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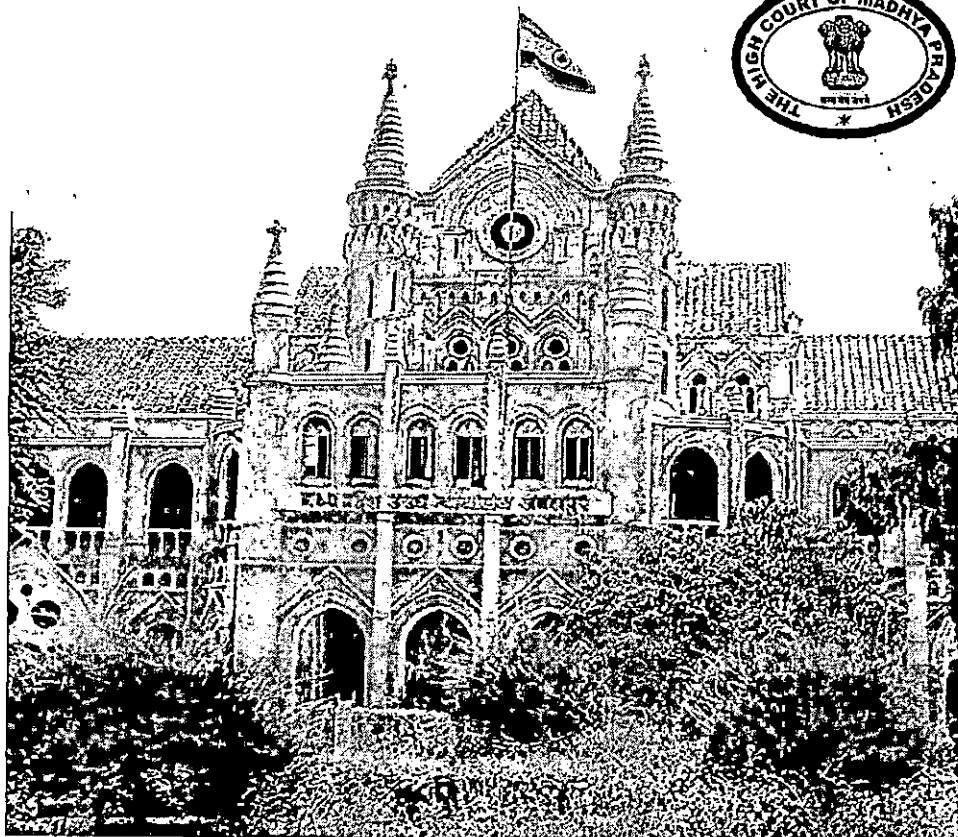
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2012

इंडियन लॉ रिपोर्ट्स
(एम.पी. सीरीज)

वर्ष 2013 के लिये वार्षिक सदस्यता का आवेदन

दिनांक / / 2013

प्रति,

प्रिंसिपल रजिस्ट्रार (आई.एल.आर.),
प्रशासनिक भवन,
म.प्र. उच्च न्यायालय,
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महोदय,

मैं, आई.एल.आर. (एम.पी. सीरीज) का वर्ष 2013 के लिये वार्षिक सदस्य बनना चाहता हूँ। इसके लिये वार्षिक सदस्यता रुपये 475/- डाक खर्च सहित जमा कर रहा हूँ।

कृपया आई.एल.आर. (एम.पी.सीरीज) की मासिक प्रति मुझे निम्न पते पर भेजेंगे।

नाम —

(पूरा नाम)

डाक का पूर्ण पता—

(फोन/मोबाईल नं. सहित)

..... जिला

पिन कोड

.....
हस्ताक्षर

(कार्यालय के उपयोग के लिये)

श्री ने आई.एल.आर.(एम.पी.सीरीज) का
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बुक क्रमांक , रसीद क्रमांक , तारीख दी गई।

केशियर/जिला नाजिर

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2012

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APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Mr. Justice Sharad Arvind Bobde on his appointment as Chief Justice of the High Court of Madhya Pradesh. Mr. Justice Sharad Arvind Bobde, took oath as Chief Justice of the High Court of M.P. on 16/10/2012 at Bhopal.



SHARAD ARVIND BOBDE, CHIEF JUSTICE

Born on April 24, 1956 at Nagpur, Maharashtra. Passed H.Sc. in 1972. Had High School education in S.F.S. School Nagpur, and College education in S.F.S. College, Nagpur. Obtained B.A. Degree in 1975 from Nagpur University. Obtained LL.B. Degree from Nagpur University in 1978. Was enrolled on the Roll of the Bar Council Maharashtra on September 13, 1978. Continuously practised at the Nagpur Bench of the Bombay High Court with appearances at Bombay before the Principal Seat and before the Hon'ble Supreme Court of India for over 21 years in Civil, Constitutional, Labour, Company, Election and Taxation matters. Specialized in Constitutional, Administrative, Company, Environmental and Election Laws. Designated as Senior Advocate in 1998. Had been Senior Standing Counsel for the Municipal Corporation of Nagpur, Nagpur Improvement Trust, Special Counsel for the State of Maharashtra, Maharashtra State Road Transport Corporation and Western Coal Fields Limited. Elevated to the Bench of the Bombay High Court on March 29, 2000 as Additional Judge and as permanent Judge on March 28, 2002.

Sworn-in as the 21st Chief Justice of the Madhya Pradesh High Court on October 16, 2012 and took charge of the high office on October 17, 2012.

We wish Mr Justice Sharad Arvind Bobde, Chief Justice, a successful tenure on the Bench.

OVATION TO THE NEW CHIEF JUSTICE

Hon'ble Mr. Justice Krishn Kumar Lahoti, Administrative Judge, while felicitating the new Chief Justice, said :-

It is a matter of great pleasure for me to welcome 21st Chief Justice of this distinguished High Court. It is also a co-incident that Hon'ble Justice Shri Bobde belongs to Nagpur, from where, the Chief Justice of Nagpur High Court Hon'ble Justice Shri M. Hidayatullah was appointed as first Chief Justice of this High Court and took oath on 1st November, 1956. During his tenure, this High Court was established, took shape and proceeded ahead for dispensation of justice to the people of Madhya Pradesh. Again we are getting an opportunity to have a leadership of a dynamic Chief Justice who hails from the same Court.

Hon'ble Justice Shri Bobde is well known to this place as he was regularly visiting this place as an advocate and was a senior judge of Bombay High Court, but on this occasion I present his brief introduction. His Lordship was born on 24th April, 1956 at Nagpur, earned B.A. degree in the year 1975 from Nagpur University and degree of law from the same University in the year 1978. During the period of his education, his Lordship had participated in elocutions, stage play and sports. He is also a very good sportsman, played tennis, represented college team which won Inter-collegiate Championship and also played in the university in All India Inter-University Tournament. He is also fond of Ravindra Sangeet. He was enrolled as an Advocate on 13.9.1978 with the Bar Council of Maharashtra. He has started his practice at Nagpur Bench of Bombay High Court with appearance before the Principal Seat Bombay and also before the Supreme Court of India in Civil, Constitution, Labour, Company, Election and Taxation matters. He was also appearing in M.P. High Court at Jabalpur in important matters. He has also appeared before the District Judge, Bhopal in a matter. In the year 1998 he was designated as Senior Advocate and on 29.3.2000, His Lordship was elevated to the Bench of Bombay High Court as an Additional Judge and was made Permanent Judge on 28th March, 2002. His father late Shri Arvind Shriniwas Bobde was a well known Advocate and was known for his courage and integrity. He was popular in the Bar as Bhausahab. His father was appointed twice as Advocate General of Maharashtra. His appointment as Advocate General had a significant importance inasmuch

it was the first occasion that an advocate practicing out of Mumbai was appointed. His grand-father Shri S.R. Bobde was a prominent lawyer and a very good Poet. His poesy "Shriniwas Ramchandra Bobde Yanchya Samagra Kavita" was published and appreciated.

Justice Shri Bobde hails from fourth generation of family of distinguished lawyers. His fifth generation is also in this profession. Apart from his father, uncle of his father late Shri M.R. Bobde was also a prominent and distinguished lawyer popularly known as Bhayyasaheb and the doyen of Nagpur Bar. He was an undisputed Leader of the entire bar throughout Vidarbha. He was elevated to the bench for some time. However, he had refused to be a Judge because by that time his nephew late Arvind alias Bhausahab had joined the practice. In those days, in the case of Bhayyasaheb it was said, among the litigant public he was invariably the first choice whenever anybody felt the need of legal advice or of a champion to fight his cause in the Court. About Shri M.R. Bobde, Justice Shri M. Hidayatulla in his Memoirs "My Own Boswell" has remembered him which I quote:- "I can truthfully say, that I felt most nervous when Bobde opposed me. He had a remarkable faculty of discovering a line of attack for which the adversary was not prepared." I have remembered his father, grand-father, grand-uncle, because our Chief Justice also possesses the same qualities, traditions of family and is known for his judgments as a judge of Bombay High Court. His Lordship has delivered various landmark judgments. Recent judgment in Adarsh Housing Society was delivered by his Lordship. His Lordship has also delivered a landmark judgment to bring in Tiger among the lists of animals under the law governing forest damage and the sufferer is now entitled for compensation from the Government. His Lordship has also decided the case of Lavasa Corporation, Maval firing case and other cases. In judiciary, his excellence is at par. He is also known for a friendly smile but with high work ethics. It is a matter of pride and pleasure to us that your Lordship is the Chief Justice of this High Court. I hope that you will enjoy this assignment. This Court will be benefited by your leadership and this Court will reach to new heights during your leadership.

My Lord this High Court is situated in a heritage building with traditional environment. The lawyers are always well prepared, knowledgeable, polite and devoted to their duties towards clients and Court. Three Judges of this Court were appointed as C.J.I. This High Court is having its two Benches at Indore and Gwalior where the work is

voluminous. At present we are short of 11 judges and lot of pressure is on the judges of the work. The expectation of everybody is very high from your Lordship. On this occasion, I assure you that you will get co-operation of all the judges, members of Bar, Registry and all who are concerned with the function of the Court which is a tradition of this High Court. On this occasion, on behalf of my brother and sister judges and on my own behalf, I welcome your Lordship to this Court.

Thank you,

Shri R.D. Jain, Advocate General, M.P., while felicitating the new Chief Justice, said :-

I extend hearty welcome to Hon'ble Mr. Justice Sharad Arvind Bobde on his appointment as Chief Justice of the MP High Court on transfer from Mumbai High Court. State of Madhya Pradesh was in dire need of a permanent Chief Justice since April, 2011 and our High Court was suffering in certain matters due to that and by Your Lordship's appointment as Chief Justice a felt need has been satisfied and as such I, on behalf of the State of Madhya Pradesh offer respectful felicitation to My Lord Chief Justice S.A. Bobde.

Shri Sharad Arvind Bobde was born on 24th of April 1956 at Nagpur (Maharashtra). After completing Higher Secondary in 1972 and college education in SFS College Nagpur, Your Lordship obtained B.A. degree in 1975 from Nagpur University and obtained LL.B degree in 1978 from Nagpur University. During the course of study Your Lordship participated in elocution, dramatics and sports. Your Lordship was a good player of Tennis and played for Nagpur University in the All india Inter-Universities Tournament. Your Lordship's keen interest in extra curricular activities demonstrates your zeal and enthusiasm in all walks of life.

After completing studies Your Lordship was enrolled on the roll of Bar Council of Maharashtra on 13th of September 1978. Your Lordship continued practice at Nagpur Bench of the Mumbai High Court and also appeared in Principal Seat at Mumbai and before the Hon'ble Supreme Court of India for more than 21 years, where-after Your Lordship was designated as Senior Advocate in the year 1998. My Lord Justice S.A. Bobde was elevated to the Bench of Bombay High Court on 29th of April. 2000 as Additional Judge and thereafter as permanent Judge on 29th of April 2002.

In the words of Ex-Chief Justice of India Shri R.C. Lahoti a Judge is

a person bestowed with excellence and according to Shrimad Bhagwat Geeta a judge ought to be bestowed with the sense of complete detachment and humility. According to him in Islam a judge surrenders himself to the will of God while the essence of Christian daily prayer is - "Thy will be done, O Lord" and I am sure that Chief Justice S.A. Bobde will demonstrate these traits in a manner as to transform *Karma* into *Karmayoga*, to be active in body but detached in mind. My Lord will surely be ideal for members of the Bar in dispensation of justice as contemplated by the Constitution.

A Judge needs to have patience, and determined commitments. Without patience there can be no exploration of truth and without truth there can be no exposition of law. The job of a judge is to decide cases impartially and fairly. A Judge should have commitments in his life as he has to work in total sincerity, honesty and devotion. This all is possible only when he is possessed of courage and litigants and advocates are hopeful that their cases will be decided expeditiously. On going through the delivered judgments of Your Lordship it is apparent that God has bestowed these qualities in Your Lordship.

In all democratic nations or even where there is no democratic functioning of administration there is a need for independent and impartial judiciary and it will not be exaggeration to say that constitutional right, statutory rights, human rights and natural rights are being protected in this country through judicial process. The qualities which My Lord inheres may be best described in Justice R.C. Lahoti's oft quoted poem below:

"God, give us men, a time like this demands;
Strong minds, great hearts, true faith and ready hands;
Men whom the lust of office does not kill;
Men whom the spoils of office cannot buy;
Men who possess opinions and a will;
Men who have honour men who will not lie;"

We the people of Madhya Pradesh hope and feel that our expectations will come true and My Lord will exhibit all these qualities and the State would be run in a constitutional manner uprightly and resolutely.

It will not be out of place to mention some of the landmark judgments of Hon'ble Justice S.A. Bobde in order to depict his constitutional concept. In the case of *Advani Builders vs Slum Rehabilitation Authority* he very clearly disdained the litigant who unscrupulously takes part in a decision making process and thereafter takes objection regarding bias of decision maker. In another case

of *Jet Airways vs Municipal Corporation of Greater Bombay* My Lord interpreted the scope of the words used in a Statute and laid down that interpretation of the words is surest index of a mature and developed jurisprudence. In the case of *Court On Its Own Motion vs State of Maharashtra* My Lord very consciously emphasized the need of keeping ecological balance pointing out the critical necessity of green area within urban, social centres. Relying upon the instance of the year 1854 when a Red Man refused to sell the land saying that "If we do not own the freshness of air and the sparkle of the water, how can you buy them? "Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and humming insect is holy in the memory and experience of my people. The perfumed flowers are our sisters; the horse, the great eagle, these are our brothers."

Hearing these very sentimental replies given by Red man, purchaser who wanted to purchase a piece of land for commercial purpose was made to feel that the "ground beneath our feet is the ashes of our grandfathers".

This judgment very illustratively demonstrates the concept of My Lord towards upkeep of natural environment in the absence of which peril of human being is imminent. This concept is all the more required in this State of Madhya Pradesh where large acreage of land is covered by forest and mad people are damaging and destroying the natural resources for commercial purpose.

Lawyers and Judges at Nagpur and Mumbai have all the praises for the working style of Your Lordship as a Judge. I hope My Lord will provide the umbrella of law to the people of MP to protect their liberties.

Your Lordship's arrival in this State will lead a friendly atmosphere in the legal circle and the Bench and Bar will make an attempt to fulfill the desire of the people regarding the need of speedy justice.

I hope that looking to Your Lordship's vast experience in the judicial field and deep knowledge of law as also the commitment of administering justice to the needy and down trodden your Lordship's appointment as Chief Justice of Madhya Pradesh High Court will be an asset to this State. I hope Your Lordship would ensure that the lawyers are treated with respect and litigants go with full satisfaction that justice has been done to them.

I, on behalf of State Government, Law Officers and My own behalf congratulate Hon'ble Justice S.A. Bobde on his appointment as Chief Justice of M.P. High Court and wish him a successful tenure as Chief Justice of this Court.

Shri Anil Khare, President, M.P. High Court Bar Association, Jabalpur, while felicitating the new Chief Justice, said :-

My Lord, Hon'ble the Chief Justice Shri Sharad Arvind Bobde, My Lord, the Administrative Judge and My Lords. Hon'ble members of Bar, distinguished guests, ladies and gentlemen.

A long walk through the corridor of this structure, a few banters with colleagues; a few submissions; a few arguments; a few of few of everything..... Amidst these few, a labyrinth sustains and survives. From the womb to the fire, I looked for a God. A God who shall hold my hand and pull me out of quandary, evince the right path, listen to me, have trust in me. To you and to mine astonishment this thought is not unnatural. God is a concept and so is justice. It is the judiciary which has to impart justice. A child fantasy has become a fascination of a citizen. Judiciary is the pious chamber of pellucidity where the fire shall glow and the impure shall sediment. A man does not expect justice to be conjured but yes to be done with very natural and child like purity of expectations.

Rich and high traditions bring this august gathering together on the occasion of this ovation to felicitate My Lord Hon'ble Justice Shri Sharad Arvind Bobde on his appointment as Chief Justice of this prestigious High Court. I stand here on behalf of more than 3,000 members of the Madhya Pradesh High Court Bar Association in welcoming you to the city of holy river Narmada as the Chief Justice of the High Court of Madhya Pradesh.

It is an honour for both, the Bench and the Bar that Justice M. Hidayatullah was the first Chief Justice of this Court. Years have passed by and the legacy of Justice M. Hidayatullah has been carried forward by Hon'ble Justice Shri G.P. Singh, Hon'ble Justice Shri J.S. Verma and many other legends. The said legacy is now been carried over to My Lord.

On this glorifying moment, I feel it to be my duty to apprise My Lord with the historical background of the Bar Association. The Madhya Pradesh High Court Bar Association came into existence with the constitution of the High Court of Madhya Pradesh in the year 1956 on the reorganization of States. Since its inception, the legal fraternity has witnessed and felt its well etched principles, determination, and endeavor for the purpose of strengthening the legal system through its great luminaries like Late Shyam Charan Upadhyaya, Late Y.P. Verma, Late Diwan Bahadur Sita Charan Dubey, Late

M. Adhikari, Late R.K. Tankha, Late Rajendra Singh, Late Y.S. Dharamadhikari, Late R.S. Dabir, Late R.P. Verma, Late N.S. Kale and Late P.S. Nair to name a few.

The professional profile of My Lord has been made known by the earlier speakers to all present. To put in brief, My Lord was born on 24.4.1956 at Nagpur, Maharashtra. After completing his graduation, My Lord obtained Bachelors Degree in Law from Nagpur University in the year 1978 and thereafter got himself enrolled with the Bar Council of Maharashtra on 13.9.1978. After his continuous practice at Nagpur Bench and appearances before the Principal Seat at Bombay and the Hon'ble Supreme Court of India for over 21 years, My Lord was designated as Senior Advocate in 1998. His ability and vast knowledge of law got him elevated to the Bench of Bombay High Court on 29.3.2000 as an Additional Judge. My Lord was appointed as a Permanent Judge on 28.3.2002.

I am conscious of the fact that this is a moment where we are welcoming My Lord as Chief Justice of this prestigious High Court, but I feel it to be my duty to say a few words on the independent judiciary. Independent judiciary is a basic feature of constitution and the Bar reiterates its commitment for the 'same. It has been said by Justice H.R. Khanna that "The Rule of Law is essentially linked with the Judicial system and has three indispensable requisites- an independent judiciary, a strong and vigilant Bar and an enlightened public opinion." At the time when the faith of the people in the political institution and bureaucracy is at its lowest ebb, any attempt to shake the confidence of the people in the Judiciary, the only institution in which people have unflinching faith today, should be thwarted at the outset.

The steps towards the Judicial accountability may hamper the very constitutional principle of judicial independence. The former Chief Justice of India Hon'ble Justice S.H. Kapadia while speaking at the Independence Day celebration in the Supreme Court suggested involving eminent jurist in matter relating to judiciary "Be it the collegium system or the accountability bill".

The drafting of the constitution is the hard work of constituent assembly which did not feel that the judicial accountability was required to be incorporated. The oath under the constitution makes a judge accountable to the expectations of the people and once he is appointed as a judge he is beyond any criticism and is supposed to be above board. It is the feeling of the Bar that there has to be a transparency and accountability in the appointment of judges in the high court.

The only accountability of judiciary should be towards the constitution and allegiance to the rule of law.

A growing concern of Bar is also towards the control exercised by the High Court over the District Courts and subordinate courts, while exercising the powers under Article 235 of The Constitution of India, which deals with the control of subordinate courts. A balance is required to be struck so as to maintain their fearlessness. We are confident under the able leadership of My Lord, a balance would be maintained, so as to make the subordinate judiciary independent and fearless.

Lawyer and Judges are part of one family- one fraternity - united with the sole aim of dispensing justice and serving the society. United we stand in achieving this pious objective and divided we fall. It is said that Judges and lawyers are the constituents of the orchestra of one Indian judiciary. If either plays the wrong fiddle the entire concert goes awry and so is the justice delivery system and with it the Rule of Law. The dignity of law and its omniscience is best articulated through the legal fraternity. I on behalf of the Madhya Pradesh High Court Bar Association assures My Lord that full cooperation would be extended by us in the smooth functioning of the Judicial system.

We hope and pray that the Bar and Bench would go hand in hand in preserving the rule of law. With these words I on behalf of the Madhya Pradesh High Court Bar Association and also on my own behalf once again warmly welcome you. I hope that great laurels would be achieved by My Lord during his tenure as Chief Justice of this Court. We hope and trust that My Lord has a long journey ahead and this is just a harbour. I pray that all the goodness of Almighty be showered upon and your family members.

Shri D.K. Dixit, President, M.P. High Court Advocates Bar Association, Jabalpur, while felicitating the new Chief Justice, said :-

Today, we have assembled to felicitate my Lord the Hon'ble Chief Justice, Shri Sharad Arvind Bobde on his appointment as the Chief Justice of this great institution, situated in the city of Jabalpur which is almost the centre point of the country. It is a great pleasure for all of us to welcome Hon'ble Justice Shri Bobde as Chief Justice of this High Court. We offer our heartiest congratulations to my Lord, really rejoicing on his appointment as Chief Justice of this Court as since last so many months Hon'ble Justice Shri Sushil Harkauli

was the Acting Chief Justice till my Lord has taken over as Chief Justice of this High Court i.e. till yesterday. Fortunately, we have heard about the family of my Lord belongs to Nagpur and know that Bobde is the big name in the legal field not only in Nagpur but in the whole of Maharashtra.

My Lord was born on 24th April 1956 at Nagpur, passed his H.Sc in 1972, obtained the degree of B.A in 1975 from Nagpur University so also the degree of LLB. in 1978. My Lord had participated in elocution, dramatics and sports. My Lord enrolled on roll of Bar Council of Maharashtra on 13th September, 1978, practiced in the High Court at Nagpur and Bombay with frequent appearance before the Hon'ble Supreme Court for over 21 years. My Lord was designated as Senior Advocate in 1998 and elevated as Additional Judge of the Bombay High Court on 29.3.2000 and made permanent Judge on 28.3.2002.

My Lord as Judge of the Bombay High Court in all these 12 years dominated the Court and known in the legal circle on the Bench all ears for the litigants. In this period, my Lord has heard so many important cases like Adarsh Society, Aryarup and other matters. My Lord is known for encouraging young lawyers to argue, a judge with friendly smile and high work ethics. As we have come to know through Net that the lawyers in Bombay are very much perturbed on leaving my Lord the High Court of Bombay saying that they are going to miss a good Judge.

My Lord not only dominating the Court, but also other Court of Tennis which he is playing since his college days. He played tennis for college team, for Nagpur University, participated in All India Inter University tournament and won so many trophies. He is a worthy son of a worthy father. We have read only yesterday in the daily newspaper 'Hitvada' about his father Shri Arvind Bobde, who was popularly known as Bhausahab, was the Advocate General of Maharashtra and was a doyen of Nagpur.

This High Court is a successor High Court of Nagpur High Court, which was established on 2nd June 1936 and on the reorganization of the State, the High Court of Madhya Pradesh was constituted on 1st November, 1956 and soon became a prestigious High Court of the country had a glorious past of eminent Judges like Sir Gilbert Stone, Vivian Bose, M. Hidayatulla, P.V. Dixit, A. P. Sen, G. P. Singh, J. S. Varma, R. C. Lahoti, R. V. Raveendran, A.K. Patnaik, Syed Rafat Alam and now my Lord is adorning great office of the Chief Justice. Hon'ble Chief Justice Syed Rafat Alam in his ovation speech said in the High Court:

"I feel proud that I have come to serve this High Court which has distinction of producing imminent jurists like Justice M. Hidayatullah, who made his mark and pride, fame to this Court by adorning the highest seat of Chief Justice of India. Hon'ble Shri Justice J. S. Varma and Hon'ble Shri Justice R. C. Lahoti were also from this Court, who by their versatile talent adorned the highest seat of the Chief Justice of India. The contribution made by Hon'ble Shri Justice G.P. Singh, former Chief Justice of this Court and author of many law books cannot be ignored in the field of law"

I unquote

These words of Hon'ble Chief Justice, Shri Syed Rafat Alam are sufficient to know the glory of this great institution. The Hon'ble Judges, who adorned the office in this High Court and always admired high tradition. As my Lord hails from Nagpur and fully conversant with the high tradition of this august institution, we are sure that my Lord will take this institution to further height. The Bar at Jabalpur is quite cooperative and the advocates here are always stand with the Bench to take up any challenge assigned to them. We are hopeful that my Lord will maintain cordial relations with the Members of the Bar and bring name, fame and glory to this great High Court. I wish my Lord a very happy and successful tenure as the Chief Justice of this High Court and I also wish that my Lord may achieve more heights in future.

I on behalf of High Court Advocates Bar Association, its Members and my on behalf once again welcome my Lord as the Chief Justice of this great High Court.

Shri Shivendra Upadhyaya, Chairman, MP State Bar Council, while felicitating the new Chief Justice, said :-

मध्यप्रदेश के न्यायिक परिवार में मुख्य न्यायाधिपति माननीय श्री शरद अरविंद बोबड़े जी का स्वागत करते हुए हमें गर्व महसूस हो रहा है। इस उच्च न्यायालय की गौरवशाली परंपरा में आपका स्वागत है। मध्यप्रदेश के उच्च न्यायालय में न्यायमूर्ति माननीय श्री जी.पी. सिंह जी, माननीय श्री ए.पी.सेन जी, माननीय श्री जे.एस.वर्मा जी, माननीय श्री आर.सी. लाहोटी जी जैसे महान न्यायविदों ने न्यायदान दिया है। उसी परंपरा को आप आगे बढ़ाएंगे ऐसा मेरा विश्वास है।

हमें इस बात की खुशी है कि मध्यप्रदेश से सटे नागपुर में 24 अप्रैल 1956 आपका जन्म हुआ एवं आपकी शिक्षा-दीक्षा भी वहीं संपन्न हुई व आपने 21वर्षों तक नागपुर, बाम्बे उच्च न्यायालय, उच्चतम न्यायालय में अधिवक्ता के रूप में कार्य किया व उसके बाद पिछले 12 वर्षों से बाम्बे उच्च न्यायालय में न्यायाधिपति के रूप में कार्य करने की वजह से एक लम्बा न्यायिक

अनुभव आपको प्राप्त है जिसका लाभ हम सब प्राप्त करेंगे।

मध्यप्रदेश उच्च न्यायालय में प्रकरणों की सुनवाई में अत्यधिक देरी लग रही है। न्यायाधीशों की संख्या कम है। न्यायाधीशों के पद रिक्त हैं। कुछ नये पद सृजित होने हैं। मध्यप्रदेश का अभिभाषक का आपके ऊपर अटूट विश्वास है कि इस हेतु आप समुचित प्रयास करेंगे।

मध्यप्रदेश के अधीनस्थ न्यायालयों में यूनिट प्रथा लागू है। यद्यपि इस प्रथा से प्रकरणों के निपटारों में तेजी आई है लेकिन कार्य की गुणवत्ता प्रभावित हुई है। सुनवाई के दौरान न्यायाधीश इतने दबाव में रहते हैं कि उनमें प्रकरण की गुणवत्ता के बजाय प्रकरण के निपटारे का दबाव अधिक रहता है। ऐसी परिस्थिति में इस बारे में कोई समुचित रास्ता मान्यवर निकालेंगे ऐसा मुझे विश्वास है।

अधीनस्थ न्यायालयों के न्यायाधीश निर्भिकता व निष्पक्षता से कार्य करें इसे मात्र सहायता देने वाले प्रकरणों को देखे जाने के बजाय सहायता से इंकार करने वाले प्रकरणों को भी देखा जाना उचित होगा व सहायता देने की स्थिति में अधीनस्थ न्यायालयों के न्यायाधीशों को अपराधबोध से ग्रस्त होकर जांच का सामना न करना पड़े ऐसी व्यवस्था श्रीमान करेंगे ऐसा मेरा विश्वास है एवं इससे उच्च न्यायालय में भी कार्य का दबाव कम होगा।

माननीय, मध्यप्रदेश में अपर सत्र न्यायाधीशों की कमी है। 42 पद रिक्त हैं, जो अधिवक्ताओं से सीधी भर्ती से भरे जाने हैं। इस वर्ष उक्त पदों के लिये कोई योग्य अभ्यर्थी न मिल पाने से सीधी भर्ती के अपर सत्र न्यायाधीशों का चयन नहीं हो पाया है। इस हेतु अधिवक्ताओं के प्रशिक्षण की व्यवस्था मान्यवर करेंगे ऐसा मेरा विश्वास है।

मध्यप्रदेश उच्च न्यायालय परिसर में न्यायाधीशों के अतिरिक्त कक्षों की कमी है। राज्य अधिवक्ता परिषद में अधिवक्ताओं के कक्ष न के बराबर हैं। मध्यप्रदेश सरकार ने राज्य अधिवक्ता परिषद के कक्ष व अभिभाषक कक्षों के लिये जनभागीदारी से राशि देना तय किया है। उसका प्रस्ताव लंबित है, उसे भी मान्यवर त्वरित निर्णय लेकर कुछ ऐसा प्रयास करेंगे कि मध्यप्रदेश उच्च न्यायालय परिसर में न्यायाधीशों एवं अभिभाषकों के कक्षों की उचित व्यवस्था हो सके।

माननीय उच्च न्यायालय में वरिष्ठ अधिवक्ताओं की नियुक्ति एवं माननीय उच्च न्यायालय के कार्य संपादन के लिये जो नियम बनाये गये हैं उन नियमों में कुछ विसंगतियां हैं जिन पर पूर्व में माननीय उच्च न्यायालय का ध्यान आकर्षित किया गया है। मान्यवर उक्त विसंगतियों को समाप्त करेंगे ऐसा मेरा विश्वास है।

मान्यवर आपको मध्यप्रदेश के अधिवक्ता समुदाय, पक्षकारगण व न्यायाधीशगण आशा भरी निगाहों से देख रहे हैं व उनकी अपेक्षाओं को पूर्ण करेंगे आपके व्यक्तित्व से यह परिलक्षित हो रहा है।

मां नर्मदा जी के तट पर इस पावन संस्कारधानी में मैं पुनः 85 हजार अधिवक्ताओं की ओर से, राज्य अधिवक्ता परिषद की ओर से एवं स्वयं अपनी ओर से आपका स्वागत, वंदन व अभिनंदन करता हूँ।

जय हिन्द, जय भारत

Shri Radhelal Gupta, Asstt. Solicitor General, Madhya Pradesh, while felicitating the new Chief Justice, said:-

Before this august gathering, today I have the honour of introducing a great legal luminary, My Lord Shri Justice Sharad Arvind Bobde. Within a short span a glittering star has shifted from one sky to another, to join the galaxy of legal stalwarts of this High Court. It is a great pleasure for all of us to welcome My Lord who has come from High Court of Maharashtra and is adorning the Office of MP High Court as Chief Justice. My Lord is the 21st Chief Justice of Hon'ble High Court of MP. We offer our heartiest welcome and congratulate My Lord.

Today, in the history of this High Court, a new chapter is about to begin once again, as Nagpur has again presented one more legal giant to this Court. So we wish and expect the repetition of history of Shri Justice M..Hidayatullah.

Year 1956 and place Nagpur is very important for Madhya Pradesh as two institutions were born in the year 1956, one, High Court of Madhya Pradesh and other My Lord Shri Justice Sharad Arvind Bobde, whose family background is so prominent as juristic eminence is inherent there in.

After completing law, My Lord in the same year started practice in Nagpur Bench, in principal seat of Bombay and Supreme Court of India. The Hon'ble High Court of Maharashtra designated his Lordship as Sr. Advocate in the year 1998. My Lord mainly dealt with the cases in Constitutional, Administrative, Company, Environmental and Election Laws. He had been Senior Standing Counsel for the Municipal Corporation of Nagpur, Nagpur Improvement Trust, Special Counsel for the State of Maharashtra, Maharashtra State Road Transport Corporation and Western Coal Fields Limited. Looking to the deep knowledge of law and experience my Lord was elevated as Judge.

My Lord, the judiciary as a whole is facing numerous problems. They are complicated. They do not admit of easy solutions. There is an erosion of confidence of the ordinary public in the effectiveness of the justice delivery system. My Lord confidence of public in judicial system is a grund-norm of democracy. In this confidence building process lawyers and judges both are equally responsible.

The Apex Court has said in S.P.Gupta's case "that the Judges and Lawyers are partners in the administration of justice. Justice is the result of a team work though the function of Judges and Lawyers are different." We offer our full co-operation to my Lord in fulfilling the great expectations of litigant public and in maintaining the dignity and effectiveness of this great institution.

My Lord, infallibility is the attribute of "ANGELS". Human being is

not infallible creature. Judges are also human beings. So the mistakes and errors do occur but if the oath taken by a Judge is not treated merely a procedural formality then, the mistakes and errors can be reduced.

Justice Benjamin Cardozo says

"The tradition of our jurisprudence commit us to objective standard. I do not mean, of course, that this ideal of objective vision is ever perfectly attained. We cannot transcend the limitation of the ego and see any thing as it really is. None the less, the idea is one to be striven for, within the limits of our capacity. This truth, when clearly perceived, tends to unify the Judge's function."

I have strong reasons to believe that on account of enormous, experience, knowledge and wisdom of My Lord, not only common man will get justice but there will be speedy disposal of the cases and besides this judicial administration will also improve in Madhya Pradesh.

So with all of my best wishes,

At last but not the least, I once again on behalf of Government of India, law officers of the Central Government and my own behalf, I sincerely offer my whole hearted welcome to My Lord to this noble temple of justice. I also pay whole hearted welcome to family members of my Lord.

Thank you all,

Shri M.L. Jaiswal, President, Senior Advocates' Council, while felicitating the new Chief Justice, said:-

Today we have assembled here to welcome over new Chief Justice Hon'ble Mr. Justice S.A. Bobde who took oath of office on 16.10.2012 at Bhopal. My Lord was born in Nagpur in an illustrious family who earned eminence in legal profession and were very respected citizens of Nagpur. Your Lordship's Grand Father, Father's Uncle Shri M.R. Bobde was a towering colossus of Nagpur Bar. He was held in such high esteem and reverence and was so meritorious that he was accorded a special Honour by elevating him as a Special judge of the Nagpur High Court. Your Lordship's father Shri A.S. Bobde was equally a very eminent lawyer and was Advocate General of Maharastra for a number of years. I had the privilege of associating with him in a couple of cases in the High Court at Jabalpur. His Advocacy was Superb Shri R.S. Dabir the doyen of Jabalpur Bar at that time while appearing against him expressed an admiration of his Advocacy. During tea break with a pipe in

his mouth he used to stand majestically. It was a pleasure to watch him. With the above family background and traditions my Lord entered into the legal profession and soon made a mark in it. I had an occasion to meet your Lordship at Nagpur during my conference with Shri A.S. Bobde. In recognition of your merit your Lordship was elevated as a Judge of Bombay High Court. Nagpur High Court is our mother High Court. It had great traditions which we followed with proud and are maintaining the same. It has produced eminent lawyers and learned judges who adored the Bench in Supreme Court. My Lord comes with such a happy and distinguished background and wide experience as a judge of Bombay High Court and we have great expectation that during your Lordship's tenure this High Court will reach to new heights.

As justice Holms Says "Spirit of Law has never being logic but it has been experience". My Lord is very well aware that Legislature is elected, executive is appointed but judiciary is selected from amongst man well versed in knowledge and practice of law.

We are passing through a critical moment in our history, civilized societies appear to be disintegrating. Minorities openly defy the law for their own ends. Terrorists seize hostages and thereafter to kill them. Workmen set up picket hives, outside power stations and thereafter to bring the country to a standstill, students occupy buildings and prevent Universities functions. Only too often their threats succeed. The peaceful majority gives in.

They surrender moral and spiritual values that too appear to be at low ebb. The scams all around are threatening us. The sanctions of religion have lost their force. School and teacher take much interest in social sciences. They seek to help the misfits. But they do not set for the standard of conducts. The only discipline to do this, is the discipline of law. It is the law which teaches us that men must not resort to violence to obtain their ends. The law covers the whole range of human behavior and says what men must do and what must not do. Law which is the very foundation of society is in peril.

My Lord, the office of Chief Justice carries with it heavy duties and responsibilities which I hope and wish your Lordship shall dispense it with equanimity and ability maintaining the High Tradition of this High Court which has produced eminent lawyers and great judges.

I on my own behalf and on behalf of Senior Advocate council again offer my Lord a hearty welcome and sincere felicitation and pray God to shower great strength and wisdom to shoulder the responsibilities and duties of this August office.

Reply to ovation, by Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice:-

This is indeed an over-whelming experience for me. It is one of the most unexpected things that happened in my life. I never thought that I would ever be at Jabalpur. I know it is the practice to say this High Court, i.e., the M.P. High Court and then to use the term 'Nagpur High Court'. There is no doubt that the location of the two is different; it is called by different names but it is the same Court. I have no feeling that I have come to another Court. I have no feeling I have come to a new place. It is home coming.

I am sure to get the assistance of one of the great Bars in the country, known for its learning and erudition, legal and forensic acumen, high professional ethics and hard work. The Bar and the Bench are equal partners in the endeavour to provide easy access to justice, in particular, to the poor, needy and social and economically backward groups. The real power of the Court lies in the trust and confidence of the public in the judiciary. The Bar and the Bench have to ensure that such trust and confidence earned by the judiciary is not eroded in any manner and the best way is to ensure that justice is administered without fear, favour, affection and ill will.

Many Hon'ble Judges of this Court, namely, Hon'ble Shri Justice B. P. Sinha, Hon'ble Shri Justice Mohammad Hidayatullah, Hon'ble Shri Justice J.S. Verma and Hon'ble Shri Justice R. C. Lahoti have adorned the Office of the Chief Justice of India. Others were elevated to the Supreme Court of India, namely, Hon'ble Justice Vivian Bose, who was the first Supreme Court Judge, Hon'ble Shri Justice A. P. Sen, Hon'ble Shri Justice G. L. Oza, Hon'ble Shri Justice Faizanuddin, Hon'ble Shri Justice D. M. Dharmadhikari, Hon'ble Shri Justice P. P. Naolekar and Hon'ble Shri Justice Deepak Verma. Hon'ble Shri Justice G. P. Singh, Former Chief Justice of this Court and author of "Principles of Statutory Interpretation" is known nationwide and abroad for his knowledge and legal acumen.

Many eminent lawyers of this Court, namely, Frank Anthony, Sardar Rajendra Singh, B. L. Seth, Y. S. Dharmadhikari, R. S. Dabir, V. S. Dabir, P.R. Padhye, M. M. Sapre, R.P. Verma, J. P. Gupta, P. L. Dubey of Gwalior and Surajmal Garg, K. A. Chitale of Indore etc. have earned nationwide reputation and enhanced the glory of this Court. I had the occasion to learn about the great lawyers who practiced in this Court, during the occasion of the 75th Anniversary of the Nagpur Bar.

I look forward to working in this Court. It is said Judges do what others avoid doing, that is making decisions. It would be unnatural for a Judge to become very popular. In every case somebody loses and somebody win.

It will be possible to reduce the pendency of cases, if there is a good rapport between the Bar and the Bench. It is not possible to support the mere speedy disposal of cases, because if *justice delayed is justice denied*, it is equally true that *justice hurried is justice buried*. Justice, they say, has the walk of Queen and there is no place for undue haste. I hope that with the active support and co-operation of my esteemed colleagues, Members of the Bar, Judges of the subordinate Judiciary and members of the staff, I will be able to answer atleast some of your expectations and the confidence reposed in me as Chief Justice of the Madhya Pradesh High Court. I thank everyone present on this occasion and for this touching ovation extended to me on my appointment as Chief Justice of High Court of Madhya Pradesh. I look forward to working with you.

JAI HIND

NOTES OF CASES SECTION

Short Note

***(106)**

Before Mr. Justice Alok Aradhe

W.P.No. 4525/2011 (Jabalpur) decided on 31 July, 2012

ASHOK MISHRA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Service Law - Absorption - Meaning - Absorption and Promotion - Petitioner's absorption and promotion were cancelled on the ground that he did not have 5 years qualifying service - In view of paucity of employees, qualifying service of 5 years was relaxed as one time measure - Case of petitioner was considered and was granted promotion - Lien of petitioner in his parent department was also terminated - Petitioner has already worked for more than 16 years and has acquired experience - Cancellation of his absorption and promotion orders was quashed - Petition allowed.

क. सेवा विधि - संविलियन - अर्थ - संविलियन एवं पदोन्नति - याची का संविलियन एवं पदोन्नति को इस आधार पर निरस्त किया गया कि उसकी 5 वर्ष की अर्हक सेवा नहीं थी - कर्मचारियों की कमी को दृष्टिगत रखते हुए 5 वर्षों की अर्हक सेवा को एक बार के उपचार के रूप में शिथिल किया गया - याची के प्रकरण पर विचार किया और पदोन्नति प्रदान की गई - याची का मूल विभाग में पुनर्ग्रहणाधिकार (लियन) भी समाप्त किया गया - याची ने पहले ही 16 वर्षों से अधिक कार्य किया है और अनुभव अर्जित किया है - उसके संविलियन एवं पदोन्नति के आदेशों का निरस्तीकरण अभिखंडित किया गया - याचिका मंजूर।

B. Professional Examination Board (Service & Recruitment) Rules, 1966, Professional Examination Board (Service & Recruitment) Rules, 1999 - Rules are not statutory in nature.

ख. व्यावसायिक परीक्षा मंडल (सेवा और भर्ती) नियम, 1966, व्यावसायिक परीक्षा मंडल (सेवा और भर्ती) नियम, 1999 - नियम कानूनी स्वरूप के नहीं हैं।

C. Service Law - Statutory Rules - Recruitment - In absence of any Statutory rule, appointment cannot be held to be illegal.

ग. सेवा विधि - कानूनी नियम - भर्ती - किसी कानूनी नियम की अनुपस्थिति में, नियुक्ति को अवैध नहीं माना जा सकता।

NOTES OF CASES SECTION

Cases referred :

AIR 1976 SC 367, AIR 1989 SC 1985, (1996) 10 SCC 734, (2006) 10 SCC 214, (2009) 4 SCC 700, AIR 1970 SC 1118, (1976) 4 SCC 543, (1987) 3 SCC 50, (2006) 4 SCC 1, ILR [2008] M.P. 1622, 1997 ILR (KER)-3-826, AIR 1992 SC 410, 1976 MPLJ 667, 1979 [1] WN SN 146, (1997) 8 SCC 372, (2000) 7 SCC 1, (2001) 3 SCC 328.

V.S. Shrotri & Vikram Johri, for the petitioner.

Sanjay Dwivedi, G.A. for the respondent nos. 1 & 2.

P.K. Kaurav, for the respondent no.3.

Short Note (SC)

*(107)

Before Mr. Justice K.S.Radhakrishnan & Mr. Justice Madan B.Lokur
Cr.A.No. 1403/2012 decided on 13 September, 2012

ASHWANI KUMAR SAXENA

...Appellant

Vs.

STATE OF M.P.

...Respondent

Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 7A, Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 12 - Age Determination Inquiry - While ascertaining the age of accused, procedure laid down under Rule 12 of the Rules has to be followed - Any other procedure laid down in Cr.P.C. or any other criminal procedure cannot be imported - It is a duty cast on the Courts/J.J. Board and Committees to seek evidence by obtaining certificates as mentioned in Rule 12 - Question of ascertaining medical opinion from a duly constituted Board arises only if the documents mentioned in Rule 12 are not available - In case exact assessment of the age cannot be done, then the Court, for reasons to be recorded, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of 1 year.

किशोर न्याय (बालकों की देख-रेख और संरक्षण) अधिनियम (2000 का 56), धारा 7, ए - किशोर न्याय (बालकों की देख-रेख और संरक्षण) नियम 2007, नियम 12 - आयु निर्धारण की जांच - अभियुक्त की आयु का निर्धारण करते समय, नियमों के नियम 12 में प्रतिपादित प्रक्रिया का पालन किया जाना चाहिए - द.प्र.सं. में दर्शित कोई अन्य प्रक्रिया अथवा कोई अन्य दायित्वक प्रक्रिया को धोतित नहीं

NOTES OF CASES SECTION

किया जा सकता – यह न्यायालयों/किशोर न्याय बोर्ड एवं समितियों का कर्तव्य है कि प्रमाणपत्रों को अभिप्राप्त कर साक्ष्य खोज निकाले जैसा कि नियम 12 में वर्णित है – सम्यक् रूप से गठित बोर्ड से चिकित्सकीय मत सुनिश्चित करने का प्रश्न केवल तब उत्पन्न होगा यदि नियम 12 में वर्णित दस्तावेज उपलब्ध नहीं – यदि आयु का निश्चित निर्धारण नहीं किया जा सकता, तब न्यायालय कारण अभिलिखित करते हुए, यदि आवश्यक समझे, बालक या किशोर की आयु, 1 वर्ष की गुंजाईश के भीतर, कमतर होने की धारणा करके उसे लाम प्रदान कर सकता है।

The judgment of the Court was delivered by: **K.S. RADHAKRISHNAN, J.**

Cases referred :

(2000) 5 SCC 488, (2005) 3 SCC 551, (2009) 13 SCC 211, (2010) 5 SCC 344, (2010) 10 SCC 669, (2010) 3 SCC 757, (2011) 2 SCC 224, (2011) 2 SCALE 429, (2008) 13 SCC 133, (2011) 13 SCC 751

Short Note (DB)

***(108)**

Before Mr. Justice A.K. Shrivastava & Mr. Justice G.D. Saxena

W.P.No. 727/2012 (Gwalior) decided on 24 September, 2012

OMKAR SINGH

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Nikshepakon Ke Hiton Ka Sanrankshan Adhiniyam, M.P., 2000 - Sections 4,5,7 - Refund of Money invested in Chit Fund Company -
Petitioner has filed the petition for refund of money invested by him with the respondent no. 3 - Properties of respondent no.3 company has already been attached under Section 4 of Act, 2000 - Special Court constituted under Section 7 is empowered to direct for equitable distribution among depositors - Petitioner directed to approach the Competent Authority who will apply to the Special Court along with certificates - Special Court will verify the liability of payment of deposits and interests accrued and shall pass necessary order for equitable distribution amongst the depositors and even if after auctioning/selling the property of the Company, if the Court finds that it is not sufficient to cover the shortfall, shall impose such fine on the Company or its Directors to cover the shortfall.

NOTES OF CASES SECTION

निक्षेपकों के हितों का संरक्षण अधिनियम, म.प्र. 2000 - धाराएं 4, 5 व 7 - चिट फंड कंपनी में निवेश किये गये धन की वापसी - याची ने प्रत्यर्थी क्रं. 3 के पास उसके द्वारा निवेश किये गये धन की वापसी हेतु याचिका दायर की - प्रत्यर्थी क्रं. 3 कंपनी की संपत्तियों, अधिनियम 2000 की धारा 4 के अंतर्गत पूर्व में ही कुर्क की जा चुकी - धारा 7 के अन्तर्गत गठित विशेष न्यायालय जमाकर्ताओं के बीच समान वितरण हेतु निदेश देने के लिए सक्षम है - याची को निदेशित किया गया कि वह प्रमाण पत्रों सहित सक्षम प्राधिकारी के समक्ष उपस्थित हों, जो विशेष न्यायालय में आवेदन करे - विशेष न्यायालय जमा राशियों का एवं उस पर प्रोद्भुत ब्याज के भुगतान के दायित्व का परीक्षण करेगा और जमाकर्ताओं के बीच समान वितरण हेतु आवश्यक आदेश जारी करेगा और तब भी यदि कंपनी की सम्पत्ति की नीलामी/विक्रय के बाद भी यदि न्यायालय यह पाता है कि कमी की पूर्ति हेतु यह पर्याप्त नहीं है तो कंपनी या इसके निदेशकों पर कमी की पूर्ति हेतु ऐसा जुर्माना लगायेगा।

The order of the Court was delivered by: **G.D. SAXENA, J.**

S.K. Sharma assisted by *V.K. Shrivastava*, for the petitioner.
Raghvendra Dixit, G.A. for the respondent no. 1 & 2/State.

Short Note

*(109)

Before Mr. Justice S.C. Sharma

W.P.No. 1660/2005 (Indore) decided on 26 June, 2012

PARVINDER SINGH (EX. ASI/M)

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

A. Service Law- Departmental Enquiry - Criminal Case - Stay - Criminal case and departmental enquiry on similar charges - Once a departmental enquiry was pending in respect of the same charges, in all fairness, the respondents should have deferred the departmental enquiry, till the pendency of the criminal case.

क. सेवा विधि - विभागीय जांच - आपराधिक प्रकरण - रोक - समान आरोपों पर आपराधिक प्रकरण एवं विभागीय जांच - जब समान आरोपों के संबंध में विभागीय जांच लंबित थी, समुचित रूप से प्रत्यर्थीगण को, आपराधिक प्रकरण के लंबित रहने तक विभागीय जांच आस्थगित करना चाहिए थी।

B. Service Law - Departmental Enquiry - Acquittal in criminal case- Charge in departmental enquiry was found proved on

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the basis of a statement made by petitioner before the Civil Police Authorities - Held - Petitioner cannot be held guilty in departmental enquiry merely on the basis of statement made before police authorities in a criminal case, in which he has been honorably acquitted.

ख. सेवा विधि - विभागीय जांच - आपराधिक प्रकरण में दोषमुक्ति - सिविल पुलिस प्राधिकारियों के समक्ष याची द्वारा दिये गये कथन के आधार पर विभागीय जांच में लगाया गया आरोप सिद्ध होना पाया गया - अमिनिर्धारित - आपराधिक प्रकरण में मात्र पुलिस प्राधिकारियों के समक्ष दिये गये कथन के आधार पर याची को दोषी नहीं ठहराया जा सकता जिसमें उसे ससम्मान दोषमुक्त किया गया है।

Cases referred :

(1999) 3 SCC 679, 2007(1) Recent Service Judgment, 287, 2004(3) MPLJ, (2006) 4 SCC 731, (1999) 5 SCC 762,

Parvinder Singh, petitioner in person.

Vinay Zelawat, for the Union of India.

Short Note

*(110)

Before Mr. Justice Sujoy Paul

W.P.No. 1024/2008 (S) (Gwalior) decided on 31 August, 2012

TEXTILE MAZDOOR CONGRESS

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), Section 11(2)* - Statutory contribution under the Act is the first charge on the assets of the establishment - Even if the Industry of erstwhile owner is taken over by the financial institution, said statutory liability is neither waived nor extinguished- It will stand and financial institution is bound to repay the same - Bonafide purchaser of industry who was not apprised of any charge or contribution is outstanding against the erstwhile industry not liable to pay the contribution.

क. कर्मचारी भविष्य-निधि और प्रकीर्ण उपबंध अधिनियम(1952 का 19), धारा 11(2) - अधिनियम के अंतर्गत कानूनी अंशदान, स्थापना की आस्तियों पर प्रथम भार है - यदि भूतपूर्व स्वामी का उद्योग वित्तीय संस्था द्वारा अधिकार में

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लिया जाता है तब भी उक्त कानूनी दायित्व न तो अधित्यक्त होता है न ही समाप्त होता है - वह कायम रहेगा और वित्तीय संस्था उसका प्रतिसंदाय करने के लिए बाध्य होगी - उद्योग का सद्भाविक क्रेता जिसे भूतपूर्व उद्योग के विरुद्ध बकाया किसी भार या अंशदान के बारे में जानकारी नहीं दी गई, वह अंशदान का भुगतान करने के लिए दायी नहीं है।

B. *Employees' Provident Funds and Miscellaneous Provisions Act (19 of 1952), Section 11 - Priority of payment of contributions over other debts - Statutory authorities attached certain properties of erstwhile employer but did nothing thereafter - Financial Institution because of non-payment of loan of erstwhile employer invoked Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and sold the property to the auction purchaser - Inaction after the attachment will not amount to waiver of statutory contribution - Financial Institution is liable to pay the said contribution.*

ख. कर्मचारी भविष्य-निधि और प्रकीर्ण उपबंध अधिनियम(1952 का 19), धारा 11 - अन्य ऋणों के मुकाबले अंशदानों के भुगतान की प्राथमिकता - कानूनी प्राधिकारियों ने भूतपूर्व नियोक्ता की कतिपय संपत्तियां कुर्क की परंतु उसके पश्चात् कुछ नहीं किया - भूतपूर्व नियोक्ता के ऋण के असंदाय के कारण वित्तीय संस्था ने वित्तीय अस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, 2002 का अवलंब लिया और नीलामी क्रेता को संपत्ति विक्रय की - कुर्की पश्चात् कोई कार्यवाही न की जाना कानूनी अंशदान के अधित्यजन की कोटि में नहीं आयेगा - वित्तीय संस्थान उक्त अंशदान का भुगतान करने के लिए दायी है।

Cases referred:

(2010) 6 SCC 193, (2011) 9 SCC 354, (2008) 1 SCC 643, (2004) 13 SACC 53, (2009) 6 SCC 791, (2008) 8 SCC 705, 2012(2) DRTC 513, W.P. No. 1419/2011 decided on 17-3-2011, 2012(1) DRTC 403, W.P. (C) 36175/2005(F), (2010) 3 SCC 463, W.P.(C) 21344/2010, (2009) 10 SCC 123, AIR 2010 SC 868, (2011) 10 SCC 727, AIR 2012 SC 11.

Prashant Sharma, for the petitioner.

Praveen Newaskar, Dy. G.A. for the respondents No. 1 to 3/State.

R.K. Goyal, for the respondent No. 4.

None, for the respondents No. 5 to 7.

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Short Note

*(111)

Before Mr. Justice Rajendra Menon

W.P.No. 8140/2009 (Jabalpur) decided on 28 September, 2012

VINOD KUMAR SHRIVASTAVA

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

A. Service Law - Disciplinary Proceedings - Enquiry Report - Application of mind - Enquiry officer without considering the defence has merely agreed with the prosecution case - It shows complete non-application of mind - Enquiry Report is vitiated.

क. सेवा विधि-अनुशासनिक कार्यवाहियां-जांच प्रतिवेदन-मस्तिष्क का प्रयोग-जांचकर्ता अधिकारी प्रतिरक्षा को विचार में लिए बिना, अभियोजन मामले से सहमत हुआ-यह पूर्णतः मस्तिष्क का प्रयोग नहीं किया जाना दर्शाता है-जांच प्रतिवेदन दूषित।

B. Service Law - Disciplinary Proceedings - Misconduct - Allegations of using derogatory language in letters addressed to superior officers - Petitioner applied for grant of education loan for the higher studies of his son - In his various communications, he had merely expressed his frustration on inaction on the part of his superior officers in not sanctioning the loan - Such frustration cannot be termed as derogatory.

ख. सेवा विधि-अनुशासनिक कार्यवाहियां-अवचार-वरिष्ठ अधिकारियों को प्रेषित पत्रों में अप्रतिष्ठाकारक भाषा का उपयोग करने के आरोप-याची ने अपने पुत्र की उच्च शिक्षा हेतु शैक्षणिक ऋण प्रदान किये जाने के लिए आवेदन किया-अपने विभिन्न संसूचनाओं में उसने अपने वरिष्ठ अधिकारियों की ओर से ऋण मंजूर नहीं किये जाने की कार्यहीनता पर मात्र हताशा अभिव्यक्त की-उक्त हताशा को अप्रतिष्ठाकारक नहीं माना जा सकता।

C. Service Law - Misconduct - Misconduct means, conduct arising from ill motive; acts of negligence, errors of judgment or innocent mistake do not constitute such misconduct.

ग. सेवा विधि-अवचार-अवचार का अर्थ है, दोषपूर्ण हेतु से उत्पन्न आचरणय उपेक्षा के कृत्य, निर्णय की त्रुटियां या निर्दोष भूल, उक्त अवचार गठित नहीं करते।

Cases referred :

(2006) 5 SCC 88, (2011) 13 SCC 533, (2006) 8 SCC 776, AIR 1985 SC 1121, (1998) 3 SCC 732

Vivek Rusia, for the petitioner.

Vikram Singh, for the respondent Bank.

I.L.R. [2012] M.P., 2317

WRIT APPEAL

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

W.A.No. 10/2012 (Indore) decided on 17 January, 2012

QUTUBUDDIN

...Appellant

Vs.

MP PASHCHIM KSHETRA VIDYUT

VITRAN CO. LTD. & ors.

...Respondents

Electricity Act (36 of 2003), Sections 126 & 127 - Disconnection of Electricity - Appeal - Premises of the appellant was searched and provisional assessment order was served - Appellant raised objections to the Provisional Assessment Order - Without deciding the objections and without passing the final order, electricity was discontinued - Held - Alternative remedy of filing appeal would only arise when a final order under Section 126 is passed - Electricity cannot be discontinued - Respondents directed to decide the objections and pass the final order - The appellant may thereafter if aggrieved can file an appeal - Appeal allowed.

(Paras 8 to 11)

विद्युत अधिनियम (2003 का 36), धारा 126 व 127 - विद्युत प्रदाय बंद कर दिया जाना - अपील - अपीलार्थी के परिसर की तलाशी ली गई और अंतरिम निर्धारण आदेश तामील किया गया - अपीलार्थी ने अंतरिम निर्धारण आदेश के विरुद्ध आक्षेप उठाये - आक्षेपों का विनिश्चय किये बिना और अंतिम आदेश पारित किये बिना विद्युत प्रदाय बंद कर दिया गया - अभिनिर्धारित - अपील प्रस्तुत करने का वैकल्पिक उपचार केवल तब उत्पन्न होगा जब धारा 126 के अंतर्गत अंतिम आदेश पारित किया गया हो - विद्युत प्रदाय बंद नहीं किया जा सकता - प्रत्यर्थागण को आक्षेपों का विनिश्चय करने और अंतिम आदेश पारित करने के लिए निदेशित किया गया - तत्पश्चात् यदि अपीलार्थी व्यथित होता है, अपील प्रस्तुत कर सकता है - अपील मंजूर।

*Amit Agrawal, for the appellant.**Sudha Shrivastava, for the respondents.*

ORDER

The Order of the court was delivered by :
SHANTANU KEMKAR, J. - By filing this intra Court appeal under Section 2 (1) of Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, the appellant/writ petitioner has challenged the order dated 03.01.2012 passed by the learned Single Judge of this Court in Writ Petition No.8092/2011.

2. Short facts necessary for disposal of this appeal may be stated, as under: -

On 20.06.2007, the vigilance team of the respondents carried out the inspection of the appellant's premises. In the inspection, it was found that the appellant was indulged in unauthorized use of electricity and as such, the panchnama was prepared regarding the said unauthorized use of electricity. Thereafter, the assessing officer made a provisional assessment, as provided under Section 126 (1) of the Electricity Act, 2003 (for short, the Act) vide order dated 07.08.2007, assessing a sum of Rs.5,06,056/- to be recoverable from the appellant. The said provisional assessment order dated 07.08.2007 was served upon the appellant on 25.08.2007. The appellant submitted objections against the said provisional assessment on 31.08.2007. However, even after receipt of the objections, no final order of assessment, as provided under Section 126 (3) of the Act was passed by the assessing officer. Thereafter, on 20.09.2011 the respondents disconnected the appellant's electricity connection. Feeling aggrieved by the said action of disconnection of electricity connection, the appellant had filed the aforesaid writ petition.

3. The learned Single Judge, after considering the pleadings raised by the parties, dismissed the writ petition by accepting the respondents' plea that the appellant has an alternative remedy available under the Act of approaching the Electricity Consumer Redressal Forum (for short, the Forum). The learned Single Judge also accepted the stand taken by the respondents, that the provisional assessment order itself is the final assessment order, which can be challenged in appeal under Section 127 of the Act. Aggrieved by this order, the appellant has filed this appeal.

4. We have heard learned counsel for the parties at length and perused the documents.

5. Shri Amit Agrawal, learned counsel for the appellant argued that the learned Single Judge has committed error in dismissing the writ petition, holding that the appellant has got an alternative remedy of approaching the Forum. According to him, the grievance against alleged unauthorized use of electricity would not lie before the Forum. He further argued that learned Single Judge has also ignored the fact that the respondents were required to pass a final assessment order, after affording a reasonable opportunity of hearing to the appellant, as the appellant had already submitted the objections (Annexure P/14), against the provisional assessment order and only that final order can be challenged under Section 127 of the Act. In the circumstances, he submitted that the impugned order passed by the learned Single Judge be set aside and this appeal may be allowed, by directing the assessing officer of the respondents to consider the objections submitted by the appellant and pass a final order of assessment, as provided under Section 126 (3) of the Act.

6. Smt. Sudha Shrivastava, learned counsel appearing for the respondents, on the other hand, supported the order passed by the learned Single Judge. It is the case of the respondents that since the appellant did not submit the objections within 7 days of passing of the provisional assessment order and also did not deposit the assessed amount, the action taken by the respondents cannot be said to be illegal. She argued that the appellant had committed theft of electricity as such a criminal complaint under Section 135 of the Act was also filed against him. She further argued that the learned Single Judge has committed no error in directing the appellant to avail the alternative remedy of approaching the Forum and to file appeal under Section 127 of the Act.

7. Before dealing with the question raised in this appeal, it would be appropriate to consider the relevant provisions of the Act. Section 42 (5) of the Act provides for establishment of a forum for redressal of grievances of the consumers, in accordance with the guidelines as may be specified by the State Commission. It provides that every distribution

licensee shall, within six months from the appointed date or date of grant of licence, shall establish such forum. MPERC (Establishment of Forum and Electricity Ombudsman for redressal of grievances of the Consumers) (Revision-I) Regulations, 2009 (for short, Regulations) provides for constitution of the Forum. Clause 2 (m) of the Regulations defines the term 'grievance.' The definition of the term Grievance specifically excludes from its ambit the 'unauthorized use of electricity', as provided under Section 126 of the Act. In the circumstance, the Forum established under Section 42 (5) of the Act is not empowered to deal with the grievances of the consumers regarding 'unauthorized use of electricity', as provided under Section 126 of the Act. As would be clear from the pleadings raised by the parties, the disconnection of the electricity connection in question is not on account of any other dues, but is ordered on account of non-deposit of the amount assessed by way of provisional assessment order dated 07.08.2007. Having regard to this position, in our considered view, the learned Single judge has committed an error in relegating the appellant to the Grievance Redressal Forum for redressal of his grievance impugned before the writ Court. We are of the view that the grievance of the appellant is relating to the provisional assessment order passed on the basis of alleged unauthorised use of electricity and for redressal of the said grievance, the appellant cannot be directed to approach the Forum, as the said grievance cannot be adjudicated by the said Forum.

8. It is also pertinent to mention that as provided under Section 127 (2) of the Act, the provisional assessment order dated 07.08.2007 was served upon the appellant on 25.08.2007 and as provided in the said order within 7 days on 31.08.2007, he submitted his objections to the same before the assessing officer. Thus, though the objections (Annexure P/14) were submitted by the appellant well within the time limit of days of receipt of the provisional assessment order fixed by the respondents, the assessing officer did not afford opportunity of hearing to the appellant and did not pass a final order of assessment, as provided under Section 126(3) of the Act and taken recourse of the disconnection of the electricity connection, on account of non-deposit of the amount of provisional

assessment order.

9. In our considered view, the aforesaid entire action of the respondents is violative of the provisions contained in Section 126 of the Act. As would be clear from a bare reading of Section 126 (2) of the Act, it provides for service of provisional assessment order upon the person in occupation or possession or in-charge of the place or premises in the manner prescribed. The said person, on whom the order is served, is entitled to file objections against the provisional assessment order before the Assessing Officer. The Assessing Officer is then required to give reasonable opportunity of hearing to the objector and to pass a final order of assessment within 30 days from the date of service of such order of provisional assessment of the electricity charges payable by such person. It is this final order, which is to be passed after considering the objections, as aforesaid, can be challenged by filing an appeal, as provided under Section 127 of the Act.

10. Thus, the respondents having resorted to the disconnection of appellant's electricity connection, without following the provisions of Section 126 of the Act, the learned Single Judge should have interfered into the matter instead of directing the appellant to approach the Forum and to file appeal under Section 127 of the Act.

11. In the circumstances, we set aside the order passed by the learned Single Judge and direct restoration of electricity connection of the appellant in the premises in question with a further direction to the assessing officer to treat the objections to be within limitation and to afford a reasonable opportunity of hearing to the appellant and pass a final order of assessment, as provided under Section 126 (3) of the Act. The final order, as may be passed may be challenged by the appellant before the Appellate Authority by invoking provisions of Section 127 of the Act, if required.

12. With the aforesaid directions, the writ appeal stands allowed with no order as to costs.

C.c. within three days.

Appeal allowed.

I.L.R. [2012] M.P., 2322

WRIT APPEAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube

W.A.No. 650/2011 (Gwalior) decided on 30 July, 2012

DHARAMVEER

...Appellant

Vs.

THE DIRECTOR GENERAL OF POLICE & anr.

...Respondents

Central Civil Services (Temporary Service) Rules, 1965, Rule 5(1) - Termination from service - False Declaration - Petitioner made false declaration at the time of his appointment that he was never arrested and prosecuted, kept under detention or bound down/ fined, convicted by a Court of law - This declaration was made in the year 2008 - Record shows that a criminal case was registered against the appellant in the year 2005 which was pending on the date of making declaration - Defence of the appellant that he was not aware of the registration and pendency of criminal case not trustworthy under the facts and circumstances of the case - Termination of services proper - Appeal dismissed. (Para 8)

केन्द्रीय सिविल सेवा (अस्थायी सेवा) नियम, 1965, नियम 5(1) - सेवा समाप्ति - मिथ्या घोषणा - याची ने अपनी नियुक्ति के समय मिथ्या घोषणा की कि उसे न्यायालय द्वारा कमी भी गिरफ्तार एवं अभियोजित नहीं किया गया, कमी अभिरक्षा में या बंधन में नहीं रखा गया कमी अर्थदण्डित या दोषसिद्ध नहीं किया गया - यह घोषणा सन् 2008 में की गई - अभिलेख दर्शाता है कि अपीलार्थी के विरुद्ध सन् 2005 में आपराधिक प्रकरण दर्ज किया गया था जो घोषणा की तिथि को लंबित था - अपीलार्थी का बचाव कि वह आपराधिक प्रकरण दर्ज होने एवं लंबित रहने के तथ्य से अनभिज्ञ था, प्रकरण के तथ्य एवं परिस्थितियों में विश्वसनीय नहीं है - सेवा समाप्ति उचित - अपील खारिज।

Cases referred :

2011 AIR SCW 4807, (2010) 2 SCC 169, 2011 AIR SCW 3601, 2007 (2) MPHT 373 (DB), (2003) 3 SCC 437, (2008) 1 SCC 660

D.P. Singh, for the appellant.

Varun Kaushik, for the respondents.

O R D E R

The Order of the court was delivered by :
A.K. SHRIVASTAVA, J. - This appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005 has been filed against an order dated 27.10.2010 passed by learned Writ Court in Writ Petition No.810/10(s) whereby writ petition of the appellant has been dismissed.

2. The facts necessary for the disposal of this appeal lie in a narrow compass. The appellant was appointed on the post of *Jal Wahak* in June, 2008 under the employment of the respondents. His services were temporary in nature and were governed by Central Civil Services (Temporary Service) Rules, 1965 (in short CCS (Temporary Service) Rule). At the time of appointment, the appellant was directed to fill up the verification form in form No.25 in which it was specifically directed to submit information as to whether he was ever prosecuted or any criminal case was registered against him. It would be relevant to quote the information which was sought from the appellant, which reads thus: -

"(a) Have you ever been arrested, prosecuted, keep under detention or bound down/ fined, convicted by a court of law for any offence or debarred/disqualified by any Public Service Commission from appearing at its examination/selections or debarred from taking any examination/rusticated by any University or any other education authority/Institution?"

(b) Is any case pending against you in any court of law, University or any other education authority/Institution at the time of filling up this Verification Roll ? If answer to

(a) or (b) is 'Yes' then give details of prosecution detention fine conviction and punishment etc. and state about the case pending with the court/University /education authority at the time of filling this form."

In answer to the aforesaid queries and information, the appellant specifically denied the fact by writing 'No'. Thereafter, since the services of the appellant were temporary in nature, pursuant to Sub-Rule (1) of Rule 5 of the CCS (Temporary Service) Rules, his services were terminated w.e.f. 21.12.09. In this regard, the termination order dated 21.12.09 was placed as Annexure P/3 in the Writ Court. After the services of the appellant were terminated, vide Annexure P/4 he submitted a representation to Commandant, 65th Battalion, CRPF Raipur, (C.G.) that although his services have been terminated on 21.12.09 without disclosing any ground that why his services have been terminated, but on being inquired, it came into his knowledge that because, some criminal case was pending against him when he was appointed on the post of *Jal Wahak*, hence his services have been terminated. The stand of the appellant is that he was not at all aware that any criminal case was pending against him and for this reason he answered in negative in form No.25. Further, it has been stated in the representation that on receiving the information about the case, after taking leave, he went to his village and now the matter has been compromised in the said criminal case on 29.10.09. In this representation, it has been mentioned that when he was serving in a private concern far away from his village, in a false case his name was implicated, and hence, it was prayed that by allowing the representation, he be taken back in services. But, when nothing was done by the respondents, he filed the writ petition before this Court.

3. When the respondents were served with the notice of writ petition, return was filed by them and the stand of the respondents in the return is that the services of the appellant were terminated under Rule 5(1) of the CCS (Temporary Service) Rules. The further stand of

the respondents is that appellant himself submitted information that on being inquired by him, he came to know that some criminal case is pending against him which was not in his knowledge earlier, but the said information which he supplied was incorrect and totally false. The further stand which has been taken in para 3 of the return by the respondents is that on being inquired from the Superintendent of Police Morena, it was informed that a criminal case is pending against the appellant under Sections 323, 294, 324, 506(B) and 34 of IPC. The criminal case was registered against the appellant by his alias name Bunti because his popular name is Bunti in the village. On the aforesaid premised stand taken by the respondents, it was stated in the return that because deliberately the appellant submitted incorrect information in regard to pendency of the criminal case, therefore, his services have been rightly terminated.

4. The learned writ Court by the impugned order dismissed the writ petition. In this manner, this writ appeal has been filed assailing the impugned order passed by the learned Writ Court.

5. It has been put forth by Shri D.P.Singh, learned counsel for the appellant, that the appellant was prosecuted by his alias name Bunti although his name is Dharmveer and he was not at all aware that any criminal case was registered against him and any charge-sheet has been filed against him and he was ever prosecuted. Hence, the informations required in form No.25 were correctly given by him. Further it has been contended by learned counsel that even if it is held that the appellant did not supply correct information in form No.25, since the matter was already compromised between the parties on 22.10.09, therefore, in the light of the decisions of the Supreme Court *Ram Kumar v. State of U.P.*, 2011 AIR SCW 4807; *Kamal Nayan Mishra v. State of Madhya Pradesh & Ors.*, (2010) 2 SCC 169; *Commissioner of Police & Ors V. Sandeep Kumar*, 2011 AIR SCW 3601 and Division Bench decision of this Court *Union of India & Ors. v. Hariom*, 2007(2) M.P.H.T. 373 (DB), straightway termination was not contemplated, and therefore, since the

matter has already been compounded on 22.10.09, therefore, the termination order be quashed and the appellant be taken back in the service.

6. On the other hand, Shri Varun Kaushik, learned counsel appearing on behalf of the respondents argued in support of the impugned order and submitted that it is factually incorrect to say that appellant was not aware about the pendency of the criminal case. Indeed, he was fully aware that he was arrested and was bailed out in the police Station itself because all the offences were bailable. It has also been put forth by him that because the appellant was serving in the State of Chhattisgarh and further because he was unable to attend the dates before the Magistrate at Morena, therefore, on his behalf on each date applications were being filed by his counsel for condoning his absence and ultimately the matter was also compounded on one date in his presence. Hence, on the date of filing of verification form, it was well known to the appellant that a criminal case is pending against him. It has been further put forth by him that learned Writ Court has taken into account all the aspects of the matter, and therefore, this appeal be dismissed. In support of his contention, learned counsel has placed reliance upon *Kendriya Vidyalaya Sangathan & Ors. v. Ram Ratan Yadav*, (2003) 3 SCC 437 and *R. Radhakrishnan v. Director General of Police & Ors.*, (2008) 1 SCC 660.

7. Having heard learned counsel for the parties, we are of the considered view that this appeal deserves to be dismissed.

8. On bare perusal of the order-sheet dated 22.10.09 passed by learned CJM, Morena, in Criminal Case No.1383/05 (State of M.P. v. Tika @ Tikaram and seven others), it is gathered that a case under Sections 323, 294, 324, 506(B) and 34 of IPC was registered by police Station Civil Lines, Morena. On perusing the case number, one can infer that the case is of the year 2005, because the case number is 1383/05. According to us, the charge-sheet must have been filed in the year 2005, and therefore, the number of the case is 1383 of the year 2005. In this criminal case, the appellant stood as accused No.6 and he was prosecuted by the

name of Bunti alias Dharmveer. When the matter was pending before this Court in appeal, on 10.2.2012 it was specifically directed to the appellant to produce the evidence as to whether he knew about the factum of registration of criminal case against him at the time of entering in service and also for the period from his appointment till passing of the order of termination. For ready reference, it would be condign to quote the entire order-sheet dated 10.2.12 passed in this appeal which reads thus:

"Appellant by Shri D.P.Singh, Advocate.
Respondents/UOI by Shri Ankur Mody, Assistant Solicitor
General.

The impugned order has upheld the termination of the appellant/petitioner from service on account of existence of criminal antecedents (registration of an offence punishable under Sections 323, 294, 323 and 506-B/34 of IPC) by holding that the appellant / petitioner has knowledge of fact of criminal case registered against him.

There is specific averment in that regard in the writ petition in paragraph 5.4 and denial by the employer also on this particular aspect.

There is no finding in regard to factum as to whether the appellant/ petitioner at the time of entering in service had knowledge of the fact of the registration of the criminal case against him.

In this view of the matter, the counsel for the appellant is directed to produce evidence as to whether he knew about the factum of registration of criminal case against him at the time of entering in service and also for the period from his appointment till passing of the order of termination. In this regard, counsel for the appellant/ petitioner may place before this Court the order-sheets of

the criminal case pending before the Court at Morena.

Let the same be done within 15 days. List this matter on 24/02/2012."

Very cleverly the appellant filed the order-sheets w.e.f. 1.3.09 only and not earlier to it although the case was pending against him before C.J.M. Morena since 2005 (looking to its number 1383/2005). Since all the offences under which the case was registered were bailable, naturally the appellant must have been bailed out in the police Station, and therefore, we do not have any scintilla of doubt in holding that the appellant was not aware about the pendency of criminal case against him. Indeed, it is apparent that not only a case was registered but he was also prosecuted. Apart from this, on bare perusal of the order-sheets of C.J.M. which are filed pursuant to the aforesaid order passed by this Court in this appeal, it is gathered that all through applications were being submitted on behalf of the appellant for condoning his absence which were being allowed by the said Court and ultimately on 22.10.09 before termination of services of the appellant, the matter was compounded. Thus, we are of the firm view that deliberately it was concealed by the appellant at the time of submitting form No.25 that he was never arrested or prosecuted. Indeed he was fully aware that not only he was arrested, but was being also prosecuted.

9. The stand taken by the appellant is that he was being prosecuted by his alias name 'Bunti' although his name is Dharmveer, therefore, he was not at all aware about the registration of any criminal case against him. However, this argument is also not useful for the appellant for the simple reason that because on perusal of the order dated 22.10.09 (Annexure P/5) by which the learned CJM compounded the offence and acquitted the appellant, it is gathered that he was being prosecuted by the name Bunti alias Dharmveer S/o Dataram. Apart from this, since the charge-sheet was filed in the Court in the year 2005 looking to the number of the case, certainly the case must have been registered earlier to it and

the appellant must have been formally arrested in the police Station and must have been bailed out, and therefore, not even for hair breadth scape, it can be thought that appellant was not at all aware about the pendency of any criminal case. Indeed, there is overwhelming material to hold that the case was pending against him since 2005. In all fairness, the appellant ought to have submitted the order-sheets of learned CJM Court right from very beginning, but despite there is an order of this Court, he deliberately submitted the order-sheets w.e.f. 1.3.09 and not earlier to it. The earlier order-sheets have not been filed with the uttermost object that it would come on the record that the appellant was having full knowledge about his arrest as well as pendency of the criminal case before the CJM.

10. All the decisions of the Supreme Court placed reliance by learned counsel for the appellant are distinguishable on facts for the simple reason that in all those decisions the offences were either compounded or the accused, who was given appointment, was acquitted before filling up the incorrect information in the requisite format, but in the present case, the appellant was appointed in June, 2008 and in the form No.25, which he filled later on, he deliberately gave false information that he was never arrested and prosecuted and no criminal case is pending against him. The Division Bench decision of this Court in *Hariom* (supra) is also not applicable because the information which was sought was altogether different and on bare perusal of para 8 of the said decision it is gathered that the information which was sought from the petitioner of that case was that "Have you ever been convicted by Court of offence ? If the answer is 'Yes' the full particulars of the conviction and the sentence should be given". However, the information which has been sought in the present case is altogether different and in the present case the information which has been sought is whether appellant was ever arrested, prosecuted, kept under detention etc. including conviction by court of law for any offence. Thus, the informations which were sought from the appellant in the aforesaid form No.25 were in broader spectrum including arrest and

prosecution. In the instant case, both these conditions are present, and therefore, the Division Bench decision of this Court is also not applicable in the present case.

11. Shri Varun Kaushik, learned counsel for the respondents, has rightly placed reliance on two decisions of the Supreme Court *Kendriya Vidyalaya Sangathan and R. Radhakrishnan* (supra). We would like to apt to quote para 10 of the judgment delivered in *R. Radhakirshnan* (supra) by Justice S.B.Sinha speaking for the Bench, which reads thus:

"10. Indisputably, the appellant intended to obtain appointment in a uniformed service. The standard expected of a person intended to serve in such a service is different from the one of a person who intended to serve in other services. Application for appointment and the verification roll were both in Hindi as also in English. He, therefore, knew and understood the implication of his statement or omission to disclose a vital information. The fact that in the event such a disclosure had been made, the authority could have verified his character as also suitability of the appointment is not in dispute. It is also not in dispute that the persons who had not made such disclosures and were, thus, similarly situated had not been appointed.

12. We have gone through the reasonings assigned by the the learned Writ Court and we find that the reasonings are quite cogent and do not require any interference looking to the limited scope of this Court in this intra-court appeal.

13. Resultantly, this appeal fails and is hereby dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2012] M.P., 2331

WRIT APPEAL

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

W.A.No. 908/2012 (Jabalpur) decided on 5 September, 2012

STATE OF M.P.

...Appellant

Vs.

MOTILAL

...Respondent

Penal Code (45 of 1860), Sections 379, 411, 120-B & 201 - Police Head Constable seized 29.851 kg. of silver from possession of the respondent - After investigation challan was filed - Judicial Magistrate First Class finding respondent not guilty for any offence, acquitted him - Property seized from the respondent, was also directed to be released in favour of the respondent - However, during this period the property was misappropriated by the police officials - Held - The property was seized on behalf of the State by its employee and property was mis-appropriated by its employee - The State is liable to return the property, after the decision of the case - Single Judge rightly directed to return the seized property or its value as on date - Writ appeal dismissed. (Paras 2, 4, 6 & 7)

दण्ड संहिता (1860 का 45), धाराएं 379, 411, 120-बी व 201 - प्रहरी पुलिस आरक्षक ने प्रत्यर्थी के कब्जे से 29.851 कि.ग्रा. चांदी जब्त की - अनुसंधान पश्चात् चालान प्रस्तुत किया गया - न्यायिक मजिस्ट्रेट प्रथम श्रेणी ने प्रत्यर्थी को किसी अपराध का दोषी नहीं पाते हुए उसे दोषमुक्त किया - प्रत्यर्थी से जब्त सम्पत्ति प्रत्यर्थी के पक्ष में मुक्त किये जाने के लिए भी निदेशित किया गया - किन्तु इस दौरान पुलिस अधिकारियों द्वारा सम्पत्ति का दुर्विनियोजन किया गया - अभिनिर्धारित - सम्पत्ति को राज्य की ओर से उसके कर्मचारी द्वारा जब्त किया गया था और सम्पत्ति का दुर्विनियोजन उसी के कर्मचारी द्वारा किया गया - प्रकरण के विनिश्चय के उपरान्त राज्य, सम्पत्ति लौटाने के लिए दायी है - एकल न्यायाधिपति ने उचित रूप से जब्त सम्पत्ति अथवा उसका उस समय का प्रचलित मूल्य वापिस करने के लिए निदेशित किया - रिट अपील खारिज।

Case referred :

1977 (4) SCC, 358

*Vijay Pandey, Dy. A.G. for the appellant/State.***ORDER**

The Order of the court was delivered by : **K.K. LAHOTI, J.** - This appeal is directed against an order dated 18/04/2012 passed in Writ Petition No.1448/2008 (Motilal Vs. State & others) by which the learned Single Judge directed to the appellant to return back the silver seized from the petitioner or in the alternative, the value of the seized silver as on the date be returned back to the respondent within the period of two months from the date of receipt of the order.

2. Facts of the case are that the a Police Head Constable namely Loknath Dwivedi seized 29.851 kg. of silver from possession of the respondent Motilal. The allegations were made against the respondent and some other persons that it was a metal of theft and respondent had converted the stolen property into the silver bricks. However, after investigation an offence under Sections 379, 411, 120-B and 201 of the Indian Penal Code was registered and challan was filed. The Judicial Magistrate First Class, Rewa found that the respondent was not guilty for any offence, he was acquitted and the property seized from the respondent, was directed to release in favour of the respondent.

3. In the final order dated 10/07/2006, the Judicial Magistrate also recorded findings that the respondent was the owner of silver seized from him and he was entitled to get back the same. When the silver was not returned back, he approached to the writ Court.

4. A reply was filed on behalf of the appellant that the silver was seized by one Loknath Head Constable, but Loknath after his transfer had handed over the silver to another one Head Constable Ramayan Pratap Singh. But Ramayan Pratap Singh had not deposited the property to the competent authority, as a result of this a criminal case under Section 409 of the Indian Penal Code, has been registered against Ramayan

Pratap Singh. As the aforesaid criminal case was registered against Ramayan Pratap Singh, it was stated before the writ Court that the respondent was not entitled to get the seized property from the State.

5. Learned Single Judge found that Loknath as an employee of the appellant-State, who was vested with the police power and was working as Head Constable, seized the property on behalf of the State and it was in custody of the State. The Single Judge also found that the respondent was entitled to return of the property or its value as on the date.

6. This order has been assailed by the appellant. It was submitted that the property was handed over to Ramayan Pratap Singh, who has mis-appropriated it, so the writ Court could not have directed to return the property. It was the duty of concerned employee so the respondent ought to have filed a civil suit for return of the property or for its value. But we are not convinced with the aforesaid argument raised by learned Dy. Advocate General. The property was seized on behalf of the State by its employee and property was mis-appropriated by its employee. The State is liable to return the property, after the decision of the case. It was the duty of the appellant to keep the property in safe custody and to preserve it, till the decision of the case. If the property was mis-appropriated after seizer, State is liable for return of the property. [See: *Basavva Kom, vs. State of Mysore, 1977 (4) SCC, 358*]. In this case, the property was with Loknath and Ramayan Pratap Singh, it was seized on behalf of the State and when the order of acquittal was passed, State was liable to return the aforesaid property. Normally, after seizer of the property, it should have been sent to the treasury through the Court. Neither Loknath nor Ramayan Pratap Singh was entitled to retain with them. The concerned In-charge of the police station ought to have looked into the matter, so that the property must have deposited in the Court or be sent to the treasury for its safe custody, but it appears that neither the Head Constable, who had seized the property nor concerned Station House Officer discharged their duty properly and the property was mis-appropriated at the police station.

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7. In the aforesaid circumstances, learned Single Judge rightly directed to return the seized property or its value as on date. We do not find any error in the aforesaid order.

8. In view of the aforesaid, this appeal is found without merits and is dismissed.

No order as to costs.

Appeal dismissed.

I.L.R. [2012] M.P., 2334

WRIT APPEAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice G.D. Saxena

W.A.No. 171/2012 (Gwalior) decided on 24 September, 2012

RAM NARESH SINGH TOMAR

...Appellant

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Seniority - Ad hoc appointment - Appellant was appointed on adhoc basis for a period of six months or till appointment is made by Mini P.S.C. - Appellant was subsequently selected by Mini P.S.C. - In the merit list prepared by Mini P.S.C., appellant was placed at serial no. 93 and his seniority was fixed below the writ petitioners - Appointment order specifically provided that the inter se seniority shall be fixed in accordance to the merit given in the appointment letter - Appellant cannot get advantage of his ad hoc appointment for fixing the seniority as the appellant could not point out that under which service conditions rules, the appointment of appellant on ad hoc basis was made - As the ad hoc appointment was only with a further stipulation of facing the Mini P.S.C., the period of ad hoc appointment cannot be computed for fixing the inter se seniority - Appeal dismissed. (Para 9 to 13)

सेवा विधि - वरिष्ठता - तदर्थ नियुक्ति - अपीलार्थी तदर्थ आधार पर छः माह की अवधि के लिए या मिनी पी.एस.सी. द्वारा नियुक्ति होने तक नियुक्त

किया गया था - तत्पश्चात् अपीलार्थी का चयन मिनी पी.एस.सी. द्वारा किया गया - मिनी पी.एस.सी. द्वारा तैयार की गई वरियता सूची में अपीलार्थी का स्थान अनुक्रमांक 93 पर था और उसकी वरिष्ठता रिट याचिकाकर्ताओं के नीचे सुनिश्चित की गई थी - नियुक्ति आदेश विनिर्दिष्ट रूप से उपबंधित करता है कि परस्पर वरिष्ठता, नियुक्ति पत्र में दी गई वरियता के अनुसार सुनिश्चित होगी - वरिष्ठता सुनिश्चित करने के लिए अपीलार्थी को तदर्थ नियुक्ति का लाभ नहीं दिया जा सकता क्योंकि अपीलार्थी यह स्पष्ट नहीं कर सका है कि किन सेवा शर्तों नियमों के अन्तर्गत अपीलार्थी को तदर्थ आधार पर नियुक्ति दी गई थी - चूंकि तदर्थ नियुक्ति केवल मिनी पी.एस.सी. का सामना करने की अतिरिक्त शर्त के साथ की गई थी, तदर्थ नियुक्ति की कालावधि की गणना परस्पर वरिष्ठता सुनिश्चित करने के लिए नहीं की जा सकती - अपील खारिज।

Cases referred :

AIR 1982 SC 1064, AIR 1990 SC 1607, (2009) 12 SCC 49

Vivek Jain, for the appellant.

Nidhi Patankar, G.A., for the respondents no.1 & 2.

S.C. Sharma & Jitendra Sharma, for the respondents no. 3 to 6.

ORDER

The Order of the court was delivered by : **A.K. SHRIVASTAVA, J.** - The order passed in this writ appeal shall also govern the disposal of connected W.A. No. 389/2012 (State of M.P. And another Vs. Ramveer Singh Tomar and Others) and W.A. No. 208/2012 (Arun Pratap Singh and another Vs. State of M.P. And Others) since all these three appeals have arisen out of a common order dated 8.2.2012, passed by learned Writ Court.

2. The order dated 8.2.2012 passed by learned Writ Court in W.P. No. 837/2012(s) has been made pivot by the appellant by filing an appeal under Section 2(1) of Madhya Pradesh Khand Nyaypeeth Ko Appeal Adhiniyam, 2005.

3. In this bunch of three writ appeals the only question which is to be taken into account is that whether the State Government rightly issued

the orders dated 15.1.2009 (Annexure P/1) and 17.2.2009 (Annexure P/1-A) whereby appellant Ram Naresh who was arrayed as respondent no.3 in the writ Court has been rightly given inter se seniority over the writ petitioners. During the pendency of the writ petition writ petitioner no.1 Shyam Singh Sikarwar died and his name was deleted from the cause title by further changing the seriatim of writ petitioners. Undisputedly, vide Annexure A/2 dated 31.10.1985 the applications were invited to recruit the suitable candidates on ad hoc basis on the post of Senior Horticulture Development Officer (in short, SHDO).

4. The appellant was appointed on ad hoc basis as per order dated 5.2.1986 for a period of six months or till appointment is made by the Mini Public Service Commission (in short, called Mini PSC) whichever is earlier. Later on, the appellant also appeared in the Mini PSC. However in the merit list prepared by the Mini PSC he was placed at serial no. 93 and thus his seniority was fixed below the writ petitioners/respondents 3 to 6. Later on, the State Government published the gradation list showing the position as on 1.4.2005 wherein also name of the appellant (respondent no.3 before writ Court) was shown below the writ petitioners. Thereafter various employees including the appellant who were appointed on ad hoc basis submitted their representations claiming their seniority by computing the ad hoc period. In order to decide the representations, the State Government constituted a Committee who submitted its report dated 14.9.2000 and recommended that the seniority of SHDO's be granted in accordance with the Madhya Pradesh Agriculture (Horticulture) Non Gazetted (Non-Ministerial) Service Recruitment Rules, 1987 (in short, Recruitment Rules of 1987) and the representations including the representation of the appellant, were rejected. Thereafter, again respondent no.3 submitted another representation upon which the impugned order dated 17.2.2009 Annexure P/1-A was passed in favour of the appellant by respondents 2 and 3 holding him to be senior in the gradation list to that of writ petitioners by counting his ad hoc service period and hence the writ petition was filed by the writ petitioners/respondents 3 to 6.

5. The learned writ Court allowed the writ petition by holding that ad hoc service period of the appellant cannot be counted in order to compute his seniority and having faced the Mini PSC, the names of writ petitioners were placed above the appellant, therefore, for the purpose of inter se seniority he cannot be treated as senior to the writ petitioners.

6. The contention of Shri Vivek Jain, learned counsel for the appellant is that in view of two decisions of Supreme Court *Wing Commander, J. Kumar Vs. Union of India and others* AIR 1982 SC 1064 and *The District Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others* AIR 1990 SC 1607 the ad hoc service period of the appellant should be counted to compute the inter se seniority. Hence, it has been prayed that by allowing this appeal and connected Writ Appeals 389/2012 and 208/2012, the order passed by learned Writ Court be set aside and the writ petition be dismissed.

7. On the other hand Shri S.C. Sharma and Shri Jitendra Sharma learned counsel appearing for the respondents 3 to 6 argued in support of the impugned order and submitted that before 1982 there was one Department of Agriculture, however in the year 1982 with effect from 12.2.1982 it was bifurcated into two Departments namely Horticulture and Agriculture Department. Learned counsel submits that in the advertisement there was no substantive vacancy and on the basis of the vacancies of future, the advertisement was issued for recruitment to the post of SHDO on ad hoc basis. Learned counsel by placing reliance on Rule 12(4) of M.P. Civil Services (General Conditions of Service) Rules, 1961 (in short Rules of 1961) and by putting more emphasis to clause(b) of sub-rule (4) of Rule 12 has submitted that if the recruitment was substantively made according to the recruitment rules and the appointee continues on the post uninterruptedly till the regularization of his services in accordance with the rules, the period of officiating service shall be counted for the seniority but the appellant was never appointed on the basis of the procedure laid down by the Recruitment Rules of 1987, but he was appointed on ad hoc basis and not in accordance to any Rule. It has also been put forth by learned counsel that the Madhya Pradesh

Regularization of Ad-hoc Appointment Rules, 1986 came into force for one year only and no benefit was given to the appellant under these rules also. In support of his contention learned counsel has placed heavy reliance on the decision of Supreme Court *State of Rajasthan and others Vs. Jagdish Narain Chaturvedi* (2009) 12 SCC 49 and submitted that if the ratio of this decision is tested on the touchstone and anvil of the present factual scenario, the appellant has no case. Learned counsel further submits that learned Writ Court has assigned cogent reasons in allowing the writ petition and hence prayed that this appeal and connected Writ Appeals 389/2012 and 208/2012 be dismissed.

8. Having heard learned counsel for the parties, we are of the view that this appeal and connected Writ Appeals 389/2012 and 208/2012 deserve to be dismissed.

9. In the present case if the appointment letter of the appellant dated 30.11.1985 is considered in true perspective, it would reveal that he was appointed on the post of Senior Horticulture Development Officer on ad hoc basis for a period of six months with a further condition that he has to face Mini PSC whichever is earlier in the pay scale of Rs. 900-1450/-. Thus, the appellant was required to face Mini PSC and his appointment was subjected to the result of Mini PSC. This order was never challenged by the appellant. Thereafter the appellant also faced the Mini PSC and was also found fit for selection on the post of SHDO. However, his name figured below the writ petitioners. In the regular appointment letter dated 28.10.1989 after facing the Mini PSC, specifically in clause 8 it has been mentioned that the inter se seniority shall be fixed in accordance to the merit given in the appointment letter and thus writ petitioners were shown above the name of appellant. According to us the inter se seniority should be given in terms of the seniority fixed in the appointment letter dated 28.10.1989. Further, since in the appointment letter of the appellant dated 30.11.1985 itself there was a condition that his appointment shall be subject to selection by Mini PSC, according to us, the inter se seniority should also be computed in terms of the appointment letter of the appellant dated 28.10.1989 specifying in clause 8 therein that inter se seniority

shall be in terms of select list made by Mini PSC.

10. Learned counsel for the appellant could not point out under which rules on 5.2.1986 the appellant was appointed on *ad hoc* basis. There is no averment in the writ petition as well in this regard. Thus, the appointment of the appellant was not on regular basis and, therefore, in his appointment letter it has been specifically mentioned that his appointment is on *ad hoc* basis subject to the result of the PSC in which he was required to appear. Under the Madhya Pradesh Regularization of Ad-hoc Appointment Rules, 1986 also, the services of appellant were not regularized. The Recruitment Rules of 1987 came later on and earlier to it. the appellant was appointed on ad hoc basis. Hence, according to us, he was not appointed on regular basis but on ad hoc basis. Merely because the appellant was sent for training etc. it would not confer any right on him that his appointment was made in accordance to a particular rule.

11. The advantage of Rule 12(4) of the Rules of 1961 which is being relied by learned counsel for the appellant is not applicable for the simple reason that in clause (b) of Rule 4 itself it has been mentioned that if the appointment on *ad hoc* basis by substantially following the procedure laid down by the Recruitment Rules is made and the appointee continued uninterruptedly on that post till his services were regularized, service of ad hoc period shall be counted. However, in the present case it could not be pointed out by learned counsel for the appellant that under which Service Conditions Rules the appointment of the appellant was made, on the contrary it has been borne out that he was appointed only on ad hoc basis with a further stipulation that he has to face the Mini PSC and, therefore, according to us, in this backdrop the decisions of *Wing Commander and The District Recruit Class-II Engineering Officers' Association* (supra) placed reliance by learned counsel for the appellant are not applicable and indeed the decision of Supreme Court in *Jagdish Narain* (supra) is squarely applicable. In this regard paras 17 and 18 of the aforesaid decision is quite relevant and which we would like to quote as under:

"17. The present stand that the initial appointment was substantive appointment is contrary to the factual position because in each case the proficiency test was undertaken and the appointment letter shows that the appointment was till selected candidates join. Additionally, even if the proficiency test is passed the question of eligibility is of relevance, "when the vacancy occurs". So far as daily-wage services are concerned, there is no scale of pay and the lowest figure scale of pay has to be given. According to Fundamental Rule 9(4), "cadre" means the strength of a service or part of service sanctioned as a separate unit."

"18. In order to become "a member of service" a candidate must satisfy four conditions, namely,

(i) the appointment must be in a substantive capacity;

(ii) to a post in the service i.e. in a substantive vacancy;

(iii) made according to rules;

(iv) within the quota prescribed for the source.

Ad hoc appointment is always to a post but not the cadre/service and is also not made in accordance with the provisions contained in the recruitment rules for regular appointment. Although the adjective "regular" was not used before the words "appointment in the existing cadre/service" in para 3 of the G.O. Dated 25.1.1992 which provided for selection pay scale the appointment mentioned there is obviously a need for regular appointment made in accordance with the Recruitment Rules. What was implicit in the said paragraph of the G.O. when it refers to appointment to a cadre/service has been made explicit by the clarification dated 3.4.1993 given in respect of Point

2. The same has been incorporated in Para 3 of the G.O. dated 17.2.1998."

12. In the present case, the ad hoc appointment of the appellant was not made on any substantive capacity and was also not in the substantive vacancy. It has also not been pointed out that appointment was made in terms of any Rules and within the quota prescribed for the source. Since ad hoc appointment is always to a post but not to the cadre/service and is also not made in accordance with the provisions made in the Recruitment Rules of 1987 for regular appointment nor it can be so because before coming into force of these Rules of 1987 the appellant was appointed on ad hoc basis, therefore, according to us the *ad hoc* service period of appellant cannot be counted for the purpose of computing the inter se seniority between him and the writ petitioners.

13. So far as the applicability of the Rules of 1987 is concerned, if Rule 23 which speaks about repealing clause is taken into consideration, we find that since no order was made in favour of the appellant for regularization prior to coming into force of these rules, on the contrary he was directed to face the Mini PSC which he faced in the year 1989, therefore, these Rules of 1987 are also not helpful to the appellant.

14. We have also gone through the reasonings assigned by learned Writ Court allowing the writ petition and we find that cogent reasons have been assigned and we do not find any ground to interfere in this intra-court appeal.

15. Resultantly, this appeal and connected W.A. No. 389/2012 (State of M.P. And another Vs. Ramveer Singh Tomar and Others) and W.A. No. 208/2012 (Arun Pratap Singh and another Vs. State of M.P. And Others) fail and are hereby dismissed. No costs. Let a copy of this order be kept in the record of W.A. No. 389/2012 and 208/2012.

Appeal dismissed.

I.L.R. [2012] M.P., 2342

WRIT PETITION

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

W.P.No. 157/2008(S) (Indore) decided on 13 January, 2012

RAVINDRA SHOBHAWAT

...Petitioner

Vs.

SECRETARY, KRISHI UPAJ MANDI

SAMITI, BADNAGAR

...Respondent

***Industrial Disputes Act (14 of 1947), Section 25-F -
Retrenchment - Services of petitioner were terminated orally -
Judgment passed in the case of Secretary State of Karnataka vs. Uma
Devi has no application as petitioner was not seeking regularization
but had challenged his termination - Judgment passed in the case of
Uma Devi has no bearing on interpretation of section 25-F - Matter
remanded back.*** (Para 8)

***औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ - छंटनी - याची
की सेवा मौखिक रूप से समाप्त की गई - सेक्रेटरी स्टेट ऑफ कर्नाटक वि. उमा
देवी के प्रकरण में पारित निर्णय लागू नहीं होता क्योंकि याची ने नियमितकरण नहीं
चाहा बल्कि अपनी सेवा समाप्ति को चुनौती दी थी - धारा 25-एफ के निर्वाचन पर
उमा देवी के प्रकरण में पारित निर्णय का कोई प्रभाव नहीं - प्रकरण प्रतिप्रेषित।***

Cases referred :

(1) JT 1997 (4) SCC 560, AIR 2006 SC 1806, (3) 2005 (5) SCC 591, (4) 2007 (I) SCC 575, 4 SCC PAGE1=2006 AIR SC 1806, 2010 (4) MPLJ 39 (SC).

G.S. Patwardhan with Dharmendra Sharma, for the petitioner.

C.L. Yadav with Manish Yadav, for the respondent.

ORDER

The Order of the court was delivered by :
SHANTANU KEMKAR, J. - This order shall govern disposal of Writ petition No.157/2008 (s), Writ Petition No. 158/2008 (s) and Writ Petition No.974/2008 (s).

For the sake of convenience the facts are taken from Writ Petition No.157/08 (s).

2. The petitioner was working as Assistant Sub Inspector in the respondent Krishi Upaj Mandi Samiti from 01.01.1991. His services were terminated by an oral order dated 16.01.1998. He challenged his termination from service by raising an industrial dispute contending that his services were terminated orally without complying with the mandatory provisions of Section 25-F of the Industrial Disputes Act, 1947 (for short the Act). On failure of conciliation the Deputy Labour Commissioner in exercise of powers conferred upon him under Section 10 of the Act, referred the following dispute to the Labour Court, Ujjain for adjudication :-

“Whether the termination of Ravindra Shobhawat
S/o Rameshwar Shobhawat is legal and proper if not, then
what relief he is entitled for and what direction should be
issued to the employer in this regard?”

3. On receipt of the reference the Labour Court gave opportunity to the parties to submit their claim and reply. After recording the evidence led by the parties, the Labour Court answered the reference vide award dated 23.09.2005 passed in Case No.51/2004/IDR in favour of the petitioner and directed reinstatement of the petitioner in service with 25% back wages. Feeling aggrieved by the said award the respondent employer had filed a writ petition No.1841/2006 (s). The learned Single Judge of this Court vide common order dated 05.04.2007 allowed the said writ petition and connected writ petitions bearing Nos. 2458/2005 (s), 1839/2006 (s) and 1842/2006 (s) and remanded the matter to the Labour Court to re-examine the issue keeping in view the law laid down by the Supreme Court in (1) JT 1997 (4) SCC 560, (2) *State of Karnataka Vs. Umadevi* (AIR 2006 SC 1806), (3) 2005 (5) SCC 591, (4) 2007 (I) SCC 575 and other cases, if any, on the issue. The learned Single Judge also observed that the Presiding Officer would appreciate the law laid down and would apply the said law to the facts of the case involved in the Reference and will accordingly answer to the reference

on merits either way in accordance with law (emphasis supplied).

4. In pursuance to the aforesaid the order dated 05.04.2007 passed in the said writ petitions and other connected writ petitions the matter was re-examined by the Labour Court and the Labour Court by the impugned award answered the award in favour of the respondent and maintained the termination of the petitioner placing reliance on the judgment of the Supreme Court passed in the case of *State of Karnataka Vs. Uma Devi* 4 SCC Page 1 =2006 AIR SC 1806 by observing that the petitioner's appointment was not through the regular process of employment by calling names from Employment Exchange, advertising the vacancy, following the recruitment procedure and observing the provision about reservation. Feeling aggrieved by the said award the petitioner has filed this writ petition.

5. Shri G.S.Patwardhan and Shri D.M.Sharma, learned counsel for the petitioners have argued that in the earlier round of litigation while remanding the matter to the Labour Court the learned Single Judge had directed the Labour Court to take into consideration the various judgments mentioned therein including the judgment passed by the Supreme Court in the case of *State of Karnataka Vs. Uma Devi* (supra). However, it was also made clear by the learned Single Judge that the decision shall be taken by the Labour Court on merits either way in accordance with law (emphasis supplied). In the circumstances, the learned Labour Court was required to have taken decision taking into consideration the aforesaid judgments of the Supreme Court as mentioned in the order and was also required to have considered as to whether they apply to the facts of the case in hand or not and thereafter was further required to decide the matter in accordance with law. According to the learned counsel for the petitioner, the judgment of the Supreme Court passed in the case of *State of Karnataka Vs. Uma Devi* (supra) had no application to the dispute which was to be decided by the Labour Court as the case of *State of Karnataka Vs. Uma Devi* (supra) is relating to the rights of casual, daily wage, temporary and ad-hoc employees about their regularisation, their continuation in service or salary in the regular time scale. Whereas before

the Labour Court the matter was regarding termination of service of the petitioner which was alleged to be in violation of the provisions contained in Section 25-F of the Act. According to the petitioner, the termination was not preceded by the mandatory requirement of Section 25 F of the Act and therefore, it was an illegal retrenchment. It has been contended by the learned counsel for the petitioner that the Labour Court has totally ignored the nature of dispute which was to be decided by it and therefore, the impugned award is not sustainable and is liable to be set aside.

6. On the other hand, learned Senior counsel appearing for the respondent supported the impugned award passed by the Labour Court and contended that the Labour Court was required to comply the order passed by this Court in the earlier round of litigation and, therefore, had rightly applied the law laid down by the Supreme Court in the case of *State of Karnataka Vs. Uma Devi* (supra).

7. Having considered the submissions made by the learned counsel for the parties, we find that although the learned Single Judge while remanding the matters had directed the Labour Court to re-examine the issue keeping in view the law laid down by the Supreme Court in the cases mentioned therein including in the case of *State of Karnataka Vs. Umadevi* (supra) but learned Single Judge had further directed that other cases if any on the issue shall be brought to the notice of the Presiding Judge by the learned counsel appearing for the parties and the Presiding Judge was expected to apply the law to the facts of the case and was expected to decide the matter on merits either way in accordance with law. Thus, in view of the said categorical observations made by this Court in earlier round of litigation in our considered view the submission made by the learned Senior counsel for the respondent is of no merit.

8. As would be clear from the dispute referred to the Labour Court, the pleadings raised by the parties the Labour Court was required to decide as to whether the oral order of termination of service of the petitioner, allegedly passed without complying the provisions of Section 25-F of the Act was valid or not and if not what relief the petitioner is

entitled for. Thus, the case before it was not a case of regularization but about termination from service alleging violation of Section 25-F of the Act. It was a specific case of the petitioner that he was working with the respondent since 01.01.1991 till 16.01.1998 when his services were terminated by an oral order without complying the provisions of retrenchment. He also pleaded that before his termination he had put 240 days continuous service in the year. Having regard to this, in our considered view, the reliance of the Labour Court on the judgment of the Supreme Court in the case of *State of Karnataka vs. Umadevi* (supra) was wholly misconceived as it had no application to the issue involved before it. The judgment of *State of Karnataka vs. Umadevi* (supra) has no bearing on the interpretation of Section 25-F of the Act and the employer's obligation to comply with the conditions enumerated in it. (See *Anoop Sharma Vs. Executive Engineer, Public Health Division No.1 Panipat (Haryana)* 2010 (4) MPLJ 39 (SC).

9. In view of the aforesaid legal position, in our considered view the Labour Court has not appreciated the facts and law correctly. It has ignored the nature of dispute which was required to be adjudicated by it and has mechanically applied the ratio of judgment of the Supreme Court in the case of *State of Karnataka Vs. Uma Devi* (supra) which relates to regularisation and has no application to the facts of the case in which the reinstatement is claimed by a discharged workman without any direction for regularization of his services.

10. In the circumstances, we quash the impugned award of the Labour Court and remit the matter to the Labour Court for passing a fresh award in accordance with law keeping in view the nature of dispute which is required to be adjudicated by it, as expeditiously as possible.

Parties to appear before the Labour Court on 09.02.2012.

No orders as to the costs.

Order accordingly.

I.L.R. [2012] M.P., 2347

WRIT PETITION

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

W.P.No. 1741/2011 (Indore) decided on 29 March, 2012

AMBESH GRIH NIRMAN SAHAKARI SANSTHA

MARYADIT, UJJAIN

....Petitioner

Vs.

UJJAIN DEVELOPMENT AUTHORITY, UJJAIN

...Respondent

Constitution - Article 226 - Enforcement of Contract - UDA is a public undertaking and discharging public function and is a State within the meaning of Article 12 - Admittedly an agreement was entered into between the parties - Respondent without any justifiable reason denied the compliance of agreement - Action of UDA can be termed as arbitrary and unfair - UDA directed to comply with the conditions of agreement entered by it with petitioner. (Paras 12 to 17)

संविधान - अनुच्छेद 226 - संविदा का प्रवर्तन - यू.डी.ए. सार्वजनिक उपक्रम है और लोक कार्य का सम्पादन कर रहा है तथा अनुच्छेद 12 के अर्थात्तर्गत राज्य है - स्वीकृत रूप से पक्षकारों के मध्य अनुबंध हुआ - प्रत्यर्थी ने बिना किसी न्यायोचित कारण के अनुबंध के अनुपालन से इंकार किया - यू.डी.ए. का कृत्य मनमाना एवं अनुचित कहा जा सकता है - यू.डी.ए. को उनके द्वारा याची के साथ किये गये अनुबंध की शर्तों का पालन करने के लिए निदेशित किया गया।

Cases referred :

(2010) 11 SCC 186, (2010) 10 SCC 388, (2001) 10 SCC 513, AIR-2004 SC 510, (2002) 1 SCC 216, (1991) 1 SCC 212,

V.K. Jain, for the petitioner.

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

Vivek Dalal, for the proposed Intervenor-J.P.J.Exim Pvt.Ltd.

T.N. Singh with Hemlata Gupta, for the proposed Intervenor.

ORDER

The Order of the court was delivered by :
SHANTANU KEMKAR, J. -THE petitioner, which is a Society registered under

the M. P. Cooperative Societies Act, has filed this petition under Article 226 of the Constitution of India against the Respondent – a development authority constituted under Section 38 of the Nagar Tatha Gram Nivesh Adhiniyam, 1973 making a prayer for grant of following reliefs :

“(1) To quash the letter dated 07.01.2011 (Annexure P/23) issued by the respondent and the tender notices dated 22.01.2011 & 21.01.2011 (Annexure P/24 & 25) issued by the respondent.

(2) To direct the respondent to immediately provide agreed plots to the petitioner and to execute sale deeds thereof.

(3) To allow this petition with costs and any other relief which this Hon'ble Court may deem fit be granted to the petitioner.”

[2] Shortly stated the petitioner-society claims to be owner of the land admeasuring 7.657 hectares comprised in various survey numbers of Village Lalpur. The part of the said land to the extent of 3.119 hectares was sought to be included in the scheme No.P2/ 87 prepared by the Respondent – Ujjain Development Authority [for short “the UDA”]. However, in a meeting of the Board of the UDA held on 11.09.1998 the said land was excluded from the scheme.

[3] Though as aforesaid, the land was excluded by the UDA from acquisition in the scheme, a Notification under Section 4 of the Land Acquisition Act was issued for its acquisition. In the circumstances, the petitioner had to file a Writ Petition No.1211 of 1999 before this Court challenging the said Notification. In the said writ petition, an interim order was passed by this Court on 08.09.1999 restraining the UDA from dispossessing the petitioner from the land in question with a further direction to the UDA to maintain the status-quo so far as the land in question. In spite of the interim order dated 08.09.1999 being passed in favour of the petitioner, the UDA proceeded with the acquisition proceedings and an Award was passed in respect of the said land measuring 3.119 hectares. Thereafter it appears that realizing the mistakes occurred, firstly in issuing Notification for acquisition of land which was executed from the scheme; and secondly in spite of there being an order of status-quo the acquisition proceedings were continued and an Award was passed an amicable settlement was arrived at between the petitioner and the UDA as per agreement dated 29.01.2004 (Annexure P/1). Having regard to

the settlement arrived at, the petitioner withdrew the said Writ Petition No.1211 of 1999.

[4] In the meantime the remaining part of the land of the petitioner to the extent of 2.639 hectares was declared surplus by the State Government. Challenging the order of declaration of land to be surplus, the petitioner had filed Writ Petition No.1604 of 2000. The said writ petition was disposed of on 20.11.2007 by this Court directing the Principal Secretary of the Revenue Department to take a final decision in the matter. In pursuance to the aforesaid directions issued by this Court, the revision was heard by the Competent Authority of the State Government and was allowed in favour of the petitioner and the land which was declared to be surplus was returned to the petitioner vide order dated 27.05.2008.

[5] As aforesaid, in the meantime a settlement was arrived between the parties vide agreement dated 29.01.2004 (Annexure P/1) to the effect that the petitioner's land which was wrongly acquired shall be developed by the UDA and the petitioner shall be entitled to get developed plot as mentioned in the map attached to the agreement for which the petitioner will have to pay development charges as agreed to in the said agreement. Thereafter further agreement and the amended agreements were entered into between the petitioner and the UDA. However, when the petitioner claimed possession of the plots, the UDA instead of giving possession of the plots mentioned in the agreement, issued a letter to the petitioner stating therein that a sub committee has been constituted and after the matter being inquired by the said sub committee, the petitioner's grievance about delay in giving the possession of the plots in question shall be decided. Having informed the petitioner as aforesaid, the UDA issued the impugned notice inviting tender in respect of the plots which were to be allotted to the petitioner. Aggrieved the petitioner has filed this petition seeking the reliefs as mentioned above.

[6] From the averments made by the parties, we find that undisputedly part of the petitioner's land to the extent of 3.119 hectares was initially proposed to be acquired by the UDA under the aforesaid scheme. However, the said proposal of acquisition of the petitioner's aforesaid land was dropped and the petitioner's land was excluded from the scheme. Even after exclusion of the petitioner's land from the scheme, inadvertently notification to acquire the said land was issued. The said action of issuance of Notification was assailed by the petitioner in Writ Petition No.1211 of 1999. In the said writ

petition an interim order as described hereinabove was passed on 08.09.1999 in favour of the petitioner. Thereafter realizing the mistakes, as aforesaid above, a settlement as per the agreement dated 29.01.2004 (Annexure P/1) was arrived at between the parties.

[7] It appears that on account of some complaint, Lokayukt Enquiry was ordered in the matter, however, no irregularity or illegality was found in the Lokayukt Enquiry and the Lokayukt vide order dated 21.08.2009 closed the complaint as would clear from the letter dated 29.08.2009 (Annexure P/10) issued from the office of Lokayukt. However, even after this when there was no impediment in giving the possession of the plots to the petitioner in terms of the settlement and when out of the plots which were to be allotted to the petitioner, few plots were sought to be auctioned, the petitioner had filed this petition.

[8] According to the learned counsel for the petitioner, the UDA being the instrumentality of the State is duty bound to act fairly and justly in discharging its duties, however, inspite of no fault on the part of the petitioner in paying the development charges, the UDA has not adhered to the agreement entered into between them. Thus, he argued that the UDA is acting arbitrarily, unfairly and unreasonably by not complying the agreement which is statutory in nature. The learned counsel for the petitioner in support of his contention that the writ petition would be maintainable keeping in view the facts and circumstances of the case has placed reliance on the judgment passed by the Supreme Court in the case of *Zonal Manager, Central Bank of India v/s Devi Inspat Limited and others* [(2010) 11 SCC 186]; and in the case of *Sushila Chemicals Private Limited and another v/s Bharat Coking Coal Limited and others* [(2010) 10 SCC 388].

[9] The learned counsel for the Respondent/UDA on the other hand contended that the petitioner has a remedy of filing a civil suit for specific performance of the contract and the writ petition is not a proper remedy for redressal of the grievance raised in this petition. He placed reliance on the judgment of the Supreme Court in the case of *World Tel Inc. and another v/s Union of India and others* [(2001) 10 SCC 513]; *State of Jammu and Kashmir v/s Ghulam Mohd. Dar and another* [AIR 2004 SC 510]; and *State of Bihar and others v/s Jain Plastics and Chemicals Ltd.* [(2002) 1 SCC 216].

[10] In the case of *Zonal Manager, Central Bank of India v/s Devi Inspat*

Limited and others (Supra), it has been held by the Supreme Court that :

“ It is clear that (a) in the contract if there is a clause for arbitration, normally, a writ court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and, (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution of India in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the State and if any action on the part of the State is wholly unfair or arbitrary, writ courts can exercise their power. In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in the earlier paragraphs.”

[11] In the case of *Sushila Chemicals Private Limited and another v/s Bharat Coking Coal Limited and others* (Supra), the Supreme Court placing reliance on the judgment passed in the case of *Shrilekha Vidyarthi v/s State of U.P.* [(1991) 1 SCC 212] has held that even in the domain of contractual matters, the High Court can entertain writ petition on the ground of violation of Article 14 of the Constitution when the impugned act of the State or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law.

[12] In the present case it is not in dispute that the Respondent – UDA is a public undertaking and is discharging public function and as such is a State within the meaning of Article 12 of the Constitution of India. Admittedly a settlement was arrived at between the parties and they had entered into an agreement as aforesaid. However, it appears that without any justiciable cause the Respondent on the pretext of pendency of some enquiry of which also no material was placed on record, denied the compliance of the agreement (Annexure P/1) and denied the allotment of plots in favour of the petitioner's society. The action of the UDA being manifestly contrary to the agreement entered by it with the petitioner, it can be very well termed to be arbitrary and unfair. In the circumstances, in our considered view in view of the law laid

down by the Supreme Court in the case of *Zonal Manager, Central Bank of India v/s Devi Inspat Limited and others* (Supra) and in the case of *Sushila Chemicals Private Limited and another v/s Bharat Coking Coal Limited and others* (Supra), the writ petition is maintainable.

[13] The case of *World Tel Inc. and another v/s Union of India and others* (Supra) on which reliance has been placed by the Respondent relates to claim of refund of money arising out of hotly disputed issue. In that in view of the fact that the issues were hotly contested, the Supreme Court observed that in such contractual matter writ would not be maintainable. In the present case, the execution of agreement is not disputed. In the Lokayukt enquiry also nothing adverse was found enabling the UDA to deny the compliance of the settlement as per agreement (Annexure P/1). In the reply no plausible explanation was offered by the UDA to deny the compliance of the agreement.

[14] In the case of *State of Jammu and Kashmir v/s Ghulam Mohd. Dar and another* (Supra), the amount claimed under the works contract was sought to be enforced through a writ petition under Article 226 of the Constitution of India. In the circumstances, the Supreme Court has observed that ordinarily writ of mandamus would not be issued for enforcing the terms and conditions of contract. It further observed that High Court would not entertain the writ petition involving disputed questions of fact.

[15] In the case of *State of Bihar and others v/s Jain Plastics and Chemicals Ltd.* (Supra), the Supreme Court had observed that the petition under Article 226 of the Constitution of India would not be maintainable when it is to be decided as to whether action of party in breach of the contract was justified on the basis of facts and evidence. In the present case as observed no disputed questions of facts which requires recording of evidence exist. Thus, the cases on which reliance has been placed by learned counsel for the Respondent are having no application to the facts involved in the present matter.

[16] As already narrated in the present case, there is no dispute about execution of the agreement. There is also no dispute about the petitioner's entitlement on the basis of the said agreement. The only defence which has been taken by the Respondent in the return is that an enquiry is to be conducted. However, no material was produced as to what sort of enquiry is to be held. It is also revealed that in the Lokayukt enquiry nothing wrong was found in the matter. It is worthwhile to mention that the Respondent has neither filed any

documents to show that any Sub Committee is enquiring into the matter nor any record to that effect was produced. It has also not been brought to our notice as to on what issue the Sub Committee is examining the matter and under which authority or on the basis of which order of any Competent Authority.

[17] Having regard to the aforesaid, in our considered view, the action of UDA is unreasonable unfair and is arbitrary. Having held so, we allow the petition and direct the Respondent – UDA to comply with the terms and conditions of the agreement entered by it with the petitioner. As a consequence the impugned letter dated 07.01.2011 and the notices inviting tender (Annexures P/24 and P/25) impugned in this petition are quashed. The Respondent – UDA is directed to provide the agreed plots to the petitioner and to do the necessary requirements of executing the sale deeds thereof after receiving necessary development charges as per the agreement.

[18] No order as to costs.

Petition allowed.

I.L.R. [2012] M.P., 2353

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No.116/2011 (S) (Jabalpur) decided on 11 May, 2012

CHINTAMAN MASULKAR

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Constitution - Article 226 - Finance Code Bill (M.P.), Rule 84, Evidence Act (1 of 1872), Section 115 - Correction of date of birth in service record - Initially date of birth was recorded on the basis of Higher Secondary Mark Sheet in 1986 - No clerical error - Never objected up to 2009 - No step for modification - Now on the basis of duplicate certificate of Primary School the change in date of birth could not be permitted under existing rule - Principle of estoppels under Section 115 of Evidence Act also do not support to petitioner - Petition dismissed.

(Paras 4, 5 & 9)

संविधान - अनुच्छेद 226 - वित्त संहिता बिल (म.प्र.), नियम 84, साक्ष्य अधिनियम (1872 का 1), धारा 115 - सेवा अभिलेख में जन्मतिथि का सुधार - प्रारंभ में 1986 में उच्चतर माध्यमिक अंकसूची के आधार पर जन्मतिथि दर्ज की गई थी - कोई लिपिकीय त्रुटि नहीं - 2009 तक कमी भी आक्षेप नहीं लिया गया - संशोधन हेतु कोई उपाय नहीं किया गया - प्राथमिक शाला के अनुलिपि प्रमाणपत्र के आधार पर अब वर्तमान नियमांतर्गत जन्मतिथि में परिवर्तन की अनुमति नहीं दी जा सकती - साक्ष्य अधिनियम की धारा 115 के अंतर्गत विबंधन का सिद्धांत भी याची को कोई सहायता प्रदान नहीं करता - याचिका खारिज।

Case referred :

AIR 2011 SC 3418.

Brindawan Tiwari, for the petitioner.

Divyakirti Bohre, P.L. for the respondents No.1, 3 to 6.

Harmeet Ruprah, for the respondent No.2.

ORDER

U.C. MAHESHWARI, J. - The petitioner working as Patwari in the revenue department of the State of M.P. has filed this petition under Article 226 of the Constitution of India for issuing appropriate writ in the nature of mandamus directing the respondents/authorities to correct his date of birth as "5.5.1954" at the place of "10.4.1952" in the service record with a further direction to extend him all consequential benefits accordingly.

2. The facts giving rise to this petition in short are that the petitioner was appointed on the post of Patwari in the service of respondent No.1 vide order dated 3.1.1986 (Annexure P/5). In connection of the aforesaid appointment, the requisite informations including the date of birth "10.4.1952" were given by the petitioner. The same date of birth i.e 10.4.1952 was mentioned in the mark-sheet of his Higher Secondary School Examination of 1973 (Annex.P/3). Pursuant to aforesaid information of the petitioner, in his service book and record, his date of birth "10.4.1952" was recorded and since then the same is coming in the record. After completing the service of near about 25 years, the petitioner has come to this court with the case that near about year 2009 from the Certificate of Primary School Education of the year 1966 (Annex.P/1)

and the School Leaving Certificate issued on 12.10.88 with the signature of the Head Master of the concerning school (Annex.P/2) in which his date of birth "5.5.1954" is mentioned, he came to know about his correct date of birth and the aforesaid mistake of supplying the wrong date of birth at the time of entering in the service, on which, immediately along with copy of the aforesaid Annexures P/1 and P/2, he submitted his representation (Annex.P/6) in the office of the respondents/authorities on 2.6.2009 to correct his date of birth as "5.5.1954" and since then such representation has neither been considered nor his date of birth has been changed in the service record, on which, the petitioner has come to this court with this petition.

3. In the return of the respondents, it is stated that the petitioner, according to his own case joined the aforesaid service in the year 1986 and the aforesaid representation (Annex.P/6) along with Annexures P/1 and P/2 has been made in the year 2009. It is further stated that in this regard, the District Education Officer, Balaghat has conducted an enquiry. According to its report dated 16.3.2011 (Annex.R/1), the date of birth of the petitioner in 6th Class certificate and mark-sheet was found to be 10.4.1952 while in the Dakhil Kharij/ Admission Register, the same was mentioned as 5.5.1954. In such premises, the date of birth 10.4.1952 mentioned by the petitioner, at the time of entering in the service, based on Higher Secondary School certificate and the same has been accepted since long for years together by him, cannot be corrected. As such, in recording his date of birth 10.4.1952 in the service record, no clerical error was committed by any official of the respondents No.1 to 4. As per further averments, in the available factual matrix, in the light of Rule 84 of the M.P. Finance Code Bill also (Annex.R/2), such correction could not be carried-out at the fag end of the service or at the eve of retirement of the petitioner in near future. If such alteration is directed to be carried out then it would cause prejudice to the interest of the respondents department and prayer for dismissal of the petition has been made.

4. Having heard the counsel at length on admission as well as for final disposal of the matter, keeping in view their arguments, I have gone through the petition and the return along with the annexed papers so also the case law cited by the counsel of the parties. It is undisputed fact on record that initially

the petitioner entered in the service as Patwari on the basis of the mark-sheet of Higher Secondary School the part of Annexure P/3 in which his date of birth "10.4.1952" has been mentioned and accordingly at his instance, such date of birth was recorded in his service book and record. Thereafter, till 2.6.2009, the same was neither objected nor any steps for its modification or correction was taken on behalf of the petitioner. Besides this in the progress book of the petitioner of the year 1969 (Annex.p/4) of 8th class, issued by Shasikiya Madyamik Shala, Ponia his date of birth "10.4.1952" is mentioned. Even in his mark-sheet of Class 6th the part of Annexure P/3 issued in the year 1966-67 also his date of birth "10.4.1952" is mentioned.

5. Now, the petitioner has come to this court for appropriate direction to change his date of birth from "10.4.1952" to "5.5.1954" on the basis of the photocopy of the duplicate certificate of the Primary School Examination of district Balaghat (Annexure P/1) issued by the District Education Officer as also the photocopy of the School Leaving Certificate issued by the Head Master of some school of Balaghat vide dated 12.10.88 (Annexure P/2) in which his date of birth "5.5.1954" is mentioned.

6. Initially in the course of the argument, on asking the petitioner's counsel regarding availability of the original mark-sheet of Annexure P/1, on which, he could not satisfy the court regarding existence of the original certificate Annexure P/1. Apart this, it is apparent from the School Leaving Certificate issued on 12.10.88 (Annexure P/2) that the same was available with the petitioner since long while the aforesaid duplicate mark-sheet (Annexure P/1) was obtained by the petitioner on 1.8.2005. In spite that to correct such date of birth in the service record for years together on the basis of such certificate and mark-sheet Annexures P/1 and P/2, no step was taken by the petitioner upto the year 2009 and now, near about at the eve of his retirement, at the fag end of service, he wants to change his date of birth in the service record contrary to his mark-sheet of Higher Secondary School (part of Annex.P/3) which is not permissible under the existing Rules.

7. In the aforesaid factual matrix, the correction in the date of birth of the petitioner in his service book as prayed is not permissible under Rule 84 of M.P Finance Code Bill. Such rule reads as under :-

"Rule 84. Every person newly appointed to a service or a post under Government should at the time of the appointment declare the date of his birth by the Christian- era with as far as possible confirmatory documentary evidence such as a matriculation certificate, municipal birth certificate and so on. If the exact date is not known, an approximate date may be given. The actual date or the assumed date determined under Rule 85 should be recorded in the history of service; Service book or any other record that may be kept in respect of the Government servant's service under Government. The date of birth, once recorded in this manner, must be deemed to be absolutely conclusive, and except in the case of a clerical error no revision of such a declaration shall be allowed to be made at a later period for any purpose whatsoever."

In view of the aforesaid rule, on subsequent request of the petitioner, contrary to his service book prepared on the information and documents submitted by him in the department at the time of entering in the service, his date of birth could not be directed to be changed.

8. My aforesaid approach is also fortified with the decision of the Apex Court in the matter of *State of M.P. Vs. Premlal Shrivastava-AIR 2011 SC 3418* in which considering the similar circumstances, taking into consideration the aforesaid Rule 84 of the M.P. Finance Code Bill it was held as under :-

14. It is manifest from a bare reading of Rule 84 of the M.P. Financial Code that the date of birth recorded in the service book at the time of entry into service is conclusive and binding on the government servant. It is clear that the said rule has been made in order to limit the scope of correction of date of birth in the service record. However, an exception has been carved out in the rule, permitting the public servant to request later for correcting his age provided that incorrect recording of age is on account of a clerical error or mistake. This is a salutary rule, which was, perhaps, inserted with a view to safeguard the interest of employees so that they do

not suffer because of the mistakes committed by the official staff. Obviously, only that clerical error or mistake would fall within the ambit of the said rule which is caused due to the negligence or want of proper care on the part of some person other than the employee seeking correction. Onus is on the employee concerned to prove such negligence.

15. In *Commissioner of Police, Bombay and Anr. Vs. Bhagwan V. Lahane* this Court has held that for an employee seeking the correction of his date of birth, it is a condition precedent that he must show, that the incorrect recording of the date of birth was made due to negligence of some other person, or that the same was an obvious clerical error failing which the relief should not be granted to him. observed that a bonafide error would normally be one where an officer has indicated a particular date of birth in his application form or any other document at the time of his employment but, by mistake or oversight a different date has been recorded.

16. As aforesaid, in the instant case, no evidence has been placed on record by the respondent to show that the date of birth recorded as 1st June, 1942 was due to the negligence of some other person. He had failed to show that the date of birth was recorded incorrectly, due to want of care on the part of some other person, despite the fact that a correct date of birth had been shown on the documents presented or signed by him. We hold that in this fact situation the High Court ought not to have directed the appellants to correct the date of birth of the respondent under Rule 84 of the said rules.

17. In view of the foregoing discussion, the decision of the High Court, holding that the respondent was entitled to get his date of birth corrected in the service record, cannot be sustained. Resultantly, the appeal is allowed and the impugned judgment is set aside, leaving the parties to bear their own costs throughout.”

9. Apart the above, the person like the petitioner could not be permitted to change his date of birth in the service record at the eve of his retirement on the principle of estoppel enumerated under section 115 of the Evidence Act also. Once the petitioner, by stating his date of birth "10.4.1952" entered in the aforesaid service as Patwari and such date of birth was recorded in the service record, the same could not be changed.

10. In the aforesaid premises, I have not found any substance in the petition for invoking the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India to direct the respondents/authorities to change the date of birth of the petitioner in the service record. Consequently, the petition is hereby dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 2359

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P.No. 6548/2012 (Jabalpur) decided on 19 June, 2012

RAJESH GUPTA

...Petitioner

Vs.

SMT. URVASHI MARWAHA & anr.

...Respondents

Civil Procedure Code (5 of 1908), Order 39 Rule 1 and 2 - Temporary Injunction against Plaintiff - Plaintiff was granted license to run saw mill for a period of 11 months - Petitioner was only given the permission to use the machine and not the premises - As the possession of the property in question remained with the defendant, the temporary injunction order which restrains the plaintiff/petitioner from causing any interference cannot be faulted with. (Para 21)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 - वादी के विरुद्ध अस्थाई व्यादेश - वादी को 11 माह की अवधि के लिए सॉ. मिल चलाने की अनुज्ञप्ति प्रदान की गई थी - याची को केवल मशीन का उपयोग करने की अनुमति दी गई थी और न कि परिसर - चूंकि प्रश्नगत सम्पत्ति का कब्जा प्रतिवादी के पास रहा है, किसी प्रकार के हस्तक्षेप से वादी/याची को रोकने के अस्थाई व्यादेश के

आदेश में कोई त्रुटि नहीं पाई जा सकती।

Cases referred :

AIR 1959 SC 1262, AIR 1976 SC 1813, (2011) 3 SCC 710, (1952) All E.R. 149, (2011) 5 SCC 270, (2004) 15 SCC 769, AIR 1996 Delhi 351, AIR 2004 SC 1975

Ashok Kumar Jain, for the petitioner.

Siddharth Gulati, for the respondents.

ORDER

SANJAY YADAV, J. - The respondent No. 1 is a proprietor of a Saw Mill, named and styled as Durga Trading Company situated over plot No. 1099/1100, Narsingh Ward, Madan Mahal, Village Amanpur, Jabalpur, Bandobast No. 5, Patwari Circle No. 28 Khasra No. 90/1. In the said premises three Saw Machines, of which one belong to respondent No. 1 and two belong to respondent No. 2 are being operated on the strength of the licence issued by the Forest Department, Government of Madhya Pradesh, under the provisions of the Madhya Pradesh Kashtha Chiran (Vinnyaman) 1984 and the Rules made thereunder, viz., The M.P. Kashtha Chiran (Vinnyaman) Niyam, 1984.

2. The petitioner is a proprietor of M/s. Shri Ram Kashtha Udyog and deals in the business of purchase and sale of timber.

3. That, for the purpose of sawing the timber purchased by the petitioner, an agreement was entered between the respondent No. 1 and the petitioner on 30.1.2009; where-under, on certain terms and conditions permission was granted to the petitioner to use the sawing machine.

4. It was agreed between the parties, i.e., between the respondent No. 1 and the petitioner that:

"1. यह कि पक्षकार कं. 1 उपरोक्त वर्णित अपनी आरा मशीन पक्षकार कं.2 को सिर्फ वन विभाग के सरकारी डिपो अथवा अन्य वैधानिक स्रोतों से प्राप्त की गई लकड़ी की चिराई कार्यों हेतु ही उपलब्ध करेगा।

2. (अ) यह कि पक्षकार कं. 2 द्वारा स्वयं की देखरेख में उपरोक्त वर्णित

काष्ठ की चिराई हेतु आवश्यक सामान की व्यवस्था जैसे कि मिस्त्री, हेल्पर आवश्यक मजदूर एवं मशीन के संबंधित सामान जैसे कि आरी, कूड आयल आदि उपकरणों की पूर्ति का दायित्व स्वयं का होगा। आरा मशीन चालू हालत में पक्षकार कं. 1 के द्वारा लकड़ी चिराई कार्य करने हेतु प्रदान की गई है। अतएव अनुबंध समाप्त होने पर, मशीन एवं अन्य उपकरण पक्षकार कं. 2 के द्वारा हस्तांतर करते समय "जैसी थी वैसी ही" स्थिति में वापिस सौंपी जावेगी। इस बीच किसी भी प्रकार की टूट-फूट, रख-रखाव, मरम्मत, नुकसानी की पूर्ण जबाबदारी पक्षकार कं. 2 की ही होगी।

(ब) अगर पक्षकार कं. 2 के द्वारा अपनी स्वेच्छा से व्यवसाय से संबंधित या किसी भी प्रकार का पुनः निर्माण या विस्तार कार्य, पक्षकार कं. 1 के बिना लिखित स्वीकृति के उसके व्यवसायिक प्रतिष्ठान में किया जाता है तो वह विधि समस्त स्वीकृति के अभाव में मान्य वा बंधन कारी नहीं होगा। तथ अनुबंध पत्र की समाप्ति पश्चात, ऐसी चल, अंचल सम्पत्ति पर व्यय की गई राशि पर कोई विवाद, दावा शून्य समझा जावेगा, तथा ऐसी स्थिति में स्वमेव निर्मित निर्माण कार्य पर वैधानिक अधिपत्त्व पक्षकार कं. 1 का पूर्णतयः होगा, व किसी भी तरह की क्षति-पूर्ति के लिये उत्तरदायी नहीं होगा। उक्त संबंध में भविष्य में किसी भी प्रकार का दावा या क्लेम राशि मान्य नहीं होगी।

3 यह कि पक्षकार कं. 2 अपना स्वतंत्र एवं विधि-समस्त व्यापार करेंगे और संबंधी कार्यों की सरकारी अथवा गैर सरकारी संस्थाओं, विभागों, एवं कार्यालयों के प्रति वे स्वयं पूर्णतया जबाबदार होंगे। अर्थात् उनके द्वारा किसी भी प्रकार के अवैधानिक कार्यों के लिये पक्षकार कं. 2 को दोषी या उत्तरदायित्व नहीं होगा।

4 यह कि पक्षकार कं. 2 के द्वारा, उक्त प्रयुक्त मशीन सिर्फ स्वयं के द्वारा, वन विभाग के सरकारी डिपो अथवा अन्य वैज्ञानिक स्त्रोतों से प्राप्त अथवा कय की गई काष्ठ की चिराई हेतु ही प्रयुक्त की जावेगी। अन्य दूसरे किसी कार्य हेतु अन्यथा किसी दूसरे व्यक्ति या फर्म को सब-लेट नहीं की जावेगी। उक्त नियम का उल्लंघन पाये जाने की स्थिति में मशीन, परिसर कार्य पर कब्जा लेकर तुरन्त कार्य बाद की कार्यवाही करत हुये यह अनुबंध पत्र हजाने सहित निरस्त करने का अधिकारी पक्षकार कं. 1 का होगा।

5 यह कि व्यवहारिक तौर पर पक्षकार कं. 2 को कार्यालय एवं माल रखने हेतु गोदान एवं खाली मशीन से लगा हुआ प्लाट, काग़ हेतु उपयोग में लाने हेतु सुविधा दी गई है। जिसका उपयोग लकड़ी व्यवसाय से संबंधित

कार्यो हेतु किया जावेगा अन्य किसी कार्य हेतु नहीं

6 यह कि अग्नि अथवा आकस्मिक दुर्घटनाओं हेतु मॉल— मशीन, शेड, आफिस, गोदाम आदि संबंधित कर्मचारियों का बीमा पक्षकार कं. 2 द्वारा करवाना अनिवार्य है अन्यथा किसी भी प्रकार की आकस्मिक दुर्घटना होने पर पूर्ण—रूपेण जबाबदारी क्षतिपूर्ति हर्जाना नुकसानी सहित पक्षकार कं. 2 की होगी

7 यह कि बिजली विभाग द्वारा प्रदत्त मासिक शुल्क नगर निगम फैंक्टरी टैक्स, एवं वन विभाग से संबंधित टैक्स फीस, शासकीय या अर्द्धशासकीय शुल्क के भुगतान की पूर्ण जबाबदारी भी पक्षकार कं. 2 की होगी। बिजली विभाग द्वारा व्यवसाय संचालन हेतु स्वीकृत, बिजली का भार का उपभोग ही किया जावेगा। असैवाधिनक रूप से अतिरिक्त विद्युत प्रभार पाये जाने शासकीय दण्ड एवं परिणाम स्वरूप अन्य नुकसानों के लिये पक्षकार कं. 2 की पूर्णतया जिम्मेदारी होगी। तथा ऐसी गतिविधियों में सलग्नता पाये जाने पर यह अनुबंध शून्य निरस्त माना जावेगा।

8 यह कि वन विभाग के नियमानुसार प्रतिमाह या तिमाही प्रपत्र डी 1, डी-2, डी-3 में विवरणी प्रस्तुत करने की पूर्णतया जबाबदारी पक्षकार कं. 2 की ही होगी। चूंकि लकड़ी व्यवसाय से संबंधित सम्पूर्ण कार्य संचालन कय विकय इत्यादि पक्षकार कं. 2 के निरीक्षण देखरेख में किया जाता है।

9 यह कि उभय पक्षों द्वारा आपासी सहमति से गोला काष्ठ चिराई हेतु दर 300/- अंकन में तीन सौ रूपये प्रति घन मीटर की दर से निश्चित की गई है। पक्षकार कं. 2 के द्वारा न्यूनतम चिराई मात्रा कम से कम 20 घनमीटर प्रतिमाह काष्ठ चिराई करवाना अनिवार्य है अन्यथा न्यूनतम मात्रा में चिराई हेतु काष्ठ उपलब्ध न होने पर न्यूनतम चिराई की मात्रा अर्थात् 20 घनमीटर काष्ठ की चिराई का भुगतान प्रतिमाह की दर से करना अनिवार्य होगा।

10 यह कि पक्षकार कं. 2 के द्वारा प्रति केलेण्डर माह के एक सप्ताह से भीतर चिराई बिल प्राप्त होने पर भुगतान किया जाना आवश्यक है। समयावधि के अंतर्गत भुगतान न किये जाने पर अगर पक्षकार कं. 1 अगर आवश्यक समझे तो पक्षकार कं. 2 की लकड़ी लेकर तथा को बेचकर क्षति—पूर्ति सहित चिराई राशि वसूल कर सकता है। पक्षकार कं. 2 कोइस पर कोई उज्र नहीं होगा।

11 यह कि पूर्व में किये गये अनुबंध पत्र के अनुसार प्राप्त अग्रिम राशि जमानत के बतौर रु. 15000/- (पन्द्रह हजार रुपये) नगर, दोनों पक्षकारों की आपसी सहमति के द्वारा प्राप्त की गई थी से इस वर्तमान अनुबंध पत्र के

अंतर्गत अग्रेषित किया गया है। अब किसी प्रकार का भी कोई आपसी लेनदेन बाकी शेष नहीं है। इस अग्रिम राशि का समायोजन अनुबंध पत्र की समयावधि समाप्त होने पर ही एक माह की अतिरिक्त अवधि के पश्चात् ही वापिस दिया जावेगा।

12 यह कि उपरोक्त अनुबंध पत्र की अवधि सिर्फ 11 महीनों के लिये है, उभय पक्ष आपसी सहमति से इस अनुबंध पत्र को पुनः आगे बढ़ा सकते हैं।

13 यह कि उपरोक्त वर्णित शर्तों के आधार पर अगर किसी भी पक्ष द्वारा किसी भी शर्तों के उल्लंघन किया जाता है अथवा वह अपनी स्वेच्छा से या अन्य कोई व्यक्तिगत कारणों से, इस अनुबंध पत्र को समय-पूर्ण निरस्त करना चाहता है तो उसे दूसरे पक्ष को लिखित अथवा मौखिक रूप से एक माह का समय देते हुए सूचना देना अनिवार्य है। ताकि इस समयावधि के अंतर्गत उभय पक्ष उचित व्यवस्था कर सकें।

14 यह कि उभय पक्ष किसी भी असामाजिक तत्वों को परिसर में प्रवेश या जमाव नहीं करेंगे जो कि भारतीय दंड विधान प्रक्रिया या आचरण निवारण नियम के विपरीत हों।

15 यह कि मुख्य द्वारा से परिसर में प्रवेश हेतु शासकीय नियमों के अन्तर्गत सूर्यकाल से सूर्यास्त तक ही लकड़ी चिराई का कार्य किया जावेगा। एवं इस समयावधि के पहले अथवा बाद में किसी भी व्यक्ति का प्रवेश वर्जित रहेगा। उक्त नियम का उल्लंघन किये जाने पर अनुबंध पत्र को निरस्त मानकर चिराई कार्य बन्द करने का अधिकार पक्षकार कं. 1 का होगा।

16 यह कि स्वयं के द्वारा चिराई हेतु प्रस्तुत लकड़ी की सुरक्षा, एवं अन्य सभी उपकरणों संबंधित चीजों की सुरक्षा का दायित्व पक्षकार कं. 2 की होगी।

17 यह कि उपरोक्त अनुबंध पत्र में वर्णित सभी शर्तों और नियमों को उभय पक्ष द्वारा मान्य करते हुए, पूर्ण राजी खुशी, होशोहवास, पसन्नचित्त एवं बिना किसी अनुचित दबाव से पढ़कर समझकर समक्ष साक्षियों के हस्ताक्षर किये ताकि सनद रहे और वक्त काम आवे। ”

5. Three things were clear from above agreement that the same was for the period of 11 months with a renewal clause. That, the permission granted was only to use the saw machine and no interest in immovable property was created in favour of the petitioner. And that, as per clauses 4, right to revoke the permission to use the saw machine was reserved with the respondent No.

1, the owner and occupier of the premises in question.

6. The agreement dated 30.1.2009 when construed in its entirety reflects that a licence to use the saw machine for sawing the timber was granted to the petitioner and no right in immovable property was created. Thus, satisfying the test laid down under Section 52 of the Indian Easements Act, 1882, whereby the 'licence' is defined as "where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence".

7. It has been held in *Associated Hotels of India Ltd. v. R.N. Kapoor* :AIR 1959 SC 1262, that, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof it will be a licence. But if there is a transfer of interest in land and exclusive possession is given to the grantee then it is a lease. (in this context please also see *Board of Revenue etc. v. A.M. Ansari* AIR 1976 SC 1813).

8. Recently in *Bharat Petroleum Corporation Ltd. v. Chembur Service Station* : (2011) 3 SCC 710, the Supreme Court affirms following principles culled out from the judicial opinion reflected in *Errington v. Errington* (1952) All E.R. 149, (i) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (ii) the real test is the intention of the parties - whether they intended to create a lease or a licence; (iii) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. (Please also see *Pradeep Oil Corporation v. Municipal Corporation of Delhi and another*): (2011) 5 SCC 270.

9. That, by agreement dated 30.1.2009 the respondent No. 1 permitted the petitioner to enter the premises for the purpose of using the saw machine belonging to the respondent No. 1. Under the agreement the petitioner cannot

enter the premises for any other purpose than to use the saw machine. The agreement as apparent from the terms therein does not thus create any tenancy, right in the premises in favour of the petitioner.

10. That, on expiry of the term of licence the petitioner was called upon not to enter the premises and was required to take away the timber lying in the premises. Letters and reminders to that effect were sent to the petitioner on 4.11.2010 and 20.11.2010. The petitioner, to overcome the same filed the suit for permanent injunction, seeking the relief that a judgment and decree for permanent injunction be passed and the defendants be restrained permanently from dispossessing the plaintiff from plot No. 1093/1100, Narsingh Ward, Jabalpur by force and they be directed to follow the due procedure of law in evicting the plaintiff. The defendants be further restrained from causing any disturbances in the smooth running of the business of the plaintiff in the premises.

11. Along with the suit petitioner filed an application under Order 39 Rules 1 and 2 Code of Civil Procedure, 1908 seeking temporary injunction of restraining the respondent No. 1 from taking any coercive steps.

12. On being summoned, the respondents besides filing the written statement filed a counter claim seeking permanent injunction to the following extent:

"वादी विवाद ग्रस्त संपत्ति जो कि प्रतिवादे (अतिरिक्त कथन) की कंडिका कंमांक 1 में वर्णित है, जो संलग्न नक्शे में दिखाई गई है उससे प्रति वादिनी के कब्जे में किसी भी प्रकार का व्यवधान उत्पन्न न करे और न ही वाद ग्रस्त संपत्ति पर किसी भी प्रकार से प्रवेश या हस्तक्षेप करें एवं वादी एवं उसके अन्य सहयोगी, व्यक्ति, प्रतिनिधि, कर्मचारी द्वारा प्रतिवादिनी संपत्ति पर किसी भी प्रकार का हस्तक्षेप न किया जाए। "

13. Along with the written statement and the counter claim the respondents herein filed an application under Order 39 Rules 1 and 2 CPC seeking temporary injunction that the petitioner be restrained from entering into the suit premises.

14. The trial court dwelt upon the two applications and by two separate orders on 5.7.2011, rejected both the applications on the findings that, the

plaintiff and defendants have failed to prove the prima facie case and the irreparable injury which may be caused.

15. Though the petitioner, who is plaintiff in the suit, did not prefer any appeal against the order dated 5.7.2011 rejecting his application. An appeal under Order 43 Rule 1 (r) CPC was, however, filed by the respondents/defendants against the order dated 5.7.2011 whereby their temporary injunction application was dismissed.

16. The appeal was allowed by impugned order dated 9.4.2012, restraining the petitioner from entering into the suit premises.

17. The appellate court while discarding the contentions by the petitioner that, interim injunction would tantamount to grant of final relief observed:

"13 अपी०गण/प्रति०गण की ओर से प्रतिवादा में किये गये अभिवचनों और संबंध में प्रस्तुत किये गये दस्तावेजों जिनका उल्लेख उपर पूर्ण में किया जा चुका है के आधार पर यह स्पष्ट हो जाता है कि वादग्रस्त संपत्ति पर अपी०गण/प्रति०गण के वैधानिक कब्जे में हस्तक्षेप करने का प्रयास प्रत्यर्थी/वादी के द्वारा किया गया है। अपी०/प्रति० कं० 1 श्रीमती उर्वशी मरवाहा वादग्रस्त संपत्ति प्लॉट नं० 1099/100 नरसिंहवाड़ मदनमहल आमनपुर जबलपुर की स्वामी है एवं अनुधि पत्र दिनांकित 23/1/2009 के माध्यम से उक्त प्लॉट पर स्थित मशीन लकड़ी चिराई कार्य हेतु प्रत्यर्थी/वादी को प्रदान की गई थी जैसा कि अभिलेख पर उपलब्ध अनुबंध पत्र की प्रति से प्रगट होता है। अपीलार्थी/प्रति०कं० 2 सुरेन्द्र मरवाहा, प्रतिवादी कं० 1 श्रीमति उर्वशी मरवाहा का मुख्यतार है यह पॉवर ऑफ अटॉर्नी के अवलोकन से प्रगट होता है ऐसी स्थिति में प्रथम दृष्टया मामला, सुविधा का संतुलन एवं अपूर्णीय क्षति के बिंदु अपीलार्थी गण / प्रतिवादीगणों के पक्ष में स्पष्ट रूप से प्रतीत होते हैं एवं ऐसा न मानकर अधी०विचा०न्याया० ने निश्चित रूप से त्रुटि कारित की है।

14 अधी० विचा०न्याया० द्वारा आलोच्य आदेश के पैरा 5 में यह उल्लेख किया गया है कि जहां अंतरिम अनुतोष मूल अनुतोष की ही प्रकृति का है वहां अंतरिम अनुतोष नहीं दिया जा सकता एवं यह भी उल्लेख किया गया है कि प्रतिवादी के पक्ष में ऐसी कोई अपवादित परिस्थिति भी नहीं है जिसके आधार पर प्रतिवादी को अंतरिम अनुतोष प्रदान किया जा सके। परंतु अधी० विचा०न्याया० का उक्त निष्कर्ष एक उचित निष्कर्ष नहीं कहा जा सकता क्योंकि वर्तमान प्रकरण में निश्चित रूप से अपीलार्थी गण/ प्रति०गण के पक्ष में अपवादित

परिस्थितियों विद्यमान है। उनके पक्ष में न केवल सुदृढ़ प्रथम दृष्टया मामला है बल्कि सुविधा का संतुलन एवं अपूर्णोप कृति के बिंदु भी अपी०गण/प्रति०गण के पक्ष में प्रतीत होते हैं। ”

18. Assailing the order learned counsel for the petitioner reiterates the submissions put forth before the appellate court, that an order of final nature cannot be passed at an interim stage and that the petitioner who has acquired a right to enter the suit premises on the basis of agreement cannot be prevented from entering the premises except by recourse to law. In other words, it is urged that, unless declared by a judicial pronouncement creating a legal clog, the petitioner cannot be prevented from using the premises.

19. The proposition, as propounded in the considered opinion of this Court, may carry some weight where a person is a lessee. In which case even when there is no right to remain in property, he cannot be dispossessed by the owner except by recourse to law. (please see: *Rame Gowda(Dead) by LRs. v. M. Varadappa Naidu (dead) by LRs. And another*: (2004) 15 SCC 769. The issue as to whether a tenant whose term of tenancy has expired can be evicted without recourse to law though does not crop up for consideration in the present case as it is already seen from the term of agreement dated 30.1.2009 that no right or interest in premises was created in favour of the petitioner. However, for completion of record necessary it would be to refer to the decision by a Division Bench of High Court in *D.T.T.D.C v. M/s. D.R. Mehara and sons* :AIR 1996 Delhi 351 wherein it is observed:

10. In our opinion, there are two different sets of principles which have to be borne in mind. Taking up the first aspect, it is true that where a person is in settled possession of property, even on the assumption that he has no right to remain in property, he cannot be dispossessed by the owner except by recourse to law. This principle is laid down in Section 6 of the Specific Relief Act, 1103 (Sic 1963). That Section says that if any person is dispossessed without his consent from immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set lip in such suit.

That a person without title but in "settled" possession as against mere fugitive possession- can get back possession if forcibly disposed or rather, if disposed otherwise than by due process of law, has been laid down in several cases. It was so held by the Supreme Court in *Yashwant Singh v. Jagdish Singh*, AIR 1968 SC 620, *Krishna Ram Mohale v. Mrs. Shobha Venkata Rao*, 1989(4) SCC 131 (136) : (AIR 1983 SC 2097), *Ram Rattan v. State of U.P.*, 1977 (1) SCC 188 : (AIR 1977 SC 619) and *State of U.P. v. Maharaja Dharmender Prasad Singh*, 1989 (2) SCC 505 (516-517) : (AIR 1989 SC 997). The leading decision quoted in these rulings is the decision of the Bombay High Court in *K.K. Verma v. Union of India*, AIR 1954 Bom 358.

11. Before going to the other aspect, we shall refer to one of the cases cited for the appellant. In *East India Hotels Ltd. vs. Syndicate Bank* (1992) Suppl (2) SCC 29; there was a conflict of opinion between two learned Judges of the Supreme Court not in regard to the above principle but in regard to the question whether the appellant (owner) of the premises was bound to give back possession to the Bank (plaintiff therein) in the latter's suit for possession under Section 6 of the Specific Relief Act, 1963. Kasliwal J. held that the licence in favour of the Bank stood terminated, and the Bank was in the position of a trespasser in view of *D.H. Manian v. Waman Laxman Kudav*, (1970) (4) SCC 118. If dispossessed, a trespasser could not resort to Section 6 of the Specific Relief Act, 1963. The learned Judge observed that in *K.K. Verma's case* (AIR 1954 Bom 358) Chagla, C.J. pointed out that a tenant whose tenancy had ceased could get back possession under the summary procedure in the Specific Relief Act but that a trespasser who had been thrown out of possession could not go to Court under Section 9 and claim possession as against the true owner'. Kasliwal J. pointed out that the Bombay case was approved by the Supreme Court in *Lalla Yeshwar Singh*

vs. Rao Jagdish Singh (1968 SC 620). His Lordship would allow the appeal of the owners and dismiss the suit. However Ramaswamy J. differed holding that the possession of the Bank was "settled" possession and even if the Bank was atrespasser, it could resort to Section 6 of the Specific Relief Act, 1963 if dispossessed otherwise than by due process of law. He would therefore dismiss the appeal of the owner and confirm the decree for possession. The matter was referred to a third Judge.

12. Ramaswamy, J. had occasion recently to refer to his views in *East India Hotel's* case while dealing with question whether a person whose tenancy had expired could be said to be in lawful possession' for purposes of grant of licence under Cinematograph Act in *R. V. Bhupal Prasad vs. State of A.P.* . His Lordship held that 'lawful possession' was necessary at the time of grant of licence by the licensing authority in view of the, language in the rule. For renewal of licence also, lawful possession was necessary even though the word lawful' was not used in the rules relating to renewal. His Lordship referred to *M.C. Chokkalingam vs. V. Manichava sagar and to Krishna Kishore Firm vs. Government of A.P.* . The possession of a tenant whose tenancy expired was a tenant at sufferance and his possession Was not lawful' and he was not entitled to renewal. No writ could be issued to the licensing authority. We have referred to this case because it refers to the views expressed by Ramaswamy, J. in *East India Hotels case*. This is so far as the first aspect referred to by us earlier, is concerned."

20. Be that as it may, in the case at hand since the petitioner has failed to establish from the agreement in question that he is not a licensee but a tenant no presumption can be drawn of his being a tenant.

21. On the contrary as observed from the agreement in question, the petitioner was only given the permission to use the machine and not the premises

as would create any right in favour of the petitioner over the premises. Since the physical possession of the property in question is retained by the respondent No. 1, the impugned order which restrains the petitioner from causing any interference cannot be faulted with, as would call for any interference.

22. In respect of the contention that the granting of the interim relief, i.e., restraining the petitioner from interfering with the possession of the respondent No. 1 tantamount to granting of final relief, it is established that the petitioner was never placed in possession of the premises, he was only permitted to use the machinery and the physical possession of the premises was retained by the respondent No. 1. Thus, a very strong prima facie case having been made out by the respondent No. 1, the appellate court was justified in injuncting the petitioner from causing any interference with the peaceful possession of the premises by respondent No. 1. Otherwise, the same could have caused irreparable injury to the respondent No. 1. In *Deoraj v. State of Maharashtra and others* (AIR 2004 SC 1975) it is held:

11. The Courts and Tribunals seized of the proceedings within their jurisdiction take a reasonable time in disposing of the same. This is on account of fair procedure requirement which involves delay intervening between the previous and the next procedural steps leading towards preparation of case for hearing. Then, the Courts are also over burdened and their hands are full. As the conclusion of hearing on merits is likely to take some time, the parties press for interim relief being granted in the interregnum. An order of interim relief may or may not be a reasoned one but the factors of prima facie case, irreparable injury and balance of convenience do work at the back of the mind of the one who passes an order of interim nature. Ordinarily, the Court is inclined to maintain status quo as obtaining on the date of the commencement of the proceedings. However, there are a few cases which call for the Court's leaning not in favour of maintaining the status quo and still lesser in percentage are the cases when an order tantamounting to a mandamus is required to be issued even at

an interim stage. There are matters of significance and of moment posing themselves as moment of truth. Such cases do cause dilemma and put the wits of any Judge to test.

12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case - of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent.

23. Keeping in view the above proponement of law and the given facts of present case, the impugned order cannot be said to have suffered the vice of illegality or an error in exercise of jurisdiction.

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

Petition dismissed.

I.L.R. [2012] M.P., 2372

WRIT PETITION

***Before Mr. Sushil Harkauli, Acting Chief Justice and
Mr. Justice Alok Aradhya***

W.P.No. 8783/2012 (Jabalpur) decided on 27 June, 2012

ANKIT KHARE

...Petitioner

Vs.

THE HIGH COURT OF M.P.

...Respondent

A. *Competitive Examination - Model Answer - Correct answer* - A question may have more than one correct answer and the candidate will have to select the one which is more correct out of the alternative answers. (Para 7)

क. *प्रतियोगिता परीक्षा - आदर्श उत्तर - सही उत्तर* - किसी प्रश्न के एक से अधिक सही उत्तर हो सकते हैं और अभ्यर्थी को वैकल्पिक उत्तरों में से अधिक सही उत्तर का चयन करना होगा।

B. *Competitive Examination - Model Answer* - One question carries two correct answers - Candidates who have marked "C" as correct answer would not get one mark although he is entitled to one mark as his answer to the question is correct - Respondents direct to take out the answer books of candidates who have failed to secure cut-off marks by one mark and shall examine whether their answer to question is "C". If the said candidate has given correct answer then he should be awarded one mark and the result of preliminary examination be re-tabulated. (Paras 13 & 14)

ख. *प्रतियोगिता परीक्षा - आदर्श उत्तर* - एक प्रश्न के दो सही उत्तर - अभ्यर्थी जिन्होंने 'सी' को सही उत्तर अंकित किया है उन्हें एक अंक नहीं मिलेगा यद्यपि उसका उत्तर सही है और वह एक अंक का हकदार है - प्रत्यर्थीगण को निदेशित किया गया कि वे उन अभ्यर्थियों की उत्तर पुस्तिका निकालें जो एक अंक से, न्यूनतम निर्धारित अंक प्राप्त करने में असफल रहे और परीक्षण करें कि क्या उन्होंने प्रश्न का उत्तर 'सी' अंकित किया है। यदि उक्त अभ्यर्थी ने सही उत्तर दिया है तब उसे एक अंक प्रदान किया जाए और प्रारंभिक परीक्षा का परिणाम पुनः सारणीबद्ध किया जाए।

Cases referred :

AIR 1983 SC 1230, (2007) 8 SCC 242, AIR 2010 SC 2620, 1995 Suppl. (1) SCC 325, (1889) ILR 13, Bom.131.

Anuwad Shrivastava, Vipin Yadav. M.A. Khan & Aditya Sanghi,
for the petitioners.

V.S.Shrotri with Vikram Johri, for the respondents.

O R D E R

The Order of the court was delivered by :
SUSHIL HARKAULI, AG. CJ. - Heard.

2. In this batch of writ petitions since common questions of law and facts arise for consideration, they were heard analogously and are being decided by this common order.

3. The petitioners had appeared in the preliminary examination which was held for recruitment to the post of Civil Judge, Class II in Lower Judicial Service of the State. An advertisement was issued by which applications were invited for the post of Civil Judge, Class II. A preliminary examination was held on 6.5.2012, the result of which was declared on 12.5.2012. Three questions namely question No.6, 61 and 95 were cancelled and consequently, revised result was declared in which marks of the aforesaid three questions were deducted from the total marks. The case of the petitioners is that model answers to question No.5, 8, 15, 25, 67 and 89 are not correct. In the aforesaid factual background, the petitioners inter-alia have prayed for a direction to correct the answers to the aforesaid questions and to award them the marks in respect of the aforesaid questions as well as to permit them to appear in the main examination.

4. Learned counsel for the petitioners while inviting the attention of this Court to question No.5 submitted that correct answer to question No.5 is option "C" whereas in the model answer the correct answer is mentioned as "D". Learned counsel for the petitioners while referring to the definition of Section 24 of the Indian Penal Code submitted that the word "dishonestly" as defined under Section 24 of the Indian Penal Code means that 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly", whereas as per

model answer, all the options are correct. It is further submitted that option "C" is correct answer to question No.5. Similarly, while drawing the attention of this Court to question No.8, it is submitted that intention to cause death is not essential under Section 300 of the I.P.C. in clause fourthly whereas in the model answer clause thirdly is mentioned as the correct answer. As per petitioners, the correct answer to the aforesaid question is "D" and not "C". Similarly, it is submitted that in respect of question No.15, the correct answer is "D" whereas in the model answer, the correct answer is mentioned as "C". In respect of question No.24, it has been urged that correct answer is option "D" whereas in the model answer, the same has been mentioned as option "B". It is also urged by the learned counsel for the petitioners that in respect of question No.67, the correct answer is option "A" whereas in the model answer, the correct answer is described as option "C", which is incorrect. In respect of question No.89, it has been submitted that all the options are correct whereas in the model answer, option "C" has been described to be the correct answer, which is incorrect. In support of their submissions, learned counsel for the petitioners have placed reliance on a Division Bench decision of Patna High Court in Civil Writ Jurisdiction No.5300/11.

5. On the other hand, Shri V.S. Shroti, learned senior counsel for the respondents submitted that key answer is assumed to be correct unless the same is proved to be wrong and the same cannot be held to be wrong by an inferential process of reasoning or by process of rationalisation. It is further submitted that the question whether or not the key answer is correct has to be decided on the ground that key answer must be such as no reasonable body of men well versed in particular subject would regard as correct. It has been further submitted that there may be two correct answer in respect of a question. It is also urged that the key answers are correct and the petitioners have miserably failed to point out that key answers are either palpably incorrect or such that no reasonable body or men well versed in the particular subject would regard them as correct. Learned senior counsel for the respondents has also produced before us relevant extract from the book by William F.Ganong "Review of Medical Physiology", 22nd edition. In support of his submissions, learned senior counsel for the respondents has placed reliance on decisions of Supreme Court in *Kanpur University and others Vs. Sameer Gupta and others*, AIR 1983 SC 1230, *Secretary, West Bengal Council of Higher Secondary Education Vs. Ayan Das and others* (2007) 8 SCC 242 and *H.P. Public Service Commission Vs. Mukesh Thakur and another*,

AIR 2010 SC 2620.

6. We have considered the submissions made on both sides. Before proceeding further, it would be apposite to reproduce the questions No.5, 8, 15, 24, 67 and 89 as under:-

"Q.5 Word 'Dishonestly' as defined in Section 24 of IPC means:

- (A) With the intention of causing wrongful gain to one person.
- (B) With the intention of causing wrongful loss to another person.
- (C) With the intention of causing wrongful gain to one person and with the intention of causing wrongful loss to another person.
- (D) All the above are true.

Q.8 Intention of cause death is not essential under Sec.300 (clause):

- (A) Firstly
- (B) Secondly
- (C) Thirdly
- (D) Fourthly

Q.15 Any Public Prosecutor or Assistant Public Prosecutor in charge of a case may before the judgment is pronounced, withdraw from the prosecution of any person. For this he has to take consent of:

- (A) Central Government
- (B) State Govt.
- (C) Court
- (D) All of the three.

Q.24 Name of the vitamin that needs no support for its

digestion, is :

- (A) Vitamin A
- (B) Vitamin B
- (C) Vitamin C
- (D) Vitamin D

Q.67 'A' contracts to pay 'B' a sum of money when 'B' marries "C". This is a type of:

- (A) Contingent Contract
- (B) Vested Contract
- (C) Illegal Contract
- (D) Voidable Contract

Q.89 Who among the following is not authorised under the code to transfer the land through lease:

- (A) Widow
- (B) Unmarried woman
- (C) Married woman
- (D) Cooperative Society

7. Before proceeding to deal with the issue involved in the instant writ petitions, at this stage, it would be apt to note relevant decisions of the Supreme Court. In *Kanpur University and others*, supra, the Supreme Court has held that key answer should be assumed to be correct unless it is proved to be wrong and it should not be held to be wrong by an inferential process of reasoning or by a process of rationalisation. It must be clearly demonstrated to be wrong. That is to say, it must be such as no reasonable body of men well versed in the particular subject would regard as correct. In *Subhash Chandra Verma Vs. State of Bihar and others*, 1995 Suppl. (1) SCC 325, it has been held that a question may have more than one correct answer and the candidate will have to select the one which is more correct out of the alternative answers. In *H.P. Public Service Commission*, supra it has been held that the Court cannot take upon itself the task of the statutory authorities.

8. Bearing in mind, the aforesaid well settled legal principles, we may now proceed to deal with the issue relating to correctness of the key answers. Section 24 of the I.P.C. defines the word 'dishonestly'. Section 24 provides that 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly"'. From a careful scrutiny of Section 24 of the I.P.C., it is apparent that if a person does anything with the intention of causing wrongful gain to one person or causing wrongful loss to another person, the same would be covered under Section 24 of the I.P.C. The action of doing something with intention of causing wrongful gain to one person or causing loss to another person is not mutually exclusive. Therefore, the key answer to question No.5 i.e. "D" is correct. Question No.8 pertains to Section 300 of the I.P.C. Intention to cause death is not essential under clause 'thirdly' of Section 300 of I.P.C. which is apparent from illustration 'C' appended to the section. Therefore, the key answer "C" is correct. Question No.15 deals with withdrawal of any public prosecutor or Assistant public prosecutor. Section 321 of Cr.P.C. provides that public prosecutor or Assistant public prosecutor incharge of the case may with consent of the Court at any time before judgment is pronounced, withdraw from the prosecution. Therefore, the key answer namely option "C" is the correct answer to the aforesaid question. Question No.67 deals with nature of contract. As per the petitioners, it is a contingent contract whereas as per key answer, it is an illegal contract. In *Pitamber Ratansi Vs. Jagjivan Hansraj*, (1889) ILR 13, Bom. 131, it has been held that marriage brokers should not be given a legal status such as would enable them to enforce their contracts by law. The tendency of such a decision would be to still further degrade the position of women and to perpetuate the inequality of their relations with the other sex. Accordingly, it has been held that payment of money to a person in lieu of marriage is void under Section 23 of the Contract Act. Thus, the contract which has been referred to in question No.67 is obviously an illegal contract and not a contingent contract. For yet another reason, we are inclined to hold that option "C" i.e. illegal contract is the correct answer to question No.67. Section 2 of the Dowry Prohibition Act reads as under:

"Dowry" means any property or valuable security given or agreed to be given either directly or indirectly -

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parent of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties.

9. Thus the contract in question would be covered under the definition of dowry as defined under section 2 of the Dowry Prohibition Act, 1961. Therefore, the contract referred to in question No.67 is illegal contract. So far as reliance placed by learned counsel for the petitioners on illustration to Section 32 of the Contract Act, 1872 is concerned, the same is misconceived as the Dowry Prohibition Act was enacted much later i.e. in the year 1961 whereas, the Indian Contract Act was enacted in the year 1872.

10. Question No.89 pertains to M.P. Land Revenue Code. Section 168(1) of the M.P. Land Revenue Code provides that except in cases provided for in sub-section 2 no bhumiswami shall lease any land comprised in his holding for more than one year during any consecutive period of three years. Sub-section 2 enumerates the bhumiswamis who are exempted from the rigors of sub-section (1) of Section 168. In Section 168(2) of the Code, married woman is not mentioned. Therefore, a married woman is not authorised under the Code to transfer the land through lease. Therefore, the option "C" given in the key answer is correct. The contention of the petitioners that all the persons can lease out the land cannot be accepted. Learned counsel for the petitioners were unable to satisfy this Court that model answers in respect of the questions except question No.24 are such as no reasonable body of men well versed in the particular subject would regard as correct.

11. Now we may advert to question No.24 which pertains to the vitamins that needs no support for its digestion. In support of the key answer which is mentioned as "Vitamin D", learned senior counsel for the respondents has produced the book by William F.Ganong "Review of Medical Physiology", 22nd edition. The relevant extract is as under:

"Those that are water-soluble (vitamin B complex, vitamin C) are easily absorbed, but the fat-soluble vitamins (vitamins A, D, E and K) are poorly absorbed in the absence of bile or pancreatic lipase."

12. Thus, from perusal of the relevant extract of the book, it is apparent that both the options i.e. option "B" namely Vitamin B and option "C" namely

Vitamin C are correct answers. If the candidate has marked Vitamin C as correct answer, he would not get one mark though he is entitled to one mark as his answer to the question is correct.

13. Accordingly, it is directed that the respondents shall take out the answer books of all the candidates who have failed to secure cut-off marks by one mark and shall examine whether their answer to question No.24 is option "C". If the answer to question No.24 given by such candidates is option "C", then they shall be awarded one mark. Accordingly, the result of the preliminary examination of the Civil Judge, Class II shall be re-tabulated and an intimation shall be sent to the concerned candidates for their appearance in the main examination. The aforesaid exercise shall be carried out within a period of ten days from today.

14. The writ petitions are accordingly disposed of. Let a photocopy of this order be placed in the record of connected cases.

C.C. within 24 hours.

Petition disposed of.

I.L.R. [2012] M.P., 2379

WRIT PETITION

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

W.P.No. 4718/2010 (Jabalpur) decided on 3 July, 2012

SATYAM PANDEY & ors.

...Petitioners

Vs.

UNIVERSITY INSTITUTE OF

TECHNOLOGY, RGPV & ors.

...Respondents

Education - Green Card - Exemption from payment of Fee -
Petitioners were admitted in B.E. Course in the academic session of 2008-2009 and were exempted from payment of fee under the policy of the State Govt. in vogue vide circular dated 17-10-2007 - Benefit of exemption was withdrawn in the light of order dated 3-7-2009 - Held - Policy dated 3-7-2009 had in fact restored the past with certain rider - Petitioners are not hit by two exceptions as laid down in policy dated 3-7-2009 - Petitioners were exempted from tuition fee since their admission in the year 2008-2009 and the same having been granted

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vide circular dated 17-10-2007 which is not superseded by subsequent order/policy decision-dated 3-7-2009 - Petition allowed.

(Paras 14 to 18)

शिक्षा – ग्रीन कार्ड – शुल्क के भुगतान से छूट – याचीगण को 2008–2009 के शैक्षणिक सत्र में बी.ई. पाठ्यक्रम में प्रवेश दिया गया और परिपत्र दिनांक 17.10.2007 द्वारा, राज्य सरकार की विद्यमान नीति के अंतर्गत शुल्क के भुगतान से छूट दी गई – आदेश दिनांक 3.07.2009 के आलोक में छूट का लाभ वापस लिया गया – अभिनिर्धारित – नीति दिनांक 3.7.2009 ने वास्तव में पिछली नीति को कतिपय बदलाव के साथ पुनः स्थापित किया था – याचीगण नीति दिनांक 3.7.2009 में प्रतिपादित किये गये दो अपवादों द्वारा प्रभावित नहीं होते – याचीगण को सन् 2008–2009 में उनके प्रवेश लेने के बाद से शिक्षा शुल्क से छूट दी गई थी और उक्त को परिपत्र दिनांक 17.10.2007 द्वारा प्रदान किया गया था, जो पश्चात्बर्ती आदेश/नीति निर्णय दिनांक–3.7.2009 द्वारा अतिक्रमित नहीं होता – याचिका मंजूर।

Abhishek Arjaria, Brijesh Mishra & Pradeep Bhargav, for the
petitioners.

Paritosh Gupta, for the respondent No.1.

Vivek Agrawal, G.A. for the respondent No.2 & 3.

ORDER

The Order of the court was delivered by :
SANJAY YADAV, J. - Common question which crops up for consideration in these petitions is as to whether the State Government and its functionaries are justified in withdrawing the benefit of exemption of tuition fee enjoyed by the petitioner on the anvil of green card held by the parents.

2- Bare facts necessary for adjudication of the above issue may be noted first.

3- Petitioner in all these petitions are students of University Institute of Technology, an educational institution under Rajiv Gandhi Proudhyogiki Vishwavidyalaya (hereinafter to be referred as the 'R.G.P.V.'), Bhopal.

4- They were admitted to the course of B.E. (Bachelor of Engineering) in the academic session 2008-2009. Their parents being holder of green card, the petitioners were exempted from payment of fee under the policy of the

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State Government in vogue vide circular dated 17.10.07.

5- It is not in dispute that R.G.P.V. was established by virtue of enactment promulgated by the Madhya Pradesh State Legislature viz., the Rajiv Gandhi Proudhyogiki Vishwavidyalaya Adhiniyam, 1998. The Act provided for establishing and incorporating a University of Technology for the purpose of ensuring systematic, efficient and qualitative education in engineering and technological subjects including Architecture and Pharmacy at Degree and Diploma level and to provide for matters connected therewith or incidental thereto. The enactment was in furtherance to the decision taken by the State Government to establish a University of Technology in the State of Madhya Pradesh which will cater to the academic needs of Engineering Colleges and Polytechnics of the State.

6- It is also not in dispute that since 1985 there is in vogue a policy of the State Government to exempt the wards of parents in possession of green card issued to them on they being operated (Tubectomy or Vasectomy as the case may be). The object was to promote family planning in order to control population growth.

7- The first order was issued as back as on 5.1.85 and thereafter the policy has been reiterated time and again. In the case at hand policy as was circulated on 17.10.2007 was in vogue, which stipulated that-

“(1)- The children of the green card holders would be entitled to exemption from the payment of fee only in Government and autonomous Medical Colleges, Engineering College/ Polytechnic Colleges/ Industrial Training Institutes.

(2) The children of the green card holders shall not be entitled to exemption from the payment of fee who are prosecuting their studies in Medical College, Engineering College/ Polytechnic Colleges/ Industrial Training Institutes established by the private sectors.

(3) The benefit with regard to tuition fee shall be granted only one time and only for one degree/ course in Government autonomous Medical Colleges, Engineering College/ Polytechnic Colleges/ Industrial Training Institutes.

(4) As per the circular dated 13.5.03 issued by the Public

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Health and Family Welfare Department the benefits of green card shall be given only to the persons belonging to below poverty line.

2/- Such green card holders who have undergone operation before 13.5.03 they will get the benefits as per the provisions which were prevalent prior to this order. Those persons who have undergone operation after 13.5.03 shall be given the aforesaid benefits if they belong to below poverty line.”

8- It is not in dispute that University Institute of Technology an engineering institution under the R.G.P.V. which was established in 1986 by the Government of Madhya Pradesh as Government Engineering College.

9- In July 1998, Government of Madhya Pradesh has declared University Institute of Technology R.G.P.V. as autonomous and named it as Bhopal Engineering College. It was declared a constituent college of R.G.P.V., Technical University of the State of Madhya Pradesh w.e.f. July 2002 by an order passed by Government of Madhya Pradesh. It is informed that University Institute of Technology was again declared as autonomous in July 2007. Thus, University Institute of Technology wherein the petitioners are prosecuting their studies is definitely not a private institution but an autonomous institution, being a constituent college of State University.

10- That in furtherance to the policy to promote family planning certain decisions were taken by the State Government on 23.6.09, formulated in an order on 03.07.09. The decision taken were in the following terms- (English translation is reproduced as under-)

“Government of Madhya Pradesh,
Public Health and Family Welfare Department,
Ministry

Bhopal, Date 03/07/09

ORDER

No.F-10-101/2001/17/MD-2; In the course of same numbered order dated 17-10-2007, issued earlier by the Department of Public health and Family Welfare following decisions have been taken in the Cabinet on 23-06-2009 by the State Government in regard with reimbursement / refund of the tuition fees to the children of Green Card Holders studying under Green Card Scheme

covered by Public Welfare Programme:-

- (1) The tuition fees of the children of Green Card Holders studying prior to 13/05/2003, shall be exempted till the completion of their courses. These institutions shall not be eligible to reimbursement of the tuition fees. If the tuition fee has been recovered from them after 13/05/2003, it shall be the responsibility of the institutions to refund such amount to them.
- (2) The Medical Education and Technical Education Department shall make necessary provisions in their respective budgets for re-imbursement of tuition fee of the children of only the green card holders taking admission in Government Autonomous Medical College, Govt. Engineering College from 13-05-2003 to the date of the decision of the Cabinet. For this purpose, their allotment limit shall be increased as per the requirement.
- (3) As per the previous arrangement, the students studying / getting admission in private institutions shall not be eligible for fee exemption / reimbursement.
- (4) The children of all the green card holders who have got the family planning operation done before 13-05-2003 and only the green card holders living below poverty line who have got the family planning operation done after 13-05-2003 shall be eligible for exemption in tuition fee only for one degree / course in Medical College [Govt. Autonomous], Govt. Engineering Colleges, Govt. Polytechnic, Govt. Industrial Training Institutes. If needed, these institutions shall be provided grant by the concerned administrative department.

The said orders shall take effect immediately.

In the name of the Governor of Madhya Pradesh and as per his Order.

Sd/-

(Jayshree Kiyavat)

Deputy Secretary

Govt. of Madhya Pradesh,

Public Health & Family Welfare Department”

11- After the issuance of aforesaid order University Institute of Technology passed an order on 20.8.09 directing that the petitioners herein will henceforth be not entitled for any relaxation and will have to deposit the tuition fee from academic session 2009-2010 onwards.

12- Assailing the order it is urged on behalf of the students that the respondent No.3 is not justified in stopping the benefit which enured in favour of the petitioner by virtue of the circular dated 17.10.07 and by directing the petitioner to pay tuition fee from academic session 2009-2010 onward.

13- It is urged that, the decision taken by the State Government vide circular dated 3.7.09 besides not being retrospective also does not create any impediment in respect of the benefit which flowed in favour of the petitioner in pursuance to the policy dated 17.10.07. The bar, it is contended, created vide the policy decision dated 03.07.09 is confined to Non-Governmental institutions and in such cases where the operation has been undergone after 13.05.03 wherefrom it is made applicable to only such students who are wards of parents Below Poverty Line. It is urged that, the petitioners are not effected by the bar created vide aforesaid policy as in the case of petitioners, the green card has been issued to their parents much prior to 13.05.03 and that the petitioners are prosecuting their studies in autonomous/government institutions. There is much force in the contention put forth on behalf of the petitioners.

14- The policy decision dated 03.07.09 when scanned microscopically reveals that the State Government took a decision for reimbursement of tuition fee of the children on only green card holders taking admission in Government/ Autonomous Medical College, Government Engineering College between 13.5.03 to 23.6.09 when the Cabinet took the decision and that the children of green card holders who have got the family planning operation done before 13.05.03 and only the green card holders living Below Poverty Line who have undergone family planning operation after 2003 shall be eligible for exemption of tuition fee only for one Degree/Diploma course in Medical College [Govt. Autonomous], Govt. Engineering Colleges, Govt. Polytechnic, Govt. Industrial Training Institutes. And that the students studying/getting

admission in private institutions be eligible for exemption.

15- Apparent it is from the policy dated 03.07.09 that it restored the past with certain rider. In other words, in case where the students are prosecuting their studies in autonomous/government institutions and the government colleges has been issued prior to 13.5.03 they are held entitled for the relaxation in tuition fee. However, in case where the students are prosecuting their studies in non governmental institutions and in respect of the students whose parents have undergone Tubectomy and Vasectomy operation after 13.5.03 and if not Below Poverty Line, they are not held entitled for relaxation in tuition fee.

16- The petitioners are not hit by these two exceptions. On the contrary, the record reveals that the petitioners were exempted from tuition fee since their admission in the academic session 2008-2009 and the same having been granted vide circular dated 17.10.07 which is not superseded by a subsequent order/policy decision dated 03.07.09. The Respondents therefore, in our considered opinion, are not justified in debarring the petitioners from the benefit of exemption from the tuition fee.

17- In the result, the impugned order dated 20.08.09 is hereby quashed.

18- Respondents are directed to exempt the petitioner from paying the tuition fee since academic session 2009-2010. In case any amount is deposited by the petitioner in lieu of tuition fee for the said academic years, respondents would do well to refund the same within a period of three months from the date of communication of this order.

19- In the result, petition is allowed to the extent above. There shall be no costs.

Petition allowed.

I.L.R. [2012] M.P., 2385

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P.No. 3693/2011 (Gwalior) decided on 10 July, 2012

BAHEED KHAN & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

A. Land Revenue Code, M.P. (20 of 1959), Section 248, Wakf Act 1995 - Applicability - Whether revenue authorities can invoke this

provision against alleged encroachment on wakf property - Held - No - Sec. 248 empowers the revenue authorities to take action against certain kinds of lands which are mentioned in the said provision - Anterior to or later to amendment in Sec. 248, no action can be taken against the encroachment on notified Wakf property. (Para 14)

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 248, वक्फ अधिनियम 1995 - प्रयोज्यता - क्या राजस्व प्राधिकारीगण, वक्फ सम्पत्ति पर अभिकथित अतिक्रमण के विरुद्ध इस उपबंध के अवलंब ले सकते हैं - अभिनिर्धारित - नहीं - धारा 248 राजस्व प्राधिकारियों को कतिपय प्रकार की भूमियों के विरुद्ध कार्यवाही करने के लिए शक्ति प्रदान करती है जिन्हें उक्त उपबंधों में उल्लिखित किया गया है - धारा 248 में संशोधन से पूर्व या बाद में, अधिसूचित वक्फ सम्पत्ति पर अतिक्रमण के विरुद्ध कोई कार्यवाही नहीं की जा सकती।

B. *Wakf Act (43 of 1995), Sections 54 & 55 - Prescribes a complete methodology and code to remove encroachment on Wakf Property - Wakf Act is a special Central Act which prescribes this methodology - Thus, sec 248 cannot be pressed into service against Wakf Property. (Paras 12 & 14)*

ख. वक्फ अधिनियम (1995 का 43), धाराएं 54 व 55 - वक्फ सम्पत्ति पर किया गया अतिक्रमण हटाने के लिए संपूर्ण विधि एवं संहिता विहित करती है - वक्फ अधिनियम एक विशेष केन्द्रीय अधिनियम है जो यह विधि विहित करता है - अतः धारा 248 को वक्फ सम्पत्ति के विरुद्ध जोर डालकर लागू नहीं किया जा सकता।

C. *Interpretation of Statute - If something is prescribed in a statute to be done in a particular manner, it has to be done in the same and other method are forbidden - Held - Revenue authorities erred in passing the impugned order - This order is set aside - Petition is allowed. (Paras 16 & 17)*

ग. कानून का निर्वचन - यदि कानून में कोई कार्य किसी विशिष्ट ढंग से करना विहित है तो, उसे उसी ढंग से किया जाना चाहिए और अन्य रीतियां निषिद्ध हैं - अभिनिर्धारित - राजस्व प्राधिकारियों ने अपेक्षित आदेश पारित करने में भूल की - यह आदेश अपास्त - याचिका मंजूर।

Cases referred :

2011(II) MPJR 151, 1979 RN 122, (1999) 8 SCC 16, 1992 RN 194, 1971 RN 359, (2001) 4 SCC 9, (2002) 1 SCC 633, 2011 (2) MPLJ 690

N.K. Gupta, for the petitioners.

Sangita Pachauri, Dy.G.A. for the respondents no. 1 to 3.

Anand V. Bharadwaj, for the respondent no.4.

ORDER

SUJOY PAUL, J. - In this petition filed under Article 226 of the Constitution, the petitioners have challenged the orders, Annexures P/1 to P/4. These orders are passed by Tahsildar, Sub-Divisional Officer, Commissioner and Board of Revenue, respectively.

2. Avoiding unnecessary details of the matter, in fact the singular question is whether the revenue authorities have power to act as an authority of first instance against the petitioners, who are allegedly occupying a wakf property. In other words, whether revenue authorities are competent to invoke section 248 of M.P.Land Revenue Code, 1959 ('MPLRC' for brevity) against the petitioners who are the alleged encroacher on a wakf property.

3. The revenue authorities have admitted that the property on which the petitioners have allegedly encroached is a wakf property, which is duly notified in the Official Gazette. This finding is given by the Member, Board of Revenue also in the impugned order, Annexure P/1.

4. Shri N.K.Gupta, learned counsel for the petitioners, by placing reliance on section 248 of MPLRC submits that the said provision has no application against the wakf property. Learned counsel by relying on certain sections of Wakf Act, 1995 submits that the said provision (section 248 of MPLRC) has no application in the facts and circumstances of the case.

5. Per Contra, Smt. Sangita Pachauri, learned Deputy Government Advocate for respondents No.1 to 3 and Shri Anand V. Bharadwaj, learned counsel for respondent No.4 supported the impugned orders. As per their

contention, the revenue authorities are well within their jurisdiction while invoking section 248 of MPLRC against the petitioners. Shri Bharadwaj placed reliance on 2011 (II) MPJR 151 (*Govind Prasad vs. Vidhata and others*); 1979 RN 122 (*Ramcharan vs. Moorti Shri Murli Manoharji Mandir*); (1999) 8 SCC 16 (*Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar and others*); 1992 RN 194 (*State of MP vs. Kanchania*); and, 1971 RN 359 (*Pancham Singh vs. Mahant Ramkrishan Das and others*). *Shri Anand V. Bharadwaj* by placing reliance on certain provisions of Wakf Act submits that ultimate power to administer the wakf properties is also in the hands of the officers appointed by the State Government. Once such ultimate control is in the hands of the officers of the State Government, no fault can be found in the action of the revenue authorities. The petitioners have not shown any title or right to continue on the land in question, they have no right to continue and enjoy the said property. Learned counsel by placing reliance on *Maharaja Chintamani* (supra) submits that even if revenue authorities have no jurisdiction and if it is found that legally the petitioners have no right, no interference is warranted. The analogy is drawn to show that once it is clear that the petitioners have no right or title on the land in question, even if the revenue authorities have no jurisdiction, their orders are not liable to be interfered with in this writ petition.

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

7. It is relevant to refer to section 13 of the Wakf Act, 1995, which reads as under:-

“13. Incorporation.-- (1) With effect from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf, there shall be established a Board of Wakfs under such name as may be specified in the notification.

(2) Notwithstanding anything contained in sub-section (1), if the Shia wakfs in any State constitute in number more than fifteen per cent of all the wakfs in the State or if the income of the properties of the Shia wakfs in the State constitutes more

than fifteen per cent of the total income of properties of all the wakfs in the State, the State Government may, by notification in the Official Gazette, establish a Board of Wakfs each for Sunni wakfs and for Shia wakfs under such names as may be specified in the notification.

(3) The Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued."

A bare perusal of this section would show that with effect from the date a notification is published in Official Gazette, the Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed. This is an admitted position that the property in question is a notified wakf property.

8. Respondents have invoked section 248 of MPLRC, which reads as under:-

[248. Penalty for unauthorisedly taking possession of land.--

(1) Any person who unauthorisedly takes or remains in possession of any unoccupied land, abadi, service land or any other which has been set apart for any special purpose under Section 237 *[or upon any land which is the property of Government, or any authority, body corporate, or institution constituted or established under any State enactment,] may be summarily ejected by order of the Tahsildar and any crop which may be standing on the land and any building or other work which he may have constructed thereon, if not removed by him within such time as the Tahsildar may fix shall be liable to forfeiture. Any property so forfeited shall be disposed of as the Tahsildar may direct and the cost of removal of any crop, building or other work and of all works necessary, to restore

the land to its original condition shall be recoverable as an arrear of land revenue from him. Such person shall also be liable at the discretion of the Tahsildar to pay the rent of the land for the period of unauthorised occupation at twice the rate admissible for such land in locality and to a fine which may extend to five thousand rupees and to a further fine which may extend to twenty rupees for every day on which such unauthorised occupation or possession continues after the date of first ejectment. The Tahsildar may apply the whole or any part of the fine to compensate persons, who may in his opinion have suffered loss or injury from the encroachment.”

(Emphasis Supplied)

9. The impugned action was taken against the petitioners way back in 1982-83. Thereafter the parties have fought a long drawn battle in the corridors of various revenue authorities and matter ultimately travelled to this Court by filing the present petition. A microscopic reading of section 248 of MPLRC would show that the powers are vested with the State authorities to take action on any unoccupied land, abadi, service land or any other land which has been set apart for any special purpose under section 237 of MPLRC. Section 237 aforesaid deals with following kinds of land:-

“237. Collector to set apart land for exercise of Nistar rights.-

- (1) Subject to the rules made under this Code, the Collector may set apart unoccupied land for the following purposes, namely,--

- (a) for timber or fuel reserve;
- (b) for pasture, grass bir or fodder reserve;
- (c) for burial ground and cremation ground;
- (d) for gaathan;
- (e) for encamping ground;
- (f) for threshing floor;

- (g) for bazar;
- (h) for skinning ground;
- (i) for manure pits;
- (j) for public purposes such as schools, play grounds, parks, road, lanes, drains and the like; and
- (k) for any other purposes which may be prescribed for the exercise of right of Nistar.”

10. It is noticeable that an amendment was carried out in section 248 w.e.f. 8.10.2003. By this amendment, the words “or upon any land which is the property of Government, or any authority, body corporate, or institution constituted or established under any State enactment” are inserted. Thus, prior to amendment, section 248 could have been invoked only with regard to the land described in the original section as well as described in section 237. After the amendment, the lands which are property of the Government or other bodies which are constituted or established under any State enactment are also brought within the purview of section 248.

11. The pivotal question is whether the wakf property can be brought within the purview of section 248 of MPLRC ?

12. Section 23 of the Wakf Act deals with appointment of Chief Executive Officer, who shall be appointed by the State Government whereas section 25 of the said Act prescribes duties and powers of the Chief Executive Officer. The powers include inspection or causing inspection of wakf properties and account, records, deeds or documents relating thereto. It includes the power and duty to do all such acts as may be necessary for the control, maintenance and superintendence of wakfs. Section 54 provides power and methodology for removal of encroachment from wakf property. This section reads as under:-

“54. Removal of encroachment from wakf property – (1)

Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other

property which is wakf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.

(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is wakf property and that there has been an encroachment on any such wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the wakf.

(4) Nothing contained in sub-section (3) shall prevent any person aggrieved by the order made by the Chief Executive Officer under that sub-section from instituting a suit in a Tribunal to establish that he has right, title or interest in the land, building, space or other property:

Provided that no such suit shall be instituted by a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the mutawalli of the wakf or by any other person authorised by him in this behalf.”

Section 55 of the Wakf Act provides a method of enforcement of orders made under section 54, which reads as under:-

“55. Enforcement of orders made under section 54.-- Where the person, ordered under sub-section (3) of section 54 to remove any encroachment, omits or fails to remove such encroachment, within the time specified in the order or, as the case may be, fails to vacate the land, building, space or other property to which the order relates, within the time aforesaid, the Chief Executive Officer may apply to the Sub-divisional Magistrate within the local limits of whose jurisdiction the land, building, space or other property is situate for evicting the encroacher, and, thereupon, such Magistrate shall make an order directing the encroacher to remove the encroachment, or, as the case may be, vacate the land, building, space or other property and to deliver possession thereof to the concerned mutawalli and in default of compliance with the order, remove the encroachment or, as the case may be, evict the encroacher from the land, building, space or other property and may, for the purpose, take such police assistance as may be necessary.”

13. In the light of these provisions, it is required to be examined whether section 248 of MPLRC was rightly invoked by the revenue authorities .

14. A minute reading of the aforesaid provisions of the Wakf Act would show that it is a complete Code in itself. A methodology of removal of encroachment is prescribed in this special Act of Parliament. The Wakf Act nowhere gives power to the revenue authorities to act as authorities of first instance against the encroachers on wakf property. The Land Revenue Code is a general provision whereas the Wakf Act is a special enactment. This is settled in law that the special enactment prevails over the general. Apart from this, a minute reading of section 248 of MPLRC shows that a wakf land does not fall within the scope and ambit of section 248. It is neither any unoccupied, abadi or service land nor it is a land which is set apart for any special purpose under section 237. Later to amendment in section 248 also, only such properties which are constituted or established under any State enactment were brought within the purview of section 248. The Wakf Act, 1995, by no stretch of

imagination, can be brought within the purview of the State enactment because it is enacted by Parliament in the Forty-sixth Year of the Republic of India by Act 43 of 1995. Thus, section 248 is clearly not applicable against the wakf properties.

15. The judgments cited by the respondents are mainly related with aukaf and muafi properties. In these judgments the lands in question were not wakf properties. They were the lands admittedly within the purview of section 248 of MPLRC. Thus, the judgments are clearly distinguishable and have no application in the facts and circumstances of the present case. This is settled in law that the judgments are precedent on the basis of the facts and circumstances of the case. There cannot be any straight jacket formula where one judgment can be made applicable in all situations despite difference of facts and circumstances and difference of applicability of provisions. Thus, the judgments cited by the respondents are clearly distinguishable and are not applicable in the fact situation of the present case.

16. So far as the case of *Maharaja Chintamani* (supra) is concerned, in that case the facts and circumstances were different. This was not a case arising out of wakf property. There was no special mechanism provided as it is provided in the Wakf Act and, therefore, in prevalent fact situation, the Apex Court gave its opinion. In the present case, there exists a specific provision of removal of encroachment in the Wakf Act. This is settled in law that if something is prescribed and required to be done as per law, the action has to be taken in accordance with the said provision or not at all. In other words, if a methodology to do certain things is prescribed in an enactment, it has to be done in the same manner and other methods are forbidden. This view is taken by Supreme Court in (2001) 4 SCC 9 (*Dhanajaya Reddy vs. State of Karnataka*) and (2002) 1 SCC 633 (*Commissioner of Income Tax, Mumbai vs. Anjum M.H. Ghaswala and others*) and followed by this Court in 2011 (2) MPLJ 690 (*Satyanjay Tripathi and another vs. Banarsi Devi*).

17. Considering the aforesaid, the following conclusions can be drawn :-

- (i) Admittedly, the land/property in question is a notified wakf property.

(ii) Section 248 of MPLRC has no application qua wakf property.

(iii) Various provisions of Wakf Act prescribe a methodology to deal with encroachment.

(iv) Wakf Act 1995 is a complete Code in itself for the purpose in question.

(v) Wakf Act 1995 is a central and special Act whereas the MP Land Revenue Code 1959 is a State enactment and is a general law.

(vi) The provisions of Special Act will prevail over the General Act.

18. On the basis of aforesaid analysis, there is no doubt that the revenue authorities have erred in passing the impugned orders, Annexures P/1 to P/4. Consequently, these orders are set aside being without authority and jurisdiction. However, it is made clear that this order will not preclude the competent authorities to take action against the petitioners in accordance with law.

19. Petition is allowed to the extent indicated above.

Petition allowed.

I.L.R. [2012] M.P., 2395

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P.No. 5864/2007 (Gwalior) decided on 10 July, 2012

SURESH PAL SINGH

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Police Regulations, M.P. - Regulation 270 - Power of Review - ADGP reviewed the punishment order and cancelled the punishment of fine and remitted the matter to I.G. for further review - Regulation 270 does not contemplate such a situation where one reviewing

authority may undertake review partially by cancelling the punishment order and then midway transferring to another authority - The power can be exercised by any of the superior authorities - Once a superior authority (ADGP) holds that the punishment is less/minor, no discretion is left to be exercised by IG - Show cause notice is empty formality - However, liberty is reserved to the ADGP/Authority, who has passed order to complete the exercise under regulation 270 - If the said authority deems it fit to continue with the proceedings, he may complete the same within six months from the date of production of certified copy of this order, failing which any action pursuant to order shall stand abated - Petition is allowed. (Paras 6, 8 & 9)

पुलिस विनियमन, म.प्र. - विनियम 270 - पुनर्विलोकन की शक्ति - ए.डी. जी.पी. ने शास्ति आदेश का पुनर्विलोकन किया और अर्थदण्ड की शास्ति निरस्त करते हुए, मामला और आगे पुनर्विलोकन हेतु आई.जी. को प्रतिप्रेषित किया - विनियम 270 उक्त स्थिति को अनुध्यात नहीं करता जब एक पुनर्विलोकन प्राधिकारी शास्ति का आदेश निरस्त करके आंशिक रूप से पुनर्विलोकन करता है और फिर बीच में ही अन्य प्राधिकारी को अंतरित करता है - शक्ति का प्रयोग, वरिष्ठ प्राधिकारियों में से किसी एक के द्वारा किया जा सकता है - एक बार वरिष्ठ प्राधिकारी (ए.डी.जी.पी.) यह धारणा करता है कि शास्ति कम है/लघु है, तब आई.जी. द्वारा प्रयोग करने के लिए कोई विवेकाधिकार नहीं बचता - कारण बताओ नोटिस मात्र औपचारिकता है - अपितु, आदेश पारित करने वाले ए.डी.जी.पी./प्राधिकारी को विनियम 270 के अंतर्गत कार्यवाही पूर्ण करने की स्वतंत्रता सुरक्षित है - यदि उक्त प्राधिकारी, कार्यवाही को जारी रखना उचित समझे, वह उसे इस आदेश की प्रमाणित प्रतिलिपि प्रस्तुत करने की तिथि से छः माह के भीतर पूर्ण कर सकेगा, ऐसा न करने पर, आदेश के अनुसरण में की गई किसी कार्यवाही का उपशमन हो जाएगा - याचिका मंजूर।

Prashant Sharma, for the petitioner.

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

O R D E R

SUJOY PAUL, J. - The petitioner was served with a charge sheet and after disciplinary proceedings, he was inflicted with a punishment of fine by order dated 22.2.2007. Thereafter, Additional Director General of Police

(ADGP) passed an order, Annexure P/1, dated 12.6.2007 and directed the Inspector General (IG), Chambal Range, Gwalior that the punishment is not commensurate with the misconduct of the petitioner and the said punishment of fine of Rs.500/- was set aside by him and then IG was directed to review the same. In turn, the IG issued show cause notice dated 26.6.2007 to the petitioner as to why this punishment should not be enhanced to withholding of one increment with cumulative effect. The petitioner submitted his reply and thereafter the IG by order, Annexure P/2, dated 29.10.2007 inflicted the punishment of withholding of one increment with cumulative effect. This order was communicated to the ADGP with the endorsement that it is in furtherance of the order dated 12.6.2007 of the ADGP, Annexure P/1.

2. Shri Prashant Sharma, learned counsel for the petitioner, by placing reliance of Regulation 270 of the Police Regulation submits that no doubt the said regulation provides power to the higher authorities to review the disciplinary proceedings but once the said review power is invoked by ADGP in passing the order, Annexure P/1, it was not permissible for him to send the matter midway to the I.G. to complete further proceedings. In other words, learned counsel for the petitioner submits that there is no power under regulation 270 to delegate the powers midway to some other authority when a particular superior authority has undertaken the review to some extent.

3. Per Contra, Mrs. Sangita Pachauri, learned Deputy Government Advocate supported the order and submits that it is well within the scope and ambit of regulation 270. She submits that a very lenient punishment has been imposed on the petitioner in view of his misconduct.

4. I have heard the parties and perused the record.

5. A bare perusal of regulation 270 clearly shows that power to review is vested with any superior police officer than the officer, who has imposed the punishment. In that eventuality, both the officers, i.e., ADGP as well as IG were the superior officers and were competent to invoke regulation 270. However, twin questions are required to be answered in this matter -- (i) whether one reviewing authority after partially undertaking the review can entrust the job to any other authority? (ii) whether the authority to whom it

was entrusted midway can act dispassionately ?

6. In the present case the punishment imposed by the disciplinary authority was reviewed under regulation 270 by ADGP and he raised his eyebrows against punishment of fine with a finding that why minor punishment was given and major punishment has not been given. Thereafter, ADGP himself set aside the punishment order of imposition of fine of Rs.500/-. Then, he directed the IG to review the matter under regulation 270. Thus, half of the power to the extent of setting aside the punishment is exercised by the ADGP and then it was remitted for undertaking remaining exercise of review to IG. The IG, in turn, issued a show cause notice for enhancement of punishment and after receiving reply, inflicted a major punishment of stopping of increment with cumulative effect.

7. In the considered opinion of this Court, the intention of regulation 270 is to give power to one of the higher authorities to exercise the power. It does not contemplate the situation where against one disciplinary proceeding two reviewing authorities will exercise their power simultaneously or jointly. It was open either for ADGP or for IG to invoke and complete the exercise as per regulation 270. In my considered opinion, regulation 270 cannot be read in the manner by which one authority may start action under regulation 270, proceed to some extent and then entrust the work to another authority. Needless to mention that disciplinary proceedings are quasi judicial proceedings and outcome of the said proceedings may be punitive and detrimental to an employee. In such a situation the need of principle of natural justice is to ensure that the said authority works dispassionately without there being any iota of influence or dictate from a higher authority. However, in the present case the ADGP with almost a dictate that punishment is minor directed the IG to undertake the review. Although IG issued a notice of proposed enhancement of punishment to petitioner, in my considered opinion the said notice was an empty formality. After having received a dictate from ADGP, it was no more open for the IG to exercise his discretion in maintaining the earlier punishment or to impose any other punishment than what has been desired by ADGP. Even if it is not a dictate, to a great extent it has a severe influence on the IG for the purpose of undertaking review and imposition of proper punishment.

In this view of the matter, in my considered opinion, regulation 270 does not prescribe any enabling provision to undertake review in partial manner in the same matter by two different authorities simultaneously.

8. Apart from this, the action cannot be upheld for another reason that the IG was directed to review with a specific finding and question by ADGP as to why leniency was shown and why minor punishment was imposed. In that situation, there was no scope of any independent, dispassionate and discretionary exercise of power by the IG. This was almost a dictate by the higher authority. In such situation, the principle of natural justice and fair play had no role to play and accordingly, this action is totally capricious in nature.

9. For the reasons stated above, I am unable to uphold the action of the respondents. Consequently, the impugned order Annexure P/2 is set aside. However, liberty is reserved to the ADGP/Authority, who has passed Annexure P/1 to complete the exercise under regulation 270. If the said authority deems it fit to continue with the proceedings, he may complete the same within six months from the date of production of certified copy of this order, failing which any action pursuant to Annexure P/1 shall stand abated.

10. Petition is allowed to the extent indicated above. No costs.

Petition allowed.

I.L.R. [2012] M.P., 2399

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P.No. 4899/2012 (Jabalpur) decided on 11 July, 2012

SUSHILA TIWARI

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Transfer - Surplus list of employees was to be prepared in descending order - Petitioner is undisputedly senior to respondent no. 4 - Petitioner cannot be treated as surplus - Her transfer on the ground of being surplus is bad - Transfer order quashed.

(Para 7)

सेवा विधि – स्थानांतरण – अधिशेष कर्मचारियों की सूची घटते क्रम में तैयार की जाना थी – याची निर्विवादित रूप से प्रत्यर्थी क्रमांक 4 से वरिष्ठ है – याची को अधिशेष नहीं माना जा सकता – अधिशेष के आधार पर उसका स्थानांतरण अनुचित है – स्थानांतरण आदेश अभिखण्डित।

Case referred :

(2009) 2 SCC 592

D.K. Dixit, for the petitioner.

Lalit Joglekar, P.L. for the respondent nos. 1 to 3.

Manoj Chansoriya, for the respondent no. 4.

ORDER

K.K. TRIVEDI, J. - This petition under Article 226 of the Constitution of India has been filed challenging the order dated 5.3.2012, by which the petitioner, who was working on the post of Auxiliary Nurse Midwife in Community Health Centre, Naogaon, District Chhatrapur, is sought to be transferred to Sub Primary Health Centre, Kouthaha (Gourihar), on the ground that the aforesaid order has been issued treating the petitioner as surplus in the Community Health Centre, Naogaon, whereas, in view of the order passed by the M.P. State Administrative Tribunal, in the Original Application of the petitioner, she is not surplus in the said Community Health Centre. On the other hand, the respondent No.4 is surplus who was required to be transferred, but malafidely she has been accommodated and the petitioner has been transferred. It is contended that the dispute with respect to the counting of seniority of the petitioner in the said place for the purposes of assessing whether she was surplus or not, had already come to an end and this was specifically ordered by the Tribunal that the petitioner is to be treated as senior, yet illegally the respondent No.4 who is surplus is retained and the petitioner is sought to be transferred. In view of the aforesaid, it is claimed by the petitioner that the order impugned is bad in law and is liable to be quashed.

2 : This Court has entertained the writ petition and since a caveat was filed by the respondent-State, the notices were delivered to the respondents and they were asked to file the effective return. The respondent-State has

filed the return contending that since the petitioner was working in the Community Health Centre, Naogaon, with effect from the year 1998, whereas, the respondent No.4 was posted in the said Community Health Centre on 18.2.1988, the petitioner has rightly been found surplus and has been transferred by the order impugned. It is contended that since there is a report submitted in this respect by the Chief Medical and Health Officer, Chhatarpur, the petitioner was rightly transferred and that being so, the petitioner is not entitled to any relief. The respondent No.4 has also supported the action of respondents No. 1 to 3. A rejoinder has been filed by the petitioner controverting the allegations made by the respondents in their return.

3 : Learned counsel for the parties are heard at length. The record is examined.

4 : Undisputedly, the petitioner was appointed as Auxiliary Nurse Midwife vide order dated 27.11.1981. It is not in dispute that the respondent No.4 was appointed after seven years of appointment of petitioner as is clear from Document No.R/3 filed by the respondents along with their return. Therefore, from the initial date of appointment the petitioner was senior to the respondent No.4. However, it appears that there were certain excess staff posted and, therefore, the policy was made by the State Government for adjustment of those excess staff. Prior to this, the final adjustment/absorption of petitioner was already ordered on 28.2.1994 by the Chief Medical and Health Officer, Chhatarpur. In terms of policy dated 19.5.1997, list of surplus staff was to be prepared. One such list was prepared, according to which, the respondent No.4, who was treated to be surplus in the Community Health Centre, Naogaon, was sought to be posted elsewhere. However, for the said purposes of posting, the Chief Medical and Health Officer, Chhatarpur, was authorised. It further appears that the order of posting in respect of respondent No.4 was issued by the Chief Medical and Health Officer Chhatarpur on 6.8.1997 transferring her to Chandrapura Gourihar. Pursuance to this order, the respondent No.4 was required to be relieved, but the Chief Medical and Health Officer made a change in the posting and issued the order dated 13.11.1997, by which the respondent No.4 was accommodated in Community Health Centre, Naogaon, and in her place, the petitioner was sought to be

transferred to Chandrapura Gourihar. This was the order which was challenged by the petitioner in the M.P. Administrative Tribunal by filing Original Application No.119/1998. The respondent No.4 was a party in the said litigation.

5 : The Tribunal entertained the Original Application granted an interim protection to the petitioner pursuant to which she was allowed to continue on the post at Community Health Centre, Naogaon. The returns were filed by the respondent-State in the said case. The point of dispute was centralised by the Tribunal, specifically asking the State Government to reply as to how the petitioner was treated surplus when she was specifically posted prior to the posting of respondent No.4 in the Community Health Centre, Naogaon, and she was already regularised against a regular vacancy of an incumbent who had retired in the year 1994. The Tribunal has held in its order that the respondent-State has utterly failed to submit any response or comments, or even has thrown any light on the dispute as nothing was said in the return filed by the respondent-State before the Tribunal. Recording these facts the Tribunal has held in paragraph 5 of its order which read thus :-

“5. It was expected that the return of the Respondent/State would throw some light on this point based on the Govt. instructions and the policy on this subject. However, like most Govt. returns the return in this case is not of good quality and the main issue raised by the applicant has not been addressed. Respondent State have stated in their return that respondent No.4 will be treated as senior because she has been working at Community Health Centre, Naogaon since February, 1988. But the return is silent on the point raised by the applicant that she was working in Sub Centres under the Community Health Centre, Naogaon since 1981 and therefore, she should be considered senior. The applicant has stated in her rejoinder that “in fact the seniority of A.N.M. is maintained P.H.C. wise irrespective of their working at a sub-centre or in the main centre. The order of her regularisation as per her seniority by the C.M.O. Vide order dated 28.2.1994 was a legal, valid

and proper order.” Even after this, the respondent-State has not cared to file any additional reply to clarify the real point in issue.”

6 : On the basis of these findings, the Tribunal has categorically held that the dispute with respect to the seniority of petitioner and respondent No.4 would be decided by the Commissioner of the Health Services by passing a speaking order. However, it is not clear whether any specific order was passed by the Commissioner of Health Services or not even after the decision of the Original Application of the petitioner on 15.2.1999. At least, nothing has been placed on record while the respondents by filing the return to this writ petition.

7 : In terms of the policy made by the State Government for assessing whether a particular person is surplus or not, specific orders were issued on 19.5.1997. It was very categorically said that a list of surplus person is required to be prepared taking into account the posting in the district or the institutions and the said list is to be prepared in descending order meaning thereby the person who was posted by earlier order has to be treated as senior and those who have come by subsequent orders are to be treated as junior. Admittedly, the petitioner was posted in the year 1981 and right from 1981, she was working there. The respondent No.4 was appointed in the year 1988 and she was working from that year, therefore, there was no doubt left that the petitioner was senior to respondent No.4 and was not to be treated as surplus at all. It appears that because this finding was to be recorded, no orders were passed by the competent authority despite the direction of the Tribunal. The certificate in this respect was also issued by the Block Medical Officer, which specifically says that the petitioner was working right from 30.11.1981 in the Community Health Centre, Naogaon, and she has been regularised against the vacancy which occurred on account of superannuation of one Smt. S. Mathai. The Chief Medical and Health Officer has also sent a letter in this respect categorically saying that in fact the respondent No.4 is surplus, therefore, the salary of the petitioner is to be drawn against the post on regular basis and not as a surplus. This was the information with the respondents, yet the order impugned has been issued saying that only because

the Minister Incharge has approved the shifting of surplus employees of the Health Department, they are to be transferred under the Policy of Rationalisation of surplus staff. The name of the petitioner is included in this order, whereas, there is no reference with respect to the respondent No.4.

8 : From the return, it is also clear that only because the respondent Chief Medical and Health Officer has written that the petitioner was surplus, the order impugned has been issued. What enquiry was conducted by the respondent Chief Medical and Health Officer and on what basis he has said that mistake was committed in stating that the respondent No.4 was surplus, whereas, the petitioner is surplus has not been clarified in return, and only on the basis of this information, the petitioner is sought to be transferred. Whether this was done under the directions of any authority, or under the orders of the Court nothing is stated. However, the order Annx.R/6 was endorsed to one of the Govt. Advocate in the High Court at Jabalpur, which indicates that only on the basis of certain opinion obtained from the Govt. Advocate such a letter was written. Thus, it is clear that there was no application of mind and even the specific order of the Tribunal was not taken into consideration. The list so prepared and placed on record as Annx.R/5 is again faulty one. If there were six sanctioned posts, according to the date of appointment of the petitioner, she would be at Serial No.2 of the list as she was appointed in the year 1981 and is working against the said post. The petitioner has been shown to be surplus only because her date of posting is shown to be 26.9.1998 and most probably this was done because after passing of the interim order in the Original Application filed by the petitioner in the year 1998, some accommodation of petitioner was done. This accommodation will not take away the right of the petitioner of claiming the benefit of service which she had already rendered in the said institution. The date of appointment/posting of the petitioner in the Community Health Centre, Naogaon, would be the date of her initial appointment I.e. 27.11.1981, and accordingly, she will be at Serial No.2 of the persons who are working in the said place as all others have been appointed after the appointment of petitioner in the said Community Health Centre. This being so, the

order impugned could not have been issued only because the respondent No.4 was to be accommodated. The claim made by the petitioner thus was not rightly considered despite the order of the Tribunal.

9: When asked, the learned counsel appearing for the respondent-State and the respondent No.4 have failed to explain as to how the respondent No.4 was treated to be senior when the specific finding was recorded by the Tribunal in its order that the petitioner is senior to the respondent No.4. Specially when the order of the Tribunal was not assailed anywhere and in fact, it has attained the finality. Again when it was specifically asked whether the respondent Commissioner, Health Services, has conducted any enquiry in terms of the directions of the Tribunal and has given any finding, nothing has been indicated by learned counsel for respondents. The return is silent on this point. It was categorically recorded by the Tribunal that the malfunctioning is going on and that the respondent-State is not vigilant even to file appropriate return in the litigation brought against it before the Courts of law. This is one of the glaring example of the said act of respondents.

10: Normally, this Court would not have interfered in the order of posting and transfer as it has been categorically held by the Apex Court in scores of cases that an administrative order of transfer or posting is not required to be interfered with unless it is actuated on malafides or has been issued by an authority not competent to do so, or is violative of the statutory Rules or Act. However, in the case of *Somesh Tiwari Vs. Union of India and others* [(2009) 2 SCC 592], the Apex Court has explained what would be the meaning of malice. As has been held, there are two types of malice, malice in fact and malice in law. If lawfully something which is required to be done is not done and something contrary to law is done by the State authorities, it would amount to malice in law. The respondent-State had made a Policy of Rationalisation of those employees who were surplus. For the purposes of assessing as to who is surplus and who is not, specific instructions have been issued. The entire consideration is to be done in terms of those instructions and if it is done, a list is prepared, only the surplus persons are required to be shifted

from one place to another as per the requirement. As has been held hereinabove, the petitioner at any rate could not be termed as surplus in the Community Health Centre, Naogaon, nor could the respondent No.4 be adjusted as regular one as there was no post available for her accommodation. Thus, in fact, the respondent No.4 was to be treated as surplus and was required to be shifted. This action was taken long back in the year 1997, but malafidely the change in the posting was done and the petitioner was shifted in place of respondent No.4. This action was challenged in the Tribunal and the Tribunal has set aside the order of posting with the direction to assess and fix the seniority of petitioner and respondent No.4 in the Community Health Centre, Naogaon. Having failed to do so, at any rate, the respondents could not say that the petitioner was surplus and thus was required to be shifted nor could have issued the order impugned. If this is not the malice in law then what else would be, therefore, the act of the respondents is *per se* illegal. This is one of the cases in which this Court is compelled to exercise its extraordinary power under Article 226 of the Constitution of India for doing the right things as the same is not being done by the State authorities despite the long litigation.

11 : Consequently, this writ petition is allowed. The order impugned dated 5.3.2012 in so far as it relates to petitioner is hereby quashed. The Chief Medical and Health Officer, Chhatarpur, is directed to allow the petitioner to continue on her post in the Government Community Health Centre, Naogaon. The respondent No.3 is hereby commanded to issue an order of posting with respect to respondent No.4 treating her surplus and transferring and posting her in the Sub Health Centre, Kouthaha Gourihar, District Chhatarpur, in which place the petitioner was sought to be transferred by the impugned order. This is being ordered because the respondents have utterly failed to discharge their lawful duty, even order of a erstwhile law enforcing authority like M.P. State Administrative Tribunal.

12 : The writ petition is allowed to the extent indicated hereinabove. The petitioner will get cost of this litigation from respondents No. 2 and 3, which is quantified to Rs.10,000/-.

Petition allowed.

I.L.R. [2012] M.P., 2407

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P.No. 4907/2010(S) (Jabalpur) decided on 25 July, 2012

RAJARAM RATNAKAR

...Petitioner

Vs.

STATE OF M.P.

...Respondent

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 16(1) (a), 16 (1)(d), Rule 10(4), Rule 14 - Minor Penalty - Stoppage of increment without cumulative effect - Rule specifically contemplates that on an explanation and defence submitted by the delinquent employee, there has to be a finding with regard to each imputation/misconduct - The disciplinary authority is required to consider the allegations of imputation misconduct, evaluate it in the backdrop of the explanation or defence of the employee - The competent authority has not discharged its function properly, as there is no recording of finding with regard to each misconduct - In a casual order explanation was rejected without any reason and without application of mind - Petition allowed. (Paras 5 & 6)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 16(1)(ए), 16(1) (डी), नियम 10(4), नियम 14 - लघु शास्ति - बिना संचयी प्रभाव के वेतन वृद्धि रोकना - नियम विनिर्दिष्ट रूप से अनुध्यात करता है कि अपचारी कर्मचारी द्वारा स्पष्टीकरण व बचाव प्रस्तुत किये जाने पर, प्रत्येक आरोपण/अवचार के संबंध में निष्कर्ष होना चाहिए - अनुशासनिक प्राधिकारी को चाहिए कि आरोपण/अवचार के आरोपों पर विचार करे, कर्मचारी के स्पष्टीकरण या बचाव की पृष्ठभूमि में उसका मूल्यांकन करे - सक्षम प्राधिकारी ने अपने कर्तव्यों का निर्वहन उचित रूप से नहीं किया, क्योंकि प्रत्येक अवचार के संबंध में कोई निष्कर्ष अभिलिखित नहीं किये गये - नैमित्तिक आदेश में बिना कोई कारण दिये और मस्तिष्क का प्रयोग किये बिना स्पष्टीकरण अस्वीकार किया गया - याचिका मंजूर।

*Vivek Rusia, for the petitioner.**Rajesh Tiwari, G.A. for the State.*

O R D E R

RAJENDRA MENON, J. - Challenging an order passed by the Competent authority imposing minor punishment of stoppage of increment without cumulative effect as contemplated under Rule 10 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 and the order passed by the appellate authority rejecting the appeal, this writ petition has been filed. The impugned order of punishment is Annexure P/6 dated 5.11.2005 and the order of appellate authority is Annexure P/11 dated 4.10.2006.

2- Records indicate that petitioner was working as a Commercial Tax Inspector and was posted at Chowki Kuanrgarh in District Bhind. On various dates i.e. 8.8.2005 and 13.7.2005 it was reported on complaint received or on information otherwise received that various irregularities are being committed in the Chowki in question, illegal gratification is being taken and various other illegal activities are going on. On the basis of complaint received, a charge sheet/ show cause notice as contemplated under Rule 16(1)(a) of the M.P. Civil Services (Discipline and Appeal) Rules, 1966 was issued to the petitioner vide Annexure P/4 on 17.8.2005 and it was indicated that the acts of commission and omission indicated in the show cause notice constitutes misconduct under Rule 3 of M.P. Civil Services (Conduct) Rules and therefore, disciplinary authority proposes to impose punishment under Rule 10 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966, accordingly the petitioner was directed to give his say in the matter. Petitioner submitted a detailed representation running to more than three pages and by taking various defence denied each and every allegations leveled in the charge sheet and gave his explanation/ justification with regard to the conduct as indicated in the charge sheet Annexure P/4. The disciplinary authority rejected the explanation of the petitioner and imposed the punishment impugned. The appeal preferred by the petitioner having been rejected by competent authority vide Annexure P/11, petitioner is before this Court assailing the impugned action.

3- Shri Vivek Rusia, learned counsel for the petitioner invites my attention to the procedure contemplated under Rule 16, the manner in which the impugned action is taken and tried to emphasized that action has been taken

mechanically without application of mind and without following the mandate of the Rules, in as much as explanation and defence of the petitioner is not considered, it is rejected in a very casual manner and the findings with regard to imputation of the misconduct alleged have not been properly recorded, contending that the charges leveled are incorrect and petitioner was liable to be exonerated after considering his explanation, learned counsel prays for interference.

4- Shri Rajesh Tiwari, learned Govt. Advocate refutes the aforesaid and points out that as various complaints were received against the petitioner and as only a minor punishment is imposed, no further indulgence into the matter is called for. By referring to the order of punishment Annexure P/6 dated 5.11.2005 and the finding recorded by the disciplinary authority in the said order, Shri Rajesh Tiwari, learned Govt. Advocate tried to emphasize that as the requirement of Rule 16 has been complied with, no further interference into the matter is called for.

5- I have heard learned counsel for the parties and perused the record. From the record it is clear that the punishment imposed is a minor punishment as contemplated under Rule 10(4) of the Discipline and Appeal Rules and for imposing such a minor punishment the mandate of Rule 16, Discipline and Appeal Rules has to be followed. Before proceeding to consider the rival contention it would be appropriate to take note of the statutory rules and the procedure contemplated under Rule 16 of the Discipline and Appeal Rules for imposing any of the punishment specified in Clause 1 to 4 of Rule 10 and 11. It is contemplated under the rules that the government employee be informed in writing by the disciplinary authority about the proposal to take action against him and the imputation of misconduct or misbehavior on which the action is proposed to be taken should be communicated to him and thereafter a reasonable opportunity of hearing and representation is required. After the representation is received, discretion is given to the Disciplinary Authority either to proceed and hold an enquiry as contemplated under Rule 14 of Discipline and Appeal Rules or to take representation submitted by the government servant on record and thereafter record a finding of guilt with regard to each imputation or misconduct and after consulting the Public Service

Commission where-ever necessary pass an order. If the procedure in this regard contemplated under sub rule 1 and 2 of Rule 16 is taken note of, it would be clear that after a show cause notice or a charge sheet under Rule 16(1)(2) is issued and the employee concerned submits its representation or defence by way of representation then recording of a finding of guilt with regard to each imputation, misconduct or misbehavior is required to be done and based on such a finding, the order of punishment with reason has to be communicated. If the procedure followed in the present case is taken note of, it would be seen that after the said show cause notice/ charge sheet Annexure P/4 dated 17.8.2005 communicating the allegations of imputation, misconduct was served on the petitioner, he submitted a defence by way of representation, Annexure P/5 refuted the allegations and gave his defence statement indicating that the allegations leveled are incorrect. Thereafter there is no recording of finding by the competent authority with regard to each imputation or misconduct as required under Rule 16 (1)(d) nor is there a separate order of punishment passed as required under sub rule (2) and (7) of Rule 16. Instead an order Annexure P/6 is passed imposing the punishment. If the order Annexure P/6 is taken note of it would be seen that after indicating the issuance of show cause notice dated 17.8.2005, in para 1 to 3 the allegations of misconduct and imputation as alleged in the charge sheet dated 17.8.2005 are reproduced and thereafter in a very casual manner it is held that with regard to the aforesaid charges the representation and defence submitted by the petitioner is taken note of and the disciplinary authority holds that the allegations are proved as the explanation is not satisfactory and accordingly, punishment is imposed. I am of the considered view that the manner in which the punishment has been imposed is contrary to requirement of the rules. Rule 16 specifically contemplates that on an explanation and defence submitted by the delinquent employee, there has to be a finding with regard to each imputation/ misconduct. The aforesaid statutory provision mandates that the disciplinary authority is required to consider the allegations of imputation misconduct, evaluate it in the backdrop of the explanation or defence of the employee concerned and thereafter by either accepting the explanation or rejecting by recording his findings with reasons, the disciplinary authority who is conducting the proceeding under Rule 16 is required to record a finding of guilt with regard

to each of the misconduct and this can be done only after defence of an employee as made out in the representation is considered, taken note of and thereafter either reject or accept i by giving cogent reason showing application of mind and consideration of the defence.

6- In the present case, the competent authority has not discharged its function properly. The procedure as contemplated in the statutory rules, in as much as there is no recording of finding with regard to each misconduct nor is the order of punishment passed after recording such a finding. On the contrary in a casual order rejecting the explanation without any reason and without application of mind is made.

7- When an employee is proceeded against and a punishment is proposed to be imposed upon him, even a minor punishment should be passed after following the procedure contemplated under Rule 16. The action of the competent authority in imposing the punishment has serious adverse consequence on the service career of an employee. Punishment imposed may have effect of denying promotion and other service benefits to the employee concerned and therefore, the legislature has provided adequate safeguard in the statutory provisions to rule out unreasonable or arbitrary action being taken. That apart, this is also the requirement of the principles of natural justice. In the present case, apart from the fact that the statutory requirement of the rule as contemplated under Rule 16 (1)(d) and 16(2)(7) has not been filed. The manner in which impugned action is taken shows total non application of mind, it is a non speaking order and has been passed in a casual manner without even advertting to consider or discuss the defence of the employee concerned.

8- In view of the above, I am unable to upheld the impugned action. When the appeal is filed by the petitioner, appeal has also been decided in a similar fashion. The appellate authority was also required to decide the appeal after following the requirement of Rule 29 of the Appeal and Revision Rules, 1966 and thereafter pass an order. Neither is the requirement of Rule 27 followed while deciding the appeal nor is any reason given for rejecting the grounds raised by the employee in the appeal.

9- In the facts and circumstances of the case, I am of the considered view that as orders impugned have been passed without following the principles of law and is inconsistent to and contrary to statutory provisions, the same cannot be upheld.

10- Accordingly, this petition is allowed. Orders impugned are quashed.

Petition allowed.

I.L.R. [2012] M.P., 2412

WRIT PETITION

Before Mr. Justice A.K.Shrivastava & Mr. Justice Brij Kishore Dube

W.P.No. 7668/2011(Gwalior) decided on 26 July, 2012

SPARSH EDUCATION & WELFARE SOCIETY & anr. ...Petitioners
Vs.

NATIONAL COUNCIL FOR TEACHER
EDUCATION & anr. ...Respondents

National Council for Teacher Education Act (73 of 1993), Section 15, Regulations 2009, Regulation 8(3) - Starting New Course - Petitioners were granted permission to start B.Ed. Course from the session 2009-2010 - Petitioners can be permitted to start new course only after completing 3 academic sessions - Application seeking permission to start new course of D.Ed. was made prior to completing 3 academic sessions - Application was rightly rejected as premature - Petition dismissed. (Para 7)

राष्ट्रीय अध्यापक शिक्षा परिषद अधिनियम (1993 का 73), धारा 15, विनियमन 2009, विनियम 8 (3)—नये पाठ्यक्रम को आरंभ करना — याचीगण को सत्र 2009-2010 से बी.एड. पाठ्यक्रम आरंभ करने की अनुमति प्रदान की गई — याचीगण को नया पाठ्यक्रम आरंभ करने की अनुमति केवल 3 शैक्षणिक सत्रों को पूरा करने के पश्चात् ही दी जा सकती है — डी.एड. का नया पाठ्यक्रम आरंभ करने की अनुमति चाहने का आवेदन, 3 शैक्षणिक सत्रों के पूरा होने से पूर्व किया गया था — आवेदन समय पूर्व होने के कारण उचित रूप से अस्वीकार किया गया — याचिका खारिज।

D.K. Agrawal, for the petitioners.

Tapan Trivedi, for the respondents.

ORDER

The Order of the court was delivered by :
A.K. SHRIVASTAVA, J. - By this petition under Article 226 of the Constitution of India, the petitioners are seeking following reliefs:

(i) "The order dated 06.07.2011 (vide Annexure P/1) and the order dated 21.02.2011 (vide Annexure P/12) may kindly be quashed and the Respondents may kindly be directed to immediately grant recognition/issue formal letter of recognition to the petitioners for the academic session 2011-2012 for D.Ed. Courses and/or;

(ii) the respondents may kindly be directed to immediately grant recognition/issue formal letter of recognition to the petitioners for the academic session 2011-2012 for D.Ed. Course and/or;

(iii) any other relief in favour of the petitioners may also be granted, if the facts and circumstances of the case permit in the interest of justice;

(iv) the cost of this petition be allowed in favour of the petitioners."

2. The contention of learned counsel for the petitioners is that vide impugned order dated 13.8.2009 (Annexure P/2) passed by the respondent no.2, the Secretary, National Council for Teacher Education, permission was not granted to start the D.Ed. Course. This order has been affirmed in appeal by the Appellate Authority, National Council for Teacher Education (respondent no.1)

3. By inviting our attention to Section 15 of the National Council for Teacher Education Act, 1993 (in short, the NCTE Act) as well as Regulation 8(3) of Regulations 2009 framed under the said Act, it has been contended by learned counsel for the petitioners that by incorrect interpreting Section 15 of the Act and particularly clause 3(8) of the Regulations 2009 it has been held by the respondents that petitioners are not entitled to start D.Ed. courses with effect from 2009-2010. Learned

counsel submits that if clause 8(3) of the Regulations 2009 is applied in stricto sensu, it would reveal that since the petitioners institutions are recognized to carry out B.Ed. course, therefore, since additional course of D.Ed. is to be started, clause (3) of the Regulation 8 is not at all applicable. Further it has been prayed by learned counsel that even if there was some deficiency, it was imperative on the part of the respondents to call upon the petitioners to remove the discrepancies. Learned counsel submits that since no such opportunity was given by the respondents, therefore, both the impugned orders are to be set aside on this additional ground also.

4. Combating the aforesaid submissions, it has been put forth by Shri Trivedi, learned counsel appearing for the respondents that indeed the petitioners have incorrectly interpreted the aforesaid two provisions. Learned counsel by reading clause 8(3) of the Regulations submitted that "respective course" should be read in context to the Institution for whom recognition has been made and therefore the existing recognized course should have been completed for three academic sessions and, therefore, unless and until the academic session of B.Ed. course is not completed of three years, the application to start new D.Ed. course is premature. To buttress his submissions, learned counsel has invited our attention to an important document dated 21/29th October, 2008 (annxure P/9) and submitted that indeed this is a recognition order of the petitioners' Institution which recognized them to start the course of B.Ed. course from academic session 2009-2010 and thus when the application was submitted to start the D.Ed. course, the same was premature.

5. Having heard learned counsel for the parties we are of the considered view that this petition deserves to be dismissed and grievance of the petitioners is premature.

6. On bare perusal of the recognition order dated 21/29th October, 2008 (annexure P/9) it would become luminously clear like a noon day that the recognition to carry out B.Ed. course was given to the petitioners from the academic session 2009-2010 and after having completed three years academic session from 2009-2010 then only an application to start any new course of D.Ed. can be said to be matured and the petitioners can be authorized to start a new course of D.Ed. If Section 15 of the

NCTE Act is kept in juxtaposition to Regulations of 2009 and by paying heed to Regulation 8(3), it would reveal that interpretation of "respective courses" envisaged in this clause would mean the recognition which has been given to a recognized course. For ready reference, we would like to quote clause 8(3) of the Regulations which reads thus:

"An institution can apply for one basic unit only of an additional course or for an additional unit of the existing recognized course after completion of three academic sessions of the respective course, for which the institution shall submit application before the cut off date prescribed for submission of applications in the year succeeding the completion of three academic sessions. Maximum intake capacity of an institution taking into consideration of all courses, along with additional intake, in any case, shall not exceed 300."

7. According to us, learned counsel for the respondents was right in his submission that order of recognition to start B.Ed. course with effect from the session 2009-2010 was never challenged by the petitioners anywhere and thus it has become final and, therefore, the application of the petitioners' Institutions to start new course of D.Ed. could be given only after the completion of three academic sessions of B.Ed. course i.e. after completion of sessions 2009-2010, 2010-2011 and 2011-2012. Since the application was submitted much earlier to it, it was premature and, therefore, according to us, the respondent no.2 has rightly rejected the application and learned Appellate Authority (respondent no.1) did not commit any error in affirming the said order.

8. We do not find any merit in this petition, the same is hereby dismissed. However, after attaining the maturity to start new course of D.Ed., the petitioners shall be free to file fresh application and if such an application is filed, it be decided in accordance with law by paying heed to clause 3(8) of the Regulations and necessary orders in accordance with law may be passed. No costs.

Petition dismissed.

I.L.R. [2012] M.P., 2416

WRIT PETITION

Before Mr. Justice R.S. Jha

W.P.No. 9516/2011 (Jabalpur) decided on 31 July, 2012

BASANTI BAI (SMT.)

...Petitioner

Vs.

SMT. PREMWATI BAI & ors.

...Respondents

A. Constitution, Article 243 F, Panchayat Nirvachan Niyam, M.P. 1995, Rule 35(2) - Date of Birth - Date of scrutiny - Qualification or disqualification of a candidate has to be seen on the date of scrutiny of nomination papers. (Paras 10 to 11)

क. संविधान, अनुच्छेद 243 एफ, पंचायत निर्वाचन नियम, म.प्र. 1995, नियम 35 (2) - जन्म तिथि - जांच की तिथि - प्रत्याशी की योग्यता या अयोग्यता नामांकन पत्रों की जांच की तिथि को देखी जानी चाहिए।

B. Nirvachan Niyam, M.P. 1995, Rule 35(2), Evidence Act (1 of 1872), Section 35- Date of Birth - Birth certificate issued by Registrar birth and death would prevail over the school certificate. (Para 13)

ख. निर्वाचन नियम, म.प्र. 1995, नियम 35 (2), साक्ष्य अधिनियम (1872 का 1), धारा 35 - जन्म तिथि - जन्म एवं मृत्यु पंजीयक द्वारा जारी जन्म प्रमाण पत्र, शाला प्रमाण पत्र पर अभिभावी होगा।

Cases referred :

AIR 1968 SC 1455, (2003) 8 SCC 673, (1998) 5 SCC 697, (2009) 7 SCC 283, AIR 2010 SC 2933, 1988 (SUPP) SCC 604, JT 2010 (7) SC 500, AIR 1965 SC 282, AIR 1981 SC 361, AIR 1988 SC 1796, (2006) 1 SCC 283=(AIR 2006 SC 508=2005 AIR SCW 6149), JT 2010 (7) SC 500) =(2010 AIR SCW 495), (2001) 2 SCC 524=(AIR 2001 SC 703 = 2001 AIR SCW 347), AIR 2005 SC 1868, MP 1999 CR.L.J. 3451,

T.S. Ruprah with Harmeet Ruprah, for the petitioner.

Aditya Sanghi, for the respondent no.1.

S.S. Bisen, G.A. for the State.

ORDER

R.S. JHA, J. - The petitioner has filed this petition being aggrieved by order dated 9.6.2011 passed by the respondent no.3 Sub Divisional Officer, Gotegaon in the election petition setting aside the election of the petitioner to the post of Sarpanch of Gram Panchayat, Vedu, Tehsil Gotegaon, District Narsinghpur.

2. The brief facts, leading to the filing of the present petition, are that the petitioner and the respondent no.1, both contested the election for the post of Sarpanch of Gram Panchayat, Vedu, District Narsinghpur which was held in the year 2010. In accordance with the notified election programme, the date of filing nomination papers commenced from 31.12.2009 and the date for scrutiny of the nomination papers was 4.1.2010. Voting took place on 18.1.2010 and the result of the election was declared on 3.2.2010, according to which the petitioner was declared elected by 124 votes.

The respondent no.1, being aggrieved by the result of the election, filed an election petition under section 122 of the M.P. Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993, contending that the petitioner was infact disqualified to contest the election as she was below 21 years of age and that the returning officer failed to adjudicate upon the objection to the nomination papers filed by the respondent no.1 and thereby wrongly accepted the same.

After hearing both the parties and adducing evidence, the election tribunal by the impugned order dated 9.6.2011 has set aside the election of the petitioner by recording a finding to the effect that the petitioner was below 21 years of age and was, therefore, disqualified and that the returning officer failed to consider and decide the objection in this regard filed by the respondent no.1 at the time of submission of the nomination papers. The petitioner, being aggrieved, has filed this petition.

3. It is contended by the learned Senior Counsel for the petitioner that the date of birth of the petitioner was infact 9.12.1988 and she had, therefore, attained the age of 21 years on the date of scrutiny of the nomination papers which is the relevant date and not the date of preparation of the voters list as held by the election tribunal.

4. It is further contended that the election tribunal has wrongly ignored the certificate produced by the petitioner issued under the provisions of the Registration of Births and Deaths Act, 1969; the certificate of Kotwar of

village Sirkona regarding entry in the Kotwar register and the certificate issued by the Janpad Panchayat Gotegaon and has wrongly relied upon the transfer certificate issued by the school and the register of date of birth mentioned by the school to record a finding to the effect that the date of birth of the petitioner was 15.1.1990 and not 9.12.1988.

5. It is also contended that the petitioner and her relatives are all tribals and are illiterate and uneducated and usually their names are changed after marriage in view of their customs and, therefore, the election tribunal has also erred in disbelieving the cogent evidence adduced by the petitioner clearly establishing the fact that Sukhwati Bai and the petitioner Basanti Bai are one and the same person while allowing the election petition filed by the respondent no.1.

6. The learned Senior Counsel for the petitioner has relied upon the decision of the Supreme Court rendered in the cases of *Amrit Lal Ambalal Patel v. Himathbhai Gomanbhai Patel and another*, AIR 1968 SC 1455 and *Sushil Kumar vs. Rakesh Kumar*, (2003) 8 SCC 673 in support of his contention that the relevant date for determining the age of the candidate is the date of scrutiny of nomination papers and has relied upon the decision of the Supreme Court in the cases of *Santenu Mitra vs. State of West Bengal*, (1998) 5 SCC 697, *CIDCO vs. Vasudha Gorakhnath Mandevlekar*, (2009) 7 SCC 283, *Madan Mohan Singh & Others vs. Rajni Kant & Another*, AIR 2010 SC 2933, *Birad Mal Singhvi vs. Anand Purohit*, 1988 (Supp.) SCC 604, *Satpal Singh v. State of Haryana*, JT 2010 (7) SC 500, *Brij Mohan Singh vs. Priya Brat Narain Sinha and Others*, AIR 1965 SC 282 and *Harpal Singh and Another vs. State of Himachal Pradesh*, AIR 1981 SC 361 in support of his submission that the certificate issued under the provisions of the Registration of Births and Deaths Act, 1969 has to be given precedence over the certificates issued by the school and that in cases where the election petitioner disputes the date of birth of the returned candidate, the burden of proving the same lies upon him and not on the successful returned candidate i.e. the petitioner in the present case.

7. The learned counsel for the respondent no.1, per contra, submits that while he does not dispute the law laid down by the Supreme Court regarding the date of scrutiny being relevant for the purpose of determining the age and the fact that the certificate issued under the provisions of the Registration of Births and Deaths Act, 1969 has to be believed and the school certificates have to be ignored, he seriously disputes the contention of the petitioner that

Sukhwati Bai and Basanti Bai are the same, by relying upon the statement of Basanti Bai herself. It is submitted that in such circumstances, the certificates produced by the petitioner which relate to the date of birth of Sukhwati Bai loose significance and cannot be relied upon by the petitioner. It is submitted that in the circumstances no fault can be found with the impugned order passed by the election tribunal.

8. I have heard the learned counsel for the parties at length. As the election tribunal has held that the date of birth of a candidate has to be ascertained as on the first day of the year in which elections are held, by relying on the provisions relating to preparation of the voters list, it would be appropriate to first address the issue as to the relevant date for determining the age of a contesting candidate in Panchayat elections.

9. Article 243F of the Constitution of India which relates to disqualification of membership in Panchayat elections provides that a person shall be disqualified for being chosen as a member of a Panchayat if he is so disqualified by or under any law for the time being in force for the purposes of elections to the Legislature of the State concerned; provided that no person shall be disqualified on the ground that he is less than 25 years of age, if he has attained the age of 21 years. The provisions of Article 243F of the Constitution of India therefore provides that a person who has attained the age of 21 years is qualified to contest the panchayat election.

10. For the purposes of deciding as to what would be the relevant date on which the age has to be determined in view of the provisions of Article 243F(1)(a) of the Constitution of India, it is necessary to refer to the relevant provisions of Section 36(2)(a) of the Representation of the People Act, 1951, which is in the following terms:-

“36(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, [reject] any nomination on any of the following grounds:-

[(a) [that on the date fixed for the scrutiny of nominations the candidate] either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:-

Articles 84, 102, 173 and 191.”

A reading of the aforesaid section makes it clear that the qualification or disqualification of a candidate has to be determined as on the date fixed for the scrutiny of the nomination. Rule 35(2) of the M.P. Panchayat Nirvachan Niyam, 1995 is also couched in similar terms and provides that the returning officer, after filing of the nomination papers, shall examine the nomination papers and shall decide all objections at that time regarding qualification and disqualification of the candidate concerned.

11. In view of the aforesaid provisions of the Constitution of India and the Representation of People Act, 1951, it is clear that the relevant date for ascertaining the age of the contesting candidate is the date of scrutiny of the nomination papers and not the date first of January of the year in which the election is held or the year in which the voters list is prepared as held by the election tribunal in the impugned order. The view taken by me stands fortified by the view taken by the Supreme Court in the cases of *Amrit Lal Ambalal Patel (supra)* and *Sushil Kumar (supra)*.

12. The next issue raised by the petitioner is regarding the primacy of the certificate issued by the competent authority under the Registration of Births and Deaths Act, 1969 over the school certificates issued by the school authorities whether it is the marksheet or as copies of the date of birth register maintained by them.

13. From a perusal of the decision of the Supreme Court rendered in the cases of *CIDCO (supra)* and *Madan Mohan Singh (supra)*, it is clear that this issue is no longer in dispute as the Supreme Court in clear terms has held that the certificate issued by the competent authority under the Registration of Births and Deaths Act, 1969 would prevail over the certificates issued by the school authorities.

The Supreme Court, in the case of *CIDCO (supra)* has held in para 18 as follows:-

“18. The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance

of the guardian of the respondent. (See *Birad Mal Singhvi v. Anand Purohit*, 1988 Supp. SCC 604: AIR 1988 SC 1796)”

In the case of *Madan Mohan Singh* (supra) the Supreme Court has reiterated the aforesaid view in the following terms:-

“16. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/ School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

17. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc., the entry in the school register is to be discarded. (Vide: *Brij Mohan Singh v. Priya Brat Narain Sinha & Ors.*, AIR 1965 SC 282; *Birad Mal Singhvi v. Anand Purohit*, AIR 1988 SC 1796; *Vishnu v. State of Maharashtra* (2006) 1 SCC 283: (AIR 2006 SC 508: 2005 AIR SCW 6149); and *Satpal Singh v. State of Haryana*, JT 2010 (7) SC 500 : (2010 AIR SCW 495).

18. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. (Vide: *Updesh Kumar & Ors. v. Prithvi Singh & Ors.*, (2001) 2 SCC 524: (AIR 2001 SC 703 : 2001 AIR SCW 347); and *State of Punjab Vs. Mohinder Singh*, AIR 2005 SC 1868).”

Similar view has been taken by the Supreme Court in the case of *Santenu Mitra* (supra) and by this Court in the case of *Mohandas Suryavanshi v. State of M.P.*, 1999 Cr.L.J 3451.

14. In the case of *Harpal Singh* (supra), the Supreme Court has in fact gone further to hold that the entries made by the concerned official in the discharge of his official duties under the Registration of Births and Deaths Act, 1969 is admissible under section 35 of the Evidence Act and it is not necessary for the prosecution to examine its author and, therefore, I have no hesitation in holding that the election tribunal was not correct and has gone wrong in ignoring the certificate produced by the petitioner under the Registration of Births and Deaths Act, 1969 and relying upon the school certificates.

15. There is yet another reason for setting aside the aforesaid finding of the election tribunal. The election tribunal, in the impugned order, has held that the burden of proving the age was on the petitioner rather than the respondent no.1 who was the election petitioner. It is a settled law that where the election petition is filed by the election petitioner contending that the returned candidate was disqualified to be elected on the ground that she was below the prescribed age, it is for the election petitioner to establish that the returned candidate was disqualified and not the returned candidate as has been held by the Supreme Court in the case of *Brij Mohan* (supra) in para – 21 which is in the following terms:-

“21. On an examination of the entire evidence, oral and documentary, we therefore reach the position that the petitioner-respondent has not been able to prove that the appellant Brij Mohan was below 25 years of age on the date of filing of nomination papers while the appellant himself has also not been able to show that he was at least 25 years of age on that date. It cannot be disputed and is not disputed that the burden of proving that the appellant's age was below 25 years on the date of his nomination was on the petitioner-respondent. The petition in so far as it is based on the ground that the appellant was below 25 years of age on the date of his nomination must therefore fail.”

16. The contest in the present petition is mainly in respect of the third issue, i.e the identity of the petitioner and Sukhwati Bai being the same, for if it is concluded that Sukhwati Bai and the petitioner are the same then the

certificate issued by the authorities under the Registration of Births and Deaths Act, 1969 would have to be accepted which indicates that the date of birth of the petitioner is 9.12.1988 according to which she would then be eligible and qualified to contest the election.

17. This Court, to ascertain the factual aspect of the matter has summoned the record of the election tribunal which has been produced before this Court alongwith the documentary and oral evidence and has been thoroughly examined by all concerned.

18. The learned Senior Counsel for the petitioner has relied heavily upon the statement of the father of the petitioner Muniram who, it is stated, is the best person to establish the aforesaid aspect. A perusal of the statement of Muniram clearly indicates that he has specifically stated that he has two daughters and three sons; that his elder daughter has two names, Sukhwati Bai and Basanti Bai. Similarly his younger daughter also has two names, Shanti Bai and Rajni and his three sons are Prakash, Sanjay and Pradeep. He has also stated that he had gone alongwith the petitioner for obtaining admission in the school and that he being illiterate had requested the concerned person of the school to record the name and age in accordance to his own assessment. Hakam Singh and Ajay Bakshi, the petitioner's two witnesses, have also clearly stated that Sukhwati Bai and Basanti Bai are the same person. Khuman Singh, who is the Kotwar of village Sirkona and whose statement has been recorded, has stated that as per the record Muniram was blessed with a daughter on 9.12.1988 who was named Sukhwati Bai and entries to that effect was made in the register and a certificate was also issued to that effect. On the basis of the statement of the aforesaid witnesses, the contention of the petitioner to the effect that Basanti Bai, the petitioner, and Sukhwati Bai are the same, appears to be correct.

19. However, the learned counsel for the respondent relying upon the statement of the petitioner herself has submitted that the contention of the petitioner deserves to be rejected as the petitioner has herself stated that she has two sisters namely, Basanti Bai/Sukhwati Bai and Rajni/Shanti Bai and that the petitioner has an elder sister whose name is Sukhwati Bai/Basanti Bai.

20. I have carefully perused the statement of the petitioner recorded before the election tribunal. A perusal of the statement indicates that while the petitioner, at the very beginning of her statement, has stated that her father has five issues; two sisters and three brothers, she however appears to have

given the statement treating herself to be a third person thereby giving the impression that she has two sisters Basanti Bai/ Sukhwati Bai and Rajni/Shanti Bai apart from herself which has been construed by the election tribunal to mean that the petitioner in fact has two sisters apart from her and that Basanti Bai/Sukhwati Bai is her elder sister.

21. Having perused the aforesaid statement of the petitioner, I am of the considered opinion that the contention of the petitioner deserves to be accepted on two grounds; firstly, that a reading of the entire statement of the petitioner indicates that she was talking in third person thereby giving an impression that she has another sister which is however contrary to the statements of her father as well as her own statements wherein she has stated that her father had two daughters and has also not given any name of the non-existent third sister; and secondly, on the ground that the best evidence in such cases is that of the parents as has been held by the Supreme Court in the case of Madan Mohan Singh (supra) in para-17 which has already been quoted above as well as in the case of *Birad Mal Singhvi* (supra) wherein it has been held as under:-

“14. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or some one having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved. The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar's register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone

else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value....”

22. In the instant case the petitioner's father has quite clearly stated that he has five children i.e. two daughters and three sons, the elder daughter is named Basanti Bai/Sukhwati Bai and the younger one Shanti Bai/Rajni and that it was he who had gone along with the petitioner at the time of her admission in the school and being illiterate had got her name recorded as Basanti Bai and her date of birth as 15.1.1990 which is not her correct date of birth. He has also stated that her correct date of birth is 9.12.1988 which has been recorded and certified by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969.

23. In view of the aforesaid analysis and the evidence on record, I am of the considered opinion that the petitioner has been able to establish that Sukhwati Bai/Basanti Bai are the same and that the date of birth of the petitioner is 9.12.1988 which is evident from a perusal of the certificate issued by the competent authority under the provisions of the Registration of Births and Deaths Act, 1969.

24. In view of the aforesaid findings recorded by me, the impugned order passed by the election tribunal deserves to be and is hereby set aside. The petition, filed by the petitioner, stands allowed.

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

Petition allowed.

I.L.R. [2012] M.P., 2425

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P.No. 5677/2012 (Gwalior) decided on 28 August, 2012

K.S. OILS LTD.

...Petitioner

Vs.

M.P.K.V.V.C.L. & ors.

...Respondents

Electricity Supply Code, M.P. 2004, Clause 5.3 - Dedicated Feeder - Merely because a consumer has opted for getting power supply from dedicated feeder, it does not mean that no other consumer can be

provided electricity from the said feeder - It is not the Intention of the Code making authority to confine the electricity supply by dedicated feeder to a solitary consumer - It is only to ensure that electricity supply is provided to the consumer from a particular feeder which is known as dedicated feeder. (Para 5)

विद्युत प्रदाय संहिता, म.प्र. 2004, खंड 5.3 - डेडीकेटेड फीडर - मात्र इसलिए कि उपभोक्ता ने डेडीकेटेड फीडर से बिजली प्राप्त करने का विकल्प लिया है, इसका अर्थ यह नहीं कि उक्त फीडर से किसी अन्य उपभोक्ता को बिजली प्रदाय नहीं की जा सकती - संहिता बनाने वाले प्राधिकारी का यह आशय नहीं है कि डेडीकेटेड फीडर से विद्युत प्रदाय एकमात्र उपभोक्ता तक सीमित रहे - ऐसा केवल यह सुनिश्चित करने के लिए है कि उपभोक्ता को विद्युत प्रदाय विशिष्ट फीडर से किया जा रहा है जिसे डेडीकेटेड फीडर के रूप में जाना जाता है।

Mahesh Goyal, for the petitioner.

Vivek Jain, for the company.

ORDER

SUJOY PAUL, J. - With the consent of parties, matter is finally heard.

1. The grievance of the petitioner is that he had opted for a dedicated feeder as defined in clause 5.3 of the M.P. Electricity Supply Code, 2004 (hereinafter called as "Code"). Learned counsel for the petitioner submits that the entire cost for the purpose of installation of the feeder was paid by the petitioner and the respondents were bound to provide electricity through that feeder only to the petitioner. Learned counsel submits that the very purpose of providing a dedicated feeder is to ensure direct supply from sub-station to the industry without any hindrance/interruption. He submits that if other persons were given connection from the said feeder, it no more remains a dedicated feeder and it will defeat the very purpose for which a dedicated feeder is opted by the petitioner. Learned counsel by placing reliance on clause 11 of the agreement for high tension supply, submits that the respondents are bound to provide uninterrupted electricity supply to the petitioner and the same is possible only when a dedicated feeder solely dedicated for the petitioner continues and if from the said feeder other lines are given, it neither remains a dedicated feeder nor it can fulfill the requirement of uninterrupted service to the petitioner.

2. Per contra, Mr. Vivek Jain, learned counsel for the respondents/ Company, submits that the capacity of transformer as well as feeder in question is 11400 KVA whereas the petitioner is consuming electricity only to the extent of 2000 KVA. Mr. Goyal submits that the agreement filed by the respondents shows that the agreement was for 3000 KAV. Mr. Vivek Jain, learned counsel for the respondents, submits that the very purpose of providing dedicated feeder is to ensure providing of electricity to a particular consumer from a particular feeder. In other words, Shri Jain submits that the dedicated feeder means that the electricity would be provided from that particular feeder and no other feeder would be used for the said purpose. He submits that clause 5.3 nowhere prescribes that the dedicated feeder means a feeder confined to a singular consumer. In other words, Shri Jain submits that the dedicated feeder does not mean that it should be solely confined or dedicated to a singular consumer. The only purpose is to ensure electricity supply to its optimum through a particular feeder which is earmarked as a dedicated feeder to a consumer. He also relied on clause 4.9 of the Code to submit that petitioner has no case.

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

4. The singular question needs to be answered is whether a dedicated feeder means a feeder from which the supply can be given only to a particular consumer ? It is apt to quote clause 5.3 of the Code which reads as under :-

“5.3 Consumers desirous of getting power supply from dedicated feeders may request for such facility to the licensee. The dedicated feeder shall be extended from the Power Substation to the consumer's point of supply. In such cases the consumers shall be liable to pay the cost of Bay and all protection Switchgears and its accessories provided at the power substation for this feeder in addition to the cost of the feeder. On receipt of such request, the licensee will check the feasibility based on merit of providing a dedicated feeder to the consumer's premises. If found feasible, the consumer will be provided with a dedicated feeder and the consumer will be liable to pay additional charges as indicated in the Schedule of Miscellaneous Charges.”

5. A bare perusal of the clause 5.3 of the Code shows that it nowhere confines the feeder to a singular consumer. On the contrary, the clause 5.3 begins with a

plural word which is "consumers". Thus, the intention of the code making authorities is not to confine the dedicated feeder to a singular consumer but it was left open to provide the dedicated feeder to the consumers. Thus, I am unable to hold that the intention of the code making authority is to confine the dedicated feeder to a singular consumer. Consequently, I find no substance in the argument that the dedicated feeder should be confined to a singular consumer/petitioner. So far as the right to get continuous/uninterrupted electricity supply from clause 11 of the agreement is concerned, if this is violated, it is always open for the petitioner to invoke the arbitrary clause 36 of the said agreement. In the light of the aforesaid analysis, I find no substance in the petition and I am unable to hold that the dedicated feeder is solely dedicated to the singular consumer/petitioner. Even otherwise, this cannot be the intention of the code making authority because one feeder having a larger capacity cannot be wasted for a consumer whose requirement is much less than the capacity of the feeder. On the basis of the aforesaid analysis, no case is made out by the petitioner. Petition is bereft of any merit and substance and is hereby dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 2428

WRIT PETITION

Before Mr. Sushil Harkauli, Acting Chief Justice

& Mr. Justice Alok Aradhe

W.P.No. 4551/2012 (Jabalpur) decided on 21 September, 2012

HAJIABDULRAJJAK

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

National Security Act (65 of 1980), Section 3(2) - Order of detention - Action of the petitioner had disturbed the even tempo of life - Act of the petitioner had affected the public order - The same is sufficient to justify the order of detention. (Para 9)

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) - निरोध का आदेश - याची के कृत्य ने जीवन की संतुलित गति भंग की - याची के कृत्य से लोक व्यवस्था प्रभावित हुई - निरोध के आदेश को न्यायोचित मानने के लिए यह पर्याप्त है।

Cases referred :

(1981) 2 SCC 436, (1986) 4 SCC 762, (1989) 2 SCC 370, 2010 (2) MPLJ 59, 2000 (2) MPLJ 618, AIR 1976 SC 780, AIR 2004 SC 4703, (2007) 9 SCC 28, AIR 1970 SC 1228, AIR 1972 SC 922, AIR 1973 SC 197, AIR 1974 SC 1214, (2012) 7 SCC 499

Naman Nagrath with *A. Usmani*, for the petitioner.

Prashant Singh, A.A.G. for the respondents.

ORDER

The Order of the court was delivered by :
ALOK ARADHE, J. - In this writ petition the petitioner has challenged the validity of the order dated 17.3.2012 passed by the District Magistrate by which petitioner has been detained under section 3(2) of the National Security Act, 1980 (for short the 'Act').

2. As per the case set forth by the respondents in the return, the Superintendent of Police vide memorandum dated 14.03.2012 informed the District Magistrate, Jabalpur about the criminal activities and involvement of the petitioner in several criminal cases since 1991 which are prejudicial to the public order. The District Magistrate by the aforesaid memorandum was informed that the petitioner is a habitual offender and has formed a gang which is in possession of dangerous weapons and explosives. The petitioner along with his gang is repeatedly committing serious crimes and that the petitioner has made criminal activities, means of his livelihood and has earned crores of rupees and has started using the money to eliminate other criminals in the city in order to create monopoly of his gang in the criminal activities in city. It was also stated in the memorandum that on account of criminal activities of the petitioner, there is an atmosphere of fear in the locality. The petitioner, with the help of his son and gang formed by him, tried to disturb the communal harmony of the city and that the petitioner is having history of committing serious crimes, including murder, gang war and to provoke riots between the two communities. Due to the activities of petitioner there is an atmosphere of terror in the city and no victim comes forward, even to lodge a report, against the petitioner in the Police Station. The memorandum further states that on earlier occasions also preventive actions were taken against the petitioner under different Laws but no improvement was observed so far as the involvement of the petitioner in criminal activities is concerned.

3. It has further been stated in the return that in the criminal cases where the petitioner was acquitted, it can easily be seen that witnesses turned hostile in the Court of law as no witness dared to depose anything against the petitioner and the petitioner got acquitted even in the case in which offences were committed by him in broad day light and at public place and in full public view. In the return it has further been averred that the petitioner has formed a gang and the police has prepared the record of the criminal activities in which the gang formed by the petitioner is involved. The aforesaid confidential report of the Police Department was also placed before the District Magistrate. It has further been averred that though the son of the petitioner, against whom warrant of arrest was issued on 16.8.2007 in compliance of the order passed under Section 3(2) of the National Security Act, could not be executed as he was under the unlawful protection of the petitioner. As soon as the petitioner was arrested, his son was also arrested by the Police within a period of three days.

4. In the additional return, which has been filed on behalf of the respondents, it is stated that the Police Authorities have collected the details of offences committed by the gang formed by petitioner, which show that more than 103 crimes have been committed by said gang, not only in Jabalpur district but even in the surrounding districts as well. It has further been averred that the preventive proceedings under sections 107 and 116 of the Code of Criminal Procedure were initiated against the petitioner in the year 2010, as there was possibility that the petitioner may commit breach of peace or disturb the public tranquility, because on 24.9.2010 the judgment in respect of Babri Masjid case was to be delivered by Allahabad High Court. Similarly, in 2012 a complaint was received that the petitioner and one Rais Wali were trying to provoke the feelings of particular community in Khuda Baksha Masjid situated in Omti and, therefore, proceedings under sections 107 and 116 of the Code of Criminal Procedure were initiated against the petitioner. The petitioner was asked to show cause as to why he should not be required to execute the bond for keeping peace.

5. In compliance of the order dated 18.5.2012, learned Additional Advocate General has produced the record for our perusal. However, in the case of *Kirit Kumar Chaman Lal Kundaliya vs. Union of India and others*, (1981) 2 SCC 436 it has been held by the Supreme Court that it is not open to the Court to wade through the confidential file of the government in order to fish out a ground for detention against the detinue. Similarly, in *Ramveer Jatav vs. State of UP, and others*, (1986) 4 SCC 762 it has been held that

if the material on which reliance is placed does not find place in the grounds of detention, the same cannot be relied upon. It has further been held that the Detaining Authority cannot be allowed to supplement/add to the grounds of detention which have been mentioned in the order of detention. In the light of the aforesaid decisions of the Supreme Court we have carefully perused the grounds of detention. The facts, which have been referred to in the preceding paragraphs and have been mentioned in the return as well as additional return, do not find place in the grounds of detention which have been supplied to the petitioner. Therefore, the same cannot be looked into. Similarly, the record which has been produced before us in compliance of the order of this Court also cannot be looked into. For yet another reason we cannot look into the records, as the copies of the same have not been supplied to the counsel for the petitioner.

6. Learned counsel for the petitioner while inviting the attention of this court to the grounds of detention submitted that out of nine cases mentioned in the grounds of detention the petitioner has been acquitted in four cases, namely, the cases mentioned at Sr.Nos.1, 2, 3 & 6. So far as the cases referred to in the grounds of detention at Sr.Nos.4 & 8 are concerned, no proceedings were initiated against the petitioner. Similarly, in the grounds of detention the crime which is referred to at Sr.No.7, in respect thereof the proceedings under sections 107 & 116 Cr.P.C. were initiated against the petitioner in the year 2007. With regard to ground No.9 it is submitted that warrant of arrest was issued against the petitioner's son on 16.8.2007 and if the Police Authority had reason to believe that the petitioner was giving unlawful protection to his son, the proceedings under the provisions of Code of Criminal Procedure could have been initiated against the petitioner. It is further submitted that with reference to case mentioned at ground No.5, that though the petitioner has been convicted for offences punishable under sections 147, 148, 326/149 and 324/149 for a period of two years, against the aforesaid order an appeal is pending before the High Court. It was further submitted that from the allegations levelled in the First Information Report as well as in the judgment it is apparent that the aforesaid case is one of "law and order" and not of "public order". The instance referred to in ground No.5 of the order of detention took place over a dispute pertaining to contract and there is no material to justify the order of detention which has been passed against the petitioner. It is also submitted that the effect of acquittal of the petitioner in four cases has not been considered by the Detaining Authority and, therefore, the order of

detention is vitiated in law. In support of the aforesaid proposition the learned senior counsel has placed reliance on the decision of Supreme Court in *Dharamdas Shamlal Agarwal vs. Police Commissioner and another*, (1989) 2 SCC 370, the Division Bench decision of this Court reported in *Tahsildar Singh vs State of M.P. and others*, 2010 (2) MPLJ 59 and *Geeta Sahu vs. District Magistrate, Shahdol and other*, 2000 (2) MPLJ 618 and Full Bench decision of Allahabad High Court reported in AIR 1987 Allahabad 169. It is further submitted that there is total absence of subjective satisfaction on the part of the Detaining Authority and the order of detention suffers from non-application of mind.

7. On the other hand, learned Additional Advocate General while opposing the submissions made on behalf of the petitioner submitted that even a single act, affecting the public order, can also be considered as sufficient ground for passing an order of detention. It has further been submitted that the instance which is referred to in the ground No.5 of order of detention took place in the broad day of light in public place and, therefore, the same affected the public order. In support of his submissions, learned Additional Advocate General has relied upon the decisions of Supreme Court in *Narayan Debnath vs. State of West Bengal*, AIR 1976 SC 780 *State of U.P. and another vs. Sanjai Pratap Gupta*, AIR 2004 SC 4703, and *Mukesh Tikaji Bora and Union of India and others*, (2007) 9 SCC 28.

8. We have considered the respective submissions made by learned counsel for the parties. The crucial issue which arises for consideration is, whether the activities of the detenu mentioned in the order of detention were prejudicial to the public order. [See: *Pushkar Mukherjee vs. State of W.B.*, AIR 1970 SC 852, *Arun Gosh vs. State of W.B.*, AIR 1970 SC 1228, *Kishori Mohan Boara vs. State of W.B.*, AIR 1972 SC 922, *Babul Mitra alias Anil Mitra vs. State of W.B.*, AIR 1973 SC 197, and *Milan Banik vs. State of W.B.*, AIR 1974 SC 1214. It is well settled that a single act can also be sufficient for holding that public order was affected. What is required to be seen is the effect of an act on even tempo of life and extent of its reach upon the society and its impact. [See: *Sanjai Pratap Gupta* (supra)]

9. Now we may advert to the grounds of detention. Admittedly, out of nine grounds, in respect of four criminal cases referred to above, at Sr.Nos.1; 2, 3 & 6, the petitioner has been acquitted. Similarly, in respect of cases mentioned at grounds No.4 & 8, no proceedings have been initiated against

the petitioner. In respect of ground No.7, the proceedings under sections 107 and 116 of the Code of Criminal Procedure were initiated against the petitioner in the year 2007. In respect of grounds which are mentioned at Sr.No.9 the warrant of arrest against the son of the petitioner has been issued approximately five years ago. So far as the ground mentioned at Sr.No.5 is concerned, the same indicate that on 06.2.1996 at about 11.30 a.m. in morning at Bus Stand the petitioner alongwith his companions assaulted one Mehboob Ali in full public view. The facts stated in the F.I.R. reveal that at about 11.15 a.m. in the morning at Bus Stand the petitioner alongwith other companions reached the Bus Stand in Maruti Car. The petitioner took out a large hammer and assaulted Mehboob Ali. His companions assaulted Mehboob Ali by rod. The petitioner's companions assaulted one Chintoo and Rana by a sword and the rod. Accordingly, offences under sections 147, 148, 149, 294, 307 and 324 of the Indian Penal Code were registered against the petitioner and his companions. The petitioner was convicted in the aforesaid case for offences under sections 148, 149, 324/149, 326/149 of the Indian Penal Code and was sentenced to rigorous imprisonment for a period of two years. From the judgment as well as the First Information Report it is apparent that incident had taken place at public place i.e. Bus Stand in a broad day light. The petitioner accompanied by the members of his gang reached the public place i.e. the Bus Stand which is a crowded locality and brutally assaulted one Mehboob Ali in full public view. The aforesaid action of the petitioner had disturbed the even tempo of life. Therefore, the act of the petitioner had affected the public order. In view of the section 5A of the Act as well as decision of Supreme Court in *Sanjai Pratap Gupta* (supra) the same is sufficient to justify the order of detention.

10. Before proceeding further, it would appropriate to notice section 5-A of the National Security Act, which reads as under:

"5A. Grounds of detention severable. - Where a person has been detained in pursuance of an order of detention whether made before or after the commencement of the National Security (Second Amendment) Act, 1984 under section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly-

(a) such order shall not be deemed to be invalid or

inoperative merely because one or some of the grounds is or are

- (i) vague,
- (ii) non-existent,
- (iii) not relevant,
- (iv) not connected or not proximately connected with such person, or
- (v) invalid for any other reason whatsoever.

and it is not, therefore, possible to hold that the Government or officer making such order would have been satisfied as provided in section 3 with reference to the remaining ground or ground and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said section after being satisfied as provided in that section with reference to the remaining ground or grounds."

From the perusal of above quoted Section 5-A of the Act it is apparent that it has been incorporated to take care of the situation whether one or more of the grounds can be separated from other grounds for justifying the order of detention.

11. After having noticed section 5A of the Act, we may deal with the contention of the learned counsel for the petitioner that since the factum of acquittal of the petitioner in some cases has not been considered by the Detaining Authority, therefore, the order of detention is vitiated in law and the same suffers from the vice of non application of mind. The Constitution Bench of the Supreme Court considered the scope of section 5A of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA") which is *pari materia* with section 5A of the Act. It was held in the aforesaid case that where the order of detention is based on more than one ground by a legal fiction, it would be deemed that there are as many orders of detention as there are grounds which means each of such order is independent one. Section 5A of COFEPOSA is reproduced below for the facility of reference.

"5A. Grounds of detention severable. - Where a person has been detained in pursuance of an order of detention under sub-section (1) of section 3 which has been made on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly-

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are

(i) vague,

(ii) non-existent, (iii) not relevant, (iv) not connected or not proximately connected with such person, or

(iii) in valid for any other reason whatsoever; and it is not therefore possible to hold that the Government or officer making such order would have been satisfied as provided in sub-section (1) of section 3 with reference to the remaining ground or grounds and made the order of detention;

(b) the Government or officer making the order of detention shall be deemed to have made the order of detention under the said sub-section (1) after being satisfied as provided in that sub-section with reference to the remaining ground or grounds."

12. In view of the decision by the Constitution Bench of Supreme Court, the two Division Bench decisions relied on by learned senior counsel for the petitioner, namely, *Dharamdas Shamlal Agarwal (supra)* and *Tahsildar Singh vs. State of M.P. And others, 2010 (2) MPLJ 59* lose their significance in the facts of the case. Therefore, aforesaid contention of the learned counsel for the petitioner cannot be accepted.

13. We are conscious of the fact that concept of preventive detention is not to punish the detenu for an act done in the past, but to prevent the person concerned in anticipation of doing an illegal activity prejudicial to public order. [See: *Dropati Devi and another vs. Union of India and others, (2012) 7SCC 499*]. One serious act which has the impact of affecting the public order coupled with several criminal cases pending against the petitioner, even

though of minor nature, show the continuing tendency of the petitioner to affect the public order. From the continuing tendency of the petitioner to indulge himself in the act of affecting public order as well as the material available on record i.e. grounds of detention, we are satisfied that the order of detention has been passed with a view to prevent the petitioner from indulging in any activity which is prejudicial to public order. On this ground also the order of detention does not call for any interference.

14. We, therefore, do not find any merit in the writ petition. The same fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 2436

WRIT PETITION

Before Mr. Justice Rajendra Menon

W.P.No. 5823/2006(S) (Jabalpur) decided on 26 September, 2012

RAJ BAHADUR KHARE

...Petitioner

Vs.

MADHYA BHARAT GRAMIN BANK PRADHAN

KARYALAYA, SAGAR & ors.

...Respondents

Service Law - Disciplinary Proceedings - Complainant, Prosecutor, Witness and Judge - Same Authority - Two charge sheets were issued alleging lodging of false complaint against superior officers of bank and also casting aspirations and accusations against various officers including the Chairman - Chairman directed for departmental enquiry - Chairman appeared as a witness in the enquiry - Chairman issued show cause notice after receiving the inquiry report - However, the punishment order was passed by a different person - Held - Main allegation is against the Chairman who issued the charge sheet although he himself was the complainant, he appeared as a witness, acted as a prosecutor, a judge and was instrumental in taking the impugned action as he himself had issued show cause notice to the petitioner - A person should not be a judge in his own cause - Fundamental principle of Natural Justice applies in quasi judicial proceedings - Doctrine of necessity does not apply - As the same person had acted as a complainant,

**prosecutor, witness and a judge, the entire proceedings are vitiated -
Petitioner be reinstated in service with all consequential benefits.**

(Para 33)

सेवा विधि - अनुशासनात्मक कार्यवाहियां - शिकायतकर्ता, अभियोजक, गवाह और न्यायाधीश - समान प्राधिकारी - बैंक के वरिष्ठ अधिकारियों के विरुद्ध झूठी शिकायतें दर्ज कराने के साथ ही चेयरमैन सहित कई वरिष्ठ अधिकारियों पर आरोप लगाने का अभिकथन करते हुए दो आरोप पत्र जारी किये गये - चेयरमैन ने विभागीय जांच के लिए निदेशित किया - जांच में चेयरमैन गवाह के रूप में उपस्थित हुए - चेयरमैन ने जांच प्रतिवेदन प्राप्त करने के पश्चात् कारण बताओ नोटिस जारी किया - किन्तु दंडादेश किसी अन्य व्यक्ति द्वारा पारित किया गया - अभिनिर्धारित - मुख्य आरोप चेयरमैन के विरुद्ध है कि जिसने आरोप पत्र जारी किया और आक्षेपित कार्यवाही उसी के माध्यम से की गई क्योंकि उसने स्वयं याची को कारण बताओ नोटिस जारी किया - व्यक्ति को अपने स्वयं के प्रकरण में जज नहीं होना चाहिए - नैसर्गिक न्याय का मूलभूत सिद्धांत अर्ध न्यायिक कार्यवाहियों में लागू होता है - आवश्यकता का सिद्धांत लागू नहीं होगा - चूंकि उसी व्यक्ति ने शिकायतकर्ता, अभियोजक, साक्षी एवं जज के रूप में कार्यवाही की है, संपूर्ण कार्यवाहियां दूषित हो जाती है - याची को सभी परिणामिक लाभों के साथ सेवा में बहाल किया जाए।

Cases referred :

AIR 1962 MP 15, AIR 1973 SC 2701, AIR 1976 SC 2428, (1996) 4 SCC 104, (2006) 11 SCC 1, (2006) 3 SCC 276, (2006) 4 SCC 348, AIR 1959 SC 308, AIR 1958 SC 86, (2005) 12 SCC 388, (1985) 3 SCC 398

R.K. Verma, for the petitioner.

Ashish Shroti, for the respondents/Bank.

ORDER

RAJENDRA MENON, J. - Challenging the orders passed by respondent bank removing the petitioner from service vide order Annexure P-1 dated 8.12.2005 and dismissing his appeal vide order dated 4.4.2006 Annexure P-3, petitioner has filed this writ petition.

2. Petitioner Shri Raj Bahadur Khare at the relevant time when the impugned action took place was working as a Junior Management Grade-I in the respondent bank and was posted in Chandla Branch. He was appointed

on 14.6.1978 and after earning various promotion due to his satisfactory service attained the position of officer in the cadre of Junior Management Grade-I.

3. It is the case of petitioner that while he was so working, his case for promotion was not being properly considered and the bank authorities were indulging in granting undue benefit to certain other employees in the matter of fixation of seniority, grant of promotion and various other service benefits, petitioner had being filing writ petitions before this Court challenging various actions of the bank, between the year 2003-2005. It is stated that he had filed 10 writ petitions and particulars of these writ petitions are given in para 3.1 of the petition. Reference is made particularly by the petitioner to two writ petitions namely W.P(s) No.110/2003 and W.P.(s) No.6508/2005, it is contend that these writ petitions were filed against the illegal promotion granted to various persons in an arbitrary and illegal manner and it was also pointed out that some of the officers who were granted these promotions were related to certain administrative authorities of the bank, like its Chairman.

4. Be it as it may be, it was the case of petitioner that at the relevant time i.e. in the year 2003 the then Chairman of the bank, one Shri S.K. Jain and the other officers came to his house on 27.9.2003 and tried to assault him, intimidate him, pressurized him for withdrawing the writ petitions filed. It is stated by the petitioner that because of the aforesaid he lodged an FIR with the police authorities against Shri S.K. Jain Chairman, Shri S. Agnihotri General Manager and one Shri N.C. Jain Sr. Manager, apart from Shri Prabhakar Shukla against whom one petition was filed. It is stated that the case was registered by the police authorities i.e. Police Station Kotwali Teekamgarh and challan was filed in the Criminal Court on 18.3.2004. According to petitioner because of the aforesaid act of the petitioner the respondents got annoyed with the petitioner and, therefore, a charge-sheet Annexure P-4 dated 28.4.2004 was issued to the petitioner. In the charge-sheet the first allegation against the petitioner was with regard to lodging of a false complaint against Officers of the Bank and further allegations in the charge-sheet pertained to various communications made by petitioner to officers of the bank particularly the Chairman Shri S.K. Jain, casting aspiration and accusations, various other irregularities in the matter of working of the petitioner were also pointed out. Petitioner submitted various applications seeking documents and other papers to enable him to submit a detailed explanation to the charge-sheets, Annexure P-6 and Annexure P-7 are the applications submitted by the petitioner. But

however the request of petitioner for grant of documents were rejected by the Disciplinary Authority namely Chairman Shri S.K. Jain therefore, the petitioner was constrained to submit his reply to the charge-sheet without the documents. The petitioner submitted his reply to the charge-sheet and when matter was so pending it is stated that a second charge-sheet Annexure P-5 dated 28.9.2004 was issued to the petitioner and in this the allegation made was that in a communication made by petitioner on 4.5.2004 to the Chairman of the Bank, Shri S.K. Jain various uncalled-for comments and observations were made by the petitioner. It is indicated that petitioner is in habit of making false allegations and casting aspersions on the superior officers and even during pendency of the proceedings after issuance of first charge-sheet dated 28.4.2004 as he had again indulged in similar act, therefore, the second charge-sheet was issued. Petitioner again sought for various documents but when the documents were not supplied, submitted his reply to the charge-sheet. The same was found to be unsatisfactory and, therefore, a departmental enquiry was ordered into the matter and Shri S.K. Jain the Chairman himself appointed an Inquiry Officer. The enquiry was conducted on various dates, petitioner participated in the enquiry on various dates but when petitioner did not appear in the enquiry on certain dates ex-parte proceeding were drawn. Subsequently the statement of witnesses were recorded in the enquiry, they were supplied to the petitioner, the witnesses were again produced for cross-examination by the petitioner, certain opportunity to examine defence witnesses were granted, which according to petitioner was not sufficient. Finally on the basis of the evidence and material that came on record the Inquiry Officer submitted his report to the Disciplinary Authority namely the Chairman Shri S.K. Jain who went through the enquiry report submitted his comments and on the basis of same the impugned action has been taken against the petitioner. Appeal filed having also been dismissed petitioner is before this Court.

5. Challenging the action on various counts Shri R.K. Verma, learned counsel appearing for petitioner at the very outset emphasized that in the present case the entire action taken against the petitioner stands vitiated for the simple reason that the proceedings against the petitioner have been initiated by Shri S.K. Jain the then Chairman, who was not only the complainant and a witness but also acted as the disciplinary authority and imposed the punishment. Accordingly, the first ground canvassed is that Shri Jain, the Chairman was biased and had prejudices against the petitioner, he acted as a Judge and prosecutor and as this is impermissible, is in violation to the principles of

natural justice the entire enquiry stands vitiated on this count alone and action taken against the petitioner is liable to be quashed.

6. The second ground canvassed was that petitioner had submitted an application for change of the Inquiry Officer because certain enquiry by the Central Bureau of Investigation was conducted against the Inquiry Officer on the basis of a report submitted against the Inquiry Officer and in the said enquiry conducted by the Central Bureau of Investigation petitioner had appeared as a witness and, therefore, the petitioner apprehends that he will not get justice from the particular Inquiry Officer he, therefore, sought for change of Inquiry Officer but his request was again rejected not only by Inquiry Officer but also by the Disciplinary Authority namely Shri S.K. Jain, accordingly on the ground of bias and prejudice of the Inquiry Officer, the second ground is canvassed.

7. The third ground of challenge is that proper opportunity to submit reply to the charge-sheet was not given. Documents prayed for by the petitioner in support of allegations levelled in the charge-sheet and which were necessary to put forth his defence were not supplied and in the absence of documents being supplied it is stated that enquiry stands vitiated.

8. The fourth ground argued was that proper opportunity to examine defence witnesses were not granted, even though petitioner was permitted to examine certain witnesses but his claim to examine one Shri H.P. Khare as defence witness was denied and in the absence of proper opportunity being granted to examine witness in his defence the entire enquiry stands vitiated.

9. Finally the last ground canvassed was that appeal was not properly decided, the Appellate Board was not constituted properly in as much as the Chairman of the Appellate Board was not present and the appeal was decided in his absence. As the appeal was decided by the Board without the Chairman by appointing an Adhoc Chairman the entire proceedings before the Appellate Board stands vitiated.

10. Accordingly, Shri R.K. Verma by taking me through various documents available on record in support of his submission, emphasized and tried to demonstrate as to how the aforesaid grounds canvassed by him are established from the material available on record, he referred to various documents filed and available in the enquiry file in support of his contentions. That apart the following judgments were relied upon by him in support of the grounds

canvassed by him, the judgments relied upon are:

1. *Nandkishore Jugalkishore vs Commissioner, Jabalpur Division* AIR 1962 (MP) 15.

2. *S. Parthasarathi vs State Of Andhra Pradesh* AIR 1973 SC 2701.

3. *G. Sarana vs University Of Lucknow & Ors* AIR 1976 SC 2428.

11. Refuting the aforesaid contention advanced, Shri Ashish Shroti learned counsel submits that in the establishment of the respondents as per the rules applicable the Chairman is the Disciplinary Authority, who can take action in the matter and as there is no other authorities to whom the power of taking disciplinary action can be delegated the "doctrine of necessity" warrants that action can be taken only by the said authority and not by any other authority. Accordingly, emphasizing that the power of disciplinary authority cannot be exercised by the next higher authority which is the appellate authority, Shri Shroti submits that the act of the Chairman Shri S.K. Jain in discharging the duties of disciplinary authority inspite of the fact that he was a witness does not vitiate the enquiry, as the act in question is protected by the "doctrine of necessity". In support of his contention in this regard he invited my attention to the law laid down by the Supreme Court in the case of *Election Commission Of India & Anr. Vs. Dr. Subramaniam Swamy & Anr.* 1996(4) SCC 104, *Jagjit Singh Vs. State of Haryana & Others* (2006) 11 SCC 1, *State of U.P. Vs. Sheo Shanker Lal Srivastava & Others* (2006) 3 SCC 276 and to another judgment of the Supreme Court in the case of *A. Sudhakar Vs. Postmaster General, Hyderabad and Anr.* (2006) 4 SCC 348 to say that the appellate authority cannot initiate the charge sheet or conduct the departmental enquiry. Accordingly, Shri Shroti tried to emphasize that the principle objection with regard to the Chairman Shri S.K. Jain being a judge in his own cause will not apply in the peculiar facts and circumstances of the present case, under the administrative set up, as is applicable to the bank in question. That apart, Shri Shroti submits that except for contending that Shri S.K. Jain Chairman has acted as judge in his own cause, no prejudice caused to the petitioner is pointed out. It was stated by Shri Shroti that in the charge-sheet Annexure P-4 issued to the petitioner apart from the false complaint and communication made to Shri Jain various other acts of the petitioner in of discharge his duties have been indicated and as action is taken collectively

with regard to all these charges it is stated that there is no illegality in the matter. Shri Shroti points out that with regard to charge-sheet No.1 Annexure P-4 dated 28.4.2004 there are 9 allegations and as action is taken cumulatively for all the allegations the ground canvassed in this regard is unsustainable.

12. With regard to the second ground pertaining to bias of Inquiry Officer and the fact that petitioner was a witness to an enquiry against the Inquiry Officer Shri Shroti points out that the so called complaint and the grievance of petitioner with reference to this question is unsustainable. He referred to the so called complaint Annexure P-10, the report on which the enquiry was conducted by the Central Bureau of Investigation and submits that Annexure P-10 submitted by the petitioner against the Inquiry Officer is nothing but it was a spot audit report of the year 1996 the matter was investigated by the Central Bureau of Investigation and petitioner who had given the report was required to make his statement. It is stated that petitioner had only made certain statement with regard to the audit report which had got nothing to do with the official duties of Inquiry Officer and therefore, on this ground interference in the matter is not called for. It was also submitted by him that the complaint by petitioner in this regard was raised at a belated stage when enquiry has commenced and as objection was not raised in time, at a proper stage, on this ground interference into the matter is not called for. In support of aforesaid contention he invited my attention to the law laid down in the case of *Dr. G. Sarana vs University Of Lucknow & Ors* AIR 1976 SC 2428 and certain other cases. It was further submitted by Shri Shroti with regard to the ex-parte enquiry being conducted and non-grant of opportunity that the enquiry was conducted on various dates. Shri Shroti referred to the proceedings of enquiry held on 4.12.2004, 3.11.2004, 21.12.2004 & 30.12.2004, the objections filed by petitioner vide Annexure P-12, decision on the same vide Annexure R-25 & R-26 and argued that all these proceedings go to show that it was petitioner who was deliberately trying to prolong the enquiry, was not participating in the enquiry and, therefore, Inquiry Officer had no option but to proceed with the enquiry in the manner done. Shri Shroti thereafter invites my attention to the proceedings of the enquiry and submitted that after all the witnesses in the departmental enquiry were examined on behalf of prosecutor and when the prosecution had closed their case the statement of all the witnesses were forwarded to the petitioner along with chance to the petitioner to cross-examine these witnesses. Thereafter, in the enquiry proceedings held on 11.5.2005 all these prosecution witnesses were produced and they were cross-

examined by the petitioner except P.W.-2 one Shri S.C. Jain in whose case petitioner refused to cross-examine. Shri Shrotri accordingly, contend that even though on 21.12.2004 the enquiry was conducted ex-parte and certain witnesses were examined in the enquiry, but as all these witnesses were presented for cross-examination, by petitioner on 11.5.2005 there is no illegality in the matter as petitioner was given full opportunity to defend himself in the enquiry. Shri Shrotri thereafter took me through the proceedings of enquiry held on 7.7.2005, 14.7.2005, 26.7.2005 and 27.7.2005 and submitted that before closing of the enquiry on 4.8.2005 petitioner was given opportunity to examine his defence witnesses, he participated did so and merely because his defence witnesses one Shri Saxena and Shri H.P. Khare were not examined the enquiry will not stand vitiated. Accordingly, by referring to the proceedings as indicated hereinabove Shri Shrotri emphasized that the enquiry conducted was proper, full and fair opportunity was granted to the petitioner to participate in the enquiry and there is no illegality.

13. Thereafter, referring to applications submitted by the petitioner vide Annexure P-6 and P-7, the orders passed by the competent authority as contained in Annexure R-7 Shri Shrotri submits that all the documents which were relevant were supplied, the petitioner was insisting upon grant of irrelevant documents for filing reply to the charge-sheet, but in the enquiry all the documents which were necessary were made available and as no prejudice is caused due to non-supply of documents on these grounds interference into the matter is not called for, because actual prejudice cause is neither pleaded or established. Shri Shrotri placed reliance on various judgments of the Supreme Court in support of the said contention.

14. Finally, with regard to the appeal not being decided by the competent authority Shri Shrotri points out that as Disciplinary Authority was the Chairman and as the punishment order was issued by the Chairman, when the appellate Board met the Chairman left the proceedings of the Appellate Board and an Adhoc Chairman was appointed and after personally hearing the petitioner the appeal has been decided, therefore, there is no illegality in the matter. Shri Shrotri points out that when the impugned order of punishment Annexure P-1 dated 8.12.2005 was passed Shri S.K. Jain did not discharge the duties as a Chairman or Disciplinary Authority, instead the function of Disciplinary Authority for the said action was discharged by Shri O.P. Tank and as the punishment order is passed by a different person, other than Shri S.K. Jain, the contention of petitioner that the enquiry and entire action stands vitiated

due to Shri Jain being a judge in his own cause is of no consequence, because the final order of punishment is imposed by a Chairman other than Shri S.K. Jain. He also submits that as the appeal is also decided by a competent Appellate Board and as Disciplinary Authority who was Chairman of the Appellate Board had left the proceedings the petitioner cannot have any grievance in the matter of decision on the appeal, as the same is ordered after due consideration by an independent body of members, who are unconnected with the case. Accordingly on the basis of aforesaid submissions Shri Shrotri submitted that the action of the Management is legal and proper, same does not call for any interference.

15. In rebuttal to the aforesaid arguments of Shri Shrotri, Shri R.K. Verma learned counsel for the petitioner refuted his contentions with regard to applicability of the principle i.e. "Doctrine of Necessity" canvassed by Shri Shrotri and argued that the said doctrine cannot be made applicable in the present case. It was submitted that the judgments relied upon by Shri Shrotri are with regard to action taken by a Constitutional Authority wherein appointment of any other Adhoc Authority was not possible. It is argued that the 'Doctrine of Necessity' applicable with regard to discharging of duties by Constitutional Authorities cannot be made applicable in the cases of a departmental enquiry into misconduct by Disciplinary Authorities, as in such cases appointment of a adhoc disciplinary authority is possible and, therefore, on the ground of Shri S.K. Jain being a judge in his own cause, Shri R.K. Verma submits that the entire act stands vitiated.

16. I have heard learned counsel for the parties at length and have perused the record, so also the original enquiry file produced by Shri Shrotri.

17. In all five questions arises for consideration in this writ petition, the first and the foremost question is as to whether the entire action taken against the petitioner stands vitiated because Shri S.K. Jain the Chairman acted as a Disciplinary Authority, a complainant, a witness, a prosecutor and finally as a Judge. Accordingly, a question of grave importance in this writ petition is with regard to Shri S.K. Jain acting as a Judge in his own cause.

18. The second question is with regard to competency of the Enquiry Officer in conducting the enquiry inspite of the fact that petitioner had made certain complaints against him vide Annexure P-10 and on this complaint an enquiry by the Central Bureau of Investigation was ordered in which submission of the petitioner was recorded.

19. The third question is as to whether non-grant of documents to the petitioner requested for vide Annexure P-6, Annexure P-7 and Annexure P-8 before submitting the charge-sheet vitiate the enquiry proceedings.

20. The fourth question is as to whether the enquiry stands vitiated due to non-grant of proper opportunity of defence to the petitioner in as much as proceedings were held ex-parte against the petitioner on 21.12.2004 and whether right of the petitioner to examine his witnesses Shri H.P. Khare and Shri A.K. Saxena as defence witnesses vitiate the enquiry.

21. The fifth and the last question is as to whether the appeal in question was properly decided or not.

22. Before dealing with the questions as formulated hereinabove it may be appropriate to take note of the charges levelled against the petitioner in the two charge-sheets. The first charge-sheet is Annexure P-4 dated 28.4.2004 and in this charge-sheet nine allegations of misconduct are imputed and it is indicated that the acts/ complaints imputed therein are in violation to Regulation 17, 19 & 23 of the Bundelkhand Kshetriya Gramin Bank (Officer and Employees) Service Regulation, 2001 and, therefore, action is proposed to be taken. In this charge-sheet the first allegation against the petitioner is that he lodged a false complaint with the police authorities of Police Station Kotwali, Teekamgarh on 28.9.2003 and implicated the then Chairman Shri S.K. Jain and various other officers by making false complaint against them. It was indicated that as per the procedure applicable in the bank the petitioner should have first put up these grievance before the Grievance Committee and his act of lodging an F.I.R. directly before going to the Grievance Committee is said to be illegal. The second allegation against the petitioner are that in letters dated 23.10.2003 and 3.3.2004 he has used objectionable and indecent language against the officers of Bank particularly against Shri S.K. Jain, the Chairman. The third allegation was that a notice was issued to him on 18.12.2003 and he did not given his reply to the said notice, inspite of several reminders. It was also alleged that he has committed default in submitting statutory return to the Reserve Bank of India and NABARD. The fourth charge was with regard to not following the directions issued in a circular dated 5.10.1998 regarding submission of internal audit report within three months, causing delay in submission of the reports. The fifth charge was with regard to disobeying certain directions issued by the competent authority on 13.8.2003 with regard to grant of medical leave and proceeding on medical leave even much prior to sanction of the same. The sixth charge was with regard to non

deposit of duplicate key in the bank during internal audit conducted on 3.11.2003, another charge was with regard to certain directions issued in a order passed on 11.12.2003 not being complied with inspite of reminders issued in December-January, 2003-2004. The seventh charge was general in nature and it was stated that petitioner was not paying full attention to the affairs of the bank, as a result grading of his branch has been brought down. The eighth charge was again with regard to performance of the bank in the year 2003-2004 and nonfulfillment of target in the said financial year. The ninth charge was again a general charge to the effect that petitioner is not taking interest in working, his devotion to duty is lacking and inspite of several punishment imposed in the past he has not improved. It is, therefore, clear from this charge-sheet that the most important allegation in the charge-sheet is with regard to act of petitioner in submitting false report on 28.9.2003 and his act of writing letters using objectionable and indecent language against officers of the Bank, particularly the Chairman.

23. After this charge-sheet was issued and when proceedings into this charge-sheet was pending, the second charge-sheet was issued to the petitioner vide Annexure P-5 on 28.9.2004 and in this charge-sheet allegation against the petitioner was that in the communication made by him on 4.5.2004 to the higher authorities and the Disciplinary Authority he has used objectionable language and sought for documents under presumption which were not even in existence. Thereafter, certain allegations with regard to his working was also indicated in this charge-sheet.

24. From the aforesaid narration of allegations levelled in the charge-sheet it would be seen that in both the charge-sheets the main allegation are insubordination, acts of indiscipline by the petitioner with regard to his conduct in lodging an F.I.R. against the Chairman Shri S.K. Jain and various other officers, making certain comments in two letters on 23.10.2003 and 3.3.2004 wherein he has made allegations against the Chairman of the Bank Shri S.K. Jain, these pertain to use of certain language/words against the Chairman, the Disciplinary Authority. It is, therefore, clear that the main crux of the allegations against the petitioner is with regard to his indisciplined act of insubordination, particularly in relation to certain act committed by him against Shri S.K. Jain, the then Chairman. In the F.I.R. Lodged by petitioner, which is available on record, it is complained by him that Shri S.K. Jain and other officers came to his house pressurized him to withdraw all the writ petitions and tried to assault him. It is, therefore, a case where the petitioner is being proceeded against for

making a false complaint against officers of the bank, writing letters with using objectionable words or using indecent language against officers of bank, one of whom happens to be Chairman of the bank and the Disciplinary Authority himself. It is in the back-drop of these vital facts that the first question of Shri S.K. Jain, the Chairman and the Disciplinary Authority being a judge in his own cause which is to be decided by this Court. If this finding is recorded in favour of petitioner and his contention in this regard are accepted the entire act against the petitioner has to be interfered with as it may vitiate the entire disciplinary proceedings.

25. It may be seen that both the charge-sheet Annexure P-4 and P-5 are issued by Shri S.K. Jain, the Chairman who was also the Disciplinary Authority, as already indicated hereinabove, there are allegations against Shri Jain in the F.I.R. lodged and the communications made with regard to his conduct towards the petitioner and his working as Chairman of the bank. Shri Jain took note of all these so called acts of commission and omission by the petitioner towards Shri Jain himself and issued the charge-sheets as indicated hereinabove, when the petitioner sought for various documents and material to give his detailed reply to the charge-sheets and sought various material to give an explanation, the same was rejected by the same Disciplinary Authority, Shri Jain and he thereafter directed for an enquiry to be conducted into the matter. The Inquiry Officer was also appointed by Shri Jain and in the enquiry Shri Jain appeared as witness against the petitioner, gave his statement. It would be seen from the documents available on record that Shri Jain himself as the Chairman and the Disciplinary Authority of the bank issued various communications and passed orders in the departmental proceedings which bear the signature of the Chairman Shri Jain as Disciplinary Authority.

26. Be it as it may be, Shri Jain appeared in the departmental enquiry as witness after issuing charge-sheet and ordering enquiry and thereafter the Inquiry Officer submitted his report on 11.10.2005 which was received by Shri Jain himself as the Disciplinary Authority. Shri Jain thereafter went through the entire report of the Inquiry Officer and in an tabulated proceedings consisting of about 22 pages available from page 105 to 127 of the paper-book submitted the comments of the Disciplinary Authority on the Inquiry Officers report, the comments, as indicated hereinabove was prepared in tabulated form consisting of five columns, the first column was the allegation levelled against in the charge-sheet, the second column was with regard to the prosecution story, the third column was the defence and explanation of

the delinquent employee, the fourth column was the finding of Inquiry Officer with regard to each allegation and the fifth column was the comments and observations of Disciplinary Authority i.e. Shri S.K. Jain. This detailed comments of the Disciplinary Authority Shri Jain was again considered by him and thereafter Shri Jain himself issued a show-cause notice Annexure R-18 dated 10.11.2005 to the petitioner under his own signature asking him to show-cause as to why on the basis of the proved misconduct petitioner be not dismissed from service or removed from service. The petitioner's explanation was called for within 10 days to this show cause notice dated 10.11.2005. The petitioner approached this Court and tried to challenge the show-cause notice, but this Court refused to interfere into the matter, as only show-cause notice was issued to the petitioner. Accordingly, petitioner submitted his explanation to the show-cause notice and the entire matter was thereafter placed before a different person namely one Shri O.P. Tank, who then passed the order of punishment on 8.12.2005. It is, therefore, clear from the aforesaid narration of fact that except for the act of passing of the order of removal from service on 8.12.2005 the entire act of initiating the action against the petitioner, giving evidence in the enquiry, considering the explanation and appointing Inquiry Officer receiving the report of enquiry, preparing the comment on the same, issuing show-cause notice for punishment was undertaken by Shri S.K. Jain and merely because the final punishment order was passed by Shri O.P. Tank, that also in a mechanical manner accepting the comments and observations prepared by Shri Jain, it cannot be held that Shri Jain had no role to play in the entire matter. It is the case where Shri Jain was himself the complainant, he himself was a witness, he acted as a prosecutor, a judge and was instrumental in taking the impugned action against the petitioner. That being so, the contention of Shri R.K. Verma to the effect that Shri Jain has acted as a judge in his own cause has to be considered by this Court based on these facts. In the light of aforesaid factual aspect of matter wherein at each stages from the time of issuing of the charge-sheet till issuance of show-cause notice for dismissal/removal from service involvement of Shri S.K. Jain as Chairman and Disciplinary Authority is apparent. It is also a fact that the main allegation against the petitioner and the acts of commission and omission alleged against him in the charge-sheets (Annexure P-4 and P-5) are in relation to Shri Jain.

27. It is a well settled principle of law that a man should not be a judge in his own cause. The fundamental principle of natural justice, which is applicable

in quasi judicial proceedings contemplates that the authority empowered to take a decision must be the one who acts without any bias towards one or the other side involved in a dispute. This is one important principle of natural justice and it should not only be done and followed but should manifestly and undoubtedly be seen to have been done. The basic principle governing the Doctrine of Bias which is applicable to a judicial tribunal or quasi judicial proceedings is that; (i) no man should be a judge of his own cause and (ii) justice should not only be done but should manifestly and undoubtedly seen to have been done. The result of these two principles is that if a quasi judicial body or person acts in a manner which shown that the aforesaid principle is adversely effected or violated then bias is assumed to exists and such a person or body should not take part in the decision making process. In this regard the principle laid down by the Supreme Court as far back as in the year 1959 in the case of *Gullapalli Nageswara Rao Vs. A.P. SRTC*, AIR 1959 SC 308 may be taken note of.

28. The principle of law in this regard requires that hearing by a quasi judicial authority should be conducted in a impartial manner and no person directly or indirectly involved in a dispute should be a party in the proceedings, any person who has any interest in the matter is deemed to have bias against one of the party concerned. In the case of *State of U.P. Vs. Mohd. Nooh* AIR 1958 SC 86, in the conduct of a departmental enquiry against an employee a witness who was being examined in the enquiry turned hostile, at this stage the enquiry officer left the enquiry, entered the witness box, given evidence against the employee and thereafter resumed his role as the Enquiry Officer to conduct the enquiry and thereafter passed the order of dismissal. The dismissal was quashed and the Supreme Court held that the rule of natural justice were grossly violated in such case. Similarly in the case of *Suman Bala Vs. Union of India* (2005) 12 SCC 388 certain Disciplinary proceedings were initiated against an employee at the instance of the Commissioner of Income Tax, action was taken and after an order of punishment was passed the appeal preferred was heard by the same officer and he dismissed the appeal. The proceedings were declared as vitiated by the Supreme Court. It is the cardinal principle of law that justice must not only be done, it should also be seem to have been done. These are basic principles of natural justice and are of fundamental importance in the matter of dispensation of justice and is applicable to proceeding held before a quasi judicial authorities. In the case of *Union of India Vs. Tulsiram Patel* (1985) 3 SCC 398 this principle has

been upheld and it has been held that it is a requirement of the principle of natural justice and is applicable not only in civil and criminal cases but also in the exercise of judicial, quasi-judicial and administrative process.

29. In Light of the aforesaid principles if the cases relied upon by Shri R.K. Verma are taken note of, it would be seen that in the case of *Nandkishore Jugal Kishore* (supra) a Division Bench of this Court considered similar questions where the Collector of a District acted as Disciplinary Authority initiated action, appeared as witness in the enquiry and thereafter issued the order of punishment. This act was held to be in violation of principle of natural justice.

30. Similarly, in the case of *S. Parthasarathi* (supra), the act of an authority who had bias was held to vitiate the enquiry and by applying the 'real and likelihood' test and 'reasonable suspicion' theory the enquiry conducted by a person who was found to be biased was found to be vitiated.

31. It is, therefore, clear that in the present case the entire act and the role undertaken by Shri S.K. Jain the Chairman and the Disciplinary Authority has to be held to vitiate, the entire enquiry. At this stage it may be appropriate to take note of the judgment relied upon by Shri Shrotri and consider the question of upholding the action of the respondents by applying the theory of 'Doctrine of Necessity'. In the case of *Election Commission of India* (supra) the matter pertains to exercise of power by the Election Commission of India as a constitutional authority and the observations made in para 16 of the said judgment with regard to the concept of 'doctrine of necessity' it has been indicated that it can be applied in certain unavoidable situations, when no other option is available, the observations and the principle laid down therein has to be taken note of in relation to a unavoidable situation that may arises, when no substitute officer/authority is available to discharge the statutory function. Similar is the position with regard to a judgment in the case of *Jagjit Singh* (supra) where decision by the Speaker of Legislative Assembly in disqualifying a Member of the Legislative Assembly was under consideration. These are cases where the concept of 'doctrine of necessity' is applied because the authority who had taken action is found to be a constitutional authority and whose substitute is not available or the situation and law warrants the said authority only to take action as no one else under law could be delegated with the power which was to be exercised by such constitutional

functionary.

32. In the present case, I am of the considered view that no such unavoidable situation or position is in existence. It is a case where a departmental enquiry is conducted against an officer of the Bank, who is posted in the junior management cadre and in the set-up of the bank there are various other senior officers who are exercising, supervising and undertaking administrative control over the delinquent employee. If Chairman happens to be the disciplinary authority and if the said disciplinary authority was a person who was the complainant and is also a witness in the departmental proceedings, then the appellate authority which consisted of a Board of Directors can always nominate an Adhoc Disciplinary Authority to discharge all the functions of the Disciplinary Authority. In the peculiar facts and circumstances of present case it is surprising that when an appeal was to be decided, Chairman who had passed the order of removal from service left the appellate proceedings, permitted the appeal to be decided by appointing an Adhoc Chairman to preside over the proceedings of Appellate Board, but when it came to appointment of a Adhoc Disciplinary Authority no such steps was taken. Normally in a case of departmental enquiry when the disciplinary authority is himself a witness or has some interest in the enquiry he should disassociate himself from the proceedings and the next Higher authority i.e. the appellate authority in this case should nominate a Adhoc Disciplinary Authority to proceed in the matter. If such a procedure is followed then the requirement of the principle of natural justice would be fulfilled and the allegations of bias and prejudice removed. In a departmental proceedings where alternate options are available and when a adhoc Disciplinary Authority can be appointed, the 'doctrine of necessity' cannot be applied. The 'doctrine of necessity' can be made applicable only if there is no alternate available and the constitutional authority or the authority concerned who is to take action is the only person empowered under law to proceed in the matter. In a departmental proceedings when the delinquent employee against whom action is to be taken holds a post or a position over and above which various other superior officers are available, a disciplinary authority, adhoc in nature can always be appointed and, therefore, the 'doctrine of necessity' cannot be made applicable in such cases, as no unavoidable situation is in existence in such cases, to that extent I have no hesitation in rejecting the

explanation and justification given by Shri Shrotri to say that the Chairman Shri S.K. Jain had no other option. The principle applicable in the cases of exercise of power by the constitutional authorities where delegation of power is not possible cannot be made applicable in a case where under law itself the principle of delegation of authority can be made applicable.

33. This is a case wherein the facts, as narrated hereinabove, clearly indicates that in both the charge-sheet Annexure P-4 & P-5 the impugned allegations against the petitioner were with regard to certain acts of commission and omission committed against the Chairman of the bank Shri S.K. Jain, who happens to be disciplinary authority and when Shri Jain acted as a Disciplinary authority, a prosecutor, a judge, requirement of law and the principle of natural justice are clearly violated. Shri Jain has acted as a judge in his own cause and in the proceedings held against the petitioner. It is a case where justice does not seems to have been done manifestly and, therefore, it is my considered opinion the entire action taken against the petitioner is violated, on this count alone and this Court is unable to uphold the impugned action. On this count Shri R.K. Verma is right in contending that as the Disciplinary Authority in the present case has acted as a judge in his own cause and had taken the action, the entire action impugned stands vitiated. In accepting the aforesaid submissions made on behalf of the petitioner the grounds and reasons as indicated hereinabove, this Court has no hesitation as the justification and explanation given by Shri Shrotri by applying the "doctrine of necessity" cannot be accepted. Accordingly, the first ground canvassed is found to be substantial enough to vitiate the entire action.

34. Having held so and having found the entire action to be contrary to law it is not not necessary now for this Court to go into the other questions, as on the first ground itself the entire action stands vitiated. Accordingly this petition is allowed. The order of the disciplinary authority Annexure P-1 dated 8.12.2005 stands quashed. As the appellate authority has also acted in dismissing the appeal without taking note of all these legal principles the order of appellate authority also stands vitiated and has to be quashed accordingly the order of appellate authority Annexure P-3 dated 4.4.2006 is also quashed. The petition is allowed. Petitioner be reinstated in service with all consequential benefit.

35. The petition stands allowed and disposed of, no order so as to costs.

Petition allowed.

I.L.R. [2012] M.P., 2453

WRIT PETITION

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

W.P.No. 2851/2012 (Jabalpur) decided on 27 September, 2012

ANAND DAS SHARMA (DR.) & ors.

...Petitioners

Vs.

STATE OF M.P.

...Respondent

Medical and Dental Post Graduate Course Entrance Examination Rules, M.P. 2012 - Rule 9(1)(a) - In Service Candidates -
Petitioners working as Medical Officers on contract basis in Reproductive Child Health Programme - Service conditions are governed by M.P. Civil Services Conduct Rules, 1965 - Persons who are Medical Officers under Reproductive Child Health Programme and have served in rural areas for five years are entitled to be treated as in service candidate - However, petitioners are not entitled for stipend.
(Paras 8, 9 & 10)

चिकित्सा और दंत स्नातकोत्तर पाठ्यक्रम प्रवेश परीक्षा नियम, म.प्र. 2012 - नियम 9 (1)(ए) - सेवारत अभ्यर्थी - याचीगण रिप्रोडक्टिव चाईल्ड हेल्थ प्रोग्राम में संविदा आधार पर चिकित्सा अधिकारियों के रूप में कार्यरत - सेवा शर्तें, म.प्र. सिविल सेवा आचारण नियम, 1965 द्वारा शासित - व्यक्ति जो रिप्रोडक्टिव चाईल्ड हेल्थ प्रोग्राम के अंतर्गत चिकित्सा अधिकारी है और ग्रामीण क्षेत्रों में पांच वर्षों तक सेवाएं दी है, सेवारत अभ्यर्थी के रूप में समझे जाने के हकदार है - अपितु, याचीगण वृत्तिका के लिए हकदार नहीं।

Cases referred :

(2002) 1 SCC 428, 2009 (3) MPHT 16

Aditya Sanghi, for the petitioners.

Kumaresh Pathak, for the respondents.

Vipin Yadav, for the interveners.

ORDER

The Order of the court was delivered by :
ALOK ARADHE, J. - With the consent of learned counsel for the parties, the matter is heard finally.

2. In this petition the petitioners inter alia have challenged the validity of rule 9 (1) (a) of M.P. Medical and Dental Post Graduate Course Entrance Examination Rules, 2012 (in short 'the Rules'). The petitioners also seek quashment of the order dated 28.1.2012 (Annexure P-4) issued by the Commissioner, Health Services by which the petitioners who are working as Medical Officers on contract basis in Reproductive Child Health Programme have been excluded from the category of in-service candidate. The petitioners have also prayed for a direction to the respondents to make payment of stipend to them. . In order to appreciate the petitioners' grievance reference to few facts is necessary which are stated infra.

3. The petitioners after completing their MBBS course joined the services in the State of Madhya Pradesh as medical officers in Reproductive Child Health Programme which is being run by the State Government. It is the case of the petitioners that they have served in rural areas for a period of five years and are eligible to be treated as in-service candidates. The petitioners submitted their application forms for Pre-P.G. Examination held in the year 2012 as in-service candidates. However, the Commissioner, Health Services issued an order dated 28.1.2012 by which the medical officers employed in Reproductive Child Health Programme were excluded from the category of in service candidates. In the aforesaid factual backdrop, the petitioners have visited this Court.

4. Learned counsel for the petitioners submitted that rule 2 (d) of the Rules describes 'in-service candidate' to mean medical officer of the Government of Madhya Pradesh, who is serving under the Government of Madhya Pradesh on regular or contract basis. It is further submitted that rule 9 (1) (a) of the Rules is contradictory to rule 2 (d) of the Rules and is violative of Article 14 of the Constitution of India and, therefore, rule 9 (1) (a) of the Rules is liable to be struck down. In support of his submissions, learned counsel for the petitioners has placed reliance on a decision of the Supreme Court in *AIIMS Students' Union v. AIIMS and Others*, (2002) 1 SCC 428 and a decision of Division Bench of this Court in *Shailu Mangal v. State of M.P. and Others*, 2009 (3) MPHT 16.

5. On the other hand, learned Deputy Advocate General for the respondents while inviting the attention of this Court to rule 2 (d) has submitted that the petitioners are not medical officers of the State Government and, therefore, they cannot be treated as in-service candidate. It is further submitted that the petitioners are working under the Reproductive Child Health Programme which is a programme sponsored by the Central Government and substantially financed by the Central Government therefore, the petitioners cannot claim that they are working as medical officers of the State Government. Learned counsel for the interveners while supporting the submissions made by learned Deputy Advocate General, has invited the attention of this Court to the order dated 28.1.2012 passed by the Commissioner, Health Services and has submitted that the petitioners are not entitled to be treated as in-service candidates.

6. We have considered respective submissions made by learned counsel for the parties. Before proceeding further it would be appropriate to notice relevant provisions of the Rules. Rule 2 (d) of the Rules defines expression 'in-service' candidate which reads as under:

"2.. Definitions: In these rules, unless the context otherwise requires,-

(d) "In-Service Candidate" means, Medical officer of the Government of Madhya Pradesh, who is serving under the Government of Madhya Pradesh on regular or contract basis."

7. The relevant extract of Rule 9 (1) of the Rules reads as under:

"(1) Medical Officer

(a) Only those candidates, who are working as Medical Officers in the Department of Public Health and Family Welfare, Govt. of M.P. & who have completed 3 years of rural service on 30th April of year of examination as Medical Officer, or a candidate who is working consecutively as contractual medical officer in Department of Public Health & Family Welfare, Govt. of M.P. and has completed 3 years of rural service will be eligible as In-service candidate.

(b) Other in-services candidates who have completed 5 years of service by 30 April, 2012 will be eligible. Such

candidates will have to execute a bond for serving the State Govt. in the notified rural areas for at least 5 years, after completing Post Graduate degree and 3 years for diploma course. As per Government Instruction the bond is Rs.10.00 Lac. for post graduate degree and Rs.8.00 Lac. for Post Graduate Diploma course."

8. If Rule 2 (d) and Rule 9 (1) (a) and (b) are read conjointly it is apparent that Rules contemplate two categories of medical officers, firstly, medical officers who are serving under the department of Public Health and Family Welfare of Government of M.P. and secondly, other in-service candidates who are working in rural areas. Rule 9 (1) (a) of the Rules deals with 'Medical Officer' of the department of Public Health and Family Welfare of Government of M.P. whereas Rule 9 (1) (b) of the Rules deals with other in-service candidates and provides that other in-services candidates who have completed five years of service by 30th April, 2012 will be eligible to appear as in-service candidate. Such candidates will have to execute a bond for serving the State Government in the notified rural areas for at least five years after completing the post graduate degree and three years after completing post graduate diploma course. They are also required to execute a bond of Rs.10.00 Lacs in respect of post graduate degree course and a bond of Rs.8.00 lacs in respect of post graduate diploma course. Therefore, the submission made by learned counsel for the petitioners that Rule 9 (1) (a) is contrary to Rule 2 (d), cannot be accepted.
9. From the orders of appointment of the petitioners, it is apparent that the orders of appointment of the petitioners, on contract basis initially for a period of one year, were issued by the Chief Medical and Health Officer. The service conditions of the petitioners are governed by the M.P. Civil Services Conduct Rules, 1965. The petitioners have been posted in various primary health centres in rural areas under Reproductive Child Health Programme'. Thus, the petitioners are performing the duties as medical officer on contract basis in rural areas. The source of financing or sponsorship of the scheme under which the petitioners are engaged is not relevant and the same cannot be made the basis for not treating the petitioners as in-service candidates.
10. However, only those petitioners who are medical officers under the Reproductive Child Health Programme and have served in rural areas for five years are entitled to be treated as in-service category candidates subject to

their complying with the provisions of Rule 9 (1) (b) of the Rules. Learned counsel for the petitioners was unable to show any provision under which the petitioners are entitled to stipend therefore, the claim of the petitioners for stipend is rejected. The petitioners under the interim order passed by this Court have been granted provisional admission in various post graduate degree/ diploma courses it is, therefore, directed that the petitioners shall be allowed to continue in post graduate degree/diploma courses subject to their executing a bond for serving the State Government in the notified rural areas for at least five years after completing post graduate degree and three years after completing diploma course. The petitioners shall also execute a bond of Rs.10.00 lacs for post graduate degree course or a bond of Rs.8.00 lacs in case of post graduate diploma course, as the case may be.. The aforesaid exercise shall be completed by the petitioners within a period of four weeks from today, failing which the admission of the petitioners to the course in question shall stand cancelled.

With the aforesaid directions, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2012] M.P., 2457

ELECTION PETITION

Before Mr. Justice R.C.Mishra

E.P.No.7/2009 (Jabalpur) decided on 20 June, 2012

RAJESH KUMAR

... Petitioner

Vs.

DEVENDRA SINGH

...Respondent

A. Evidence Act (1 of 1872), Section 45 & 73 - Expert opinion
- Prayer for subjecting the writings on the nomination paper to examination by Handwriting Expert - Held - It is still open to the respondent to call in evidence the returning officer, who received the nomination paper - There is absolutely no justification for referring the writings to the Handwriting Expert for examination and opinion as to identity thereof - Application dismissed with costs. (Paras 14 & 15)

क. साक्ष्य अधिनियम (1872 का 1), धारा 45 एवं 73 - विशेषज्ञ का मत
- हस्तलेख विशेषज्ञ द्वारा नामांकन पर्चों की लिखावट के परीक्षण हेतु निवेदन -

अभिनिर्धारित - प्रत्यर्थी अभी भी उस निर्वाचन अधिकारी को साक्ष्य में बुला सकता है जिसने नामांकन पर्चा प्राप्त किया - हस्तलेख विशेषज्ञ के परीक्षण हेतु लिखावट निर्दिष्ट करने का और उसकी पहचान के बारे में मत लेने का निश्चित रूप से कोई न्यायोचित्य नहीं है - आवेदन सव्यय खारिज।

B. Civil Procedure Code (5 of 1908), Order 16 Rule 14 - Representation of the People Act, (43 of 1951) Section 87 - Summoning of returning officer as a Court witness - Prayer for summoning returning officer as a Court witness was made by the respondent before closure of his evidence - Respondent can substantiate his pleadings by examining Returning Officer - No reasonably satisfactory explanation has been given for not summoning the Officer as his own witness - No compelling reason to summon Returning Officer as a Court witness - Application rejected. (Paras 24 & 25)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 16 नियम 14 - लोक प्रतिनिधित्व अधिनियम, (1951 का 43) धारा 87 - निर्वाचन अधिकारी को न्यायालयीन साक्षी के रूप में बुलाया जाना - प्रत्यर्थी द्वारा अपनी साक्ष्य की समाप्ति से पूर्व निर्वाचन अधिकारी को न्यायालयीन साक्षी के रूप में बुलाये जाने की प्रार्थना की गई - प्रत्यर्थी अपने अभिवचनों को, निर्वाचन अधिकारी के परीक्षण द्वारा प्रमाणित कर सकता है - अपने स्वयं के साक्षी के रूप में अधिकारी को नहीं बुलाये जाने के लिए कोई युक्तिसंगत संतोषप्रद स्पष्टीकरण नहीं दिया गया है - निर्वाचन अधिकारी को न्यायालयीन साक्षी के रूप में बुलाये जाने हेतु कोई बाध्यकारी कारण नहीं - आवेदन अस्वीकार।

Cases referred :

AIR 1996 SC 3439, AIR 1957 SC 381, AIR 1967 SC 1326, AIR 1960 AP 359, AIR 1997 SC 3255, AIR 2008 SC 1541, (1996) 4 SCC 596, AIR 2006 CA/CUTTA 109, AIR 1944 ALL 130, AIR 1947 Bom 394, AIR 1956 SC 593, AIR 1969 SC 692

Manoj Sharma with Rajmani Mishra, for the petitioner.

Imtiyaz Husain with R.B. Patel, for the respondent.

ORDER

R . ISHRA, J. - This order shall govern disposal of I.A. Nos.3/11, 4/11 and 47/11.

2. In this petition, election of the returned candidate viz. the respondent to the M.P. Legislative Assembly Constituency No.143, Silwani has been called in question on the ground of improper rejection of the nomination paper, as contemplated in sub-section (1)(c) of S.100 of the Representation of the People Act, 1951 (for short 'the Act').

3. The petitioner's nomination paper, a copy of which has been tendered in evidence as Exhibit P-1, was rejected for the reason that he, being an elector of a different constituency namely Udaipura, had failed to submit a copy of the electoral roll of that constituency or certification from ERO of that constituency, as per requirement of Section 33(5) of the Act.

4. While supporting the corresponding decision of the Returning Officer, the respondent has pleaded that the nomination was also liable to be rejected on the following grounds -

- (i) Absence of signature of the petitioner.
- (ii) Non-compliance with Article 173(a) of the Constitution of India.
- (iii) Conduct of the petitioner in making contradictory statements regarding his caste.

According to him, even the petition deserves rejection for want of common authorship of signatures available on it as well as on the nomination paper.

5. The petitioner's prayer for striking out the issues nos.2 and 3(c) respectively based on the aforesaid averments made by the respondent has already been rejected vide order-dated 11.8.2011 in the light of the well-settled position of law that in an election petition, the High Court's jurisdiction cannot be confined to the grounds on which the Returning Officer rejected the nomination (See. *J.H. Patel v. Subhan Khan* AIR 1996 SC 3439).

6. It is also relevant to note that the respondent's earlier application, under Section 73 of the Evidence Act, 1872 and registered as I.A. No.25/10, has been dismissed, vide order-dated 18.1.2011, as withdrawn with liberty to file an appropriate application, under Section 45 thereof, in view of the fact that specimen signatures of the petitioner had already been obtained on the deposition sheet.

I.A. No.3/2011

7. It is an application, under Section 45 read with 73 of the Evidence Act, 1872, for subjecting the writings on the nomination paper to examination by an Handwriting Expert namely S.K. Kelkar and opinion as to whether they are of one and the same person.

8. As per the respondent, such an examination is necessary for a just decision of issue no.3(c) in the wake of his pleadings to the effect that the petitioner had not subscribed to oath & affirmation and on the corresponding form, only petitioner's name was written at places 'A to A' and 'B to B'. In this regard, attention has been invited to the provision of Section 36(2)(c) of the Act, which reads as under -

36. Scrutiny of nominations.-(1)

(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:-

(a)

(b)

(c) that the signature of the candidate or the proposer on the nomination paper is not genuine.

9. The prayer has been vehemently opposed inter alia on the ground that it does not fall within the ambit of Section 73 of the Evidence Act.

10. At the trial, Neeraj Shrivastava (PW3) has admitted that the nomination paper was filled up by him only. It is trite that evidence given by experts of handwriting can never be conclusive, because it is, after all, opinion evidence. Re-affirming the earlier decisions including the one rendered in *Ram Chandra v. State of Uttar Pradesh* AIR 1957 SC 381, the Apex Court in *Fakhruddin v. State of Madhya Pradesh* AIR 1967 SC 1326, proceeded to point out that -

"Evidence of the identity of handwriting receives treatment in three sections of the Indian Evidence Act. They are

Sections 45, 47 and 73. Handwriting may be proved on admission of the writer, by the evidence of some witness in whose presence he wrote. This is direct evidence and if it is available the evidence of any other kind is rendered unnecessary. The Evidence Act also makes relevant the opinion of a handwriting expert (S.45) or of one who is familiar with the writing of a person who is said to have written a particular writing. Thus besides direct evidence which is of course the best method of proof, the law makes relevant two other modes. A writing may be proved to be in the handwriting of a particular individual by the evidence of a person familiar with the handwriting of that individual or by the testimony of an expert competent to the comparison of handwritings on a scientific basis. A third method (S.73) is comparison by the Court with a writing made in the presence of the Court or admitted or proved to be the writing of the person".

11. Learned counsel for the petitioner, while placing implicit reliance on decision of the Andhra Pradesh High Court in *Annapurnamma v. B. Sankararao* AIR 1960 AP 359 and highlighting the fact that he has already examined himself and Neeraj Shrivastava at the trial, has submitted that when oral evidence clearly established that a person executed a certain document it would be completely unnecessary for the Court to embark upon an investigation into the signatures by comparison. Reference has also been made to the following observations by the Bench -

"There are many factors which have to be taken into consideration in effecting a comparison of the two signatures, and although a Court could apply its own eyes and its own mind to determine whether a particular signature is resembling another it would be going beyond the ordinary limits of the capacity of a Court to constitute itself as a Handwriting Expert and try to compare the signature without all the gadgets and devices which are available to a Handwriting Expert, besides the lack of expert knowledge which a Handwriting Expert possesses".

12. However, as explained by the Supreme Court in -

- (i) *Ajit Savant Majagavi v. State of Karnataka* AIR 1997 SC 3255 -

"Section 73 does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act, it is clear that such comparison may either be made by a handwriting expert under Section 45 or by anyone familiar with the handwriting of the person concerned as provided by Section 47 or by the Court itself. As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of slightest doubt, leave the matter to the wisdom of experts. But this does not mean that the Court has not the power to compare the disputed signature with the admitted signature as this power is clearly available under Section 73."

(Underlined for emphasis)

- (ii) *Thiruvengada Pillai v. Navaneethammal* AIR 2008 SC 1541-

"Section 45 of the Indian Evidence Act, 1872 relates to 'opinion of experts'. It provides inter alia that when the Court has to form an opinion as to identity of handwriting or finger Impressions, the opinion upon that point of persons specially skilled in questions as to identity or handwriting or finger impressions are relevant facts. Section 73 provides that in order to ascertain whether a finger impression is that of the person by whom it purports to have been made, any finger impression admitted to have been made by that person, may be compared with the one which is to be proved".

13. Further, the ordinary method of proving a document is by calling as a witness the person who had executed the document or saw it being executed or signed or is otherwise qualified and competent to express his opinion as to the handwriting. As an obvious corollary, the receiver of the document, on establishing his acquaintance with the handwriting of the person and competence to identify the writing with which he is familiar, may also prove a document

(*S. Gopal Reddy v. State of A.P.* (1996) 4 SCC 596) relied on).

14. Needless to point out that it is still open to the respondent to call in evidence the returning officer, who received the nomination paper.

15. For these reasons, there is absolutely no justification for referring the writings to the Handwriting Expert for examination and opinion as to identity thereof. The I.A., therefore, deserves to be dismissed with costs.

I.A. No.4/2011

16. It is an application, under Section 45 of the Evidence Act, 1872, for summoning S.K. Kelkar, the Handwriting Expert to compare the admitted signatures of the petitioner on his deposition sheet with those on the nomination paper and to submit his reasoned opinion before this Court.

17. As averred by the respondent, in order to show that the nomination paper was signed by a person other than the person, who appended the signature on the election petition, the only course open to him is to examine the handwriting expert.

18. In reply, the petitioner has termed the prayer as uncalled for saying that it is not uncommon to find differences in the signature of the same person even after a short interval of time. According to him, - the main issue in the present case is as to whether his nomination was wrongly rejected and it is clearly proved from the oral evidence of the petitioner and Neeraj Shrivastava that the nomination paper was signed by the petitioner only.

19. Learned counsel for the respondent has strenuously contended that the admission made by the petitioner that signatures in dispute were appended by him on the nomination paper does not assume any significance as it amounts to admission in his own favour. For this, attention has been invited to the illustration (a) to Section 21 of the Evidence Act, that is reproduced thus -

"The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged"

In support of the contention, reference has also been made to the

following decisions -

(i) *Sunil Chowdhury v. Arup Kumar* AIR 2006 CALCUTTA 109 wherein it was held that the word "admission", if construed to be the admission of the person by whom it purports to have been written, it will lead to disastrous effect because such person will deliberately admit some document not really written by him to be in his handwriting so that on examination by the expert it would not be tallying with the disputed document and consequently, he will be benefited by the report.

(ii) *Bans Narain v. Chandrani Kuer* AIR 1944 All 130, wherein it was held that a statement of a party can be of no avail to that party.

(iii) *Manilal Ratanchand Shah v. Nanubhai Jesingbhai* AIR 1947 Bom 394, wherein it was held that admission in one's own favour has no evidentiary value.

20. However, fact of the matter is that in accordance with Section 81(1) of the Act, an election petition has to be presented in person before the Registrar of the Court and the corresponding report of the Registry raises a presumption, though rebuttable, that the petition was filed by the petitioner himself. Moreover, for establishing that while filing the nomination paper, someone else has impersonated himself as the petitioner, the Returning Officer would be the best witness. The well-settled position of law on the comparison of disputed signature/writing with the admitted signature/writing has already been discussed. This apart, it is trite that the effect of an alleged admission depends upon the circumstances in which it was made. For this, the following illuminating observations made by the Supreme Court in *Nagubai Ammal v. B. Shama Rao* AIR 1956 SC 593 may usefully be quoted -

"an admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel."

21. To sum up, it is neither expedient in the interests of justice nor desirable to summon the Handwriting Expert for opinion on the aforesaid point. This I.A. also deserves rejection with costs.

I.A. No.47/2011

22. The I.A. is an application for summoning J.S. Dhurve, the Returning Officer, as a Court witness.

23. Opposing the prayer, the petitioner has pointed out that the respondent has a right to summon the Returning Officer as his own witness and is also entitled to cross-examine him, under Section 154 of the Evidence Act, after declaring him hostile in case, he gives statement favourable to the petitioner during his chief examination.

24. Ordinarily, it is for the party to summon any witness necessary for his case. However, by virtue of Order 16 Rule 14 of the Code of Civil Procedure read with Section 87(1) of the Act, the Court also has the power to summon any person, not called as a witness by a party to the petition, to give evidence and the only pre-requisite is that where the Court at any time thinks it that the ends of justice require or that the case before it needs that kind of evidence. (*R.M. Seshadri v. C. Vasantha Pai* AIR 1969 SC 692 referred to).

25. However, the prayer for summoning returning officer as a Court witness has been made by the respondent even before closure of his evidence. Obviously, the respondent can substantiate his pleadings by examining Returning Officer and no reasonably satisfactory explanation has been given for not summoning the Officer as his own witness.

26. Taking into consideration the nature of controversy involved and other facts and circumstances of the case, I am of the view that there is no compelling reason to summon Returning Officer as a Court witness. The I.A. is liable to be rejected.

27. In the result,-

(i) I.A. Nos.3/11 and 4/11 stand dismissed with costs, quantified at Rs.1000/-.

(ii) I.A. No.47/11 is dismissed with liberty to the respondent to summon the Returning Officer as his own witness.

Order accordingly.

I.L.R. [2012] M.P., 2466

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A.No. 525/1997(Jabalpur) decided on 25 September, 2012.

ZAKIUDDIN

...Appellant

Vs.

RAJENDRA KUMAR & anr.

...Respondents

Contract Act (9 of 1872), Sections 217, 218 & 221 - Liability of Agent - Payment made by the debtor to the agent of the Principal absolves the debtor from the liability of payment to the Principal and the agent alone is liable and responsible to his Principal. (Para 1)

संविदा अधिनियम (1872 का 9), धाराएँ 217, 218 व 221 - अभिकर्ता का दायित्व - ऋणी द्वारा स्वामी के अभिकर्ता को भुगतान किये जाने से स्वामी को भुगतान करने के दायित्व से ऋणी मुक्ति पा जाता है और केवल अभिकर्ता स्वामी के प्रति जवाबदेह तथा उत्तरदायी है।

Cases referred :

AIR 1960 Raj 296, AIR 1960 Bombay 548,

Imtiyaz Hussain, for the appellant.*None*, for the respondent no. 1.*Faiyaz Khan*, for the respondent no. 2.**J U D G M E N T**

ALOK ARADHE, J. - This appeal is by the defendant No.1, which was admitted on the following substantial question of law:-

"Whether the payment made by the debtor to the agent of the Principal absolves the debtor from the liability of payment to the Principal and the agent alone is liable and responsible to his Principal ?"

2. Facts giving rise to filing of the appeal briefly stated are that plaintiff filed the suit on the ground that he had deposited a sum of Rs.5000/- with defendant No.1, who had agreed to pay interest at the rate of 2% per month on the aforesaid amount and had executed a receipt. However, the defendant No.1 did not make payment of the amount of interest. Thereupon, the plaintiff sent a notice on 26.10.1979 and filed a suit for recovery of an amount of

Rs.7650/-. The defendant No.1 filed the written statement in which the transaction in question was denied. It was stated that defendant No.1 had received a sum of Rs.5000/- from one Mangaldas and had returned the amount to aforesaid Mangaldas. It was further stated that on receipt of the amount, the aforesaid Mangaldas had duly executed the receipt in favour of defendant No.1 i.e. Ex.D/1. Thereupon, the plaintiff impleaded the aforesaid Mangaldas as defendant No.2, who was proceeded ex-parte.

3. The trial Court vide judgment and decree dated 30.1.1985 inter-alia held that defendant No.2 had deposited a sum of Rs.5000/- on behalf of the plaintiff with defendant No.1 and defendant No.1 had agreed to pay interest on the aforesaid amount. Accordingly, the trial Court directed the defendant No.1 to pay an amount of Rs. 7650/- to plaintiff and to pay interest at the rate of 6% per annum on the Principal amount i.e. Rs. 5000/- from 1.5.1980 i.e. the date of filing of the suit till its realisation. Being aggrieved by the aforesaid decree, the defendant No.1 preferred an appeal. The lower appellate Court vide impugned judgment and decree dated 30.1.1985 inter-alia held that defendant No.1 had paid back the amount to defendant No.2 which is apparent from Ex. D/1. However, it was not proved that the amount in question was paid to the plaintiff. Accordingly, lower appellate Court modified the decree of the trial Court and directed that defendants No.1 and 2 shall pay a sum of Rs. 7650/- to plaintiff and shall pay interest on the Principal amount from the date of institution of the suit till its realisation. It was further directed that the amount shall first be recovered from defendant No.2 and in case the amount is not recovered from defendant No.2, the same shall be recovered from defendant No.1 and in case the amount is recovered from defendant No.1, the defendant No.1 shall be at liberty to institute a separate suit for the recovery of the amount in question against defendant No.2.

4. Learned counsel for the appellant submitted that the Courts below have grossly erred in fastening the liability on the defendant No.1. It was further submitted that both the Courts have concurrently found that defendant No.1 had paid back the amount to defendant No.2 and therefore, in view of section 218 of the Indian Contract Act, 1872 the liability on the appellant/ defendant No.1 to pay the amount in question could not have been fastened. In support of his submissions, learned counsel for the appellant has placed reliance in the cases of *Firm Murlidhar Banwarilal Vs. Firm Kishorelal Jagannath Prasad and others*, AIR 1960 Rajasthan 296 and *Babulal Swarupchand Shah Vs. South Satara (Fixed Delivery) Merchant's*

Association Ltd., and another, AIR 1960 Bombay 548. On the other hand, learned counsel for respondent No.2 submitted that the judgment and decree passed by the lower appellate Court is perfectly just and legal and does not call for any interference.

5. I have considered the respective submissions made by learned counsel for the parties and have perused the record. Agency in its broadest sense include every relation in which one person acts for or represents another by his authority. In the more restricted sense, in which the term is used in the law of principal and agent, agency may be defined as the relation which results where one party, called the principal, authorises another, called the agent, to act for him in business dealing with third persons. The agent is the substitute or representative of his principal and derives his authority from him. The relationship contemplates dealings by the agent with third persons. See: *Advanced Law Lexicon 3rd edition at page 3714*. The relationship of agency arises when A (the principal) authorises B (the agent) to act on his behalf in making a contract with C (the third party). B may be liable or entitled under that contract because he contracts personally, or as co-principal, or acts for a principal who is undisclosed. See: Fourth Edition of *Halsbury's Laws of England*, Volume 9 Para 336. Section 218 of the Indian Contract Act, 1872 provides that subject to such deductions, the agent is bound to pay to his Principal all sum received on his account. An agent who has received an amount on behalf of his Principal is accountable to the Principal for the payment of the amount and he is under an obligation to do so subject to provisions of Sections 217 and 221 of the Indian Contract Act. In other words, the Principal is the owner of the amount in the hands of his agent subject to latter's statutory rights enumerated in Sections 217 and 221 of the Act. Also See: *Firm Murlidhar Banwarilal and Babulal Swarupchand Shah* (supra). In last paragraph of the statement, the plaintiff has admitted that the transaction in question took place through defendant No.2 and that it was agreed between the parties that defendant No.1 would deposit the amount with defendant No.2 and the defendant No.2 would pay back the amount to the plaintiff. The defendant No.2 who has been examined as DW-1 in para 3 of his statement has admitted that defendant No.1 had paid the amount in question to him and a receipt in this regard Ex.D/1 was executed. In view of the admission of the defendant No.2, the defendant No.1 could not have been held liable for payment of the amount in question. For the aforementioned reasons, the substantial question of law framed by this Court is answered in the affirmative

and in favour of the appellant.

6. The judgment and decree passed by the trial Court as well as the lower appellate Court are set aside. The claim of the plaintiff is decreed as against defendant No.2: It is directed that plaintiff shall be entitled to recover an amount of Rs.7650/- from defendant No.2 and shall also pay interest on the Principal amount i.e. Rs.5000/- from the date of filing of the suit till its realisation at the rate of Rs.6% per annum.

7. In the result, the appeal is allowed with costs.

Appeal allowed.

I.L.R. [2012] M.P., 2469

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A.No. 130/1996 (Jabalpur) decided on 04 October, 2012

PANDHARI

...Appellant

Vs.

RAMCHANDRA & anr.

...Respondents

Hindu Succession Act (30 of 1956), Section 14 - Absolute Right

- Wife was given the right of maintenance under a compromise decree

- Held - If a Hindu Female is given a right in the property in view of her pre-existing right, in such a case Section 14(1) of the Act would apply -

Wife had an absolute right in view of provisions of Section 14(1) of the Act. (Para 9)

हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 14 - आत्यंतिक अधिकार - पत्नी को समझौता डिक्री के अंतर्गत मरणभोषण का अधिकार प्रदान किया गया - अभिनिर्धारित - यदि हिन्दू स्त्री को उसके पूर्व-विद्यमान अधिकार को दृष्टिगत रखते हुए, सम्पत्ति में अधिकार दिया जाता है, ऐसे प्रकरण में अधिनियम की धारा 14 (1) लागू होगी - पत्नी को अधिनियम की धारा 14 (1) के उपबंधों के अनुसार आत्यंतिक अधिकार प्राप्त है।

Cases referred :

AIR 1977 SC 1265, AIR 1977 SC 1944, AIR 1977 SC 2024, AIR 1970 SC 1963.

R:D. Hundikar, for the appellant.

None, for the respondents.

J U D G M E N T

ALOK ARADHE, J. - This appeal has been filed by the defendant No.1 which was admitted on the following substantial question of law:-

"Whether the lower appellate Court erred in law in holding that the deceased Mohini from whom the appellant is claiming his right, did not acquire rights of full owner u/s 14(1) of Hindu Succession Act even though she obtained a decree in her favour in respect of her pre-existing right?"

2. Facts giving rise to filing of the appeal, briefly stated, are that the plaintiff filed the suit on the ground that one Tulsi Bai was legally married wife of Pandurang and one Mohini bai was his concubine. The aforesaid Mohini Bai filed a suit for partition against Narayan son of Pandurang, namely, Civil Suit No.18-A/1947. During the pendency of the aforesaid civil suit the parties entered into a compromise under which Mohini Bai was granted the right of maintenance in respect of the suit property. Accordingly, the compromise decree was passed. Thus, Late Mohini Bai had limited right in the suit property and had no authority to alienate the same. After the death of Mohini Bai, Narayan and thereafter the plaintiff is in cultivating possession of the suit property. However, the defendant got a forged Will prepared which was allegedly executed by Mohini Bai and started asserting his right over the suit property. Accordingly, the plaintiff file the suit seeking the relief of declaration of title and permanent injunction.

3. The defendant No.1 filed a written statement in which, inter alia, it was pleaded that Mohini Bai was married wife of Pandurang. The factum of compromise in the earlier suit was denied. It was pleaded that suit land was allotted to Mohini Bai in lieu of her right to maintenance and after commencement of Hindu Succession Act, 1956 (for short the 'Act'), by operation of law, Late Mohini Bai became absolute owner of the property. Thereafter, she executed a registered Will in favour of the defendant No.1. A counter claim was also filed seeking relief of possession and damages.

4. The learned trial Court vide judgment and decree dated 04.2.1993, inter alia, held that Mohini Bai was not concubine of Pandurang. On the basis

of judgment and decree which passed on the basis of compromise (Exhibits-P-1 & P-2), the trial Court held that Mohini Bai was granted right of maintenance in respect of the suit property and after commencement of the Act, by operation of law, she became the absolute owner of the property in question and accordingly, she was competent to execute the Will (Exhibit-D-1) in favour of the defendant. The trial Court dismissed the suit and decreed the counter claim of the defendant and the plaintiff was directed to handover possession of the suit property.

5. Being aggrieved by the aforesaid judgment and decree of the trial Court the plaintiff preferred an appeal. The lower appellate court held that the plaintiffs had acquired limited right of maintenance under the decree of the Court and, therefore, in view of section 14(2) of the Act, she did not become the absolute owner and consequently had no authority to execute the Will in favour of the defendant No.1. Accordingly, the decree passed by the trial Court was set aside and the plaintiff's suit was decreed whereas the counter claim filed by defendant No.1 was dismissed.

6. Learned counsel for the appellant submitted that the lower appellate Court committed an error of law in setting aside the decree passed by the trial Court. It ought to have been appreciated that the provisions of Section 14(2) of the Act have no application to the facts of the case. In support of his submissions learned counsel for the appellant has placed reliance on the decision reported in *Sellammal and others vs. Nellammal (dead) by L.Rs.*, AIR 1977 SC 1265, *V.Tulasamma and others vs. Sessa Reddi*, AIR 1977 SC 1944 and *Santhanam Kachapalaya Gurukkal vs. V.Subramanya Gurukkal*, AIR 1977 SC 2024.

7. I have considered the submissions made by learned counsel for the appellant and have perused the record. The sole question which arises for consideration in the appeal is whether the provisions of Section 14(1) or 14(2) of the Act would apply to the facts of the case. The object of section 14 of the Act is to wipe out the disability from which the Hindu female suffer in regard to the ownership of the property in old Sastric Hindu law. In *Badri Pershad vs. Smt.Kanso Devi*, AIR 1970 SC 1963 while dealing with the ambit and scope of section 14(2) of the Act it has been held that Section 14(2) is in the nature of an exception to Section 14(1) of the Act and is calculated to achieve a social purpose by bringing about the change in the social and economic position of women in Hindu society. It is further held that it must be construed

strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1) of Section 14 of the Act. It cannot be interpreted in the manner which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1) of Section 14. It has further been held that if a Hindu female is given a right in the property in view of her pre existing right, in such a case, sub-section (1) of Section 14 of the Act would apply. [Also see: *Balwant Kaur and another vs. Chanan Singh and others*, AIR 2000 SC 1908 and *Sharad Subramanyan vs. Soumi Mazumdar*, AIR 2006 SC 1993].

8. In the backdrop of well settled position, the facts of the case may be seen. From perusal of Exhibit-P-1 I.e. compromise decree passed in Civil Suit No.18-A/1947 dated 04.11.1947 it is apparent that Mohini Bai was granted right of maintenance of the suit property in lieu of her pre existing right under Hindu Womans Rights Act, 1937. The relevant extract of the decree reads as under:-

"1.....The plff and the defts constituted members of the joint Hindu family and the plff now wants her 1/3rd share from the estate of her husband under Hindu Womans Rights Act. The defts contested the suit on various grouinds and at the time of evidence, they filed compromise, I hold the compromise both fair and valid and in the interest of the minor deft 1. The compromise is allowed. The suit is decree in terms of the compromise.

2. It is therefore decreed and ordered that the plff shall get 13.11 acres only from Kh.Nos 85, 86 and 88 in suit which are total 17.11 and the rest of 4 acres towards the north of these fields shall be in possession of the defts.

That the field no. 55/1 in suit shall be in possession of the defts.

That the plff shall continue to be in possession of the portion of the house in which she is staying.

That the plffs gets this property with limited interest and has no right to aliniate and she shall enjoy the property till her lift time.

That the parties shall bear their own costs."

9. This relevant extract of the compromise decree leaves no iota of doubt that Late Mohini Bai was granted limited right under the decree in lieu of her pre existing right under Hindu Womans Right to Property Act, 1937. Therefore, in view of law laid down in the case of *Badri Pershad* (supra) the provisions of section 14(1) of the Act would apply.

10. Accordingly, the substantial question of law framed by this Court is answered in affirmative and in favour of the appellant. The judgment and decree passed by the lower appellate Court is set aside and that of the trial Court is restored.

11. In the result, the appeal is allowed with costs.

Appeal allowed.

**I.L.R. [2012] M.P., 2473
APPELLATE CRIMINAL**

Before Mr. Justice U.C. Maheshwari

Cr. A. No. 1073/1996 (Jabalpur) decided on 23 February, 2012

VINAY SINGH

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 304 Part-II, 323, Probation of Offenders Act (20 of 1958), Section 6, Criminal Procedure Code, 1973 (2 of 1974), Section 357 - Acquitted co-accused abused deceased with filthy language and asked that why he is spreading rumor that he married his daughter after obtaining the money - Appellant lashed with stick came there and gave a blow of such stick on the head of deceased - Co accused and his son also gave blows of stick on the person of deceased - During such incident deceased was also subjected to threat of his life - Held - Considering the age i.e. 19 years, of the appellant he is held entitled to be extended benefit of mandatory provision of Section 6 of the Probation of Offenders Act and directed to pay compensation of Rs. 25,000/- to natural heirs and legal representatives of victim - Conviction of the appellant affirmed under Sections 323,

304 Part II, IPC - Appeal allowed in part. (Paras 2, 10, 11, 13, 14)

दण्ड संहिता (1860 का 45), धाराएँ 304 भाग- II, 323, अपराधी परिवीक्षा अधिनियम (1958 का 20), धारा 6, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 357 - दोषमुक्त सहअभियुक्त ने मृतक को अमद भाषा में गालियां दीं और पूछा कि वह यह अफवाह क्यों फैला रहा है कि उसने अपनी पुत्री की शादी पैसा प्राप्त करने के बाद की - अपीलार्थी लाठी से सुसज्जित होकर वहां आया और उक्त लाठी का एक बार मृतक के सिर पर किया - सह अभियुक्त और उसके पुत्र ने भी लाठियों से मृतक पर बार किया - उक्त घटना के दौरान मृतक को उसकी मृत्यु का भय भी दिया गया - अभिनिर्धारित - अपीलार्थी की उम्र 19 वर्ष को विचार में लेते हुए अपीलार्थी अपराधी परिवीक्षा अधिनियम की धारा 6 के आज्ञापक उपबंध के विस्तार का लाभ पाने का हकदार है और प्रतिकर के रूप में रुपये 25000/- मृतक के प्राकृतिक वारिस और विधिक प्रतिनिधि को मुगतान करने के लिए निदेशित किया गया - अपीलार्थी की मा.द.सं. की धाराएँ 323, 304 भाग II के अंतर्गत दोषसिद्धि की पुष्टि की गई - अपील अंशतः मंजूर।

Cases referred :

AIR 1972 SC 955, 1989 Vol II M.P. Weekly Notes, Note 9.

Imtaiz Hussain, for the appellant.

Yogesh Dhande, Dy.G.A. & Rakesh Keshwerwani, P.L. for the respondent/State.

J U D G M E N T

U.C. MAHESHWARI, J. - On behalf of the appellant-accused this appeal is preferred under Section 374 of Cr.P.C. being aggrieved by the judgment dated 29.6.1996 passed by IInd Additional Sessions Judge Bhopal, in Sessions Trial No. 281/1995, convicting him under Sections 304 Part-II and 323 of I.P.C. for R.I. seven years with fine of Rs.1000/-, in default of depositing the same, further six months R.I. in the earlier count, while three months R.I. in later.

2. The facts giving rise to this appeal in short are that, on dated 21.5.1995 at about 7 O'clock in the morning at village Undarai, the acquitted co-accused Fateh Singh was abusing with filthy languages to the deceased Prithavi Singh asking him why he is spreading the rumor about him that he married his daughter after obtaining the money. On which, deceased-Prithavi Singh told him that he

has not spread such rumor. By the time, the appellant Vinay Singh lashed with stick came there and gave a blow of such stick on the head of Prithavi Singh. Thereafter, said Fateh Singh and his other son Parasram also gave him the blows of stick on the person of Prithavi Singh. During such incident victim Prithavi Singh was also subjected to threat of his life. Due to aforesaid blows of sticks Prithavi Singh sustained the injuries and fell down, on the coming Parwat Singh (PW-1), to rescue him then, he was also subjected to blows of sticks by the abovementioned persons and co-accused Sarju Bai. Soon after the incident, said Parwat Singh (PW-1), went to the Police Station Gunaga, and lodged the First Information Report (Ex.P-1), on which the offence of Sections 323 and 307 read with Section 34 of I.P.C. was registered against the appellant and the co-accused Fateh Singh, Parasram and Sarju Bai. After lodging the report, the victims were sent to the hospital where on medical examination their MLC reports were prepared. Looking to the nature of the head injuries of Prithavi Singh, for further treatment he was admitted in the hospital, but inspite long treatment of 13 days, he could not survive and succumbed to such head injury. On carrying out the autopsy of his corpus, alleged head injury was found to be cause of his death and as per further opinion of the doctor, the same could have been caused by hard and blunt object. On completion of the investigation, the appellant and the co-accused named above were charge-sheeted for the offence of Sections 307, 323, 302/34 of I.P.C.

3. After committing the case to the Sessions Court on framing the charge against the appellant and other co-accused for the offence of Section 302 of I.P.C. in alternate Section 302 read with Section 34 and Section 323 in alternate Section 323/34 of I.P.C., they abjured the guilt. On which the trial was held. After recording the evidence on appreciation by acquitting the other co-accused from all charges instead the aforesaid charge of Section 302 of I.P.C., the appellant was held guilty for the offence of Section 304 Part-II and 323 of I.P.C. and was punished with the abovementioned punishment. The same is under challenge in this appeal.

4. Shri Imtaiz Hussain, learned appearing counsel of the appellant after taking me through the record of the trial Court along with the impugned judgment without challenging the findings of the trial Court holding guilty to the appellant for the aforesaid offence of Sections 304 Part-II and 323 of I.P.C., has made his limited submissions on two counts. Firstly, he said that keeping in view 19 years age of the appellant on the date of the alleged incident,

the benefit of Mandatory provision of Section 6 of the Probation of Offenders Act, 1958 (hereinafter in short 'the Act'), be extended to him. In such background, he said that the appellant did not possess any criminal antecedents except the present matter and the alleged incident was happened without any premeditation in a sudden quarrel. He also said that the findings of the trial Court on which the prayer for extending the benefit of probation has been refused to the appellant in view of law laid down by the apex Court in the matter of *Chand and others vs. The State of U.P.* reported in AIR 1972 SC 955 and of this Court in the matter of *Mangilal vs. State of M.P.* reported in 1989 Vol II M.P. Weekly Notes, Note-9, is not sustainable. He further said that in case the Court does not found fit to extend such benefit of probation to the appellant then, by adopting the lenient view his awarded jail sentence be reduced upto the period for which he has already suffered in jail by enhancing some amount of fine under the discretion of the Court. According to him after suffering the judicial custody during trial between 27.5.1995 till 16.10.1995 i.e. four months and 20 days, he was released on bail and he also suffered the awarded jail sentence from 29.6.1996, the date of impugned judgment till passing the order for suspension of his remaining jail sentence by this Court vide order dated 14.10.1996, i.e. near about three and half months accordingly, he has suffered the jail of 8 months and 6 days out of the awarded jail sentence and prayed to allow the appeal accordingly.

5. On the other hand Shri Yogesh Dhande and Shri Rakesh Keshernwani, learned counsel for the State by justifying the impugned conviction and sentence of the appellant said that the same being based on proper appreciation of the evidence, do not require any interference either for extending the acquittal to the appellant or for extending him the benefit of the Probation of Offenders Act even, there is no scope even to reduce the awarded jail sentence of the appellant by enhancing the amount of fine or by imposing the compensation. It was also argued that looking to the nature of the incident and the manner in which the alleged fatal injury on the head of deceased was caused by the appellant with sticks, the appellant does not deserve for adopting any lenient view in the matter and prayed for dismissal of this appeal.

6. Having heard, keeping in view their arguments advanced, I have carefully gone through the record of the trial Court along with the impugned judgment.

7. Although, the case has not been argued by the appellant's counsel to

extend the acquittal to the appellant, but in order to do the justice with him, I deem fit to examine the case to find out the probability of extending the acquittal to the appellant. In such premises, on examining the matter, I have not found any perversity, infirmity or anything contrary to the propriety of law in appreciation of the evidence by the trial Court in giving the finding to hold guilty to the appellant in the aforesaid Sections. So, in such premises, there is no scope in the matter to extend the acquittal to the appellant. Hence, the findings of the trial Court holding guilty to the appellant for the above-mentioned offence are hereby affirmed.

8. Coming to consider the prayer of the appellant's counsel for extending the benefit of the Probation of Offenders Act to the appellant is concerned, in view of aforesaid cited case of the apex Court in the matter of *Chand* I have found some substance in such prayer. In the matter of *Chand and others* (supra) while dealing with the question for extending the benefit of the Probation in the matter of Section 304-II of I.P.C. the apex Court has held as under:-

"6. The question before us is whether and what sentence should be awarded to each of the accused. In so far as the two adult appellant who are above 21 years are concerned, namely, Nanhoo Appellants No. 2, and Maqsood appellant No. 3, we think that their acts are such as would justify the maximum sentence of 10 years' rigorous imprisonment. With respect to the other appellants, namely, Appellants 1, 4, 5, 6 & 7, they are all below 21 years and one of them as already noticed by the High Court Appellant No. 5, Ashfaq is a mere lad of 12 years. What we have to consider is whether the benefits of Probation of Offenders Act should be given to them. It, however, appears that the Central Act has not been made applicable to the State of Uttar Pradesh. On behalf of the appellants it is pointed out that there is a local Act applicable to that State, which is, the United Provinces First Offenders Probation Act 1938. It is not denied that this Act was made applicable Rampur State after it became a part of Uttar Pradesh. Section 4 of the said Act is as follows :-

4. Power of Court to release certain offenders on probation of good conduct -

(1) When any person is convicted of an offence not punishable

with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character, antecedents or physical or mental condition of the offender and to the circumstances in which the offence was committed that it is expedient that the offender should be released on probation of good conduct, the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not exceeding three years as the court may direct and in the meantime to keep the peace and be of good behavior :

Provided that the court shall not direct the release of an offender under this section unless it is satisfied that the offender, or his surety, has a fixed place of abode and regular occupation in the place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions :

Provided also that if a person under twenty-one years of age is convicted of any offence under the Indian Penal Code, or any other enactments prescribed in this behalf under rules made by the State Government which is punishable with imprisonment not exceeding six months, the court shall take action under this section unless, for special reason to be recorded in writing, it does not consider it proper to do so.

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7. Now that the offence with which the appellants are being convicted falls under the second part of Section 304, I.P.C., such of them as are under 21 would be entitled to the benefits of the above provision. We think this is a case in which the appellants who it is admitted are the first offenders, should be released on probation. The learned Advocate for the State contends that it is not known whether any Probation Officers have been appointed for the District of Rampur and as such we should give him an opportunity to ascertain this fact and also that we should call for a report from that officer, if such a

person is appointed for that District. We do not think there is any necessity to obtain this information because under the first proviso all that the Court has to be satisfied is that the offender or his surety has a fixed place of abode and regular occupation in the place for which the court acts or in which the offender is likely to live during the period named for the observance of that condition. In this case it would be sufficient if we direct the District Magistrate concerned to conform with the requirements of that provision."

9. Apart the above, on arising the occasion, this Court has also answered such question in the matter of *Mangilal* (supra) in which it was held as under:-

"The result is that the appeal partly succeeds and is allowed. The conviction of the accused/appellant No.1 Mangilal under section 304(Pt.II)/34 of I.P.C. and sentence of 5 years R.I. is set aside. His conviction under Section 323/34 I.P.C. is maintained, but the period of sentence of imprisonment is reduced to the period already undergone. He is on bail. He need not surrender. His bail bonds are discharged. The conviction of accused/appellant No.2 Shambhoo under Section 304 (Pt.II)/34 and S. 323/34 I.P.C. is set aside as also the sentences of 5 years and 4 months R.I. Instead, he is held guilty of offence punishable u/s 304 (Pt.II)/34 and 323 I.P.C. His sentences of imprisonment of 5 years and 4 months and also set aside. It is ordered that accused/appellant Shambhoo shall surrender to his bail bonds and appear before the trial Court on or before 1.12.1988 and execute a personal bond in an amount of Rs.3,000/- with one solvent surety in the like amount to the satisfaction of the trial Court to the effect that he shall keep peace and be of good behaviour for a period of 3 years and shall appear and receive the sentence whenever called upon to do so by the trial Court. 1988 (I) MPWN 134, 1979 (II), MPWN 232 and 1965 JIJ SN 83 relied on. Appeal partly allowed."

10. In view of the aforesaid principles, on examining the case at hand, it is undisputed fact on record that the appellant was 19 years of the age on the date of alleged incident as stated in his arrest memo dated 27.5.1995 (Ex.P-

20). The trial Court while recording his accused-statement under Section 313 of Cr.P.C. on 4.6.1996 also stated his age 21 years. In such premises in the available factual matrix of the case, the appellant is held to be entitled to extend the benefit of the mandatory provision of Section 6 of the Probation of Offenders Act. In view of the law laid down in the aforesaid cited case, the findings of the trial Court in para 28 of the impugned judgment refusing to extend such benefit is not sustainable hence, the same is hereby set aside and subject to following directions, the benefit of mandatory provision of Section 6 of the Probation of Offenders Act is extended to the appellant and pursuant to it, his awarded sentence under the aforesaid Sections on all count are set aside.

11. It is settled proposition of law that even after holding guilty to the appellant for the alleged offence and extending him the benefit of the probation under the abovementioned Act, appellant could be directed to pay the compensation to the victims under Sections 357 of Cr.P.C. So, there is no bar under the aforesaid act for imposition of the sum regarding compensation with a direction to pay the same to the victims or his natural heirs and legal representatives and the same could be recovered as arrears of fine. So, in such premises, while extending the benefit of probation I direct the appellant to pay the compensation of Rs.25,000/- (Rs. Twenty five thousand) to the natural heirs and legal representatives of the deceased Prithavi Singh the same is to be deposited by the appellant with the trial Court within three months from today. On depositing the same, the entire sum be given to the natural heirs and legal representatives of deceased Prithavi Singh in equal proportion by calling them in the trial Court through summons. At this juncture, I am apprised by the appellant's counsel that after the death of Prithavi Singh, his wife has also been passed away and now, they are surviving with two sons namely Sarjan Singh(PW-4) and Gudda. The trial Court shall be at liberty to enquire this aspect.

12. Subject to aforesaid compliance and also on furnishing the personal bond of Rs.10,000/- (Rs. Ten thousand) along with one surety of the like amount to the satisfaction of the trial Court as per prescribed procedure under the aforesaid Act, within three months along with an undertaking that he will maintain the peace and good behaviour for three years and shall not involve himself in any criminal activities, then the appellant is directed to be released on Probation.

13. On violating any of the aforesaid term by the appellant, the trial Court shall be at liberty to take appropriate steps against him in accordance with the prescribed procedure under the provisions of the Probation of Offenders Act.

14. In view of the aforesaid discussions, by affirming the conviction of the appellant under Section 323 and 304 Part-II of I.P.C., this appeal is allowed in part and by extending the benefit of Probation of Offenders Act subject to abovementioned terms and conditions, the awarded sentence of the appellant is hereby set aside. Till this extent the impugned judgment is modified while the other findings of the same are hereby affirmed. The bail bond of the appellant is hereby discharged.

15. In order to secure the recovery of the compensation, it is made clear that if the aforesaid imposed compensation is not deposited by the appellant within the prescribed period, then by deeming the amount of compensation as imposed fine amount for the offence of Section 304-II of I.P.C., the appellant has to suffer further two years R.I. The trial Court shall be at liberty to take steps in this regard if the occasion arises.

16. Appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2012] M.P., 2481

APPELLATE CRIMINAL

Before Mr. Justice A.K.Shrivastava

Cr.A.No. 877/2010(Jabalpur) decided on 27 April, 2012.

SANTOSH KUMAR VISHWAKARMA

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 376 - Rape - Appellant undressed the prosecutrix and lay down over her - Prosecutrix in her examination in chief stated specifically that the appellant could not do anything because at that juncture, the witnesses reached to the spot and on seeing them, the appellant fled away - Appellant guilty of committing offence punishable under Section 376/511 of I.P.C. - Appeal partly allowed.

(Para 14)

क. दण्ड संहिता (1860 का 45), धारा 376 - बलात्कार - अपीलार्थी ने अभियोक्त्री को निर्वस्त्र किया और उसके ऊपर लेट गया - अभियोक्त्री ने अपने मुख्य परीक्षण में विनिर्दिष्ट रूप से कथन किया है कि अपीलार्थी कुछ नहीं कर सका क्योंकि उसी समय, साक्षीगण घटनास्थल पर पहुंचे और उन्हें देखकर अपीलार्थी भाग गया - अपीलार्थी, भा.द.सं. की धारा 376/511 के अंतर्गत दण्डनीय अपराध कारित करने का दोषी - अपील अंशतः मंजूर।

B. Evidence Act (1 of 1872), Section 154 - Witness - Prosecution witness not supporting the prosecution story in examination-in-chief - Witness not declared hostile - Prosecution is bound by the statement given by the prosecutrix. (Para 14)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 154 - साक्षी - अभियोजन साक्षी ने मुख्य परीक्षण में अभियोजन कहानी का समर्थन नहीं किया - साक्षी को पक्ष विरोधी घोषित नहीं किया गया - अभियोजन, अभियोक्त्री द्वारा दिये गये कथन से आवद्ध है।

Cases referred :

2005 SCC (Cri) 1050, 2005 SCC (Cri) 1037

S. Mukherjee, for the appellant.

Akshay Namdeo, P.P. for the respondent/State.

J U D G M E N T

A.K. SHRIVASTAVA, J. - Feeling aggrieved by the judgment of conviction and order of sentence dated 31.3.2010 passed by learned Special Judge Seoni, in Special Case No. 56/2009 convicting the appellant under section 376(2)(f) IPC and sentencing him to suffer rigorous imprisonment of ten years and fine of Rs. 1500/- in default to undergo further R.I. for six months, the appellant has knocked the doors of this Court by preferring the appeal under Section 374 (2) of the Code of Criminal Procedure, 1973.

2. In brief, the case of the prosecution is that the prosecutrix belongs to a Gond community and is a member of scheduled tribe committing while appellant belongs to a Vishwakarma community, as such, he is not either member of scheduled caste or scheduled tribe community. On 22.6.2009 the age of the prosecutrix was below 12 years. On that date, at 9.00 in the morning the prosecutrix went to pick up the leaves and to graze she-goats

where she met with the appellant who offered that he will provide *Gutka* to her. Thereafter, appellant carried the prosecutrix in the *Parchi* of the house of Amoldas Patekar where after undressing the prosecutrix, appellant committed sexual intercourse with her. When the prosecutrix screamed, Pappu and Dayaram who were passing away from that place, arrived at the spot and on seeing them, appellant fled from the place of occurrence. The matter was reported by the prosecutrix to her parents and they assembled the villagers. One Ram swaroop also arrived at that place. The prosecutrix narrated the entire episode to the villagers. The villagers suggested to lodge a report, as a result of which, the prosecutrix along with her parents went to lodge the report. A written report which was told by prosecutrix to Ram Swaroop was submitted in the police station and on the basis of the said report, a case was registered against the appellant. The prosecutrix was sent for medical examination and after arrest, the appellant was also sent for medical examination.

3. After the investigation was over, a charge sheet was submitted in the Special Court who framed the charge punishable under section 376(2)(f) IPC and also under section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (in short 'Act') against the appellant which he denied and requested for the trial.

5. In order to prove the charges, the prosecution examined as many as 14 witnesses and placed Ex.P.1 to P.18 the documents on record. The defence of the appellants is of false implication and the same defence he set forth in his statement recorded under Section 313 Cr.P.C. However, in support of his defence, he did not choose to examine any witness.

6. The learned trial Court, on the basis of the evidence placed on record, came to hold that charge under section 3(2)(v) of the Act has not been proved and eventually acquitted him from the said charge. However, on the basis of evidence came on record and particularly on the basis of the testimony of the prosecutrix, it was held that appellant has committed an offence under section 376(2)(f) of the IPC and convicted and sentenced the appellant which I have mentioned herein-above.

7. In this manner, the appellant has filed this appeal assailing his judgment of conviction and order of sentence.

8. The contention of Shri Mukherjee, learned counsel for the appellant

is that on bare perusal of the testimony of the prosecutrix it is clear that since nowhere she has stated that at the time of the commitment of the offence, she ever resisted and restrained the appellant not to commit such an act therefore, it would mean that she was a consenting party.

9. Learned counsel further contended that there is absolutely no evidence of the prosecution in order to hold that prosecutrix was below 16 years and if that would be the position since she was a consenting party no offence was committed by the appellant.

10. On the other hand Shri Akshay Namdeo, learned Public Prosecutor argued in support of the impugned judgment and submitted that cogent reasons have been assigned by the learned Special Court while convicting and sentencing the appellant therefore, this appeal be dismissed.

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

12. So far as the age part of the prosecutrix is concerned, there is overwhelming evidence of the parents of the prosecutrix namely Girani Lal (PW.2) and Dammi Bai (PW.3) who have categorically stated that the age of the prosecutrix between 10 to 11 years at the time of the incident and she was a student of 4th standard. On bare perusal of Ex.P/10 which is the admission register of the school where the prosecutrix was undergoing her studies it is gathered that her date of birth 24.4.1998 has been written. Hence on the date of incident, her age was only 11 years and thus, her age was below 16 years, therefore, according to me the consent part is totally immaterial in the present case.

13. I shall now test the testimony of the prosecutrix in order to hold whether appellant has committed the offence under section 376(2) (f) IPC or not.

14. On bare perusal of para 3 of examination-in-chief of the prosecutrix it is gathered that on the fateful day, the appellant carried her to the Parchi where he totally undressed the prosecutrix. Her entire clothes were kept at one corner. The appellant was wearing his clothes and thereafter he lay down over her. By changing her version, she has stated that appellant was not wearing the clothes. However, in the examination-in-chief itself she has specifically stated that appellant could not do anything with her because at that juncture Pappu Bhaiya and Dayaram reached to the spot and on seeing

them, appellant fled away from the place of occurrence. The aforesaid statement was given by the prosecutrix in her examination in chief. Despite this statement of prosecutrix was against the prosecution, she was not declared hostile by the prosecution and no cross examination was made over her and if that would be the position, according to me, the prosecution is bound by the statement given by the prosecutrix. In this context, I may profitably reliance on two decisions of the Supreme Court. They are *Rajaram V. State of Rajasthan* 2005 SCC (Cri) 1050 and *Mukhtiar Ahmed Ansari V. State (NCT of Delhi)* 2005 SCC (Cri) 1037. The Supreme Court in *Rajaram* (supra), in para 9 has categorically held as under:-

“9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined.”

Similar view has been taken by the Supreme Court in *Mukhtiar Ahmed Ansari* (Supra). Since the statement of the prosecutrix in her examination-in-chief is that the appellant could not do anything and in absence of any evidence about penetration or sexual intercourse as envisaged under Section 375 IPC, I am of the view that offence under Section 376 (2)(f) IPC has not been proved, but the appellant has committed an offence under section 376/511 IPC. At this juncture, it would be profitable to go through para 14 of the cross examination of the prosecutrix, wherein she has stated that the appellant did not undress himself and on seeing persons who assembled there, he ran away from the place of occurrence.

15. I do not find any merit in the contention of learned counsel for the appellant that nowhere it has come in the testimony of the prosecutrix that she ever resisted the act of undressing her by the appellant nor she has

stated that against her wishes and consent appellant undressed her therefore, no offence has been committed by the appellant. I have already held herein above that the prosecutrix was minor at the time incident and therefore, even if she was a consenting party, it cannot be said that appellant did not commit any offence.

16. Looking to the evidence of the prosecutrix and for the reasons mentioned herein above, the conviction of the appellant is altered from section 376 (2)(f) to section 376/511 IPC and since the age of the prosecutrix is found to be below 12 years, on the date of incident, the appellant shall undergo jail sentence of five years rigorous imprisonment, alongwith the amount of fine as imposed by the learned Special Judge in the impugned judgment.

17. Resultantly, this appeal is allowed in part as indicated herein above.

Appeal Partly allowed.

I.L.R. [2012] M.P., 2486

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr.A.No. 311/1996 (Jabalpur) decided on 20 June, 2012

PAPPU @ NARENDRA KUMAR & anr.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 64 - Admissibility of document - Merely because of document has been exhibited is not sufficient to hold that the same has been proved - Document should be proved by relevant witness - In lack of it such document cannot be held to be proved.

(Para 7)

क. साक्ष्य अधिनियम (1872 का 1), धारा 64 - दस्तावेज की ग्राह्यता
 = मात्र इसलिए कि दस्तावेज प्रदर्शित किया गया है, यह धारणा करने के लिए पर्याप्त नहीं होगा कि उक्त को साबित किया गया है - दस्तावेज को सुसंगत साक्षी द्वारा साबित किया जाना चाहिए - इसके अभाव के कारण ऐसा दस्तावेज साबित किये जाने की धारणा नहीं की जा सकती।

B. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) - Original FIR not

produced - MLC was prepared after 20 days of incident - As per MLC injuries were received within 48 hours - Prosecution story is suspicious - Appeal allowed. (Para 9)

ख. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) - मूल प्रथम सूचना रिपोर्ट प्रस्तुत नहीं - एम.एल.सी. घटना के बीस दिन पश्चात् तैयार की गई - एम.एल.सी. के अनुसार क्षतियां 48 घंटों के भीतर की थी - अभियोजन कहानी संदेहास्पद - अपील मंजूर।

Case referred :

AIR 1978 SC 59.

Surendra Singh with Manish Mishra, for the appellants.

Umesh Pandey, G.A. for the respondent/State.

J U D G M E N T (Oral)

U.C. MAHESHWARI, J. - The appellants/accused have filed this appeal being aggrieved by the judgment dated 16.1.1996 passed by Special Judge (Constituted under the provisions of Scheduled Caste and Schedule Tribes (Prevention of Atrocities Act), (In short 'the Act'), Panna, convicting and sentencing to each of them for the offence under Section 3 (1) (x) of the Act with a direction to undergo for RI 6 months with fine of Rs. 1,000/- and in default of depositing the same, further three months simple imprisonment.

2. The facts giving rise to this appeal in short are that on dated 18.9.1993, at about 10.30 in the morning the complainant Mulayam Kori (PW-1) went to his field and saw that the animals of appellant no.1 under supervision of him are grazing his crops. On asking in this regard from the appellant no.1 on which, both the appellants taking the name of his caste 'Kuriya' covered under the Act abused him with filthy languages and said that their animals will do this thing. Thereafter, when he was going to village to inform the other persons in this regard then, on the way in front of the house of Lakhan Choubey, again he was intercepted and abused with filthy languages by the appellants and in continuation of it he was subjected to beating with fists and kicks by them. The witnesses Purushottam Chandpula (PW-2) and Guddu Yadav (PW-4) came there and rescue him. Subsequently, on dated 8.10.1993, a report in writing of this incident was given by him to the Police Station Harijan Kalyan Thana, Panna, on which vide dated 9.10.1993 the Crime No. 25/93, was

registered against the appellants for the offences of Sections 341, 294, 506, 323/34 of I.P.C. and Section 3 (1) (x) of the Act. Prior to registration of the offence, the complainant Mulayam was sent to hospital on 8.10.1993 where after his medical examination the MLC report Ex.P./10 was prepared. On advising the X-ray of some injuries, the same was carried out in which no bony injury was found. After holding the investigation, the appellants were charge-sheeted for the offence under Sections 341, 294, 506, 323/34 of I.P.C. and Section 3(1) (x) of the Act.

3. On evaluation of the charge-sheet, the charge of Section 3(1) (x) of the Act was framed against the appellants. They abjured the guilt on which, the trial was held. After recording the evidence on appreciation of the same, the appellants were held guilty for the abovementioned offence and punished with the sentence as mentioned above. On which, the appellants have come to this Court with this appeal.

4. Shri, Surendra Singh, learned Senior Advocate after taking me through the record of the trial Court along with the impugned judgment argued that on proper appreciation of the available evidence, the appellants' ought to have been acquitted by the trial Court, but under the wrong premises they have been convicted. In continuation by referring the deposition of Dr. G.P. Singh (PW-7), he said that according to this witness, the medical examination of the complainant was carried out on 8.10.1993 before registration of the offence and the MLC report (Ex.P.10) was prepared. According to such MLC, four contusions were found on the person of the complainant. Out of them, two contusions were found of bluish red colour and as per opinion of the Doctor, the stated injuries were sustained by the victim within 48 hours from the time of his medical examination. In the light of this fact if the case is examined then as per case of the prosecution the alleged incident was happened on dated 18.9.1993 and the MLC was prepared on 8.10.1993 just after near about 20 days, thus the alleged injuries could not be connected with the alleged incident and in such premises, the case of the prosecution is apparently on false pretext. He further said that the original First Information Report given by the complainant in writing to the Police on 8.10.1993, has neither been proved nor marked the exhibit on record. In the lack of proving the original FIR mere on the basis of the report of registration of offence, the appellants' could not have been convicted. He further argued that the caste of the complainant has not been proved by any admissible evidence or by examining the Tahsildar, from whom the alleged Certificate (Ex.P.9) was obtained by the investigation

agency. Accordingly, the prosecution has also failed to prove the caste of the complainant covered with the Act. He further said that in any case, keeping in view the previous enmity factors between the parties if the case is examined, then it is apparent from the record that the deposition of the complainant Mulayam Kori (PW-1) with respect of the aforesaid offence of Section 3 (1) (x) of the Act, is not supported by the other witnesses including the alleged eye witnesses Purushottam Chanpuriya (PW-2) and Guddu (PW-4). With these submissions, he prayed for extending the acquittal to the appellants by allowing this appeal.

5. On the other hand, responding the aforesaid arguments Shri Umesh Pandey, learned Govt. Adv. by justifying the impugned conviction and sentence of the appellants said that the same being based on proper appreciation of the evidence is in conformity with law and does not require any interference for extending the acquittal or other benefits to the appellants. He fairly conceded that the caste certificate of the complainant placed on the record has not been proved by examining the concerning Tahsildar, who issued the same with his signature and prayed for dismissal of this appeal.

6. Having heard the counsel, keeping in view their arguments, after perusing the record along with the impugned judgment, due to following reasons, I am of the considered view that the impugned conviction of the appellants is not sustainable under the law.

7. As per record, along with the charge-sheet the caste certificate of the complainant Mulayam Kori (PW-1) issued by the Tahsildar in which his case Kori and sub-caste kabirpanthi has been stated was filed. But at trial such certificate has not been proved by examining the aforesaid Additional Tahsildar, who issued the same. The same is marked as exhibit on record by Head Constable Balwan Singh (PW-6). Mere marking the exhibit on a paper is not sufficient to hold that such document has been proved on record. A document should be proved by the relevant witnesses and in the lack of it, such document could not be deemed to be proved. So, in such circumstances, it is held that the certificate regarding caste of the complainant has not been proved on record. Pursuant to it, in the lack of cogent and admissible evidence showing the caste of the complainant, it could not be deemed that the caste of the complainant covered under the Act, has been proved by the prosecution.

8. True it is, on the question of the caste, the complainant Mulayam has not been properly cross-examined on behalf of the appellants, but on account

of such lacunae the prosecution could not be benefited. As per settled proposition of law the prosecution is duty bound to prove all material facts of the case by cogent and admissible evidence and as per aforesaid discussions the prosecution has failed to prove the caste of the complainant whether he is covered under the Act or not. Therefore, only on this technical ground, the appellants deserve for acquittal from the aforesaid charge.

9. Apart the above, in view the other arguments of the Senior counsel on examining the case, it is apparent fact on record that the original FIR the report in writing was neither produced nor proved on the record. The MLC report of the complainant was also prepared on 8.10.1993, near about after twenty days from the date of alleged incident and the crime was registered on 9.10.1993. In such circumstances, the story put forth by the prosecution becomes suspicious.

10. It is also apparent on record that on the basis of some report in writing dated 8.10.1993, the complainant was sent to hospital where on the same day his MLC report was prepared and thereafter, on 9.10.1993, the crime was registered. As per MLC report, the alleged injuries sustained by the complainant was found to be caused within 48 hours from the time of medical examination on 8.10.1993. In such premises, in the lack of proving such report in writing given by the complainant on record, the MLC report (Ex.P./10) would not have been connected with the present matter and in such premises, there is no option with the Court except to hold that the case of prosecution being suspicious on the facts against the appellants, the impugned conviction of them could not be sustained at this stage. So, in such premises also, the appellants deserve for extending the acquittal in the matter.

11. Besides the aforesaid, on examining the case further from the evidence, it is apparent that on account of grazing the cattle of the appellant no.1 on the field of the complainant there was previous enmity between them and in view of such enmity factor unless the story put forth by the complainant is supported by any of the independent witnesses, the appellants could not be convicted in the matter as laid down by the apex Court in the matter of *Bir Singh and others vs. The State of Uttar Pradesh* reported in AIR 1978 SC 59.

12. The witness Purushottam Chandpuria (PW-2) and Guddu (PW-4) were cited by the prosecution as eye witnesses, but on recording the depositions said Guddu (PW-4) turned hostile and did not state anything against the appellants incrementing them with the alleged offence while, Purushottam

Chandpuria (PW-2), had not stated anything to show that any of the appellants had abused the complainant with intention to humiliate him on account of his caste or otherwise. So, the story put forth by Mulayam (PW-1) has not been supported by any of the aforesaid independent witnesses. So, in such circumstances also, the appellants deserve for extending the acquittal.

13. In view of the aforesaid, this appeal is allowed and the impugned judgment of conviction and sentence is hereby set aside and the appellants are acquitted from the aforesaid charge of Section 3 (1) (x) of the Act. The bail bonds of the appellants are hereby discharged. The amount of fine, if deposited, then the same be refunded to the appellants after proper verification.

14. Appeal is allowed.

Appeal allowed.

I.L.R. [2012] M.P., 2491

APPELLATE CRIMINAL

Before Mr. Justice U.C. Maheshwari

Cr.A.No. 1708/1997 (Jabalpur) decided on 21 June, 2012

PARVAT SINGH

...Appellant

Vs.

KHANJUWA

...Respondent

A. *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(vi) (x) - Caste* - There is no ocular or documentary evidence to prove the caste of the complainant - Merely on the basis of weakness of the defence or his counsel, it could not be said that the respondent has proved that his caste and community is covered under the Act. (Para 8)

क. अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(vi) (x) - जाति - शिकायतकर्ता की जाति साबित करने के लिए कोई चक्षुदर्शी या दस्तावेजी साक्ष्य नहीं - मात्र बचाव पक्ष या उसके अधिवक्ता की कमजोरी के आधार पर यह नहीं कहा जा सकता कि प्रत्यर्थी ने साबित किया है कि उसकी जाति व समुदाय अधिनियम के अंतर्गत आती है।

B. *Penal Code (45 of 1860), Section 323 - Sentence* - Incident took place near about 20 years back - Appellant has not

remained in jail even for a single day - However, considering the fact that during last 20 years, the appellant has suffered the mental agony of his case and has also appeared before the Trial Court as well as Appellate Court, jail sentence is set aside and a fine of Rs. 1000 is imposed. (Para 12)

ख. दण्ड संहिता (1860 का 45), धारा 323 - दण्डादेश - घटना करीब 20 वर्ष पूर्व घटित हुई - अपीलार्थी एक दिन के लिए भी कारागृह में नहीं रहा - किन्तु, इस तथ्य का विचार करते हुए कि 20 वर्षों के दौरान अपीलार्थी ने अपने प्रकरण में मानसिक पीड़ा सहन की है और विचारण न्यायालय तथा अपीली न्यायालय के समक्ष उपस्थित हुआ है, कारावास का दण्डादेश अपास्त किया गया और रु. 1000 का अर्धदण्ड अधिरोपित किया गया।

Sidharth Datt, for the appellant.

Nirmala Nayak, for the respondent/complainant.

J U D G M E N T (Oral)

U.C. MAHESHWARI, J. - The appellant/accused has directed this appeal under Section 374 (2) of Cr. P. C. being aggrieved by the judgment dated 1.8.1997 passed by Special Judge, Panna constituted under S.C.S.T. (Prevention of Atrocities), Act (in short "the Act"), in Special Case No.133/97, convicting and sentencing him in a private complaint filed by the respondent under Section 3 (1) (vi) and 3(1) (x) of the Act and under Section 323 of IPC for RI one year with fine of Rs.1,000/- in first two counts separately while six months RI in last count with a direction to run the jail sentence concurrently.

2. The facts giving rise to this appeal in short are that the respondent herein filed a private complaint against the appellant contending that on 20.8.1992 at about 1.00 O'clock in the noon he was called by the appellant through one Khunda Chamar at his residence. He went to the house of the appellant where he found him to be under the influence of liquor having a rifle of 315 Bore in his hand and in such a condition the appellant asked him to direct his son to do the Harwahi, a type of bonded labour on his field. On refusing the same by the complainant by giving slaps on his face again asked him for the aforesaid. Again on refusing to do such work by his son he was subjected to beating by means of shoes by taking him from his door to the square of the village and thereafter by abusing him in the filthy language with

the name of his caste Chamar and Chamra he was threatened saying that he will make him Chamra and during the course of such beating wear clothes of the complainant were also torn. He was also beaten by the backside of the rifle. Consequently on sustaining the injuries he fell down and became unconscious and after gaining consciousness while he was returning on the way he met to Jangalia Chamar (Panch), whom he apprised about the incident and thereafter due to fear of the appellant he remained in the house of Jangalia where he came to know that appellant went to his residence and threatened to his mother saying that if the matter is reported to the police then he will kill him. Subsequent to that complainant/ respondent went to the police station and gave a report of the incident on 21.8.1992. In such premises also it was stated that appellant is used to get forcefully unlawful labour from the person of SCST by showing fear in their mind and in continuation of such activities the act was committed by the appellant with the respondent. Subsequent to said report when no action was taken by the police against the appellant, even the medical examination of the complainant was not carried out by the police, on which the complainant proceeded to file the instant private complaint. On filing the aforesaid private complaint in the trial Court by adopting the procedure provided under Section 200 and 202 of Cr. P. C. on establishing the prima-facie circumstance of the above mentioned offence against the appellant the cognizance of the same was taken by the trial Court and the presence of the appellant was secured by issuing the summons and in response of summons the appellant appeared before the Court.

3. After appearance of the appellant vide order dated 5.12.1996 the charge of Section 3 (1) (vi) and 3(1) (x) of the Act and of Section 323 of IPC were framed against the appellant, he abjured the guilt, on which the trial was held. After recording the evidence on appreciation of the same by holding guilty to the appellant under the aforesaid sections he was punished as mentioned above. Being dissatisfied with such conviction and sentence the appellant has come to this Court.

4. Appellant's counsel Shri Sidharth Datt, after taking me through the record of the trial Court as well as the impugned judgment said that that on proper appreciation of the evidence led by the prosecution this was not the case of conviction of the appellant but he has been convicted under the wrong premises. In continuation he said that in any case if it is found that on the date of the incident the appellant asked the respondent

to direct his son to do the Harwahi unlawful or forcefully on his filed and on refusing by the respondents for the same if the alleged beating was carried out then mere on the basis of such beating or abusing it could not be assumed or deemed that appellant has committed any of the aforesaid offence of the Act, as such offence is related to the son of the complainant/ respondent who is not examined in the Court, and in such premises the appellant could not have been convicted by the trial Court. In continuation, he said that the respondent utterly failed to prove the entire alleged incident by independent source of the evidence. Whosoever witnesses have been examined being from the community of the respondent are not reliable. Specifically in view of previous enmity factor between the appellant and respondent without independent corroboration the appellant could not have been convicted. By referring the deposition of P. W. 1 Khanjua, he said that in his entire in chief he has not stated his caste covered under the Act and in the lack of it only on imagination it could not be assumed or deemed that respondent was belonging to the caste covered under the Act. It is apparent fact on record that in order to prove the caste of the respondent no certificate of the appropriate authority has either been produced or proved on record. In such premises the trial Court has committed error in holding that the respondent was belonging to the community covered under the Act. Accordingly if there is suspicion regarding caste of the complainant then the benefit of doubt should be extended to the appellant and prayed for extending the acquittal to the appellant by setting aside the impugned judgment by allowing this appeal.

5. As no one is appeared on behalf of the respondent/ complainant to assist the Court, hence in order to adjudicate this appeal with the consent of Smt. Nirmala Nayak, Government Advocate was directed to assist the Court for adjudication of this appeal. Pursuant to it, in response of the aforesaid argument of the appellant, she by justifying the impugned conviction and sentence of the appellant under the aforesaid sections said that the same being based on proper appreciation of available evidence, is in conformity with law and does not require any interference at this stage for extending the acquittal to the appellant. After perusing the record she fairly submitted that the complainant himself in his entire in chief has not stated that he is belonging to the caste covered under the Act. She also stated that the certificate regarding caste of the complainant/ respondent issued by any competent authority,

showing that his caste is covered under the Act has, neither been enclosed with the complaint nor proved on record, and prayed for dismissal of this appeal.

6. Having heard the counsel of the parties keeping in view their arguments after going through the record of the trial Court because of the following reasons, I am of the considered view that the approach of the trial Court holding guilty to the appellant under Section 3 (1) (x) and 3 (1) (vi) of the Act is not sustainable while the conviction of the appellant under Section 323 of IPC does not require any interference.

7. True it is that in complaint filed by the respondent under Section 200 of Cr. P. C. in the trial Court he stated himself to be a member of Chamar community which is covered under the Act and even prior to filing the complaint in a report in writing given to the police, which has not been proved by marking the Exhibit, it was stated that his caste is covered under the Act but in order to prove the same no certificate issued by the competent authority, has been produced to show that he is belonging to the caste of Chamar. So it is apparent that such fact has not been proved by the respondent by any admissible documentary or other evidence.

8. Besides the aforesaid after appearance of the appellant in the trial Court and framing the charge on recording the deposition of the respondent/complainant, he in his entire in chief has not specifically stated that he is from the community of Chamar covered under the Act, he only stated that on refusing the aforesaid direction of the appellant to do the forceful labour by his son in his filed he was subjected to abuses saying that "चमार को चमरा करके छोड़ूंगा" so in this way also the respondent had failed to prove his caste covered under the Act by the ocular evidence. In the lack of supporting ocular evidence so also in the lack admissible documentary evidence as stated above mere on some weakness of the defence or his counsel as no material question was asked by the defence counsel from the respondent in this regard, it could not be said that respondent has successfully proved that his caste and community is covered under the Act.

9. It is settled proposition that the provisions of the law should be complied with according to its language and spirit and case should also be proved according to such language. In such premises, in view of the aforesaid discussion on examining the case it is apparent that as per requirement of law

the complainant/ respondent has failed to prove his caste in the matter. Thus mere on this technical ground the conviction and sentence of the appellant under Section 3(1)(x) and 3(1)(vi) of the Act is not sustainable, hence the approach of the trial Court in this regard is hereby set aside and appellant is acquitted from such charge.

10. After setting aside the aforesaid conviction and sentence of the appellant under Section 3(1)(x) and 3(1)(vi) of the Act on examining the evidence of Khanjua (A.W.1), Himmat Singh (A.W.2), Kadhora (A.W.3) and Khunda (A.W.4) I have found that it has been proved beyond reasonable doubt that respondent was called by the appellant at his residence through some Khunda Chamar and when on such call he went to the place of the appellant then he was asked forcefully to direct his son to do the ploughing of his field for which he denied, on which he was subjected to slaps by the appellant on his face and was again asked for the aforesaid agricultural work. Again on denying by the respondent he was subjected to filthy abuses and beating with shoes and legs and as per available evidence he was also beaten by the backside of the rifle. In view of the available evidence instead the offence of the Act the same appears to be covered which is made punishable under Section 374 of IPC but in the lack of framing any specific charge of such section by the trial Court against the appellant and in view of difference in the language of Section 3(1)(vi) of the Act and aforesaid Section 374 of IPC, he could not be held guilty and sentenced under Section 374 of IPC. However, after near about 20 years from the date of the incident, I do not find fit to remand the matter for fresh trial after framing the charge of Section 374 of IPC, as the appellant has already suffered the mental agony of this case for years together and also appeared on various dates in the trial Court as well as before this Court in the present matter. So it is held that in the lack of framing the charge of Section 374 of IPC the appellant could not be held guilty and convicted under such section.

11. So far the conviction and sentence of the appellant under Section 323 of IPC is concerned, on perusing the deposition of above mentioned all four witnesses namely Khanjua (A.W.1), Himmat Singh (A.W.2), Kadhora (A.W.3) and Khunda (A.W.4), I have found sufficient evidence against the appellant to carry out the beating of the respondent by him. As alleged due to such beating the respondent sustained some injury which has neither been proved by examining any doctor nor by any MLC report but in any case the offence

causing simple hurt to the respondent is made out against the appellant. In such premises, I have not found any scope in the matter for extending the acquittal to the appellant from the charge of Section 323 of IPC. Thus it is held that trial Court has not committed any error in holding guilty to the appellant under Section 323 of IPC, consequently such finding of the impugned judgment is hereby affirmed.

12. So far the question of sentence awarded against the appellant by the trial Court under Section 323 of IPC is concerned, it is apparent on record that appellant had not suffered the jail sentence or the judicial custody for a single day, as such he remained on bail during trial and subsequent to his conviction awarded jail sentence was suspended by the trial Court and it is further suspended by this Court, pursuant to that he remained on bail in pendency of this appeal. But in the available circumstances of the case after near about 20 years from the date of the incident instead to send him jail by maintaining the awarded jail sentence of this section taking into consideration the circumstance that during last twenty years the appellant has suffered the mental agony of this case and also appeared on various dates in the trial Court as well as before this Court or its authority his awarded jail sentence under Section 323 of IPC is set aside and fine of Rs.1,000/- is imposed.

13. In view of the aforesaid discussion, by allowing this appeal in part, appellant is acquitted from the charge of Section 3(1)(x) and 3(1)(vi) of the Act. Consequently, the awarded punishment of such sections are also set aside. While by affirming his conviction under Section 323 of IPC and setting aside the impugned awarded jail sentence he is punished with the fine of Rs.1,000/-, failing in depositing such fine amount the appellant has to suffer further three months SI. The amount of fine deposited by the appellant under Section 3(1)(vi) and 3(1)(x) of the Act shall be adjusted in the above mentioned imposed fine amount under Section 323 of IPC and remaining fine amount, be refunded to the appellant after proper verification. The bail bond of the appellant is hereby discharged. Till the aforesaid extent the impugned judgment is modified while the other findings of the same are hereby affirmed.

14. Appeal is allowed in part as indicated above.

Appeal partly allowed.

**I.L.R. [2012] M.P., 2498
APPELLATE CRIMINAL**

Before Mr. Justice Rakesh Saxena & Mr. Justice T. K. Kaushal

Cr.A.No. 142/2005 (Jabalpur) decided on 16 August, 2012

TUNNU @ RAJESH KUMAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 302 - Murder - Circumstantial Evidence - Appellant used to quarrel with his wife and had a quarrel with her in the late night, the appellant and deceased were seen together, the dead body of the deceased was found in the house, the appellant absconded from the place of occurrence and was arrested after about 5 days, weapon of offence as seized at his instance and the death of the wife of the appellant was homicidal in nature - Guilt of the appellant is proved beyond reasonable doubt. (Para 13)

क. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - परिस्थितिजन्य साक्ष्य - अपीलार्थी अपनी पत्नी से अक्सर झगड़ा किया करता था और उसने देर रात उससे झगड़ा किया, अपीलार्थी तथा मृतिका एक साथ देखे गये, मृतिका का शव घर में पाया गया, अपीलार्थी घटना स्थल से फरार हो गया और उसे 5 दिन पश्चात् गिरफ्तार किया गया, उसकी निशानदेही पर हथियार की जब्ती की गई और अपीलार्थी की पत्नी की मृत्यु मानववध स्वरूप की थी - अपीलार्थी की दोषिता युक्तियुक्त संदेह से परे साबित की गई।

B. Penal Code (45 of 1860), Section 302 / 304 Part I - Culpable Homicide not amounting to murder - Deceased died due to a solitary head injury caused by appellant - Appellant was provoked all of a sudden on a trivial issue - Appellant did not use any conventional weapon to inflict injury - Appellant convicted under Section 304 Part I and sentenced to 10 years RI. (Paras 14 & 15)

ख. दण्ड संहिता (1860 का 45), धारा 302/304 भाग I - हत्या की कोटि में न आने वाला आपराधिक मानव वध - मृतिका की मृत्यु अपीलार्थी द्वारा सिर पर कारित एक मात्र चोट के कारण हुई - अपीलार्थी, मामूली विवाद पर अचानक उत्तेजित हुआ - अपीलार्थी ने चोट कारित करने के लिए किसी परम्परागत हथियार

का उपयोग नहीं किया – अपीलार्थी को धारा 304 भाग I के अन्तर्गत दोषसिद्ध किया गया और 10 वर्ष के सश्रम कारावास से दण्डादिष्ट किया गया।

Madan Singh, 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.** - This appeal has been preferred against judgment dated 30.06.2004 passed by Third Additional Sessions Judge (Fast Track) Court Betul (M.P.) in S.T. No. 261/2003, convicting the appellant under Section 302 of IPC for committing murder of his wife Rataibai (since deceased) and sentencing him to imprisonment for life.

2. Facts of the case, in short, are that deceased along with her husband, the appellant and two children had been living in adjoining portion of the house of her brother Shankar (PW- 1) since about 7 years: Appellant was in habit of making quarrels with the deceased, doubting her character and loyalty. On 3.9.2003 also appellant reached his house at 11:00 p.m. and quarrelled with the deceased saying she goes anywhere without taking him in confidence. In morning at about 8:00 a.m. blood stained body of deceased was found in the house. Appellant fled from the place. Ajay aged 4 years, minor son of the appellant and the deceased, stated to the persons assembled there that appellant demanded money from the deceased and assaulted her with a burning wood.

3. Shankar, brother of deceased (PW-1) informed the incident at police station Jhallar District-Betul. On 4.9.2003 inquest proceeding Ex.P- 1 was registered. Police prepared *Naksha Panchnama of laash* and sent dead body of the deceased to hospital for postmortem. Police seized broken bangle pieces from the spot and arranged to take photographs of the dead body and of the scene of the occurrence. Dr. Manish Sharma (PW-4) conducted postmortem of dead body and prepared postmortem report Ex.P- 17 mentioning the cause of death to be the head injury. On 5.9.2003, vide FIR (Ex.P-2 1) a case was registered against appellant under Section 302 of IPC~ On 8.9.2003 appellant was arrested. At his instance, weapon of offence, the wood stick was recovered. Prior to that appellant had made extra judicial

confession to Ashok (PW-6) stating that he has committed murder of his wife and police is running after him.

4. After completing the investigation, police Jhallar, District-Betul submitted a charge sheet against the appellant in the Court of concerned magistrate. Case was committed to the Court of Sessions for trial. Trial Court framed charge under Section 302 of IPC. Appellant abjured guilt and pleaded that he has been implicated in the matter.

5. To substantiate the case of prosecution, statements of Shankar, brother of deceased (PW- 1), Bhagabai, sister-in-law of deceased (PW-2), Shivaji, cousin of deceased (PW-3), Dr. Manish Sharma (PW-4), Keshorav Savle, Patwari (PW-5), Ashok (PW-6), M.R. Malviya, Head Constable (PW-6), H.L. Sharma, Sub Inspector (PW-7) and Santosh Patil, Head Constable (PW-8) were recorded. After appreciating aforesaid evidence, trial Court has convicted and sentenced the appellant as above.

6. Assailing aforesaid judgment, this appeal has been preferred on the grounds that prosecution has failed to adduce sufficient evidence before the trial court- to prove the chain of circumstances against the appellant. Trial Court has not appreciated the evidence in right perspective. Conviction has been based on unreliable and insufficient evidence. Conviction is bad in law. On the other hand, learned Panel Lawyer supported the finding of conviction and sentence both.

7. Dr. Manish. Sharma (PW-4) on 5.11 .2003 at Public Health Center Betul conducted the postmortem of the deceased and found a contusion measuring 3 inch X 4 inch on left side of parital region. He found 3 fractures of spiral shape in the frontal bone on left side. Cause of death was found shock due to head injury which damaged the brain also, within 24 to 36 hours of the postmortem examination. Death was found to be homicidal in nature. In response to the query Ex.P- 18, Dr. Sharma (PW-4) further opined that swelling on face and neck of the deceased might be caused as a result of head injury and is not indicative of asphyxia. Cause of death was the head injury. In view of the evidence of Dr. Sharma (PW-4), postmortem report (Ex. P-17) and query report (Ex. P-18), it remains no longer disputed that death of deceased was homicidal in nature.

8. Bhagabai, sister-in-law of deceased (PW-2) over heard a quarrel

between the appellant and the deceased in the night, expressing annoyance by the appellant with the deceased that she used to leave the house for anywhere without asking him. Shankar, brother of deceased (PW- 1) saw the dead body of the deceased in the adjoining portion of his house where the appellant and deceased live. PW- 1 informed about the incident to his cousin Shivaji (PW-3). They did not find the appellant in the house. On asking Ajay aged 4 years, minor son of the appellant and the deceased. He stated that appellant was demanding money from her mother and inflicted a burning wood on her head.

9. It is submitted by learned counsel for the appellant that prosecution did not examine Ajay in the Court, hence what he has stated would be an evidence of "hearsay" category and cannot be considered and relied upon.

10. It is submitted by learned Panel Lawyer that during investigation police recorded statement of child who narrated the incident "*Korku*" language, translated in Hindi with the help of PW-3. On 26.04.2003 child was produced in the trial Court for recording his statement but despite lot of efforts his statement could not be recorded as he was not able to state the facts clearly before the Court. Learned Panel Lawyer further submitted that what happened before Ajay in the night in the house was disclosed by him in the morning before PW-1 and PW-3 would be admissible under Section 6 of the Evidence Act because child witnessed the incident occurred in the night in the house and immediately thereafter in the morning disclosed what he saw there.

11. Shivaji (PW-3) stated that at the instance of appellant a burnt *Sagoan* wood was recovered from the back side of Majar. On 8.9.2003 H.L. Sharma, Sub-Inspector (PW-7) arrested the appellant. On the basis of information furnished by the appellant PW-7 recovered a *Sagoan* wood and sent it to doctor seeking an opinion whether head injury of the deceased could have been caused by it or not. Dr. Sharma (PW-4) submitted a positive opinion in query report Ex. P- 18.

12. Ashok (PW-6) did not support the prosecution and he was declared hostile. Hence, fact of extra judicial confession could not be found to be proved.

13. From the aforesaid evidence, in our opinion, prosecution

succeeded to prove beyond doubt that (1)appellant, as usual, quarrelled with the deceased in the late night, (2) The deceased and the appellant were seen last together in the house, (3) Dead body of the deceased was found in his house in the morning, (4) Appellant absconded from the place of occurrence, and was arrested after about 5 days of the incident, (5) At his instance, weapon of offence, a burnt Sagoan wood was recovered and (6) Death of deceased was found to be homicidal. Aforesaid circumstantial evidence against the husband (appellant) clearly and unerringly indicated that only appellant caused the death of deceased.

14. It is submitted by learned counsel for the appellant that death of the deceased was a result of a solitary head injury caused by appellant. There was no intention of the appellant to commit murder of his wife. It appears that appellant had been provoked all of a sudden on a trivial issue i.e. demand of money by him and refusal by the deceased. The appellant did not use any conventional weapon to inflict injury. Learned Panel Lawyer also conceded the above fact situation.

15. Though, the appellant (husband) and deceased (wife) used to quarrel frequently but on fateful night according to evidence of PW-3, a quarrel arose on the point of demand of money by the appellant. On a sudden quarrel being provoked the appellant inflicted a blow with a burning wood log without premeditation. Said one and only blow was caused in heat of passion on the head of the deceased during quarrel which resulted into her death. There is no evidence to show that the appellant took undue advantage and acted in unusual or cruel manner. Act of the appellant is fully covered under exception 4 of Section 300 IPC.

16. As discussed above conviction of appellant under Section 302 of IPC deserves to be and is set aside. Instead appellant is convicted under Section 304 (Part 1) of IPC for committing culpable homicide not amounting to murder and is sentenced to 10 years RI. Needless to write that period of sentence served out by the appellant during investigation, trial and appeal shall be adjusted accordingly.

Appeal partly allowed.

Appeal partly allowed.

**I.L.R. [2012] M.P., .2503
APPELLATE CRIMINAL**

Before Mr. Justice Rakesh Saxena & Mr. Justice T.K.Kaushal

Cr.A.No. 2156/2000 (Jabalpur) decided on 4 September, 2012

JHAM SINGH PAWAR

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 or 302 Part II - Murder or Culpable Homicide not amounting to murder- Appellant used to visit the house of the deceased because of love relations - On the insistence of deceased that he should keep her as his wife, appellant kicked her and picked up kerosene, sprinkled it and set the deceased on fire - When she caught fire and shouted, he extinguished the fire to save her and did not try to run away from the spot - Held - It can be appreciated that the incident occurred in a sudden impulse without any premeditation on the part of appellant - Appellant did not intend to inflict the injuries on deceased which she ultimately sustained - Appellant guilty of committing offence under Section 304 Part II and sentenced to 10 years R.I. (Paras 20 & 21)

दण्ड संहिता (1860 का 45), धारा 302 या 302 भाग II - हत्या या हत्या की कोटि में न आने वाला अपराधिक मानववध - अपीलार्थी का मृत्तिका के घर पर प्रेम संबंधों के कारण आना जाना था - मृत्तिका के इस आग्रह पर कि उसे पत्नी के रूप में उसको रखना चाहिए, अपीलार्थी ने उसे लात मारी और मिट्टी का तेल उठाकर मृत्तिका पर छिड़ककर उसे आग लगा दी - जब उसे आग लगी और चिल्लायी, उसने उसे बचाने के लिए आग बुझाई और घटना स्थल से भागने का प्रयास नहीं किया - अभिनिर्धारित - यह मूल्यांकन किया जा सकता है कि घटना अचानक आवेग में अपीलार्थी की ओर से बिना किसी पूर्व चिंतन के घटित हुई - अपीलार्थी का आशय मृत्तिका को क्षतियां पहुंचाना नहीं था जो उसने अंतिमतः सहन की - अपीलार्थी, धारा 304 भाग II के अंतर्गत अपराध कारित करने का दोषी एवं 10 वर्ष सश्रम कारावास से दण्डादिष्ट किया गया।

Case referred :

AIR 2000 SC 3630

Siddharth Datt, for the appellant.

Amit Pandey, P.L. for the 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 29th June, 2000, passed by First Additional Sessions Judge, Seoni in Sessions Trial No. 119/99, convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life.

2. In short, the prosecution case is that appellant developed affairs with Koushalyabai, a married woman, who was residing in village Nandora. Her husband and son had gone to Nagpur to earn livelihood. On 28.5.1999, at about 9 P.M., when appellant went to the house of Koushalyabai, she insisted him to keep her as his woman. When appellant did not agree for the same, there occurred an altercation, during which, he kicked Koushalyabai and after pouring kerosene set her on fire by burning matchstick. But, immediately thereafter he tried to save her by extinguishing the fire. On her shouting, Lakkhu (PW2), Shankerlal (PW5), Shivilal (PW7) and Rajkumar (PW1) also reached there and extinguished the fire. They carried her in a jeep to Police Station Barghat, where, in the night of 29.5.1999, at about 2.25 A.M., she lodged the report Ex. P/14.

3. Sub Inspector G.R.Singh (PW14) after recording the report sent Koushalyabai to Community Health Centre, Barghat. At Barghat, Naib Tahsildar S.L.Choudhary (PW8) recorded her dying declaration Ex.P/9. She was referred to District Hospital, Seoni for further treatment. Dr. R.K.Sharma (PW12) examined her injuries and vide her M.L.C. report Ex. P/12 found 40% burn injuries on her body. She was admitted in female surgical ward. In the course of treatment, on 8.7.1999, Koushalyabai succumbed to her injuries. Dr. Abdul Hamid Qureshi (PW11) sent intimation about her death to Police Station, Seoni.

4. Head Constable Nandlal (PW13), in presence of witnesses viz. Sewakram Sahu (PW3) & Nandkishore (PW4) conducted inquest proceeding and recorded memorandum Ex. P/4. The dead body of Koushalyabai was sent to District Hospital, Seoni for postmortem examination.

5. Dr. A.K.Sarawgi (PW6) conducted postmortem examination on 8.7.1999 and found burn injuries on her body. In his opinion, the death of deceased was the result of septic shock and complications due to 45% burn injuries.

6. Sub Inspector G.R.Singh (PW14) converted the offence under Section 302 of the Indian Penal Code and proceeded for investigation. After completing the investigation, he filed charge sheet in the Court of Chief Judicial Magistrate, Seoni. The case was then committed to the Court of Sessions.

7. On charge being framed, appellant abjured his guilt and pleaded false implication. He pleaded that Koushalyabai suffered accidental burn injuries. On hearing her shrieks, he reached there and tried to extinguish the fire.

8. In support of prosecution case, prosecution examined Rajkumar (PW1), Lakkhu (PW2), Shankerlal (PW5) and Shivilal (PW7), but they did not support the prosecution version. The trial Judge, however, relying on the evidence of dying declaration Ex. P/9 recorded by Executive Magistrate S.L.Choudhary (PW8), the first information report Ex. P/14 recorded by Inspector G.R.Singh (PW14) treating as dying declaration and finding the same corroborated by the medical evidence held the appellant guilty and convicted him under Section 302 of the Indian Penal Code. Aggrieved by his conviction and sentence, appellant has filed this appeal.

9. Shri Siddharth Datt, learned counsel for the appellant, submitted that the evidence of dying declaration was not reliable since it was not supported by the evidence of independent witnesses Rajkumar (PW1), Lakkhu (PW2), Shankerlal (PW5) and Shivilal (PW7). It was evident from the aforesaid dying declarations that the appellant tried to save deceased by extinguishing fire and also took deceased to police station and hospital. In the alternative, placing reliance on the ratio of Apex Court decision rendered in case of *Kalu Ram Vs. State of Rajasthan*-AIR 2000 SC 3630, he submitted that the conviction of appellant under Section 302 of the Indian Penal Code was not justified. At the most, appellant could have been held guilty under Section 304-II of the Indian Penal Code. He pointed out that appellant was in custody since the date of his arrest i.e. 30.5.1999. On the other hand, Shri Amit Pandey, learned Panel Lawyer for the State submitted that the guilt of appellant under Section 302 of the Indian Penal Code was well established by the evidence of two dying declarations. Once appellant ignited deceased, it had to be presumed that he intended to cause her death. He justified and supported the impugned judgment of conviction.

10. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

11. As far as the death of Koushalyabai by burn injuries, it has not been disputed that she died due to burn injuries. It was apparent from the First Information Report Ex. P/14 lodged by deceased herself, the dying declaration Ex. P/9 recorded by Executive Magistrate S.L.Choudhary (PW8) and the evidence of Rajkumar (PW1), Lakkhu (PW2), Shankerlal (PW5) and Shivilal (PW7) that deceased suffered burn injuries in her house in the night of 28.5.1999. She was taken to hospital, Barghat and then to District Hospital Seoni, where her injuries were examined by Dr. R.K.Sharma (PW12). Dr. Sharma vide his report Ex. P/12 found burn injuries on the face and both the sides of neck of deceased. Both arms, forearms and chest was burnt. On front side of abdomen and on the back there were burn injuries and blisters. Her hair were singed. There were about 40% of burn injuries. Koushalyabai was admitted in female surgical ward for the treatment.

12. Koushalyabai remained under treatment at District Hospital Seoni. On 7.7.1999, she expired. After her death, on 8.7.1999, after inquest her body was sent for postmortem examination. Dr. A.K.Sarawgi (PW8) conducted postmortem examination and observed: "highly emaciated body with bone and skin appearance. Eyelids were partially eaten by maggots. There was ulcer in different stages of healing. Ulcers were distributed in her whole face, forehead, chest, post thorax, both upper limbs & scalp hair. The body was ulcerated over about 45% of body surface area. Ulcers were ante mortem and were consistent with the history of burns of longer duration." Dr. Sharma opined that the cause of death of deceased was septic shock as a complication and sequelae of burns. Postmortem examination report Ex. P/7 was written and signed by him.

13. From the aforesaid evidence, there appears no doubt that deceased died as a result of burn injuries.

14. Rajkumar (PW1), Lakkhu (PW2), Shankerlal (PW5) and Shivilal (PW7); the neighbours of deceased, who reached immediately after the occurrence and extinguished the fire, did not support the prosecution case that appellant set fire to deceased. On the contrary, all of them stated that deceased told to them that while she was climbing up the stairs with a lamp in hand, it fell down due to which she got burnt. All these witnesses were declared hostile.

15. The only evidence on which the learned trial Judge placed reliance

was the evidence of dying declaration. Learned counsel for the appellant submitted that the evidence of dying declaration was not reliable. Naib Tahsildar S.L.Choudhary (PW8) stated that at the time of occurrence, he was posted at Barghat. On the requisition of police Barghat, he went to record the dying declaration of Koushalyabai, who was admitted in Govt. Hospital Barghat. The doctor, who was on duty, certified that Koushalyabai was in fit state to give her statement. On 29.5.1999, at 2.50 A.M., he recorded the dying declaration (Ex.P/9). Koushalyabai told that she was in love with Jham Singh, therefore, she asked him to keep her as his wife, but he refused. During the talks, he picked up the bottle of kerosene kept in the house and after sprinkling kerosene over her, he ignited her. He obtained the right hand thumb impression of Koushalyabai on the dying declaration Ex. P/9. On perusal of the dying declaration Ex. P/9, it is revealed that deceased stated that when she cried, appellant Jham Singh extinguished her fire and in the meanwhile, Shivilal, Shankerlal and Lakkhu reached there. It is true that none of these witnesses, who reached at the spot supported the version given by deceased in the dying declaration, but they were declared hostile. There appeared no reason for the Executive Magistrate to have recorded the aforesaid dying declaration incorrectly. In our opinion, dying declaration Ex. P/9 was a correct and genuine document.

16. The dying declaration Ex. P/9 stands further supported by the first information report Ex. P/14, which was got recorded by deceased herself at police station Barghat. This report was recorded by Sub Inspector G.R.Singh (PW14), the station officer of the said police station. Report Ex. P/14 was recorded soon after the occurrence i.e in the morning of 29.5.1999 at about 2.25 A.M. In Ex. P/14, deceased disclosed the same story that she was in love with appellant. He used to visit her house. In the night at 8-8.30 P.M., when he came to her house, she told to him that since he loved her, he should keep her as his wife, but he refused. This resulted into an altercation during which he gave two kicks to her and picked up kerosene bottle from the house and after dousing her with kerosene ignited her with matchstick. When she shouted, appellant extinguished her fire and at the same time Lakkhu, Shankerlal, Shivilal, and Rajkumar reached there and brought her to police station. Sub Inspector G.R.Singh proved the first information report Ex. P/14. Absolutely, no allegation was levelled against Inspector G.R.Singh that

he recorded a false report. The fact that deceased was taken to police station immediately after the occurrence and the said report was recorded early in the morning indicated the genuineness of the said document. It is well settled that the first information report lodged by a person, who subsequently dies can be treated as a dying declaration, if it relates to the cause of his/her death, or as to any of the circumstances of the transaction which resulted in his/her death.

17. Indisputably, the conviction can be recorded on the basis of dying declaration alone, but therefor the same must be wholly reliable. In a case, where suspicion can be raised as regard the correctness of the dying declaration, the Court before convicting an accused on the basis thereof would look for some corroborative evidence. In the instant case, there appears no circumstance to give rise any suspicion about the genuineness, correctness or the truthfulness of the dying declaration. The presence of appellant at the time of occurrence is also established by the evidence of Lakkhu (PW2), Shankerlal (PW5) and Shivilal (PW7). It is thus amply established that appellant, who was in love with deceased, set fire to her as a result of which she died.

18. The evidence of defence witnesses Chain Singh (DW1) and Murlidhar (DW2) does not appear truthful that they along with appellant and other persons had gone to pacify a quarrel in the neighbourhood of the deceased and on hearing cries of deceased they went there. According to Chain Singh, the uncle and brother of deceased went to police station and got a false report lodged against Jham Singh because of enmity. This fact is belied by the evidence of first information report Ex. P/14.

19. Learned counsel for the appellant next submitted that the conviction of appellant under Section 302 of the Indian Penal Code was not justified as the appellant was in love with deceased and that upon a sudden quarrel he set fire to deceased because deceased, who was a married woman insisted him to keep her as his wife.

20. On perusal of the dying declarations Ex. P/9 and Ex. P/14, it is revealed that appellant used to visit the house of deceased because of love relations between him and the deceased. On the insistence of deceased that he should keep her as his wife, appellant kicked her and picked up kerosene from the house of deceased itself, sprinkled it and threw a burning matchstick at her.

When she caught fire and shouted, he extinguished the fire to save her and did not try to run away from the spot. From these facts, it can be appreciated that the incident occurred in a sudden impulse without any premeditation on the part of appellant. In case of *Kalu Ram* (supra), accused without any premeditation ablated deceased, his wife, when deceased refused to part with her ornaments on the insistence of accused/husband. Under infuriation accused doused her with kerosene and wanted her to die and supplied a box of match-stick to her. When she failed to ignite the matchstick, accused collected the match box and lit one matchstick and set her ablaze. When the flames were up, he brought water in a frantic effort to save her from death. Statement of deceased was recorded by the police which became the basis for the FIR and subsequently the Magistrate also recorded her dying declaration. Later deceased succumbed to her burn injuries. The Apex Court in the above circumstances held that the conduct of accused could not be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die, he would not have altered his senses to bring water in an effort to rescue her. It could be that unfortunately the situation slipped out of his control and it went to the fatal extent. Accused would not have intended to inflict the injuries which she sustained on account of his act. Therefore, the Apex Court brought down the offence from the first degree murder to culpable homicide not amounting to murder and altered the conviction of accused/appellant from Section 302 of the Indian Penal Code to Section 304 Part II of the Indian Penal Code. Finding the circumstances of the instant case similar to the circumstances of the case of *Kalu Ram* (supra), we deem it appropriate to hold that appellant did not intend to inflict the injuries on deceased which she ultimately sustained on account of his act and ultimately died after about 38-39 days.

21. We, therefore, alter the conviction of appellant from Section 302 of the Indian Penal Code to Section 304-Part II of the Indian Penal Code and impose a sentence of rigorous imprisonment for 10 years. If appellant, who is reported to be in custody since 30.5.1999, has served out his aforesaid sentence, he be released forthwith if not required in any other case.

22. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2012] M.P., 2510

APPELLATE CRIMINAL

Before Mr. Justice N.K.Gupta

Cr.A.No. 857/2009 (Jabalpur) decided on 6 September, 2012

LAL SINGH GOND

...Appellant

Vs.

STATE OF M.P.

...Respondent

A. Penal Code (45 of 1860), Section 376/511 - Age of Prosecutrix - Ossification Test - Age between 15-16 years - Doctor found that secondary sex characteristics of prosecutrix were not fully developed and menses (sic: menses) were not started - Looking to the physical appearance of the prosecutrix, two years cannot be added on the upper side. (Para 10)

क. दण्ड संहिता (1860 का 45), धारा 376/511 - अभियोक्त्री की आयु - ओसिफिकेशन जांच - आयु 15-16 वर्ष के बीच - चिकित्सक ने पाया कि अभियोक्त्री के द्वितीय यौन लक्षण पूर्णतः विकसित नहीं हुए थे और उसका मासिक धर्म आरंभ नहीं हुआ था - अभियोक्त्री की शारीरिक संरचना देखकर, दो वर्ष अधिक नहीं जोड़े जा सकते।

B. Penal Code (45 of 1860), Section 376/511 - Attempt to commit rape - No External or Internal injury was found - Hymen was found intact - Appellant did not remove his underwear before lying upon the prosecutrix - It cannot be said that he attempted to commit the rape. (Para 13)

ख. दण्ड संहिता (1860 का 45), धारा 376/511 - बलात्कार का प्रयास - कोई बाह्य या आंतरिक चोट नहीं पायी गई - हायमन अक्षत पाया गया - अभियोक्त्री पर लेटने से पहले अपीलार्थी ने अपना अंडरवियर नहीं हटाया - यह नहीं कहा जा सकता कि उसने बलात्कार का प्रयत्न किया था।

C. Penal Code (45 of 1860), Section 354 - Outraging the modesty - Appellant undressed the prosecutrix and directed her to lie down on his pant, which was placed on the earth and thereafter, he lied down upon the prosecutrix and in the meantime, the witnesses came to

the spot, the appellant ran away - As the appellant had used some criminal force upon the prosecutrix to outrage her modesty, he is guilty of committing offence punishable under Section 354 of I.P.C.(Para 13)

ग. दण्ड संहिता (1860 का 45), धारा 354 - लज्जा भंग करना - अपीलार्थी ने अभियोक्त्री को निर्वस्त्र किया और उसे जमीन पर रखे अपने पतलून पर लेट जाने के लिए निदेशित किया और इसके बाद वह अभियोक्त्री पर लेट गया और उसी समय साक्षीगण घटनास्थल पर आये, अपीलार्थी भाग गया - चूंकि अपीलार्थी ने अभियोक्त्री पर उसकी लज्जा भंग करने के लिए कुछ आपराधिक बल का प्रयोग किया, वह भा.द.सं. की धारा 354 के अंतर्गत दण्डनीय अपराध कारित करने का दोषी है।

D. Penal Code (45 of 1860), Section 363 - Kidnapping - Appellant induced prosecutrix to go with him to the bushes near the Nala and therefore, who was taken few yards away from the place where she was playing - She was not taken away from the guardianship of her maternal grand father - Prosecutrix was taken to a nearby place, so that they could not be seen by the others - Act of the appellant doesnot amount to kidnapping. (Para 16)

घ. दण्ड संहिता (1860 का 45), धारा 363 - व्यपहरण - अपीलार्थी ने अभियोक्त्री को अपने साथ नाले के पास की झाड़ियों में चलने के लिए उत्प्रेरित किया और इसलिए, उसे उस स्थान से कुछ गज दूर ले जाया गया जहां वह खेल रही थी - उसे उसके नानाजी के संरक्षण से नहीं ले जाया गया - अभियोक्त्री को नजदीक के स्थान पर ले जाया गया जिससे कि अन्य लोग देख न सके - अपीलार्थी का कृत्य व्यपहरण की कोटि में नहीं आता।

Cases referred :

AIR 1970 SC 713, (2004) 4 SCC 379, AIR 1965 SC 942, 1983 JIJ SN 63

S.K. Patel, for the appellant.

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

J U D G M E N T

N.K. GUPTA, J. - The appellant has preferred this appeal against the judgment dated 31.1.2009 passed by learned Seventeenth Additional Sessions

Judge, Jabalpur in S.T.No.305/2008, whereby the appellant was convicted for offence punishable under sections 363 and 376 read with section 511 of IPC and sentenced for 7 years' rigorous imprisonment with fine of Rs.1,000/- for each count of the offence and in default of payment of fine, 2 months' additional rigorous imprisonment for each count.

2. Prosecution's case, in short, is that, on 23.3.2008, at about 1.45 p.m., the prosecutrix was playing near her hut at village Banjar Nala, Tinheta, (Police Station Chargawan, District Jabalpur). Thereafter, she went to answer the call of nature towards the Nala and then, she came back. When she was playing near a Mend of a field, the appellant gave her a currency note of Rs.20/- to fetch some Bidis and thereafter, he took her to the bushes near the Nala. The appellant undressed her and committed rape upon her. When she was not visible to her parents, Radhelal maternal grandfather of the prosecutrix, went to the spot and after looking the maternal grandfather of the prosecutrix, the appellant ran away from the spot. The prosecutrix told about the entire incident to her maternal grandfather and other persons like Sumrat (P.W.4), Bhagwan Das (P.W.5) etc. She was taken to the Police Station Chargawan, where Radhelal Gond lodged an FIR, Ex.P/1. The prosecutrix was sent to the Government Hospital for her medico legal examination and treatment. Dr.Rashmi Bhatnagar (P.W.10) after examining the prosecutrix gave a report, Ex.P/10. No external or internal injury was found on her person. Even her hymen was found intact. However, 2 slides were prepared from the vaginal swab of the prosecutrix and handed over to the police for forensic analysis. The prosecutrix was also sent for ossification test and Dr.Agrawal (P.W.11) in his report Ex.P/12 found that she was 15-16 years old girl.

3. The appellant was arrested on 26.5.2008. He was also directed for his medico legal examination. Doctor who examined the appellant, prepared 2 slides of sample of his semen and handed over to the Police constable after sealing them. All the sealed properties were sent to the Forensic Science Laboratory, Sagar for their analysis. However, no report of forensic Science Laboratory was placed before the trial Court till the disposal of the case. After due investigation, a charge-sheet was filed before the JMFC, Patan, who committed the case to the Sessions Court and ultimately, it was transferred to the 17th Additional Sessions Judge, Jabalpur.

4. The appellant abjured his guilt. He did not take any specific plea but, he has stated that he was falsely implicated in the matter. He was an agricultural

labour in the field of Radhelal and he was not given his wages. When he demanded for the wages, he was falsely implicated. However, no defence evidence was adduced by the appellant.

5. The learned Additional Sessions Judge after considering the evidence adduced by the prosecution, convicted the appellant for offence punishable under sections 363, 376 read with section 511 of IPC and sentenced him as mentioned above.

6. I have heard the learned counsel for the parties.

7. The learned counsel for the appellant has submitted that the appellant was falsely implicated in the matter. No offence is made out against him. At the most offence punishable under section 354 of IPC may be constituted. If the prosecutrix was stopped at a particular place and taken into bushes to commit an offence then, such an act would not amount to be an offence of kidnapping. Similarly, looking to the report of Dr.Rashmi Bhatnagar, the overt-act of the appellant does not fall within the purview of section 376 read with section 511 of IPC. In the alternate, it is also submitted that the appellant remained in the custody for a longer period and therefore, looking to his conduct and his overt-act, his sentence may be reduced to the period, which he has already undergone in the custody.

8. On the other hand, the learned Panel Lawyer has submitted that the conviction and sentence directed by the trial Court appears to be appropriate and there is no basis by which any interference can be done in the findings given by the trial Court.

9. After considering the submissions made by the learned counsel for the parties and looking to the evidence adduced by the prosecution, it is to be considered as to whether the appellant has committed the offence under section 376 read with section 511 of IPC? Whether the appellant has committed the offence under section 363 of IPC? And whether the sentence awarded to the appellant can be reduced?

10. In the present case, the prosecutrix (P.W.2) was the main eye witness, whereas Radhelal (P.W.1) and Sumrat (P.W.4) had reached to the spot during the incident. The prosecutrix (P.W.2) has stated that the appellant took her near the Nala and directed her to lie down on the Earth on his pant, which he had removed and placed on the Earth. Thereafter, he committed the rape upon the prosecutrix. The prosecutrix was shown to be a girl of 10 years of

age initially. However, she was found to be 15 to 16 years of age in her ossification test. Dr. Rashmi Bhatnagar (P.W.10) has found that secondary sex characters of the prosecutrix were not well developed and menaces were not started to the prosecutrix. Looking to the information given by Dr.Bhatnagar, it appears that the prosecutrix was approximately between 10 to 13 years of age. Though radiological age of the prosecutrix was assessed by Dr.Agrawal to be 15 to 16 years but, in such computation, 2 years may be deducted or added according to the physical appearance of the prosecutrix. In the present case, looking to her physical appearance and her secondary sex characters, the prosecutrix appears to be 10 to 13 years of age and therefore, 2 years may be deducted in the age computed by the ossification test.

11. The prosecutrix has stated that the appellant undressed her to lay upon her. She has stated about the entire rape but, looking to the evidence given by Dr.Rashmi Bhatnagar that there was no external or internal injury to the prosecutrix and her hymen was also intact, it appears that being a child witness, the prosecutrix was tutored by her parents and therefore, though she is alleging about the rape but, no such overt-act is proved beyond doubt. If insertion was done with a prosecutrix of 10 to 12 years of age then, she would have sustained some internal injuries due to that penetration and therefore, that portion of evidence given by the prosecutrix cannot be accepted. The trial Court has rightly acquitted the appellant from the charges of offence punishable under section 376 of IPC.

12. For a commission of offence there are three stages: (1) Preparation, (2) Attempt and (3) Commission of offence. For so many offences, preparation is not at all a crime. There is a slight difference between preparation and the attempt. In this connection, the judgment passed by Hon'ble the Apex Court in case of "*Malkiat Singh and another VS. State of Punjab*", [AIR 1970 SC 713] may be referred. In para 4 of that judgment, it is mentioned by Hon'ble the Apex Court as under:-

"The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit 'a crime, he must be

shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the actus reus of a criminal attempt. The sufficiency of the actus reus is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently approximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but, if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it."

In the light of the aforesaid judgment, one has to examine the slight demarcation between the preparation and the attempt.

13. Also, the judgment passed by Hon'ble the Apex Court in case of "*Aman Kumar & another Vs. State of Haryana*", [(2004) 4 SCC 379] abstract from para 11 may be taken as under:-

"11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect."

In the light of the aforesaid judgment if the present case is examined then, it would be apparent from the evidence given by the witnesses Radhelal and Sumrat that when the appellant saw these witnesses, he ran away from

the spot and at that time he was wearing a shirt and underwear. It is no stated by the prosecutrix that before lying upon her, the appellant removed his underwear or his shirt. She has simply stated that the appellant removed his pant and directed her to lie down on the pant. The appellant could not do any intercourse unless he took his penis out of the underwear and therefore, when he had not removed his underwear, it cannot be said that he attempted to commit the rape. In the light of slight demarcation given by Hon'ble the Apex Court in case of *Aman Kumar* (supra), it would be apparent that in the present case, though the appellant undressed the prosecutrix and directed her to lie down on his pant, which was placed on the Earth and thereafter, he lied down upon the prosecutrix and in the meantime, the witnesses came to the spot and the appellant ran away. Under such circumstances, the overt-act of the appellant as proved by the prosecutrix and the witnesses, does not fall within the purview of attempt of the offence but, it remains within the purview of preparation. In so many offences preparation of offence is not an offence itself but, in the present case, the preparation to commit the rape falls within the purview of offence under section 354 of IPC. The appellant has used some criminal force upon the prosecutrix to outrage her modesty and therefore, the appellant can be held guilty for the offence punishable under section 354 of IPC instead of offence punishable under section 376 read with section 511 of IPC.

14. Learned counsel for the appellant has submitted that the appellant was falsely implicated in the matter. It is no where proved by the appellant that he ever worked with either the witness Radhelal or with Sumrat (P.W.4) and therefore, there was no possibility that his wages were due from the maternal grandfather of the prosecutrix. There is no enmity established by the appellant by which it could be said that he was falsely implicated in the matter. The testimony of the prosecutrix is duly corroborated by the witness Radhelal and Sumrat, who saw the appellant lying upon the prosecutrix. Also it is further confirmed by the timely lodged FIR, Ex.P/1 and therefore, testimony of the prosecutrix is believable upto that extent that the appellant undressed her and lay upon her. Under such circumstances, it cannot be said that the appellant was falsely implicated in the matter but, it is proved beyond doubt that he used a criminal force to outrage the modesty of the prosecutrix.

15. However, the action of the appellant does not fall within the purview of offence punishable under section 376 read with section 511 of the IPC. Offence punishable under section 354 of IPC is an inferior offence of the

same nature and therefore, there is no need to frame any separate charge for that offence. In the light of provision of section 222 of Cr.P.C., the appellant can be convicted for offence punishable under section 354 of IPC under the conviction for the offence punishable under section 376 read with section 511 of IPC. In the light of the aforesaid discussion, the learned Additional Sessions Judge has erred in convicting the appellant for offence punishable under section 376 read with section 511 of IPC but, the appellant can be convicted for offence punishable under section 354 of IPC.

16. As far as the offence under section 363 of IPC is concerned, the prosecutrix was playing near the field of her maternal grandfather. Thereafter, she went to answer the call of nature near the *Nala* and thereafter, again she came back to the *Mend* of the field, where she was playing. The appellant induced her to go with him to the bushes near the *Nala* and therefore, she was taken few yards away from the place where she was playing. She was not taken away from the guardianship of her maternal grandfather. She remained in the guardianship of her maternal grandfather but, since she was playing lonely, she was taken slightly away from the place where she was playing then, such displacement will not amount to any kidnapping or abduction. The appellant took the prosecutrix to a nearby place, so that they could not be seen by the others and therefore, it is not a kidnapping in the eye of law. In this context, the judgment passed by Hon'ble the Apex Court in case of "*S.Varadarajan Vs. State of Madras*", [AIR 1965 SC 942] may be perused, in which it is observed as under:-

"The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of S.361 of the Indian Penal Code :

"Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping."

In the light of the aforesaid judgment, it is to be seen whether the appellant was intended to take the prosecutrix from her lawful guardianship. Also, the judgment passed by the Single Bench of this Court in case of "*Alsingh Vs. State of M.P.*", [1983 J.L.J. S.N.63], in which it is held that if it was proved that the prosecutrix was taken away but, the purpose is not proved then, offence under section 366 of IPC will not be constituted. As discussed above, the appellant was an old person. He was not at all interested to take the prosecutrix away from her legal guardianship but, he was taking her to a hidden place, so that the appellant and the prosecutrix could not be seen by the others and he could commit the offence of rape. Under such circumstances, it would be apparent that the appellant was not intended to kidnap the prosecutrix and therefore, he has not done the offence of kidnapping by taking her into bushes. The learned Additional Sessions Judge erred in convicting the appellant for offence punishable under section 363 of IPC.

16. So far as the sentence is concerned, it is apparent that the appellant has faced the trial and appeal since last 4 years. He remained in the custody from his date of arrest i.e. 26.5.2008 till the disposal of the trial. Thereafter, he remained in the custody during the appeal and therefore, he is in the custody since last 4 years. He has undergone in the custody for more than the period, which is prescribed for offence punishable under section 354 of IPC therefore, it is a fit case in which the sentence of the appellant may be reduced to the period, which he has already undergone in the custody and looking to the excessive period of custody, no fine amount is required to be imposed afresh.

17. On the basis of the aforesaid discussion, the appeal filed by the appellant is hereby partly allowed. The conviction as well as sentence directed for offence punishable under section 363 and 376 read with section 511 of IPC is hereby set aside. He is acquitted from the charges of offence punishable under section 363, 376 read with section 511 of IPC but, he is convicted for the offence punishable under section 354 of IPC and sentenced for the period which he has already undergone in the custody. The appellant shall be entitled to get the fine amount back, if he has deposited before the trial Court.

18. Registry is directed to issue a supersession warrant accordingly, so that the appellant be released forthwith.

19. Copy of the judgment be sent to the trial Court with its record for information.

Appeal partly allowed.

**I.L.R. [2012] M.P., 2519
APPELLATE CRIMINAL**

Before Mr. Justice Rakesh Saxena & Mr. Justice T.K.Kaushal

Cr.A.No. 2089/2000 (Jabalpur) decided on 11 September, 2012

KISNA & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Dying Declaration - The deceased was set on fire by the appellants while she was alone in the house - She narrated the incident to her husband when he came back from the fields - In 1st dying declaration recorded by Naib Tahsildar, she did not attribute any motive to the appellants for setting her on fire whereas in the 2nd dying declaration she alleged that appellant no.1 was having evil eye on her - However, in the earliest report made by the husband of the deceased, it was alleged that when he came back from the fields he found the smoke coming out of the house and the door was opened with the help of sabbal and found that the deceased was sitting in a burnt condition and merely asked for treatment - In view of the earliest statement/information given by the husband to the police, the dying declarations made by the deceased do not appear to be trustworthy - Appeal allowed. (Paras 20 to 23)

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 32 - मृत्युकालिक कथन - अपीलार्थीगण द्वारा मृतिका को जला दिया गया जब वह घर में अकेली थी - उसका पति खेत से जब घर आया तब उसने उसे घटना की जानकारी दी - नायब तहसीलदार द्वारा अभिलिखित किये गये प्रथम मृत्युकालिक कथन में उसने अपीलार्थीगण द्वारा उसे आग लगाने का कोई कारण नहीं बताया जबकि द्वितीय मृत्युकालिक कथन में उसने यह अभिकथन किया कि अपीलार्थी क्रमांक 1 उस पर बुरी नजर रखता था - किन्तु मृतिका के पति द्वारा की गई अविलम्ब रिपोर्ट में यह अभिकथित किया गया है कि जब वह खेत से लौटा उसने पाया कि घर से धुआ निकल रहा था और सब्बल की मदद से दरवाजा खोला गया एवं पाया कि मृतिका जली हुई अवस्था में बैठी थी और सिर्फ इलाज के लिए कहा - पति द्वारा पुलिस को दिये गये आरंभिक कथन/सूचना के प्रकाश में मृतिका द्वारा

दिये गये मृत्युकालिक कथन विश्वास योग्य प्रतीत नहीं होते – अपील मंजूर।

Siddarth Datt, for the appellants.

Amit Pandey, for the respondent.

J U D G M E N T

The Judgment of the court was delivered by :
RAKESH SAKSENA, J. - Appellants have filed this appeal against the judgment dated 28th July 2000, passed by Sessions Judge, Damoh, in Sessions Trial No.183/1999, convicting the appellants under Section 302 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs.500/-. In default of payment of fine, further rigorous imprisonment for six months.

2. In short the facts of the case are that Savitribai, the deceased, alongwith her husband Dunnu Ahirwar and children lived in a hut. In the adjacent house, accused/appellants, who happened to be her husband's cousin, his mother and the wife, resided. It is said that accused Kisna had an evil eye on deceased. Frequently he made indecent overtures to her, but she always discarded and abused him. On 13.6.1999, in the morning, when deceased was in her hut, her husband had gone to answer the call of nature and her children were playing outside, accused Kisna alongwith his mother Rukman and wife Gendabai reached there. Kisna and Rukmanbai caught deceased and Gendabai, after dousing her with kerosene, set fire to her with a matchstick and ran away. When her husband reached there, she narrated the incident to him, who took her to Community Health Centre, Patera for treatment and then went to police station to inform the incident. This information was recorded in general diary (Ex.P/13-C) at 9.45 am.

3. In Community Health Centre, Patera, the injuries of deceased were examined by Dr. S.N. Mewafarosh (PW-13), but in view of serious nature of injuries, she was referred for further treatment to District Hospital, Damoh. During treatment, on 12.7.1999 Savitribai died.

4. While alive, a dying declaration of deceased (Ex.P/18) was recorded by Executive Magistrate S.K. Garg (PW-14). Her statement under Section 161 Cr.P.C. (Ex.P/6) was also recorded by Head Constable Ram Kumar (PW-4).

5. On the death of deceased, an intimation was sent by the doctor to Police Station Damoh, whereupon, a Murg No.0/1999 was recorded. In

presence of witnesses, Police Damoh conducted inquest proceedings and recorded memorandum (Ex.P/3). On receiving the Murg intimation, a fresh Murg (Ex.P/14) was registered at Police Station, Patera. On the basis of dying declaration recorded by the Executive Magistrate, Investigating Officer, Virendra Bahadur (PW-15) registered the case under Section 302 of the Indian Penal Code against the accused persons. He inspected the spot, prepared spot map and seized burnt clothes of deceased. He also arrested accused persons and on their information seized a kerosene Kuppi and matchstick.

6. After completion of investigation, charge sheet was filed in the court of Judicial Magistrate First Class, Hata. The case was thereafter committed to the court of session for trial.

7. On charge under Section 302 of the India Penal Code being framed against accused persons, they abjured their guilt and pleaded false implication due to ill will on the part of deceased. According to them, deceased suffered burn injuries accidentally by fall of kerosene lamp while cooking. They also examined Badi Bahu (DW-1) and Laltabai (DW-2) in their defence.

8. The prosecution, to substantiate its case, examined as many as 17 witnesses in the court. Main witnesses viz. Dunnu (PW-6), the husband of deceased, Nonelal (PW-7), Nunni (PW-8) and other witnesses of seizure etc. did not support the prosecution case. However, learned trial judge, believing the dying declaration (Ex.P/18) recorded by Executive Magistrate (PW-14) and the police statement of deceased (Ex.P/6) recorded by Head Constable Ram Kumar (PW-4), held the accused persons guilty of commission of murder of deceased and convicted and sentenced them as aforesaid.

9. Aggrieved by their conviction and sentence appellants have filed this appeal.

10. Shri Siddharth Datt, learned counsel for the appellants, submitted that the evidence of dying declaration was not supported by the evidence of husband and other relatives of the deceased. Husband of deceased Dunnu (PW-6) did not disclose the fact of setting fire by the accused persons in the earliest report (Ex.P/13-C) tendered by him to police. Another dying declaration, the police statement of deceased (Ex.P/6), was recorded by head constable on 21.6.1999. In these circumstances, the evidence of dying declarations was not believable, but the learned trial judge misappreciated the aforesaid evidence and convicted the accused persons. On the other

hand, Shri Amit Pandey, learned Penal Lawyer for the State, submitted that the evidence of dying declarations was fully reliable. The Executive Magistrate had no reason to fabricate an incriminating dying declaration of deceased against accused persons. He justified the impugned judgment of conviction passed by the trial court.

11. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

12. It has not been disputed that Savitribai died of burn injuries in District Hospital, Damoh. Dunnu (PW-6), the husband of Savitribai, deposed that Savitribai suffered burn injuries and died in the hospital. His evidence on this point was supported by Nunni (PW-8). Head Constable Motilal (PW-10) stated that on 13.6.1999 at about 9.45 am Dunnu gave information at Police Station, Patera that his wife suffered burn injuries. This information was recorded in general diary (Ex.P/13). Dr. S.N. Mewafarosh (PW-13), Assistant Surgeon of Community Health Centre, Patera deposed that on 13.6.1999 he examined the injuries of Savitribai and found burn marks on her face, chest, abdomen, back, both hands and both legs. There were about 80% burn injuries. Smell of kerosene emanated from her body. These injuries were around four hours old and appeared to have been caused by dry flame. He recorded the injuries of Savitribai in his report (Ex.P/17) and referred to her for further treatment and admission in District Hospital, Damoh. The injury report was written and signed by him. Head Constable Krishnakant Pradhan (PW-1), on 12.7.1999 received information at Police Station, Damoh that Savitribai died in the hospital. He recorded Murg intimation. The inquest of the dead body of Savitribai was conducted by ASI Gokal Singh (PW-2) and the dead body was sent for postmortem examination. Dr. P.K. Jain (PW-12), Assistant Surgeon of District Hospital, Damoh conducted postmortem examination of the dead body of Savitribai and found deep burn marks of burn injuries on her neck, face, arms, chest, back side of trunk and both lower arms. Heeling wounds with pus were present on the body. About 60% part of the body was affected by burn injuries. The cause of death of Savitribai was shock due to secondary infection. The postmortem report (Ex.P/15) was written and signed by him.

13. From the aforesaid evidence, we find it established that deceased died out of burn injuries.

14. The next question before us is whether the trial court was justified in holding the accused persons guilty of causing death of deceased on the basis

of alleged dying declarations Ex.P/6 recorded by Head Constable Ram Kumar (PW-4) and Ex.P/18 recorded by Naib Tahsildar S.K. Garg (PW-14).

15. Learned counsel for the appellants submitted that since the aforesaid dying declarations were not corroborated by any independent evidence, trial court committed error in placing reliance on them.

16. Naib Tahsildar S.K. Garg (PW-14) stated that on 13.6.1999 at about 10.00 am he recorded the dying declaration of Savitribai who was admitted in Primary Health Centre, Patera. Before recording her statement, Dr.Mewafarosh (PW-13), who was posted in the said Health Centre, examined Savitribai and certified her to be fully conscious and fit to give her statement. He himself found Savitribai capable of speaking. Savitribai stated that accused Kisna and Bau (Rukman Bai) caught hold of her and Kisna's wife ignited her. They caught her when she was all alone in her house. Kerosene was brought by Kisna, which was poured on her by his wife. Since nobody was in the house, she herself extinguished the fire. No serious challenge has been made to this dying declaration on the ground that it was not correctly recorded or it was not made by the deceased. There was nothing on record to indicate that deceased made the aforesaid statement on being prompted by somebody else. Otherwise also, the doctor being an independent and impartial government officer, there could be no reason for him to have concocted the aforesaid dying declaration. As far as the capability of deceased of making dying declaration is concerned, admittedly she remained alive till 12.7.1999. Otherwise also, Dr.S.N.Mewafarosh (PW-13) stated that at the time of making the dying declaration deceased was in a fit condition to give statement. As such, we have no doubt that the dying declaration (Ex.P/18) recorded by Naib Tahsildar (PW-14) was genuine record of the statement made by the deceased.

17. As far as the statement of deceased (Ex.P/6) recorded under Section 161 Cr.P.C. by Head Constable Ram Kumar (PW-4) is concerned, it has been stated by Ram Kumar that when deceased was admitted in District Hospital, Damoh, he had recorded her statement on 21.6.1999. He was sent by the Station Officer of Police Station, Patera to record the said statement. His departure from the police station was recorded in general diary of the police station. At the time of making statement, deceased was in her full senses and her husband was also present. According to him, deceased stated that accused Krishna Chamar of her village used to come to catch her,

therefore, she used to abuse him. In the morning, at about 6-7 am, when her husband had gone to answer the call of nature and her children were playing outside, because of the aforesaid animus, Krishna Chamar, his mother and his wife came to her Tapariya. Krishna and his mother caught hold of her and his wife Bhagbai, after pouring kerosene, ignited her. No other house is present in the vicinity. After 10-12 minutes, when her husband came back, she narrated the incident to him, to her mother-in-law and other people. Her relations with Krishna Chamar were strained because he looked at her with covetous eyes.

18. The aforesaid statement of deceased recorded by police constable can be accepted as a dying declaration, provided it is found trustworthy. The evidence of Head Constable Ram Kumar (PW-4) finds corroboration from the evidence of Head Constable Motilal Mishra (PW-17) who stated that he made entry in general diary on 20.6.1999 about the departure of Head Constable 508 for recording the statement of injured in Crime No.57 registered under Section 307/34 IPC. The said general diary is Ex.P/25. After recording the statement of Savitribai in District Hospital, Damoh, Head Constable Ram Kumar had come back on 21.6.1999. His arrival was recorded in general diary (Ex.P/26).

19. From the above evidence there remains no doubt that Ram Kumar (PW-4) recorded the statement of deceased on 21.6.1999.

20. No doubt we technically find the aforesaid two dying declarations genuinely recorded by their authors as stated by the deceased, as they appeared not to suffer with any infirmity in recording the same, yet in view of the fact that neither the husband of deceased Dunnu (PW-6) nor any of her relatives supported the version given by her in the dying declarations, it is necessary to be critically scrutinized whether the statement made by the deceased was truthful or reasonably probable. It is all the more important since truthfulness of a statement made in a dying declaration cannot be tested by subjecting its maker to cross-examination in the court. Dunnu (PW-6) stated that at the time of occurrence his brother Kisna, his wife and mother were not present in their house. He had gone to answer the call of nature. His wife closed the doors of her room from inside. When his children shouted, he came and saw smoke coming out of the room. He pushed the doors of the room but they did not open, then he alongwith Nunni and Nona pushed open the doors and found deceased sitting in burnt condition. Her fire had already slacked off. She did not give any answer as to why she ignited herself. When she came

out of the room, he took her to Patera hospital. He then went to Police Station, Patera and made a report to police. Since this witness did not tow the line of prosecution, he was declared hostile, but his evidence, to some extent, stood corroborated by the evidence of Head Constable 213 Motilal (PW-10), who deposed that on 13.3.1999 at 9.45 am Dunnu gave an intimation at Police Station, which was recorded as R.No.367 in general diary. On perusal of this report (Ex.P/13-C) it is revealed that Dunnu informed that on hearing the cries of his children, when he, Nunni and Nona reached his house, they saw smoke coming out of thatch. The doors of the hut were closed from outside. When he pushed the doors, they did not open, then with the help of a Sabbal they opened the doors and saw his wife sitting burnt and weeping. When he asked why did she do it, she only asked for the treatment. A kerosene Dibia was also lying there. He then took her to hospital Patera and made the report to police. It is significant to note that this information was made by the husband of deceased at the earliest. Had accused persons ignited deceased, she would have definitely disclosed that to her husband. Even otherwise, it does not appear probable that deceased would not have resisted or shouted, when she was being forcibly ignited, to attract the attention of the people living in the neighbourhood. It is also suspicious that if the doors of the room in which deceased suffered burn injuries were bolted from outside why they could not be opened unless a 'Sabbal' was used to break open the doors. It gives some indication that doors were closed from inside.

21. it is also important to note that in the dying declaration (Ex.P/18) recorded by Naib Tahsildar (PW-13) deceased did not disclose as to why accused persons set fire to her whereas in her police statement (Ex.P/6) she disclosed that accused Kisna kept an evil eye on her and also made attempts to catch her. Admittedly, accused Kisna is the cousin of her husband Dunna. Though Savitribai in Ex.P/6 stated that she narrated all these facts to Dunnu immediately after the occurrence, but these facts were not disclosed by Dunnu in Rojnamcha report (Ex.P/13-C). It is also improbable that accused Rukman Bai and Gendabai, the mother and the wife of accused Kisna would help Kisna to kill deceased because she did not yield his ugly demands.

22. Other witnesses Nonelal (PW-7), Nunni (PW-8) also stated that deceased either set fire herself or suffered burn injuries accidentally by fall of kerosene lamp. Badi Bahu (DW-1) and Laltabai (DW-2) respectively the mother-in-law and daughter of the deceased also stated that deceased caught fire by the fall of kerosene lamp.

23. It is true that these witnesses are close relatives of accused persons, therefore, they might have deposed in their favour, but, at the same time, from the probabilities emerging out from the evidence of Dunnu (PW-6) and other circumstances, a suspicion is created about the truthfulness of the statement made by deceased in the aforesaid dying declarations. It has been stated by Dunnu that deceased had told to him about the frequent skirmishes between her and accused persons about water, food or any other matter. As, a motive for committing an offence may lie hidden in the heart of accused, a motive for making false accusation against an accused may remain enshrouded in the heart of a victim. Since in the above circumstances we feel not satisfied about the truthfulness of the story given out by the deceased in her dying declarations, we find ourselves unable to accept the evidence of aforesaid dying declarations worthy of reliance. We, therefore, hold that prosecution failed to establish beyond a reasonable doubt that accused/appellants set fire to deceased and caused her death.

24. Accordingly, impugned judgment of conviction and sentence of appellants under Section 302 of the Indian Penal Code is set aside. Appellants are acquitted.

25. Appellants No.1 Kisna and No.3 Gendabai, who are in jail, shall be released forthwith, if not required in any other case. Bail bond and surety bond of appellant No.2 Rukman Bai shall stand discharged.

26. Appeal allowed.

Appeal allowed.

I.L.R. [2012] M.P., 2526

APPELLATE CRIMINAL

Before Mr. Justice N.K.Gupta

Cr.A.No. 1648/2012 (Jabalpur) decided on 13 September, 2012

LAALU@BALMUKUND SHARMA

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 323 & 376, Criminal Procedure Code, 1973 (2 of 1974), Section 222- Inferior offence - Offence under Section 323 cannot be said to be inferior offence punishable under

Section 376 - Appellant could not have been convicted without framing charge under Section 323 of I.P.C. (Para 12)

दण्ड संहिता (1860 का 45), धारा 323 व 376, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 222 - निम्नतर अपराध - धारा 323 के अंतर्गत अपराध को धारा 376 के अंतर्गत दण्डनीय अपराध से निम्नतर नहीं कहा जा सकता - अपीलार्थी को भा.द.सं. की धारा 323 के अंतर्गत आरोप विरचित किये बिना दोषसिद्ध नहीं किया जा सकता था।

Aseem Dixit, for the appellant.

S.K. Kashyap, P.P. for the State/respondent.

J U D G M E N T

N.K. GUPTA, J. - The appellant has preferred this appeal against the judgment dated 25.7.2012 passed by the learned Sessions Judge, Damoh in S.T.No.372/2011, whereby the appellant was convicted for the offence punishable under section 323 of IPC and sentenced for 6 months' rigorous imprisonment with fine of Rs.1,000/-. In default of payment of fine, rigorous imprisonment for 45 days was also directed.

2. Prosecution's case, in short, is that, on 21.6.2011, the prosecutrix (P.W.3) was picking some vegetables from the field of the appellant near the village Jabera. That field was taken on lease by Halle (P.W.4), the husband of the prosecutrix. At about 12 in the noon, she went to keep the picked vegetables in a container. At that time, the appellant came to that place where she was collecting the vegetables and on finding her alone, he held her hand and threw her on the Earth and thereafter, he committed rape upon the prosecutrix. The prosecutrix went to her house at village Kheri and informed her father-in-law Mitthu (P.W.2). Her husband Halle was not at the house. He had gone to his relatives and therefore, she informed about the incident to her husband when he came back. Thereafter, she went along with her husband to the Police Station Jabera and lodged an FIR, Ex.P/2. The prosecutrix was sent for her medico legal examination. Dr. Shraddha Gangele examined her and gave a report dated 25.6.2012. No external or internal injury was found on her person but, 2 slides of her vaginal swab were prepared and handed over to the concerned police constable after sealing them. The appellant was also arrested and sent for his medical examination. Dr. Amit examined the appellant and gave his report, Ex.P/5. No abnormality was found to the appellant. Two semen slides were prepared and handed over to the police

constable after sealing them. All the sealed substances were sent to the Forensic Science Laboratory. The Forensic Science Laboratory in its report, Ex.P/9, has found that the slides of the vaginal swab of the prosecutrix as well as the slides received from the appellant contained semen and sperms. After due investigation, a charge-sheet was filed before the JMFC, Damoh, who committed the case to the Sessions Court.

3. The appellant abjured his guilt. He did not take any specific plea but, he has stated that there was a dispute between the appellant and husband of the prosecutrix relating to the accounts of agricultural income and therefore, the appellant was falsely implicated in the matter. However, no defence evidence was adduced.

4. The learned Sessions Judge, after considering the prosecution's evidence, acquitted the appellant for the offence punishable under sections 376 and 450 of IPC but, convicted him for offence punishable under section 323 of IPC and sentenced him as mentioned above.

5. I have heard the learned counsel for the parties.

6. The learned counsel for the appellant has submitted that the prosecutrix has turned hostile. She did not mention that when and where she was assaulted. No medical evidence was adduced to corroborate her version but, the appellant was convicted for the offence punishable under section 323 of IPC without any basis. No charge for an offence punishable under section 323 of IPC was framed. Neither the Apex Court nor any High Court has ever decided that the offence punishable under section 323 of IPC is an inferior offence of the same nature to the offence punishable under section 376 of IPC and therefore, the appellant was convicted for the offence without any basis and without any charge. The prosecutrix has stated in a casual manner that she was assaulted by the appellant but, no injury was found by the concerned doctor. However, the learned Sessions Judge took the offence to be a grave offence and therefore, jail sentence was directed against the appellant. It was not considered as to why he could not be released on probation or only fine could not be imposed. Under such circumstances, it is prayed in the alternate that looking at the age of the appellant, he be released on probation.

7. On the other hand, learned Public Prosecutor has submitted that the conviction and sentence passed by the trial Court appears to be correct.

8. After considering the submissions made by the learned counsel for the

parties, it is to be considered as to whether the appellant could be convicted for the offence punishable under section 323 of IPC? And if yes then, whether the sentence awarded to the appellant can be reduced?

9. The prosecutrix (P.W.3) has turned hostile. She did not support her original allegation made upon the appellant. According to the FIR, Ex.P/2, the prosecutrix had alleged that the appellant committed rape upon her but, in the Court, she turned hostile. She did not state about the rape but, she has stated in a casual manner that she was assaulted by the appellant, due to a dispute regarding the accounts of agricultural produce. Similarly, Halle (P.W.4) has stated that his wife told him about the assault, whereas, Mitthu (P.W.2), father-in-law of the prosecutrix has mentioned that the prosecutrix informed him about the rape. He did not state about the incident of assault. There is no description given in the FIR related to the assault. Under such circumstances, it appears that when Mitthu was examined, no compromise had taken place between the parties and therefore, Mitthu confirmed the initial story told by the prosecutrix. Thereafter, it appears that a compromise took place between the parties and therefore, the prosecutrix (P.W.3) and her husband Halle (P.W.4) turned hostile. In such circumstances, learned Public Prosecutor did not examine Dr. Shraddha Gangele to prove the medical report of the prosecutrix.

10. Since the statement of the witness Mitthu was not relied upon because the substantial evidence of the prosecutrix was changed and therefore, the learned Sessions Judge acquitted the appellant for the offence punishable under section 376 of IPC. The testimony of the prosecutrix relating to the assault was not at all corroborated by her father-in-law Mitthu (P.W.2), who did not turn hostile. The testimony of the prosecutrix was no where corroborated by the FIR lodged by the prosecutrix herself and therefore, the story of assault was prepared in an 'after thought' manner, which was given as an explanation, as to why the FIR was lodged by the prosecutrix. Though Dr. Shraddha Gangele was not examined but, MLC report of the prosecutrix is a prosecution's document, which could be read in the favour of the appellant. Though it was not proved but, by that report dated 25.6.2011, it is apparent that no external or internal injury was found on the person of the prosecutrix. Under such circumstances, the story of assault is not at all corroborated by the medical evidence. Under such circumstances, the story was cooked by the prosecutrix in an 'after thought' manner, which could not be relied upon. It was not proved that the appellant assaulted the prosecutrix in any manner

and therefore, the learned Sessions Judge erred in convicting the appellant for the offence punishable under section 323 of IPC.

11. The learned counsel for the appellant has submitted that the appellant was convicted for the offence punishable under section 323 of IPC, whereas no charge for that offence was framed. If the learned Sessions Judge was of the opinion that offence punishable under section 323 of IPC was made out then, it was for him to frame a fresh charge in the case and the opportunity of cross-examination was to be given to the appellant upon the prosecutrix and her husband. The learned counsel for the appellant did not cross-examine the witness Halle and his wife on this count because there was no charge of that offence. There is no instance mentioned in the judgments/orders passed by Hon'ble the Apex Court or any Hon'ble High Court of the country which discuss that the offence punishable under section 323 of IPC is an inferior offence of the same nature, as of offence punishable under section 376 of IPC and therefore, the appellant could not be convicted for the offence punishable under section 323 of IPC without any charge.

12. The contention of the learned counsel for the appellant appears to be acceptable. The learned Sessions Judge quoted illustration (i) of section 220, in which it is illustrated that for a particular incident, charges of offence punishable under section 352 and 323 of IPC can be framed but, in that illustration, it is no where mentioned that any conviction can be drawn without framing of the charge. According to the provisions of section 222 of the IPC, if a charge of superior offence of the same nature is framed then, the accused can be convicted for the inferior offence of the same nature. If charge of offence punishable under section 376 of IPC is framed then, accused can be convicted for the offence punishable under sections 376 read with section 511, 354 or 352 of IPC. If a person commits rape with a woman then, it cannot be said that he intended to cause hurt voluntarily to the prosecutrix and therefore, the ambit of offence punishable under section 376 of IPC and that of the offence punishable under section 323 of IPC are different. For the offence punishable under section 376 of IPC, it is no where established that the accused intended to cause hurt to the prosecutrix voluntarily. Under such circumstances, it cannot be said that offence punishable under section 323 of IPC is an inferior offence of the same nature to the offence punishable under section 376 of IPC and therefore, the provisions of section 222 of IPC were not applicable in the present case. The appellant could not be convicted for the offence punishable under section 323 of IPC under the charge of offence

punishable under section 376 of IPC without framing the charge.

13. Moreover, the charges for the offence punishable under section 376 of IPC were framed for the incident which took place on 21.6.2011 at about 12 O'Clock, whereas the prosecutrix has not stated that the alleged incident of assault took place on the same day and same time. She has stated about the assault in a vague manner and therefore, it is not at all clear that the incident of assault took place on the same day and the same time and therefore, it was for the trial Court to ascertain the date and time of the assault to frame a separate charge of that offence, which was a separate offence. Under such circumstances, the learned Sessions Judge has erred in convicting the appellant for the offence punishable under section 323 of IPC without framing of the charge for that offence.

14. Since the appellant cannot be convicted for the offence punishable under section 323 of IPC, therefore, it is not necessary to discuss about the sentence directed by the trial Court. However, approach taken by the learned Sessions Judge appears to be incorrect and therefore, it would be proper to discuss about the sentence imposed by the trial Court. According to the story given by the prosecutrix, if the statement of the prosecutrix is accepted as such then, it was apparent that the appellant did not use any weapon to assault the prosecutrix. No external injury was found to the prosecutrix in her medico legal examination and therefore, it was possible that the appellant could have given some slaps to the prosecutrix. The appellant was admittedly 26 to 27 years of age at the time of the incident, who was the first offender and then, looking at his overt-act, he could be released on probation. The learned Sessions Judge did not discuss as to why the appellant was not released on probation. Similarly, looking at the overt-act of the appellant, a small fine could be imposed upon the appellant but, no reason was mentioned by the learned Sessions Judge as to why a severe sentence like 6 months' rigorous imprisonment and maximum fine of Rs.1,000/- was imposed for the offence punishable under section 323 of IPC. It is awful to see that the learned Sessions Judge quoted 4 judgments of Hon'ble the Apex Court as well as of Hon'ble High Courts in support of the sentence drawn against the appellant but, he quoted all the judgments relating to section 354 of IPC. Not a single judgment was quoted which was related to the offence punishable under section 323 of IPC. It appears that the learned Sessions Judge was bent upon sending the appellant behind bars, though the prosecutrix has turned hostile in the case.

15. If some accused is convicted in a wrongful manner then, such accused

has to file an appeal against that judgment and if sentence directed by the trial Court is suspended then, the appellant is required to appear before the Registry of the High Court or before the trial Court or before the CJM of the concerned Sessions Division, till the disposal of the appeal and it is a hardship for a person to face the trial and appeal unnecessarily for so many years without his fault and therefore, the imposition of such type of baseless convictions and harsh sentences without any basis should be strictly discouraged.

16. On the basis of the aforesaid discussion, it is apparent that no offence punishable under section 323 of IPC is made out against the appellant and therefore, the appeal filed by the appellant appears to be acceptable and consequently, it is hereby accepted. Conviction as well as sentence directed by the trial Court for the offence punishable under section 323 of IPC is hereby set aside. The appellant is acquitted for the offence punishable under section 323 of IPC. He would be entitled to get the fine amount back from the trial Court.

17. At present, the appellant is on bail. His presence is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged.

18. Copy of the judgment be sent to the trial Court along with its record for information and compliance.

19. Comments given by the learned Presiding Officer shall be considered separately on the administrative side.

Order accordingly.

I.L.R. [2012] M.P., 2532

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saxena & Mr. Justice T.K. Kaushal

Cr. A.No. 449/2002 (Jabalpur) decided on 20 September, 2012

MAHADEV ALIAS JHADHA & ors.

...Appellants

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 302 or 304 Part I - Culpable Homicide not amounting to murder - Accused persons tried to collect Mahua forcibly despite the resistance offered by deceased - Evidence

also shows that some of the accused persons carried the deceased to Police Station - However, as they caused multiple serious injuries to the deceased by sticks, it can be inferred that they either intended to cause death or to cause such bodily injuries to deceased as were likely to cause his death - Conviction altered to 304 Part I and sentenced to R.I. for 10 years - Appeal partly allowed. (Para 18 & 19)

दण्ड संहिता (1860 का 45), धारा 302 या 304 भाग- I - हत्या की कोटि में न आने वाला आपराधिक मानव वध - अभियुक्त व्यक्तियों ने मृतक द्वारा विरोध किये जाने के बावजूद बलपूर्वक महुआ एकत्रित करने का प्रयास किया - साक्ष्य भी दर्शाता है कि कुछ अभियुक्तगण मृतक को पुलिस थाने ले गये - चूंकि उन्होंने मृतक को लाठियों से कई गंभीर क्षतियों कारित की, यह निष्कर्ष निकाला जा सकता है कि उनका आशय या तो मृतक की मृत्यु कारित करना या उसे ऐसी शारीरिक क्षति कारित करना था जिससे उसकी मृत्यु संभावित थी - दोषसिद्धि 304 भाग I में परिवर्तित की गयी और 10 वर्ष के सश्रम कारावास से दण्डादिष्ट किया गया - अपील अंशतः मंजूर।

V.K.Lakhera, for the appellants.

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.** - Since both the aforesaid appeals arise out of the common impugned judgment, this judgment shall govern the disposal of both the appeals.

2. Appellants have filed the above appeals challenging the judgment dated 22.01.2002 passed by Special Judge and Additional Sessions Judge, Shahdol in Sessions Trial No.161/2000 convicting them under sections 148 and 302/149 of the Indian Penal Code and sentencing them to rigorous imprisonment for 2 years and imprisonment for life with fine of Rs.1000/- on each count, respectively.

3. In short, the prosecution case is that in village Bargawan a Mahua tree was growing on the land of Manglu Gond, the deceased. Manglu Gond and his daughter Duasiya resided in a hut near the said tree. Accused/appellants used to collect Mahua from the said tree, but that was objected by deceased. A day before the incident, which occurred on 14.3.2000, when accused

persons went to collect Mahua, Manglu made them to go away. Feeling aggrieved and annoyed, on 14.3.2000 at about 7:00 a.m. when they again reached there to collect Mahua, there occurred an altercation. Accused persons then assaulted Manglu with sticks, tangi and farsa, as a result of which Manglu sustained injuries and fell unconscious. It is said that accused persons tied his hands and legs with a rope and took him towards village. Sarpanch Ramdeen, Kotwar Lallaram (PW-2) and Duasiya (PW-6) carried Manglu to police station, Jaitpur where Manglu lodged report Ex.P/14. He was then sent to Primary Health Centre, Jaitpur for medical examination and treatment.

4. Dr. R.K.Verma (PW-5) at about 1:15 p.m. examined Manglu and found nine injuries on his body. He recorded injuries in MLC report Ex.P/7. Since he found serious injuries, he referred Manglu for further treatment and X-ray examination to district hospital, Shahdol. In the meanwhile, ASI Pradeep Dwivedi (PW-10) requisitioned Tehsildar, Jaitpur for recording dying declaration of Manglu. At 1:40 p.m. Tehsildar R.S.Pandey (PW-1) recorded dying declaration Ex.P/15 of Manglu in presence of Dr. R.K.Verma (PW-5). While Manglu was being shifted to district hospital, Shahdol, near village Madsa, at about 3:00 p.m., he succumbed to his injuries. His dead body was alighted from the bus and the intimation of his death was given to police station, Jaitpur by Munnilal Sahu. A marg 7/2000 Ex.P/5 was recorded at police station, Jaitpur. After conducting inquest, investigating officer Pradeep Dwivedi (PW-10) recorded the inquest memorandum Ex.P/4 and sent the dead body for postmortem examination to P.H.C. Jaitpur.

5. Dr. Rajesh Mithoria (PW-8) on 15.3.2000 conducted autopsy and submitted postmortem report Ex.P/12. He found serious injuries on the body of deceased including fractures of 6th, 7th, 8th & 9th ribs of left side. In his opinion, the death of deceased was caused due to shock because of excessive haemorrhage. After investigation, charge sheet was filed and the case was committed to the Court of Sessions for trial.

6. On charges being framed, accused persons abjured their guilt and pleaded false implication. According to them, five amongst them had taken deceased to police station along with his daughter duasiya. They also examined witness Lalla (DW-1) in their defence.

7. Relying mainly on the evidence of witness Duasiya (PW-6), the evidence of dying declarations Ex.P/1, Ex.P/14, Ex.P/15 and the medical evidence, learned trial Judge held the appellants guilty and convicted and

sentenced them as stated above. Aggrieved by their conviction, appellants have filed these appeals.

8. Shri V.K.Lakhera, learned counsel for the appellants, submitted that the evidence of sole eyewitness Duasiya (PW-6), who happened to be the daughter of deceased, was not reliable. Her presence at the spot was doubtful. Learned trial Judge erred in believing the evidence of dying declaration Ex.P/1 recorded by Tehsildar as well as first information report Ex.P/14 and statement of deceased (Ex.P/15) recorded by police during investigation as dying declarations. In the alternative, learned counsel submitted that since the incident occurred suddenly upon a quarrel between accused persons and the deceased when deceased did not let them collect Mahua, the conviction of appellants under section 302 of the Indian Penal Code was not justified, at the most, offence of accused persons could have been under section 304 Part I or II of the Indian Penal Code. On the other hand, Shri Amit Pandey, Panel Lawyer for the State, submitted that the evidence adduced by the prosecution was reliable. It was amply established that appellants, after forming an unlawful assembly, committed murder of deceased, therefore, there was no ground to call for interference in the impugned judgment of conviction.

9. We have heard the learned counsel for the parties, perused the impugned judgment and the evidence on record carefully.

10. It has not been disputed from the side of accused persons that deceased died a homicidal death. From the evidence of eyewitnesses Duasiya (PW-6), village Kotwar Lallaram (PW-2), investigating officer Pradeep Dwivedi (PW-10), the first information report Ex.P/14 lodged by deceased and the dying declaration Ex.P/1 recorded by Tehsildar R.S.Pandey (PW-1), it stood established that accused/appellants caused injuries to deceased. Dr. R.K.Verma (PW-5), who examined the injuries of deceased, found nine injuries on his body viz. (i) Bruise 6 x 2½ inch on back of right side of chest; (ii) contusion on left eyelid; (iii) contusion on upper eyelid of right eye; (iv) Abrasion on right side of forehead above right eyebrow; (v) diffused swelling on front of right sole with skin deep abrasion; (vi) lacerated wound 1 x 1/2cm on little finger of right foot; (vii) incised wound ½ x 1/4cm on right calf; (viii) swelling with abrasion on left calf and (ix) swelling on both palms. Except 7th injury which was caused by some sharp and pointed object, other injuries were caused by hard and blunt object. MLC report Ex.P/7 was written and signed by him. When deceased expired, postmortem examination of his body

was conducted by Dr. Rajesh Mithoria (PW-8) who also found same injuries on the body of deceased. On internal examination of the body, he found 6th, 7th, 8th & 9th ribs of left side of deceased fractured. There was laceration of left lung which had resulted in shifting of middle and lower lobe of lung. According to him, these injuries were caused to deceased by some hard and blunt object. He, however, stated that cavity found in left apex part of the left lung of deceased was probably caused by tuberculosis. The cause of death of deceased was shock due to excessive haemorrhage because of fracture of ribs. He had written and signed the postmortem report Ex.P/12. From the evidence of these witnesses, we find it established that deceased died due to injuries found on his body and that his death was homicidal in nature.

11. Now the question before us is whether accused/appellants caused injuries to deceased which resulted into his death ?

12. Prosecution examined Duasiya (PW-6) and Pawan Singh (PW-9) as eyewitnesses of the incident. Pawan did not support the prosecution case; he was declared hostile. As far as Duasiya (PW-6) is concerned, she was the daughter of deceased. She was a young girl of about 13-14 years of age. She stated that she knew all the accused persons. Accused persons used to pick up Mahua from her field. On the day of occurrence, at about 8-9 o'clock in the morning when she was in her hut and her father Manglu was collecting Mahua, accused Balkaran, Dhodha, Jakla, Ramcharan and Lala reached there armed with lathi and tangi and assaulted Manglu. She stated that accused Dobaha alias Sukhsen was not amongst them. Due to injuries when Manglu fell down unconscious, accused persons tied him with a rope and carried him to the door of Sarpanch Ramdeen. She saw incident from some distance. Since Sarpanch was not at his house it took about an hour for his coming. Thereafter accused Dhoddha and Lala took Manglu to Jaitpur police station where Manglu lodged the report. Thereafter Manglu was taken to Jaitpur hospital. While he was being taken to Shahdol hospital he expired on way. This witness was subjected to a lengthy cross-examination. Learned counsel for the appellants pointed out some omissions in her statement, but on perusal of Ex.D/1, her police statement, we find that it was merely the manner of her narrating the incident, which was different, else, substantially her evidence was intact. There appeared no reason for this witness to speak false against the accused persons. She frankly stated that accused Dobaha alias Sukhsen was not present in the incident. She also admitted that number of persons had assembled at the house of Sarpanch and on asking of Sarpanch, accused

Balkaran, Dhodha, Ramcharan, Lala and Jakla had carried deceased to Jaitpur. She also had gone to Jaitpur. Though PW-6, in her cross-examination, stated that in the police station, she lodged the report and her father put thumb impression on it and that her father was feeling difficulty in speaking, but in the same breath, she stated that police inspector after recording the statement of deceased, asked him to be taken to hospital immediately as his condition was serious. Evidence of Duasiya (PW-6), after a careful scrutiny, appears to us trustworthy. However, from her evidence, the presence and participation of accused Dobaha alias Sukhsen in the incident becomes doubtful.

13. As far as evidence of dying declaration Ex.P/1 recorded by Tehsildar R.S.Pandey (PW-1), learned counsel for the appellants submitted that it was suspicious because the condition of deceased was serious and he was throughout unconscious. Tehsildar R.S.Pandey categorically stated that on a requisition of police station Jaitpur on 14.3.2000 he went to record dying declaration of Manglu in Government hospital, Jaitpur. He obtained certificate about the fitness of Manglu from Doctor and then at 1:30 p.m. recorded dying declaration Ex.P/1. Manglu stated that in the morning at about 7 O'clock while he was sitting beneath Mahua tree, Balkaran, Dhoddha, Jhaudha, Sukhsen, Ramcharan and Lala came and assaulted him with lathi, danda, farsa and tangi. He suffered injuries all over his body. Since he did not permit them to collect Mahua which they wanted to collect forcibly, they assaulted him. He became unconscious for sometime, but regained consciousness on way. Though in the statement of this witness name of accused Jakala alias Rajbahore was not indicated, but on perusal of Ex.P/1 his name was found mentioned. He obtained thumb impression of Manglu. PW-1 stated that since there was no bed in the hospital, he recorded the statement of Manglu while lying on the floor. There were injuries all over his body. He himself had asked Manglu whether he could give his statement whereupon Manglu replied in affirmative. He recorded his statement in Ex.P/1 as narrated by him. He was fully conscious. PW-1 denied the suggestion that Manglu was not alive. No serious challenge was made to the statement of this witness in the cross-examination, otherwise also there appeared no reason why a Tehsildar, an independent Government officer, would record a false dying declaration particularly when he had no animus against accused persons.

14. The aforesaid dying declaration Ex.P/1 finds corroboration from the evidence of Dr.R.K.Verma (PW-5), who certified that deceased was fully conscious when he gave his statement Ex.P/1, from the first information report

Ex.P/14 recorded by inspector Pradeep Dwivedi (PW-10) and also from the statement of deceased (Ex.P/15) recorded by PW-10 under section 161 of Cr.P.C. Since Ex.P/14 and Ex.P/15 were recorded on the basis of information given by deceased immediately before his death, undisputedly they were relevant and admissible as dying declarations under section 32 of the Indian Evidence Act. In these statements, deceased named all the accused persons and said that they assaulted him with *lathi*, *farsa* and *tangi* and carried him after tying with a rope towards the village. Sarpanch Ramdeen, Kotwar Lallaram and his daughter Duasiya brought them to police station. We are unable to accept the argument advanced by learned counsel for the appellants that the statement in the F.I.R. Ex.P/14 was recorded on the basis of information given by Duasiya and not by deceased. No doubt Duasiya (PW-6) stated that first information report was recorded on her information, but as we have already discussed it was under confusion as she clearly stated that statement of deceased was recorded at police station. But in view of the categorical statement of Duasiya (PW-6) that accused Dobaha alias Sukhsen was not present in the incident, we feel doubt about his presence and participation in the incident.

15. Investigating Officer Pradeep Dwivedi (PW-10) deposed that on 14.3.2000 while he was posted as A.S.I. at police station, Jaitpur, he recorded first information report Ex.P/14 on the basis of information given by Manglu Singh. Ramdeen Sarpanch, Lalla and Duasiya had also come with Manglu. After recording the report, he immediately sent Manglu to Jaitpur hospital and also sent a requisition to Tehsildar for recording his dying declaration. On the same day, he also went to hospital and recorded statement Ex.P/15 of Manglu. First Information Report Ex.P/14 and the statement Ex.P/15 were recorded as stated by Manglu. He firmly denied that report Ex.P/14 was not lodged by deceased. He had sent a copy of report to Magistrate and obtained receipt Ex.P/18. Absolutely no accusation has been levelled against PW-10 that he recorded false F.I.R. or statement because of any illwill or animus.

16. After a careful scrutiny of the evidence of eyewitness Duasiya (PW-6), evidence of dying declaration Ex.P/1 recorded by Tehsildar (PW-1), First Information Report Ex.P/14 and the police statement Ex.P/15, we find them truthful and trustworthy. From the statement of deceased made in F.I.R. Ex.P/14 and also from the evidence of Duasiya (PW-6), it is revealed that accused persons entertained grudge against deceased because he did not permit them to collect Mahua from the tree. Thus, in our opinion, it has been established

beyond a reasonable doubt that accused/appellants, except appellant Sukhsen alias Dobaha, after forming an unlawful assembly, went to collect Mahua and on being objected by deceased, assaulted him with weapons and thereby caused his death.

17. Learned counsel for the appellants next submitted that in the facts and circumstances of the case, the conviction of appellants under section 302/149 I.P.C. was not justified since the incident occurred suddenly without any premeditation on the part of appellants.

18. Duasiya (PW-6) admitted that tree of Mahua belonged to Government. Accused Ramcharan and other persons collected Mahua from there and did not let other persons collect it. If anybody else collected Mahua they used to snatch away. Since a long time she saw accused Balkaran and others collecting Mahua. She also admitted that because Balkaran and others did not permit them to take Mahua she felt aggrieved. Lallaram (PW-2) stated that tree of Mahua was standing between Bharua and Bhargawan. It was a Government land and accused persons used to collect Mahua from the tree. Though deceased in his statements Ex.P/14 and Ex.P/15 stated that the land on which Mahua tree was standing belonged to him, but it appears doubtful that Mahua tree was of his possession or ownership. It was clearly reflected from the dying declaration Ex.P/1 recorded by Tehsildar and the first information report that on the day of occurrence when accused persons came to collect Mahua he prevented them, therefore, they opened assault on him. It appears that when accused persons tried to collect Mahua forcibly, despite the resistance offered by deceased, the incident occurred suddenly. In these circumstances, the possibility of eruption of a sudden quarrel cannot be ruled out. It is also significant to note that Duasiya Bai admitted that from the house of Sarpanch accused Dhoddha and Lala carried deceased to Jaitpur. Lallaram (PW-2) too stated that Lala, Dhodha alias Shivkaran and Sukhsen also went to police station with deceased. This conduct of accused persons gives some measure of indication again that they did not intend to commit murder of deceased, but since they assaulted deceased with sticks and caused number of serious injuries on his body which were sufficient to cause his death, it can be inferred that they either intended to cause death or to cause such bodily injuries to deceased as were likely to cause his death, making them liable to be convicted under section 304 Part-(I) I.P.C.

19. For the reasons stated hereinabove, we are of the opinion that prosecution failed to establish beyond doubt that appellant No.2 Sukhsen

alias Dobaha of Criminal Appeal No.449/2002 participated in commission of offence. Accordingly, his conviction on all the charges is set aside. He is acquitted. The conviction and sentence of accused/appellants No.1 Mahadev alias Jhadha, No.3 Rajbahore alias Jakala and No.4 Ramcharan alias Jugaha of Criminal Appeal No.449/2002 and appellants No.1 Balkaran, No.2 Dhodha alias Shivkaran, No.3 Lala Singh of Criminal Appeal No.1166/2009 under section 302/149 I.P.C. is set aside, instead they are convicted under section 304 Part-I/149 I.P.C. and sentenced to R.I. for 10 years. Their conviction and sentence under section 148 I.P.C. is affirmed. Except appellant Mahadev alias Jhadha, other appellants are reported to be in jail since the year 2000. If they have served out their sentences, they be released if not required in any case.

20. Appeals partly allowed.

A copy of this judgment be kept in the record of Criminal Appeal No.1166/2009.

Appeal partly allowed.

I.L.R. [2012] M.P., 2540

APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saxena & Mr. Justice T.K.Kaushal

Cr.A.No. 2091/2005 (Jabalpur) decided on 24 September, 2012

MAJOR SINGH & anr.

...Appellants

Vs.

STATE OF M.P.

...Respondent

A. Evidence Act (1 of 1872), Section 154 - Hostile Witness - Evidence of a hostile witness would not be totally rejected if spoken in favor of the prosecution or the accused, but it can be subjected to a close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. (Para 11)

क. साक्ष्य अधिनियम (1872 का 1), धारा 154 - पक्षद्रोही साक्षी - पक्षद्रोही साक्षी की साक्ष्य को पूर्णतः खारिज नहीं किया जा सकता यदि अभियोजन या अभियुक्त के पक्ष में बोलता है, किंतु यह सूक्ष्म परीक्षण का विषय है और साक्ष्य का वह भाग जो अभियोजन या बचाव के प्रकरण के अनुरूप हो स्वीकार किया जा सकता है।

B. Evidence Act (1 of 1872), Section 3 - Witness - Tutored -
Even if a part of deposition of a witness can be treated to be tutored,
remaining part if inspires confidence can be believed at least taken
into consideration for the purpose of corroboration. (Para 12)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्षी - पढ़ाया हुआ -
यदि साक्षी के कथन का कोई भाग पढ़ाया हुआ माना भी जाये तब भी शेष भाग जो
विश्वास उत्पन्न करता हो उसे कम से कम पुष्टिकरण हेतु विचार में लिया जाना
चाहिए।

C. Evidence Act (1 of 1872), Section 3 - Witness -
Exaggerations or improvements - Exaggerations or improvements per
se donot render the evidence brittle - It can be one of the factors to
test credibility of the prosecution version - Irrelevant details which
donot in any way corrode the credibility of a witness cannot be labelled
as omissions or contradictions. (Para 14)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 3 - साक्षी - अतिशयोक्ति या
परिवर्तन - अतिशयोक्ति या परिवर्तन स्वयं ही साक्ष्य मंजूर करने में सहायता नहीं
करता - अभियोजन कथा की विश्वसनीयता के परीक्षण का एक कारक हो सकता
है - असंगत विवरण जो किसी भी प्रकार से साक्षी की विश्वसनीयता को कमजोर
नहीं करते उन्हें लोप या विरोधाभास नहीं कहा जा सकता।

D. Penal Code (45 of 1860), Section 302 - Murder - Evidence
of eye witnesses inspire confidence - Sharp edged weapons were also
recovered at the instances of the appellants - Oral Evidence
corroborates the Medical Evidence as 10 incised wounds were found -
Fatal injuries were also caused on the vital part of the body of the
deceased - Appellants had intended to commit the murder of deceased
-Appeal dismissed. (Para 17)

घ. दण्ड संहिता (1860 का 45), धारा 302 - हत्या - प्रत्यक्षदर्शी
साक्षियों का साक्ष्य विश्वास उत्पन्न करता है - अपीलार्थीगण की निशानदेही पर
धारदार शस्त्रों को भी बरामद किया गया - मौखिक साक्ष्य से चिकित्सीय साक्ष्य की
पुष्टि होती है कि 10 कटे घाव पाये गये थे - मृतक के शरीर के कोमलांगों पर
भी घातक क्षतियां कारित की गई - अपीलार्थीगण का आशय मृतक की हत्या कारित
करना था - अपील खारिज।

Cases referred :

(1996) 10 SCC 360, (2006) 13 SCC 516, AIR 2009 SC 152, AIR 2009 SC 331, (2009) 11 SCC 334, (2010) 13 SCC 657, (2010) 4 SCC 324, AIR 2011SC 280, (2011) 6 SCC 279.

S.C. Datt with Siddarth Datt, for the appellants.

Umesh Pandey, G.A. for the State.

J U D G M E N T

The Judgment of the court was delivered by :
RAKESH SAKSENA, J. - Since both the aforesaid appeals arise out of the common impugned judgment of conviction, this judgment shall govern the disposal of both the appeals.

Appellants have filed this appeal against the judgment dated 30th September, 2005, passed by Additional Sessions Judge, Sohagpur District Hoshangabad in Sessions Trial No. 84/99, convicting the appellants under Sections 302/149 and 148 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs. 500/- and rigorous imprisonment for two years with fine of Rs. 100/-, on each count respectively. Both the sentences are to run concurrently.

2. The prosecution case in brief is that on 13.1.1999, at about 7.55 A.M., Halke Bhaiya (PW6) lodged report at police station, Pipariya that when he was at his betel shop, at about 7 P.M. Sakun Bai, the mother of Mukesh Sarathe came shouting that Mongia people were assaulting Mukesh and sought his help. He along with Virendra Singh (PW7) and Naval Kishore (PW2) rushed to the house of Mukesh and saw accused persons assaulting him. Accused Chatru and Major were armed with swords and rest of other accused were armed with bakka. As soon as he reached there, accused persons ran away. There were bleeding injuries on the body of Mukesh. They carried Mukesh to hospital, but doctor declared him dead. According to him, Mukesh told to him that accused persons assaulted him because of a case pertaining to a girl.

3. Station Officer R.P.Kusmakar (PW8) recorded First Information Report Ex. P/12 under Sections 147, 148 and 302/149 of the Indian Penal Code and also registered merg Ex. P/15. After recording inquest memorandum Ex. P/7 before the witnesses, he sent the body of Mukesh for postmortem

examination to Community Health Centre, Pipariya. Dr. A.K.Agrawal (PW1) conducted postmortem examination and found number of incised injuries on the body of deceased. He recorded the injuries of deceased in his postmortem examination report Ex. P/1.

4. After arresting the accused persons, Investigating Officer recovered weapons of offences from accused persons and sent them to F.S.L. for chemical examination. On completion of the investigation, he filed charge sheet in the Court of Judicial Magistrate First Class, Pipariya, who then committed the case for trial.

5. On charges being framed, accused persons abjured their guilt and pleaded false implication. According to them, deceased himself was a criminal.

6. Prosecution, to substantiate its case examined Naval Kishore (PW2), Sakun Bai (PW3), Kamlesh (PW4), Halke Bhaiya (PW6) and Virendra Singh (PW7) as eye witnesses of the occurrence and Dr. A.K.Agrawal (PW1) as a medical witness. Kamlesh, Virendra Singh and Halke Bhaiya did not support the prosecution version so they were declared hostile. However, relying mainly on the evidence of Naval Kishore (PW2) and Sakun Bai (PW3), and finding it corroborated by the medical evidence and the F.S.L. report learned trial Judge held the appellants guilty, convicted and sentenced them as aforementioned.

7. Shri S.C.Datt, learned senior counsel and Shri A.D.Mishra, learned counsel for the appellants submitted that the evidence of eye witnesses viz. Naval Kishore (PW2) and Sakun Bai (PW3) was inconsistent, discrepant and contradictory, therefore, not reliable. These witnesses were also declared hostile on some aspects. None of these witnesses saw whole of the incident, therefore, learned trial Judge committed error in relying on their evidence. On the other hand, Shri Umesh Pandey, learned Govt. Advocate for the State submitted that the evidence adduced by the prosecution was fully reliable. The evidence of aforesaid eye witnesses could not have been discarded merely on the ground of minor discrepancies and inconsistencies. Their evidence was natural and convincing. It stood corroborated by the medical evidence as well as by the recovery of weapons effected at the instance of accused persons. He justified the finding of conviction of appellants recorded by the trial Court in the impugned judgment.

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 deceased died of a homicidal death. Naval Kishore (PW2) and Sakun Bai (PW3) categorically stated that accused persons assaulted deceased with sharp edged weapons. Kamlesh (PW4), Halke Bhaiya (PW6) and Virendra Singh (PW7) stated that they saw deceased lying in the injured condition. There were injuries all over his body. Virendra Singh (PW7) stated that he and Halke Bhaiya (PW6) went to police station, Pipariya and lodged the report. Thereafter, they carried him to Govt. Hospital, Pipariya. After the death of deceased, Investigating Officer before Kamlesh and Halke Bhaiya recorded inquest memorandum Ex. P/7 and sent the dead body for postmortem examination. Dr. A.K.Agrawal (PW1) performed the postmortem examination and found following injuries on the body of deceased:

- (i) Incised wound on left parietal bone obliquely directed downward and backward 8 x 2 x 2 cm deep up to bone. Margins clean cut.
- (ii) Incised wound over left parietal bone and temporal bone behind and above ear 5 x 2 x 2.5 cm deep. Bones are cut.
- (iii) Two incised wounds over left arm outer side 3 x 2 x 1 cm and 2 x 1 x 1 cm. Fracture of left humerus bone.
- (iv) Incised wound over right hand between index and middle finger through and through 6 x 2 x 2 cm.
- (v) Three incised wounds on right forearm 7 x 2 x 2 cm, 6 x 3 x 3 cm and 3 x 2 x 2 cm. Radius on ulna bones of left forearm were fractured.
- (vi) Incised wound on right elbow 5 x 3 x 3 cm. Upper olecranon process of right radius bone cut.
- (vii) Incised wound on left knee 1 x 1 x 1/2 cm.
- (viii) Incised wound on right leg 2 x 1 x 1 cm &
- (iv) Incised wound on right foot 1 x 1/2 x 1/2 cm.

All the aforesaid injuries were caused by sharp edged weapons. On internal examination, Dr. A.K.Agrawal found laceration of left hemisphere

and left temporal lobe of brain. Blood was present in upper and lower meninges. In his opinion, the cause of death was shock caused by injuries to vital organ brain and hemorrhage (Internal and External) from injuries. Death was homicidal in nature. Postmortem examination report Ex. P/1 was written and signed by him.

10. From the evidence of aforesaid witnesses, we find it established that deceased died due to injuries caused to him and his death was homicidal in nature.

11. The next question before us is whether appellants caused the death of deceased. Prosecution examined Naval Kishore (PW2), Sakun Bai (PW3), Kamlesh (PW4), Halke Bhaiya (PW6) and Virendra Singh (PW7) as eye witnesses. Out of these witnesses, Kamlesh, Halke Bhaiya and Virendra Singh resiled from their earlier versions and did not support the prosecution case. They were declared hostile. As far as Naval Kishore (PW2) and Sakun Bai (PW3) is concerned, on some points they were also declared hostile, but they, in substance deposed against the accused persons. It is well settled that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to a close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted (*State of U.P. Vs. Ramesh Prasad Misra and another*- (1996) 10 SCC 360).

12. Naval Kishore (PW2) stated that at about 7 P.M., when he was with Halke Bhaiya, the mother of deceased came running and shouting that Mongia people were assaulting Mukesh. When he, Virendra and Halke Bhaiya rushed to the spot they saw accused persons assaulting Mukesh with bakka and sword. This witness could not say as to which accused was armed with which weapon or which accused was wearing which clothes. He also could not point out that which accused was standing at what place. He, however, denied to have stated in the police statement Ex. P/4 that accused Phullu, Hakam, Gunchi and Ganesh had bakka and Chatru and Major had swords in their hands. This contradiction, in our opinion, does not militate against the credibility of this witness. He deposed that they reached the spot first, the mother of deceased reached behind them. They saw deceased lying on the ground and that as soon as they reached and Halke Bhaiya shouted accused persons took to their heels. He along with Halke Bhaiya carried Mukesh to hospital, but later he came to know that he died. Naval Kishore (PW2)

admitted that number of criminal cases were proceeding against deceased. He was facing the cases of violence and rape also and many people were his enemies. Learned counsel for the appellants submitted that this witness admitted that Munshi of the Court made him to understand as to how he had to depose in the Court, therefore, the evidence of this witness was not reliable. On perusal of the evidence of PW-2, it appears that he gave evidence in a natural manner. There appeared some minor contradictions from his police statement, but they, in our opinion, added to his trustworthiness. Examination-in-chief of this witness was recorded on 10.2.2000, but on the request of learned counsel for the accused, cross examination of witness was deferred. The witness was then cross examined on 25.6.2003 i.e. after about three years of his chief examination. In these circumstances, witness admitted that he was read over the statement given by him in the Court earlier. In our opinion, this admission further reveals the simplicity and innocence of witness. He cannot be branded as a tutored witness. The Apex Court in case of *Gagan Kanojia and another Vs. State of Punjab*- (2006) 13 SCC 516 observed that even if a part of deposition of a witness can be treated to be tutored, remaining part, if inspires confidence, can be believed or at least taken into consideration for the purpose of corroboration. Naval Kishore (PW2) stated that on way when they were taking Mukesh, he told that he was assaulted because of the enmity developed by the rape of daughter of accused Phullu. He, Halke Bhaiya and Virendra had gone to police station for lodging the report.

13. Sakun Bai (PW3), the mother of deceased stated that at the time of occurrence Mukesh was sitting at platform outside the gate of her house. She was cooking in the inner room. When she heard noise, she went out and saw accused persons assaulting Mukesh with ballam and farsa. As soon as she saw her son being assaulted, she rushed to call Halke Bhaiya, Naval Kishore and Virendra Singh. When they came and shouted accused persons ran away. While assaulting accused Phullu was telling that he will not let Mukesh live because he enticed his daughter. About two months before the occurrence, the daughter of Phullu had eloped with Mukesh. She reiterated story as given by Naval Kishore (PW2). This witness was declared hostile probably because she stated that at the time of occurrence she was cooking food inside the house, whereas in her police statement Ex. P/5, she stated that she was sitting with Mukesh in front of the house. This contradiction, in our opinion, is not of much substance. It is true that she stated that accused persons wielded ballam

and farsa, whereas in her police statement, she stated that accused persons were armed with bakka and swords. This discrepancy also, in our opinion, does not render the evidence of this witness altogether unreliable, since Sakun Bai (PW3) happened to be a rustic village woman who witnessed the incident of brutal murder of her son. Her evidence stood substantially corroborated from the evidence of Naval Kishore (PW2). Learned counsel for the appellants took us through the entire evidence of Sakun Bai (PW3) and pointed out some discrepancies. She, at one place was confronted with her police statement that she and her son Kamlesh, out of fear, had closed the doors of their house and subsequently Halke Bahiya told to her that Mukesh had died. This statement of PW3 does not appear to us unnatural. It is possible that after seeing assault on her son by the accused persons she or Kamlesh might have shut the doors for some time. The place of incident was in front of the house of PW3, therefore, her presence at the spot was natural. If, in bonafide manner this witness stated that she came out of the house after hearing the noise, it cannot be held that she did not witness the incident or did not call Naval Kishore (PW2) and others for help. The improvements or the omissions as pointed out by learned counsel for the appellants, in the evidence of this witness, in our opinion, do not amount to such contradictions so as to create any serious doubt about the truthfulness of the witness.

14. Exaggerations or improvements per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility, therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited (*State Represented by Inspector of Police v. Saravanan & another*-AIR 2009 SC 152). [Vide: *Arumugam v. State*- AIR 2009 SC 331, *Mahendra Pratap Singh v. State of Uttar Pradesh*-(2009) 11 SCC 334, *Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. v. State of Maharashtra*- (2010) 13 SCC 657, *Vijay @ Chinee v. State of M.P.*-(2010) 8 SCC 191, *State of U.P. v. Naresh & Ors.*-(2011) 4 SCC 324, *Brahm Swaroop & another v. State of U.P.*-AIR 2011 SC 280] referred in *A. Shankar v. State of*

Karnataka-(2011) 6 SCC 279.

15. Kamlesh (PW4) though did not support the prosecution version as a eye witness, but stated that immediately after the incident when his mother, Halke Bhaiya, Naval Kishore and Virendra were taking Mukesh to hospital they told to him that accused persons assaulted Mukesh with swords etc. According to him, out of fear he did not go to hospital or to police station to lodge the report. Halke Bhaiya (PW6), who lodged the first information report Ex. P/12 resiled from his earlier version and stated that the mother of Mukesh came to him and told that there had been a quarrel of Mukesh. He, Virendra Singh and Naval Kishore went to the place of occurrence and saw Mukesh lying there. There were injuries on his body. He did not know who caused injuries to him. This witness also disowned the first information report though admitted his signatures on the same. PW-6 not only turned hostile, but, for reasons best known to him, also made deliberate attempt even to make the evidence of Sakun Bai (PW3) discredited by saying that she told to him that wife of Mitthu Chamar informed her about the quarrel of Mukesh. In our opinion, evidence of PW-6 cannot be given any weight.

16. Virendra Singh (PW7), who is said to have reached the spot on being called by PW-3 and witnessed the incident, also did not support the prosecution version. He, however stated that the mother of Mukesh came at the room of Halke Bhaiya and shouted that there had been a quarrel with Mukesh without disclosing the name of persons with whom quarrel occurred. When he along with Halke Bhaiya and Naval Kishore reached the house of Mukesh they found him lying in the back of the house. This witness was declared hostile and subjected to a lengthy cross examination, but nothing material could be elicited out in favour of prosecution. He, however reassured the presence of Naval Kishore (PW2) and Sakun Bai (PW3) at the spot.

17. After examining the testimony of Naval Kishore (PW2) and Sakun Bai (PW3) critically in the light of proposition of law aforesaid, we find that their depositions inspire confidence and are reliable and acceptable. Their evidence also finds support from the evidence of Investigating Officer R.K.Kusmakar (PW8), who recovered 'Bakka' on the information under Section 27 of the Evidence Act from Ganesh, Phullu, Hakam, Gunchi and swords from the possession of Chatru and Major. Except the sword of Chatru, other weapons were found stained with human blood vide F.S.L. report Ex. P/31. Evidence of these witnesses finds further corroboration from the evidence

of Dr. A.K.Agrawal (PW1), who found 10 incised wounds on the body of deceased. Injury found on the skull of deceased had resulted into the laceration of brain. Since, the injuries apart from caused on various parts of the body, fatal injuries were also caused on the vital part of the body of deceased like head by the accused persons, in our opinion, it can be held certainly established that the accused persons intended to commit murder of deceased in a premeditated manner after forming unlawful assembly armed with deadly weapons.

18. For the aforesaid reasons, we find no error in the impugned judgment of the trial Court recording the finding of conviction of appellants under Sections 148 and 302/149 of the Indian Penal Code. Conviction and sentence awarded to accused/appellants are, therefore affirmed. Appeals being devoid of merits are dismissed.

A copy of this judgment be kept in the record of Criminal Appeal No. 2162/2005.

Appeal dismissed.

I.L.R. [2012] M.P, 2549

APPELLATE CRIMINAL

Before Mr. Justice Anil Sharma

Cr.A.No. 129/2006 (Gwalior) decided on 27 September, 2012

JITENDRA SONI

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Section 402 - Assembly for the purpose of committing dacoity - Seized weapons not produced - Police officer who conducted the raid, prepared the seizure memo and lodged F.I.R. himself investigated the matter - Acquittal of appellants under Section 399 and conviction under Section 402 of I.P.C. is self contradictory - Appeal allowed. (Para 13)

दण्ड संहिता (1860 का 45), धारा 402 - डकैती कारित करने के उद्देश्य से जमाव - जब्दशुदा शस्त्रों को प्रस्तुत नहीं किया गया - पुलिस अधिकारी, जिसने छापा संचालित किया, जब्ती मेमो तैयार किया और प्रथम सूचना रिपोर्ट दर्ज की, उसी ने स्वयं मामले की विवेचना की - अपीलार्थीगण की धारा 399 के अंतर्गत

दोषमुक्ति एवं भा.द.सं. की धारा 402 के अंतर्गत दोषसिद्धि अपने आप में विरोधाभासी है - अपील मंजूर।

Cases referred :

AIR 1979 SC 1412, 1999 Cr.L.J. 2525, 2008(4) MPHT 397, 21009(5) MPHT 151, 2010(4) MPHT 430, 2006(1) MPLJ 164

A.K. Nirankari, for the appellant.

Prabal Solanki, P.P.for the respondent/State.

J U D G M E N T

ANIL SHARMA, J. - This judgment shall govern the disposal of Criminal Appeal No.129/2006 and Criminal Appeal No.140/2006 arising out of a common judgment dated 17-01-2006 passed by learned Special Judge (Dacoity), Datia.

2- These appeals have been filed by the appellants under Section 374 of Code of Criminal Procedure, 1973 against a common judgment of conviction and sentence dated 17-01-2006 passed in S.S.T.No.14/04 by learned Special Judge (Dacoity), Datia whereby the appellants have been convicted for the offence under Section 402 of IPC read with Section 13 of Madhya Pradesh Madhya Dacoity Vyaparan Prabhavit Kshetra Adhiniyam (for brevity MPDVPK Act) and under Section 25(1)(1-b)(a) of Arms Act and they have been sentenced to undergo 3 years' RI with fine of Rs.1000/- and 1 year's RI with fine of Rs.500/- respectively each with default stipulation.

3- The brief facts of the case are that on 26-03-2004, Station House Officer U.S. Tomar, Police Station Indargarh District Datia has received an information through informer that some anti-social elements are making preparation of committing dacoity in the house of Ramjisharan. Thereafter, two teams have been formed and police party has arrested four persons including the appellants and two persons have succeeded in escape from the spot. Appellants were armed with firearm. After registering the FIR, challan has been filed and learned trial Court after trial of the case has convicted the appellants as mentioned in paragraph 2 of this judgment. But learned trial Court vide impugned judgment has acquitted the appellants from the offence under Section 399 of IPC and under Section 27 of Arms Act.

4- Feeling aggrieved by the impugned judgment of conviction and

sentence, appellants have filed these appeals on the ground that learned trial Court is not justified in convicting the appellants on the sole and uncorroborated testimony of Investigating Officer U.S. Tomar. Learned trial Court is further not justified in convicting the appellants as the seized arms and ammunition have not been produced at the time of trial.

5- The moot question for consideration in these appeals is whether learned trial Court is justified in convicting the appellants by the impugned judgment.

6- Learned counsel for the appellants have submitted that the statement of police officers regarding conversation between the accused persons for making preparation to commit dacoity in the house of Ramji Patsariya on some earlier dispute of Holly Festival has not been confirmed by Ramji Patsariya (PW-6). The independent witness Siyasharan (PW-2) and Ashique Ali (PW-3) who are the witness of whole incident have turned hostile and not supported the prosecution story.

7- Learned counsel for the appellants have submitted that the appellants have been acquitted from the charge of offence under Section 399 of IPC which contains the provisions for convicting the accused for the act of making preparation to commit dacoity on the other hand learned trial Court has convicted the appellants under Section 402 of IPC which relates to assembling for the purpose of committing dacoity. According to learned counsel for the appellants the findings of learned trial Court are self-contradictory as when the appellants have not been found guilty for making preparation to commit dacoity their conviction for assembling for the purpose of committing dacoity is not sustainable.

8- Learned counsel for the appellants submitted that in support of prosecution story there are only statements of police personnel ASI Santosh Sharma (PW-1), ASI Parmanand Sharma (PW-8) and Station House Officer U.S. Tomar (PW-9) who have stated that when they have reached at the spot they have heard the conversation of appellants alongwith other co-accused persons who were talking about commission of dacoity in the house of Ramjisharan. They have also stated that from appellant (Jitendra Soni) one Lohangi and two live cartridges of 12 bore gun have been seized vide seizure memo Ex-P/4 and from appellant (Sujan Singh Parihar) one Katta of 12 bore alongwith three live cartridges have been seized vide seizure memo Ex-P/3.

9. Learned counsel for the appellants has placed reliance on the decision of Apex Court in the matter of *Chaturi Yadav and others Vs. State of Bihar*,

AIR 1979 SC 1412 in which reversing the judgment of conviction, it has been held that the prosecution evidence merely showing that 8 persons including appellant were found in the school premises which was quite close to the market at 1 pm and that some of them armed with guns, some had cartridges and others ran away, conviction of appellant under Section 399 and 402 of IPC is not sustainable. Mere fact that these persons were found at 1 pm did not by itself prove that they had assembled for the purpose of committing dacoity or for making preparation to accomplish that object. The possibility that the appellants might have collected for the purpose of murdering somebody or committing some other offence could not be safely eliminated.

10- Learned counsel for the appellants further placed reliance on the decision of Apex Court in the matter of *Suleman and another Vs. State of Delhi Through Secretary*, 1999 Cr.L.J.2525 in which it has been held that the accused persons alleged to have assembled in Dharmshala and were planning to commit dacoity. The conversation amongst the accused alleged to be heard by witness, a Head Constable from outside room of Dharmshala. Non-examination of ASI who accompanied with said witness at Dharmshala, evidence showing that weapons were kept concealed and there was complete darkness inside room, testimony of witness that he heard accused talking about looting a petrol pump, not truthful, therefore, the conviction under Sections 399 and 402 of IPC is not proper.

11- Learned counsel for the appellants submitted that the seized arms were not produced before learned trial Court, therefore, in absence of identification of arms before the Court, the conviction of appellants is not justifiable. In support of their arguments, he has placed reliance on the decision of this Court in the matter of *Kalebabu Vs. State of Madhya Pradesh*, 2008(4) MPHT 397 in which it has been held that the foundation of offence was based on the notification regarding knife then it was the duty of the prosecution to produce the article seized before the Court to prove that the arm or weapon was contrary to the prescribed size. Mere oral statement of the witnesses could not be said to be sufficient as the seizure witness had turned hostile and since the foundation of the offence itself depended on the article then it was an utmost importance that it ought to be produced before the trial Court. Appellant has been acquitted from the charges of offence punishable under Sections 25 (1-B) (b) and 4 of Arms Act.

12- Learned counsel for the appellants further drawn attention of this Court towards the statement of Station House Officer, U.S. Tomar (PW-9) who in

paragraph 10 of his cross-examination has admitted that he is complainant in the case and he is Investigating Officer also. In the present case, he is engaged from the initial stage of receiving information from the informer, investigated the case and filed the challan which is against the provisions of law, therefore, the appellants are entitled for acquittal. In support of their arguments he has cited the judgment of this Court in the matter of *Chirku @ Lakhanlal Vs. State of M.P.* 2009(5) MPHT 151 in which it has been held that the offence of carrying 'Katta' containing a live cartridge by the accused/appellant, the case based on the testimony of police officer not corroborated by independent source, there was discrepancy in the evidence of two police officers, SHO should not have himself investigated the offence when he had arrested the accused, recovered the pistol and has also lodged the FIR and lastly only case-diary of the offence was not sent to the District Magistrate for according sanction but it was doubtful whether Katta and cartridges were also sent for inspection of the District Magistrate, the offence under section 25(1-b) (a) of Arms held not proved and acquitted the accused. On this point the other judgments of this Court have been cited in the matter of *Khilan Singh Vs. State of M.P.*, 2010 (4) M.P.H.T. 430 and in matter of *Mangilal Vs. State of M.P.* 2006(1) MPLJ 164.

13- No seized article has been produced before the trial Court at the time of evidence. The police officer who conducted the raid, prepared the seizure memo and lodged the FIR himself has investigated the matter. Finding of learned trial Court for convicting the appellants for the offence punishable under Section 402 of IPC for assembling for the purpose of committing dacoity while acquitting them for the charge of Section 399 of IPC i.e. making preparation to commit dacoity are in themselves contrary and appellants deserve acquittal for the charge of Section 402 of IPC on the same ground on which he has been acquitted from the charge of Section 399 of IPC.

14- In the result, looking to the material aspects of the matter and marshaling the evidence available on record, I am of the considered view that learned trial Court is not justified in convicting the appellants, therefore, the appeals filed by the appellants are allowed, setting aside the impugned judgment of conviction and sentence. Appellants are acquitted from the charge of Section 402 of IPC read with Section 13 of MPDVPK Act and under Section 25(1-b)(a) of Arms Act. Appellants are on bail, their bail bonds stand discharged.

Appeal allowed.

I.L.R. [2012] M.P., 2554

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R.No. 410/2011 (Jabalpur) decided on 26 April, 2012

ANAND KUMAR

...Applicant

Vs.

VIJAY KUMAR & ors.

...Non-applicants

Civil Procedure Code (5 of 1908) - Order 7 Rule 11, Order 7 Rule 11(d) and Benami Transactions (Prohibition) Act, (45 of 1988), Section 4 (1) - Bar of Suit or Claim - That the petitioner is real nephew of respondent no. 1 and out of love and affection he made purchases of land in the name of petitioner and sale consideration was paid by respondent no. 1 - All those purchased were benami - The bar is to file a suit or to make a claim and not that a particular transaction is benami or not - If suit is filed after coming into force of the Act, claiming any right title or interests on the basis of any benami transaction, whether it was done prior to coming in to force of the Act or after coming into force of the Act would be barred under the Sub-Sec (1) of Sec. 4 of the Act - Prohibition under the Act is squarely applicable and such a plaint was hit by order 7 rule 11 (d) of CPC - This being so, the court below was not right in rejecting the application of the petitioner - Revision allowed. (Para 9)

सिविल प्रक्रिया संहिता (1908 का 5) - आदेश 7 नियम 11, आदेश 7 नियम 11 (डी) एवं बेनामी संव्यवहार (प्रतिषेध) अधिनियम (1988 का 45), धारा 4(1) - वाद या दावे का वर्जन - याची प्रत्यर्थी क्रमांक 1 का सगा भतीजा है एवं प्रेम एवं अनुराग के चलते उसने भूमि याची के नाम से क्रय की और विक्रय प्रतिफल का भुगतान प्रत्यर्थी क्रमांक 1 ने किया था - ये सभी क्रय बेनामी थे - वाद प्रस्तुत करने या दावा करने के लिए वर्जन है और न कि कोई विशिष्ट संव्यवहार बेनामी है या नहीं - यदि वाद, अधिनियम के प्रभावी होने के पश्चात् प्रस्तुत किया गया, जिसमें किसी बेनामी संव्यवहार के आधार पर किसी अधिकार, हक या हितों का दावा किया गया है, ऐसा या तो अधिनियम के प्रभावी होने से पूर्व या अधिनियम के प्रभावी होने के पश्चात् किया गया तब यह अधिनियम की धारा 4 की उप-धारा (1) के अंतर्गत वर्जित होगा - अधिनियम के अंतर्गत निषेध पूर्णतः लागू होगा और उक्त वादपत्र सि.प्र.सं.

के आदेश 7 नियम 11(डी) से प्रभावित होगा – ऐसी स्थिति में, अधिनस्थ न्यायालय के लिए याची का आवेदन अस्वीकार करना उचित नहीं था – पुनरीक्षण मंजूर।

Cases referred :

AIR 1994 SC 1647, AIR 2000 SC 2534.

Pranay Verma, for the Applicant.

Sourabh Bhushan Shrivastava, for the non-applicants.

ORDER

K.K. TRIVEDI, J. - This revision is directed against the order dated 09.09.2010 passed in Civil Suit No. 72-A/2010, by which the Second Civil Judge Class-II, Gadarwara, District Narsingpur rejected the application of the petitioner/defendant No. 1 under Order 7 Rule 11 of the Code of Civil Procedure.

2. Brief facts giving rise to filing of this revision are that the respondent No. 1 filed the suit alleging that the petitioner/defendant No.1 is his real nephew, being son of the elder brother of respondent No.1. Since the marriage of the respondent No.1 had taken place at a later stage, and he was not having any issue at the relevant time, he purchased certain land *benami* on the name of the petitioner vide registered sale deed dated 21.04.1982. The entire sale consideration was paid by respondent No.1 and he was put in possession. Only the name of the petitioner was recorded as purchaser *benami*. It is further contended that the land in other village was also purchased in the same manner *benami* by a registered sale deed dated 25.10.1983, though the entire sale consideration by the respondent. The petitioner got the name mutated over the land in suit 2-3 years back, after attaining the majority and is trying to sale out the property, therefore, the cloud is caused on the title of the respondent No.1 and, therefore, the suit is required to be filed for declaration of title to the effect that the respondent No.1 is in fact purchased the land in suit by a registered sale deed dated 21.04.1982, 03.08.1982 and 25.10.1983 *benami* in the name of petitioner but he is the real owner. A decree of permanent injunction is also claimed.

3. The petitioner herein after service of summon of the suit filed an application under Order 7 Rule 11(d) of CPC stating that the suit as framed by the respondent No.1 was not maintainable and the plaint was liable to be rejected as the same is barred under the provisions of Benami Transactions

(Prohibition) Act, 1988 (hereinafter referred to as 'Act'). The trial Court has rejected the application of the petitioner therefore, this revision is required to be filed.

4. It is vehemently contended by learned counsel for the petitioner that a bare perusal of provisions of Section 4 of the Act makes it clear that the suit as filed by respondent No.1, for the relief aforesaid, was prohibited under the law made by the Parliament. It is contended that if it was mentioned in the plaint that the *benami* transaction had taken place even prior to coming into force of the Act, the same would be hit by provisions of Section 4 of the Act. It is thus, contended that the suit as filed by the respondent No.1 was hit by Sub-section (1) of Section 4 of the Act and the same was not maintainable. The plaint was liable to be rejected. However, this particular aspect has not been considered by the Court below and the application filed by the petitioners has wrongly been rejected. It is contended that in such circumstances, the order impugned is bad in law and is liable to be set aside. It is contended that the suit as filed by the respondent No.1 is liable to be dismissed.

5. Per contra, it is contended by learned counsel appearing for the respondent No.1 that the entire plaint is required to be seen while considering the application under Order 7 Rule 11 of CPC. The written statement is required to be filed by the petitioner and then only an objection can be taken with respect to maintainability of the suit. Only after framing of the issues, recording of evidence, the suit could have been decided. This being the situation, it cannot be said that the suit as framed by the respondent No.1 was not maintainable and thus, the application of petitioner was rightly rejected. It is also contended that the Act was made in the year 1988, the transaction had taken place in the year 1982 and 1983 and, therefore, since the transaction was prior to coming into force of the Act, it cannot be said that the bar as prescribed under the provisions of Section 4 (1) of the Act would be applicable. It is contended that the Act itself is not made with retrospective effect. Thus, it is contended that there is no force in the revision petition and the same deserves to be dismissed.

6. Heard learned counsel for the parties and perused the record.

7. Undisputedly, the Act was enacted in the year 1988 but the bar was created under Sub section (1) of Section 4 of the Act that no claim would be made on the basis of any *benami* transaction. The bar is to file a suit or to make a claim and not that a particular transaction is *benami* or not. If a suit is

filed after coming into force of the Act, claiming any right, title or interest on the basis of any *benami* transaction, whether it was done prior to coming into force of the Act or after coming into force of the Act, would be barred under Sub section (1) of Section 4 of the Act. For proper appreciation, the provision of Sub section (1) of Section 4 of the Act is reproduced

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

8. This particular aspect has been considered by the Courts on various occasions. This particular aspect that the bar would be applicable in the suits which were required to be filed after coming into force of the Act has been considered by the Apex Court in the case of *Duvuru Jaya Mohana Reddy Vs Alluru Nagi Reddy*, AIR 1994 Sc 1647. Further it is considered by the Apex Court that if a claim was pending prior to coming into force of the Act, the same would not be barred under the provisions of Section 4 of the Act. Please refer *Prabodh Chandra Ghosh vs. Urmila Dassi*, AIR 2000 SC 2534. In view of the pronouncement of these laws by the Apex Court, it is clear that the bar is only with respect to filing of suit or making of a claim in defence only after coming into force of the Act and not in respect of the claim which are made prior to coming into force of the Act. It is also abundantly clear from this that, if a transaction is said to be done prior to coming into force of the Act but the claim is made after coming into force of the Act, based on such a transaction, the bar prescribed under the Act would be applicable.

9. In light of this, if it is considered whether the suit as framed by respondent No.1 was hit by Sub section (1) of Section 4 of the Act or not, it is to be seen as to how the claim was made by respondent No.1. In the plaint it is categorically contended by the respondent No.1 that the petitioner is his real nephew and out of the love and affection he made the purchases of land in the name of petitioner on 21.04.1982, 03.08.1982 and 25.10.1983. It is categorically contended in para 4, 5 and 6 that the aforesaid lands though were purchased in the name of petitioner but since the sale consideration was paid by the respondent No.1, all those purchased were *benami*. In view of these contentions, the relief is claimed that the respondent No.1 be declared the real owner of the land in suit and it be declared that the said sale deed

executed, are *benami* and do not confer any title on the petitioner. The permanent injunction is also claimed by the respondent No.1. If these pleadings and the relief are compared, it will be squarely clear that the respondent No.1/ plaintiff was claiming title on the basis of *benami* transaction said to have taken place on 21.04.1982, 03.08.1982 and 25.10.1983. This being so, the prohibition under the Act is squarely applicable and such a plaint was hit by order 7 Rule 11 (d) of CPC. This being so, the Court below was not right in rejecting the application of the petitioner.

10. Resultantly, the revision is allowed. The order impugned is set aside. The application filed by the petitioner under Order 7 Rule 11 (d) of CPC is allowed. The suit filed by the respondent No.1 plaintiff is dismissed as barred under Section 4 (1) of the Benami Transactions (Prohibition) Act, 1988.

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

Revision allowed.

I.L.R. [2012] M.P., 2558

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R. No. 271/2008 (Jabalpur) decided on 2 May, 2012

MUKESH MAHESHWARI

...Applicant

Vs.

THE UNITED WESTERN BANK LTD. & ors.

...Non-applicants

Civil Procedure Code (5 of 1908), Order 21 Rule 84 & 85 - Deposit of auction money - Auction purchaser is required to deposit 25% of the auction money immediately and rest of the amount within 15 days - Auction purchaser failed to deposit the remaining amount within 15 days - Sale is liable to be set aside. (Paras 9 & 10)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 84 व 85 - नीलामी की रकम जमा करना - नीलामी क्रेता को नीलामी राशी का 25 प्रतिशत तुरंत जमा करना अपेक्षित है और शेष रकम को 15 दिवस के भीतर जमा करना होता है - नीलामी क्रेता शेष रकम को 15 दिवस के भीतर जमा करने में विफल रहा - विक्रय

अपास्त किये जाने योग्य है।

Cases referred :

AIR 1999 SC 96, AIR 1932 Patna 342, AIR 1934 Allahabad 816,
AIR 1996 SC 2781.

Ashok Lalwani, for the applicant.

Praveen Chaturvedi, for the non-applicant no.1.

R.D. Hundikar, for the non-applicant no.10.

ORDER

K.K. TRIVEDI, J. - This Revision is directed against the order dated 19/07/2006 passed in Execution Case No. 7B-2001 by Second Additional District Judge, Burhanpur (M.P.) rejecting the application/objection raised by the judgment debtor, the petitioner herein with respect to the confirmation of auction and issuance of sale certificate.

2. The facts giving rise to filing of this Revision are that the respondent no.1/bank has instituted a suit for recovery of certain loan amount from the father of the petitioner Shri Narayan Das Maheshwari. The suit was decreed and the execution proceedings were initiated. The Executing Court while passing an order on 19/02/2002 attached the suit property and put the same for auction on 08/08/2002. The auction was held in favour of the respondent no.10 for an amount of Rs.75,000/-. In terms of the auction, the said auction purchaser was required to deposit 25% of the auction sale amount immediately and was required to deposit the rest of the amount within 15 days. However, the said amount was not deposited. An objection was filed by the father of the petitioner on 22/10/2002 for setting aside the said auction dated 08/08/2002 on the ground that the compliance of the provisions of Order 21 Rule 85 CPC in full was not done and the full amount of consideration of the auction sale was not deposited by the respondent no.10, therefore, the said proceedings were liable to be set aside. The auction sale was liable to be set aside. During the pendency of such proceedings, the original judgment debtor died and was substituted by the petitioner and other family member. However, since such an objection has been rejected, the present Revision has been filed.

3. It is contended by learned counsel appearing for the petitioner that

the mandatory provisions of CPC are required to be seen. If the amount of auction sale is not deposited within the stipulated period, the auction is not to be confirmed. That being so, it was to be seen by the executing court that the amount was deposited on 07/03/2006 and that being in violation of the statutory provision, the auction sale had become void and was not to be confirmed. However, this particular aspect is ignored on the ground that the matter on an application made by the petitioner or original judgement debtor was being contested and thereafter the same was transferred on account of transfer of the Presiding Officer of the Court, from one court to another and during this period ultimately the deposit was made. Thus, it was found that no irregularity was committed in making the deposit. It is contended that in terms of the provisions of the code, the deposit was must within the time which was not done and accordingly the auction sale cannot be confirmed. However, since this particular aspect is totally ignored, the order impugned is bad in law and is liable to be set aside.

4. Per contra, it is contended by learned counsel appearing for the respondent no.10 that the auction sale was rightly held, the bid of respondent no.10 was accepted, the deposit in terms of the orders of the Court was made and for the lapses on the part of the petitioner or the original judgement debtor, the respondent No.10 was not to be denied the benefit of title over the property purchased in auction. This being the situation the Court below was right in rejecting the objection of the petitioner and no illegality whatsoever has been committed in passing the order impugned. Thus, it is contended that in view of the settled law, the objection raised by the petitioner was not to be entertained and since there is no jurisdictional error committed by the Court below, the Revision itself is liable to be dismissed.

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

6. Order 21 Rule 84 & 85 of CPC prescribe the procedure for deposit by purchaser of auction sale amount and on failure resale of the immovable property attached and sold in auction for execution of any money decree. Order 21 Rule 84 CPC deals with the deposit by purchaser and resale on default and it is clearly prescribes that on every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration twenty five per cent of sale amount to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold. Similarly the provisions of Order 21 Rule 85 of CPC prescribe the

time for payment of full purchase money. It is categorically provided that the full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the date of sale of the property.

7. A plain and simple reading of the aforesaid provisions makes it clear that there are two conditions precedent for confirmation of the sale one is deposit of twenty five percent amount of auction sale on the date when the auction is held in favour of any such purchaser. The other condition for confirmation of the auction sale is payment of the rest of the amount or better to say the full of the amount of auction sale within fifteen day, before closer of the Court, in the Court by the auction purchaser. Though the word "Court" is not defined in the Code itself but the plain and simple meaning of word "Court" as can be understood means any Court established within the District which is to be treated as a Principal Civil Court of original jurisdiction within the said district. The jurisdiction of the Courts are decided according to the provisions made in the Civil Procedure Code. If the Presiding Judge in one of the Court which was executing the decree and under which direction auction was held was not available at the relevant time, could it be said that deposit was not to be made by auction purchaser within the time stipulated under the provisions of Order 21 Rule 85 of CPC.

8. It is not disputed that auction was held on 08/08/2002. It is clear that twenty five percent deposit was to be made on that day. The auction was held for an amount of Rs. 75,000/- (seventy five thousand). The remaining amount was to be deposited within fifteen days that is by 23rd August 2002, so that, the auction could be confirmed. Since this was not done, the objection was raised by the father of the petitioner on 22/10/2002. By that time the deposit was not made. The consequence of non deposit of the amount would be nothing except setting aside the sale. The law in this respect has been considered by the Apex Court in the case of *Usmansab Hatel Sahab Vs. R.L. Meharwade and others*, AIR 1999 SC 96 and it has categorically been held that in case there is failure on the part of the auction purchaser to pay the amount of auction sale within fifteen days as required by Order 21 Rule 85 of CPC, the auction sale is liable to be set aside under Order 21 Rule 86 of CPC. It is also held by the Apex Court that in such case there cannot be any direction to compensate the auction purchaser. From the facts as have come on record it is clear that the deposit of auction amount was not made within time. The objection to that effect was raised immediately on 22/10/2002. If

the said objection was contested by the decree holder and it was said that the delayed deposit will not completely made the auction as null and void and that matter was contested for a long period, how could it be said that default was not there and auction sale was not to be set aside. What was required to be seen whether there was full compliance of the provisions of the Order 21 Rule 85 CPC or not.

9. The word which is used in the said provision makes it clear that the said provision is mandatory in nature as the word "shall" has been used by the legislature. If the decree holder was raising any objection with that respect, it was meaning less. It is not satisfaction of the decree holder but it is the satisfaction of the law and the Court that such an objection is required to be considered. In the given circumstances when it is found that the amount was not deposited, as per the provisions of the Code, the Court below was required to cancel the auction held in favour of the respondent no.10 and to put the property for re-auction or to accept any other offer extended by the judgment debtor to satisfy the judgment and decree granted by the Court. The another aspect is required to be examined. The Division Bench of this Court in Writ Appeal No.1314/2006 has considered the aspect of application of provision of Order 21 Rule 85 & 86 of CPC with respect to the auction held by the DRT. The similar provisions are applicable with respect to confirming the auction sale and interpreting the law laid down by the Apex Court in this respect, the Division Bench of this Court has categorically held that the prescription of deposit of the balance amount of 75% of the purchased money was mandatory and the consequence of non deposit of such balance amount during the fixed period was infact violative of the peremptory provision of the Code and thus there was no question of relaxation to be extended to such a defaulter.

10. It is contended by learned counsel for the respondent no.10 that merely because the deposit was made at a belated stage, ofcourse because of certain pending proceedings on account of filing of objection by the petitioner, it cannot be said that the respondent no.10 was a defaulter. For the said purposes, reliance is place in the case of *Bijoy Singh Vs. Raja Kirtyanand Singh and others*, AIR 1932 Patna 342 and in the case of *Bharat Singh and others Vs. Ramprasad*, AIR 1934 Allahabad 816. The facts and circumstances of each case are required to be examined. In the present case it was nowhere pointed out that the amount was ready with the respondent no.10 for deposit, he was ever since willing to deposit the amount in the Court but for some reasons

beyond the control of the respondent no.10 the said deposit could not be made within time. On the other hand from the order it appears that since the objection filed by the petitioner was being contested by the decree holder only, the deposit was not made by the respondent no.10. In such a case if the respondent no.10 was ready and willing to deposit the amount, he could have obtained sanction from the Court even before other Court where the urgent work of the concerning executing court was required to be sent, in case of non availability of the Prescribing Officer of the executing Court and the deposit could have been made in the CCD. The deposit was not to be made directly to the bank, on the other hand it was to be deposited in the Court and said amount was to be paid to the bank, the decree holder by the Court, therefore, there was nothing available on record before the Court below to indicate that the procedure laid down under Order 21 Rule 86 of CPC was not to be resorted to. The said provision is very clear where it is said that if the amount has not been deposited within the time the Court not only can cancel auction sale but can also forfeit the claim to the property or any part of the same and the money paid for said purposes can be deposited with the Government. Thus, in the considered opinion of this Court, such a procedure was not rightly followed by the Court below.

11. In view of the aforesaid, as also in view of the law laid down by the Apex Court in the case of *Balram son of Bhasa Ram Vs. Ilam Singh and others*, 1996 SC 2781, no escape was available to the Court below except to set aside the auction sale and to take further action for recovery of the decreetal amount from the petitioner.

12. In view of the aforesaid, the order impugned cannot be sustained. The Revision deserves to be and is hereby allowed. The order dated 19/07/2006 passed in execution case no. 7-B/2001 by the Second Additional District Judge, Burhanpur is hereby set aside. The auction sale held on 08/08/2002 in favour of the respondent no.10 is hereby set aside. However, if the petitioner is so willing, he may deposit the decreetal amount in the executing court. If the decree is already satisfied in favour of the respondent no.1 the amount deposited by petitioner, would be payable to the respondent no.10 as refund of the amount deposited by him. In such circumstances, the property put in auction to be restored in favour of the petitioner. There shall be no order as to costs.

Revision allowed.

I.L.R. [2012] M.P., 2564

CIVIL REVISION

Before Mr. Justice K.K. Trivedi

C.R. No. 36/2010 (Jabalpur) decided on 2 May, 2012

STATE OF M.P. & ors.

...Applicants

Vs.

RAMPYARE DUBEY

...Non-applicant

A. Civil Procedure Code (5 of 1908), Order 21 - Power of Executing Court - If a decree is specifically drawn, the Executing Court can not travel beyond the decree. (Para 8)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 - निष्पादन न्यायालय की शक्ति - यदि डिक्री विनिर्दिष्ट रूप से बनाई गई है तो निष्पादन न्यायालय डिक्री से परे नहीं जा सकता।

B. Civil Procedure Code (5 of 1908), Order 21 - Power of Executing Court to calculate interest - High Court while granting decree did not grant any specific compensation but declared that the respondent would be entitled to compensation for the land held in his favour - As decree contains no specific amount, therefore, it has to be calculated and ascertained by Executing Court. (Para 8)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 - ब्याज गणना करने की निष्पादन न्यायालय की शक्ति - उच्च न्यायालय ने डिक्री मंजूर करते समय कोई विनिर्दिष्ट प्रतिकर मंजूर नहीं किया, लेकिन घोषणा की कि प्रतिवादी उसके पक्ष में धारण की गई भूमि के लिए उसका प्रतिकर पाने का हकदार होगा - चूंकि डिक्री में कोई विनिर्दिष्ट रकम अंतर्विष्ट नहीं है, इसलिए निष्पादन न्यायालय द्वारा इसकी गणना करना होगी और अभिनिश्चित करना होगा।

C. Civil Procedure Code (5 of 1908), Order 21 - Calculation of interest - While calculating the interest, the Executing Court rightly considered the conduct of the applicants in denying the payment of compensation and long legal battle - Order of Executing Court proper. (Para 10)

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 – ब्याज की गणना – ब्याज की गणना के दौरान निष्पादन न्यायालय ने आवेदकगण द्वारा प्रतिकर का भुगतान करने से मना करने के व्यवहार और लंबी कानूनी लड़ाई को उचित रूप से विचार में लिया – निष्पादन न्यायालय का आदेश उचित।

Cases referred :

AIR 1964 SC 1878, AIR 1985 SC 382, AIR 1991 Calcutta 42, (1997) 2 SCC 161, AIR 2005 NOC 380 (Kerala), (2011) 5 SCC 553.

Rahul Jain, G.A. for the applicants.

Rakesh Pandey, for the non-applicant.

ORDER

K.K. TRIVEDI, J. - This revision is directed against the order dated 19.11.2009 passed in Execution Case No.51-A/1991 by the III Additional District Judge, Sagar, whereby the petitioners/ judgment debtors have been directed to pay the amount of compensation to the respondent for the land acquired.

2. Brief facts giving rise to filing of this revision are that the petitioner-State initiated an action for acquisition of the land measuring 0.21 acre, out of the land area of 1.38 acres, of Khasra No.220/1 of village Dulchipur, Tahsil Banda, District Sagar, belonging to the respondent under the provisions of Land Acquisition Act, 1894 (herein after referred to as 'Act'). The purpose of acquiring the land, as notified in the notification was construction of a dam. It was found that as a whole the land sought to be acquired was not needed and some part of the land was returned. After passing of the award on 24.03.1969, the compensation was assessed and the amount was deposited in the Treasury, payable to the respondent. It was alleged that some lease was got executed and on the basis of such a lease, demands were made. The persons in the locality started making complaints with respect to such acquisition of land and payment of compensation and when the said complaints reached to the Collector, exercising suo motu power of revision, he cancelled the said lease granted in favour of the respondent on 13.01.1987. Such an order was not called

in question anywhere but a demand was made by the respondent by filing a civil suit being Civil Suit No.31-A/1991 as indigent person and the said suit was dismissed on 29.09.1993. The mutation in respect of the respondent was cancelled. Such an order was challenged up to the Commissioner unsuccessfully. The order of Commissioner was challenged before the Board of Revenue, which stood partly allowed granting Bhumiswami rights to the respondent/plaintiff vide order dated 03.05.2001 over the two acres of land. The said order was the subject matter of challenge in W.P. No.577/2002, which stood dismissed vide order dated 14.10.2008. It is contended that against the judgment and decree passed by the Civil Court, a first appeal was preferred before this Court by the respondent and the same was partly allowed. In execution of the said judgment and decree, objection with respect to the claim of amount by the respondent was raised but the same has been dismissed, therefore, this revision is required to be filed.

3. It is contended by the learned Government Advocate that if the judgment and decree passed by this Court in the first appeal is looked into, it would be abundantly clear that only a part of the claim of the respondent was accepted by this Court. The judgment and decree of the Court below was set aside with respect to the land survey No.220/1. The respondent was entitled to the compensation for the said land only. The said amount has already been deposited in the Treasury, which the respondent has not accepted, therefore, the Executing Court was not right in holding that the respondent was entitled to the interest and total amount of Rs.38,85,034/-. Such a huge amount was not to be paid to the respondent. Thus, it is contended that the order impugned is bad in law and is liable to be set aside.

4. Refuting such submissions of learned Government Advocate, learned Counsel for the respondent has contended that the dam was to be constructed in the year 1964. Emergent provisions of the Act were exercised while acquiring the land of the respondent. Notification under Section 6 of the Act was issued and a meager amount of compensation was paid. The dispute was raised with respect to the quantum of

compensation, area which was sought to be acquired, but instead of deciding the same, illegal proceedings were initiated against the respondent by cancelling the lease obtained by him. All this has resulted in long series of litigation before the Revenue Court, ultimately before this Court and when the relief was granted by the Board of Revenue to the respondent, such an order was also called in question before this Court in W.P. No.577/2002, which ultimately was decided on 14.10.2008, affirming the order of the Board of Revenue. It was categorically held by this Court that in the civil suit when such a claim was made by the respondent, a written statement was filed by the State but in the said written statement, there was no averment that any lease was obtained by the respondent fraudulently or in a fake manner. Such objection raised by the State was found to be incorrect and invalid by this Court. Even when the suit was dismissed, the first appeal was required to be filed by the respondent being F.A. No.73/1994, which was ultimately decided by this Court on 14.10.2008. That being so, it is contended that if the amount was not paid expeditiously, the respondent was entitled to not only the rightful compensation but solatium and the interest on the said amount. All these facts have been considered by the Executing Court while passing the order impugned and as such, just and proper order of the Executing Court need not be interfered with. It is submitted that such a baseless claim of the petitioners-State is required to be ignored. The revision is liable to be dismissed.

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

6. Undisputedly the claim was made by the petitioners- State that the entire land was not belonging to the respondent nor there was any construction made on the said land. The award was passed without taking into consideration such fact on 28.03.1969. Admittedly the procedure was started while issuing the notification under the Act way back in the year 1963. The entire procedure of acquisition was to be completed within a period of two years as is prescribed under the Acquisition Act. The emergent provisions were required to be exercised indicating the

emergency, urgent need of the land sought to be acquired, otherwise the provisions of hearing of objections were not to be curtailed. The settled law is that in case the proceedings of acquisition are not completed within a period of two years, the same stand abated. From the date of publication of the notification if it is seen that the proceedings were completed within the period of two years or not, the date of passing of the award would be relevant. Undisputedly the award was passed on 28th March, 1969 and, therefore, from the notification so issued in the year 1963, subsequent notification issued on 14.02.1964, it would be clear that the proceedings of acquisition were not completed within a period of two years as is prescribed under the Act. On this count alone, the land of the respondent was required to be released. However, the fact remains that the land was used for the purposes of construction of a dam. If the land is submerged, the respondent was required to be compensated. For the said purposes, the proceedings were rightly done. Ultimately, this Court has also held that the respondent is entitled to get the compensation of the land of Survey No.220/1. To that extent, the appeal filed by the respondent is allowed. If this land is already acquired or has gone in submergence, the respondent is required to be paid the compensation of the said land. If there was any construction made as is claimed by the respondent, the compensation for the same was also required to be paid but the said fact has not been found proved. It is the case of the respondent that though the compensation for the land has been assessed, the assessment of compensation for construction over the said land has not been done. The same was required to be done only if such a construction is established by evidence. None is found in this respect.

7. Learned Government Advocate has contended that the law is well settled in this respect and in various decisions rendered by the Apex Court where it has been said that such an order could not have been passed by the Executing Court. Placing reliance in the case of *Dr. Sham Lal Narula vs. The Commissioner of Income Tax, Punjab, Jammu and Kashmir, Himachal Pradesh and Patiala, AIR 1964 SC 1878*, learned Government Advocate has contended that such an interest was not payable to the

respondent as has been ordered by the Executing Court. It is contended that as per the law laid-down by the Apex Court if the legislature has expressly used the word 'interest' with its well known connotation, the simple and plain meaning of the same is required to be taken. Instead of doing this, the Executing Court has proceeded further in holding that the respondent is entitled to much higher rate of interest as is prescribed. Further placing reliance in the case of *Joginder Singh and others vs. State of Punjab and another*, AIR 1985 SC 382, it is contended that the date of determination of interest is must and it should not be exorbitantly fixed from the date the proceedings were initiated. It is contended that in fact the date of interest would be the date when the respondent becomes entitled to the claim as was ordered by this Court in the first appeal and not prior to that. It is contended that since the suit of the respondent was dismissed by the Trial Court, there was no occasion to fix the interest nor to grant the same to the respondent. Only when the first Appellate Court decided the claim of the respondent then only the clock of interest started and from that day the interest would be payable to the respondent. Further placing reliance in the case of *Md. Alam vs. State of West Bengal*, AIR 1991 Calcutta 42, it is contended by learned Government Advocate that the rate of enhanced solatium and the interest was not to be granted to the respondent as the same applies only to the awards made between the date of introduction of the amendment bill in the Parliament and date of passing of the amendment Act. It is contended that enhanced rate of interest on unpaid amount of compensation is available to the respondent only where the possession of the land sought to be acquired is taken before the date of introduction of the bill. Further placing reliance in the case of *Ratan Kumar Tandon and others vs. State of U.P.*, (1997) 2 SCC 161, it is contended that the burden of proof of market value of the trees, land and the structure was only on the respondent, which he completely failed to establish and, therefore, such a heavy compensation was not to be granted to the respondent by the Executing Court. Lastly, learned Counsel for the petitioners has put his reliance heavily in the case of *State of Kerala vs. Mariyamma and others*, AIR 2005 NOC 380 (Kerala), it is contended by the learned Government

Advocate that no claimant is entitled to claim compound interest or further interest on interest once accrued under Section 28 of the Act or on solatium, if decree does not provide for interest on solatium. It is contended that the decree passed by this Court do not contemplate such prescription and, therefore, the respondent is not entitled to such heavy amount.

8. The submissions of learned Counsel for the petitioners are considered in view of the law laid-down by the Apex Court. True it is that if a decree is specifically drawn, the Executing Court cannot travel beyond the decree. True it is also that if the decree does not prescribe for grant of compensation with compound interest, the same cannot be allowed. Various facts as have been pointed out indicate that there were circumstances in which the respondent was required to run from one Court to another. It is not explained as to how Collector sit tight over the matter for good 20 years till he exercised his suo motu revision power and set aside lease granted in favour of the respondent. It is to be seen that in this peculiar case the matter was agitated before the Revenue Courts and ultimately the Board of Revenue granted some relief to the respondent. That order too was not accepted by the State Government and a writ petition was filed before this Court unsuccessfully. The civil suit filed by the respondent was dismissed only on the strength of such orders passed by the revenue authorities in exercise of suo motu revision power. This point was also examined by this Court only in first appeal and partially the relief was granted to the respondent. That being so, specially in the circumstances where the acquisition proceedings itself were not completed within the statutory period of two years, the cases relied by learned Government Advocate would not be attracted at all. Even if the principle laid-down is taken into consideration, it will be clear that there was gross negligence on the part of the petitioners in settling the claim of the respondent. This Court itself has not granted any specific compensation but has declared that the respondent would be entitled to compensation for the land held in his favour. The decree passed by this Court contains no specific amount, therefore, it has to be calculated and ascertained by the Executing Court. In view of this, the law laid-down by the Apex

Court would not be applicable in case of petitioner.

9. The important aspect which is required to be examined is whether there was a justified calculation done by the Executing Court with respect to the amount of award to be paid to the respondent or not. Certain facts are required to be kept in mind, such as initiation of proceedings of acquisition of land, deprivation of the right of the respondent to use the said land and the manner in which the calculation of award itself was done by the Land Acquisition Officer. The Apex Court in the case of *Radhy Shyam (dead) Through LRs and others vs. State of Uttar Pradesh and others*, (2011) 5 SCC 553, has in fact culled out the principles, which are required to be followed in case of exercise of emergent powers for acquisition of the land of a citizen by the sovereign State, curtailing his right of property as enshrined under Article 300-A of the Constitution of India. The principles, which have been specifically laid-down by the Apex Court, are thus :

“(i) Eminent domain is a right inherent in every sovereign to take and appropriate property belonging to citizens for public use. To put it differently, the sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good – *Dwarkadas Shrinivas v. Sholapur Spg. and Wvg. Co. Ltd.*, *Charanjit Lal Chowdhury v. Union of India* and *Jilubhai Nanbhai v. State of Gujarat*.

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly – *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana*, *State of Maharashtra v. B.E. Billimoria* and *Dev Sharan v. State of U.P.*

(iii) Though, in exercise of the power of eminent domain, the Government can acquire the private property for public purpose, it must be remembered that compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the court is not only entitled but is duty-bound to scrutinise the action/ decision of the State with greater vigilance, care and circumspection keeping in view the fact that the landowner is likely to become landless and deprived of the only source of his livelihood and/or shelter.

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/ instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the Act. A public purpose, however, laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the landowner or other interested persons.

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks or months. Therefore, before excluding the application of Section 5-A, the authority concerned must be fully satisfied that time of few weeks or authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the authorities concerned did not apply their mind to the relevant factors and the records.

(vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Section 17(1) and/or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Sections 5-A(1) and (2) is not at all warranted in such matters.

(ix) If land is acquired for the benefit of private persons, the court should view the invoking of Sections 17(1) and/or 17(4) with suspicion and carefully scrutinise the relevant record before adjudicating upon the legality of such acquisition."

10. If the land of the respondent was needed by the State Government for the purposes of construction of dam, not only expeditious actions were required to be taken, amount was to be paid to the respondent and then only further proceedings were required to be done. From the facts as have come on record, it appears that the calculation of the compensation was done, the award was passed, keeping in view the price of the land in the year when the acquisition proceedings were initiated. The objection raised by the respondent was not considered properly. Not only this, the authorities of the petitioners hatched up the scheme of denying the compensation to the respondent by cancelling the lease granted in his favour, which gave initiation for legal battle in the revenue courts, which ultimately ended before this Court. The petitioners were aware of the fact that the land of the respondent has already been utilized by the petitioners or it has gone in submergence and thus the respondent was denied the right to cultivate the said land, use the same for any other purposes to enjoy his right to property under Article 300-A of the Constitution of India. They were duty bound to compensate the respondent in adequate manner. All this was taken note of by the Executing Court and since no calculation of the amount of compensation was done by this Court while granting a decree in favour of the respondent, the said amount was calculated by the Court below and after adding the solatium, interest as accrued on the said amount, the total calculation was done. If this part of the order is examined, it is clear that no illegality was committed by the Court below nor the Court below had traveled beyond the scope of decree granted by this Court. In fact the theory of merger would be applicable and the decree granted by the lower Court had merged in the final decree granted by this Court.

11. In such circumstances, if the amount was calculated and a direction

was given for payment of the same, in the considered opinion of this Court, no illegality was committed by the Executing Court. The claim as set forth in the revision is, therefore, totally misconceived. By the subsequent order the Executing Court has rejected the application of the petitioners for grant of time to obtain an interim order from this Court, though the case was so fixed that the petitioners may obtain an interim order from this Court. Thus, the order dated 19.11.2009 passed by the Court below cannot be said to be an illegal order beyond the jurisdiction of the Court below.

12. The revision filed against such order fails and is hereby dismissed. However, in the given circumstances of the case, there shall be no order as to cost.

Revision dismissed.

I.L.R. [2012] M.P., 2575

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 433/2001 (Jabalpur) decided on 9 May, 2012

RAMCHARAN

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Section 379 - Theft - Recovery of stolen currency from alleged place not proved - Entry of arrival and returning, description of work done neither produced nor exhibited - Co-accused acquitted on the basis of same evidence - Findings against principle of parity - Revision allowed - Applicant acquitted from charge.

(Paras 10, 11 & 12)

दण्ड संहिता (1860 का 45), धारा 379 - चोरी - अभिकथित स्थान से चुराई गई मुद्रा की बरामदगी साबित नहीं - आने और जाने की प्रविष्टि, किये गये कार्य का विवरण न तो प्रस्तुत किया गया और न ही प्रदर्शित किया गया - सह-अभियुक्त समान साक्ष्य के आधार पर दोषमुक्त - निष्कर्ष समानता के सिद्धांत के विरुद्ध - पुनरीक्षण मंजूर - आवेदक आरोप से दोषमुक्त।

Cases referred :

AIR 1971 SC 1641, AIR 1979 SC 1408.

Sanjay Patel, for the applicant.

Vandana Shrivastava, P.L. for the non-applicant.

O R D E R

U.C. MAHESHWARI, J. - The applicant has directed this revision under Section 397/401 of Cr. P. C. being aggrieved by the judgment dated 25th April 2001 passed by Sessions Judge, Sagar in Criminal Appeal No. 52/2001, whereby till the extent of applicant by affirming the judgment dated 30.1.2001 passed by the Chief Judicial Magistrate, Sagar in Criminal Case No. 760/2000 convicting him and one co-accused Karan under Section 379 of IPC with direction to undergo for RI one year the co-accused-Karan has been acquitted from such charge.

2. The facts giving rise to this revision in short are that on dated 30.7.2000, the complainant- Mukesh (PW-3) gave a report in writing at P.S., GRP, Sagar contending that his father working as Head Constable in the Police Department had passed away on 22.6.2000, on which to get the sum of his terminal benefits and to submit the application for compassionate appointment he went to the office of the Superintendent Police of Railways, Jabalpur on dated 27.7.2000. After submitting the aforesaid application in such office before Dy. Superintendent of Police he obtained the sum of terminal benefits of his father Rs.41,935/-, out of which Rs.40,000/-, in four bundles having the denomination of Rs.100/- alongwith some documents in some bag of blue colour and remaining Rs.1935/- was kept by him in his pocket. Thereafter the aforesaid bag, he boarded the train Godwana Express from Jabalpur and got down at Katni, where he met the applicant accompanied with acquitted co-accused Karan. The applicant introduced himself to be a person of Police Department, Sagar. Thereafter he accompanied with the applicant and his aforesaid companion went to some hotel and took their meals and came back to Railway Station, Katni from where he accompanied with the applicant and his companion boarded the Passenger Train No. 1506 Up Katni Bina for

Sagar. On the way of such travelling aforesaid bag of currency note was kept by him under his head and they were talking to each other upto Damoh and thereafter he slept. On reaching Sagar, he awoke and found missing his aforesaid bag having the currency note of Rs.40,000/- alongwith the papers. The applicant and his companion Karan were also absent from the train. He tried to trace them out but could not get success, on which he went to Police Station Sagar on 30.7.2000 and gave the aforesaid report in writing, on which, vide dated 31.7.2000, the first information report for the offence of Section 379 of IPC was registered against the applicant and co-accused Karan Ahirwar. In the course of investigation, the applicant and co-accused-Karan were arrested. On their interrogation, they disclosed the information regarding the place where the stolen currency were concealed by them. On such information their respective memorandum under Section 27 of the Evidence, (Ex. P-7 and P-8) were recorded. Pursuant to it, at the instant of the applicant and the co-accused-Karan such currency were seized, from the place shown by them in the memorandum, by preparing the seizure memo, (Ex.P-9 and P-10) in presence of the witnesses, Pradeep Kumar, (PW-4) and Sunil Kumar, (PW-5). As usual interrogatory statements of the witnesses were recorded. Other formalities of the investigation was carried out and on completion of the same, the applicant and acquitted co-accused Karan were charge sheeted for the offence of Section 379 of IPC.

3. On evaluation of the charge sheet, the charge of Section 379 of IPC was framed against the applicant and co-accused Karan. They abjured the guilt, on which the trial was held in which as many as ten witnesses were examined by the prosecution while no one was examined in defence. On appreciation of the evidence, after holding guilty to both the accused for the aforesaid offence each of them was punished by the trial court for RI one year. On filing the appeal on consideration, the co-accused- Karan was acquitted while the conviction and sentence of the applicant has been affirmed, on which the applicant has come to this court with this revision.

4. Shri Sanjay Patel, learned appearing counsel of the applicant after taking me through the evidence adduced by the prosecution as well as exhibited papers of the charge sheet from the record of the trial court argued

that on proper appreciation of the evidence, the applicant also ought to have been acquitted by the courts below but he has been convicted under wrong premises. In continuation he said that mere perusal of the deposition of the complainant- Mukesh, (PW-3), it is apparent that he has not identified the applicant or acquitted co-accused Karan as culprit of the incident. As such he stated inconsistent facts of different stages of his deposition, he was also declared hostile and cross examined by the prosecution even then no fruitful thing has come implicating the applicant with the offence. He also argued that the memorandum of applicant recorded under Section 27 of the Evidence Act and pursuant to it prepared seizure memo have also not been proved by the independent source of evidence. The independent witnesses of seizure memo, on recording their depositions had turned hostile. So in the lack of any independent supporting evidence mere on the testimony of the Police Officer/ Investigation Officer or of other Police Officials such memorandum and seizure memo could not be the foundation to hold guilty to the applicant for the alleged offence. He also argued that as per available evidence the currency note and the papers were not recovered from the exclusive possession of the applicant or at his instance. For the sake of arguments, if it is deemed that the same were recovered from some house where other persons are also residing, then such house could not be deemed to be in exclusive possession of the applicant. So in such premises, the applicant could not be connected with the alleged recovery and the seizure memo. Lastly he argued that there is no distinguishable case against the present applicant in comparison of the acquitted co-accused Karan and on extending the acquittal to him by the appellate court, then on the ground of parity such benefit ought to have been extended to the applicant also. But the same was not given under the wrong premises and prayed to extend the acquittal to the applicant by allowing this appeal.

5. On the other hand, responding the aforesaid arguments, by justifying the aforesaid conviction and sentence of the applicant, Ku. Vandana Shrivastava, learned PL argued that same being based on proper appreciation of the evidence and in conformity with law do not require any interference at this stage either for extending the acquittal or even for reducing the awarded jail sentence of the applicant. In support of her arguments, she specifically

referred paragraph no. 13 of the impugned judgment and prayed for dismissal of this revision.

6. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the record of the trial court alongwith the judgment of the courts below. In the available factual matrix of the matter, the courts below have committed grave error in convicting the applicant under the alleged offence of Section 379 of IPC.

7. In order to prove the case the prosecution had examined as many as ten witnesses including the aforesaid complainant- Mukesh Kumar (PW-3). On perusing his deposition, it is apparent from paragraphs 1 and 2 that he did not identify the applicant and the acquitted co-accused Karan as culprits of the alleged incident. Although he stated entire story as stated by him in Annexure P-5, report in writing on which FIR, (Ex. P-6) was registered but he did not depose anything implicating the applicant with the alleged offence. As such he did not identify the applicant as culprit of the incident in the court dock, on which he was declared hostile by the Public Prosecutor and cross examined. Even in such cross examination also no fruitful thing has come in support of the prosecution. On going through his entire cross examination, I have not found any single sentence implicating the applicant with the alleged offence. I am of the considered view that mere on the aforesaid deposition of Mukesh- complainant the applicant was entitled for extending the acquittal because he was the only affected person and the material witness of the alleged theft. So in the lack of such material evidence in the deposition of complainant himself mere on the basis of the depositions of some officials of the Police Department namely Shri Pramod Kumar, Head Constable, (PW-1) Shri K.D. Sharma, Constable, (PW-6), Shri Ansar Ali, Constable, (PW-8), Raghuvendra Urmaliya, Constable, (PW-9) and Shri K.P. Singh, Constable, (PW-10), as alleged who were accompanied with the Investigating Officer of the case at the time of making the arrest of the applicant and accused and co-accused, on recording their memorandum under Section 27 of the Evidence Act and at the time of recovering the currency note, the applicant could not be held guilty for the alleged offence as they are not the eye witnesses of the incident. In any case their statements could not be taken into consideration

for holding the conviction unless the same is supported by the testimony of some independent witnesses. Besides this, on recording the deposition of Pradeep Kumar Yadav, (PW-4) and Sunil Kumar, (PW-5), the witnesses of aforesaid memorandum of the applicant and seizure memo, both had turned hostile and have not stated anything implicating the applicant. So in view of such evidence of the independent witnesses, the testimony of the aforesaid Constable or other Police Officials could not be a foundation to hold guilty to the applicant as memorandum and seizure memo have not been proved beyond reasonable doubt by the prosecution.

8. Apart the above, the Investigating Officer Shri M.S. Sikarwar, (PW-7) deposed that in pursuance to the aforesaid memorandum of the applicant, the alleged recovery of currency was made from the house of the applicant but through any document he could not prove that the house from which the alleged currency and documents were recovered and seized was in exclusive possession of the applicant. The same has also not been proved by the other evidence available on record. In such premises, the inference could only be drawn that at the time of alleged recovery the applicant was in custody of the Police and such house was in possession of some other person and in such circumstances the alleged recovery could not be said to be at the instance of the applicant from his house. It is not the case of the prosecution that at the time of seizure, the alleged house was closed or locked and same was opened at the instance of the applicant. In such premises, exclusive possession of the applicant over such house could not be deemed and I am of the considered view that unless the exclusive possession of the applicant over the house, from where the alleged currency and documents were seized is proved by any admissible or documentary evidence, the alleged house could not be deemed to be the house of the applicant and in such premises, the applicant could not be connected with the alleged recovery. My aforesaid view is fully fortified by the decision of the Apex Court in the matter of *Ghuran Yadav Vs. State of Bihar* reported in AIR 1971 SC 1641, in which it was held as under:-

4. *The search, if any, which is said to have led to the recovery of the six bags in question appears to us on the existing record to have been effected in a manner which*

does not inspite confidence. But we need say nothing more on this point because the absence of evidence of ownership of the house is enough to determine the fate of the prosecution case.

5. *On going through the record and examining the evidence which we have just discussed we are clear that there is no legal evidence on the record on which we can sustain the conclusions of the Courts below that it was the appellant's house which was searched.*

9. It is apparent from the deposition of the complainant, Mukesh Kumar, (PW-3), as stated above, that he has not supported the case of the prosecution against the applicant. On the contrary he has stated some inconsistent facts at different stages of the same deposition as such in chief he has stated something and after declaring him hostile on his cross examination by the Public Prosecutor, he stated some other thing and in cross examination of the defence counsel, he stated some different thing and when his testimony was not relied on by the appellate court to convict Karan, then no different yardstick to evaluate such evidence to affirm the conviction of the present applicant could have been adopted by the appellate court. My such aforesaid view is fully fortified by the decision of the Apex Court in the matter of *Suraj Mal Vs. State (Delhi Administration)* reported in AIR 1979 SC 1408, in which it was held as under:-

"2.

It is well-settled that where witnesses make two inconsistent statements in their evidence either at one state or at two stages, 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. For these reasons, therefore, when the Special Judge disbelieved the evidence of P Ws. 6 8 and 9 in regard to the complicity of Ram Narain, It was not open

to him to have convicted the appellant on the same evidence with respect to the appellant, which suffered from same infirmities for which the said evidence was disbelieved regarding the complicity of Ram Narain. If the witnesses drew no distinction in the examination in chief regarding acceptance of bribe by Ram Narain and by the appellant and the witnesses were to be disbelieved with respect to one, they could not be believed with respect to the other. In other words, the evidence of witnesses against Ram Narain and the appellant was inseparable and indivisible"

10. It is also apparent on record that in order to prove the bonafide of the Investigation Officer and accompanied Police Officials to show that in fact they visited the alleged place/house, for recovery of the stolen currency at the instance of the applicant, pursuant to his memorandum recorded under Section 27 of the evidence Act, the concerning Rojnamcha Entries regarding their departure from the Police Station to such place so also such entry of their returning and arrival to Police Station, with the description of the work done, have neither been produced nor exhibited on record. In the lack of such evidence, it could not be deemed beyond reasonable doubt that to make the alleged recovery, the aforesaid Police Officials alongwith the applicant at his instance visited the alleged house and seized the alleged sum and document at his instance from his possession. Therefore, on this ground also the applicant deserves to extend the acquittal.

11. In the aforesaid premises, I have come to this conclusion that the prosecution has failed to prove the alleged offence of Section 379 of IPC against the applicant beyond reasonable doubt and in such premises, the approach of the trial court as well as the appellate court holding guilty to the applicant for such offence being perverse and contrary to the record is not sustainable.

12. Besides the aforesaid, it is apparent fact on record that present applicant as well as co-accused Karan are situated in similar circumstances

in the matter and on consideration by the appellate court if co-accused Karan was extended acquittal, then on the basis of same evidence and contrary to the principle of parity, the conviction of the applicant could not be affirmed by the appellate court. So on the ground of parity also the applicant is entitled for extending the acquittal. So in such premises also the judgment of the appellate court till the extent of this applicant being perverse is not sustainable.

13. In view of the aforesaid, this revision is allowed and by settling aside the judgments of both the courts below till the extent of the applicant - Ramcharan holding conviction and sentence against him under Section 379 of IPC are set aside and he is acquitted from such charge. His bail bonds are hereby discharged.

14. The revision is allowed, as indicated above.

Revision allowed.

I.L.R. [2012] M.P., 2583

CRIMINAL REVISION

Before Mr. Justice M.A. Siddiqui

Cr.R.No. 492/2012 (Jabalpur) decided on 26 July, 2012

RAJEEV KUMAR

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Essential Commodities Act (10 of 1955) Section 3/7, Penal Code (45 of 1860), Sections 467, 468 & 471, Criminal Procedure Code, 1973 (2 of 1974), - Framing of charge - Powers of Revisional Court - Driver co accused was carrying a tanker in which 20,000/- liter kerosene oil of blue colour was found - Held - Revisional jurisdiction can not embark upon re-appreciation of evidence unless the finding of fact is on the face of it illegal or perverse - It is a cardinal principle of law that in a revision, the revisional court will not interfere with the order of the court below, unless there is some compelling reason for doing so such as where the judgment or order of the court below is vitiated by perversity or gross illegality - The impugned order does not suffer

from any illegality nor there is any error of jurisdiction - Thus, it is clear that charges are properly framed - Revision dismissed.

(Paras 1, 13, 14 & 15)

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7, दण्ड संहिता (1860 का 45), धाराएँ 467, 468 व 471, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) - आरोप विरचित किया जाना - पुनरीक्षण न्यायालय की शक्तियाँ - सह अभियुक्त वाहन चालक टैंकर ले जा रहा था जिसमें 20,000 लीटर नीले रंग का मिट्टी का तेल पाया गया - अभिनिर्धारित - पुनरीक्षण अधिकारिता, साक्ष्य का पुनः मूल्यांकन आरंभ नहीं कर सकती जब तक कि तथ्य का निष्कर्ष प्रकट रूप से अवैध या अनुचित न हो - यह विधि का प्रमुख सिद्धांत है कि पुनरीक्षण में, पुनरीक्षण न्यायालय, निचले न्यायालय के आदेश में हस्तक्षेप नहीं करेगा, जब तक कि ऐसा करने के लिए बाध्यकर कारण न हो जैसा कि जब निचले न्यायालय का आदेश या निर्णय अनुचितता या घोर अवैधता से दूषित हो - आक्षेपित आदेश किसी अवैधता से ग्रसित नहीं और न ही अधिकारिता की कोई त्रुटि हुई है - अतः यह स्पष्ट है कि आरोप उचित रूप से विरचित किये गये हैं - पुनरीक्षण खारिज।

Cases referred :

AIR 1995 SC 2339, 1988 (2) JLJ 69, AIR 1976 SC 985, AIR 1960 SC 886, 1992 CRI. L.J. 527, (2007) 13 SCC 530.

R.K. Samaiya, for the applicant.

Akshya Namdeo, P.L. for the non-applicant/State.

ORDER

M.A. Siddiqui, J. - This criminal revision u/s 397/401 Code of Criminal Procedure, 1973 (hereinafter referred to for short 'Cr.P.C.') has been filed in order to quash the order dated 13.12.2011 passed by 4th Additional Sessions Judge, Tikamgarh in Sessions Trial No.244/2009 (State of M.P. v. Ashok Gujjar and another) by which learned trial Court has framed the charge u/ss 467, 468, and 471 of IPC and u/s 3/7 of Essential Commodities Act, against the applicant.

2. In nut shell, the facts of the prosecution case are that on 6.6.2009 at 17.30 (5.30 p.m.) at Kitakhera Tigaila (Tiraha) about 3 K.M. away from

Jatara towards Tikamgarh, Ashok driver co-accused was carrying a tanker bearing registration No.MH-18-M/7182 in which 20,000/- liter kerosine oil of 'blue' colour was found. The tanker was stopped by Ramesh Rajak, Brijesh Vyas, Roopesh Tiwari and Dinesh Mishra and they informed Virendera Bahadur Singh, Inspector the incharge Police Station Jatara , who came on the spot and inquired from Driver Ashok who informed that he was carrying kerosene from Kanpur to Manjusr, Baroda (Gujrat) and built, Voucher, bill and tanker have been seized from him. On inquiry it was found that the tanker was filled with kerosene from Lalit Oil Agency Jatara which was owned by applicant and applicant is a licence holder of controlled kerosene for government supply.

3. A Crime No.200/09 at 18.15 on 6.6.09 of PS Jatara was registered against driver of the tanker and also against the alleged Lalit Oil Agency Jatara. The matter was investigated by Virendera Bahadur Singh and sample of kerosene was sent for chemical examination. On inquiry from Kanpur it was revealed that no built was made from Kanpur, so-many statements of witnesses were recorded who stated that the tanker was filled with kerosene from Lalit Oil Agency Jatara. Report of FSL shows that the kerosene was for government supply for distribution to public having specific 'blue' colour.

4. After due investigation, charge-sheet was submitted to the competent court and the case was committed to the court of session for trial. Applicant being owner/proprietor of Lalit Oil Agency Jatara was made an accused and charges u/s 467,468, and 471 of IPC and u/s 3/7 of Essential Commodities Act, were framed vide order dated 13.12.2011. Hence this criminal revision has been preferred to quash the charge-sheet on the following grounds:

(A) The complainant Virendera Bahadur Singh who lodged the FIR himself has no authority or jurisdiction to make the paralleled enquiry himself and the charges so framed on the basis of that unauthorised enquiry charge is vitiated.

(B) The enquiry report conducted by the team of Food Authorities who found the stock of Lalit Oil Agency according to the kerosine oil supplied and after verification from the

record and fair price shop and semi wholesale dealers found the same which is a sufficient proof of the fact that kerosene oil was not lifted from Lalit Oil Agency.

(C) As per statement of Driver Ashok Gurjar which was recorded by the team of Food Authority, he categorically stated that the kerosene oil was lifted from Maruti Chemical Limited Kanpur and transported from Prakhyat Road Lines Kanpur.

(D) As per bare reading of First Information Report which was lodged by the Town Inspector himself the offence prima facie was found u/s 3/7 of Essential Commodities Act against the driver Ashok Gurjar only and there is no offence u/ss 467, 468, 471 of IPC but the Town Inspector without authority of law conducted the enquiry and made the offence of the Indian Penal Code. By bare reading of FIR when no offence is made out against the petitioner then it is clear that the name of the petitioner was added subsequently for the ulterior motive best known to the Town Inspector.

(E) It is settled principle of law that the complainant cannot perform the duty of Investigation Officer.

(F) As per challan papers and the enquiry conducted by Food Authorities as per mandate of the Collector there is absolutely no material that any document was tampered, fabricated so as to constitute the offence within the meaning of sections 467,468 and 471 of IPC.

(G) All the documents pertaining to transporting of kerosene oil were seized from Ashok Gurjar and if there is any tampering of the same, Ashok Gurjar would be held liable for the same and not the petitioner.

(H) Absolutely there is no evidence on record that these

documents seized from Ashok Gurjar were given by the applicant to him, hence no offence is made out.

(I) Learned court below without considering the report of Team of Food Authorities which is integral part of the challan framed the charge without any foundation.

(J) As per law laid down by the Apex Court in famous leading *Kapoor Case and Bhajanlal vs. State of Haryana* no case is made out against the petitioner where the allegation made in FIR or the complaint are so absurd and inherently improbable of which no prudent person can ever reach a such conclusion that there is sufficient ground for proceeding against the applicant. As per material on record the criminal proceedings is manifestly attended with malafide and maliciously instituted with an ulterior motive for breaking vengeance on the applicant the proceedings should be quashed.

5. Learned counsel for the applicant vehemently submitted orally and also submitted written submission dated 20.7.2012 showing some case laws that as the case was registered by Town Inspector Virendra Bahadur Singh who has also conducted inquiry and submitted challan is against the interest of justice and on this ground alone the charge sheet should be quashed.

6. Reliance is placed on *Megha Singh v. State of Haryana* AIR 1995 SC 2339 in which it has been held that where u/ss 156 and 157Cr.P.C investigation was done by Head Constable who has arrested the accused and recovered pistol and cartridges from him, on his complaint First Information Report was lodged, he being complainant should not have proceeded with investigation of the case. This process was not appreciated but conviction was not set aside on the sole ground. Reliance is placed on *Baijnath Singh v. State of M.P.* 1988 (2) J.L.J. 69 in which it has been held that Police Officer arresting the accused- seizing the weapon --Lodging the FIR --should not be

provided with the investigation of the case.

7. Reliance is placed on *Bhagwan Singh v. The State of Rajasthan* AIR 1976 SC 985 in which it has been held that Investigation by a Head Constable who was himself the person, to whom bribe was alleged to have been offered and who lodged the F.I.R as informant or complainant. This was an infirmity which was bound to reflect on the credibility of the prosecution case.

8. Learned counsel for the respondent has submitted that here the position is different. Virenera Bahadur Singh, Town Inspector can not be called to be a complainant in this case. One Head Constable was also complainant and more over he is not interested in investigation of the prosecution. Since Virenera Bahadur Singh, was posted as Inspector so cognizable offence was informed and as he reached on the spot and seized article and registered FIR he also done from investigation but his position is not as a complainant hence this authority is not applicable to the facts and circumstances of the case. Reliance is placed on *B.N.E. Elias and Co. Ltd. Employees' Union and others vs. B.N.E. Elias and Co. Ltd. And others* AIR 1960 SC 886 on perusal of this case it is very much clear that this case has wrongly been quoted. Reliance is placed on *State of Haryana and others v. Ch. Bhajan Lal and others* 1992 CRI. L. J. 527 in which it has been held that the proceedings were quashed on the ground where a criminal proceeding is manifestly attended with malafide and /or where the proceeding is maliciously instituted with an ulterior motive but here in the case at hand all work done by Virenera Bahadur Singh, it can not be said that he was at all interested in prosecution in a manner manifestly attended with malafide or in maliciously with an ulterior motive . It is true that as seizure and registration of FIR was done by Virenera Bahadur Singh, the then Town Inspector, and he also made some investigation so it is desiorable that person who has seized the article and registered FIR should not be allowed to do investigation but only on this ground without showing or proving what prejudice has been caused by his act the case of prosecution can not be thrown on the ground that investigation was conducted by one person only.

9. Learned counsel for the State has submitted that specially there are statements of witnesses that the tanker was not filled with kerosene from Kanpur and fake documents have been prepared and produced before the police and there are statements of witnesses that the tanker was filled with kerosene from the premises owned and in possession of applicant and the applicant who is said to be dealer of kerosene so the case of prosecution can not be said to be baseless.

10. As far as report of Food Inspector is concerned, the petitioner/ applicant who is said to be a dealer of kerosene firstly manage to supply to villagers and then he will let the kerosene lifted from him and moreover the report of some departmental officer is binding on the criminal court. The Criminal Court will have to decide the case independently.

11. It has been held in *Paramjit Singh v. State of Punjab*, (2007)13 SCC 530 that even a defect, if any, found in investigation, however, serious, has no direct bearing on the competence or the procedure relating to the cognizance or the trial. A defect or procedural irregularity, if any, in investigation itself cannot vitiate and nullify the trial based on such erroneous investigation.

12. Learned counsel for the State has submitted that it is not only the case of violation of provisions of the Essential Commodities Act but there are also charges of making false documents and using them -u/ss 467, 468, and 471 of IPC and there are statements of Head Constable who gone to Kanpur and approached the firm and documents have been prepared and submitted that such firm is not in existence. Submission of the learned counsel for State is that even in case of strong suspicion charges are to be framed and charges can not be quashed on the ground that case of prosecution is doubtful. There is important to see evidence in the case. Learned counsel for the State has further submitted that kerosene was of 'blue' colour which is specifically made for government supply under controlled scheme to BPL Cards holder i.e. poor persons. There is report of FSL that kerosene was of Govt. Supply was 'blue' in colour. Being dealer the petitioner was dealing in such kerosene. He further

submits that whole investigation was not done by Virendra Bahadur Singh but one Head Constable has also done investigation in the case. Hence the case requires trial, evaluation / appreciation/marshalling of evidence.

13. It is well settled that the revisional jurisdiction can not embark upon reappreciation of evidence unless the finding of fact is on the face of it illegal or perverse. It is a cardinal principle of law that in a revision, the revisional court will not interfere with the order of the court below, unless there is some compelling reason for doing so such as where the judgment or order of the court below is vitiated by perversity or gross illegality. The impugned order does not suffer from any illegality nor there is any error of jurisdiction.

14. I have considered the contentions raised before me, First of all I take the contention regarding charges. A perusal of the charges shows that the learned trial Court has not committed any mistake in framing charges vide order dated 13.12.2011 for the offence punishable u/ss 467,468, and 471 of IPC and u/s 3/7 of Essential Commodities Act, thus it is clear that charges are properly framed. The prosecution has to establish its case beyond reasonable doubt by producing the evidence. However, the defence of the applicant/petitioner will be considered by the trial Court at the appropriate stage.

15. On due consideration and looking to the facts and circumstances of the case this petition being devoid of merit and is hereby dismissed. The charges framed by learned trial court can not be quashed. Learned trial court is directed that the observations made in this order shall not be binding on the trial Court and the trial Court shall proceed with the trial in accordance with law without prejudice to the observations made in this order.

Petition fails and is dismissed.

Petition dismissed.

I.L.R. [2012] M.P., 2591

INCOME TAX REFERENCE

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

I.T.R.No. 01/2000 (Indore) decided on 11 April, 2012

PRESTIGE FOODS LTD., INDORE (M.P.)

...Applicant

Vs.

COMMISSIONER OF INCOME TAX, BHOPAL (M.P.) ...Non-Applicant

Income Tax Act (43 of 1961), Sections 30, 31 & 37 - Exemption - Expenditure whether revenue or capital in nature - Plant suffered heavy damage due to an accident - Assessee claimed expenses incurred by it for the repairs of plant and charged the same in profit and loss account - Assessing officer came to conclusion that the entire plant was destroyed and was reconstructed by assessee and therefore treated the expenses as capital expenditure - Held - Assessment made on the basis of survey report, which was never supplied to assessee - No opportunity was given to assessee - It is open for assessing authority to collect private evidence but assessee must be informed and proper opportunity is to be given. (Paras 2, 3 & 6)

आयकर अधिनियम (1961 का 43), धाराएं 30, 31 व 37 - छूट - क्या व्यय का स्वरूप राजस्व है अथवा पूंजी है - दुर्घटना के कारण संयंत्र ने भारी क्षति सहन की - निर्धारिती ने संयंत्र के सुधार में उसके द्वारा उठाये गये व्यय का दावा किया और उसे लाभ-हानि लेखा में दर्ज किया- निर्धारण अधिकारी इस निष्कर्ष पर पहुंचा कि संपूर्ण संयंत्र नष्ट हुआ था और निर्धारिती द्वारा पुनःनिर्मित किया गया और इसलिए व्यय को पूंजी व्यय के रूप में माना गया - अभिनिर्धारित - सर्वेक्षण रिपोर्ट के आधार पर निर्धारण किया गया जो निर्धारिती को कभी उपलब्ध नहीं कराया गया - निर्धारिती को कोई अवसर नहीं दिया गया-निर्धारण प्राधिकारी, निजी साक्ष्य एकत्रित करने के लिए स्वतंत्र है परंतु निर्धारिती को सूचित किया जाना चाहिए और उचित अवसर दिया जाना चाहिए।

Cases referred :

(1954) 26 ITR 775 SC, (1962) 45 ITR 206 SC, (1980) 125 ITR 713 SC.

P.M. Chaudhary, for the applicant.

R.L.Jain with Ms. Veena Mandlik, for the non-applicant.

ORDER

The Order of the court was delivered by :
SHANTANU KEMKAR, J. - Pursuant to the order dated 19.07.1999 passed by the Supreme Court in Civil Appeal No.3975/1999 the Income Tax Appellate Tribunal, Indore Bench (for short the Tribunal) has drawn up the statement of the case and has referred the following questions of law to this Court, for giving opinion :-

“(i) Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the sum of Rs. 16,47,766/- was not allowable as expenditure on repairs?

(ii) Whether in the facts and circumstances of the case, the finding of the tribunal that the expenditure of Rs.16,47,766/- is capital in nature is inter-alia based on material not disclosed to the assessee and is hereby vitiated ?

(iii) Whether in the facts and circumstances of the case, the mode of apportionment of expenditure determining the profits exempt under section 80HH & 80-I adopted by the Tribunal is tenable in law ?”

2. Brief facts necessary for deciding the aforesaid questions No.1 and 2 may be stated as follows. In the year 1988-89 the applicant Assessee set up a Seed Handling Plant (for short the Plant) in its second unit namely Prestige Soya Industries in order to store the seeds purchased by it for being used in its manufacturing process. The plant was operational for almost 15 months till it was severely damaged due to an accident which occurred on 26.05.1991. As the plant was insured with the New India Assurance Company Limited, on a claim for damages being made by the Assessee the survey of the plant was conducted by the Surveyor of the Insurance Company in order to assess the damage caused and the loss suffered by the Assessee. In the meantime in the assessment proceedings the Assessee claimed expenses of Rs.16,47,766/- incurred by it for the repairs of the damaged plant and charged the same in the

profit and loss account. The Assessing Officer was not satisfied with the explanation offered by the Assessee about the charging of the repair expenses in the profit and loss account. The Assessing Officer arrived at a conclusion that the plant was totally destroyed in the said accident and it was reconstructed by the assessee. He, therefore, treated the expenses as capital expenditure and declined to allow the claim of the Assessee made under Sections 30, 31 or 37 of the Act vide order dated 27.03.1995.

3. Dissatisfied with the order dated 27.03.1995 passed by the Assessing Officer the Assessee filed an appeal No.IT-122-95/96 before the Commissioner of Income Tax (Appeals). While deciding the appeal vide order dated 23.11.1995 the CIT (A) took into consideration the aforesaid survey report of the Insurance Surveyor and on the basis of the findings recorded in the survey report dismissed the assessee's appeal. Aggrieved, the Assessee filed a further appeal before the Tribunal. The Tribunal also considered and relied the said survey report and dismissed the Assessee's appeal No.1/IND/1996 vide order dated 27.11.1996. The Tribunal held that since the plant was reconstructed with the changed design, the expenses incurred on it can only be treated as expenditure incurred on reconstruction of the plant which are to be treated as capital expenditure and the same are not allowable as revenue expenditure for repairs.

4. The facts necessary for deciding question No.3 in brief are that during the course of assessment the Assessing Officer had noticed that the Assessee has debited major expenses towards the Directors' remuneration, books, periodicals, Diwali expenses, professional charges, vehicle expenses, telephone and trunk call expenses, Director's travelling expenses in the assessee Prestige Food Industries. The nominal expenses were debited in the account of its second unit viz Prestige Soya Industries. The Assessing Officer asked the assessee to submit explanation of the aforesaid disproportionate allocation of miscellaneous expenses. The Assessee submitted its explanation but the Assessing Officer was not satisfied with the same and vide order dated 27.03.1995 bifurcated the expenses by dividing it in the ratio of turnover of both the units of the Assessee. Feeling aggrieved the Assessee filed an appeal before the CIT (A). The CIT (A) dismissed the appeal vide order dated

23.11.1995. The order of the CIT (A) was upheld by the Tribunal in the further appeal filed by the Assessee.

5. Having heard learned counsel for the parties on the aforesaid questions, our opinion on the questions referred is as under.

6. Re questions No.1 and 2 :-

On going through the order passed by the CIT (A) and the Tribunal, we find that the CIT (A) has recorded the finding against the Assessee on the basis of the survey report of the Insurance Company. The said survey report was received by the Assessing Officer behind the back of the Assessee. No opportunity was ever given by the CIT (A) to the Assessee to dispute the correctness of the said survey report which formed the basis of recording of findings against the Assessee. We find that even copy of the same was not supplied to the Assessee. The CIT (A) and the Tribunal have considered the said survey report without showing it to the Assessee and without giving opportunity to the Assessee to furnish its explanation about it by observing that the same is confidential in nature. They held that the report was available on record of the Assessing Officer which can be looked by any judicial authority in confidence, if need so arise. Having regard to this undisputedly the findings have been recorded by the CIT (A) and the Tribunal on the basis of the survey report which was never supplied to the Assessee.

It has now been well settled that the Income Tax Officer though not bound to rely on evidence produced by the Assessee as he considers to be false, yet if he proposes to make an estimate in disregard of that evidence he should in fairness disclose to the Assessee the material on which he is going to found that estimate; and that in case he proposes to use against the Assessee the result of any private inquiries made by him, he must communicate to the Assessee the substance of the information so proposed to be utilized to such an extent as to put the Assessee in possession of full particulars of the case he is expected to meet and that he should further give him an ample opportunity to meet it. The Income Tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the

Assessee must be informed of the material and must be given an adequate opportunity to explain it and controvert the contents of it. (emphasis supplied) [See *Dhakeshwari Cotton Mills Ltd. Vs. Commissioner of Income Tax* (1954) 26 ITR 775 SC, *C. Vasantlal and Co. Vs. Commissioner of Income Tax, Bombay City* (1962) 45 ITR 206 SC and *Kishinchand Chellaram Vs. Commissioner of Income Tax, Bombay City* (1980) 125 ITR 713 SC]. In view of this legal position, in our considered view the orders of the CIT (A) and the Tribunal are in violation of principles of the natural justice. The Assessee has been deprived of fair opportunity to object and challenge the correctness of the survey report on the basis of which opinion has been formed by the CIT (A) and the Tribunal against the Assessee. In all fairness the said survey report should have been disclosed to the Assessee and the Assessee should have been provided opportunity to explain and object the findings recorded in it before forming any opinion adverse to it. In this view of the matter the question No.2 is decided in favour of the Assessee by holding that the finding that the expenditure of Rs.16,47,766/- is capital in nature is vitiated as it is based upon the material not disclosed to the Assessee. Having regard to this opinion about question No.2, we do not feel it necessary to answer question No.1.

7. Re Question No.3 :-

On going through the orders of the Assessing Authority we find that in the assessment proceedings no details of expenses were furnished by the assessee in order to establish that the particular expenses were incurred in its particular unit out of its two units. In the circumstances, in our considered view in the absence of any details being made available by the Assessee to establish that the particular expenses were incurred for its particular unit out of its two units, the expenses incurred in the various heads are required to be treated for both the units and thereafter in order to arrive at a just figure of expenses of each unit the expenses have to be bifurcated and divided in the ratio of turnover of both the units. This exactly has been done by the Tribunal. Thus, in our opinion the mode and method of apportionment of expenditure adopted by the Tribunal is fully justified. Accordingly, the question No.3 is answered in favour of the Revenue.

8. The reference stands disposed of. The Tribunal to proceed in the matter in accordance with law.

Reference disposed of.

I.L.R. [2012] M.P., 2596

MISCELLANEOUS CIVIL CASE

Before Mr. Justice Brij Kishore Dube

M.C.C.No. 95/2012 (Gwalior) decided on 12 September, 2012

SHAILEY MADNE (SMT.) ...Applicant

Vs.

PANKAJ KUMAR MADNE ...Non-applicant

Civil Procedure Code (5 of 1908), Sections 23 & 24 - Transfer of case - Family court of Bhopal comes under the territorial jurisdiction of the Principal Seat at Jabalpur - Family Court at Gwalior comes under the territorial jurisdiction of Bench of this court at Gwalior - Transfer petition could not be entertained at this Bench at Gwalior. (Para 9)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 23 व 24 - प्रकरण का अंतरण - भोपाल का कुटुम्ब न्यायालय, मुख्य न्यायपीठ जबलपुर के क्षेत्राधिकार में आता है - ग्वालियर का कुटुम्ब न्यायालय, इस न्यायालय के ग्वालियर खण्डपीठ के क्षेत्राधिकार में आता है - अंतरण याचिका ग्वालियर खण्डपीठ में ग्रहण नहीं की जा सकती।

Cases referred :

**2005 (1) MPHT 30, MCC NO. 673/2006 decided on 26.11.2008,
2012 (3) MPLJ 467, AIR 1979 MP 50**

Deepak Shrivastava, for the applicant.

Sushil Goswami, for the non-applicant.

ORDER

BRIJ KISHORE DUBE, J. - This Transfer Petition under Section 24 of the Code of Civil Procedure, 1908 is preferred on behalf of the applicant/wife for transferring the Civil Suit No.639-A/2011 HMA (Pankaj Kumar Madne vs. Smt. Shailey Madne) filed by the non-applicant/ husband

before the Court of Principal Judge of Family Court, Bhopal from such court to the Family Court at Gwalior for its further trial.

2. Learned counsel for the applicant submitted that this transfer petition is maintainable before this Bench. He has placed reliance on the case of *Smt. Lakshmi Nagdev vs. Jitendra Kumar Nagdev*, 2005(1) MPHT 30 and an unreported order dated 26.11.2008 passed in M.C.C.No.673/2006 (*Smt. Kalpana w/o Manish Alias Mahendra Singh v. Maish Singh alias Mahendra Singh*) by this Court.

3. In response, learned counsel for the respondent submits that the application is not maintainable before this Court. He has placed reliance on the case of 2012(3) MPLJ 467, *Smila Jain vs. Anil Kumar Jain*.

4. According to the applicant her marriage was solemnized with the non-applicant on 13.6.2010 as per Hindu rites and customs at Bhopal and after marriage, they lived together as husband and wife. She was ill-treated by the non-applicant and his family members for non-fulfilling their greed of dowry and she was ousted from the house by the non-applicant, thereafter, she came to her parental house at Gwalior. It is further pleaded by the applicant that he has filed an application under Section 125 of Cr.P.C. before the Family Court, Gwalior and also lodged a report against non-applicant and his (non-applicant's) family members, arising out of which a criminal case under Section 498-A, 506/34 of IPC and Section 4 of Dowry Prohibition Act, is pending in the Court of J.M.F.C., Gwalior. She has also made a complaint against the non-applicant and his family members, as a result of which a case under Section 12 of the Protection of Women from Domestic Violence Act, 2005 was registered and is pending before the Court of J.M.F.C., Gwalior. On the pretext, the non-applicant has filed divorce petition under Section 13 of the Hindu Marriage Act, 1955 against her which is registered as Civil Suit No.639-A/2011 and is pending before the Family Court, Bhopal. The applicant has no source of income and she is unable to come alone to attend the Court at Bhopal regularly and apprehending that non-

applicant may put her to trouble, therefore, she prayed for transferring case from Family Court, Bhopal to Family Court, Gwalior.

5. It is appropriate to reproduce the sections 23 and 24 of CPC, which reads as under:-

“23. To what Court application lies.— (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

24. General power of transfer and withdrawal— (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High.

Court or the District Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same;

or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of any order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section,—

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it."

6. In the case of *Jagatguru Shri Shankaracharya Jyotish Peethadhiswar Shri Swami Swaroopanand Saraswati v. Ramji Tripathi and others*, AIR 1979 Madhya Pradesh 50, the Division Bench of this Court in para 10 has held as under:-

"10. General power of transfer and withdrawal of suits are contained in S. 24 of the Code of Civil Procedure. Sections 22 and 23 of the Code apply only to cases where the plaintiff has the option to sue in two or more Courts. Under S.22, the defendant, after notice to the other parties and at the earliest possible opportunity and at or before

settlement of issues, may apply to have the suit transferred to one of the other Courts where the suit could have been filed. Though the notice to the other parties is to be given, the defect can be cured by notice on the application itself. The Court has to decide the application after hearing the objections, if any, of the other parties in the suit. Section 23 prescribes the forum where the application for transfer has to be made. In case the suit is sought to be transferred to a Court subordinate to another High Court, the application has to be made in the High Court within whose jurisdiction the suit is pending. In the present case, the respondent No.1 entered appearance in the suit for the first time before the District Judge, Seoni, on 9-9-1974 and the application for transfer was moved in this Court on the very next date on 10-9-1974 to transfer the suit to a competent Court at Allahabad. The learned single Judge decided the application after notice and hearing all the parties to the suit. As such, the learned Single Judge has rightly entertained and decided the transfer application. A Division Bench of this Court in *Kanhaiyalal Daga Firm v. Zumerlal*, AIR 1940 Nag 145 has held that under Sections 22 and 23, High Court can transfer a suit pending in a subordinate Court to a Court subordinate to another High Court. Same is the view taken by the Supreme Court in *Western U.P. Electric & Power Supply Co. Ltd. v. Hind Lamps Ltd.* (1969) 2 SCWR 16. Therefore, the learned single Judge had the jurisdiction to transfer the suit from the Court of District Judge Seoni to the Court of District Judge, Allahabad."

(Emphasis supplied)

7. While explaining the scope of Section 23 (3) of the CPC, this Court in the case of *Smt. Lakshmi Nagdev* (supra) observed that the said section empowers the High Court to transfer a suit pending in a sub-ordinate Court to

a Court subordinate to another High Court. In *Smt. Kalpana* (supra), the suit pending before the Court of Additional District Judge, Sonkakasha, Distt. Dewas was transferred to the Family Court at Gwalior.

8. In *Smita Jain* (supra), this Court has held that the High Court at Jabalpur has the control over the jurisdiction of Courts at Bhopal as per the notification issued. What the petitioner is asking for transfer of the cases from Bhopal to Vidisha. This Court is competent to issue an order of transfer of one case of any subordinate Court within its jurisdiction to the Court of competent jurisdiction in other district, which may not be within the jurisdiction of this Court but in the same State.

9. It is a undisputed fact that the aforesaid Family Court of Bhopal comes under the territorial jurisdiction of the Principal Seat at Jabalpur, while, the Family Court at Gwalior comes under the territorial jurisdiction of Bench of this Court at Gwalior and, therefore, in view of the provisions of Sections 23 & 24 of CPC read along with Rules of Chapter 3 of the Madhya Pradesh High Court Rules, 2008, such transfer petition could not be entertained at this Bench at Gwalior.

10. Therefore, in view of the aforesaid provisions and the principle discussed here-in-above, I am of the considered view that this transfer petition is not maintainable before this Bench as the applicant has the remedy to approach the Main Seat, Jabalpur seeking transfer of the case, from the Family Court, Bhopal to Family Court, Gwalior.

11. At this stage, learned counsel for the applicant seeks permission to withdraw this application with liberty to file the same before the Principal Seat at Jabalpur.

12. Considering the submission made by learned counsel for the applicant, the transfer petition is dismissed as withdrawn with the liberty as prayed for.

Petition dismissed.

I.L.R. [2012] M.P., 2602

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C.No. 11475/2011(Jabalpur) decided on 4 April, 2012

PRAKASH DESAI

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Prevention of Food Adulteration Act (37 of 1954), Section 7(ii), 16(1)(a)(i), Prevention of Food Adulteration Rules, 1955, Rule 49(29) - Drinking Water - Sample of water was collected on 8-6-2001 and complaint was filed on 25-9-2006 - Rule 49(29) is applicable to Mineral Water and not drinking water - Even otherwise, the Rule 49(29) remained inoperative till 30-6-2001 - Complaint was also filed after the period of 3 years commencing from the date of offence - No offence is made out on the basis of the face value of the complaint - Proceedings quashed.

(Para 5)

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 7(ii), 16(1)(a)(i), खाद्य अपमिश्रण निवारण नियम, 1955, नियम 49(29) - पेय जल - 8.6.2001 को पानी का नमूना संग्रहित किया गया था और शिकायत 25.9.2006 को दर्ज की थी - नियम 49 (29) मिनरल वाटर पर लागू होगा और पेय जल पर नहीं - अन्यथा भी, नियम 49 (29), 30.6.2001 तक प्रवर्तन में नहीं था - शिकायत भी अपराध घटित होने के 3 वर्ष बाद दर्ज की गई थी - प्रत्यक्षतः शिकायत के आधार पर कोई अपराध नहीं बनता - कार्यवाहियां अभिखण्डित।

Cases referred :

2006(1) FAC 202, AIR 1976 SC 394, AIR 1992 SC 604

*Surendra Singh with Amit Mishra, for the applicant.**Akhilesh Singh, P.L. for the non-applicant/State.***ORDER**

R.C. MISHRA, J. - This is a petition, under Section 482 of the Code of Criminal Procedure (for brevity 'the Code'), for quashing of the criminal proceedings pending as Complaint Case No.4837/2006, before Shri B.R.

Yadav, JMFC, Sagar.

2. The petitioner stands prosecuted as the person nominated by the manufacturing company under Section 17(1)(a)(i) of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act') for the offence punishable under Section 7(ii) read with S.16(1)(a)(i) of the Act. Cognizance of the offence has been taken upon complaint made by Shivraj Pawak, Food Inspector, Food and Drug Administration, Distt. Sagar against the petitioner, Vinod Kumar and Prafulla Patel (arraigned as accused nos.2, 1 and 3 respectively).

3. Relevant contents of the complaint, filed on 25.9.2006, may be summarized as under -

(i) On 8.6.2001 at about 2.30 p.m., R.K. Jain, the Food Inspector, inspected the shop run by Vinod Kumar under the name and style of 'Natraj Sweets' situated in Civil Lines at Sagar. By paying an amount of Rs.30/-, the Inspector purchased 3 bottles containing water, each carrying label specifying these particulars -

"KINLEY Pure Drinking Water, packaged drinking water bottled by Hindustan Coca-Cola Beverages Pvt. Ltd, Regd. Office at Enkay Towers, Udyog Vihar, Phase 5, Gurgaon, Haryana under the authority of Coca-Cola Company Net quantity 1 litre, Batch No.012, Mfd. date-18.4.2011 MRP-Rs.10.34 Best Before 6 months from Packing Unit at Nadiad, Gujarat."

(ii) One of the bottles, thus purchased, was forwarded for analysis to the Public Analyst, State Food Laboratory, Bhopal. The corresponding report dated 10.7.2001 indicated that the product was misbranded in view of contravention of Rule 49(29) of the Prevention of Food Adulteration Rules, 1955 (for short 'the Rules').

(iii) The follow up action, for ascertaining the names of the persons liable for the offence and for obtaining consent of Local

Health Authority for their prosecution, took a considerable period of more than 5 years.

4. Before proceeding further, it would be necessary to advert to Rule 49(29) [above], which reads thus -

"No person shall manufacture, sell or exhibit for sale mineral water except under the Bureau of Indian Standards Certification Mark "

5. As rightly contended by learned Senior Counsel, even initiation of the proceedings was clearly an abuse of process of the Court in view of the following facts -

(i) Report of Public Analyst could not have formed basis of the prosecution as Sub-Rule 29 of Rule 49 of the Rules is applicable to Mineral Water, for which standards are prescribed under Item A.32 and not to Packaged Drinking Water, for which standards are laid down under Item A.33 of Appendix B to the Rules.

(ii) Even if it is assumed, for the sake of arguments, that the bottle sent to the Public Analyst contained mineral water, no case for violation of Rule 49(29) of the Rules would be made out simply because the Rule, though inserted by way of Notification No.GSR-759(E) with effect from 29.3.2001, remained inoperative till 30.6.2001 by virtue of order-dated 3.4.2001 issued by Joint Secretary and CVO, Government of India, Ministry of Health and Family Welfare, whereunder the products of the Companies listed in the annexure were permitted to be in the market without the requisite certificate from the BIS and name of the manufacturing unit viz. M/s Kothari Beverages Pvt. Ltd., Nadiad (Gujarat), nominee of which has been prosecuted as accused no.3, figured in the list. In other words, even the products containing mineral water and exhibited for sale during the period from 29.3.2001 to 30.6.2001, stood wholly exempted from operation of the Rule by reason of the

order-dated 3.4.2001 (supra) whereas, as pointed out already, the sample in question was sold on 8.6.2001.

(iii) Use of words such as 'pure', 'crisp', 'refreshing', 'purified' and 'purity guaranteed', on label does not offend any provision of law (*Pepsico India Holdings Pvt. Ltd. v. The Bureau of Indian Standards* 2006 (1) FAC 202 referred to).

(iv) Since the offence of misbranding is punishable for a term which may extend to three years, the complaint ought to have been filed within a period of 3 years, commencing from the date of the offence i.e. 8.6.2001 (See. Clause (c) of Section 468 of the Code). The complaint presented on 25.9.06, therefore, was apparently time-barred in absence of a proper explanation for delay or the order of the Magistrate, extending the period of limitation on the facts and in the circumstances of the case, as contemplated under Section 473 of the Code.

6. Even though, the report of the Public Analyst, including his opinion on this point, is *per se* evidence by virtue of Section 13 of the Act yet, this does not mean that his *ipse dixit* would be conclusive and binding on the Court. To treat it so, would be to leave the determination of the guilt of the accused to the whims and fancies of the Public Analyst (*Municipal Corporation of Delhi v. Kacheroo Mal* AIR 1976 SC 394 relied on). Accordingly, it is for the Court to weigh his opinion and reach its own finding.

7. To sum up, even if the allegations made against the petitioner in the complaint, are taken at their face value and accepted in their entirety, no offence under the Act would be made out. As such, the case against the petitioner falls under categories (1) and (3) of the cases, as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting interference under the inherent powers.

8. For these reasons, the petition stands allowed and the proceedings in Complaint Case No.4837/2006 (ibid) are hereby quashed.

Petition allowed.

I.L.R. [2012] M.P., 2606

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C.No. 12496/2011 (Jabalpur) decided on 18 April, 2012

KANTILAL BHURIA

...Applicant

Vs.

SANJAY SARVARIA

...Non-applicant

Prevention of Insults to National Honour Act (69 of 1971), Section 2 - Disrespect - Petitioner, a Union Minister and President of M.P. Congress Committee arrived in a party meeting in official car whereon National Flag was having a hole - On being apprised, he made a fun of it by saying it is similar to that of State Government - Held - Article 51(a) of Constitution of India enjoins a duty on every Citizen to respect National Flag - However, allegation do not prima facie make out a case under section 2 of Act, 1971 - Proceedings quashed. (Paras 1 & 5)

राष्ट्र गौरव अपमान निवारण अधिनियम (1971 का 69), धारा 2 - अनादर - याची, एक केन्द्रीय मंत्री एवं अध्यक्ष, म.प्र. कांग्रेस समिति, पार्टी की मीटिंग में शासकीय वाहन से आये जिस पर लगे हुए राष्ट्रीय ध्वज में छेद था - उनका ध्यान आकर्षित करने पर वह व्यंग्य करते हुए बोले कि यह राज्य सरकार के समान है - अभिनिर्धारित - भारतीय संविधान का अनुच्छेद 51(ए) निर्देशित करता है कि राष्ट्रीय ध्वज का आदर करना प्रत्येक नागरिक का कर्तव्य है - चूंकि आरोप प्रथम दृष्ट्या अधिनियम 1971 की धारा 2 के अंतर्गत प्रकरण गठित नहीं करते - कार्यवाहियां अभिखण्डित।

Case referred :

AIR 1992 SC 604

Manish Datt, for the applicant.*None*, for the non-applicant nos. 1 & 2.*C.K. Mishra*, G.A. for the non-applicant no.3/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 prosecution for the offence punishable under Section 2 of the Prevention of Insults to National Honour Act, 1971 (for short 'the Act'). Corresponding trial is pending as Complaint Case No.2434/2011 in the Court in Shri S.S. Jamra, JMFC, Damoh. Cognizance of the offence has been taken upon the complaint made by the respondent nos.1 and 2 by JMFC, Damoh. It contained the following allegations -

"On 25.5.2011 at about 12 Noon, the petitioner, an Union Cabinet Minister and President of M.P. Congress Committee, arrived at Tendukheda, to address a meeting of Party workers, in an official vehicle whereon National Flag, having a hole of 1½" in diameter, was flying and even on being apprised of the condition of the Flag, he made a fun of it by saying that it is similar to that of the Government in the State and thus, allowed the disrespect to the National Flag to continue."

2. Learned counsel for the petitioner has strenuously contended that continuance of the prosecution is an abuse of the process of the Court as, apparently, he had no intention to bring National Flag into disrespect. According to him, the prosecution is politically motivated. To buttress the contentions, attention has been invited to the following facts -

(i) The petitioner was treated as a State Guest and, accordingly, the vehicle displaying the National Flag was provided to him by the Collector of the District on behalf of the State Government and therefore, it was the duty of the officer concerned to ensure that the Flag, to be used for being flown thereon, was free from any apparent defect and deficiency.

(ii) The petitioner belongs to Indian National Congress (INC), which happens to be the rival political party of Bhartiya

Janta Party, the Ruling Party in the State.

3. While opposing the prayer for quashing the proceedings, learned Govt. Advocate has pointed out that the petitioner is also guilty of perpetuating the insult to the National Flag.

Before entering into the merits of the rival contentions, it would be necessary to advert to the penal provision that is couched in the following terms -

"Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise shows disrespect to or brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both"

4. Further, specific instances of disrespect to the Indian National Flag have been enumerated in the Explanation 4 appended to Section 2 as under -

Explanation 4:-The disrespect to the Indian National Flag means and includes:-

(a) a gross affront or indignity offered to the Indian National Flag; or

(b) dipping the Indian National Flag in statue to any person or thing; or

(c) flying the Indian National Flag at half-mast except on occasions on which the Indian National Flag as flown at half-mast on public buildings in accordance with the instructions issued by the Government; or

(d) using the Indian National Flag as a drapery in any form whatsoever except in State funerals or armed forces or other para-military forces funerals; or

(e) *using the Indian National Flag -*

(i) as a portion of costume uniform or accessory of any description which is worn below the waist of any person; or

(ii) by embroidering or printing it on cushions handkerchiefs napkins undergarments or any dress material; or

(f) *putting any kind of inscription upon the Indian National Flag; or*

(g) *using the Indian National Flag as a receptacle for receiving, delivering or carrying anything except flower petals before the Indian National Flag is unfurled as part of celebrations on special occasions including the Republic Day or the Independence day; or*

(h) *using the Indian National Flag as covering for a statue or a monument or a speaker's desk or a speaker's platform; or*

(i) *allowing the Indian National Flag to touch the ground or the floor or trail in water intentionally; or*

(j) *draping the Indian National Flag over the hood, top and sides or back or on a vehicle, train, boat or an aircraft or any other similar object; or*

(k) *using the Indian National Flag as a covering for a building; or*

(l) *intentionally displaying the Indian National Flag with the "saffron" down."*

5. It is true that Article 51A(a) of the Constitution of India enjoins a duty on every citizen to respect the National Flag but even if the allegations as made against the petitioner in the complaint are taken at their face value and

accepted in their entirety, no offence of its disrespect as punishable under the Act would be made out. As such, the case against the petitioner falls under category (1) and (7) of the cases, as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting interference under the inherent powers.

6. Accordingly, the petition is allowed and the proceedings in Complaint Case No.2434/2011 pending in the Court of JMFC, Damoh are hereby quashed.

Petition allowed.

I.L.R. [2012] M.P., 2610

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C.No. 4972/2012 (Jabalpur) decided on 28 June, 2012

HAJI SAYYAD

...Applicant

Vs.

STATE OF M.P. & anr.

...Non-applicants

Dowry Prohibition Act (28 of 1961), Section 7, Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3), 482 - Statement made by aggrieved person - Respondent no. 2 was married with daughter of applicant - Respondent no. 2 is facing trial for offence under Section 498-A of I.P.C. - Respondent no.2 filed complaint on the basis of admission of the applicant that he had given dowry in connection with marriage of his daughter - Held - While forwarding the complaint for investigation, the Magistrate overlooked the provision of Section 7(3) of the Act - Further the word "May" in Section 156(3) makes it clear that the provision is directory and forwarding of complaint is not necessary in every case - Order passed under Section 156(3), F.I.R. and consequent proceedings quashed. (Paras 3 & 5)

दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 7, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 156(3), 482 - पीड़ित व्यक्ति का कथन - प्रत्यर्थी क्र. 2 का विवाह आवेदक की पुत्री के साथ हुआ था - प्रत्यर्थी क्र. 2 भा.द.सं. की धारा 498-ए के अंतर्गत अपराध के विचारण का सामना कर रहा है - प्रत्यर्थी क्र. 2 ने शिकायत दर्ज की, अपीलार्थी की इस स्वीकृति के आधार पर कि उसने अपनी पुत्री के विवाह के संबंध में दहेज दिया था - अभिनिर्धारित - जब शिकायत को जांच

के लिए अग्रेषित किया गया, न्यायाधीश ने अधिनियम की धारा 7(3) के उपबंध की अनदेखी की — इसके अतिरिक्त धारा 156(3) में शब्द 'हो सकता है' से स्पष्ट होता है कि उपबंध निदेशात्मक है और प्रत्येक प्रकरण में शिकायत अग्रेषित करना आवश्यक नहीं है — धारा 156(3) के अंतर्गत पारित आदेश, प्रथम सूचना रिपोर्ट एवं तत्पश्चात् की गई कार्यवाहियां अभिखंडित।

Case referred :

AIR 1992 SC 604

Imtiyaz Hussain, for the applicant.

Y.Dwivedi, P.L. for the non-applicant no.1/State.

Sanjay Patel, for the non-applicant no.2.

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 of -

(i) the order-dated 17/4/2012 passed by Shri Sunil Kumar Mishra, JMFC, Jabalpur, under Section 156(3) of the Code, forwarding the complaint made by respondent no.2, to SHO, P.S. Cantt. Jabalpur, for investigation, after recording an FIR against the petitioner in respect of the offence punishable under Section 3 of the Dowry Prohibition Act, 1961 (hereinafter referred to as "the Act").

(ii) the FIR leading to registration of Crime No.161/2012 at the Police Station as well as the consequent proceedings of investigation.

2. Marriage of the respondent no.2 was solemnized with Shahnaz, the daughter of the petitioner, in the year 2006. On 20/1/2007, they were blessed with a son named Tabrez. Shahnaz has been residing at her parental home since 2009 and in a case initiated on the basis of the FIR lodged by her, the respondent no.2 is facing trial upon the charge of the offence under Section 498-A of the IPC. The complaint is based on the admission said to have been made by the petitioner in his case diary statement as well as in his deposition before the trial Magistrate to the effect that he had given dowry in connection with the marriage of Shahnaz with the respondent no.2.

3. As rightly contended by learned counsel for the petitioner, while forwarding the complaint for investigation, learned Magistrate completely overlooked the statutory immunity from prosecution in respect of the statement in question provided to him under sub-section (3) of Section 7 of the Act, that reads as under :-

"Notwithstanding anything contained in any law for the time being in force, a statement made by the person aggrieved by the offence shall not subject such person to a prosecution under this Act."

4. Besides this, the background facts and circumstances of the case, as highlighted above, learned Magistrate could have easily discovered that the complaint was filed as a counter blast to the prosecution launched against the respondent no.2:

5. Moreover, use of word "may" in Section 156(3) manifests intention of the legislature to make the provision directory and, therefore, forwarding of complaint under the Code is not necessary in every case.

6. There is yet another aspect of the matter. An admission made by a person whether amounting to a confession or not cannot be split up and part of it can not be used against him.

7. Thus, even if the allegations made against the petitioner in the FIR are taken at their face value and accepted in their entirety, no offence under the Act would be made out and it is further apparent that the complaint was made maliciously with an ulterior motive of wreaking vengeance due to past animosity with the petitioner and his family members. As such, the case against the petitioner falls under categories (1) and (7) of the cases, as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting interference under the inherent powers.

8. The petition is, accordingly, allowed and the order in question, the FIR and the consequent proceedings are hereby quashed.

9. A copy of this order be forwarded to Sessions Judge, Jabalpur for information and necessary action.

C.C. as per rules.

Petition allowed.