिया में एक महत्वपूर्ण कार्यवाही है क्योंकि यह अभियुक्त को अभिकथनों का ठीक-ठीक व संक्षिप्त विवरण देकर विधि के सही उपबंधों से अवगत कराता है जिसका अभियुक्त द्वारा उल्लंघन किया गया है – यदि आरोप त्रुटिपूर्ण रूप से विरचित किया गया तब, विचारण किये जा रहे किसी यथार्थ अपराध/अपराधों के परिभाषित पैरामीटर की अनुपस्थिति में अभियोजन या अभियुक्त विचारण आरंभ करने, संचालित करने एवं समाप्त करने के लिये अक्षम है, उन्हें गंभीर प्रतिकूल प्रभाव कारित हो सकता है।

B. *Water (Prevention and Control of Pollution) Act (6 of 1974)*
Sections 25 & 26 – Charge of Offence – It is crystal clear that the allegations alleged by the Pollution board were regarding offence defined in Section 26 – Framing of Charge under Section 25(1) read with Section 44 Act of the Water Pollution and Control Act, 1974 can not be countenanced in law.

Complaint (P-1) indicates in paragraph 5 that the industry of the accused No. 2 is situated in a residential area which is being operated since number of years without prior permission of the Board and despite issuance various letters and notices the accused No. 1 and 2 are continuing to operate their industry and cause water pollution – These allegations in the complaint which are confined in para 5 of the said complaint indicate clearly that the offence of pollution being complained of is not arising out of newly established process but is an on going process which is existing and continuing since long.

(Paras 8,10 & 11)

ख. जल (प्रदूषण निवारण तथा नियंत्रण) अधिनियम (1974 का 6), धाराएँ 25 व 26 – अपराध का आरोप – यह सुस्पष्ट है कि प्रदूषण बोर्ड द्वारा अभिकथित आरोप धारा 26 में परिभाषित अपराध से संबंधित थे – जल प्रदूषण अधिनियम 1974 की धारा 25(1) सहपठित धारा 44 के अंतर्गत विरचित आरोप विधि में मान्य नहीं किये जा सकते।

Deepak Khot, for the applicant.

Harish Dixit, for the non-applicants.

ORDER

SHEEL NAGU, J. - This M.Cr.C. filed under Section 482 Criminal Procedure Code seeks for quashment of the private complaint bearing no.7724/2008 registered against the petitioner including the order dated 12.10.2011 seeking cognizance of the said complaint alleging offence punishable under Section 44 of the Water Pollution and Control Act, 1974 (Act of 1974 for brevity) for having violated the provision of section 25(1) of the Act of 1974.

1. The criminal revision preferred against the said order dated 12.10.2011 has also been dismissed on 08.02.2012 by Revisional Court viz. the Xth Additional Judge to the Court of Sessions Judge, Gwalior in Criminal Revision No.538/2011.

2. The basic and primary ground of challenge in this petition is that the offence as contemplated under Section 25 (1) of the Act of 1974 is not made out inasmuch as the complaint filed by the respondent no.1 does not allege that the petitioners took any steps to establish any industrial operation or process or any treatment and disposal system or/and extension and addition thereto which is likely to cause water pollution without the previous consent of State Board.

3. On the other hand, counsel for the respondent prays for dismissal in M.Cr.C. on the ground of the Act of 1974 has been promulgated for achieving the larger public interest for ensuring ecological balance and preventing environmental degradation by preventing, controlling and regulating the pollution of water and therefore technicalities as alleged herein ought to be ignored if they come in way of achieving the said solemn object and the petitioner should not be permitted to get away from the rigors of the provision of the Act of 1974 at the very initial stage when the trial is still to begin.

4. Heard the learned counsel for the rival parties and on perusal of the record, this Court deems it appropriate to reproduce Section 25, which provides for restriction on new outlets, as follows:-

25. Restrictions on new outlets and new discharge.-2[(1) subject to the provisions of this section, no person shall, without the previous consent of the State Board, _

(a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal

system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage); or

- (b) bring into use any new or altered outlet for the discharge of sewage; or
- (c) begin to make any new discharge of sewage:

Provided that a person in the process of taking any steps to establish any industry, operation or process immediately before the commencement of the Water (Prevention and Control of Pollution) Amendment Act 1988, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent, within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board under sub-section (1) shall be made in such form, contain such particulars and shall be accompanied by such fees as may be prescribed.]

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in sub-section (1) and in making any such inquiry shall follow such procedure as may be prescribed.

1[(4) The State Board may-

- (a) grant its consent referred to in sub-section (1), subject to such conditions as it may impose, being-
 - (i) in cases referred to in clauses (a) and (b) of sub-section (1) of section 25, conditions as to the point of discharge of sewage or as to the use of that outlet or any other outlet for discharge of sewage;
 - (ii) in the case of a new discharge, conditions as to the nature and composition, temperature, volume or rate of discharge of the effluent from the land or premises from which

the discharge or new discharge is to be made: and

(iii) that the consent will be valid only for such period as may be specified in the order,

and any such conditions imposed shall be binding on any person establishing or taking any steps to establish any industry, operation or process or treatment and disposal system of extension or addition thereto, or using the new or altered outlet, or discharging the effluent from the land or premises aforesaid; or

(b) refuse such consent for reasons to be recorded in writing.

(5) Where, without the consent of the State Board, any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, is established, or any steps for such establishment have been taken or a new or altered outlet is brought into use for the discharge of sewage or a new discharge of sewage is made, the State Board may serve on the person who has established or taken steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, or using the outlet, or making the discharge, as the case may be, a notice imposing any such conditions as it might have imposed on an application for its consent in respect of such establishment, such outlet or discharge.

(6) Every State Board shall maintain a register containing particulars of the conditions imposed under this section and so much of the register as relates to any outlet, or to any effluent, from any land or premises shall be open to inspection at all reasonable hours by any person interested in, or affected by such outlet, land or premises, as the case may be, or by any person authorized by him in this behalf and the conditions so contained in such register shall be conclusive proof that the consent was granted subject to such conditions.]

(7) The consent referred to in sub-section (1) shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the

making of an application in this behalf complete in all respects to the State Board.

(8) For the purposes of this section and sections 27 and 30,-

(a) the expression “new or altered outlet” means any outlet which is wholly or partly constructed on or after the commencement of this Act or which (whether so constructed or not) is substantially altered after such commencement.

(b) the expression “new discharge” means a discharge which is not, as respects the nature and composition, temperature, volume, and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet), so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of discharge of the effluent as compared with the previous discharge.

5. It is further relevant to reproduce Section 44 prescribing penalty inter alia for contravention of Section 25 as follows.

44. Penalty for contravention of section 25 or section 26.-

Whoever contravenes the provisions of section 25 or section 26 shall be punishable with imprisonment for a term which shall not be less than 1 [one year and six months] but which may extend to six years and with fine.

6. Reading of Section 25 indicates that it prohibits and restricts establishing of new source/outlets discharging pollutants without the previous consent of the State Board. Thus, the very foundation of Section 25 is that new outlets or new source of discharge of pollutants are established, meaning thereby that provisions of Section 25 is attracted when for the first time discharge of pollutants by industry or by way of operation process or by any outlet of any nature commences and, therefore, as a corollary the said provision would be inapplicable to an ongoing process of pollution for which Section 26, has been enacted.

7. For convenience Section 26 of Act of 1974 is reproduced hereunder:-

26. Provision regarding existing discharge of sewage or trade effluent.- Where immediately before the commencement of this Act any person was discharging any sewage or trade effluent into a 1[stream or well or sewer or on land], the provisions of section 25 shall, so far as may be, apply in relation to such person as they apply in relation to the person referred to in that section subject to the modification that the application for consent to be made under sub-section (2) of that section 2[shall be made on or before such date as may be specified by the State Government by notification in this behalf in the Official Gazette].

8. Section 26 thus deals with existing discharge of sewage and trade effluents. In the instance case, perusal of the complaint (P-1) indicates in paragraph 5 that the industry of the accused no.2 is situated in a residential area which is being operated since number of years without prior permission of the Board and despite issuance various letters and notices the accused no.1 and 2 are continuing to operate their industry and cause water pollution. These allegations in the complaint which are confined in para 5 of the said complaint indicate clearly that the offence of pollution being complained of is not arising out of newly established process but is an ongoing process which is existing and continuing since long. The evidence that is placed on record in the shape of the statement of R.K.Jain, Senior Scientist and R.K.Gupta, Regional Officer, who are functionaries of the M.P.Pollution Control Board, indicate that the industry in question is operational since 1980 but does not indicate that the process by which the alleged pollution is being caused is a newly established one.

9. The framing of charge under the Code of Criminal Procedure is an important step in the process of trial as it informs the accused of the exact provision of law which the accused violated by describing the allegations in a precise and concise manner so that the plea of guilt or innocent can be recorded and in case the accused pleads innocent, the trial commences by adducing of offence. The charge in a criminal case is like an issued framed in civil suit which decides the four corners within which the trial is to proceed. Therefore, accurate framing of charge assumes relevance. If charge is in- accurately framed, then serious adverse consequences may ensue to either the prosecution or the accused who are unable to initiate conduct and conclude the trial in

absence of the defined parameter of the exact offence/offences for which the trial is being held.

10. Testing the factual matrix of the present case, on the anvil of the above principle, it is crystal clear that the allegations alleged by the Pollution Board were regarding offence defined in Section 26 whereas the charge has been framed under Section 25(1). The requirements of the prosecution to establish the offences defined under Section 26 on one hand and 25(1) on the other, are distinct, as the basic ingredient forming the offences under both the above said sections require different set of evidence to establish and correspondingly different defence of accused.

11. Thus framing of charge under Section 25(1) read with Section 44 Act of the Water Pollution and Control Act, 1974 can not be countenanced in law.

12. Thus the prima facie view arising from the material available reflects a prima facie case under Section 26 and not under Section 25(1) as alleged.

13. Pertinently though the contravention in the impugned charge is shown to be of Section 25(1) the Act of 1974 which is incorrect in view of the findings recorded herein above as the allegations and evidence recorded, disclose contravention of Section 26 of the Act of 1974, but since the penal provision of Section 44 is common for both the Sections, this Court deems it appropriate that this Miscellaneous Criminal Case is disposed of with following directions:-

1. The impugned charge dated 12.10.2011 and Criminal Case No.7724/2008 is set aside.
2. The decision rendered by the trial Court dated 12.10.2011 taking cognizance of the offence alongwith the Revisional order dated 08.02.2012 the Criminal Revision 538/2011 are set aside.
3. The trial Court is directed to frame charge under the appropriate provision on the basis of complaint and the evidence adduced in support thereof and proceed ahead with the trial Court.

No order as to costs.

Order accordingly.