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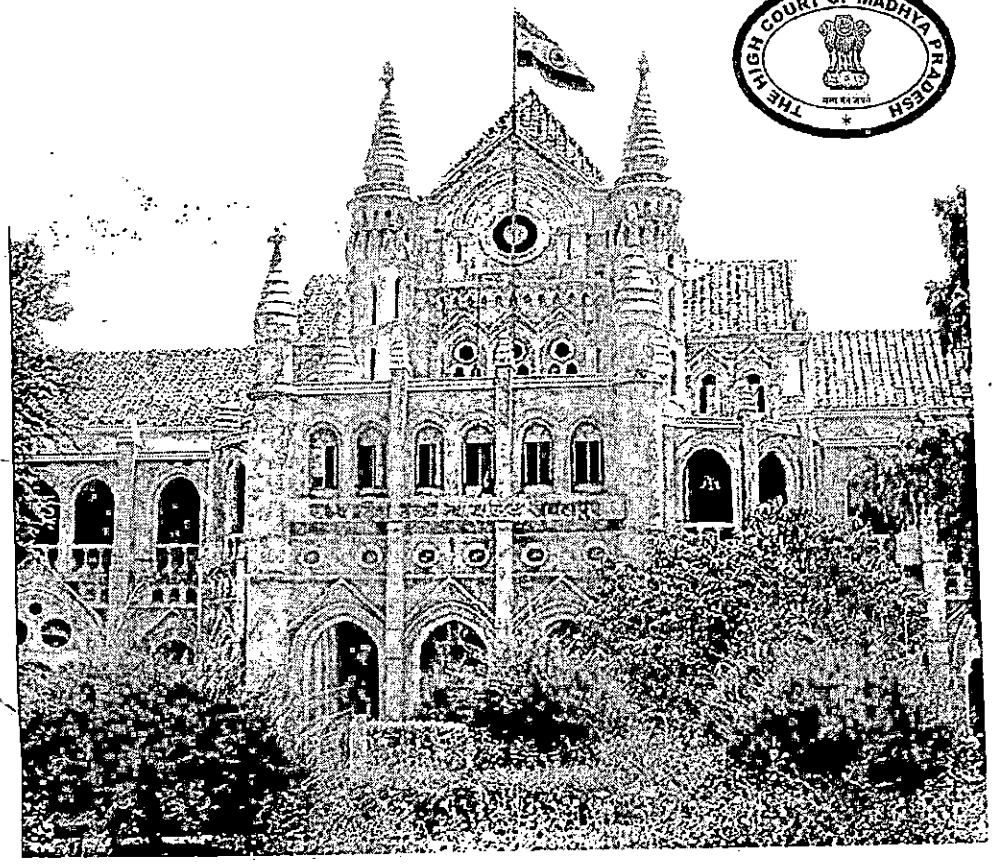
THE HIGH COURT OF MADHYA PRADESH

Year-5 **Vol.2**



April **(Single copy ₹ 40)** **2013**

(pp. 741 to 988)

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2013

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TABLE OF CASES REPORTED

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

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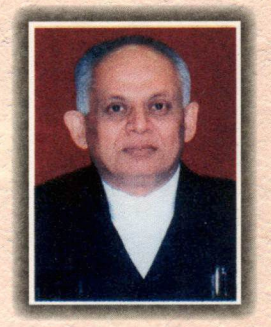
APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Subhash Raosaheb Kakade on his appointment as Judge of the High Court of Madhya Pradesh. Shri Subhash Raosaheb Kakade took oath of the High Office on 01 -04-2013



JUSTICE SUBHASH RAOSAHEB KAKADE

Born on January 23, 1955 in Dewas. After completing B.A. LL.B., joined Judicial Services on 29-10-1979. Confirmed as Civil Judge in the year 1983. Appointed as C.J.M. in the year 1991. Posted as Offg. District Judge in Higher Judicial Services in the year 1992. Worked as Registrar S.A.'T., Bhopal in the year 1997. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 08.05.1999. Posted as Special Judge SC/ST (P.A.) Act at Tikamgarh in the year 2003. Posted as District and Sessions Judge at Neemuch and thereafter at Guna in the year 2004. Posted as Registrar High Court of M.P., Bench at lndore in the year 2006. Was granted Super Time Scale w.e.f. 19.05.2006. Posted as District and Sessions Judge, Bhopal in the year 2009. Was posted as Registrar General, High Court of M .P. from 03.01.2011 till elevation.

Elevated as Additional Judge to the High Court of Madhya Pradesh and took oath on 01.04.2013.

We wish Shri Justice Subhash Raosaheb Kakade, a successful tenure on the Bench.

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Bhagwan Das Rathi on his appointment as Judge of the High Court of Madhya Pradesh. Shri Bhagwan Das Rathi took oath of the High Office on 01-04-2013.

JUSTICE BHAGWAN DAS RATHI

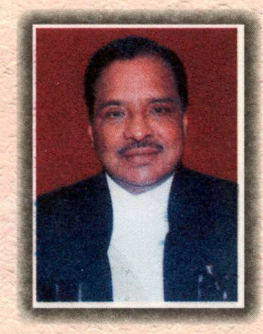
Born on September 16, 1953. After completing B.Sc. L.L.B., was enrolled as an Advocate in the year 1978 and started practice in Civil and Criminal sides in High Court and Lower Courts at Indore. Joined Judicial Services on 04.09.1979. Confirmed as Civil Judge in the year 1983. Appointed as C.J.M. in the year 1991. Posted as Offg. District Judge in Higher Judicial Services in the year 1993. Was deputed as Additional Director, Judicial Officers Training Institute, Jabalpur from August, 1994 to April, 1996. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 08.05.1999. Posted as Special Judge for cases under SC/ST (P.A) Act and N.D.P.S. Act, in the year 2000. Was granted Super Time Scale w.e.f.19.10.2006. Was posted as Principal Registrar, High Court of M.P., Bench Gwalior from 01.09.2009 till elevation.

Elevated as Additional Judge to the High Court of Madhya Pradesh and took oath on 01 .04.201 3.

We wish Shri Justicc Bhagwan Das Rathi, a successful tenure on the Bench.

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Mahendra Kumar Mudgal on his appointment as Judge of the High Court of Madhya Pradesh. Shri Mahendra Kumar Mudgal took oath of the High Office on 01-04-2013.



JUSTICE MAHENDRA KUMAR MUDGAL

Born on August 28, 1954 at Gohadi, Tahsil Gohad, District Bhind. Completed Primary Education in village Gohadi. After completing L.L.B. Degree from Jiwaji University Gwalior, started practice in the year 1976. Joined Judicial Services on 16.11.1981. Confirmed as Civil Judge in the year 1985. Appointed as C.J.M. in the year 1991. Posted as Offg. District Judge in Higher Judicial Services in the year 1993. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 04.06.1999. Posted as Dy. Secretary Law Department, Bhopal in the year 1999 and as Additional Secretary in the year 2001. Posted as Special Judge SC/ST (P.A.) Act and N.D.P.S. Act in the year 2004 at Chhatarpur and as Special Judge SC/ST (P.A.) Act at Sheopur in the year 2006 . Was granted Super Time Scale w.e.f. 10.10.2007. Posted as Principal Registrar (Exam & Training) at High Court of M.P., Jabalpur in the year 2008 and continued upto May 2010. Posted as District and Sessions Judge, Indore from May 2010 to March 2012. Was posted as Principal Registrar (Inspection & Vigilance) at High Court of M.P., Jabalpur from 15.03.2012 till elevation.

Elevated as Additional Judge to the High Court of Madhya Pradesh and took oath on 01 .04.2013.

We wish Shri Justice Mahendra Kumar Mudgal, a successful tenure on the Bench.

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Shri Dharmdhwaj Kumar Paliwal on his appointment as Judge of the High Court of Madhya Pradesh. Shri Dharmdhwaj Kumar Paliwal took oath of the High Office on 01-04-2013.

JUSTICE DHARMDHWAJ KUMAR PALIWAL

Born on March 16, 1955 in Hamirpur, Uttar Pradesh. After completing B.Sc.L.L.M., joined Judicial Services on 05.11.1981. Confirmed as Civil Judge in the year 1985. Appointed as A.C.J.M. in the year 1991 and as C.J.M. in the year 1992. Posted as Offg. District Judge in Higher Judicial Services in the year 1993. Confirmed as District Judge in Higher Judicial Services in the year 1997. Was granted Selection Grade Scale w.e.f. 04.06.1999.Worked as President, District Consumer Forum, Rewa in the year 2001. Worked as Additional Secretary M.P. Law and Legislative Affairs Department, Bhopal. Worked as Legal Remembrancer and Secretary (Law), Law Department, Bhopal, in the year 2004. Posted as District & Sessions Judge. Bhind in the year 2005, and as District & Sessions Judge, Shivpuri in the year 2008. Was granted Super Time Scale w.e.f. 10.10.2007. Posted as District Judge (Inspection and Vigilance), High Court of' M.P. at Bench Gwalior, in the year 2009 . Was posted as District and Sessions Judge, Gwalior from 01.06.2010 till elevation.

Elevated as Additional Judge to the High Court of Madhya Pradesh and took oath on 01.04.2013.

We wish Shri Justice Dharmdhwaj Kumar Paliwal, a successful tenure on the Bench..

Shri R.D. Jain, Advocate General, M.P., while felicitating the New Judges, said :

I feel great pleasure in extending hearty welcome to Hon'ble Justice Shri Subhash Raosaheb Kakade, Hon'ble Justice Shri Bhagwan Das Rathi, Hon'ble Justice Shri Mahendra Kumar Mudgal and Hon'ble Justice Shri Dharmdhwaj Kumar Paliwal appointed as Additional Judges of the High Court to whom oath of Office has been administered today. I congratulate the Hon'ble Judges on their elevation as Additional Judges of the High Court of Madhya Pradesh.

Shri Subhash Raosaheb Kakade was born on 23rd of January 1955 in Dewas. After passing B.A.LL.B in 1st division My Lord joined Judicial Services on 29th October 1979. You have held all the important assignments in lower judiciary. After your appointment you were promoted as Chief Judicial Magistrate on 18th January 1991 and posted in Hoshangabad. Further promoted in Higher Judicial Service on 27th July 1992 in Ujjain. Selection grade was granted on 18th May 1991 and super time scale on 19th May 2006, while posted in Indore. It is apparent from this narration that your Lordship possesses long experience of judicial working in different capacities of almost all different places in Madhya Pradesh including Bilaspur, Indore, Ujjain, Bhopal and finally Jabalpur. You have worked as Registrar General of High Court of Madhya Pradesh. I am sure that this vast experience on Judicial and Administrative side will bring landmark improvement in our judicial system.

Shri Bhagwan Das Rathi was born on 16th of September 1953 in Indore and obtained the degree of B.Sc. LL.B. in 1st division. Your Lordship joined judicial service on 04th September 1979. You were selected on the post of Civil Judge by the M.P.P.S.C. and promoted to the post of Additional District Judge in the year 1993 in Jabalpur and on the post of District and Session Judge in the year 2005 in Morena. Looking to your acumen on the administrative and Judicial side you were picked up for the post of Registrar, High Court of Madhya Pradesh Bench at Gwalior in August 2009 and in September 2009 appointed as Principal Registrar, High Court of Madhya Pradesh Bench at Gwalior where you have worked in the capacity of Principal Registrar till elevated as a judge of this Court.

Shri Mahendra Kumar Mudgal was born on 28th August 1954 in district Bhind and after studies joined judicial service on 16th November 1981. You were appointed as Chief Judicial Magistrate on 30th August 1991 and as District and Session Judge on 1st May 2005 in Morena district. Super time scale granted on 10/10/2007 and thereafter in September 2009 posted as Principal Registrar, (Examination and Training) High Court of Madhya Pradesh in Jabalpur and in March 2012 you were posted as Principal Registrar, (Inspection and Vigilance), High Court of Madhya Pradesh.

Shri Dharmdhwaj Kumar Paliwal was born on 16th March 1955 in Hamirpur, Uttar Pradesh and after earning the degree of B.Sc. and LL.M., joined Judicial Services as Civil Judge, Class II in November, 1981 and posted in Shivpuri. You were appointed as C.J.M. in the year 1992 and from September 2001 to 2004 held the post of Additional Secretary, M.P. Law & Legislative Affairs Department. You were appointed as District and Session Judge on 9th May 2005 in Bhind and worked in Shivpuri and Gwalior till elevation as a Judge of this Court.

We the members of legal fraternity are happy on this occasion of appointment of four judges in the Hon'ble High Court. These seats were lying vacant since long. I congratulate the Hon'ble Judges on the occasion of their elevation as Judges of this Court.

The legal disputes are multiplying with the consciousness of people about their Constitutional and legal rights. Every individual is eager to protect his fundamental rights, legal rights and human rights.

Increasing load of cases is now a challenge to our Judicial system. Vacant seats of Judges result in multiplying the problems of pendency of cases and unfortunately in our Courts, cases pending since 10-15 years are in huge number. This is causing frustration in common man and this is likely to result in a situation leading to eruption of violence. We are extremely happy and full of pleasure on the appointment of Hon'ble Judges which will be a step towards amelioration of this condition.

While dealing with the qualities of a good Judge Justice R.V. Raveendran has once observed that :-

"Rendering justice in a larger sense means giving every person, his or her due. All those entrusted with power - power to govern, power to legislate, power to adjudicate and power to punish or reward - in a sense, render justice. In the context of Judges, rendering justice, means speedy, effective and competent adjudication of disputes and complaints in a fair and impartial manner, in accordance with law, tempered by equity and compassion wherever required and permissible, after due hearing."

The appointment of your Lordships having the vast judicial experience will be an asset and we are sure that under your stewardship the staff will remain public and bar friendly which will result in smooth functioning of the whole system. In this direction the State Government and the law Officers of the State will provide full cooperation and assistance.

Needless to say that cordiality of relation and mutual respect will solve major problems in the path of speedy and efficient judicial functioning. With the vast experience there would not be any problem to the Hon'ble Judges to strike balance between conflicting claims of speedy disposal according to law. We all know that we are not infallible but the chances of mistake may be avoided if we adhere to the path shown by the veteran judges. The High Court is a superior court of record. It has original and appellate jurisdiction and possess plenary powers due to which the responsibilities are multiplied but the judge should have bastion for the people to uphold the majesty of law which is the backbone of fair and impartial dispensation of justice.

According to Justice K.Ramaswami of the Supreme Court "In this ongoing complex of adjudicatory process, the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality." We hope that this ideal will be materialized.

The great jurist Holmes once remarked that" the law is not mere logic but is also experience" and I believe that the vast experience, which My Lord hold, will be a great asset to the High Court in rendering justice. According to another jurist S. Shetreet, a Judge decides cases based on fundamental values

of the legal system and it is from this angle that we can say that the adjudication based on such long experience as a judge would be fruitful to litigant public and advocates of Madhya Pradesh and the Society. I hope My Lord will innovate new tools and find out new methods to evolve a way for quick dispensation of justice.

Justice R.C.Lahoti has succinctly observed what should a judge appear to be and in his own words relying on a poem he proclaims :~

"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 opinion and a will,

Men who have honour, men who will not lie

Men who can stand before a demagogue and damn

Lies, treacherous flatteries without talking

Tall men, sun crowned, who live without the fog,

In public duty and in private thinking,

However, they may be trained to strengthen those who are weak and wronged."

I also recollect a judge's diary in which Justice Shivdayal emphasized that judges are, "Thy servants whom thou sufferest to sit in earthly seats of judgement to administer Thy justice to Thy people."

May God bless the newly appointed judges with all the above qualities.

I once again congratulate your Lordships on behalf of the State of MP, on my own behalf and on behalf of Law Officers of the State on their appointment as additional Judges of the High Court of Madhya Pradesh.

Shri Adarsh Muni Trivedi, President, M.P. High Court Bar Association, Jabalpur, while felicitating the New Judges, said:-

We all have assembled here in this congregation in this Temple of Justice to extend our felicitation to My Lord Shri Justice Subhash Kakade; My Lord Shri Justice Bhagwan Das Rathi; My Lord Shri Justice Mahendra Kumar Mudgal and My Lord Shri Justice Dharmdhwaj Kumar Paliwal on Your Lordships' adorable adornment as Judges of this High Court. This is the auspicious occasion of beginning of your odyssey on the golden chariot of Justice. The destiny has marked Your Lordships for greatness; and the hands of destiny are sure and certain.

Today, it is the 1st April. The day of 1st April has its own significance. But thanks to God, it is for the first time that we have not been befooled on 1st April. In the words of T.S. Eliot, the April is month of mixing memories and desire. The sun is yet to stake us with its hot angle summarising its wings over the day. At this moment joining of ranks by Your Lordships in winged chariot has come to us flying with the moderate cool breeze. This cool breeze in the portal of this High Court is emerged from the very roots of values, virtues and visions.

Your Lordships have joined today the high Judicial fraternity of robed brethrens. Tennyson says:-

"Heights by great men reached and kept
Were not attained by sudden flight.
They, while their companions slept
Were toiling upward in the night."

We welcome Your Lordships on your elevation to Godly seats of this Temple, where the Almighty have conferred upon you the greatest opportunity to wipe off the tears from every eye and to adjudge the fates of the persons in plight, with sublime humanism and to assure excellence and freedom from prejudice.

Kathopnishad exhorts as follows:-

"उत्तिष्ठत् जाग्रत प्राप्य वरान्निबोधत।
क्षुरस्य धारा निश्चिता दुरत्यया
दुर्ग पथ स्तत्कदयो वदन्ति ।।"

[Kathopnishad-I (iii) 14]

[Arise, awake and approaching great souls, receive instructions from

them. The wise says that the road is difficult to tread; it is like treading on the sharp edge of a razor.]

My Lords, I on behalf of all 4600 members of M.P. High Court Bar Association and on my own behalf wish you all a very happy and successful tenure as Judges of this High Court.

My Lord Shri Justice Subhash Kakade:-

Now, I congratulate and welcome My Lord Shri Justice Subhash Kakade. We, at Jabalpur have had many occasions and privilege to acknowledge your ability as an upright, intelligent and experienced Judge as well as a good administrator in your capacity as Registrar General of High Court of M.P.; simultaneously having judicial quality as well as quality of controlling the situations. Your Lordship were born on 23rd January, 1955, a significant day on which Netaji Subhash Chandra Bose was also born. I bet if Your Lordship have had not joined the Judicial Services, must have been a revolutionary like 'Netaji', working in independent India for vital changes in the system of this country. Your Lordship's Home District is Dewas in Malwa region of Madhya Pradesh, a land of fertile thoughts. 'Dewas' is virtually 'Dev vas', the land where the Gods reside. So you represent in your personality the character and qualities of Supreme Being. You obtained your B.A. and LL.B. degrees in First Division with flying colours, and joined Judicial Service of the State on 29th October 1979; appointed as C.J.M. w.e.f. 18th January 1991; promoted as Officiating D.J. in Higher Judicial Service w.e.f. 27th July 1992, granted Selection Grade Scale w.e.f. 8th May 1999 and granted Super Time Scale w.e.f. 19th May 2006. Your Lordship have vivid and varied experience of the territory of Madhya Pradesh and its people being posted and worked at different places like Shajapur, Sehore, Seoni Malwa, Bilaspur, Indore, Hoshangabad, Ujjain, Barwaha, Bhopal, Tikamgarh, Neemuch, Guna and now at Jabalpur as Registrar General of High Court before your elevation as a Judge of this Court. When the going gets tough; the tough get going.

Your Lordship are also a great cricketer with a good running between the wickets, for stealing a run and you have stolen the show in cricket match held on 16th March this year. We hope you will run between the two wickets of Bench and Bar as well. Robert Callier has said:-

"Success is the sum of small efforts repeated day in day out."

Your Lordship have thus possessed variegated experience and

knowledge and made a name as an impartial and intrepid Judge in Higher Judicial service of this State. We hope that your commitments to impart Socio-Economic Justice to the deprived people would bring you eminence as a Judge of this Court. I again congratulate you and wish you a very happy and successful forensic tenure as a Judge of this Court.

My Lord Shri Justice Bhagwan Das Rathi :-

I now congratulate and welcome My Lord Shri Justice Bhagwan Das Rathi. As I stated earlier Shri Justice Subhash Kakade hails from the land of Gods 'Dewas' and Your Lordship's very name reflects another Godly significance, which means being a keen devotee to Almighty God. Your ability to relate to the world, begins with your spirituality to relate to yourself by diving deeper into your inner being and to better understand your true identity. Your Lordship were born on 16th September 1953 as elder son of Shri S.L. Rathi at Indore, which place stands for 'doors to inside'. There is some inter-connection also as Dewas is door-step to Indore. You qualified your graduation in science and also obtained LL.B. (Honours) degree from Indore University on 10th of January 1978, and after your enrolment as an Advocate in year 1978 became the member of M.P. High Court Bar Association, Indore. You joined the office of an eminent lawyer of Indore Late Shri K.B. Joshi, and started practice in Civil and Criminal Law, under able guidance of prominent lawyer Late Shri K.B. Joshi, Late Shri S.L. Ulhas and Late Shri Pradhan. Your Lordship joined the Judicial Service on 4th September 1979; promoted as C.J.M. w.e.f. 17th January 1991; then promoted further as Officiating D.J. in Higher Judicial Service w.e.f. 29th March 1993; granted Selection Grade Scale w.e.f. 8th May 1999 and Super Time Scale w.e.f. 19th October 2006. You were also a member of Executive Committee of M.P. Judicial Officers Association and later on became its treasurer and must have good knowledge of accountancy. Your Lordship have talent of leadership and were always popular amongst the Advocates wherever You were posted as a Judge. During the posting at Shajapur Your Lordship prepared a guide in Hindi for smooth operation of laptop based on Lynux System under the able guidance of the then Chief Justice Shri A.K. Patnaik and Chairman of E-Court Project Shri Justice K.K. Lahoti, which guide was published by M.P. High Court. Your Lordship have a rare quality of verifying Your Judgments in different colours of Law. You were the Additional Director of JOTI and efficiently trained the Judges of sub-ordinate judiciary, and were posted as Principal Registrar of High Court Bench at Gwalior. Your Lordship have worked at different places like Bhopal, Bilaspur, Jabalpur, Vidisha, Balaghat, Rajgarh, Morena, Shajapur and at last at Gwalior

and tasted the water of different rivers like Arpa, Narmada, Benganga and also that of Chambal. Really I do not know water of which river has effected you most. Your Lordship are also a great Astrologer reading the destiny of others, but now you have to write the fate of the people at large.

Your Lordship have deep roots of spirituality, great vision and enlightened virtues. We hope that Your Lordship will achieve eminence as a Judge of this Court when the destiny has thrust upon you a role to act as a true sentinel of liberty and Justice. I again wish you a very happy and successful tenure as a Judge of this Court.

My Lord Shri Justice Mahendra Kumar Mudgal :-

Now, I congratulate and welcome My Lord Shri Justice Mahendra Kumar Mudgal. We at Jabalpur, have privilege to acknowledge Your Lordship's great virtues and excellence as Registrar (Examinations & Training), then Principal Registrar (Examinations) and thereafter as Principal Registrar (Inspection & Vigilance) during last five years before your elevation. Your Lordship also have a great resemblance to other newly elevated Judges, so far as Godhood concerns. Your Lordship are not only 'Indra' the King of Gods, but the greatest of the Indras who adorned the said kingly seat being 'Mahendra'. Your Lordship were born on 28th August 1954 in the rainy season when the torridly tormented Goddess Earth with her folded thousand hands praised the God of Rains 'Indra' for sweet showers and Your Lordship have been gifted to the Goddess Earth. You obtained your B.A. and LL.B. degrees with flying colours and joined State Judicial Service on 16th November 1981; appointed as C.J.M. w.e.f. 30th August 1991; promoted as Officiating D.J. in Higher Judicial Service w.e.f. 17th October 1993; granted Selection Grade Scale w.e.f. 4th June 1999 and Super Time Scale w.e.f. 10th October 2007. Your Lordship being born at Bhind in Chambal Valley, have tasted the water of great river Chambal and therefore, no water from any other river may change your courageous and brave individuality, and great confidence. Your Lordship in Higher Judicial Service have measured almost entire territory of Madhya Pradesh like steps of 'Vaman', who in three steps measured the Chasm (Patal); the Earth (Dharti) and Cosmos (Akash); You have been posted at different places like Morena, Dabra, Niwari, Shujalpur, Sabalgarh, Sehore, Chhindwara, Ratlam, Indore, Bhopal, Chhatarpur, Sheopur, and at last at Jabalpur.

Your Lordship thus, possess vast and varied experience and knowledge and are endowed with sterling character, impeccable integrity and upright behaviour.

As a Judge, you have a mission to carry forward through a rugged voyage with its sharp and strange turns and stormy high waves. Jurist Ehrlich says:-

"There is no guarantee of Justice except the personality of the Judge."

We hope that your personality, experience and knowledge would bring you eminence as a Judge of this Court. I again congratulate you and wish you a very happy and successful forensic tenure as a Judge of this Court.

My Lord Shri Justice Dharmdhwaj Kumar Paliwal :-

Now at last, I congratulate and welcome My Lord Shri Justice Dharmdhwaj Kumar Paliwal. We at Jabalpur have heard much about your qualities, eminence and great knowledge of law, though you have never been posted at Jabalpur during Judicial Service and Higher Judicial Service. So far as God-hood concerns, you also resemble to all three other Judges elevated today. You, yourself, are 'Dharmdhwaj' carrying in hands the flag of Justice since your birth -'Manu-Smirati' says:-

"धर्म एव हतो हन्ति ।
धर्मो रक्षति रक्षितः ।।"

[Those who destroy the Dharma, Dharma itself destroys then and those who protect the Dharma, Dharma itself protects them]

'Dharma' in our traditions does not mean any religion or dogma in particular. A Spiritual path does not require any dogma, priests, rules and absolute authority of scriptures. 'Dharma' is another name for Justice.

Your Lordship were born on 16th March 1955 at Hamirpur (Uttar Pradesh) in Bundelkhand regions, which is full of sagas of great warriors like King Chhatrasal, Alha and Udal. 'Kautilya in his 'Arth Shastra' says:-

"The fragrance of flowers spreads only in the direction of the wind. But the goodness of a person spreads in all directions."

Your Lordship possess the degrees of B.Sc. and LL.M. and joined Judicial Services of Madhya Pradesh on 5th November 1981; appointed as C.J.M. w.e.f. 23rd August 1991; promoted as Officiating D.J. in Higher Judicial Service w.e.f. 18th October 1993; granted Selection Grade Scale w.e.f. 4th June 1999 and Super Time Scale w.e.f. 10th October 2007. Your Lordship have remained posted at various places like Shivpuri, Lahar, Multai, Betul, Maihar, Gwalior, Ashok Nagar, Gohad, Sironj, Rewa, Bhopal, Bhind, Shivpuri

and at last again at Gwalior as District & Sessions Judge before your elevation to the Bench, as a Judge of this Court.

"स्वदेशे पूज्यते राजा।
विद्वान सर्वत्र पूज्यते।।"

[The King is praised only in his own county. The wise-man is praised every where.]

We hope that your great visionary knowledge, wide experience and decency would bring you eminence as a Judge of this Court with Flag of Justice in your firm hands. I once again congratulate you and wish you a very happy and successful forensic tenure as a Judge of this Court.

It is the only suitable occasion when the Bar may express its view before the Bench, enjoining somewhat more liberty. A Judge in this country like India should not only be excellent in the field of Law, but should be able enough to translate the law into a language being prone to the ground realities facing by the common man day to day. Just recently the Census Commissioner of India released a new report that 6.4 crores people live in slums with unsanitary conditions "unfit for human habilitation in urban areas of the country. Conditions are for worse in most villages. It appears that we are still living under the mentality left and thrusted upon us by the Bristishers and prone to the interpretation of statutes in colonial manners, treating the citizens of India still as subjects. The 'de-rigueur' sense of Colonialism and Feudalism in the minds of Administrators in Executive and their mechanism to deprive common-men from their rights is stand - still and some times prevail over the minds of Members of the Judiciary as well.

A Five Judge Bench of Apex Court in 'M. Nagraj Vs. Union of India' [(2006) 8 SCC 212] have held thus:-

> "20. This principle of interpretation is particularly apposite to the interpretation of fundamental rights as a gift from the State to its citizens Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection."
>
> Shakespear says in "Merchant of Venice":-
>
> "Justice is always tampered with mercy:"

But the character like Shylock scarely deserves mercy. The high pedestal of Justice rests on our faith in the administration of Justice and on the instinct for justice, and which finds its expression in the "Rule of Law". Emily Dickinson says thus:-

"If I can stop one heart from breaking,
I shall not live in vain,
If I can ease one life the aching,
Or cool one pain,
Or help one fainting Robin unto his nest again,
I shall not live in vain."

It is what the word 'Justice' means in its true spirit. Then there must be a departure from 'status quo'. In a changing society such as in India, Law must be dynamic. The questions before us are:- why not to obliterate procedural anfractuosities, why not to broaden the old anglo-saxon idea of 'locus standi', why not to enable the penurious many to exercise their right to access to the step doors of the 'Temples of Justice'. Mark Twain once said :-

> "It is by goodness of the God that in our country we have those unspeakably precious things; freedom of speech, freedom of conscience and the prudence; never to practice either of them."

The lawyer's profession is one of the Ruskin's Five great intellectual professions relating to daily needs of the life. Without a strong, united and independent Bar it is not easy for the Court to receive proper Guidance which is essential for Justice Delivery System. There must be a fear of the Bar which is most efficient check upon the power which necessarily must be vested in the Judge. We both have to broaden the horizon. Things are only worth, when we make them worth.

My Lords, turn your face to the sun and the shadows fall behind you. It is definitely the Bar which protects the Administration of Justice and independence of Judiciary from the outside assaults. Justice Benjamin Cardozo says:-

> "The inn that shelters for the night is not the journey's end; law like the travellers must be ready for tomorrow."

At this juncture I must pay enshrined feelings of the entire Bar to Your Lordship, the Chief Justice as a magnanimous man for your obeiable prolixity and at times, logomachic pronouncements which are clear departures from orthodox ways and manners of colonial system; and prone to people - oriented

social philosophy, free from encumberance of personal ego. Your Lordship are titan morally and jurally, open minded, and willing to listen, adjust and learn and decide without Victorian vintage legalisms, the Judgments being weighty without being heavy. Your Lordship are a living Light House for both Bar and the Bench.

Shakespeare Says:- "What is there in a name"? But I differ. The name reflects the very inner qualities and deep personality of an individual. Your Lordship the Chief Justice Shri Sharad Arvind Bobde bears the name which is significant in many respects. The word 'Sharad' denotes a weather which brings forth charms. The moon looks like a flower and the Sun comes dancing from the East rising with warm beginning of a new atmosphere and the leaves and petals of flower in early morning become dew-pearled. The word 'Arvind' is a symbol of purity and reflects the holiness. The poet Shelly says:-

"If winter comes, can spring be far behind."

And the spring was not far behind. The spring came with a pure love - affair between the Bench and the Bar. It is beginning of a long courtship. However it is the mater of chemistry. Benjamin Franklin says - "there will be love without marriage." Your Lordship as the Head of the Institution and patron of the Bar have opened a new chapter with new dimensions of relationship, understanding and mutual love and respect. As a good cricketer, you have shown your courtesy and sportsmanship. We at Bar hope for rising of a new horizon.

We are proud enough that as a class our Judiciary maintains a higher standard of values ethics and impartiality than their counter-parts in the Executive domain. I again expect that Your Lordships elevated today will leave an indelible stamp of scholarship, learning, impartiality, pleasing Court manners, judiciousness and morality on the pages of the great history of this Court.

Rigveda Says:-

"समानी व आकूतिः समना हृदयानि वः ।
समानवस्तु वो मनो यथा वः सुसहासति ।।"

[Let there be oneness in your resolutions, hearts and minds. Let the Strength to live with mutual co-operation be firm in you all.]

Your Lordships now have vision and promises to keep.

Shri D.K. Dixit, President, M.P. High Court Advocates' Bar Association, Jabalpur, while felicitating the New Judges, said :

It is my proud priviledge to extend hearty warm and cordial welcome to the new Judges who have been added to the galaxy of this great institution.

First, I welcome Hon'ble Justice Subhash Kakade and congratulate my Lord on his appointment as Addl. Judge of this Hon'ble Court. My lord have vast experience of justice dispensation system being one of the best judicial officer of the State. My Lord is also having enough experience of Admn. side being the Registrar General of this Court. My Lord have obtained the degrees of BA & LLB in 1st Division and joined judicial service on 29.10.1979 as Civil Judge, Class-II and thereafter, promoted as C.J.M. on 18.01.91, officiating D.J. in Higher judicial service on 27.07.92, granted sleection grade from 08.05.99 and super time scale from 19.05.06. After working at so many places ultimately posted as Registrar General in High Court, Jabalpur on 03.01.11. We have seen him very closely and find in him a very pious, soul, a very sincere and gentle personality.

My Lord, on behalf of the members of M.P.H.C.A. Bar Association and on my own behalf wish you a very successful tenure as a Judge.

Now, I welcome and congratulate my Lord Hon'ble Justice Shri Bhagwandas Rathi on his appointment as Addl. Judge of this Hon'ble Court. My Lord were born on 16.05.53 at Indore, obtained the degrees of BA & LLB and appointed as C.J. II on 04.09.1979, promoted as C.J.M. on 17.01.91, officiating D.J. on 29.03.93, granted selection grade on 08.05.99 and super time scale on 15.10.06.

My Lord have worked as judicial officer at so many places and ultimately posted as Registrar, High Court at Gwalior in August 2009 and Principal Registrar in September 2009, which post my Lord were adorning till elevation. My Lord have worked for some time at Jabalpur and I had the occasion to appear before my Lord, having a very pleasant personality always ready to help a right litigant.

My Lord on behalf of the High Court Advocates Bar Association and on my own behalf wish you a very successful tenure as a Judge of this August Institution.

Now, I welcome and congratulate my Lord Hon'ble Justice Mahendra Kumar Mudgal on his appointment as Addl. Judge of this Court.

My Lord were born on 28.08.1954 at Bhind and after schooling obtained the degrees of BA, LLB. Thereafter, joined judicial service as C.J. II on 16.11.1981. Soon promoted as C.J.M. on 30.08.1991; officiating D.J. on 17.10.93, granted selection grade from 04.06.1999 and super time scale from 10.10.2007. After working at so many places in different capacities of judicial officer my Lord is posted as Principal Registrar, High Court, Jabalpur on 14.01.2008 and worked as such till elevation. My Lord have vast experience of judicial working and also of Admn. side and we hope that it will help my Lord in dispensation of justice in this Court.

I, on behalf of the members of H.C.A. Bar Association and my own behalf wish my Lord a very successful tenure as a Judge of this Court.

Now, I welcome and congratulate my Lord Hon'ble Justice Shri Dharmdhwaj Kumar Paliwal on his appointment as Addl. Judge of this Court.

My Lord were born on 16.03.1955 at Hamirpur (U.P.) and after schooling obtained the degrees of B.Sc. LLM, joined judicial service of the State on 05.11.1981 as C.J. II, promoted as C.J.M. on 23.08.1991; as officiating D.J. on 18.10.1993, granted selection grade from 04.06.99 and super time scale from 10.10.2007. My Lord were posted in different capacities of judicial officer at various places and ultimately posted as District & Sessions Judge, Gwalior on 01.06.2006; which post my Lord held till elevation. My Lord have also vast experience of judicial as well as of Admn. side; as my Lord have been working in Department of Law of the State as Addl. Secretary and Secretary in between 2001 to 2004.

I on behalf of the members of H.C.A. Bar Association and on my own behalf wish my Lord a very successful tenure as a Judge of this Court.

Once again I welcome and congratulate my Lords, Hon'ble Justice Shri Kakade, Shri Rathi, Shri Mudgal and Shri Paliwal and wish them very successful tenure as a Judge and good and healty life.

Shri Shivendra Upadhyay, Chairman, M.P. State Bar Council, while felicitating the New Judges, said :

मध्यप्रदेश उच्च न्यायालय के लम्बे इन्तजार के बाद यह ऐतिहासिक क्षण आया है। मध्यपदेश के अधीनस्थ न्यायालयों की तीव्रता से प्रकरण के निराकरण के बाद उच्च न्यायालय में लंबित प्रकरणों की संख्या व सुनवाई में हो रही देरी को दूर करने के निदान में नव–नियुक्त न्यायाधिपतियों के कार्य करने से सहायता मिलेगी। आप चारों न्यायाधिपतियों को लम्बा विधिक अनुभव है जिसका लाभ माननीय उच्च न्यायालय व मध्यप्रदेश के पक्षकारों को प्राप्त होगा। आपके अनुभव, ज्ञान व बुद्धि कौशल से मध्यप्रदेश का न्यायिक जगत लाभान्वित होगा। मैं अपनी ओर से, राज्य अधिवक्ता परिषद की ओर से आप नव–नियुक्त न्यायाधिपतियों का स्वागत, वंदन व अभिनन्दन करता हूं।

माननीय न्यायाधिपति सुभाष राव साहब काकड़े जी मध्यप्रदेश के देवास जिले में पैदा हुए व दिनांक 29.10.1979 से मध्यप्रदेश राज्य की अधीनस्थ न्यायपालिका में विभिन्न पदों पर काम करते हुए दिनांक 03.01.2011 से रजिस्ट्रार जनरल मध्यप्रदेश उच्च न्यायालय के पद पर आसीन रहकर बड़े गरिमापूर्ण तरीके से कार्य किया। आपके इस लम्बे न्यायिक अनुभव व आपके कुशाग्र विद्यार्थी रहकर प्रथम श्रेणी में स्नातक व विधि की परीक्षा पास करने का लाभ हमारे मध्यप्रदेश के पक्षकारगण व मध्यप्रदेश का न्यायिक जगत प्राप्त करेगा। आपके न्यायाधिपति के रूप में पदभार ग्रहण करने एवं आपके सफल कार्यकाल के लिए मैं बधाई देते हुए ईश्वर से मंगल–कामना करता हूं कि मध्यप्रदेश उच्च न्यायालय की स्थापित गौरवशाली परम्परा को आप आगे बढ़ावेंगे।

माननीय न्यायाधिपति महोदय श्री भगवानदास राठी जी का जन्म व बचपन मध्यप्रदेश के इंदौर जिले में बीता व वहीं उनकी शिक्षा–दीक्षा हुई व सन् 1979 से वे अधीनस्थ न्यायालय के न्यायिक सेवा में कार्य कर रहे हैं व उन्होंने मध्यप्रदेश के महत्वपूर्ण जिलों में सफलतापूर्वक व प्रभावी रूप से कार्य किया। उन्हें न्यायिक जगत में कार्य करने का एक लम्बा अनुभव है। आप मध्यप्रदेश के न्यायिक इतिहास की परम्परा को आगे जारी रखकर प्रभावी निर्णयों से मध्यप्रदेश के पक्षकारों व न्यायिक जगत को एक सुखद पथ–प्रदर्शक बनकर उनकी आशाओं में खरे उतरेंगे, ऐसा मेरा विश्वास है। आपके न्यायाधिपति के रूप में पदभार ग्रहण करने के इन क्षणों में मैं आनंदित व प्रफुल्लित हूं व आपके सफल उज्जवल भविष्य की कामना करते हुए आपको बधाई देता हूं।

माननीय न्यायाधिपति महेन्द्र कुमार मुदगल मध्यप्रदेश के भिण्ड जिले में अपना बचपन बिताया व दिनांक 16.11.1981 से मध्यप्रदेश की न्यायिक सेवा में विभिन्न महत्वपूर्ण जिलों में न्यायदान कर रहे हैं। मध्यप्रदेश के न्यायिक इतिहास का सौभाग्य है कि आप व तीन अन्य न्यायाधिपति महोदय जिन्हें लम्बे न्यायिक कार्य का अनुभव है उसका लाभ प्राप्त होगा। आपने मध्यप्रदश के महत्वपूर्ण जिलों में न्यायिक अधिकारी के रूप में सफलता पूर्वक न्यायदान दिया।आपके इस नव–नियुक्ति पर मध्यप्रदेश के पक्षकार व न्यायिक जगत हर्षित है। आपको बधाई देते हुए ईश्वर से प्रार्थना करता हूं कि मध्यप्रदेश के न्यायिक जगत के पक्षकारों के आशा अनुरूप न्यायदान देने में सफल हों।

न्यायमूर्ति धर्मध्वज कुमार पालीवाल मध्यप्रदेश से लगे हमीरपुर जिले में आपका जन्म हुआ व आपने स्नातक व एल.एल.एम. की डिग्री प्राप्त की व आप दिनांक 05.11.1981 से मध्यप्रदेश की न्यायिक सेवा में कार्य कर रहे हैं। आप मध्यप्रदेश के कई महत्वपूर्ण जिलों में शांतिपूर्ण व प्रभावी रूप से कार्य करके मध्यप्रदेश के पक्षकारों को न्यायदान दिया। आपके इस लंबे न्यायिक अनुभव का लाभ मध्यप्रदेश के पक्षकार व न्यायिक जगत प्राप्त करेगा व मध्यप्रदेश के न्यायिक जगत में लंबे समय से न्याय प्राप्ति की आशा में मृग–तृष्णा की तरह देखता पक्षकार तुरन्त न्यायदान के पथ में आगे बढ़ेगा, ऐसी मेरी आशा है। आपके न्यायाधिपति के रूप में नियुक्ति के लिए मैं बधाई देता हूं व ईश्वर से मंगल–कामना करता हूं कि आप अपने इस नये दायित्व का निर्वहन मध्यप्रदेश के पक्षकारों के आशा अनुरूप करेंगे।

मध्यप्रदेश में अधीनस्थ न्यायालयों के द्वारा त्वरित न्याय दिया जा रहा है व वहां के द्वारा दिया गया त्वरित न्याय मध्यप्रदेश उच्च न्यायालय में अगर 12 साल व 14 साल के बाद जब सुनवाई में आता है तो वह त्वरित न्याय निरर्थक हो जाता है व लोगों में निराशा व्याप्त होती है। त्वरित न्याय पक्षकारों का अधिकार है व माननीय उच्च न्यायालय में कैसे त्वरित न्याय हो, खासकर जहां व्यक्तिगत स्वतंत्रता के मौलिक अधिकार का प्रश्न अन्तर्निहित हो वहां यह विचारणीय है। किसी भी पक्षकार के द्वारा दायर मामला उसके जीवन में अगर निर्णीत नहीं होता, तो उसकी आत्मा की पीड़ा कितनी कष्टदायी होती है यह उस पक्षकार की जगह रहकर सोचा जा सकता है। किसी भी व्यक्ति को अगर दण्डित किया जाता है व उसको 12 साल व 14 साल की अवधि के बाद यदि उसे मुक्त किया जाता है तो उसके इन 14 सालों की पीड़ा उसकी जगह अपने को महसूस करके अगर सोचा जाय तो वास्तव में निर्णय के बाद वे भोगे हुए क्षण वापस नहीं लाये जा सकते हैं। वास्तव में लम्बे समय के अन्तराल के बाद की गई आप सब न्यायाधिपतियों की नियुक्ति से थोड़ी सी आशा तो जगी है लेकिन यह नाकाफी है।

मैं आशा करता हूं कि हमारे यहां रिक्त न्यायाधिपतियों की जगह व रिक्त होने वाले संभावित जगहों की पूर्ति की कार्यवाही तुरन्त शुरू की जावेगी ताकि इतना लम्बा इन्तजार रिक्त जगहों के भरने का भविष्य में न हो सके व मैं यह भी आशा करता हूं कि 13 अतिरिक्त न्यायाधिपतियों के सृजित होने वाले पदों के लिए त्वरित प्रयास करेंगे ताकि मध्यप्रदेश के लोगों को वास्तवित त्वरित न्याय प्राप्त हो सके। मैं मध्यप्रदेश के 85 हजार अधिवक्ताओं की ओर से, राज्य अधिवक्ता परिषद की ओर से और अपनी ओर से आप सब नव–नियुक्त न्यायाधिपतियों का स्वागत–वन्दन व अभिनन्दन करता हूं तथा आपके सफल प्रभावी यशस्वी कार्यकाल के लिए ईश्वर से प्रार्थना कर शुभ–कामना देता हूं।

Shri Rashid Suhal Siddiqui Asstt. Solicitor General, Madhya Pradesh, while felicitating the New Judge, said :

It gives me immense pleasure to extend a hearty welcome to Hon'ble Shri Justice Subhash Raosaheb Kakade, Hon'ble Shri Justice Bhagwan Das Rathi, Hon'ble Shri Justice Mahendra Kumar Mudgal and Hon'ble Shri Justice Dharmdhwaj Kumar Paliwal on their appointment as Additional Judges of this Hon'ble Court.

My Lord Hon'ble Shri Justice Subhash Raosaheb Kakade was born on 23rd January 1955. He joined Judicial Service as Civil Judge, Class-II on 29th October 1979. Before elevation he was working as Registrar General of High Court of Madhya Pradesh. He also served as District and Session Judge of Neemuch, Guna and Bhopal.

My Lord Hon'ble Shri Justice Bhagwandas Rathi was born on 16/09/1953 and joined Judicial Service as Civil Judge, Class-II on 4th September 1979. Before elevation he was working as a Principal Registrar, MP High Court, Bench at Gwalior. He also served as District and Session Judge of Morena and Shajapur.

My Lord Hon'ble Shri Justice Mahendra Kumar Mudgal was born on 28/08/1954 and joined Judicial Service as Civil Judge, Class-II on 11th Nov. 1981. Before elevation he was working as a Principal Registrar, (Insp. & Vig.) MP High Court. He also served as District and Session Judge of Sheopur and Ratlam.

My Lord Hon'ble Shri Justice Dharmdhwaj Kumar Paliwal was born on 16/03/1955 and joined Judicial Service as Civil Judge, Class-II 5th Nov. 1981. Before elevation he was working as a District and Session Judge, Gwalior. He also served as District and Session Judge of Bhind and Shivpuri.

My previous speakers. have already extolled the various virtues of the newly appointed my Lords, so I will not elaborate further.

I, on behalf of Union of India, my colleagues who represent Union of India and my own behalf welcome your Lordships and wish a successful tenure as Judges of this Hon'ble High Court with the assurance of our optimum cooperation to my Lords in dispensation of justice.

Shri T.S. Ruprah, General Secretary, Sr. Advocates Council, while felicitating the New Judge, Said :

I deem it to be my proud privilege to offer felicitations to your Lordships on your appointment as Judges of this High Court. We welcome Hon'ble Shri Justice **Subhash Kakade**, Hon'ble Shri Justice **Bhagwandas Rathi**, Hon'ble Shri Justice **Mahendra Kumar Mudgal** and Hon'ble Shri Justice **Dharmdhwaj Kumar Paliwal**.

My Lords, today you join the select and distinguished group of jurists and administrators of justice. Your appointment is recognition of your juristic talent and qualities of head and heart.

My Lords, Judicial responsibility, accountability and independence must be embodied in the institution of the judiciary. As Lord Delvin has said, "The prestige of the judiciary and their reputation for stark impartiality is not at the disposal of any government, but is an asset that belongs to the whole nation. It is justice that saveth and defendeth a nation that maketh it happy, fruitful and prosperous. The frontiers of a nation may be guarded with men of arms, but it will not be preserved thereby it must be justice in the midst of it. The judiciary gives a smile on the face of the nation."

My Lords it is a state where the majority of the people are poor, aboriginals and downtrodden. They need justice. People have great expectations from Your Lordships. My Lords will bring to your task a wealth of experience, the vast knowledge of law, an almost inexhaustible fund of patience, tolerance and compassion. Let "to do justice" be the motto of Your Lordships judicial career.

I am sure, Your Lordships having taken the oath of upholding the provisions of the constitution will ensure the well being of the people of the nation.

I, on behalf of all the members of the Senior Advocates Council and on my own behalf welcome Your Lordships to this glorious institution and wish your Lordships a very meaningful and successful tenure.

Reply to Ovation, by Hon,Shri Justice Subhash Raosaheb Kakade :

First of all, I offer my salutation to the Almighty God for showering his divine grace on me. I am here only because of His bountiful blessings.

I would also like to express my sincere thanks, to the learned speakers, for the kind and encouraging words spoken on this occasion. I am deeply touched by the noble sentiments expressed by them. Indeed, I feel very humble for all the praise showered upon me by the esteemed speakers .Being a member of the District Judiciary for well over three decades, I am fully aware of the responsibilities of this high office. I sincerely think that all that has been said rather is an expression of the high expectations from me in discharge of my duties. I hope that these good wishes and sentiments will throughout stand by me in good stead. I assure you all that I will try to discharge my responsibilities with full courage, confidence and devotion.

I would like to express my heart-felt gratitude to My Lord Hon'ble Shri Justice Sushil Harkauli, the then Acting Chief Justice of this High Court

and members of the collegium, Hon'ble Shri Justice K.K. Lahoti and Hon'ble Shri Justice Ajit Singh for considering and recommending my name for elevation to the Bench of this August Court. I am also grateful to all the Hon'ble Judges of this court for their blessings and good wishes.

I express my gratitude for the kindness bestowed upon me by the Hon'ble Judges of the Collegium of the Supreme Court.

It is a matter of great privilege and honor for me that the oath of the office has been administered to me by eminent jurist Hon'ble the Chief Justice Shri Sharad A. Bobde. His Lordship's able guidance has always been a source of strength and inspiration for me.

Ladies and Gentlemen, I would be failing in my duty if I do not express gratitude to all my seniors in the profession as well as in personal life. During my formative years as a Subordinate Judge, I had the privilege of being molded by Late Hon'ble Shri Justice R.P. Awasthi, the then District Judge Indore. Later, as Addl. District Judge I was ably guided by Hon'ble Shri Justice V.K. Agrawal, the then District Judge, Ujjain.

The practical training and valuable tips imparted by Justice Agrawal helped me, in a big way, in shaping my career as a judge. I also owe special thanks to Hon'ble Shri Justice M.A. Siddiqui, the then District Judge, Tikamgarh.

I am grateful to all my Teachers and Gurujis who inculcated proper values in me.

Whatever I am today, is because of the blessings of my mother Smt. Sunanda Kakade, who always strove to shape me as a better human being. Today, I also remember my late uncle Shri Bapurao Kakade who always encouraged me.

Last but not the least; I am extremely thankful my wife Smt. Bharati Kakade, not only for her unstinted support, dedication and cooperation in all walks of my life but, also for her prayers and good wishes, which gave me the courage and strength to traverse through good and bad times and to devote my self to my duties and responsibilities as a judge.

I am extremely grateful to my elder daughter Aakansha, son-in-law Nikhil Pawar, younger daughter Maitry and son Aditya who have been a source of constant solace to me.

I am extremely thankful to my relatives and friends who have come

here to shower their blessings and good wishes on me.

Thanks to all Members of the Bar and all the ministerial officials with whom I came in contact, wherever I was posted, who helped me perform my duties diligently.

I express deep gratitude to my colleagues, personal staff and Registry officials who have always extended their fullest co-operation to me during my tenure as District Judge, Neemuch, Guna and Bhopal, Registrar, Indore Bench and Registrar General.

Finally, I conclude by thanking you all once again.

Reply to Ovation, by Hon'ble Shri Justice Bhagwan Das Rathi:

A very good morning to each and every person who is part of this august gathering. Almighty Incorporeal God Lord Shiva has always showered his blessings and grace on me & my family so this day has come into my life. I pray to almighty God to continue his blessings and kind support to all of us. It is my privilege and pleasure to welcome all and to receive the blessings and good wishes of all my loved ones.

I am grateful for the excess of generosity in the remarks you have made this morning.

It is a matter of pride for me in being elevated as Judge of this august High Court. I am obliged to my Lord Hon'ble Shri Justice Sushil Harkauli, Judge of Allahabad High Court and the then Acting Chief Justice of this High Court, Hon. Members of the collegium Hon. Shri Justice K.K.Lahoti & Hon. Shri Justice Ajit Singh ,for having considered and recommended my name for elevation. I pay my special regard to Hon'ble the Chief Justice of India & Hon. Members of the Supreme Court collegium for having found me worth.

I am highly obliged to Hon. the Chief Justice of Madhya Pradesh Shri Sharad Arvind Bobde who has administered oath to me of this pious office.

I take this opportunity to pay my sincere regards to my Lord Justice A.KPatnaik, Judge, Supreme Court of India, former Chief Justice of this Court, Hon 'ble Shri Justice Dipak Misra, Judge of Supreme Court, Hon. Shri Justice Arun Mishra, Chief Justice of Calcutta High Court, Hon. Shri Justice Rajendra Menon, Senior Judge of this High Court & Chairman, JOTRI of Madhya

Pradesh, Jabalpur and all the Hon. Judges of Madhya Pradesh High Court for the love, guidance and affection bestowed on me.

I feel privileged in offering this ovation to late Hon. Shri Justice Shri G. L. Ojha, Former Judge of the Supreme Court, his Lordship 's brother late Shri Radha Kishenji Ojha, Maternal uncle Shri Tarachandji Malpani and Shri Prahladji Rathi without whose blessings this golden day could not have come in my life.

This pious moment will be incomplete without the remembrance of my mentors Advocate from Indore late Shri K.B.Joshi, Late Shri Pradhan, Late Shri S.L.Ukas from whom I undertook the training of legal ethics and Shri B.KShrivastava, Former senior District Judge in Madhya Pradesh, who always used to enlighten me in my Judicial career.

I cannot forget the great spiritual institution popularly known as Prajapita Bharmakumari's Ishwariya Vishswavidyalaya having its international headquarter at Mount Abu from where I have got knowledge of Rajyog to live life with all human virtues. I pay my tribute, on this occasion to late Dadiprakash Maniji who had been Chief Administrator of this great spiritual institution. She always used to teach me Godly versions which has enabled me to lead a divine life. I also pay my respect to Dadi Jankiji who is presently Chief Administrator B. K. Nirwerji, Secretary General of the institution, B. K. Aartzji Zone Incharge Indore, B. K Pushpaji Incharge Rajim Centre, Chhattisgarh, B.KSuresh Guptaji ,B.KSagarmalji and all B.K brothers and sisters who have always showered their love and blessings on me.

Now its time to introduce my family members to this august gathering. I fondly remember the teachings given by my Grandpa late Shri Pannalalji Rathi, my father Shri Shankarlalji Rathi & my mother Smt. Phoolkunwar Rathi and it is only due to their noble teachings & love, I could always achieve success, including the day today. I am also thankful to all my family members who have always helped and encouraged me specially my beloved wife Smt. Asha Rathi, my elder son Advocate Shri Vikas Rathi and my younger son Advocate Shri Aakash Rathi , who have stood by me at all times. I also acknowledge the love, affection & support extended ,by my elder daughter in law Smt. Neha Vikas Rathi and Younger daughter in law Smt. Deepti Aakash Rathi and all my siblings & their spouses to fulfill my dream.

I have always learnt and also received cooperation from the respected bar members of Indore, Bhopal, Bilaspur, Bagli, Khategaon, Sardarpur, Kukshi, Gangjbasoda, Vidisha, Jabalpur, Balaghat, Rajgarh(Biora), Morena, Shahjapur

and Gwalior ,so I would like to thank all of them. I have high regards for the Bar and believe that their cooperation and assistance will enhance my efficiency.

I always got love, support & inspiration for doing hard work, therefore from the core of my heart, I deeply acknowledge the love and unconditional support of my esteemed seniors, collegues and staff members.

I have vowed to defend my oath of office as Judge of High Court at all times in whatever situation. As the oath of office is the root of our independent Judiciary. I firmly believe in the fact that in exercising judicial function a Judge must not only be free but must also be perceived as being free. We have been conferred with independence in the adjudicative process so that Justice can be dispensed without fear or favour and sanctity of judiciary can also be preserved at all times. The independence and competency of Judges help instill public confidence in the Judiciary. Competency of Judge reflects when a Judge possess necessary knowledge and skills to give his opinion about the values, qualities, true, right and correctness of something. Knowledge and skills originate from following. eight spiritual powers and nine gems. the eight Powers are: - 1. Power to withdraw, 2.power to packup, 3.power to tolerate, 4. power to adjust, 5. power to discriminate, 6.power to judge, 7.power to face and 8. power to cooperate . Similarly nine gems are :- 1.purity, 2.introvertness, 3.patience, 4. sweetness, 5. cheerfulness, 6. fearlessness, 7. humility, 8. tolerance and 9. voicelesness. Source of these powers and gems is only and only one incorporeal God. Therefore, we say "Hey Prabhu tum Ashtasidhi Navnidhi ke Data ho ". Thus by way of rememberance of God, we can achieve all these to gain required knowledge and skills to become the best and competent person in the field of law.

To gain faith of public, firstly we will have to establish faith in ourselves and in our judicial system by saying "Jai" to ourselves, no doubt in a positive and ego less way. I would like to quote a very popular prayer written by Gulzar, for film Guddi.

"Humko Mann ki shakti dena,
Mann Vijay Karein .....
Dusron ke Jai se pehle.....
Khud Ko jai Karein.....

A beautiful Shayari written by Jaffar Gorakhpuri is very relevant:

अपनी परछाईयाँ साथ लेते चलो,
क्या जरूरी वहां कोई बरगद भी हो।

I extend my heartly congratulations to fellow collegues Hon.Shri Justice

Subhash Kakade Hon'ble Shri Justice Mahendra Kumar Mudgal Hon. Shri Justice D.K.Paliwal on their elevation as Judge of this prestigious High Court.

Lastly, I pledge to myself to perform the work entrusted upon me with integrity, conviction, purity and dedication to ensure a judiciary that is dignified and respected. In upholding my pledge, I seek blessings of my mentors & distinguished seniors, cooperation & motivation of my esteemed colleagues, unconditional support of the Bar members, dedication of the staff and last but not the least the faith of the public at large.

I am extremely honored to be one among the many to be a part of this institution and on this momentous occasion I feel thankful and obliged to all my well wishers assembled here in person or present through their thoughts, to witness this memorable occasion.

Thank you

"Jai Hind."

Reply to Ovation, by Hon'ble Shri Justice Mahendra Kumar Mudgal:

At the very outset, I would like to beg your pardon for trying your patience with a rather long expression of my gratitude, I have here to embark upon at the call of my conscience and demand of the occasion.

I pay my reverence to the merciful Almighty for showering his blessings upon me.

Next, I would like to express my deep sense of gratitude to Hon'ble Shri Justice Sushil Harkauli, the then Acting Chief Justice of MP High Court, Hon'ble Shri Justice K.K. Lahoti, Administrative Judge and Hon'ble Shri Justice Ajit Singh, Senior Judge of the High Court, who were kind enough to consider me worthy for this prestigious office.

I am very grateful to Hon'ble the Chief Justice Shri S.A. Bobade who has administered the oath of office to me for the coveted post. I hope that I would be able to properly discharge the responsibilities of this high office under the able guidance of Hon'ble the Chief Justice and shall be able to come true to His Lordship's expectations.

I am very much beholden to the esteemed speakers for the kind words spoken about me, words which express their affection to me and the high

expectations as well. Indeed, I am very thankful to them.

I would be failing in my duty if I don't pay my regard to Hon'ble Shri Justice A.K. Patnaik, Judge, Supreme Court of India, the then Chief Justice of M.P. High Court. When His Lordship was Chief Justice here, he called me to the Registry from Ratlam where I was working as District & Sessions Judge, and thus encouraged me in the advancement of my career.

On this occasion, I remember, my revered parents Late Shri Thakur Prasad Mudgal, my father and late Smt. Kanthshree Mudgal, my mother and bow my head at their lotus feet. Without their continued blessings, I could not have been standing where I do today. If they had been alive, they would have been the happiest persons to witness this occasion. I am very much proud of my father who served with devotion and dedication the District Judiciary in the capacity of a Ministerial Officer for around 38 years. His rich experience of the working of judiciary, instilled in me the virtues of hard work, discipline, simplicity and honesty. Virtues without which it would not have been possible for me to progress this far in my career, albeit at a heavy cost to myselft in terms of great hardship,sufferings and struggle.

I was born in village Gohadi, Tahsil Gohad, Distt. Bhind where my grandfather late Shri Subalalji was Zamindar and there were no facilities for proper schooling. When I was studying in 10th standard, my father retired. If my elder brother, Shri Mahesh Mudgal had not undertaken the responsibility of my further education, my career would have been cut short and I would have been tilling land in my native village. I am highly indebted to him as also to my sister-in-law Smt. Kalpana Mudgal without whose valuable help, I would not have been able to complete my academic career.

After graduating in law, in submission to the wishes of my father, I started practising law in the year 1976 at Gohad, Distt. Bhind where I was exposed to the salutary guidance of Shri Krishan Swaroop Shrivastava, a learned civil lawyer, a guidance without which I would not have been able to top the examination held in 1981 for recruitment of Civil Judges. I take this opportunity to express my deep sense of gratitude to him.

As CJM, Sehore in 1992, I came in contact with late Shri C.S. Gupta, the then District & Sessions Judge, Sehore, who eventually retired as Registrar General, High Court of M.P. I imbibed from him salutary qualities of hard work and devotion to the dignity of the institution. I am highly grateful to him for inducing in me the above qualities by example.

I am very thankful to all my senior Judges under whose valuable guidance I have successfully completed 31 years of my judicial service hitherto. My thanks to all the colleagues, Registry Officers, friends, advocates, staff members, especially of Vigilance Cell who co-operated with me in my judicial and official work.

I am thankful to both my elder sisters Smt.Shanti Devi Sharma, Smt. Pushpa Sharma and Shri P.K. Sharma, Brother-in-Law for showering their blessings on me and to other elder brother Dr. Shiv Kumar Mudgal whose blessings always gave me strength. I also express my thanks to my nephew Dr. Satyendra Sharma and his wife Dr.Pratibha Sharma for encouraging me all the time in my pursuit. I am also thankful to all other family members and relatives for their support and affection.

Last but not least, I am grateful to my loving, wife Smt. Rajani Mudgal who always stood by my side and fully supported me in times - fair and foul. I am grateful to my beloved son Mridul Mudgal and my daughter-in-law Smt. Suruchi Mudgal who have by their merit and industry landed a career that leaves me free of all worries on their account. And of course, how can I omit the mention of my grandson who has arrived only a fortnight back in this world as if to herald the present occasion.

I promise you all to strive ceaselessly to uphold the dignity of the office, I am going to occupy and do nothing out of fear or for favour as would compromise it.

Once again, Thanks to all the dignitaries and invitees for being a witness to this occasion.

Reply to Ovation, by Hon'ble Shri Justice Dharmdhwaj Kumar Paliwal:

Frankly, I am searching for words to adequately express my gratitude for the platitudes spoken about me. This is an occasion which is so rare in one's life that one is bound to be overwhelmed by the sentiments expressed. I must with all the humility, express that, possibly, I do not have such attributes to deserve such appreciation which has taken me to exalted heights. All I can say is that you have been generous in your praise and very indulgent in overlooking my drawbacks.

Elevation to the Bench is an ambition which is rooted in the very beginning when a judicial officer enters in to the service. I am fortunate enough to got the opportunity to come up in the hierarchy.

I express my heart felt gratitude to Hon'ble Shri Justice Sushil Harkauli,

Hon'ble Shri Justice K.K. Lahoti and Hon'ble Shri Justice Ajit Singh, for considering me, worthy enough for appointment to this august office. I also express my gratitude to the Hon'ble members of the collegium of the Supreme Court.

I would like to pay my sincere regards to all my District Judges under whose able guidance I could develop my legal acumen.

I believe that the most important mission of the Judiciary as mandated by the constitution is to build a stable and peaceful society by ensuring consistency and predictability through the implementation of the rule of law. Only then, the dignity and value of the individual the most precious value in free democracy will be fully assured and every citizen can pursue happiness in a harmonious life while enjoying their basic human rights. Another important mission is to protect the rights of the disadvantaged from being treated unfairly in a society.

I pledge, that I will devote all my capabilities in administering justice according to laws and conscience and it shall be my endeavor to come up to your expectations as well as of litigant public and to make all efforts to maintain the great traditions laid down by the distinguished judges of this Court.

Today I fondly remember my late parents Shri P.D. Paliwal & Smt. Lila Paliwal. It is sad that they are not here today to witness the swearing in ceremony but I feel from the innermost of my soul, they are still blessing me. I pay my highest regards to them. I also remember my father-in-law, Late Shri Manik Chandra Sharma who was very anxious to see me as judge of this Court unfortunately he left for heaven abode last year and his last wish remained unfulfilled. I feel that he is blessing me from heaven. I dedicate this moment to him.

I am delighted that so many of my friends, well wishers, professional colleagues are present here to bless me. I appreciate that they have traveled a long distance to extend their moral support. Time is preventing me from identifying them all but I express my heartiest gratitude towards all.

I am extremely thankful to my mother-in-law Smt. Indu Sharma, uncle in law Shri S.D. Sharma, and all the relatives who have come here to bless me. I am grateful to my wife who stood by me as strong pillar and sacrificed a lot to ensure that our children may get best education and by the grace of almighty God both the sons Mayank and Priyank are doing well in U.K. & U.S. Respectively.

I am sure that I will continue to get the co-operation from the Bar to enable me to perform the pious duty of dispension of justice.

I once again sincerely thank to all of you.

NOTES OF CASES SECTION

Short Note

**(15)*

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

W.A. No. 398/2012 (Gwalior) decided on 8 February, 2013

GANESH KUMAR SHARMA ...Appellant

Vs.

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

Service Law - Police Regulations - Regulation 226 - Punishment - Removal from Service - Quantum **- Police Regulations are having statutory force - Clauses (iii) and (v) of Regulation 226 are applicable to constables and pertains to the penalty to be awarded to a Constable - Charges were framed in regard to disobeying lawful orders of Superiors, therefore, before passing the extreme order of punishment of removal from service, clauses (iii) and (v) of Regulation ought to have been seen by Disciplinary as well as Appellate Authority - Matter remanded back to disciplinary authority to examine the case vis-à-vis Regulation 226 and fresh order in accordance to law may be passed.**

सेवा विधि – पुलिस विनियमन – विनियमन 226 – शास्ति – सेवा से हटाया जाना – मात्रा – पुलिस विनियमन को कानूनी बल प्राप्त है – विनियमन 226 के खंड (iii) व (v), आरक्षकों पर लागू होते हैं और आरक्षक को दी जाने वाली शास्ति से संबंधित है – वरिष्ठों के विधिपूर्ण आदेशों की अवेहलना के संबंध में आरोप विरचित किये गये हैं, इसलिए, सेवा से हटाये जाने का आत्यांतिक आदेश पारित करने से पूर्व विनियमन के खंड (iii) व (v) को अनुशासनिक प्राधिकारी तथा अपीली प्राधिकारी द्वारा देखा जाना चाहिए था – प्रकरण का, विनियमन 226 सामने रखकर परीक्षण करने के लिए अनुशासनिक प्राधिकारी को मामला प्रतिप्रेषित एवं विधि के अनुसार नया आदेश पारित किया जा सकता है।

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

Cases referred :

2007(1) JLJ 333, (2003) 4 SCC 331, (2005) 2 SCC 489, (2005) 12 SCC 182, (2005) 13 SCC 709, (2001) 9 SCC 592, (2009) 16 SCC 621, (2004) 4 SCC 560.

D.K. Katare with *Arun Katare*, for the appellant.

Vivek Khedkar, Dy. A.G. for the respondents.

NOTES OF CASES SECTION

Short Note

**(16)*

Before Mr. Justice Sujoy Paul

W.P. No. 96/2012 (Gwalior) decided on 19 February, 2013

PRATAP WAHINI SAMAJ KALYAN SANSTHAN ...Petitioner

Vs.

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

A. Constitution - Article 226 - **This court can entertain a petition when it challenges vires of any act, rules etc. or when the order is contrary to natural justice or when such an order is passed by the authority who has no jurisdiction - In such cases the plea of Alternative remedy may be rejected.**

क. संविधान – अनुच्छेद 226 – यह न्यायालय याचिका ग्रहण कर सकता है, जब वह किसी अधिनियम, नियम इत्यादि की शक्तिमत्ता को चुनौती देती है या जब आदेश नैसर्गिक न्याय के विरुद्ध है या जब उक्त आदेश को ऐसे प्राधिकारी द्वारा पारित किया गया है जिसे अधिकारिता नहीं है – उक्त प्रकरणों में वैकल्पिक उपचार के अभिवाक् को अस्वीकार किया जा सकता है।

B. Society Registrikaran Adhiniyam, M.P. (44 of 1973), Sections 31(1) & 32(3) - **If a thing is required to be done in a particular manner in a statute, it has to be done in the same manner or not at all - The other methods which are not in consonance with the statute are forbidden.**

ख. सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44), धाराऐं 31(1) व 32(3) – यदि किसी कानून में किसी कार्य को किसी विशिष्ट ढंग से किया जाना अपेक्षित है, उसे उसी ढंग से किया जाना चाहिए अन्यथा नहीं करना चाहिए – अन्य रीतियां जो कानून के अनुरुप नहीं है, निषिद्ध है।

Cases referred :

(2009) 2 SCC 187, (2010) 11 SCC 159, (2003) 2 SCC 111, 2004(1) MPHT 89 (CG), 1967 SC 295,(1997) 1 SCC 444.

R.N. Singh with *V.K. Bharadwaj* and *Anvesh Jain*, for the petitioner.
Pravin Newaskar, Dy. G.A. for the respondents No. 1 to 3/State.
Rohit Arya with *Purushottam Rai*, for the respondent No.4.

NOTES OF CASES SECTION

Short Note

****(17)***

Before Mr. Justice U.C. Maheshwari

C.R. No. 20/2012 (Gwalior) decided on 1 March, 2013

RIYAJ KHAN & ors. ...Applicants

Vs.

KASAM KHAN & ors. ...Non-applicants

A. Civil Procedure Code (5 of 1908), Section 115, Order 9 Rule 9 & Limitation Act (36 of 1963), Section 5 - **If on the date, counsel of the party did not appear then instead to dismiss the suit or to proceed exparte, it is the duty of the court to inform the party through summons by fixing the case on some future date - If party did not appear on that day then the court may pass order either for dismissal of the suit or to proceed exparte - In such circumstances trial court ought to have allowed the application u/s 5 of Limitation Act and Order 9 Rule 9, C.P.C. - The appellate court has not committed any error in setting aside the order of the trial court and in allowing restoration of the suit.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 115, आदेश 9 नियम 9 व परिसीमा अधिनियम (1963 का 36), धारा 5 – यदि नियत तारीख पर पक्षकार के अधिवक्ता उपस्थित नहीं होते हैं, तब वाद खारिज करने या एकपक्षीय कार्यवाही करने की बजाए न्यायालय का यह कर्तव्य है कि प्रकरण भविष्य की किसी तिथि के लिए नियत कर समन द्वारा पक्षकार को सूचित करे –यदि पक्षकार उस दिन उपस्थित नहीं होता है तब न्यायालय वाद की खारिजी का आदेश पारित कर सकता है या एकपक्षीय कार्यवाही कर सकता है – इस परिस्थिति में विचारण न्यायालय को सि.प्र.सं. के आदेश 9 नियम 9 व परिसीमा अधिनियम की धारा 5 के अंतर्गत किया गया आवेदन मंजूर करना चाहिए था – अपीली न्यायालय ने विचारण न्यायालय का आदेश अपास्त करने में तथा वाद पुनःस्थापित करने में कोई भूल कारित नहीं की है।

B. ***Limitation Act (36 of 1963), Section 5 - Condonation of delay*** **- Besides considering all other things, the court is also bound to consider the stake of litigation.**

ख. *परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब की माफी –* अन्य सभी तथ्यों का विचार करने के अलावा, न्यायालय मुकदमे में लगे दांव को विचार में लेने के लिए भी बाध्य है।

Case referred :

(2001) 6 SCC 176.

D.D.Bansal, for the applicants.

Ankur Maheshwari, for the non-applicants.

Short Note

****(18)***

Before Mr. Justice K.K. Trivedi

W.P. No. 7865/2007 (S) (Jabalpur) decided on 2 November, 2012

S.K. SAXENA (DR.) & anr. ...Petitioners

Vs.

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

Service Law - Promotion - From Speciality to Administrative Post **- Petitioners were senior to respondents as Assistant Surgeon - Respondents got promotion due to availability of vacancy in their speciality and become senior as specialist to petitioner - However, for promotion to the administrative post the original seniority of Assistant Surgeon ought to be considered - Petition allowed.**

सेवा विधि – पदोन्नति – विशेष योग्यता के पद से प्रशासनिक पद पर – याचीगण सहायक शल्य चिकित्सक के रुप में प्रत्यर्थीगण से वरिष्ठ थे – प्रत्यर्थीगण को उनकी विशेषता में रिक्ती की उपलब्धता के कारण पदोन्नति मिली और विशेषज्ञ के रुप में याची से वरिष्ठ बन गये – अपितु, प्रशासनिक पद पर पदोन्नति हेतु

सहायक शल्य चिकित्सक की मूल वरिष्ठता को विचार में लिया जाना चाहिए था – याचिका मंजूर।

Case referred :

(1990) 14 ATC 780 (SC).

G.S. Ahluwalia, for the petitioners.
Yogesh Dhande, Dy. G.A. for the respondents No. 1 & 2.
S.D. Tiwari, for the respondents No. 3 & 5.
P.D. Gupta, for the respondent No. 4.

Short Note

****(19)***

Before Mr. Justice Brij Kishore Dube

Cr. A. No. 414/2010 (Gwalior) decided on 19 March, 2013

SHRIKRISHNA & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 374 - Appeal from Convictions - Misappreciation of Evidence **- There is no evidence on record to establish that the deceased was ever provoked or encouraged or persuaded or compelled by the appellant/ accused to commit suicide - Act of commission of suicide was not the consequence of any of acts allegedly committed by the accused - Ingredients of Section 306 have not been established - Hence, conviction recorded by the trial court cannot be maintained.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 374 – दोषसिद्धि की अपील – साक्ष्य का गलत मूल्यांकन – अभिलेख पर, यह स्थापित करने के लिये कोई साक्ष्य नहीं कि मृतक को अपीलार्थी/अभियुक्त द्वारा आत्महत्या कारित करने के लिए कभी उकसाया गया या प्रोत्साहित किया गया या दुष्प्रेरित किया गया या बाध्य किया गया – आत्महत्या का कृत्य, अभियुक्त द्वारा अभिकथित रुप

से कारित किसी कृत्य का परिणाम नहीं था – धारा 306 के अवयव स्थापित नहीं किये गये – अतः विचारण न्यायालय द्वारा अभिलिखित दोषसिद्धि कायम नहीं रखी जा सकती।

Cases referred :

2010(1) SCC (Cr.) 917, 2004 Cr.L.J. 197, 1995 SCC (Cr.) 1157, 2008(1) CAR 492, 2002 SCC (Cr.) 1088, 2002(1) MPWN 40,(2010) 1 SCC 750.

V.K. Saxena with *Shipra Agrawal*, for the appellants.

Prabal Solanki, P.P. for the respondent/State.

I.L.R. [2013] M.P., 741
SUPREME COURT OF INDIA
Before Mr. Justice T.S. Thakur &
Mr. Justice Fakkir Mohamed Ibrahim Kalifulla
Cr. A. No. 353/2013 decided on 26 February, 2013

RAMESH KUMAR SONI ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), First Schedule, Penal Code (45 of 1860), Sections 408, 420, 467, 468 & 471 - Whether Triable by Court of Sessions or Magistrate **- Offence under Sections 408, 420, 467, 468 & 471 of I.P.C. was registered against appellant on 18.05.2007 - Amendment in first schedule of Cr.P.C. making the offences triable by Court of Sessions received assent of President on 22.02.2008 - Charge sheet was filed subsequently - Case is triable by Court of Sessions as no case was pending before the Magistrate on the date the amendment Act came into force. (Paras 4 to 8)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), प्रथम अनुसूची, दण्ड संहिता (1860 का 45), धाराऐं 408, 420, 467, 468 व 471 – क्या सत्र न्यायालय द्वारा या मजिस्ट्रेट द्वारा विचारण योग्य – अपीलार्थी के विरुद्ध 18.05.2007 को धारा 408, 420, 467, 468 व 471 भा.द.सं. के अंतर्गत अपराध दर्ज – द.प्र.सं. के प्रथम अनुसूची में संशोधन को राष्ट्रपति की अनुमति दिनांक 22.02.2008 को प्राप्त हुई जिससे अपराध को सत्र न्यायालय द्वारा विचारण योग्य बनाया गया – आरोप पत्र बाद में प्रस्तुत किया गया – प्रकरण सत्र न्यायालय द्वारा विचारण योग्य क्योंकि जिस तिथि को संशोधन अधिनियम प्रवर्तित हुआ, उस तिथि को मजिस्ट्रेट के समक्ष कोई प्रकरण लंबित नहीं था।

B. Criminal Procedure Code, 1973 (2 of 1974) (Amendment) Act, M.P., 2007 - First Schedule - Change of Forum **- Whether Retrospective or Prospective - Full Bench of High Court held that all cases pending before the Magistrate on 22.02.2008 remained unaffected by amendment and were triable by J.M.F.C. - Held - Any amendment shifting the forum of trial has to be on principle of retrospective in nature in absence of any indication in the amendment Act to the contrary, although proceedings concluded under the old law cannot be**

reopened for the purpose of applying the new procedure - Right of forum is not recognized as vested right - Judgment of Full Bench that amended provision to be applicable to pending cases is not correct on principle - Decision rendered by Full Bench overruled.

(Paras 9 to 19)

ख. दण्ड प्रक्रिया संहिता 1973 (1974 का 2) (संशोधन) अधिनियम, म. प्र., 2007 – प्रथम अनुसूची – न्यायालय का बदलना – क्या भूतलक्षी है या भविष्यलक्षी – उच्च न्यायालय की पूर्ण न्यायपीठ ने अभिनिर्धारित किया कि मजिस्ट्रेट के समक्ष 22.02.2008 को लंबित सभी प्रकरण संशोधन से अप्रभावित रहे और जे. एम.एफ.सी. द्वारा विचारण योग्य है – अभिनिर्धारित – कोई संशोधन जिससे विचारण के न्यायालय को बदला गया है उसे, संशोधन अधिनियम में अन्यथा कुछ नहीं दर्शाये जाने की स्थिति में सैद्धांतिक रुप से भूतलक्षी होना चाहिए, यद्यपि, पुरानी विधि के अंतर्गत समाप्त की गई कार्यवाहियों का, नयी प्रक्रिया लागू करने के प्रयोजन हेतु, नये सिरे से विचार नहीं किया जा सकता – न्यायालय के अधिकार को विहित अधिकार के रुप में मान्यता नहीं – पूर्ण न्यायपीठ का निर्णय कि लंबित प्रकरणों को संशोधित उपबंध लागू हो, सिद्धांत पर सही नहीं है – पूर्ण न्यायपीठ द्वारा दिया गया निर्णय उलट दिया।

***C. Prospective Overruling* - Overruling of Judgment passed by Full Bench will not affect cases which have already been tried or are at an advanced stage before Magistrates in terms of said decision.**

(Para 25)

ग. भविष्यलक्षी उलट दिया जाना – पूर्ण न्यायपीठ द्वारा पारित निर्णय को उलट दिये जाने से उन प्रकरणों को प्रभावित नहीं करेगा जिनका विचारण, उक्त निर्णय के निबंधन में, मजिस्ट्रेट के समक्ष पहले ही किया जा चुका है या उन्नत प्रक्रम पर है।

Cases referred :

Re : Amendment of First Schedule of Criminal Procedure Cody by Criminal Procedure Code (M.P. Amendment) Act, 2007 2008(3) MPLJ 311 - Overruled.

AIR 1964 SC 1541, (1976) 3 SCC 252, (1980) 2 SCC 91, (1975) 2 SCC 840, (1994) 4 SCC 602, (2006) 1 SCC 141, (1952) 54 Bom. LR 330, AIR 1967 SC 1419, (1996) 8 SCC 388, (2003) 1 SCC 444, (1979) 4 SCC 214, AIR 1970 SC 1636, AIR 1958 SC 915, AIR 1967 SC 1643, (1997) 5 SCC 201, (1999) 3 SCC 362, (2001) 9 SCC 550, (2003) 4 SCC 147, (2009) 4 SCC 299.

JUDGMENT

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

2. The short question that falls for determination in this appeal is whether the appellant could be tried by the Judicial Magistrate, First Class, for the offences punishable under Sections 408, 420, 467, 468 and 471 of the IPC notwithstanding the fact that the First Schedule of the Code of Criminal Procedure, 1973 as amended by Code of Criminal Procedure (Madhya Pradesh Amendment) Act of 2007, made offences punishable under Sections 467, 468 and 471 of the Penal Code triable only by the Court of Sessions. The Trial Court of 9th Additional Sessions Judge, Jabalpur has answered that question in the negative and held that after the amendment the appellant could be tried only by the Court of Sessions. That view has been affirmed by the High Court of Madhya Pradesh at Jabalpur in a criminal revision petition filed by the appellant against the order passed by the Trial Court. The factual matrix in which the controversy arises may be summarised as under:

3. Crime No.129 of 2007 for commission of offences punishable under Sections 408, 420, 467, 468 and 471 of the IPC was registered against the appellant on 18th May, 2007, at Bheraghat Police Station. On the date of the registration of the case the offences in question were triable by a Magistrate of First Class in terms of the First Schedule of Code of Criminal Procedure, 1973. That position underwent a change on account of the Code of Criminal Procedure (Madhya Pradesh Amendment) Act of 2007 introduced by Madhya Pradesh Act 2 of 2008 which amended the First Schedule of the 1973 Code and among others made offences under Sections 467, 468 and 471 of the IPC triable by the Court of Sessions instead of a Magistrate of First Class. The amendment received the assent of the President on 14th February, 2008 and was published in Madhya Pradesh Gazette (Extraordinary) on 22nd February, 2008. Consequent upon the amendment aforementioned, the Judicial Magistrate, First Class appears to have committed to the Sessions Court all cases involving commission of offences under the above provisions. In one such case the Sessions Judge, Jabalpur, made a reference to the High Court on the following two distinct questions of law:

> 1. Whether the recent amendment dated 22nd February, 2008 in the Schedule-I of the Cr.P.C. is to be applied retrospectively?

2. Consequently, whether the cases pending before the Magistrate First Class, in which evidence partly or wholly has been recorded, and now have been committed to this Court are to be tried *de novo* by the Court of Sessions or should be remanded back to the Magistrate First Class for further trial?

4. A Full Bench of the High Court of Madhya Pradesh in *Re: Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M. P. Amendment) Act,* 2007 2008 (3) MPLJ 311, answered the reference and held that all cases pending before the Court of Judicial Magistrate First Class as on 22nd February, 2008 remained unaffected by the amendment and were triable by the Judicial Magistrate First Class as the Amendment Act did not contain a clear indication that such cases also have to be made over to the Court of Sessions. The Court further held that all such cases as were pending before the Judicial Magistrate First Class and had been committed to the Sessions Court shall be sent back to the Judicial Magistrate First Class in accordance with law. The reference was answered accordingly.

5. Relying upon the decision of the Full Bench the appellant filed an application before the trial Court seeking a similar direction for remission of the case for trial by a Judicial Magistrate. The appellant argued on the authority of the above decision that although the police had not filed a charge-sheet against the appellant and the investigation in the case was pending as on the date the amendment came into force, the appellant had acquired the right of trial by a forum specified in Schedule I of the 1973 Code. Any amendment to the said provision shifting the forum of trial to the Court of Sessions was not attracted to the appellant's case thereby rendering the committal of the case to the Sessions Court and the proposed trial of the appellant before the Sessions Court illegal. The trial Court, as mentioned earlier, repelled that contention and held that since no charge-sheet had been filed before the Magistrate as on the date the amendment came into force, the case was exclusively triable by the Sessions Court. The High Court has affirmed that view and dismissed the revision petition filed by the appellant, hence the present appeal.

6. The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 is in the following words:

> *"An Act further to amend the Code of Criminal Procedure, 1973 in its application to the State of Madhya Pradesh.*

Be it enacted by the Madhya Pradesh Legislature in the Fifty-eighth Year of the Republic of India as follows:

1. Short title. – (1) This Act may be called the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007.

2. Amendment of Central Act No.2 of 1974 in its application to the State of Madhya Pradesh – The Code of Criminal Procedure, 1973 (No. 2 of 1974) (hereinafter referred to as the Principal Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Section 167 - .....

xxxx xxx xxx

4. Amendment of the First Schedule – In the First Schedule to the Principal Act, under the heading "I-Offences under the Indian Penal Code" in column 6 against section 317, 318, 326, 363, 363A, 365, 377, 392, 393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 475, 476, 477 and 477A, for the words "Magistrate of First Class" wherever they occur, the words "Court of Sessions" shall be substituted."

7. The First Schedule to the Criminal Procedure Code 1973 classifies offences under the IPC for purposes of determining whether or not a particular offence is cognizable or non-cognizable and bailable or non-bailable. Column 6 of the First Schedule indicates the Court by which the offence in question is triable. The Madhya Pradesh Amendment extracted above has shifted the forum of trial from the Court of a Magistrate of First Class to the Court of Sessions. The question is whether the said amendment is prospective and will be applicable only to offences committed after the date the amendment was notified or would govern cases that were pending on the date of the amendment or may have been filed after the same had become operative. The Full Bench has taken the view that since there is no specific provision contained in the Amendment Act making the amendment applicable to pending cases, the same would not apply to cases that were already filed before the Magistrate. This implies that if a case had not been filed upto the date the Amendment Act

came into force, it would be governed by the Amended Code and hence be triable only by the Sessions Court. The Code of Criminal Procedure does not, however, provide any definition of institution of a case. It is, however, trite that a case must be deemed to be instituted only when the Court competent to take cognizance of the offence alleged therein does so. The cognizance can, in turn, be taken by a Magistrate on a complaint of facts filed before him which constitutes such an offence. It may also be taken if a police report is filed before the Magistrate in writing of such facts as would constitute an offence. The Magistrate may also take cognizance of an offence on the basis of his knowledge or suspicion upon receipt of the information from any person other than a police officer. In the case of the Sessions Court, such cognizance is taken on commitment to it by a Magistrate duly empowered in that behalf. All this implies that the case is instituted in the Magistrate's Court when the Magistrate takes cognizance of an offence, in which event the case is one instituted on a complaint or a police report. The decision of this Court in *Jamuna Singh and Ors. v. Bahdai Shah* AIR 1964 SC 1541, clearly explains the legal position in this regard. To the same effect is the decision of this Court in *Devrapally Lakshminarayana Reddy and Ors. v. Narayana Reddy and Ors.* (1976) 3 SCC 252 where this Court held that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein and that cognizance can be taken in the manner set out in clauses (a) to (c) of Section 190(1) of the Cr.P.C. We may also refer to the decision of this Court in *Kamlapati Trivedi v. State of West Bengal* (1980) 2 SCC 91 where this Court interpreted the provisions of Section 190 Cr.P.C. and reiterated the legal position set out in the earlier decisions.

8. Applying the test judicially recognized in the above pronouncements to the case at hand, we have no hesitation in holding that no case was pending before the Magistrate against the appellant as on the date the Amendment Act came into force. That being so, the Magistrate on receipt of a charge-sheet which was tantamount to institution of a case against the appellant was duty bound to commit the case to the Sessions as three of the offences with which he was charged were triable only by the Court of Sessions. The case having been instituted after the Amendment Act had taken effect, there was no need to look for any provision in the Amendment Act for determining whether the amendment was applicable even to pending matters as on the date of the amendment no case had been instituted against the appellant nor was it pending before any Court to necessitate a search for any such provision in the

Amendment Act. The Sessions Judge as also the High Court were, in that view, perfectly justified in holding that the order of committal passed by the Magistrate was a legally valid order and the appellant could be tried only by the Court of Sessions to which the case stood committed.

9. Having said so, we may now examine the issue from a slightly different angle. The question whether any law relating to forum of trial is procedural or substantive in nature has been the subject matter of several pronouncements of this Court in the past. We may refer to some of these decisions, no matter briefly. In *New India Insurance Company Ltd. v. Smt. Shanti Misra, Adult* (1975) 2 SCC 840, this Court was dealing with the claim of payment of compensation under the Motor Vehicles Act. The victim of the accident had passed away because of the vehicular accident before the constitution of the Claims Tribunal under the Motor Vehicles Act, 1939, as amended. The legal heirs of the deceased filed a claim petition for payment of compensation before the Tribunal after the Tribunal was established. The question that arose was whether the claim petition was maintainable having regard to the fact that the cause of action had arisen prior to the change of the forum for trial of a claim for payment of compensation. This Court held that the change of law operates retrospectively even if the cause of action or right of action had accrued prior to the change of forum. The claimant shall, therefore, have to approach the forum as per the amended law. The claimant, observed this Court, had a "vested right of action" but not a "vested right of forum". It also held that unless by express words the new forum is available only to causes of action arising after the creation of the forum, the general rule is to make it retrospective. The following passages are in this regard apposite:

> *"5. On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away.*

Otherwise the general rule is to make it retrospective. The expressions "arising out of an accident" occurring in sub-section (1) and "over the area in which the accident occurred", mentioned in sub-section (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. To that extent there was no difficulty in giving the answer in a simple way. But the provision of limitation of 60 days contained in sub-section (3) created an obstacle in the straight application of the well-established principle of law. If the accident had occurred within 60 days prior to the constitution of the tribunal then the bar of limitation provided in sub-section (3) was not an impediment. An application to the tribunal could be said to be the only remedy. If such an application, due to one reason or the other, could not be made within 60 days then the tribunal had the power to condone the delay under the proviso. But if the accident occurred more than 60 days before the constitution of the tribunal then the bar of limitation provided in sub-section (3) of Section 110-A on its face was attracted. This difficulty of limitation led most of the High Courts to fall back upon the proviso and say that such a case will be a fit one where the tribunal would be able to condone the delay under the proviso to sub-section (3), and led others to say that the tribunal will have no jurisdiction to entertain such an application and the remedy of going to the civil court in such a situation was not barred under Section 110-F of the Act. While taking the latter view the High Court failed to notice that primarily the law engrafted in Sections 110-A and 110-F was a law relating to the change of forum.

6. In our opinion in view of the clear and unambiguous language of Sections 110-A and 110-F it is not reasonable and proper to allow the law of change of forum give way to the bar of limitation provided in sub-section (3) of Section 110-A. It must be vice versa. The change of the procedural law of forum must be given effect

to. The underlying principle of the change of law brought about by the amendment in the year 1956 was to enable the claimants to have a cheap remedy of approaching the claims tribunal on payment of a nominal court fee whereas a large amount of ad valorem court fee was required to be paid in civil court."

10. In *Hitendra Vishnu Thakur and Ors. etc. ect. v. State of Maharashtra and Ors.* (1994) 4 SCC 602, one of the questions which this Court was examining was whether clause (bb) of Section 20(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 introduced by an Amendment Act governing Section 167(2) of the Cr.P.C. in relation to TADA matters was in the realm of procedural law and if so, whether the same would be applicable to pending cases. Answering the question in the affirmative this Court speaking through A.S. Anand, J. (as His Lordship then was), held that Amendment Act 43 of 1993 was retrospective in operation and that clauses (b) and (bb) of sub-section (4) of Section 20 of TADA apply to the cases which were pending investigation on the date when the amendment came into force. The Court summed up the legal position with regard to the procedural law being retrospective in its operation and the right of a litigant to claim that he be tried by a particular Court, in the following words:

"26. xxx xxx

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally

speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

11. We may also refer to the decision of this Court in *Sudhir G. Angur and Ors. v. M. Sanjeev and Ors.* (2006) 1 SCC 141 where a three-Judge Bench of this Court approved the decision of the Bombay High Court in *Shiv Bhagwan Moti Ram Saraoji v. Onkarmal Ishar Dass and Ors.* (1952) 54 Bom LR 330 and observed:

"12....It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations..."

(emphasis supplied)

12. In *Shiv Bhagwan Moti Ram Saraoji's* case (supra) the Bombay High Court has held procedural laws to be in force unless the legislatures expressly provide to the contrary. The Court observed:

"...Now, I think it may be stated as a general principle that no party has a vested right to a particular proceeding or to a particular forum, and it is also well settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. Therefore, procedural laws in force must be applied at the date when a suit or proceeding comes on for trial or disposal..."

(emphasis supplied)

13. The amendment to the Criminal Procedure Code in the instant case has the effect of shifting the forum of trial of the accused from the Court of

Magistrate First Class to the Court of Sessions. Apart from the fact that as on the date the amendment came into force no case had been instituted against the appellant nor the Magistrate had taken cognizance against the appellant, any amendment shifting the forum of the trial had to be on principle retrospective in nature in the absence of any indication in the Amendment Act to the contrary. The appellant could not claim a vested right of forum for his trial for no such right is recognised. The High Court was, in that view of the matter, justified in interfering with the order passed by the Trial Court.

14. The questions formulated by the Full Bench of the High Court were answered in the negative holding that all cases pending in the Court of Judicial Magistrate First Class as on 22nd February, 2008 when the amendment to the First Schedule to the Cr.P.C. became operative, will remain unaffected by the said amendment and such matters as were, in the meanwhile committed to the Court of Sessions, will be sent back to the Judicial Magistrate First Class for trial in accordance with law. In coming to that conclusion the Full Bench placed reliance upon three decisions of this Court in *Manujendra Dutt. v. Purnedu Prosad Roy Chowdhury & Ors.* AIR 1967 SC 1419, *Commissioner of Income-tax, Bangalore v. Smt. R. Sharadamma* (1996) 8 SCC 388 and *R. Kapilanath(Dead) through L.R. v. Krishna* (2003) 1 SCC 444. The ratio of the above decisions, in our opinion, was not directly applicable to the fact situation before the Full Bench. The Full Bench of the High Court was concerned with cases where evidence had been wholly or partly recorded before the Judicial Magistrate First Class when the same were committed to the Court of Sessions pursuant to the amendment to the Code of Criminal Procedure. The decisions upon which the High Court placed reliance did not, however, deal with those kind of fact situations. In *Manujendra Dutt's* case (supra) the proceedings in the Court in which the suit was instituted had concluded. At any rate, no vested right could be claimed for a particular forum for litigation. The decisions of this Court referred to by us earlier settle the legal position which bears no repetition. It is also noteworthy that the decision in *Manujendra Dutt's* case (supra) was subsequently overruled by a seven-Judge Bench of this Court in *V. Dhanapal Chettiar v. Yesodai Ammal* (1979) 4 SCC 214 though on a different legal point.

15. So also the decision of this Court in *Smt. R. Sharadamma's* case (supra) relied upon by the Full Bench was distinguishable on facts. The question there related to a liability incurred under a repealed enactment. Proceedings in the forum in which the case was instituted had concluded and

the matter had been referred to Inspecting Assistant Commissioner before the dispute regarding jurisdiction arose.

16. The decision of this Court in *R. Kapilanath's* case (supra), relied upon by the Full Bench was also distinguishable since that was a case where the eviction proceedings before the Court of Munsif under the Karnataka Rent Control Act, 1961 had concluded when the Karnataka Rent Control (Amendment) Act, 1994 came into force. By that amendment, the Court of Munsif was deprived of jurisdiction in such cases. This Court held that the change of forum did not affect pending proceedings. This Court further held that the challenge to the competence of the forum was raised for the first time, that too as an additional ground before this Court and that, for other factors, the Court was inclined to uphold the jurisdiction of the Court of Munsif to entertain and adjudicate upon the eviction matter. The fact situation was thus different in this case.

17. Even otherwise the Full Bench failed to notice the law declared by this Court in a series of pronouncements on the subject to which we may briefly refer at this stage. In *Nani Gopal Mitra v. State of Bihar* AIR 1970 SC 1636, this Court declared that amendments relating to procedure operated retrospectively subject to the exception that whatever be the procedure which was correctly adopted and proceedings concluded under the old law the same cannot be reopened for the purpose of applying the new procedure. In that case the trial of the appellant had been taken up by Special Judge, Santhal Paraganas when Section 5(3) of the Prevention of Corruption Act, 1947 was still operative. The appellant was convicted by the Special Judge before the Amendment Act repealing Section 5(3) was promulgated. This Court held that the conviction pronounced by the Special Judge could not be termed illegal just because there was an amendment to the procedural law on 18th December 1964. The following passage is, in this regard, apposite:

> *".... It is therefore clear that as a general rule the amended law relating to procedure operates retrospectively. But there is another equally important principle, viz. that a statute should not be so construed as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time the amending Act came into force--(See In re a Debtor, and In re Vernazza. The same principle is embodied in Section 6 of the General*

Clauses Act which is to the following effect:

xx xx xx (Section 6 is quoted) xx xx xx

.... The effect of the application of this principle is that pending cases although instituted under the old Act but still pending are governed by the new procedure under the amended law, but whatever procedure was correctly adopted ***and concluded*** *under the old law cannot be opened again for the purpose of applying the new procedure. In the present case, the trial of the appellant was taken up by the Special Judge, Santhal Parganas when Section 5(3) of the Act was still operative. The conviction of the appellant was pronounced on March 31, 1962 by the Special Judge, Santhal Parganus long before the amending Act was promulgated. It is not hence possible to accept the argument of the appellant that the conviction pronounced by the Special Judge, Santhal Parganas has become illegal or in any way defective in law because of the amendment to procedural law made on December 18, 1964. In our opinion, the High Court was right in invoking the presumption under Section 5(3) of the Act even though it was repealed on December 18, 1964 by the amending Act. We accordingly reject the argument of the appellant on this aspect of the case."*

(emphasis supplied)

18. Reference may also be made upon the decision of this Court in *Anant Gopal Sheorey v. State of Bombay* AIR 1958 SC 915 where the legal position was stated in the following words:

"4. The question that arises for decision is whether to a pending prosecution the provisions of the amended Code have become applicable. There is no controversy on the general principles applicable to the case. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed

according to the altered mode. See Maxwell on Interpretation of Statutes on p. 225; The Colonial Sugar Refining Co. Ltd. v. Irving (1905) A.C. 369, 372). In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective."

19. The upshot of the above discussion is that the view taken by the Full Bench holding the amended provision to be applicable to pending cases is not correct on principle. The decision rendered by the Full Bench would, therefore, stand overruled but only prospectively. We say so because the trial of the cases that were sent back from Sessions Court to the Court of Magistrate First Class under the orders of the Full Bench may also have been concluded or may be at an advanced stage. Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to the Sessions for trial in the light of the amendment and the view expressed by us.

20. The principle of prospective overruling has been invoked by this Court, no matter sparingly, to avoid unnecessary hardship and anomalies. That doctrine was first invoked by this Court in *I.C. Golak Nath and Ors. v. State of Punjab and Ors.* AIR 1967 SC 1643 followed by the decision of this Court in *Ashok Kumar Gupta and Anr. v. State of U.P. and Ors.* (1997) 5 SCC 201.

21. In *Baburam v. C.C. Jacob and Ors.* (1999) 3 SCC 362, this Court invoked and adopted a device for avoiding reopening of settled issues, multiplicity of proceedings and avoidable litigation. The Court said:

"5. The prospective declaration of law is a devise innovated by the apex court to avoid reopening of settled issues and to ***prevent multiplicity of proceedings****. It is also a devise adopted to* ***avoid uncertainty and avoidable litigation****. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. Therefore, the subordinate forums which are legally bound to apply the declaration of law made by this Court are also duty-bound to apply such dictum to cases which would arise in future only. In*

matters where decisions opposed to the said principle have been taken prior to such declaration of law cannot be interfered with on the basis of such declaration of law..."

(emphasis supplied)

22. To the same effect is the decision of this Court in *Harish Dhingra v. State of Haryana & Ors.* (2001) 9 SCC 550 where this Court observed:

"7. Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to ***prevent multiplicity of proceedings.*** *It is also a device adopted to* ***avoid uncertainty and avoidable litigation.*** *By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty bound to apply such dictum to cases which would arise in future. Since it is indisputable that a court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation."*

(emphasis supplied)

23. In *Sarwan Kumar and Anr. v. Madan Lal Aggarwal* (2003) 4 SCC 147, this Court held that though the doctrine of prospective overruling was initially made applicable to the matters arising under the Constitution but subsequent decisions have made the same applicable even to cases under different statutes. The Court observed:

"15. The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal ***would***

otherwise work hardship to those who had trusted to its existence. *Invocation of doctrine of "prospective overruling" is left to the discretion of the court to mould with the justice of the cause or the matter before the court."*

(emphasis supplied)

24. In *Rajasthan State Road Transport Corporation and Anr. v. Bal Mukund Bairwa* (2009) 4 SCC 299, this Court relied upon the observations made by Justice Benjamin N. Cardozo in his famous compilation of lectures ***The Nature of Judicial Process*** – that *" in the vast majority of cases, a judgment would be retrospective. It is only where the hardships are too great that retrospective operation is withheld."*

25. The present case, in our opinion, is one in which we need to make it clear that the overruling of the Full Bench decision of the Madhya Pradesh High Court will not affect cases that have already been tried or are at an advanced stage before the Magistrates in terms of the said decision.

26. With the above observations, this appeal fails and is here by dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 756

FULL BENCH

Before Mr. S.A. Bobde, Chief Justice, Mr. Justice R.S. Jha & Mr. Justice Alok Aradhe

I.T.R. No. 38/1995 (Jabalpur) decided on 7 March, 2013

LILASONS BREWERIES LTD., BHOPAL (M/S) ...Applicant

Vs.

COMMISSIONER OF INCOME TAX, BHOPAL ... Non-applicant

Income Tax Act (43 of 1961), Section 256 (1), (2) - Dharmada Account **- Assessee was charging Dharmada at the rate of 2% and was maintaining separate account - However, the said account was treated as Revenue Receipts as the assessee had failed to bring on record any material to indicate contribution on regular basis to some of the Institutions - M.C.C. No. 668/1993 was dismissed - However, in the case of Commissioner of Income Tax Vs. Bijli Cotton Mills (P) Limited, Hon'ble Supreme Court had held that an amount collected as Dharmada and deposited in a separate account is not a revenue receipt - Earlier**

judgment passed was not contrary to the judgment passed by Hon'ble Supreme Court as no law was laid down or no decision was taken - Authorities are entitled to ascertain on the basis of the facts of each individual case as to whether the amount collected in the name of Dharmada is actually meant for a charitable purpose or not - Decision passed in case of M.C.C. No. 668/1993 was based on peculiar facts of that case and no law contrary to law laid down in Bijli Cotton Mills, therefore, judgment passed in M.C.C. 668/1993 cannot be said to be bad law. (Paras 6 to 10)

आयकर अधिनियम (1961 का 43), धारा 256 (1),(2) – धर्मदा लेखा – निर्धारिती 2 प्रतिशत की दर से धर्मदा पर मार लगा रहा था और पृथक खाता चला रहा था – अपितु, उक्त खाते को राजस्व प्राप्तियां माना गया क्योंकि निर्धारिती अभिलेख पर ऐसा कोई तथ्य लाने में असफल रहा जो यह दर्शाता कि निर्धारिती नियमित रुप से कुछ संस्थानों को अंशदान करता हो – एम.सी.सी. क्र. 668/1993 खारिज कर दी गई – किन्तु, कमिश्नर, इन्कम टैक्स वि. बिजली कॉटन मिल (प्रा.) लिमि. के प्रकरण में मान्नीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि रकम जो धर्मदा के रुप में इकट्ठा की गई और पृथक खाते में जमा की गई है वह राजस्व प्राप्ति नहीं – पूर्व में पारित निर्णय, सर्वोच्च न्यायालय द्वारा पारित निर्णय के विपरीत नहीं क्योंकि कोई विधि प्रतिपादित नहीं की गई या कोई निर्णय नहीं लिया गया – प्राधिकारीगण प्रत्येक प्रकरण के तथ्यों के आधार पर यह सुनिश्चित करने के हकदार हैं कि क्या धर्मदा के नाम पर एकत्रित की गई राशी वास्तविक रुप से पूर्व प्रयोजन हेतु है अथवा नहीं – एम.सी.सी. क्र. 668/1993 में पारित किया गया निर्णय, उस प्रकरण के विशिष्ट तथ्यों पर आधारित था और बिजली कॉटन मिल में प्रतिपादित विधि के विरुद्ध विधि नहीं है इसलिए एम.सी.सी. क्र. 668/1993 में पारित निर्णय को विधि की दृष्टि से दोषपूर्ण नहीं कहा जा सकता।

Cases referred :

M.C.C.668/1993 Decided on 16/7/1996, (1979) 116 ITR 60 (SC), 1993 Supp (3) 546.

A.P. Shrivastava, for the applicant.
Sanjay Lal, for the non-applicant.

ORDER

The Order of the court was delivered by :
R.S. JHA, J:- This reference to a Full Bench has been made to decide the correctness of the decision of a Division Bench of this Court in the case of *Lilasons Breweries Pvt. Limited vs. Commissioner of Income Tax,* in M.C.C No.668/1993 decided on 16.7.1996, in the light of a decision of the Supreme

Court, in the following terms:-

> "Whether the reference in MCC No.668/1993 decided by the Division Bench on 16.7.1996 in the case of *Lilasons Breweries Pvt. Limited, Bhopal Vs. Commissioner of Income Tax, Bhopal,* is good law in the light of the pronouncement of the Apex Court in *Commissioner of Income Tax vs. Bijli Cotton Mills (P) Limited,* (1979) 116 ITR 60 (SC)"

2. The learned counsel for the applicant submits that the applicant/assessee M/s Lilasons Breweries Limited is a limited company and collects a sum of Rs.20 per Rs.1,000/- of the bill amount as Dharmada which is kept and maintained in a separate account. It is submitted that as the amount collected by the assessee towards Dharmada was included as revenue receipt and assessed to tax by the Assessing Officer for the Assessment Year 1981-82 and 1984-85 to 1986-87, therefore, on the instance of the assessee the following alongwith another question of law was referred to this Court for its opinion:-

> "Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was justified in holding that the sum of Rs.42,649/- in the A.Y. 1981-82; Rs.76, 870/- in the A.Y. 1984-85; Rs.1,18,179/- in the A.Y. 1985-86 and Rs.1,67,588/- in the A.Y. 1986-87 received from the various customers through bills and credited to the Dharmada Account was in the nature of revenue receipt and, hence, liable to be taxed as the income of the assessee during these assessment years ?"

3. It is submitted that the aforesaid question was answered by this Court by order dated 16.7.1996 passed in M.C.C No.668/1993 in the following terms:-

> "4. The facts relating to the second question are that the assessee was charging Dharmada at the rate of 2% in the bills from the purchaser. The assessee had maintained a separate Dharmada account to which the amounts so realised were credited. The assessee claimed that the said amount was calculated with the intention of realising the same for charitable

purposes. The Assessing Officer, however, treated the said amount as income of the assessee. The CIT(A) sustained the assessment orders against which yet another appeal was filed before the Tribunal, but the Tribunal also endorsed the finding in this respect. The Tribunal held that the assessee had failed to bring on record any material to indicate contribution on regular basis to some of the institutions. The said finding of the Tribunal purely relates to the appreciation of evidence and we find that the same does not give rise to any question of law or the question No.2 as referred to us. Under these circumstances, the second question is also answered against the applicant-assessee and in favour of the revenue."

4. It is submitted by the learned counsel for the applicant that the decision in the case of *Lilasons Breweries Pvt. Limited* (supra) is not good law in the light of the pronouncement of the Apex Court in the case of *Commissioner of Income Tax vs. Bijli Cotton Mills (P) Limited,* (1979) 116 ITR 60 (SC), wherein the Supreme Court has held that an amount collected as Dharmada and deposited in a separate account, is not a revenue receipt and is, therefore, not liable to be included in the income of the assessee that is chargeable to tax. It is submitted that the aforesaid decision of the Supreme Court was not considered while deciding M.C.C No.668/1993 on 16.7.1996 and, therefore, the order passed therein deserves to be overruled and to be declared to be bad law.

5. The learned counsel for the revenue, per contra, submits that the decision of the Division Bench dated 16.7.1996 in M.C.C No.668/1993 was decided on its own facts and, therefore, cannot be found fault with. It is submitted that in the case of *Lilasons Breweries Pvt. Limited* (supra) this Court categorically held that the question referred to it was a pure question of fact and not a question of law and, therefore, the occasion to adjudge the decision in the case of *Lilasons Breweries Pvt. Limited* (supra) in the light of the decision of the Supreme Court in the case of *Bijli Cotton Mills* (supra) does not arise. It is submitted that the order passed in M.C.C No.668/1993 dated 16.7.1996 was not assailed in appeal before the Supreme Court by the applicant and the same has become final and binding.

6. We have heard the learned counsel for the parties at length. From a bare perusal of paragraph 4 of the decision dated 16.7.1996 in M.C.C

No.668/1993 *Lilasons Breweries Pvt. Limited* (supra), quoted above, it is abundantly and apparently clear that this Court, while deciding the question of law referred to it under Section 256(1) of the Income Tax Act (hereinafter referred to as 'the Act'), has clearly stated that the finding recorded by the Tribunal purely relates to appreciation of evidence and it does not give rise to any question of law and has answered the question accordingly. It is, therefore, clear that the Division Bench did not decide the issue at all nor did it lay down any law in respect of the issue of Dharmada but simply stated that the finding of the Tribunal and the issue raised before it was a question of fact and no question of law arises for decision. In other words, this Court in the case of *Lilasons Breweries Pvt. Limited* (supra) has not laid down any law or taken any decision which can be said to be contrary to or in derogation of the law laid down by the Supreme Court in the case of *Bijli Cotton Mills* (supra).

7. At this stage, we are also constrained to observe that there can be no cavil about the law laid down by the Supreme Court in the case of *Bijli Cotton Mills* (supra) to the effect that an amount collected as Dharmada which is kept in a separate account and is utilized for charitable purposes, is not liable to be included in the income of the assessee. However, a mere statement to that effect on the part of the assessee is not sufficient and the revenue authorities, if so required, are entitled to ascertain on the basis of the facts of each individual case as to whether the amount collected in the name of Dharmada is actually meant for a purpose which is charitable and is in fact spent for such a charitable purpose.

8. This aspect has been clarified by the Supreme Court itself in a subsequent decision in the case of *Commissioner of Income Tax (Central), Ludhiana and Others vs. Amritsar Transport Company Private Limited and Another,* 1993 Supp (3) SCC 546. after taking into consideration the decision in the case of *Bijli Cotton Mills* (supra). In the case of *Amritsar Transport Company* (supra) the matter was taken up before the Supreme Court by the Revenue on the rejection of their application under Section 256(2) of the Act by the High Court to call for a similar question of law and it was held that:-

> "4. So far as inclusion of amounts collected as 'Dharmada' which are kept in a separate account and are utilised for charitable purposes is concerned, there can be no dispute that they are not liable to be included in the income of

the assessee vide *CIT v. Bijli Cotton Mills (P) Ltd.* (1979) 116 ITR 60, but the Revenue's case herein is that though collected in the name of 'Dharmada', these amounts were neither meant for any charitable purpose nor were they spent on charitable purposes. In support of the same they rely upon the aforesaid written reply of the respondent-assessee itself.

5. In our opinion this was a proper case where the High Court ought to have directed the Tribunal to state the said question under Section 256(2) of the Act. We do not think it necessary to say more than this on this occasion, lest it may prejudice the case of the parties at the hearing of the reference.

6. The appeal is accordingly allowed, the judgment and order of the High Court is set aside and the application filed by Revenue under Section 256(2) is allowed. The Tribunal shall state the aforesaid question for the opinion of the High Court under Section 256(2) of the Act. No order as to costs."

9. Apparently, the decision in the case of *Amritsar Transport Company* (supra) was not brought to the notice of the Court while referring the matter to this Full Bench. We consciously refrain from saying anything more on this issue as it may prejudice the decision in the reference.

10. In conclusion, we are of the considered opinion that as the decision in the case of *Lilasons Breweries Pvt. Limited* (supra) dated 16.7.1996 in M.C.C No.668/1993 was based on the peculiar facts of that case and as the question of law referred to it was not answered by laying down any law contrary to the law laid down by the Supreme Court in the case of *Bijli Cotton Mills* (supra) and in fact nothing in that regard was actually decided therein nor is there any conflict or contradiction between them, therefore, the decision of the Division Bench of this Court in the case of *Lilasons Breweries Pvt. Limited* (supra) dated 16.7.1996 cannot be said to be bad law and the reference made to this Full Bench is uncalled for.

11. The question referred to this Full Bench is answered accordingly. The matter may now be placed before the Regular Division Bench for decision in accordance with law.

Order accordingly.

I.L.R. [2013] M.P., 762
WRIT APPEAL
Before Mr. Justice A.K. Shrivastava & Mr. Justice G.D. Saxena
W.A. No. 729/2010 (Gwalior) decided on 5 February, 2013

APARN GRAMIN VIKAS SANSTHA SAMITI SOCIETY ...Appellant
Vs.
STATE OF M.P. & anr. ...Respondents

Land Revenue Code, M.P. (20 of 1959), Sections 57 & 247, Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 10, Minor Minerals Rules (M.P.), 1996, Rule 9 **- Govt. Lessee (Patteddars) on the land quarry lease have limited rights - State Govt. is the owner of minerals lying beneath even on a private land - Hence it can grant a lease without the prior consent of the owner or occupier of such land - As all the land belongs to the State Govt. and land includes mines and minerals & quarries also. (Para 8)**

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 57 व 247, खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 10, गौण खनिज नियम (म.प्र.), 1996, नियम 9 – भूमि खदान पट्टे के सरकारी पट्टेदार को सीमित अधिकार है – राज्य सरकार, निजी भूमि के भी नीचे पड़े खनिजों के स्वामी है – अतः वह उक्त भूमि स्वामी या अधिभोगी की पूर्व सहमति के बिना भी पट्टा प्रदान कर सकती है – चूंकि संपूर्ण भूमि राज्य सरकार की है और भूमि में खान और खनिज एवं खदानें भी समाविष्ट है।

Case referred :

2008(4) MPLJ 255.

N.K. Gupta, for the appellant.
Raghvendra Dixit, G.A. for the respondents.

O R D E R

The Order of the court was delivered by :
A.K. Shrivastava, J:- The writ appeal under Section 2(1) of the M.P. Uccha Nyayalaya (Khand Nyayapeeth Ko appeal) Adhiniyam, 2005 has been filed against the order dated 25.11.2010 passed by learned Writ Court in W.P. No.4281/2010 whereby writ petition of the appellant has been dismissed.

2. The cause to file writ petition under Article 226/227 of the Constitution

of India is the order dated 01 .06.2010 (Annexure-P/1) and order dated 24.07.2010 (Annexure-P/2) whereby the flag stone quarry lease (in short "quarry lease") of the writ-petitioner has been cancelled by the Collector (Mines), District Shivpuri.

3. Certain unfolded facts are as under :-

22.02.2009	Vide Order (Annexure-P/4), an order to grant quarry lease was passed by the Collector (respondent no.2). for a period of 10 year in favour of appellant:
20.05.2009	vide Order (Annexure-P/5) lease-deed was executed and the appellant was allowed to operate the quarry lease:
01.06.2010	the quarry lease which was granted in favour of petitioner and mining extraction which was being carried out for last one year, it was withdrawn and cancelled by the order of respondent no.2 (Annexure-P/1):
10.06.2010	vide Annexure-P/6 learned Single Bench of this Court in W.P. No.3091/2010 *(Aparn Gramin Vikas Sanstha Samiti v. State of M.P. & Anr.)* directed respondent no.2 to decide the matter afresh; and
24.07.2010	vide Annexure-P/2 again the same order, which was passed vide Annexure-P/1, was passed by respondent no.2.

4. The contention of learned counsel for the appellant is that the consent of the owner of the private land was not at all required to be obtained before the grant of mining lease. In this context, learned counsel has invited our attention of Section 57 of the M.P. Land Revenue Code (in short "Code") and has submitted that the State Government is the owner of all land including the mines, quarries, minerals, etc. and therefore no consent was required from the government lessee to whom the surface area of the land was earlier allotted. Learned counsel has also invited our attention to Section 247 of the Code which speaks about Government's title to minerals. By inviting our attention to Section 10 of the Mines and Mineral (Development and Regulation) Act, 1957 (in short "Act of 1957") and also Rule 9 of the M.P. Minor Mineral Rules, 1996 (in short 'Rules of 1996"). It has been put-forth by learned counsel that this point has already been put to rest by Division Bench of this Court in

Shyam Bihari Singh vs. State of M.P. and others 2008(4) MPLJ 255. Learned counsel then propounded that the entire order of learned Writ Court is in favour of appellant but in para 9 of the impugned order the writ petition has been dismissed solely on the ground that petitioner did not pay any compensation to tribal persons, *Patta* holder and further that looking to the provisions contained in Clause 17 of part-4 of Revenue Book Circular, there is no provision to give consent, therefore, in such circumstances. the Collector has rightly cancelled the quarry lease of the petitioner. Hence, it has been prayed that by allowing this appeal, writ petition of the writ-petitioner be allowed.

5. On the other hand Shri Raghvendra Dixit, learned Government Advocate argued in support of the impugned order and submitted that there is absolutely no document on record to show as to whether the tribal persons who were *Pattedharis* gave any consent to operate the quarry lease to the petitioner and even if there was any consent, the same was withdrawn by them and therefore by taking note of all these facts and circumstances and by placing reliance upon Clause 17 Part-4 of the Revenue Book Circular the writ petition has been dismissed and thus the order is not at all erroneous or requires any interference. Hence, it has been prayed that this appeal be dismissed.

6. Having heard learned counsel for the parties we are of the view that this appeal deserves to be allowed.

.7. On bare perusal of Section 57 of the Code this Court finds that all lands belong to the State Government and further, the land shall include standing and flowing water, mines, quarries, minerals and forests reserved or not and all rights in the sub-soil of any land are the property of the State Government. Since the quarry lease in question is a quarry in terms of Section 57 of the Code including rights in the sub-soil of any land which would mean the quarry in question also is the property of the State Government, therefore for all practical purposes the State Government is the owner of quarry in question. For ready reference it would be appropriate to quote Section 57(1) including the proviso, which reads thus;

> **57. State ownership in all lands;-** (1) All lands belong to the State Government and it is hereby declared that all such lands, including standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the sub-soil of any

land are the property of the State Government.

Provided that nothing in this section shall, save as otherwise provided in this Code, be deemed to affect any rights of any person subsisting at the coming into force of this Code in any such property.

8. It is nobody's case that under the proviso to sub-section (1) of Section 57 any right has been saved of the Pattedars (government lessee). Thus, we are of the firm view that the land in question having quarry lease including right in the sub-soil is the property of the State Government and none-else. At this juncture. this Court would also like to go through Section 247 of the Code, which speaks about Government's title to minerals and for better understanding it would be fruitful to quote Section 247 in its entirety, which reads thus;

247. **Government's title to minerals;-** (1) Unless it is otherwise expressly provided by the terms of a grant made by the Government, the rights to all minerals, mines and quarters shall vest in the State Government which shall have all powers necessary for the proper enjoyment of such rights.

(2) The right to all mines and quarries includes the right of access to land for the purpose of mining and quarrying and the right to occupy such other land as may be necessary for purpose subsidiary thereto, including the erection of offices, workmen's dwellings and machinery, the stacking of minerals and deposit of refuse, the construction of roads, railways or tram-lines, and any other purpose which the State Government may declare to be subsidiary to mining and quarrying.

(3) If the Government has assigned to any person the right over any minerals, mines or quarries, and if for the proper enjoyment of such right, it is necessary that all or any of the powers specified in sub-section (1) and (2) should be exercised, the Collector may, by an order in writing, subject to such conditions and reservations as he may specify, delegate such powers to the person to whom the right has been assigned.

Provided that no such delegation shall be made until notice has been duly served on all persons having rights in the land affected, and their objections have been heard and considered.

(4) If, in the exercise of the right herein referred to over any land, the rights of any person are infringed by the occupation or disturbance of the surface of such land, the Government or the assignee shall pay to such persons compensation for such infringement and the amount of such compensation shall be calculated by the Sub-Divisional Officer, or, if his award is not accepted, by the Civil Court, as nearly as may be, in accordance with the provisions of the Land Acquisition Act, 1894 (1 of 1894).

(5) No assignee of the Government shall enter on or occupy the surface of any land without the previous sanction of the Collector, and unless the compensation has been determined and tendered to the persons whose rights are infringed.

(6) If an assignee of the Government fails to pay compensation as provided in sub-section (d), the Collector may recover such compensation from him on behalf of the persons entitled to it, as if it were an arrears of land revenue.

(7) Any person who without lawful authority extracts or removes minerals from any mine or quarry, the right to which vests in, and has not been assigned by, the Government shall, without prejudice to any other action that may be taken against him be liable, on the order in writing of the Collector, to pay penalty not exceeding a sum calculated at double the market value of the minerals so extracted or removed.

Provided that if the sum so calculated is less than one thousand rupees, the penalty may be such larger sum not exceeding one thousand rupees as the Collector may impose.

(8) Without prejudice to the provisions in sub-section (7) the Collector may seize and confiscate any mineral extracted or removed from any mine or quarry the right to which vests in, and has not been assigned by the Government.

On bare perusal of this section as it is borne from the title of this section that Government is having title to minerals. Sub-section (1) to Section 247 confers right upon the State Government to enjoy all minerals, mines and quarries which shall vest in the State unless otherwise provided by the terms of grant made by the Government. Since as per the case of the respondent/State government and as it also appears from the impugned orders Annexure-P/1 and P/2 as well as from the order of learned Writ Court that some persons are *Pattedars* (government lessee) on the said quarry lease but according to us their right is limited and they have only right to occupy or enjoy on the surface area. Admittedly, beneath the land in question quarry is there and eventually the quarry lease has been granted in favour of appellant under Rule 6 of Rules of 1996. Thus, if any right of *Pattadharis* is there it is limited to sub-section (4) to Section 247 only and therefore the appellant has to pay compensation for the infringement of their. right and the compensation should be calculated in terms of sub-section (4). There is nothing on record whether any such compensation has not been paid although in para 9 learned Writ Court has so held that in the impugned orders of the Collector Annexure-P/1 and P/2 it is found that compensation has not been paid. However, after going through the impugned orders of Collector Annexure-P/1 and P/2 we do not find that there is any such finding of Collector in this regard although simply it has been mentioned in its order that the tribals have submitted that they have not received the compensation and therefore the earlier consent is withdrawn by them. Indeed the finding of the Collector in the impugned orders is not that since compensation has not been paid therefore quarry lease is cancelled. On the contrary it has been cancelled because the consent has been withdrawn by the tribals. Thus, only right which vests in the government lessee/*Pattedhari* is to obtain compensation. At this juncture, on this point we would like to place reliance on the decision of Division Bench of this Court in *Shyam Bihari Singh* (supra) wherein Hon'ble the Chief Justice Shri AK. Patnaik (as His Lordship then was) who spoke for the Bench in para 9 held as under:

> 9. We. will, therefore, have to look into the provisions of 1957 Act to find out whether the consent of the owner of the private land and an opportunity of hearing to the owner of the private land are mandatory before grant of a mining lease. It is not disputed that the right over the minerals in respect of which a mining lease can be granted is vested in the State by virtue of Section 57 read with section 247 of the Code. Accordingly

> the State is owner of the minerals lying beneath even on a private land and as the owner of such minerals, the State can grant a lease in favour of a lessee by way of transfer or assignment. Neither section 10 of the 1957 Act nor Rule 22 of the 1960 Rules on which Mr. Tankha has placed great reliance, lays down anywhere that a mining lease in respect of minerals vested in the Government where the surface land belongs to a private person cannot be granted without the prior consent of the owner of such private land. In the absence of such clear statutory provisions, either in the 1957 Act or in the 1960 Rules, the State Government as the owner of the minerals can grant a mining lease in favour of a lessee without the consent of the owner of a private land, even where the minerals are embedded in such private land.

In para 13 of the said decision further it has been held as under:

> 13. A reading of Rule 22(3)(i)(h), quoted above, would show that where the land is owned by some private owner, the statement in writing has to be made by the applicant that the consent of such owner for starting mining operations has been obtained. The language of Clause (h) is clear that consent of the owner is required "for starting mining operations" and not for grant of mining lease. Similarly, the second Proviso to Clause (h) states that consent of the owner "for starting mining operations" in the area or part thereof may be furnished "after the execution of the lease-deed" but "before entry into the area". The expression "after execution of the lease-deed" again would show that no consent is required for execution of the lease-deed. The expression "before entry into the area" confirms that consent is required not for execution of lease-deed but for entering into the lease. area. Rule 22(3)(i)(ii) therefore does not indicate that consent of the owner of the land is a pre-condition for a mining lease in favour of the lessee. All that it indicates is that such consent is required before entering into the lease area.

9. Admittedly earlier to the passing of impugned orders Annexure-P/1 and P/2 by respondent no.2 the appellant was carrying on the quarry lease

operation for one year. In this regard, the order of respondent no.2 dated 22,02.2009 may be seen by which the quarry lease was granted to him for 10 years.

10. The only ground upon which the quarry lease which was earlier granted to the petitioner has been cancelled is that government lessee/*Pattedars* have withdrawn their consent, but, neither there is any provision in the Act of 1957 nor in the Code and so also in the Rules of 1996 that any prior consent' is required to be obtained. Although Rule 9 (k) speaks about filing of an affidavit and we would like to quote Rule 9(k) which reads thus:

> **9. Application for quarry lease;-** An application for the grant or renewal of a quarry lease shall be made in Form I in triplicate for the minerals specified in Schedule I and II. The application shall be affixed with a court fee stamp of the value of five rupees and shall contain the following particulars together with documents in support of the statements made therein:-
>
> (a) xx xx
>
> (b) xx xx
>
> (c) xx xx
>
> (d) xx xx
>
> (e) xx xx
>
> (f) xx xx
>
> (g) xx xx
>
> (h) xx xx
>
> (i) xx xx
>
> (j) xx xx
>
> (k) An affidavit to the effect that the applicant has, where the land is not owned by him, obtained surface rights over the area or has obtained the consent of the owner/owners for conducting mining/quarrying operations:
>
> Provided that no such affidavit shall be necessary where the

Land-rights vest with the State Government.

From the impugned orders of respondent no.2 Annexure-P/1 and P/2 it is clear like a noon day that earlier the consent of the owner *(Pattedar)* was obtained to permit the appellant to enter upon the surface area of the quarry lease. But. because they have withdrawn their consent, therefore, the impugned orders Annexure-P/1 and P/2 have been issued by the Collector. According to us, once permission has been granted by the *Pattedar/* government lessee to petitioner to carry out the quarry lease upon the surface area and to enter upon it which they were enjoying there is no provision in the law that subsequently it can be withdrawn. Learned Government has also not pointed-out any such provision either under the Code or under the Act of 1957 or even under the Rules of 1996. According to us, there cannot be any such statutory provision for the simple reason that if there would have been any such provision, the quarry lease holder like petitioner would depend and would live upon the mercy of those persons who may at any point of time may change their mind and may withdraw such consent which was earlier given and therefore according to us since there is no statutory provision to withdraw the consent to use the surface area, which was earlier given, therefore, the impugned orders of the Collector Annexure-P/1 and P/2 stand nowhere.

11. Learned Writ Court has treated those persons to be *Pattadharis* (government lessee) and thus has placed reliance upon Clause 17 (part-4) of the Revenue Book Circular. We have already held hereinabove that *Pattadharis* are having limited right to the extent of sub-section (4) of Section 247. From the impugned orders of Collector, it is revealed that the consent to obtain surface area for the quarry lease was already obtained by the appellant from Pattadharis and therefore according to us the provisions of Revenue Book Circular have no applicability which speaks about that *Pattadhari* has no power and right to sell and transfer the and in favour of any person. According to us, in the present case, the grant of quarry lease cannot be said to be a sale or transfer in terms of Clause 17 Part-4 of Revenue Book Circular and thus such provision has no applicability in the present case.

12. For the reasons stated hereinabove this appeal is allowed and the order dated 25.11.2010 of learned Writ Court is set aside and the orders of Collector dated 1.6.2010 (Annexure-P/1) and 24.07.2010 (Annexure-P/2) are also set aside. However, on being submitted by the *Pattedharis* of the government land who are tribal necessary compensation etc. may be directed

to be paid according to the law if already not paid and in this regard the Collector shall be free to initiate proceedings and may decide it in accordance with law after providing opportunity of hearing to the *Pattedharis* (government lessee) as well as to writ-petitioner. Let this exercise be done within a period of 6 months from the date of this order. However, it is made clear that assessment of the compensation etc. will not come in way of operating the quarry lease by the appellant because from the impugned orders of Collector (Annexure-P/1 and P/2) there is no adjudication that compensation has not been paid to the Pattadharis however it will be obligatory on the part of writ-petitioner to pay compensation as fixed by the Collector subject to statutory remedy of appeal etc. available to both the parties. No costs.

Appeal allowed.

I.L.R. [2013] M.P., 771
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 10069/2011 (Indore) decided on 27 August, 2012

ONKAR YADAV (M/s) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Contract Act (9 of 1872), Section 7 - Acceptance - Notice Inviting Tender - **There was no condition in NIT requiring a successful bidder to deposit any performance security - Since the respondent has imposed such a condition at the stage of acceptance of tender and before the execution of the agreement, therefore, such an acceptance cannot be held to be unconditional acceptance of tender - No concluded contract had come into existence - Forfeiture of Earnest Money for want of deposit of 12% P.A. bad in law. (Paras 8 to 13)**

क. संविदा अधिनियम (1872 का 9), धारा 7 – स्वीकृति – निविदा आमंत्रण सूचना – निविदा आमंत्रण सूचना में सफल बोली लगाने वाले को किसी संपादन सुरक्षा निधि को जमा करने की अपेक्षा की कोई शर्त नहीं – चूंकि प्रत्यर्थी ने उक्त शर्त निविदा स्वीकार करने के प्रक्रम पर और करार के निष्पादन से पूर्व अधिरोपित की, इसलिए, उक्त स्वीकृति को निविदा की बिना शर्त स्वीकृति नहीं ठहराया जा सकता – कोई अंतिम संविदा अस्तित्व में नहीं आयी – 12 प्रतिशत प्रतिवर्ष जमा नहीं किये जाने से अग्रिम राशी का समपहरण विधि अंतर्गत उचित नहीं।

B. ***Contract Act (9 of 1872), Section 5 - Proposal*** **- Proposal can be revoked at any time before the communication of its acceptance is complete against the proposer. (Para 12)**

ख. संविदा अधिनियम (1872 का 9), धारा 5 – प्रस्ताव – प्रस्ताव की स्वीकृति की संसूचना प्रस्तावक के लिए पूर्ण होने से पहले उसे किसी भी समय प्रतिसंहृत किया जा सकता है।

C. Contract Act (9 of 1872), Section 7 - Acceptance - Unqualified and absolute **- Acceptance must be based or founded on 3 components - Certainty, commitment and communication - If there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in formation of a legal contract. (Para 15)**

ग. संविदा अधिनियम (1872 का 9), धारा 7 – स्वीकृति – बिना शर्त और पूर्ण – स्वीकृति को तीन घटकों पर आधारित होना चाहिए – निश्चितता, प्रतिबद्धता और संसूचना – यदि प्रस्ताव एवं स्वीकृति के बीच अंतर हो, चाहे किसी तात्विक निबंधन के संबंध में ही क्यों न हो, स्वीकृति को पूर्ण या बिना शर्त नहीं कहा जा सकता और उक्त से विधिक संविदा निर्मित नहीं होगी।

Cases referred :

AIR 1970 SC 706, AIR 1972 Delhi 110, AIR 1988 Delhi 224, AIR 2000 Bombay 405.

Pushyamitra Bhargava, for the petitioner.
M. Ravindran, Dy. G.A. For the respondents.

ORDER

The Order of the court was delivered by :
PRAKASH SHRIVASTAVA, J:- This order will govern the disposal of W.P. No.5241/2012 and W.P. No.10432/2011 since it has been submitted by learned counsel for both the parties that these writ petitions involve identical issue in the same fact situation.

2. For convenience facts have been taken from W.P. No.10069/2011.

3. The petitioner is aggrieved by the communications dated 9.11.2011 (Annexure P/5) and 5.12.2011 (Annexure P/8) requiring the petitioner to deposit 12% performance security, failing which the earnest money is directed to be forfeited.

4. In brief the petitioner, who is a registered "A-Civil" Class contractor, had submitted tender for upgradation of Barwai, Bhawati, Morkatta, Borkhedi road in Barwani district in response to the NIT dated 27.6.2011. The percentage rate tender submitted by the petitioner after depositing earnest money was found to be lowest being 22% below of relevant SOR of road and bridge work issued by Engineer-in-Chief, and the same was accepted on 1.11.2011 but the said acceptance was not unconditional. The respondent no.3 Chief Engineer had issued the communication dated 9.11.2011 requiring the petitioner to deposit 12% amount of P.A.C. as an additional performance security to execute the contract document stating that on failure to do so the earnest money will be forfeited. The petitioner objected to it, vide communication dated 16.11.2011, and requested for deleting the said condition or to return the earnest money. The respondent no.3, vide communication dated 16.11.2011, had conveyed to the Secretary, Public Works Department that in the NIT there is no such condition, therefore, the condition of deposit of 12% performance security be reconsidered and deleted and in case of adverse decision, the refund of the earnest money be considered. Thereafter by the impugned communication dated 5.12.2011 the petitioner was again informed by the respondent no.4 to deposit the performance security of 12% within 7 days, failing which earnest money would be forfeited.

5. Learned counsel appearing for the petitioner submits that in the NIT there is no condition requiring deposit of 12% performance security. He further submits that no concluded contract has come into existence in the absence of unconditional acceptance by the respondents and in the changed circumstances, the petitioner is not inclined to enter into the contract, therefore, the respondents be directed to refund the earnest money. He has further submitted that as per the contract the offer was valid for 120 days and thereafter offer has come to an end. He has also submitted that even condition of deposit of 2.5% performance security is not acceptable and such a communication also does no result into the concluded contract.

6. Learned counsel appearing for the respondents has submitted that the bid submitted by the petitioner was accepted with the condition of deposit of 12% performance security, therefore, the concluded contract has come into existence and failure on the part of the petitioner to take steps in pursuance to the contract has resulted into forfeiture of earnest money. She further submits that even otherwise the condition of deposit of 2.5% performance security was within the knowledge of the petitioner and the respondents subsequently

have taken the stand that instead of 12%, the petitioner can give 2.5% performance security, which has resulted into concluded contract.

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

8. It is undisputed before this Court that the petitioner's bid was found to be lowest. The percentage rates and tender submitted by the petitioner was @22% below SOR of road and bridge work issued by Engineer-in-Chief. It is also undisputed that in the tender document there is no condition requiring successful bidder to deposit any performance security. Clause 1 and 3.5 of the conditions of contract relates to the security deposit and provide as under :-

> "Clause 1 – The person whose tender may be accepted (hereinafter called the contractors, which expression shall unless excluded by or repugnant to the context, include his heirs, executers, administrators, representatives and assigns) shall permit Government at the time of making any payments to him for the value of work done under the contract to deduct the security deposit as under :
>
> The Security Deposit to be taken for the due performance of the contract under the terms and conditions printed on the tender form will be the earnest money plus a deduction of 5 percent from the payment made in the running bills, till the two together amount to 5 percent of the cost of work put to tender or 5 percent of the cost of works executed when the same exceeds the cost of work put to tender."
>
> "3.5 Security Deposit – (a) The Security Deposit shall be recovered from the Running Bills @5% percent as per Clause – 1 of the agreement read with para 3.5 of the N.I.T.
>
> (b) The amount of the Earnest Money shall not be adjusted when value of work done reaches the limit of the amount of contract or exceeds the probable amount of the contract."

9. Admittedly the performance security as demanded by the respondents is not covered by these clauses. It is also undisputed that in pursuance to the tender conditions, the petitioner has deposited the earnest money.

10. The material clause which is relevant for the purpose of the present controversy is Clause 8.1.1 of the detailed NIT which provides for execution of agreement and forfeiture of earnest money, and reads as under :-

> "8.1.1 Execution of Agreement – The tenderer whose tender has been accepted hereinafter referred to as the contractor, shall produce an appropriate solvency certificate, if so required by the Executive Engineer and will execute the agreement in the prescribed form, within a ten days of the date of communication of the acceptance of his tender by competent authority. Failure to do so will result in the earnest money being forfeited to Govt. of M.P. and tender being cancelled."

11. Under the aforesaid clause after communication of acceptance of tender if the successful party fails to execute the agreement within the prescribed period of 10 days, then the earnest money deposited by him is forfeited and tender is cancelled.

12. Section 7 of the Indian Contract Act, 1872 (for short "the Act") provides that in order to convert a proposal into the promise, the acceptance must be absolute and unqualified. Under section 5 a proposal can be revoked at any time before the communication of its acceptance is complete as against the proposer.

13. In the present case there was no condition in NIT requiring a successful bidder to deposit any performance security. Since the respondent has imposed such a condition at the stage of acceptance of tender and before the execution of the agreement, therefore, such an acceptance of tender by respondent can not be held to be unconditional acceptance of tender. The bid which was submitted by the petitioner was not accepted by the respondents unconditionally. The acceptance was not absolute and unqualified but while accepting the petitioner's bid, the respondents had imposed the condition of deposit of 12% of P.A.C. as an additional performance security, therefore, no concluded contract had come into existence. Such a condition of deposit of 12% additional performance security was missing in the tender document and was imposed by the communication dated 9.11.2011. Since the tender of the petitioner was not accepted absolutely and unqualifiedly in terms of Section 7 of the Act, therefore, it can not be treated to be an acceptance and Clause 8.1.1 will not come into operation empowering the respondents to forfeit the

earnest money.

14. The counsel for the respondent has submitted that the petitioner was aware of the communication of the State addressed to the Chief Engineer dated 11.3.2011 containing the guideline relating to deposit of 2.5% additional security. We have given out thoughtful consideration to this argument. In the present matter such a condition was not incorporated in the tender document nor the petitioner had submitted the bid agreeing to such a condition and there is also no communication by the respondents on record accepting the petitioner's bid on the condition of deposit of 2.5% additional security. The endorsement in Annexure R/3 dated 22.12.2011 in this regard at a later stage was made subject to the final outcome of the writ petition. Though the O.I.C. has filed an affidavit before this Court dated 5.3.2012 stating that the State has agreed for charging 2.5% amount as additional performance security but the learned counsel for the petitioner has made his stand clear that with the lapse of time it is not possible for the petitioner to perform the contract at this stage, therefore, even the condition of furnishing additional 2.5% security can not be accepted. Counsel for the petitioner has also referred to Clause 4.7 of the detailed NIT relating to validity of the offer which provide that the tender will remain open up to 120 days from the date of receipt of tender and earnest money will be forfeited on withdrawal of offer before that period and submitted that after expiry of 120 days offer had lapsed. The Chief Engineer had also sent communication dated 16.11.2011 to the Secretary, Public Works Department stating that in the NIT there is no condition for deposit of the additional security, therefore, the said issue be reconsidered and the condition of deposit of 12% additional security be deleted.

15. The Supreme Court in the matter of *Badri Prasad Vs. State of Madhya Pradesh and another* reported in AIR 1970 SC 706 has settled that in the absence of unconditional acceptance the concluded contract does not come into existence. The Delhi High Court in the matter of *Union of India Vs. M/s Uttam Singh Dugal & Co. (Pvt.) Ltd.* reported in AIR 1972 DELHI 110 has also taken the view that acceptance must be absolute and if there is variance between the offer and acceptance even in respect of any material term, acceptance can not be said to be absolute and unqualified and the same will not result in the formation of a legal contract. In the matter of *M/s. Suraj Besan and Rice Mills Vs. Food Corporation of India* reported in AIR 1988 DELHI 224 it has been held that a person can withdraw or modify

his offer or tender before communication of the acceptance is complete as against him that is before its acceptance is intimated to him and that the acceptance under law should be absolute and unconditional. The Government by merely providing a clause to the contrary in the tender notice could not take away the legal right of a person. The Bombay High Court in the matter of *Kilburn Engineering Ltd. Vs. Oil and Natural Gas Corporation* reported in AIR 2000 BOMBAY 405 referring to Section 7 of the Act has held that the offer and acceptance must be based or founded on three components; certainty, commitment and communication. If any one of the three components is lacking either in offer or in acceptance, there can not be a valid contract.

16. Keeping in view the aforesaid relevant aspect of the matter, we are of the considered opinion that since the petitioner's tender was not accepted unconditionally, therefore, no concluded contract had come into existence. In view of this Clause 8.1.1 of the NIT will not be attracted. The respondents are not justified in taking action for forfeiture of the earnest money deposited by the petitioner, hence the impugned action of the respondents in respect of forfeiture of earnest money as contained in communication dated 9.11.2011 (Annexure P/5) and 5.12.2012 (Annexure P/8) is set aside. For the same reasons the similar impugned action of the respondents in W.P. No.5241/2012 and W.P. No.10432/2011 is also set aside.

17. Writ petition is allowed to the extent indicated above.

18. The signed order be kept in the file of W.P. No.10069/2011 and copy thereof be kept in the file of W.P. No.5241/2012 and W.P. No.10432/2011.

Petition allowed.

I.L.R. [2013] M.P., 777
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 5547/2012 (Indore) decided on 28 August, 2012

SATISH MEHARWAL ...Petitioner

Vs.

STATE OF M.P. ...Respondent

***Evidence Act (1 of 1872), Section 65-B - Admissibility of Electronic Evidence* - Public Prosecutor desired to exhibit the C.D. -**

Objection as to the admissibility of C.D. was raised which was rejected by Trial Court - Held - Special Judge is required to properly appreciate the requirement of Section 65-B of the Act, more particularly the requirement of the certificate as contained in Section 65(4) of the Act - Order of Trial Court set aside with a direction to decide the objection afresh in the light of provisions of Section 65-B of the Act. (Paras 5 & 6)

साक्ष्य अधिनियम (1872 का 1), धारा 65बी – इलेक्ट्रॉनिक साक्ष्य की ग्राह्यता – लोक अभियोजक ने सी.डी. को प्रदर्शित करना चाहा – सी.डी. की ग्राह्यता के संबंध में आक्षेप उठाया गया जिसे विचारण न्यायालय द्वारा अस्वीकार किया गया – अभिनिर्धारित – विशेष न्यायाधीश को अधिनियम की धारा 65बी की अपेक्षाओं का उचित रुप से मूल्यांकन करना अपेक्षित था, विशेष रुप से प्रमाण पत्र की आवश्यकता जैसा कि अधिनियम की धारा 65(4) में अंतर्विष्ट है – विचारण न्यायालय का आदेश अपास्त, इस निदेश के साथ कि आक्षेप का पुनः निर्धारण, अधिनियम की धारा 65बी के उपबंधों के आलोक में करें।

Case referred :

2012 (1) MPLJ 452.

Piyush Mathur with *R.K. Sharma,* for the petitioner.
M. Raveendran, Dy. G.A. for the respondent.

ORDER

The Order of the court was delivered by :
PRAKASH SHRIVASTAVA, J:- This Writ Petition under Article 226 and 227 of the Constitution is directed against the order of Special Judge (under Prevention of Corruption Act) dated 22/5/2012 whereby the learned Judge has rejected the petitioner's objection in respect of admission of audio CD in evidence.

2. The petitioner is facing a trial before the Special Judge in Crime No.28/2011 for offence under Section 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. According to the petitioner, during the examination of chief panch witness L.R.Meena the Special Public Prosecutor had desired to exhibit the CD and the envelope of the CD to which the petitioner had submitted an objection in the form of application to the admissibility of the electronic evidence of CD, thereafter the recording of the statement of panch witness L.R.Meena was suspended without deciding the objection. Then the statement

of the complainant Mohd. Faruq started and the Special Public Prosecutor again insisted on exhibiting and opening the envelope containing CD which was again objected by the petitioner and the said objection has been rejected by the Special Judge by the impugned order dated 22/5/2012.

3. Learned counsel for petitioner submits that while rejecting the petitioner's objection, the Special Judge has not properly considered the provisions contained in Section 65-B of the Indian Evidence Act 1872. He further submitted that though the learned Special Judge has taken note of the judgment of this Court in the matter of *Kailash Vs. Suresh Chandra* reported in 2012(1)MPLJ 452 but has not considered the ratio of the said judgment. He further submitted that the objection which has been raised by the petitioner has not been properly decided by the learned Special Judge.

4. Learned counsel for respondent State has supported the impugned order.

5. Having heard the learned counsel for parties, it is noticed that the petitioner vide application dated 26/4/2012 had raised the specific objection that the conditions enumerated in Section 65-B of the Act are not complied with, therefore, the CD is not admissible in evidence. Learned Special Judge is required to properly appreciate the requirement of Section 65-B of the Act more particularly the requirement of the certificate as contained in 65(4) of the Act which he has failed to appreciate in the present matter. It is also found that though the learned Special Judge has taken note of the judgment of this Court in the matter of *Kailash* (supra) but has not examined the ratio of the said judgment and its effect in the present case.

6. Having considered the aforesaid aspect of the matter, we find that the impugned order passed by the learned Special Judge cannot be sustained and is hereby set aside with a direction to the learned Special Judge to decide the petitioner's objection afresh keeping in view the provisions of Section 65-B of the Act and the aforesaid judgment of this Court and other relevant judgments on this point.

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

Petition allowed.

I.L.R. [2013] M.P., 780
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 8092/2012 (Gwalior) decided on 19 December, 2012

K.K. ARYA ...Petitioner
Vs.
M.P. MADHYA KSHETRA VIDYUT
VITRAN COMPANY LTD. & ors. ...Respondents

A. Service Law - Transfer - Is a condition of service - **Order can only be interfered if it violates any statutory provision, proved to be malafide, changes service conditions of an employee to his detriment or is contrary to law. (Para 13)**

क. सेवा विधि – स्थानांतरण – सेवा की शर्त है – आदेश में हस्तक्षेप केवल तब किया जा सकता है यदि वह किसी कानूनी उपबंध का अतिलंघन करता है, दुराशय साबित होता है, कर्मचारी को हानि पहुंचाते हुए सेवा शर्तें बदल देता है या विधि विरुद्ध है।

B. Administrative Law - **Once the discretionary element in the administrative action has been exercised by the proper authority itself, it is then immaterial as to who is entrusted to discharge the mechanical or non discretionary part of the function. (Para 11)**

ख. प्रशासनिक विधि – एक बार जब प्रशासनिक कार्यवाही में वैवेकिक तथ्य का प्रयोग समुचित प्राधिकारी द्वारा स्वयं किया गया है, तब यह तत्वहीन है कि कार्य का तकनीकी या अवैवेकिक भाग का निर्वहन किस पर सौंपा गया है।

Cases referred :

(2006) 4 SCC 348, (2007) ILR MP 1329, AIR 1968 SC 850.

Prashant Sharma, for the petitioner.
Vivek Jain, for the respondents.

ORDER

SUJOY PAUL, J.:- Since the similar issues are involved in these matters. with the consent of parties, matters are finally heard analogously and decided by this common order. The only difference in W.P. No. 8092/2012 is that the petitioner of this case is an Office Bearer of a recognized association and he is claiming immunity from transfer being an Office Bearer. The other things are

similar in nature.

(2) Shri Prashant Sharma, learned counsel for the petitioners, submits that the transfer order dated 17.10.2012 is bad in law and liable to be set aside for following reasons:-

(i) As per circular dated 22.09.2012 (Annexure P- 19), the powers are delegated for the purpose of transfer of different category of employees. He submits that as per Part-A Section (v), the General Manager (Establishment) has no authority jurisdiction and competence to issue the transfer order. He further submits that transfer order can be issued only by CE-CGM (Regional Office) after obtaining approval from the MD.

(ii) The order is malafide and is punitive in nature.

(iii) In W.P. No. 8092/2012, the petitioner could not have been transferred being an Office Bearer.

To elaborate, learned counsel for the petitioner submits that as per schedule of powers, the note-sheet could have been initiated by CE-CGM (Regional Office) alone and after obtaining approval from MD, orders could have been passed by the same authority i.e. CE-CGM (Regional Office). By drawing the attention of this Court, Shri Sharma submits that Annexure R-5 contains signature/approval of MD but the recommendation/ note-sheet is not initiated by CGM (Regional Level), whereas it is done by CGM (HR&A), an authority who is sitting in the Head Quarter. The transfer order is criticized on the ground that it is neither initiated by the competent authority nor issued by the same authority. Merely because the MD has given approval, the transfer order cannot be permitted to stand unless it fulfills all the requirements of the said circular. By placing reliance on a communication dated 11.10.2012 (Annexure-X) filed with an affidavit, Shri Sharma submits that the contents of this letter shows that CGM (Gwalior Region) was annoyed with the petitioner and he as a punitive measure, recommended the transfer of the petitioner outside Gwalior and this recommendation is acted upon by the respondents. Accordingly, the impugned order has a punitive element and it is malafide in nature, Shri Sharma submits.

(3) Lastly for the petitioner in W.P. No. 8092/2012, Shri Sharma submits that as per the transfer policy dated 16.03.2012 (Annexure R-3), the petitioner being a Circle Secretary has an immunity for additional three years in addition to the normal tenure of posting.

(4) *Per Contra*, Shri Vivek Jam, learned counsel for the respondents, controverted the stand of the petitioner and supported the order.

(5) Learned counsel for the employer produced certain note-sheets and it is stated that the decision to transfer the petitioner was taken by the competent authority i.e. Manging Director and merely because the transfer order contains the signature of GM, it will not vitiate the transfer order. In other words, Shri Jain submits that the note-sheets were initiated and placed before the competent authority (MD) who approved the transfer of the petitioner and in obedience of that approval, the transfer order Annexure P-1 is passed. No fault can be found in the said transfer order. By placing reliance on the Supreme Court judgment reported in (2006) 4 SCC 348 *[A. Sudhakar Vs. Postmaster General, Hyderabad and another]*, Shri Jain submits that even in quasi judicial proceeding, if the higher authority passes an order, it will not be vitiated unless a right of appeal of the employee is taken away by the said decision. He submits that in the present matter, there is no right of appeal etc. and if something can be done in a quasi juridical proceedings it can always be done in administrative matters. In nutshell, transfer is approved by the competent authority i.e. MD. It is hyper technicality to submit that transfer order should be issued by CGM (Regional) only. Learned counsel for the employer submits that note-sheet will indicate that transfer order is passed in administrative exigency and public interest. It has not been done on the request and at the instance of the CGM (Gwalior Region). In other words, it is stated that the confidential letter dated 11.10.2012 (Annexure-X) is not the basis for transferring the petitioner and transfer is based on an administrative exigency. By filing affidavit of respondent No. 3, the allegations of malafide were specifically denied by the employer.

(6) At the cost of repetition, Shri Jain submits that the transfer file makes it crystal clear that the reason or the transfer of the petitioner is the administrative exigency. In absence of establishing that transfer is based on any malafides, mere allegations will not serve any purpose and no interference is warranted. Lastly, he submits that the petitioner in W.P. No. 8092/2012 is posted at Gwalior since more than 20 years and, therefore, no further immunity can be given to him.

(7) Shri Sharma submits that the petitioner of the said case although remained at Gwalior but in different capacities and in the capacity of Assistant Engineer, he is at Gwalior only for two years. Thus, he claims immunity on the

basis of said policy.

(8) Learned counsel for the parties have not raised any other contention.

(9) I have heard the learned counsel for the parties and perused the record.

(10) The first contention of the petitioners is regarding competence of transferring authority. A bare perusal of the circular dated 22.09.2012 shows that the powers are delegated to different authorities for the purpose of transfer. A careful reading of this document (Page-62) shows that the Managing Director is competent to approve the transfer of an Assistant Engineer Manager. Annexure R-5 (Note-sheet) makes it clear that the competent authority/ Managing Director has approved the transfer. The circular, Annexure P-19, is silent regarding the procedure by which the note-sheet would be put up before the Managing Director. Therefore, the contention of Shri Prashant Sharma, learned counsel that the note-sheet was not put up by CGM (Regional) and it is put up by CGM (Head Quarter) does not establish any violation. He criticized the order on yet another ground that the order impugned is passed by the General Manager (Establishment) whereas it could be passed as per the said circular only by CGM-CE (Regional Office). A bare perusal of the circular shows that the authority competence to approve is Managing Director. Admittedly, the Managing Director has approved the transfer of the petitioners. I find force in the argument of Shri Vivek Jam that transfer order was not issued by CGM (Gwalior Region) because he made the complaint dated 11.10.2012 (Annexure P-10). To ensure fairness, after approval by the competent authority, the consequential order is passed by General Manager (Establishment)

(11) In the opinion of this Court, it cannot be forgotten that the circular dated 22.09.2012 is only an executive instruction. It does not have any statutory force. Accordingly, a violation if any will not render the transfer order as illegal. A Division Bench of this Court in *R.S. Chaudhary Vs. State of M.P. and others* [(2007) ILR M.P. 1329] has already taken this view. Apart from this, the basic decision regarding transfer of the petitioner is required to be taken by way of approval by the Managing Director. He did so. It is apt to refer few lines from a book of "Administrative Law" Once the discretionary element in the administrative action has been exercised by the proper authority itself, it is then immaterial as to who is entrusted to discharge the mechanical or non-discretionary part of the function. (Chapter-14 Page 449 of principles of administrative law) (Revised by Justice G.P. Singh and

Shri Alok Aradhe, Advocate) (As his Lordship then was). The Apex Court in *Union of India* Vs. *P.K. Roy* reported in AIR 1968 SC 850 opined as under:

> "if the administrative authority named in the statute has and retains in its hands general control over the activities of the person to whom it has entrusted in part the exercise of its statutory power and the control exercised by the administrative authority is of a substantial degree, there is in the eye of law no 'delegation' at all and the maxim *'delegatus non potest delegare'* does not apply...In other words, if a statutory authority empowers a delegate to undertake preparatory work and to take an initial decision in matters entrusted to it but retains in its own hands the power to approve or disapprove the decision after it has been taken, the decision will be held to have been validly made ft the degree of control maintained by the authority is close enough for the decision to be regarded as the authority's own."
>
> (Emphasis Supplied)

In the light of aforesaid, in the considered opinion of this Court, the issuance of transfer order is at best a ministerial act. A basic power and decision to transfer the petitioner was already taken by the competent authority i.e. Managing Director. Hence, no fault can be found in issuance of transfer order on hyper technical and mechanical ground. Thus, this contention is rejected.

(12) The second contention of the petitioners is that transfer order is malafide and is punitive in nature. I have carefully gone through the relevant note-sheet which deals with the transfer of the petitioner. There is no material on record nor it is reflected from the relevant transfer file that the reason for transfer of the petitioner is the recommendation of the CGM (Gwalior Region) (Annexure-X) dated 11.10.2012. The allegations of malafides raised by the petitioner are specifically denied by respondent No. 3. The allegations alone are not sufficient unless the same are proved to the hilt. There is no material which shows that the transfer order is arising out of any malice. Accordingly, this contention is also rejected.

(13) The third contention with regard to petitioner of W. P. No. 8092/2012 also based on executive instruction. Petitioner is claiming immunity from transfer on the basis of a clause of transfer policy. The said clause has no enforceability and violation thereof will not render the transfer order as illegal.

Petitioner is at Gwalior for quite some time. The different capacities in which he is in Gwalior is not relevant. Transfer is a condition of service. Transfer order can be interfered with only if it violates any statutory provision, proved to be malafide, changes service condition of an employee to his detriment or is contrary to any law. No such ingredients are available in this petition.

(14) Accordingly, I find no reason to interfere in these matters. Resultantly petitions are dismissed. Ad-interim orders are vacated. No costs.

Petition dismissed.

I.L.R. [2013] M.P., 785
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 6653/2011 (Jabalpur) decided on 2 January, 2013

BABY JOHN ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

A. Service Law - Krammonati - Scheme - Annual Confidential Report - **In case an employee is granted the benefit of Krammonati or the first Higher Pay Scale, his A.C.R.s are not required to be considered for the purposes of granting second higher pay scale, as per the scheme. (Para 4)**

क. सेवा विधि – क्रमोन्नति – योजना – वार्षिक गोपनीय प्रतिवेदन – कर्मचारी को क्रमोन्नति का या प्रथम उच्चतर वेतनमान का लाभ प्रदान किये जाने की स्थिति में योजना के अनुसार, उसे द्वितीय उच्चतर वेतनमान प्रदान करने के प्रयोजन हेतु, उसके वार्षिक गोपनीय प्रतिवेदनों को विचार में लेना अपेक्षित नहीं।

B. Civil Services (Classification, Control and Appeal) Rules M.P., 1966 - Rule 14 - Major Penalty - **Withholding of increment with cumulative effect - Withholding of increment with cumulative effect amounts to major penalty - Cannot be sustained in absence of a detailed enquiry in terms of Rule 14. (Para 5)**

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – नियम 14 – गुरुत्तर शास्ति – संचयी प्रभाव से वेतनवृद्धि को रोका जाना – संचयी प्रभाव से वेतनवृद्धि को रोका जाना गुरुत्तर शास्ति की कोटि में आता है – नियम 14 की शर्तोनुसार, विस्तृत जांच के अभाव में कायम नहीं रखा जा सकता।

C. Service Law - House Rent Allowance - Grant of - **H.R.A. is required to be paid to only one spouse and not to both if they are living together in one house. (Para 6)**

ग. सेवा विधि – गृह भाड़ा भत्ता – की मंजूरी – गृह भाड़ा भत्ता, पति या पत्नी में से केवल एक को दिया जाना अपेक्षित है और न कि दोनों को यदि वे एक घर में एक साथ निवासरत हैं।

Case referred :

1991 Supp (1) SCC 504.

D.K. Dixit, for the petitioner.
Yogesh Dhande, Dy. G.A. for the respondents.

ORDER

K.K. Trivedi, J.: The petitioner, who was serving as Assistant Superintendent in the Directorate of Sericulture, Bhopal, has approached this Court by way of filing this writ petition under Article 226 of the Constitution of India, ventilating his grievance against the order dated 09.11.2011 by which the petitioner is granted the second higher pay scale in the time scale pay with effect from 09.11.2009 and has also called in question the order dated 15.03.2011 by which a show cause notice has been issued to him and on the basis of which a major penalty has been imposed on him. He has also called in question the action of respondents by which house rent allowance with effect from May, 2002 to 31.10.2009 has been denied to him and has also complained about non-finalization of the benefit of pay scale of Rs.5000 – 8000 as has been recommended by the Brahmaswaroop Committee but which has not been implemented in the Sericulture Department, on the grounds that the petitioner was entitled to be considered for grant of benefit of higher pay scale in terms of the policy made by the State Government on 24.01.2008. However, in complete ignorance of the said policy, the benefit was extended to the petitioner but not from the appropriate date. Though he was due for grant of second Kramonnati with effect from 01.04.2006, the order in that respect was not issued on the other hand by order dated 09.11.2009 the petitioner was extended the benefit of second higher pay scale with effect from 09.11.2009. The representation in this respect was made but nothing was done, therefore, the petitioner was required to approach this Court. Since the representation was made by the petitioner against such an action of the respondents, he protested against the action of not paying the house rent allowance, by memo dated 15.03.2011 it was said that

the action is initiated against the petitioner for committing misconduct of remaining absent from the office. It is contended that a reply was submitted but since nothing was done, a monetary loss was caused to the petitioner just at the fag end of service when he was intimated to superannuate with effect from 29.12.2012. Therefore, he was required to approach this Court by way of filing this writ petition. It is contended that all such actions taken by the respondents are, thus, bad in law. The petitioner would be entitled to grant of relief claimed in this respect.

2. Refuting the allegations made in the writ petition, a return has been filed and it is contended that in fact the petitioner was not entitled to the relief claimed in the writ petition. A show cause notice has been issued to the petitioner on account of his remaining absent from duty. A reply has been filed by the petition in respect to the said show cause notice. The order in that respect has been issued and, therefore, now the petitioner is required to challenge such an order if at all he is aggrieved by filing an appeal. It is contended that as far as the house rent allowance is concerned, the wife of the petitioner was also employed in the Income Tax Department of Government of India and was thus entitled to get the house rent from her employer. Husband and wife were living together and, therefore, the petitioner was not entitled to get the benefit of house rent allowance. The wife of the petitioner has retired with effect from 31.10.2009 and a representation was made by the petitioner on the basis of which the order has already been passed sanctioning the house rent allowance to the petitioner with effect from the month of November, 2009. In view of this, no relief whatsoever can be granted to the petitioner and his petition is, thus, liable to be dismissed.

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

4. Now first of all it has to be seen whether the case of the petitioner was rightly considered for grant of higher pay scale or not. It is not in dispute that the policy was made by the State Government on 24.01.2008 implementing the scheme of grant of higher pay scale to those employees/ officers, who have worked only on one post, in one pay scale for a period of 8/10 years. The second higher pay scale is to be granted on completion of 16/20 years of service. The criteria prescribed for grant of such higher pay scale is on the consideration of ACRs of all such persons, who have completed the requisite years of service in the same manner as is prescribed for consideration for grant of promotion in the relevant statutory rules. The scheme further contemplates that if an employee is found fit for grant of first higher

pay scale, it is not necessary to consider the five years ACRs for the last five years working for the purposes of granting the second higher pay scale. Time and again this has been pointed out by the respondents by issuing the clarification that in case an employee is granted the benefit of Kramonnati or the first higher pay scale, his ACRs are not required to be considered for the purposes of granting second higher pay scale. This particular aspect has also been considered by this Court in the case of *Rajaram Patel vs. State of Madhya* Pradesh and other, W.P. No.20038/2011 (S), decided on 14.12.2012. It is not in dispute that the petitioner was found fit for grant of Kramonnati pay scale. He was due to be considered for grant of second higher pay scale w.e.f. 2006 as all such persons similarly situated were granted this benefit w.e.f. 01.04.2006. Only with respect to the claim of the petitioner it is said that when the consideration was done and meeting was held on 21.11.2008, the petitioner was not found fit for grant of this benefit. Though for others it was said that they were found fit for grant of such benefit. This was mainly done only on account of consideration of the ACRs of the petitioner for last five years. The criteria as prescribed by the respondents was that there should not be any adverse remarks in the ACRs and the last two ACRs should be good. The master chart appended with proceedings indicates that there were no adverse remarks in respect of the petitioner and he was having good remarks for the two years but in the last three years ACRs, average marking was done and, therefore, it was said that the petitioner was not found fit for grant of such benefit. The persons, who were considered along with the petitioner, one was having only four years ACRs but he too was found fit for grant of such benefit. Next consideration of the claim of the petitioner was done on 09.11.2009 and in that year though only in one year's ACR good remark was there and remaining four years remarks for the ACRs were average, yet the petitioner was found fit for grant of such benefit w.e.f. 09.11.2009. This consideration by the Committee for the purpose of granting of this benefit to the petitioner is not understood by this Court. Firstly, there was no requirement of considering the ACRs for the purposes of granting the second higher pay scale in terms of the scheme dated 24.01.2008 wherein in paragraph 12 this condition was specifically mentioned. Secondly, the criteria was not dependant on the wish of the committee members. An uniform criteria should have been made applicable. As has been reflected herein above, for the year 2006 when the consideration was done, despite there being two good remarks in the ACRs, the petitioner was not found fit for grant of second higher pay scale whereas in comparison to this in the year 2009 he was found fit for grant of

benefit of second higher pay scale despite the fact that he was having only one good remark and rest of the four were average. Thus, such consideration for the purposes of grant of second higher pay scale done by the respondents cannot be said to be just and proper.

5. Now the question would be whether any major penalty could have been imposed on the petitioner as has been done vide order dated 07.05.2011. It is not in dispute that if an increment of pay is withheld with cumulative effect, the same would be a major penalty [Please see *Kulwant Singh Gill vs. State of Punjab,* 1991 Supp(1) SCC 504]. In view of the law laid-down by the Apex Court, if the increment of pay is withheld with cumulative effect, it will amount to nothing but a major penalty and same cannot be done without detailed enquiry as prescribed under Rule 14 of the Madhya Pradesh Civil Services (Classification, Control & Appeal) Rules, 1966 (herein after referred to as 'Rules'). It is not in dispute that the petitioner was given a show cause notice dated 15.03.2011, which he has called in question in this writ petition. The response was submitted by the petitioner to the said show cause notice. The result of the said show cause notice is the order (Annexure R-3) filed by the respondents by which a penalty of withholding of one increment of pay with cumulative effect has been imposed on the petitioner. It is not the case of the respondents that they conducted a detailed enquiry in terms of Rule 14 of the Rules and thereafter they imposed the penalty. Thus, in view of the law laid-down by the Apex Court in the case of *Kulwant Singh Gill* (supra), the order of penalty cannot be sustained.

6. Now the question would be whether the petitioner was rightly given the benefit of house rent allowance from the month of November, 2009 or not ? It is not disputed by the petitioner that his wife was also in the Government employment serving with the Central Government and was posted at Bhopal and she too was living with the petitioner. It is not disputed by the petitioner that his wife was not getting the house rent allowance from the Central Government. The house rent allowance is required to be paid to only one spouse and not to both if they are living together in one house. It is mentioned that wife of the petitioner had retired from service on 31st October, 2009. Thereafter, the representation was made by the petitioner and the order was passed giving him house rent allowance w.e.f. November, 2009. This being so, nothing wrong was committed in the matter of granting house rent allowance to the petitioner.

7. Now the last claim of the petitioner is with respect to grant of pay scale of Rs.5000 – 8000 as has been recommended by the Brahmaswaroop

Committee. It is contended by the respondents in their return that recommendations in this respect have been sent to the Department on 03.07.2007 and the same are pending consideration before the State Government for rectification of the mistake committed in granting the lower pay scale to Assistant Superintendent. This being so, it would be appropriate to direct the respondents-authorities to take final decision in that respect within the time fixed by this Court.

8. Consequently, the writ petition is allowed in part. It is held that the petitioner is entitled to grant of the benefit of second higher pay scale w.e.f. 01.04.2006 from the date the same was made available to other persons serving in the department of the petitioner. It is further held that the order of penalty issued against the petitioner on 07.05.2011 is bad in law and cannot be sustained. However, it is held that the petitioner has rightly been given the house rent allowance from the date he became eligible for the same. The respondents are further directed to finalize the claim of grant of pay scale of Rs.5000 – 8000 to the persons like petitioner in terms of the recommendations made by the department on 03.07.2007 expeditiously.

9. Resultantly, this writ petition succeeds to the extent that the petitioner is entitled to the benefit of grant of second higher pay scale w.e.f. 01.04.2006 instead of 09.11.2009. All the arrears of salary after refixation of pay of the petitioner be calculated and paid to him. Consequently, the benefit of revised retiral dues and the pensionary benefits in terms of the revised pay scale be granted to the petitioner immediately. The order of penalty dated 07.05.2011 (Annexure R-1) is hereby quashed. The amount of increment so illegally withheld be repaid to the petitioner immediately. The petitioner would be entitled to the benefit of house rent allowance only from the date the same is made available vide order dated 01.12.2009 (Annexure R-3). The respondents would finalize the claim with respect to grant of pay scale of Rs.5000 – 8000 as has been recommended by the department on 03.07.2007 within a period of three months from the date of order and in case it is found that the persons like petitioner are to be granted this pay scale, the pay of the petitioner be accordingly refixed and all the arrears of salary be paid to him within the aforesaid period.

10. The writ petition is allowed to the extent indicated herein above. However, there shall be no order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 791
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 4030/2009 (Jabalpur) decided on 2 January, 2013

YUGUL KISHORE SHARMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Fundamental Rules (As Amended in M.P. Act 29 of 1967), Rule 56(1-a)* - Term "Government Educational Institution" - Meaning - Women Weaving Centres under the Women and Child Development Department are to be treated as educational institutions - Petitioner appointed on the post of Instructor in such centre must be treated as a teacher and would be entitled to continue on the post till he attains the age of 62 years. (Paras 9 & 10)**

मूलभूत नियम (म.प्र. अधिनियम 1967 का 29 में यथा संशोधित), नियम 56(1–ए) – शब्द "सरकारी शैक्षणिक संस्था" – अर्थ – महिला एवं बाल विकास विभाग के अंतर्गत महिला बुनकर केन्द्रों को शैक्षणिक संस्थान समझा जाना चाहिए – उक्त केन्द्र में अनुदेशक के पद पर नियुक्त याची को शिक्षक के रुप में माना जाना चाहिए और वह उस पद पर बने रहने का हकदार होगा जब तक वह 62 वर्ष की आयु प्राप्त नहीं करता।

Cases referred :

AIR 1968 SC 662, AIR 1997 SC 1436, 2007(4) MPHT 147.

Umesh Shrivastava, for the petitioner.
S.D. Tiwari, G.A. for the respondents.

O R D E R

K.K. Trivedi, J.: This petition under Article 226 of the Constitution of India has been filed challenging the order dated 6.3.2009 passed by the respondents retiring the petitioner at the age of 60 years on the grounds that the petitioner was working on the post of Junior Instructor in the Women Weaving Centre, Rewa, and thus, is termed to be a teacher. By an amendment made in the M.P. Shaskiya Sevak (Ardhvarshiki Ayu) Adhiniyam, 1967 (hereinafter referred to as the Act for brevity), the amendment in the age of superannuation for the teachers serving in the Govt. institutions has been made enhancing such age to 62 years, by amending Fundamental Rule 56. It is

contended that the petitioner though is appointed on the post of Instructor, but in fact is performing the teaching job, therefore, he could not have been superannuated at the age of 60 years. According to the petitioner, the amendment and the explanation attached to the Amending Act specifically prescribes that those who are appointed on teaching post, have to retire on attaining the age of 62 years. It is contended that the similar issue was raised before this Court in some what similar circumstances by one Annapurna Prasad Shukla by filing Writ Petition No.2289/2003 and the said writ petition has been allowed interpreting the provisions of the Amending Act and treating that the persons like Lab Technician and Assistant Librarian are to be treated as teachers within the definition of the amending provisions and, therefore, are entitled to continue on the post upto the age of 62 years. It is further contended that when the age of superannuation of the teachers was enhanced from 58 years to 60 years way back in the year 1987, the persons working on the post of Instructor have approached the High Court of Madhya Pradesh by filing the writ petition which subsequently was transferred to the M.P. Administrative Tribunal and was registered as T.A.No.747/1988 *(Ku. Chandra Kakker Vs. State of M.P.)* and was allowed vide order dated 14.11.1991. In terms of the said provision and in terms of the explanation appended to the Act of 1998, it would be abundantly clear that Instructors appointed in the institute to impart training are also to be treated as Teacher and, therefore, they are to be granted the benefit of extension of services upto the age of 62 years. Thus, it is contended that the order impugned passed in respect of the petitioner is bad in law.

2. This Court has entertained the writ petition granted an interim order in favour of the petitioner on 15.6.2009 and till the date of final hearing of the writ petition, in fact the petitioner has completed the age of 62 years. It is contended that since the petitioner has worked on the post, he would be entitled to the payment of salary of the post and the question involved in the present writ petition has become only an academic question which need not to be adjudicated in this petition as after the working, the petitioner would be entitled to the salary of the post.

3. However, refuting such submissions made by the petitioner, a return has been filed. Placing full reliance in the amending provisions of the Act aforesaid as notified vide amending Act of 1998, it has been contended that the amendment would become applicable only in cases of those for whom specific provisions are made in the amending Act. It is contended that every Government teacher has been specifically mentioned in the amended provisions

and for the purposes of interpretation of the word "Teacher" an explanation has been appended to the Amending Act. Since the explanation is the part of the Amending Act, unless a person is appointed in the educational institutions which are covered under the said explanation, he or she cannot be designated as Teacher. Therefore, it is contended that even if the petitioner has performed the duty as Instructor for more than 20 years, he would not be entitled to grant of benefit of enhancement of age of superannuation by the amending Act. However, it is contended that since the petitioner had worked on the post because of an interim stay granted by this Court, ultimately, on attaining the age of superannuation as per the amending Act, the petitioner stood retired on 30.6.2011. It is refuted by the respondents that since the petitioner was allowed to continue to work on the post, he would be entitled to the salary. It is contended that in terms of the provisions of the amending Act, since the petitioner is not one, who can be termed as teacher, the writ petition is misconceived and the same is liable to be dismissed.

4. Heard learned counsel for the parties at length and perused the record minutely.

5. It is not in dispute that the petitioner has continued to work on the post on the strength of an interim order passed by this Court and has ultimately retired on attaining the age of 62 years. However, it has to be seen whether the petitioner was entitled to continue on the post of Instructor treating him as a Teacher working in an educational institution, so as to make the provisions of amending Act applicable in his case ? This is primarily important because only on the strength of interim stay granted by this Court, the petitioner has continued on the post after the actual age of superannuation, he may not be entitled to the salary for the period he remained working on the post after the age of superannuation unless the said period is treated as period spent on re-employment, therefore, the petition is not to be disposed of only because of the fact that the petitioner has now completed the age of superannuation even according to the amending Act. The question is thus not academic purely as is contended.

6. Now the scheme of amendment made in the Act is required to be seen and it has to be interpreted that the petitioner can be treated as teacher or not. The explanation appended to the Act prescribing the age of superannuation for the teachers upto the age of 62 years is required to be examined at length. For the said purpose, the entire provisions of Section 2 of

the amending Act is required to be reproduced where the amendment has been prescribed. The amending provisions of the Act read thus :-

"2. In Section 2 of the Madhya Pradesh Shaskiya Sevak (Adhivarshiki-Ayu) Adhiniyam, 1967 (No.29 of 1967), after sub-rule (1) of rule 56, of the Fundamental Rules, the following sub-rule shall be inserted, namely. -

"(1-a) Subject to the provisions of sub-rule(2), every Government Teacher shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty two years:

Provided that a Government teacher whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty two years.

Explanation.- For the purpose of this sub-rule "Teacher" means a Government servant by whatever designation called appointed for the purpose of teaching in Government educational institution including technical or medical educational institutions in accordance with the recruitment rules applicable to such appointment and shall also include the teacher who is appointed to an administrative post by promotion or otherwise and who has been engaged in teaching for not less than twenty years provided he holds a lien on a post in the concerned School/Collegiate/Technical/ Medical education service."

7. A plain reading of the aforesaid provisions will make it clear that the word every Govt. teacher is specifically mentioned in sub-rule (1-a) of the amending provisions. The proviso is not relevant for the purposes of interpretation. The word ***"Teacher"*** is defined in explanation appended to the aforesaid Rule. The teacher means a Government servant by whatever designation called appointed for the purposes of teaching in Govt. "Educational Institution". Certain educational institutions have been inserted in the same for the purposes of example such as technical or medical educational institutions. However, the word ***"Educational Institution"*** has not been defined completely nor it is said in the said explanation that the institutions only where the classroom teaching in primary, middle or secondary education or even the collegiate level education is imparted, would be termed to be educational

institution, therefore, the word *"Educational Institution"* is required to be interpreted and it has to be seen whether the institution where the petitioner was engaged for imparting instructions, could be termed as an educational institution or not. This is required to be done only because persons like petitioner even working on the post of Laboratory Assistant in the colleges were termed to be Teachers by this Court. In the case of *Ku. Chandra Kakker* (supra), the Tribunal has interpreted the word *"Teacher"* and has included the Instructor, appointed for tailoring and cutting classes as Teacher within the definition given in the amending Act. This being so, this has to be examined whether again the same analogy is to be made applicable and again it has to be treated that the centre where the petitioner was working was in fact an educational institution established by the State Government or not. This particular aspect was not considered either by the Tribunal or by this Court while dealing with such a situation. Obviously, the Laboratory Assistant and Technicians were appointed in the colleges and schools, therefore, it was not necessary for this Court to interpret the word "Educational Institution"

8. The educational institutions are not defined in the amending Act nor their status is clear from the statutory provisions of the Rules, therefore, the literary meaning of the educational institution is required to be seen. The definition of educational institution according to the literary meaning means a pre-primary, primary or secondary school owned or managed or recognised by any local authority, State or Central Government or any college affiliated to or established or managed by any university established by law. However, the Apex Court in the case of *S Azeez Basha and another Vs. Union of India* (AIR 1963 SC 662) while interpreting the provisions of Article 30(1) has categorically said that the word *"Educational Institutions"* are of very wider import and would include a university also. The Noise Pollution Regulation and Control (Rules) 2000 defines the word *"Educational Institution"*. As per the definition given in Rule 2(e) of the Rule aforesaid, the educational institution means a school, seminary, college university, professional academies, training institutes or other educational establishment, not necessarily a chartered institution and includes not only buildings, but also all grounds necessary for the accomplishment of the full scope of educational instruction, including those things essential to mental, moral and physical development. However, such a wider definition of word *"Educational Institution"* is given under the Rules only for the purposes of making the Noise Pollution Regulation applicable.

9. While making the provisions for constitution of the Panchayat in Part-IX of the Constitution of India, specific provision are made under Article 243-G of the Constitution of India, prescribing the powers, authority and responsibilities of Panchayat. One of the subject entrusting such responsibilities to the Panchayat is for preparation of plans for economic development and social justice. In Schedule XI of the Constitution, the education is included as a responsibility or the Panchayats and social justice which includes primary and secondary school education. In the entry 18 of Schedule XI, technical training and vocational education are included as the responsibility of the Panchayat. Thus, if an institution is opened for the purposes of imparting vocational education, it has to be treated as an educational institution. In the case of *Aditanar Educational Institution Vs. Additional Commissioner of Income Tax* (AIR 1997 SC 1436) even a Society established for the purposes of establishing an educational college, was termed as an educational institution by the Apex Court for the purposes of assessment of the said Society for income tax. This Court has come accrossed such a situation and has looked into the provisions of the amending Act and has held that the Weaving Master appointed in a prison cannot be termed to be a teacher appointed in a teaching institution as the prison is differently defined and the welfare scheme run within the prison for the purposes of providing some vocational training to the prisoners, cannot be termed to be a teaching institution. Please refer *S.A.M. Ansari Vs. State of M.P* (2007(4) MPHT 147]. The distinction is to be seen. If a Scheme is started by the State Government for the purposes of economic upliftment of the weaker section and the vocational trainings are prescribed in the said institution whether such an institution can be termed as educational institution or not? This particular aspect is required to be seen in view of the law laid down by the Apex Court in the aforementioned cases. The Apex Court in various cases though has specifically dealt with the admissions, the systems of regularating the fees, but has normally dealt with all such cases in respect of the educational institutions like schools and colleges and has not considered whether a vocational training institute started by the State Government under the Scheme of prescribing education to the weaker section can be termed as an educational institution or not. However, from the narration of the fact and the provisions of the Constitution of India specially the responsibility of the State to make Schemes for upliftment of the weaker section, if a vocational training centre is opened prescribing vocational training to the members of the weaker section so as to make them self sufficient to make earning, it has to be held that the said institution or centres started by

the State Government are covered as educational institutions. Prescribing training or providing such elementary information to make a member of the society to become self sufficient is in fact a part of imparting education. It is more so important looking to the growth of population in the country and, therefore, all such institutions established by the State Government for prescribing the training are to be treated as educational institutions. One more reason of giving such a finding is that in the amending Act, the State Government itself has included the institution established for the purposes of providing technical education. All industrial training institutions are to be treated as educational institutions. Similarly, the training centres started by the respondents under the Women and Child Development Department are also to be treated as educational institutions.

10. This Court has already held that instructors are to be treated as teachers. The Tribunal has also equated the instructors as teachers, therefore, the petitioner has to be treated as a teacher and, thus, would be entitled to continue on the post till he actually attained the age of 62 years. Since the petitioner has already worked upto the age of 62 years, in view of the aforesaid finding, he would he entitled to payment of salary of the post till he worked on the said post. If the salary has not been paid to the petitioner, now the amount be paid to him within a period of two months from the date of order. The petitioner would also be entitled to all benefits of services including, counting the period of two years of service, for the purposes of fixation of pension.

11. The writ petition stands allowed to the extent indicated herein above. However, there shall be no order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 797
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 4352/2012 (Jabalpur) decided on 8 January, 2013

AMITABH SHUKLA (DR.) ...Petitioner
Vs.
RANI DURGAWATI VISHWA VIDYALAYA & anr. ...Respondents

Service Law - Promotion **- Committee constituted for considering the Senior Lecturer for promotion to the post of Reader recommended the name of petitioner along with other Senior Lecturers**

- Recommendations of Committee also approved by Executive Council - Promotion of petitioner was stayed on the ground of pendency of Departmental Enquiry - Held - There is no material to show that when the promotion was recommended by Committee, any charge sheet was issued to the petitioner or any Departmental Enquiry was pending - Issuance of Charge sheet subsequent to promotion will not hamper the promotion recommended on merit - Petitioner be promoted as per recommendation of committee which were affirmed by Executive Council - Petition partly allowed. (Paras 2,7 & 8)

सेवा विधि – पदोन्नति – रीडर के पद पर वरिष्ठ प्राध्यापक की पदोन्नति हेतु विचार करने के लिए गठित की गई समिति ने याची के नाम की अन्य वरिष्ठ प्राध्यापक के साथ अनुशंसा की – समिति की अनुशंसाओं को कार्यपालिक परिषद द्वारा भी अनुमोदित किया गया – याची की पदोन्नति, विभागीय जांच लंबित होने के आधार पर रोक दी गई – अभिनिर्धारित – कोई सामग्री यह दर्शाने के लिए नहीं कि जब समिति द्वारा पदोन्नति की अनुशंसा की गई, याची को कोई आरोप पत्र जारी किया गया था या कोई विभागीय जांच लंबित थी – पदोन्नति पश्चात जारी किया गया आरोप पत्र, गुणदोषों पर की गई पदोन्नति की अनुशंसा को बाधित नहीं करेगी – याची को कार्यपालिक परिषद द्वारा अनुमोदित समिति की अनुशंसाओं के अनुसार पदोन्नत किया जाये – याचिका अंशतः मंजूर।

Cases referred :

AIR 1991 SC 2010, AIR 1993 SC 1488, AIR 1968 SC 1113, (1989) 2 SCC 541, 1994 Supp (2) 222.

Rajendra Mishra, for the petitioner.
P.K. Kaurav, for the respondents.

ORDER

SANJAY YADAV, J.: Heard.

1. Being aggrieved by this non-promotion to the post of Reader (Economics), petitioner, Senior Lecturer, University Teaching Department, Rani Durgavati Vishwavidyalaya, has filed this writ petition seeking direction to the respondent to implement the recommendation dated 24.5.2004.

2. Appointed as Lecturer (Economics) in the year 1988, petitioner became a Senior Lecturer. In the year 2004, on 24.3.2004, a Committee constituted for consideration of Senior Lecturer for promotion of teachers under Career Advancement Scheme recommended the petitioner along with

three other Senior Lecturers for promotion to the post of Reader. The Executive Council of the University in its meeting convened on 24.5.2004 affirmed the recommendation; however, except the petitioner, other Senior Lecturers were promoted as Readers either from 27/7/98 or from the date they acquired qualification as per Career Advancement Scheme. In respect of petitioner it was stated that his promotion is stayed because of pending departmental enquiry.

3. Aggrieved petitioner preferred the representation; however, having not succeeded thereby, as no heed being paid, present writ petition is filed.

4. It is urged that, there was no departmental enquiry pending against the petitioner nor was the same initiated against him either on 24.3.2004 when the petitioner was interviewed and found suitable by the Committee, nor on 24.5.2004 when the executive Committee accepted the recommendation. It is contended that the council addressing to non existing facts erroneously stayed the promotion. It is further submitted that though nomenclatured as promotion it was basically an up-gradation and under Career Advancement Scheme enabling enhancement of pay, i.e. Senior Lecturer was upgraded as Reader and the Reader as Professor.

5. The respondents on their turn though have taken a stand that the conduct of the petitioner was not in commensurate with his status as Senior Lecturer as he remained unauthorised absent from 7.2.2004 which led the University to issue a charge sheet on 12/10/2004 which later on culminated in the decision of holding the petitioner unauthorised absence from 7.4.2004 to 22.2.2006, directing the said period to be treated either as leave without pay or extra ordinary leave. It is contended that earlier also the pay of the petitioner was stopped from March 2003 because of his remaining unauthorised absent. Furthermore, it is urged that the petitioner was placed under suspension on 23.8.2004 which was revoked by order dated 17.10.2006 w.e.f, 8.9.2006. (It is strange to note when the petitioner was placed under suspension on 23.8.2004 which was revoked on 17.10.2006; how could the said period be treated as without pay or extraordinary leave; as resolved on 8.9.2006. Be that as it may.)

6. It is however, not established by the respondents that as on 24.3.2004, when the petitioner was interviewed by the Committee for promotion to the post of Reader and or 24.5.2004 when the council accepted the

recommendation, any charge sheet was issued to the petitioner or any departmental enquiry was pending against him.

7. True it is that pending departmental enquiry or currency of punishment have the bearing or promotion. In the former case, subject to the Rules/ Regulations in vogue, the recommendations are kept in sealed cover, the opening whereof depends on the outcome of enquiry. In case of exoneration the sealed cover is opened. However, in the later case, i.e, currency of punishment, the consideration is deferred. None of these eventualities however were present when the petitioner was considered for promotion. There is no material on, record to show that the departmental enquiry was pending. The verdict of the Executive Council holding that because of pending departmental enquiry the promotion is stayed is thus on non-existing fact.

8. Issuance of charge sheet subsequent to promotion will not hamper the promotion recommended on merit merely because some administrative opinion was formulated to take a disciplinary action , as has been put forth by learned counsel for respondent, nor the same can be the ground for deferment of promotion.

9. In *Union of India V. K.V. Jankiraman*: AIR 1991 SC 2010, it has been observed:

> "6.....The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the 800 instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/chargesheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalize the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and

the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a ,remedy.

10. In respect of the proposition as to the stage of initiation of disciplinary proceeding whether it would be when an administrative decision is taken or when the charge sheet prepared on the basis of such decision is issued, it has been held in *Delhi Development Authority V. H.C. Khurana:* AIR 1993 SC 1488:

> "15.....The issue of a chargesheet, therefore, means its despatch to the government servant, and this act is complete the moment steps are taken for the purpose, by framing the chargesheet and despatching it to the government servant, the further fact of its actual service on the government servant not being a necessary part of its requirement. This is the sense in which the word 'issue' was used in the expression 'chargesheet has already been issued to the employee', in para 17 of the decision in *Jankiraman.".*

11. In the case at hand since the respondents have failed to show the existence of a departmental enquiry (as observed by the Executive Council in its meeting on 24.5.2004) the inevitable conclusion would be that the decision to defer the promotion is not sustainable.

12. Whether respondents can be directed to give promotion and whether the petitioner would be entitled for actual wages from the date when recommended for promotion are the corollary issues.

13. In the *State of Mysore and another V. Syed Mahmood and others*: AIR 1968 SC 1113 it was held:

> "5.We are of the opinion that the State Government should be directed at this stage to consider the fitness of Syed Mahmood and Bhao Rao for promotion in 1959. If on such examination the State Government arbitrarily refuses to promote them, different considerations would arise. The State Government would upon such consideration be under a duty to promote them as from 1959 if they were then fit to discharge the duties of the higher post and if it fails to perform its duty, the Court may direct it to promote them as from 1959."

14. In view whereof, the respondents are directed to promote the petitioner as per recommendation by the Committee on 24.3.2004 and as affirmed by the Executive Council on 24.5.2004.

15. Regarding backwages it is observed that, the petitioner was denied promotion on 24.5.2004 formulating into a decision on 27.5.2004 whereas, the petitioner has filed this petition on 15.3.2012,i.e, after almost 8 years, during which period, besides on alleged medical leave, petitioner was at ICFAI, Pune and Eritrea (North East Africa) in 2008; Ethiopia in 2009, Kualalumpur in 2010 and joined back in 2011. Thus instead of seeking redressal of grievance of non-promotion in 2004, the petitioner was taking various assignments, therefore he has no entitlement for the actual wages of the post of Reader, which he can be held entitled from the date of petition, i.e. 15.3.2012.

16. In this context reference can be had of a decision in *Paluru Ramkrishnaiah and others V. Union of India and another* (1989) 2 5CC 541 and *Telecommunication Engineering Service Association (India) and another V. Union of India and another* :1994 Supp (2) 222.

In the result the petition is partly allowed to extent above. However, there shall be no costs.

Petition partly allowed.

I.L.R. [2013] M.P., 802
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 11269/2011 (Jabalpur) decided on 18 January, 2013

GANESH PRASAD TIWARI ...Petitioner
Vs.
THE SECRETARY/ADDL. SECRETARY, M.P.S.E.B. & ors. ...Respondents

A. Service Law - Higher Pay Scale - **Scheme was formulated for giving the benefit of placement in pay scale on completion of 9/18/25 years of service - Benefit was denied on the ground that he was not sent for training on account of becoming overage - Held - Respondents have failed to show any scheme for selection was prescribed for sending any persons for technical training in training institute - Petitioner cannot be held responsible in absence of any such scheme - He on his own also could not have made an application to the Training Institute for**

admitting him for such training - There was no fault on the part of the petitioner so as to deny the benefit of consideration for grant of second higher pay scale. (Para 5)

क. सेवा विधि – उच्चतर वेतनमान – सेवा के 9/18/25 वर्ष पूर्ण करने पर वेतनमान में स्थानन का लाभ प्रदान करने के लिये योजना बनाई गई थी – इस आधार पर लाभ अस्वीकार किया गया कि चूंकि वह अधिक आयु का हो जाने के कारण उसे प्रशिक्षण के लिये नहीं भेजा गया – अभिनिर्धारित – प्रत्यर्थीगण यह दर्शाने में असफल रहे कि किसी व्यक्ति को तकनीकी प्रशिक्षण हेतु प्रशिक्षण संस्थान मे भेजे जाने के लिए चयन की कोई योजना विहित की गई थी – ऐसी किसी योजना की अनुपस्थिति में याची को उत्तरदायी नहीं ठहराया जा सकता – वह स्वयं भी उक्त प्रशिक्षण के लिए प्रवेश हेतु प्रशिक्षण संस्थान को आवेदन नहीं कर सकता था – याची की ओर से कोई दोष नहीं था जिससे कि उच्चतर वेतनमान प्रदान करने हेतु विचार में लिये जाने का लाभ अस्वीकार किया जाये।

***B. Service of Higher Pay Scale - Job Responsibility* - Respondents have not clarified that any greater responsibility or a different higher technical job is required to be discharged by the Line Asstt. Grade II - Petitioner was already working as Line Attendant Grade I for a considerable long time - If the job responsibility was same, the benefit of experience of working could not have been denied to the Petitioner. (Para 6)**

ख. उच्चतर वेतनमान की सेवा – कार्य का दायित्व – प्रत्यर्थीगण ने स्पष्ट नहीं किया है कि लाईन सहायक ग्रेड– II द्वारा कोई गुरुत्तर दायित्व या भिन्न उच्चतर तकनीकी कार्य का निर्वाहन अपेक्षित है – याची पहले ही लम्बे समय से लाईन अटेन्डेन्ट ग्रेड–I के रुप में कार्यरत था – यदि कार्य का दायित्व समान था, तब याची को कार्य के अनुभव का लाभ अस्वीकार नहीं किया जा सकता था।

Case referred :

AIR 1990 SC 371.

Rajesh K. Pandey, for the petitioner.
M.B. Shrivastava & Jitesh Shrivastava, for the respondents.

ORDER

K.K. TRIVEDI, J.:- The main grievance of the petitioner in the present petition is that he has been denied the benefit of consideration of his claim for grant of placement in the next higher pay scale for which he has completed the requisite years of service, It is contended by the petitioner that a scheme

was made by the respondents circulated on 19.07.1990 (Annexure P-4) for giving the benefit of higher placement in the pay scale on completion of 9/18/ 25 years of service. Such benefit was extended to Class-Ill and ClassIV employees. The object of making such a scheme was to make available at least the pay scale of a promotional post to such employees, who were working in the cadres, having less opportunity of promotion in the next cadre post. It is contended that in Clause (xiii) of the scheme it was specifically provided that the second option will be allowed in only such cases in which higher grade posts are available for promotion and the employee is eligible for promotion based on educational/professional qualification as prescribed for the promotional post by the Board from time to time.

2. it is contended that the petitioner had worked on the post of Line Attendant Grade-I (Assistant Lineman) for considerable long time but was not allowed to be given the pay scale of the Line Assistant Grade-Il (Lineman) only because it was said that the petitioner has not obtained the training or a certificate of competency in overhead and/or underground cable work. It is contended that it was not the fault on the part of the petitioner in not obtaining the said training as up to the age of 50 years he was not sent for such a training by the respondents and lastly it was said that he could not be sent for such training since he has completed the age of 50 years. Accordingly, the petitioner was made to retire from the post of Line Attendant Grade-I by a notice dated 07.05.2008, w.e.f. 30.06.2009. Since such a benefit of placement in the higher pay scale was not given to the petitioner, he has not only suffered monetary loss while in service but is continuously suffering the loss by not getting appropriate pension and retiral dues.

3. In response to the notice issued by this Court in the writ petition, a reply has been filed by the respondents. It is contended by them that the scheme of recruitment prescribes the educational and general as well as technical qualification for appointment/promotion on the post of Line Assistant Grade-Il (Lineman) in the schedule of regulations, which prescribes primary (4th standard) as minimum qualification in education and a competency certificate in overhead and/or underground cable work. The petitioner was having the educational qualification but was not having the competency certificate and since he was not to be sent for such training on account of becoming overage, his claim was not to be considered for grant of second placement in the higher pay scale as per the scheme. It is contended that though the condition mentioned in the scheme referred to herein above was

subsequently changed inasmuch as availability of the promotional post was deleted but the condition of obtaining technical training was very much there and that being so, the case of the petitioner was not considered for grant of benefit of second higher pay scale in terms of the scheme. By issuing instructions, specific condition was made that the qualified persons in education were required to be sent for such training only up to the age of 50 years. The persons, who have attained the age of 50 years or above, were not to be sent for training. Accordingly, it is said by the respondents that rightly the claim of the petitioner was not considered and as such he is not entitled to any relief. The writ petition, according to the respondents, deserves to be dismissed.

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

5. As was directed by this Court, the respondents have not been able to show that any scheme for selection was prescribed for sending any person for technical training in the training institute and that the petitioner after taking part in the said process was not selected. This makes it clear that it was the responsibility of the respondents to select and send the persons for training so as to become eligible for promotion on the next post as prescribed in the schedule of the Regulations. Those who were nearing the age of 50 years, were required to be sent for training on earlier occasion so that non-obtaining the certificate from training institute may not come in their way for getting the benefit of next promotion. However, if the scheme was not made in this respect by the respondents, the petitioner cannot be held responsible for the same. It is not that on his own the petitioner could have made an application to the Central Training Institute for admitting him for such training. The persons are required to be sent for training by the respondents. In view of this, it cannot be said that there was any fault on the part of the petitioner on account of which he could be denied the benefit of consideration for grant of second higher pay scale.

6. The other aspect is that the respondents have not clarified that any greater responsibility or a different higher technical job is required to be discharged by the Line Assistant Grade-II (Lineman). The petitioner was also working as Line Attendant Grade-I for considerable long time. If the job responsibility was same, the benefit of experience of working could not have been denied to the petitioner. Apex Court in the case of *Bhagwati Prasad vs. Delhi State Mineral Development Corporation,* AIR 1990 SC 371,

has held that long working on one post, even on adhoc basis, prescribes obtaining of experience of working on the said post, which cannot be said to be inferior in any manner so as to the minimum educational certificate prescribed for the said post. This being so, it was to be seen by the respondents that the petitioner by virtue of working on the post for a long time has obtained the experience and thus was required to relax such a condition of obtaining the technical training certificate of the similar nature and to consider the case of the petitioner in appropriate manner. In fact there was no question of promotion on the next higher post. Only the pay scale of the post was to be made available as per the scheme made by the respondents. In that situation, merely because of prescription of such a condition, the claim of the petitioner was not to be denied. Apparently, the respondents have not at all considered the case of the petitioner in terms of his second option only because of his not obtaining the training certificate.

7. This being so, it cannot be said that the claim of the petitioner was rightly rejected by the respondents. In view of this, the writ petition is allowed. The respondents are directed to consider the case of the petitioner for placement in the second higher pay scale in terms of his option from the date of his eligibility, ignoring the obtaining of technical training certificate and in case the petitioner is found fit for grant of such a benefit, to extend the said benefit from the date the same was due. All the consequential benefits be also made available to the petitioner. The aforesaid exercise be completed within a period of two months from the date of receipt of copy of the order passed today.

8. The writ petition is allowed to the extent indicated herein above. However, there shall be no order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 806
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 17240/2012 (Jabalpur) decided on 5 February, 2013

SAMPAT BAI (SMT.) ...Petitioner
Vs.
STATE OF M.P. ...Respondent

Work Charged and Contingency Paid Employees Pension Rules M.P. 1979, - Rule 4A - Family Pension - Entitlement **- Deceased was**

employed as Jeep Driver in the office of Horticulture Department, on daily wages, thereafter, was appointed as Jeep Driver on Regular Work Charged Establishment - Before his death, the deceased qualified the qualifying service as "permanent employee" by virtue of Rule 2(c)- Widow of the deceased would be entitled for family pension.(Para 2, 11)

कार्य भारित व आकस्मिकता भोगी कर्मचारी पेंशन नियम म.प्र. 1979, – नियम 4ए – परिवार पेंशन – हकदारी – मृतक उद्यान विज्ञान विभाग के कार्यालय में दैनिक वेतन पर जीप चालक के रुप में नियोजित था, तत्पश्चात उसे जीप चालक के रुप में नियमित कार्य भारित स्थापना में नियुक्त किया गया – उसकी मृत्यु से पहले, नियम 2(सी) के कारण "स्थायी कर्मचारी" के रुप में मृतक ने अर्हक सेवा अर्हित की – मृतक की विधवा, परिवार पेंशन हेतु हकदार होगी।

Case referred :

2011(3) MPLJ 2010.

S.K. Sharma, for the petitioner.
S.M. Lal, G.A. for the respondent/State.

ORDER

SANJAY YADAV, J.:- Heard

1. This is the second round of litigation. Earlier also petitioner visited this Court vide W. P. No.3495/2009 (s) which was decided on 24.07.2010.

2. Order dated 07.05.2012, is being assailed vide this petition. Vide impugned order claim of the petitioner for grant of Family Pension in lieu of death of her husband Prahlad Patel has been turned down. Husband of the petitioner was initially appointed in the Horticulture Department, on daily wages. Thereafter, he was appointed as Jeep Driver on Regular Work Charged Establishment.

3. While discharging his duties as Jeep Driver on Regular Establishment petitioner's husband died in harness on 29.9.1986. Petitioner approached the authorities for settlement of retiral dues including Family Pension which was turned down by respondents by order dated 25.06.1997.

4. Aggrieved, whereby, petitioner preferred W. P No.3495/2009 (s). The said petition was allowed on 27.08.2010 and the respondents were directed to settle Family Pension in favour of petitioner along with interest @ 6% till final decision.

5. Respondent/State and its functionaries preferred Writ Appeal against the order placing reliance on Full Bench judgment of this Court in case of *Mamta Shukla v. State of M.P. and others:* 2011 (3) MPLJ 2010. The Division Bench while recording the concession of learned counsel for the parties, regarding legal position in view of law laid down by the Full Bench, set aside the order passed in W. P. No.3495/2009 (s) and directed that the matter deserves to be re-examined in light of law laid down by the Full Bench in *Mamta Shukla* (supra).

6. It was further expressed by Division Bench that the aspect of entitlement of the petitioner has not been examined and the same is to be examined by the respondents keeping in view all the facts and facets into consideration.

7. Armed with aforesaid order passed in Writ Appeal No.305/2011 dated 12.04.2012, the respondents have passed the impugned order declining the petitioner's entitlement for family pension holding-

> "माननीय उच्च न्यायालय के उक्त दिनांक 12.04.12 के निर्णय के परिपेक्ष्य में आपके द्वारा प्रस्तुत अभ्यावेदन का परीक्षण किया गया एवं निम्न कारणों से उसे अमान्य किया जाता है :–
>
> 1. आपके पति स्व. श्री प्रहलाद पटेल, वाहन चालक कृषि विभाग में संयुक्त संचालक कृषि, जबलपुर के अधीन दिनांक 23.12. 1978 से 31.03.1980 तक दैनिक वेतन रूपये 6.65 की दर पर कार्यरत थे इस प्रकार वे 1 वर्ष 3 माह 9 दिन दैनिक वेतन पर थे एवं बाद में उन्हें दिनांक 01.04.1980 से कार्यभारित तथा आकस्मिकता के पद पर नियमित किया गया । दिनांक 01.04.1980 से 29.10.1986 (मृत्यु दिनांक) तक कुल 6 वर्ष 7 माह नियमित पद पर कार्यरत रहे । इस प्रकार स्व. श्री पटेल की कुल सेवा 7 वर्ष 10 माह ही रही है ।
>
> 2. म.प्र. (कार्यभारित तथा आकस्मिकता से वेतन पाने वाले कर्मचारी) पेंशन नियम, 1979 के नियम 2(ग) के अनुसार कार्यभारित एवं आकस्मिकता से वेतन पाने वाले स्थायी कर्मचारी जिसकी सेवायें 10 वर्ष पूर्ण हो चुकी हो उसे ही पेंशन की पात्रता आती है ।
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> 3. अतः स्व. श्री प्रहलाद पटेल, वाहन चालक की सेवायें नियमानुसार 10 वर्ष की पूर्ण नहीं होने से परिवार पेंशन की पात्रता नहीं है ।"

8. Question is whether the respondents are justified in rejecting the claim and whether the proposition of law laid down in *Mamta Shukla* (supra) and the provisions of M. P. (Work Charged and Contingency Paid Employees) Pension Rules, 1979 and M. P. Civil Services (Pension) Rules 1976, supports the rejection order.

9. And whether rendering 10 years of service in a work charged establishment will also be condition precedent for granting of family pension, could be ascertained after examining the relevant provision of 1979 Rules and that of 76 Rules.

10. Rule 4 A of the Rules of 1979 and Rule 6 thereof respectively provide for:

> "4 A. Not withstanding anything contained in rule 4 the family of a permanent employee, who dies while in service or after retirement on pension on or after the 1st April 1981 shall be entitled to family pension at the rate of 30% of his/her pay drawn at the time of death/retirement subject to minimum, of Rs.40/-per month and maximum of Rs. 100/- per month subject to other conditions of Rule 47 of Madhya Pradesh Civil Services (Pension) Rules, 1976 except sub-rule (3) of the said Rules. it
>
> 6. Commencement of qualifying service-(1)
>
> subject to the provisions of Chapter III of the Madhya Pradesh Civil Services (Pension) Rules, 1976 or section IV of the Madhya Pradesh New Pension Rules, 1951 as the case may be, for calculating qualifying service of a permanent employee who retires as such, the service rendered with effect from the 1st January, 1959 onwards shall be counted.
>
> (2) On absorption of a permanent employee without interruption against any regular pensionable post, the service rendered with effect from 1st January, 1959 onward shall be counted for pension as if such service was rendered in a regular post.
>
> (3) On absorption of temporary employee without interruption against any regular pensionable post, the service rendered with

effect from 1st January, 1974 onwards, if such service is of less than six years shall be counted for pension as if such service was rendered in a regular post.

When the aforesaid two Rules are read together, it is clear as crystal that the provisions which govern the family pension has a different field of operation than the provisions regarding pension to an employee who retires from the work-charged establishment and are governed by Rule 6 of Rules of 1979.

By virtue of Rule 4 A the provisions as contained under Rule 47 of the M.P. Civil Services (Pension) Rules, 1976 are attracted. The said Rule provides for

47.Contributory Family Pension - (1) The provisions of this rule shall apply:-

(a) to a Government servant entering service in a pensionable establishment or on after 1st April 1966, and

(b) to a Government servant who was in service on 31st March, 1966 and came to be governed by the provisions of the Family Pension Scheme for State Government Employees, 1966 contained in Government of Madhya Pradesh Finance Department memo No 1963/C.R903-IV-R. II dated 17th August, 1966 as in force immediately before the commencement of these rules.

(2) Subject to the provision of sub-rule (5) and without prejudice to the provisions contained in sub rule (3), where a government servant dies-

(a) during the period of service he was found medically fit at the time of appointment.

(b) after retirement from service and was on the date of death in receipt of a pension or compassionate allowance, referred to in Chapter V other than the pension referred to in

Rule 34, on the date of death, the family of the deceased shall be entitled to a contributory family pension (hereinafter in this rule referred to as Family pension) the amount of which 'shall be determined as follows:

Pay of Government Servant	Amount of monthly Family Pension
(i) Below Rs.400	30 per cent. Of pay subject to minimum of Rs. 60 and maximum of Rs. 100.
(ii) Rs.400 and above but not exceeding Rs. 1200	15 per cent of pay subject to minimum of Rs.100 and a maximum of Rs.160.
(iii) Above Rs. 1200	12 per cent of pay subject to a minimum of Rs. 160 and a maximum of Rs. 250.

A harmonious reading of Rule 4 A of Rules, 1979 and Rule 47(2) (a) of Rules, 1976 would fresco that if a person employed in a regular work-charged establishment dies while in service, his family cannot be deprived of the pension which it would be entitled for by virtue of Rule 4 A of Rules, 1979.

11. As to the law laid down by Full Bench in *Mamta Shukla* (supra) the issue before the Full Bench was -

"(i) Whether the decision of the Division Bench in W.A. No. 725/2007, *Smt. Rahisha Begum vs. State of M.P.* and others is not a good law in view of the decision of the earlier Division Bench of this Court vide order dated 18-7-2005, passed in W.P. No. 1273/2000, *State of M.P. And others vs. Ram Singh and another?*

(ii) Whether an employee is eligible for the benefit of family pension in accordance with the provisions of Madhya Pradesh (Work Charged and Contingency Paid Employees) Pension Rules, 1979 after completing qualifying service in accordance with the provisions of Recruitment Rules framed by the concerned Department for work charged and contingency paid employees or in accordance with the definition of Rule 2 of Madhya Pradesh (Work Charged and Contingency Paid Employees) Pension Rules, 1979 in regard to "contingency

paid employee", "work-charged employee" and permanent employee"?

(iii) Whether for counting qualifying service of an employee for the purpose of grant of benefit of pension it is necessary that the employee has to be appointed in accordance with the provisions of contingency paid employees recruitment rules framed by the concerned department in regard to work charged and contingency paid employees ?"

The reference was answered in the following terms-

"24- On the basis of above discussion, we hold in regard to the substantial questions of law Nos: 2 and 3 that an employee is eligible to count his past service as qualifying service in accordance with Rule 6 of the Pension Rules, 1979, if he was appointed in accordance with the provisions of Recruitment Rules of 1977. We further hold that an employee, who was not appointed in accordance with the provisions of Recruitment Rules framed by the concerned department, i.e., the Recruitment Rules of 1977, would not be eligible to count his past service as qualifying service for the purpose of grant of pension in accordance with the Pension Rules of 1979 and we answer the substantial questions of law Nos. 2 and 3 accordingly.

25. In regard to substantial question of law No. 1 Earlier Division Bench of this Court in W.P. No. 1273/2000, *State of M.P. vs. Ramsingh and another,* as held that a daily wager employee would not fall within the definition of work charged and contingency paid employee, hence his case would not be covered by Madhya Pradesh Workcharged and Contingency Paid Employees Pension Rules, 1979, has not been noticed by the subsequent Division Bench of this Court in *Rahisha Begum vs. State of M.P. And other,* 2010(4) MPLJ 332. However, in the subsequent case, the Division Bench has held that if an employee comes within the definition of work charged and contingency paid employee as defined the Pension Rules of 1979, then he is eligible to count his past service for the purpose of qualifying service in accordance with the Rules of

1979. In our opinion, there is no conflict between the Division Bench judgments, because the findings of the Division Benches are based on different factual aspects. Accordingly, we answer the substantial question of law No. 1 that there is no conflict of opinion between the two Division Bench judgments. Hence, the decision of the Division Bench in the case of *Rahisha Begum vs. State of M.P.* and others, 2010(4) MPLJ 332, is not per incuriam. We answer substantial question of law No. 1 accordingly."

12. Apparent, it is from the above proponement that, the issue as to grant of family pension to a widow of an employee of work charged who are apparently covered by Rule 4A of Rules of 1979 was not the term of reference and nor was the same dwelt upon by the Full Bench.

13. In view of above, the respondents are not justified in denying the family pension to the petitioner only on the ground that the petitioner's husband did not complete 10 years of service in Regular Work Charged Establishment.

14. In view whereof, the impugned order dated 07.05.2012 is quashed. The respondents are directed to grant family pension to the petitioner from the date of entitlement. Petitioner shall also be entitled for the interest @ 7.5% on the difference till its final payment.

15. The petition is allowed, to the extent above.

Petition allowed.

I.L.R. [2013] M.P., 813
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 4204/2005 (Jabalpur) decided on 7 February, 2013

MOHD. SAGIR ...Petitioner
Vs.
BHARAT HEAVY ELECTRICALS LTD. BHOPAL & ors. ...Respondents

***A. Industrial Relations Act, M.P. (27 of 1960), Section 31(3), Industrial Disputes Act (14 of 1947), Section 25-F* - Petitioner appointed as Medical Attendant, remained absent for a period exceeding 30 days - Notice was sent to resume duty - He neither joined nor submitted any explanation for his un-authorised absence -**

Thereafter, drawing a presumption under Clause 42(10) of Standing Order, that the petitioner had voluntarily abandoned the services, name of the petitioner was struck off from the roll of the company and intimation was sent to him which was refused to accept - The petitioner thereafter approached the Company - Demanded copy of order, which was supplied to him on the same day - Labour Welfare Supervisor also met petitioner on 30.05.78 at his residence and persuaded him to join duty, however the petitioner did not resume duty - Held - There is no violation of principles of natural justice in dispensing with the services of the petitioner as the same were complied with. (Para 2)

क. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धारा 31(3), औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ – चिकित्सा परिचर के रुप में नियुक्त याची, 30 दिनों से अधिक की अवधि के लिये अनुपस्थित रहा – कार्य ग्रहण करने के लिये नोटिस भेजा गया – उसने न तो कार्य ग्रहण किया और न ही अपनी अनाधिकृत अनुपस्थिति के लिए कोई स्पष्टीकरण प्रस्तुत किया – तत्पश्चात, स्थायी आदेश के खंड 42(10) के अंतर्गत उपधारणा करते हुए कि याची ने स्वेच्छापूर्वक सेवा त्याग दी है, कम्पनी की नामावली से याची का नाम हटाया गया और उसे सूचना भेजी गई जिसे लेने से इंकार किया गया – याची तत्पश्चात कम्पनी के पास गया – आदेश की प्रति की मांग की, जो उसी दिन उसे प्रदाय की गई – श्रम कल्याण सुपरवाईजर भी याची से उसके निवास पर 30.05.78 को मिला और उसे कार्य ग्रहण करने के लिये अनुनय किया, किन्तु याची ने कार्य ग्रहण नहीं किया – अभिनिर्धारित – याची की सेवा समाप्त करने में नैसर्गिक न्याय के सिद्धांतों का कोई उल्लंधन नहीं हुआ है क्योंकि उक्त का अनुपालन किया गया था।

***B. Industrial Disputes Act (14 of 1947), Section 2(oo)(bb) - Non-renewal of contract* - Since the service of the petitioner have been terminated as a result of non-renewal of contract of employment the same would not amount to retrenchment - No relief can be granted. (Para 11)**

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2 (oo)(बीबी)– संविदा का नवीनीकरण नहीं किया जाना – चूंकि याची की सेवा, नियोजन की संविदा का नवीनीकरण नहीं किये जाने के फलस्वरुप समाप्त कर दी गई है, यह छंटनी की कोटि में नहीं आयेगा – कोई अनुतोष प्रदान नहीं किया जा सकता।

Cases referred :

2004(2) MPLJ 359, AIR 1976 1111, AIR 1978 SC 8, AIR 1982 SC 854, AIR 1993 SC 259, 1994 MPLJ 482, AIR 1998 SC 1681, (2002) 6

SCC 552, (2012) 3 SCC 178, 2004(103) FLR 32, AIR 1996 SC 1623, 2000(1) CLR 451, (2006) SCC (L&S) 250, 2000 SC (L&S) 601, 2001(88) FLR 383, 2005 SCC (L&S) 689.

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

ORDER

A **LOK ARADHE, J.:-** In this petition under Article 227 of the Constitution of India the petitioner has challenged the validity of the order dated 16.3.2005 passed by the Industrial Court.

2. The background facts, necessary for adjudication of the controversy involved in the writ petition, briefly stated, are that the petitioner was appointed as medical attendant grade-2 on 9.6.1977 on probation for a period of six months in the hospital of the respondent No.1 (hereinafter referred to as 'the company') at Habibganj. The petitioner remained absent from 15.4.1978 for a period exceeding thirty days. Thereupon a notice dated 4/16.5.1978 was sent by registered post to the petitioner by which he was asked to resume his duty within three days. It was further informed that if the petitioner remains absent for more than thirty days, it would be presumed that he is not interested in serving the company and shall be deemed to have left services of the company and his name shall be struck off. The aforesaid notice was received by the petitioner on 20.5.1978. However, the petitioner neither joined the duty nor submitted an application for his unauthorised absence. Thereafter in exercise of power under clause 42 (10) of the Standing Orders, the name of the petitioner was struck off from the roll of the company with effect from 15.4.1978 on the ground that he has voluntarily abandoned his services.

3. The petitioner approached the company on 21.9.1978 and requested for supply of copy of the order dated 4.6.1978 which was supplied to him on the same day. The petitioner thereafter filed an application on 22.8.1980 under Section 31 (3) of the M.P. Industrial Relation Act, 1961 (in short 'the Act') on the ground that his services have wrongly been terminated without holding the departmental enquiry which constitutes violation of Section 25-F of the Industrial Disputes Act, 1947 (in short 'the 1947 Act'). The Labour Court vide order dated 9.9.1985 held that the claim of the petitioner is barred by limitation. However, the Labour Court found that in similar circumstances other employees have been re-employed and, therefore, the company should

consider the case of the petitioner for reemployment. Being aggrieved by the aforesaid order the petitioner as well as the company filed the appeal before the Industrial Court. The Industrial Court by the order dated 28.2.1992 decided both the appeals and remanded the matter to the Labour Court to decide all the issues afresh.

4. The Labour Court vide order dated 11.3.1995 inter alia, held that the petitioner was submitting the representations and there is delay of five months. Accordingly, the Labour Court found that sufficient cause for condonation of delay is made out. Labour Court further held that termination of the services of the petitioner amounts to retrenchment and the same constitutes violation of Section 25- F of the 1947 Act. Accordingly, a direction was issued for reinstatement without backwages. Being aggrieved by the aforesaid order, the petitioner as well as the company preferred appeals before the Industrial Court. The Industrial Court vide order dated 27.6.2002, held that the Labour Court has no power to condone the delay in filing the application under Section 31 of the Act. Accordingly, the appeal filed by the petitioner was dismissed whereas the appeal preferred by the company was allowed. The petitioner challenged the order passed by Industrial Court in writ petition before this Court. The Full Bench of this Court in *Mohd. Sagir v. Bharat Heavy Electricals Ltd.*, 2004 (2) MPLJ 359 held that the Labour Court has power to condone the delay in filing the application under Section 31 of the Act. Accordingly, the matter was remanded to the Industrial Court. The Industrial Court vide order dated 16.3.2005 inter alia, held that the delay in filing the application under Section 31 of the Act could not have been condoned in the absence of any application for condonation of delay. It was further held that the petitioner failed to prove that the order dated 4.6.1978 was passed in violation of the Standing Order. Accordingly, the Industrial Court came to the conclusion that the name of the petitioner was rightly struck off from the roll of the company. In the aforesaid factual backdrop, the petitioner has approached this Court.

5. Learned senior counsel for the petitioner submitted that the Industrial Court ought to have appreciated that the termination of the services of the petitioner amounts to retrenchment in the facts of the case. It is further submitted that absence without leave is misconduct and, therefore, an enquiry ought to have been held and the services of the petitioner could not have been terminated on the ground of abandonment of the services. It is also submitted that automatic termination of services of the petitioner under Standing Order without holding

departmental enquiry is violative of principles of natural justice. In support of his submissions, learned senior counsel has placed reliance on the decisions in *State Bank v. N.S. Money,* AIR 1976 1111, *Delhi Cloth and General Mills Co. Ltd. v. Shambhu Nath,* AIR 1978 SC 8, *L. Robert D'Souza v. Executive Engineer, Southern Rly.,* AIR 1982 SC 854, *D.K. Yadav v. J.M.A. Industrial Ltd.,* AIR 1993 SC 259, *All India Trade Union of Food Corporation Employees and Workers and Another v. Food Corporation of India and Others,* 1994 MPLJ 482, *Uptron India Ltd. Shammi Bhan,* AIR 1998 SC 1681, *Lakshmi Precision Screws Ltd. v. Ram Bahagat,*(2002) 6 SCC 552 and *Krushnakant B. Parmar v. Union of India,* (2012) 3 SCC 178. It is further submitted that the Industrial court grossly erred in holding that in the absence of an application for condonation of delay, the delay in filing the application under Section 31 of the Act could not have been condoned. It is further submitted that there was only a delay of five months and the Labour court had power to condone the delay by taking into account the material on record even without an application for condonation of delay was filed. In support of the aforesaid proposition, learned senior counsel has placed reliance on the the decisions in 2004 (103) FLR 32 and *State of Haryana v. Chandramani,* AIR 1996 SC 1623 and *Joy Xavier v. Madmaloats,* 2000 (1) Current Labour Reports 451. It is also submitted that the petitioner in the facts of the case is entitled to backwages. In this regard reference has been made to the decisions in *UP. StateBrasware v. Udai Narayan,* (2006) SCC (L&S) 250.

6. On the other hand, learned counsel for the company submitted that the petitioner was given notice to join the duty but despite notice the petitioner neither explained his unauthorized absence nor joined the duty therefore, as per standing order applicable to the company, the services of the petitioner were terminated. It is further submitted that no enquiry was reuired to be held in the facts of the case and the order of termination of employment does not amount to retrenchment as the action against the petitioner has been taken as per standing order. It is further submitted that in any case, the Company cannot be saddled with the liability to pay backwages. In support of his submissions, learned counsel for the Company has placed reliance on the decisions in *Syndicate Bank v. General Secretary, Syndicate Bank Staff Association,* 2000 SC (L&S) 601, *Punjab & Sindh Bank v. Saktar Singh,* 2001 (88) FLR 383, *Viveka Nand Sethi v. Chairman, J & K Bank Ltd,* 2005 SCC (L&S) 689, *Mohd. Sagir* (supra),

7. I have considered the respective submissions made by learned counsel for the parties. In *Synidcate Bank* (supra) the Supreme Court was dealing with clause 16 of the bipartite agreement which provided that if a workman remains absent from the work for a period of ninety days or more consecutive days thereafter the Company shall serve a notice calling upon him to report on duty within thirty days of the notice. If the employee on receipt of aforesaid notice, fails to explain his absence or to join the duty, the employee shall be deemed to have voluntarily retired from the services of the bank. It was held that principles of natural justice are inbuilt in clause 16 of the bipartite settlement and since the employee neither explained his unauthorized absence nor reported on the duty, therefore, the bank rightly came to the conclusion that the employee voluntarily retired from the services of the bank and, therefore, no enquiry was necessary to be held. Similar view was taken in *Punjab and Sindh Bank* (supra). In *Viveka Nand Sethi* (supra), the Supreme Court while considering the scope and ambit of clause 2 of the bipartite settlement, held that it is a complete code by itself and lays down a complete machinery as to how and in what manner employer can arrive at satisfaction that the workman has no intention to join the duty . Clause 2 of the bipartite agreement raises a legal fiction. Once the action on the part of the employer is found to be fair, no interference in the matter is called for.

8. Before proceeding further it is appropriate to notice clause 42 (10) of the Standing Order which reads as under:

> "42 (10) An employee who remains absent from duty without leave, or permission or in excess of the period of leave originally sanctioned or subsequent extended, shall be liable to disciplinary action unless he is able to explain his absence in a manner satisfactory to the sanctioning authority. Where the period of such absence exceeds 30 days, the employee shall be presumed to have left the service of the company of his own accord without notice and shall be liable to deduction of wages for the notice period. In case of overstayal of leave without competent sanction and authority, the period of such overstayal should be treated as leave on half pay to the extent such leave is due and as extraordinary leave i.e. leave without pay to the extent of the period of half pay leave is not due or falls short of the period of overstayal. The employee will not be entitled to leave salary during such overstayal of leave nor covered by an

extenson of leave by the competent authority. In other words, though the period will be debited to the half pay leave account of the employee (if he is due leave, on half pay), no leave salary will be paid for the full period of overstayal of leave."

9. The aforesaid clause is clear and unambiguous. The first part of the clause provides that an employee who remains unauthorisedly absent from the duty without leave or overstays the leave, shall be liable to disciplinary action unless he is able to explain his absence in a manner satisfactory to the sanctioning authority. Where the period of such absence exceeds thirty days, the employee shall be presumed to have left the service of the company on his own accord without notice. Thus, the presumption with regard to abandonment of services arises only after a period of thirty days. This Court is conscious of the fact that the language employed in clause 2 as well as clause 16 of the bipartite agreement with which the Supreme Court was dealing in *Viveka Nand Sethi* (supra) and *Syndicate Bank* (supra) and in clause 42 (10) of the Standing order, are different.

10. Now, I may advert to the case at hand, Admittedly, the petitioner was employed in the company on 9.6.1977 as medical attendant grade-II on probation for a period of six months. The period of probation was extended for a period of three months each twice. By letter dated 6.12.1977, the petitioner was warned with regard to his unauthorized absence. The petitioner absented himself from the duty with effect from 15.4.1978 without leave. Thereupon, the notice dated 4th May, 1978 was sent by registered post by the Company to the petitioner by which the petitioner was informed that he is unauthorizedly absent from the duty w.e.f. 15.4.1978 and in case he remains absent for a period more than thirty days the presumption shall arise under clause 42 (10) of the Standing Order that he has abandoned the services. The petitioner was further advised that he should join his duty within three days failing which his services shall be terminated. However, despite the receipt of the aforesaid notice, the petitioner neither joined the duty nor submitted any explanation for his unauthorized absence. Thereafter, the then Labour Welfare Supervisor was deputed to visit the petitioner who met the petitioner on 30.5.1978 at his residence and persuaded him to join the duty. However, the petitioner did not resume the duty. Thereafter the presumption was drawn by the Company under clause 42 (10) of the Standing Order that the petitioner has voluntarily abandoned his services. Accordingly, the name of the petitioner was struck off from the roll of the company w.e.f. 15.4.1978. The intimation

was sent to the petitioner vide letter dated 4.6.1978 by registered post. However, the petitioner refused to accept the aforesaid letter. The petitioner thereafter approached the company only on 21.9.1978 i.e. after a period of three months with a request to supply copy of the order dated 4.6.1978 which was supplied to him on the same day. Thus, in the facts of the case, the principles of natural justice were complied with and the action of the employer in dispensing with the services of the petitioner is found to be fair which does not call for any interference.

11. For yet another reason, no relief can be granted to the petitioner. Section 2 (oo) (bb) of the 1947 Act provides that if the services of a workman are terminated as a result of non-renewal of contract of employment or such a contract is terminated under stipulation on that behalf contained therein, the same would not amount to retrenchment. The services of the petitioner have been terminated in accordance with the stipulation contained in the Standing Order which admittedly applies to him. Therefore, the same does not amount to retrenchment.

12. In view of the preceding analysis, the order passed by the Industrial Court neither suffers from any error apparent on the face of the record nor any jurisdictional infirmity warranting interference by this Court in exercise of power under Article 227 of the Constitution of India. In the result, the writ petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 820
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 2345/2012 (Jabalpur) decided on 13 February, 2013

K.K. SINGH CHOUHAN ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Municipal Corporation Act, M.P. (23 of 1956), Sections 52, 53, 420 & Municipal Corporation (Appointment and conditions of Service of Officers and servants) Rules, M.P. 2000, Rule 13(2) & Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9*** **- Petitioner Additional Commissioner, Municipal Corporation, Bhopal was suspended by the Municipal Commissioner in terms of the directions of the State**

Government - Commissioner has failed to exercise the discretion vested in him u/r 9 and has exercised the same at the dictates of the Appellate Authority - Order of suspension quashed. (Paras 8,9 & 11)

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराऐं 52, 53, 420 व नगरपालिक निगम (अधिकारियों व कर्मचारियों की नियुक्ति एवं सेवा शर्तें) नियम, म.प्र. 2000, नियम 13(2) व सिविल सेवा (वर्गीकरण, नियंत्रण एवं अपील) नियम, म.प्र., 1966, नियम 9 – याची अपर आयुक्त, नगरपालिक निगम, भोपाल को नगरपालिक आयुक्त द्वारा राज्य सरकार के निदेशों की शर्तों के अनुसार निलंबित किया गया – आयुक्त, नियम 9 के अंतर्गत उसमें निहित विवेकाधिकार का प्रयोग करने में असफल रहा और अपीली प्राधिकारी के कहने पर उक्त का प्रयोग किया – निलंबन का आदेश अभिखंडित।

B. ***Administrative law*** **- When the statute confers a discretion on the authority to take action in the prescribed manner, the authority has to exercise the discretion independently on its own - If an Authority exercises the discretion vested in it by law under dictation from or at the behest of the Superior Authority in a specific manner, the same would tantamount to non-exercise of discretionary power by the authority and such an action or decision cannot have any sanctity in law. (Para 8)**

ख. प्रशासनिक विधि – जब कानून, प्राधिकारी को विहित ढंग से कार्यवाही करने का विवेकाधिकार प्रदान करता है, तब प्राधिकारी को विवेकाधिकार का प्रयोग स्वमेव स्वतंत्र रुप से करना होता है – यदि कोई प्राधिकारी उसमें विधि द्वारा निहित विवेकाधिकार का प्रयोग, वरिष्ठ प्राधिकारी के कहेनुसार या उसके हुक्म पर विनिर्दिष्ट ढंग से किया जाता है, वह प्राधिकारी द्वारा विवेकाधिकार की शक्ति का प्रयोग नहीं किये की कोटि में आयेगा और उक्त कार्यवाही या निर्णय को विधि की कोई मान्यता नहीं हो सकती।

Cases referred :

AIR 1970 SC 1498, AIR 1994 SC 2296, (2010) 7 SCC 678, 2005(4) MPLJ 524, AIR 1984 SC 626, AIR 1994 SC 1262, (1996) 2 SCC 145, (1993) Suppl. 3 SCC 483, 2012 (1) MPLJ 479, (1995) 5 SCC 440, (1996) 6 SCC 634, (1989) 2 SCC 505, AIR 1995 SC 2390, (2008) 7 SCC 117, (1997) 6 SCC 75, (1996) 4 SCC 708.

Shobha Menon with *C.A. Thomas,* for the petitioner.
V. Sharma, P.L. for the respondents No. 1 & 2.
Sanjay K. Agrawal, for the respondents No. 3 & 4.

ORDER

ALOK ARADHE, J.: In this writ petition the petitioner, *inter alia*, has assailed the validity of the orders dated 10.9.2007 and 29.6.2011 passed by the Commissioner, Municipal Corporation, Bhopal as well as by the State Government respectively. The petitioner also seeks quashment of the charge-sheet dated 18.10.2007.

2. Background facts leading to filing of the writ petition, briefly stated, are that the petitioner at the relevant time was posted as Additional Commissioner in Municipal Corporation, Bhopal and was holding the charge of building permission and illegal colony cell, On 05.4.2007 a search and seizure operation was carried out by the Income Tax Department at the residence of the petitioner. In the said operation a sum of Rs.4.82 lacs in cash was recovered forom the petitioner and evidence of investment in immovable properties and several bank accounts were found. The Income Tax Department also reported that the petitioner was having relations with several builders from whom he received the amount. On receipt of aforesaid information from the Income Tax Department, the State Government vide order dated 10.9.2007 directed the Commissioner, Municipal Corporation, Bhopal to forthwith suspend the petitioner and institute departmental enquiry against him. The Commissioner, Municipal Corporation, Bhopal keeping in view the gravity of accusations made against the petitioner, by order dated 10.9.2007 placed the petitioner under suspension. The Commissioner reported the matter to the appointing authority, namely, Mayor-in-Council, which in its meeting dated 12.9.2007 granted *ex facto* approval to order of suspension passed by the Commissioner.

3. Being aggrieved by the order of suspension the petitioner preferred an appeal on 27.10.2007. Thereafter, the petitioner filed writ petition, namely, W.P.No.203/2008 which was disposed of by a Bench of this Court vide order dated 10.1.2008 with a direction to the Appellate Authority to decide the appeal. Thereafter, the petitioner submitted a representation dated 30.1.2008, which failed to evoke any response. The petitioner, thereafter, again filed writ petition, namely, W.P.No.134/2009 which was disposed of by order dated 20.4.2010 by a Bench of this Court with a direction to the Appellate Authority to decide the appeal preferred by the petitioner within stipulated period. The Appellate Authority by the impugned order dated 29.6.2011 remanded the matter to the Municipal Corporation to reconsider the matter and to take action in accordance with the instructions issued by the General Administration

Department, Government of Madhya Pradesh from time to time. In the aforesaid factual backdrop the petitioner has approached this Court.

4. Learned senior counsel for the petitioner submitted that the Disciplinary Authority of the petitioner is Mayor-in-Council which is the competent authority to place the petitioner under suspension, however, the order of suspension was passed by the incompetent authority, namely, Commissioner, Municipal Corporation at the dictates of the State Government. It is further submitted that the order of suspension suffers from vice of non-application of mind and has been passed in casual and routine manner. It is also urged that ratification of the order which is *per se* illegal cannot be done and there is no material on record to show compliance of provisions of Sections 52 & 53 of the Municipal Corporation Act, 1956 (hereinafter referred to as the 'Act') and Rule 3(2)(ii) of M.P. Civil Service (Conduct) Rules, 1965 (for short 'Conduct Rules'). Lastly, it is submitted that the charge-sheet has been issued by the incompetent authority, namely, Commissioner, therefore, the same is liable to be quashed and for past about five years no proceeding in the departmental enquiry initiated against the petitioner has been taken. In support of her submissions, learned senior counsel has placed reliance on the decisions in the cases of *V. P. Gindroniya vs. State of Madhya Pra desh and another,* AIR 1970 SC 1498, AIR 1994 SC 2296, (2010) 7 SCC 678 and *Suresh Kumar Purohit vs. State of M.P. and another,* 2005 (4) MPLJ 524.

5. On the other hand, learned Panel Lawyer for the respondents No.1 & 2 submitted that the State Government has remanded the matter to the Municipal Corporation to reconsider the matter relating to suspension of the petitioner. Learned counsel for the respondents No.3 & 4 while inviting the attention of this Court to second proviso to Rule 9 of M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 (for brevity 'CCA Rules') submitted that the order of suspension can be passed an authority lower than the appointing authority and such authority is required to forthwith report to the appointing authority the circumstances in which the order of suspension was passed. It is submitted that the Commissioner passed the order of suspension and placed the matter for consideration before the appointing authority i.e. Mayor-in-Council which accorded *ex facto* approval on 12.9.2007. It was further submitted that though the State Government has passed an order dated 10.9.2007 directing the Commissioner, Municipal Corporation, Bhopal to place the petitioner under suspension, yet the order of suspension does not reflect that the same was issued at the instance of the

State Government. The Commissioner taking into account the nature of accusations and the material which was available against the petitioner and on due consideration has passed the order of suspension. It is further submitted that under section 420 of the Act, if in the opinion of the State Government any officer or servant of the Corporation is negligent in the discharge of his duties, the Corporation shall on the requirement of the Government, suspend, fine or otherwise punish him. It is also submitted that the charges contained in the charge-sheet have nothing to do with the proceeding which is pending against the petitioner under the Prevention of Corruption Act, 1988 and the charge-sheet has been issued by the Commissioner who is the competent authority being the Controlling Authority of the petitioner. In this connection, learned counsel for respondents No.3 & 4 has referred to section 25(1)(a) and Section 55 of the Act. In support of his submission, learned counsel has placed reliance on the decisions in *Corporation of the City of Nagpur Civil Lines, Nagpur and another vs. Ramchandra G. Modak and others,* AIR 1984 SC 626, *State of Haryana vs. Hari Ram Yadav and others,* AIR 1994 SC 1262, *Inspector General of Police and another vs. Thavasiappan,* (1996) 2 SCC 145, *U.P.Rajya Krishi Utpadan Mandi Parishad and others Vs. Sanjiv Rajan,* (1993) Suppl. 3 SCC 483 and *N.K.Pandey vs. State of M.P. and others,* 2012 (1) MPLJ 479.

6. I have considered the respective submissions made by learned counsel for the parties. Before proceeding further it is appropriate to notice relevant statutory provisions. Admittedly, the services conditions of the petitioner are governed by Madhya Pradesh Municipal Corporation (Appointment and Conditions of Services of Officers and Servants), Rules, 2000 (hereinafter referred to as the '2000 Rules'). In view of Rule 13(2) of 2000 the provisions of 1966 Rules as well as provisions of CCA Rules apply to the officers and servants of the Corporation. Under Rule 9(1) of the CCA Rules it is provided that the appointing authority or any authority to which it is subordinate or disciplinary authority or any other authority empowered in that behalf by the Governor by general or special order may place a Government servant under suspension where a disciplinary proceeding against him is contemplated or is pending or any criminal offence is under investigation, inquiry of trial. Second proviso of Rule 9 stipulates that where the order of suspension is made by the authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made.

7. Section 53 of the Act provides the manner in which the proceedings

of the Corporation, Mayor-in-Council or any committee shall be recorded. Section 420 thereof provides notwithstanding anything contained in this Act, if in the opinion of the Government any officer or servant of the Corporation is negligent in the discharge of his duties, the Corporation shall, on the requirement of the Government, suspend, fine or otherwise punish him, and if in the opinion of the Government he is unfit for this employment, the Corporation shall dismiss him.

8. It is well settled legal principle that when a statute prescribes a mode of doing an act in a particular manner, that act has to be done in that manner alone and other modes of its performance are forbidden. [See: *Bhagwant Rai and others vs. State of Punjab and others,* (1995) 5 5CC 440 and *L.T.C.Bhadrachalam Paper Boards and another vs. Mandal Revenue Officer, A.P. and others,* (1996) 6 SCC 634]. It is equally well settled rule of Administrative Law that when the statute confers a discretion on the authority to take action in the prescribed manner, the authority has to exercise the discretion independently on its own. If an authority exercises the discretion vested in it by law under dictation from or at the behest of the Superior Authority in a specific manner, the same would tantamount to non-exercise of discretionary power by the authority and such an action or decision cannot have any sanctity in law. In *State of U.P. vs. Maharaj Dharmendra Prasad Singh* (1989) 2 SCC 505, the Supreme Court has held that Statutory Authority cannot permit its discretion to be influenced by the dictation of others as the same would amount to abdication and surrender of its discretion. Similarly, in *Anirudhsinghji Karansingji Jadeja vs. State of Gujarat,* AIR 1995 SC 2390, Supreme Court has held that discretion exercised under the dictates or instructions of a Higher Authority amounts to failure to exercise the discretion altogether. In *Panchmchand vs. State of Himachal Pradesh,* (2008) 7 SCC 117, the Supreme Court has held that an authority has to act within the four corners of the Act and not under on the dictates of a Superior Authority.

9. After having noticed relevant statutory provisions and the well settled legal principles of law, I may advert to the facts of the case. Admittedly, the Disciplinary Authority' of the netitioner is Mayor-in-Council and against the order of suspension, admittedly, an appeal lies under Rule 23 of 1966 Rules to the State Government. In the instants case, the State Government by by order dated 10.9.2007 directed the Commissioner, Municipal Corporation, Bhopal to forthwith suspend the petitioner and to institute a departmental enquiry. Thereupon the Commissioner on the same day suspended the

petitioner. If the order (Annexure-P-1) is read in its entirety it leaves no iota of doubt that same has been passed at the behest of the appellate authority i.e. the State Government. Thus, in the facts of the case the Commissioner has failed to exercise the discretion vested in him under Rule 9 of 1966 Rules and has exercised the same at the dictates of the appellate authority, therefore, the order cannot have any sanctity in law. So far as the contention made by learned counsel for respondents No.3 & 4 that the State Government has the power under section 420 of the Act to direct suspension of an employee is concerned, suffice it to say, the order dated 10.9.2007 has been passed by the Commissioner and not by the State Government. Therefore, apparently, the order of suspension has not been passed by the State Government in exercise of powers under section 420 of the Act.

10. Section 55 of the Act provides that Commissioner shall be the principal executive officer of the Corporation and all other officers and servants of the Corporation except the servants and officers of the Corporation office shall be subordinate to him. Thus, in view of section 55 of the Act the Commissioner is the Controlling Authority of the petitioner. In (1997) 6 SCC 75 and (1996) 4 SCC 708 it has been held by the Supreme Court that the Controlling Authority can also initiate the disciplinary proceedings. In the instant case, the charge-sheet has been issued by the Controlling Authority, namely, the Commissioner, who is competent to issue the charge-sheet. Therefore, the charge-sheet issued to the petitioner cannot be quashed on the ground that it has not been issued by the competent authority. However, in view of the statement made by learned counsel for the respondents No.3 & 4 that the charges contained in the charge-sheet do not have any relation with the proceedings pending against the petitioner under the Prevention of Corruption Act, 1988 as the same relates to the misconduct under the provisions of Conduct Rules and in view of the fact that Corporation has expressed its willingness to expeditiously conclude the departmental enquiry which is pending against the petitioner for past about 5 years, in the facts of the case the proceeding in the departmental enquiry needs to be expedited.

11. In the preceding analysis the order of suspension dated 10.9.2007 (Annexure-P-1) and the order passed by the State Government dated 9.6.2011 are hereby quashed. Needless to state, the competent authority would be at liberty to take appropriate action in accordance with the law to place the petitioner under suspension. The competent authority is further directed to ensure that the disciplinary proceeding initiated against the petitioner shall be

concluded expeditiously preferably within a period of six months from the date of production of certified copy of the order passed today. Needless to state, the petitioner shall cooperate with the proceeding in departmental enquiry and shall not seek unnecessary adjournments.

12. Accordingly, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2013] M.P., 827
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 4908/2005 (Gwalior) decided on 19 February, 2013

SATYA PRAKASH (PROF.) ...Petitioner
Vs.
JIWAJI UNIVERSITY, GWALIOR & anr. ...Respondents

***Vishwavidyalaya Adhiniyam, M.P. (22 of 1973) - Section 12 - Reasonable opportunity of showing cause* - Non Supply of the relevant documents and providing no opportunity to lead evidence amounts to denial of reasonable opportunity - Non supply of complaints and no evidence by the other side nor he was permitted to lead any evidence - Amounts to clear violation of natural justice - Impugned order directing the petitioner to relinquish the post of Vice-Chancellor quashed. (Para 15)**

विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22) – धारा 12 – कारण दर्शाने का युक्तियुक्त अवसर – सुसंगत दस्तावेजों का अप्रदाय और साक्ष्य पेश करने का कोई अवसर प्रदान नहीं किया जाना, युक्तियुक्त अवसर से इंकार किये जाने की कोटि में आता है – शिकायतपत्रों का अप्रदाय और दूसरी ओर से कोई साक्ष्य नहीं और न ही उसे कोई साक्ष्य पेश करने की अनुमति दी गई – स्पष्ट रुप से नैसर्गिक न्याय के उल्लंघन की कोटि में आता है – आक्षेपित आदेश जिसमें याची को कुलपति का पद त्यागने का निदेश था, अभिखण्डित।

Cases referred :

(1987) Supp. SCC 518, (1996) 5 SCC 474, (2001) 6 SCC 392, (2002) 3 SCC 443, 2003 ILLJ 156 MP, 1967(2) SCR 625, (1973) 3 SCC 333.

K.N. Gupta with *Sweta Bothra,* for the petitioner.
Tapan Trivedi, for the respondent No.1.
Nitin Agrawal, for the respondent No.2.

ORDER

SUJOY PAUL, J.: By filing this petition under Article 226 of the Constitution, the petitioner, Vice Chancellor of Jiwaji University, Gwalior, has challenged the order dated 15.10.2005, whereby by invoking Section 13(1) of M.P. Vishwavidyalaya Adhiniyam, 1973 (for short "the Adhiniyam"). The Chancellor has directed him to relinquish the post of Vice Chancellor with immediate effect. Brief facts necessary for adjudication are as under:-

(1) The petitioner was appointed as Vice Chancellor of the said University by order dated 02.01.2002 for a period of four years. He was served with a show cause notice (Annexure P-2) dated 30th August, 2005. The petitioner submitted his reply (Annexure P-8) dated 18.09.2005. In this reply, the petitioner prayed for following relief:-

> "24. The noticee reiterates that-
>
> (i) The noticee hereby denies all the charges against the noticee as being false and without any basis and prays that the inquiry be dropped immediately.
>
> (ii) In case, the Hon'ble Chancellor decides to proceed with the inquiry then all the evidence on which the Hon'ble Chancellor relies shall be examined in the presence of noticee and the noticee or his counsel shall be permitted to cross-examine the witnesses and thereafter,
>
> (iii) the noticee shall be permitted to examine himself and to examine his defence witnesses. Thereafter,
>
> (iv) a personal hearing should be given to noticee and then the matter be dropped.
>
> It is, therefore, humbly prayed that this reply may kindly be accepted and all further proceedings with regard to the said cause notice may kindly be dropped at this stage only."

(2) The said reply was followed by a supplementary reply to the said show cause notice. This supplementary reply is dated 26th September, 2005 (Annexure P-9). The petitioner prayed that in the show cause notice, there are reference of certain complaints on the strength of which show cause notice was issued. The petitioner prayed that the copies of complaints be provided

to him with a view to provide him a reasonable opportunity to show cause. It is prayed that the complaints be provided to the petitioner immediately and, thereafter, he be given a reasonable opportunity to show cause and till such time, the aforesaid documents are provided, the reply be treated as a tentative reply. It is further stated that an investigation must have been done on the complaints preferred against him. The said investigation report be also provided to him at the earliest and, thereafter, a reasonable time be provided to him to put forth his defence. Yet another request dated 04.10.2005 (Annexure P-10) was made to the Chancellor requesting him to provide the copy of complaint referred in the opening paragraph of the show cause notice. It is again prayed that the investigation report be also provided to him so that he can file an effective reply to the show cause. It prayed that in absence of these documents, the reasonable opportunity is denied to him. In para 5 of this reply, the petitioner again stated as under:-

> "(v) It may kindly be appreciated that unless the Hon'ble Chancellor examines the evidence, on which he relied, in my presence and permits me to cross-examine the witnesses, it will not be possible for me to examine my evidence in rebuttal.
>
> In the aforesaid circumstances, I very humbly pray that I may even now be supplied with the copies of the complaints and investigation report and the evidence of which the Hon'ble Chancellor relies be examined in my presence and I be permitted to cross-examine them and thereafter I be permitted to examine myself and my defence evidence. It may kindly be appreciated that unless this is done, the stage of personal hearing would not arise. It is in this context that my humble submission before the Hon'ble Chancellor is that the aforesaid necessary procedure may kindly be followed and thereafter my personal hearing be made."

(3) This is not in dispute between the parties that the provisions of the Adhiniyam will govern the field. Shri K.N. Gupta, learned senior counsel has advanced two fold submissions:-

> (i) The documents referred in the show cause notice and investigation report are not provided to the petitioner and in absence thereof the reasonable opportunity of defence is

denied to the petitioner.

(ii) No oral evidence was led by the department to prove its case. The petitioner's valuable right to lead evidence and to establish that he is innocent is also infringed and taken away.

He also relied on the judgment of the Supreme Court in SLP (c) 24314 of 2008 *(Professor A.D.N. Bajpai Vs. State of Madhya Pradesh and others)*. By relying on Section 14(3)(4) of the Adhiniyam it is stated that the reasonable opportunity of show cause has not been given to him.

(4) Per Contra, Shri Nitin Agrawal, learned counsel for the respondent No. 2 submits that the relevant material was provided to the petitioner. Petitioner has not shown any prejudice being caused to him because of non-supply of the documents demanded by him. He relied on following judgments:-

(i) (1987) supp SCC 518 *[Chandrama Tewari Vs. Union of India (Through General Manager, Eastern Railways)]*

(ii) (1996) 5 SCC 474 *[State of T.N. Vs. Thiru K.V. Perumal and others]*

(iii) (2001) 6 SCC 392 *[State of U.P. Vs. Harendra Arora and another]*

(iv) (2002) 3 SCC 443 *[State of U.P. and others Vs. Ramesh Chandra Mangalik]*.

Further reliance is placed on the judgment of this Court rendered in *Shri Kishan Mittal Vs. Uco Bank and others* [2003 ILLJ 156 MP]. On the strength of these authorities, it is stated that mere non-supply of documents will not render the proceedings as invalid. One has to show that such non-supply has caused prejudice. Shri Agrawal submits that this aspect has not been dealt with by the Supreme Court in the case of *Professor A.D.N. Bajpai* (supra) and, therefore, the said judgment cannot be pressed into service by the petitioner. On the contrary, the consistent stand of learned senior counsel of the petitioner, is that the petitioner reserved his right to file detailed reply after receiving the documents. Unless those documents are supplied to him, he was unable to file detailed reply on merits. The replies by the petitioner were tentative reply. It is further argued that non-supply of documents has an

adverse impact on the petitioner and grave prejudice is caused to petitioner. Petitioner was deprived from filing an effective and adequate reply in absence of those documents. It is further stated that in the proceedings, no evidence is recorded by respondent No. 2 nor the petitioner was afforded with an opportunity to lead evidence.

(5) Shri Tapan Trivedi, learned counsel appearing for the respondent No. 1, has stated that the petition is mainly directed against the order of respondent No. 2 and he is a formal party. Noother point is pressed by the learned counsel for the parties.

(6) I have heard the learned counsel for the parties and perusedthe record.

(7) Before proceeding further, it is apt to quote the relevant portion of Section 14 of the Adhiniyam:-

> "14. (1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (2-A) xxx xxx xxx
>
> (3) If at any time upon representation made or otherwise and after making such enquiries as may be deemed necessary, it appears to the Kuladhipati that the Kulapati:
>
> (i) has made default in performing any duty imposed on him by or under this Act; or
>
> (ii) has acted in a manner prejudicial to the interests of the University; or
>
> (iii) is incapable of managing the affairs of the University the Kuladhipati may, notwithstanding the fact that the terms of office of the Kulpati has not expired, by an order in writing stating the reason therein, require the Kulpati to relinquish his office as from such date as may be specified in the order.
>
> (4) No order under sub-section (3) shall be passed unless the particulars of the grounds on which such action is proposed to be taken are communicated to the Kulpati and he is proposed to be taken are communicated to the Kulpati

and he is given a reasonable opportunity of showing cause against the proposed order.

(5) xxx xxx xxx

(6) xxx xxx xxx"

The aforesaid provision and the Adhiniyam nowhere prescribes the meaning of "reasonable opportunity of showing cause". This aspect was dealt with by the Apex Court in Para 10 of Professor *A.D.N. Bajpai* (supra). The said para reads as under:-

> "The expression 'reasonable opportunity of hearing' has not been defined in the Act. Therefore, the same has to be interpreted keeping in view the fact that an order made under Section 14(3) of the Act has grave adverse impact not only on the image, reputation and integrity of the person holding the high office of the Vice- Chancellor, but also the institution of which he is the academic and administrative head, and in consonance with the expansive meaning given by the courts to the rule of audi alteram partem. The rules of natural justice in the context of Section 14(3) and (4) of the Act would mean that the Vice-Chancellor is made aware of the specific allegations on which an inquiry is proposed to be made and he is also informed about the material/evidence sought to be used against him at such inquiry and is given an opportunity to controvert/rebut such material/evidence. ***The Vice-Chancellor can also ask for an opportunity to lead evidence to prove that the allegations levelled against him are false and baseless and that he is innocent.*** The Chancellor is required to evolve an appropriate mechanism by which the Vice-Chancellor gets an effective opportunity to challenge the grounds enumerated in the show cause notice. After receiving reply of the Vice Chancellor, the Chancellor has to consider the entire record of inquiry as well as the defence put forward by the Vice Chancellor and then pass a speaking order."

(8) The Apex Court has taken note of judgment of the Supreme Court in the case of *State of Orissa V. Binapani Dei* [1967 (2) SCR 625], the relevant portion of the said judgment reads as under:-

> "11.....He is however under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom in enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed; it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

(9) The Apex Court also relied on the judgment of the Supreme Court in the case of *Sayeedur Rehman V. State of Bihar* reported in (1973) 3 SCC 333, the relevant portion of the same reads as under:-

> "12.....we are, however, clear that if the order, dated April 22, 1960, is to be reconsidered then the appellant must be afforded adequate opportunity of hearing and presenting his case. This unwritten right of hearing is fundamental to a just decision by any authority which decides a controversial issue affecting the rights of the rival contestants. This right has its roots in the notion of fair procedure. It draws the attention of the party concerned to the imperative necessity of not overlooking the other side of the case before coming to its decision, for nothing is more likely to conduce to just and right decision than the practice of giving hearing to the affected parties. The President of the Board of Secondary Education

would be deciding a controversy affecting the rights of the parties before him if and when he chooses to reconsider the order, dated April 22, 1960, whatever be the source of his power to do so – a point left open by us. He is required to decide in the spirit and with a sense of responsibility of a tribunal with a duty to mete out even-handed justice. The appellant would thus be entitled to a fair chance of presenting his version of facts and his submissions on law as his rights would be directly affected by such proceeding. The omission of express requirement of fair hearing in the rules or other source of power claimed for reconsidering the order, dated April 22, 1960, is supplied by the rule of justice which is considered as an integral part of our judicial process which also governs quasi-judicial authorities when deciding controversial points affecting rights of parties."

(10) By taking stock of the said judgments, the Apex Court opined in Para 13 that the documents forming part of the show cause notice were not provided to the petitioner therein. It is held that without adverting to the grievance of the petitioner regarding non-supply of copies of documents forming part of the show cause notice and without recording a finding that the documents were not relevant or were not being relied upon for taking action prejudicial to him, the Chancellor passed the order which runs contrary to the rule of *audi alteram partem.*

(11) It cannot be doubted that in the first page of show cause notice, the respondent No. 2 has specifically referred about various complaints received against the petitioner. On a bare perusal of the show cause notice shows that the action against the petitioner was initiated on the basis of certain complaints. However, admittedly, copies of complaints and the investigation report desired by the petitioner were not supplied to him. The respondent No. 2 in his final order (Annexure P-1) dealt with this aspect. In Para 22 of the impugned order, the respondent No. 2 has referred about the request of the petitioner for supply of the documents coupled with the request of leading evidence. However, in this paragraph, the respondent No. 2 has partially dealt with the request of the petitioner. It is stated that the petitioner had prayed for an opportunity, whereby the witnesses of the other side be examined in their presence and they be permitted to be cross-examined. However, there is no whisper about the petitioner's request to lead his own evidence in this

paragraph. Thereafter, by placing reliance on Section 14(3)(4) of the Adhiniyam, the respondent No. 2, opined that the show cause notice is replied by the petitioner and a supplementary reply was also filed. He further opined that providing the copies of complaints is not the legal requirement. The only requirement is to inform the gist (विशिष्टियां) of it. It is held that the said gist was provided to the petitioner and all the relevant record was in possession of the Vice Chancellor himself, therefore, it was not felt necessary to record evidence of any witness. Hence, there was no question of any cross-examination of any witness. In the light of rival contentions, the question is whether the opportunity provided to the petitioner by respondent No. 2 amounts to a "reasonable opportunity".

(12) The Apex Court had an occasion to consider Section 14(3)(4) of the Adhiniyam in the case of Professor *A.D.N. Bajpai* (supra). Professor A.D.N. Bajpai was Vice Chancellor of Awadesh Pratap Singh Vishwavidyalaya, Rewa and was directed to relinquish the charge before completion of his tenure. The reproduced paragraph of the judgment of Professor *A.D.N. Bajpai* (supra), makes it crystal clear that the Apex Court has applied the principles of natural justice and held it is necessary to inform the other side about the material/ evidence, which is sought to be used against him. The said material was held to be relevant material/evidence. It is not in dispute that the entire action against the petitioner is founded upon and initiated pursuant to certain complaints. Considering the said backdrop, the petitioner prayed for supplying the said documents/complaints to enable him to file an effective and adequate reply. It was denied on the ground that gist of it has been supplied to him. However, it was not the stand of respondent No. 2 that those documents/complaints were not relevant. This is settled principle that justice is not only to be done but it should appear to be done. The petitioner also prayed for an opportunity to lead his own evidence after recording of the evidence of the other side. However, this request of the petitioner was at all considered.

(13) No doubt, mere non-supply of documents will not vitiate the proceedings. The ratio of the judgments cited by Shri Agrawal is on the same aspect, i.e., one has to show the prejudice in cases of non-supply of documents. However, I am unable to accept the contention of Shri Agrawal that judgment in Professor *A.D.N. Bajpai's* case cannot be pressed into service. In Professor *A.D.N. Bajpai's* case, the same provision of the Adhiniyam was considered and interpreted by the Supreme Court. Thus, the said judgment is a binding

precedent and the *ratio decidendi* of the said judgment is also applicable in the present case.

(14) At the cost of repetition, it can be referred that in Professor *A.D.N. Bajpai* (supra), the Apex Court held that non-supply of the relevant documents and not providing opportunity to lead evidence amounts to denial of reasonable opportunity. In view of stand of the petitioner in his reply, it is clear that the petitioner reserved his right tofile a detailed reply after perusing the complaints and other relevant documents. He also reserved his right to lead evidence and cross-examine the witnesses of the other side. If the relevant material is not provided to him, prejudice is certainly caused to him because it deprived him to put forth his defence in effective and adequate manner.

(15) Thus, in the opinion of this Court, prejudice is certainly caused to the petitioner because the complaints aforesaid were not provided to him. The petitioner is further prejudiced when no evidence was led by the other side nor he was permitted to lead any evidence. The impugned order (Annexure P-1) does not deal with the prayer of the petitioner to lead his own evidence in rebuttal. The respondent No. 2 only opined that since petitioner was afforded with an opportunity to show cause and in turn, he submitted his reply, the requirement to "provide reasonable opportunity" is satisfied. It is opined on the strength of the finding that the relevant documents were also in possession of the University and the finding are based on documentary evidence. However, admittedly, the complaints were not provided to the petitioner by stating that it is not a legal requirement. When the Adhiniyam does not define what is "reasonable opportunity", it has to be seen as per the principles of natural justice whether the documents demanded by the petitioner are relevant documents and whether non-supply of these documents caused any prejudice. Petitioner has established the relevance of the documents by referring to the show cause notice itself where those documents are specifically referred and relied upon for the purpose of taking action against the petitioner. In the impugned order also it is not the stand of the respondent No. 2 that those complaints were not relevant documents. The stand of respondent No. 2 is that it is not a legal requirement to provide those documents.

(16) In my opinion, this finding runs contrary to the principles of natural justice and law laid down by the Apex Court in Professor *A.D.N. Bajpai's case*. Since the entire action was founded upon certain complaints, in all fairness, the respondents should have provided copies of those documents to

the petitioner. The petitioner's valuable right to lead evidence is also taken away by the respondent No. 2 which was held to be a right flowing from Section 14(4) of the Act by the Supreme Court in Para 10 of the judgment in *Professor A.D.N. Bajpai* (supra). Thus, in my opinion, decision making process is vitiated.

(17) On the basis of aforesaid analysis, the petition deserves to be allowed. Accordingly, the impugned order Annexure P-1 dated 15.10.2005 is set aside. The parties shall bear their own costs.

Petition allowed.

I.L.R. [2013] M.P., 837
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 867/2013 (Gwalior) decided on 21 February, 2013

CENTRAL HOMEOPATHIC & BIOCHEMIC ASSOCIATION, GWALIOR & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. Natural Justice - **Whether impugned order is outcome of a quasi judicial act or an administrative act - In both the situations the principle must be complied with. (Para 22)**

क. नैसर्गिक न्याय – क्या आक्षेपित आदेश किसी अर्द्धन्यायिक कार्यवाही का परिणाम है अथवा किसी प्रशासनिक कार्यवाही का – दोनों स्थितियों में सिद्धांत का अनुपालन किया जाना चाहिए।

B. Society Registrikaran Adhiniyam, M.P. (44 of 1973) - Section 32 - Enquiry and settlement of disputes - **Natural Justice - The principles of natural justice are implicit and are required to be read into section 32(4) of the Adhiniyam - In cases, whether after supplying the result of the enquiry, the Registrar receives the response of the society and if he intends to pass any order which affects the right of the society in any manner or which may entail civil consequences, the Registrar is bound to follow the principles of natural justice and fair play in action. (Para 24)**

ख. सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44) – धारा 32 – जांच एवं विवादों का निपटारा – नैसर्गिक न्याय – नैसर्गिक न्याय का सिद्धांत अडिग

है एवं अधिनियम की धारा 32 (4) के साथ इन्हें पढ़ा जाना अपेक्षित है – प्रकरणों में, जांच के परिणाम को प्रदाय करने के पश्चात् यदि रजिस्ट्रार, सोसायटी की प्रतिक्रिया प्राप्त करता है और यदि वह कोई आदेश पारित करना चाहता है जिससे किसी रूप में सोसायटी के अधिकार प्रभावित होते हैं या परिणामस्वरूप दीवानीवाद उत्पन्न होता है, रजिस्ट्रार उचित कार्यवाही एवं नैसर्गिक न्याय के सिद्धांत का पालन करने हेतु बाध्य है।

C. Constitution - Article 226 - Alternative Remedy - **Exhaustion of alternative remedy is not a rule of law but is a rule of policy, convenience and discretion - It is not a compulsion but discretion. (Para 25)**

ग. संविधान – अनुच्छेद 226 – वैकल्पिक उपचार – वैकल्पिक उपचार का समापन किया जाना, विधि का नियम नहीं बल्कि नीति, सुविधा एवं विवेकाधिकार का नियम है – यह अनिवार्यता नहीं बल्कि विवेकाधिकार है।

Cases referred :

2003(2) MPLJ 377, AIR 2004 SC 1280, 2006(4) MPLJ 403, (2001) 8 SCC 509, 1964 AC 40, (1978) 1 SCC 248, 1969 MPLJ 516, AIR 1970 SC 150, (1978) 1 SCC 405, (1981) 1 SCC 664, (1980) 4 SCC 379, (1994) 4 SCC 328, (2010) 9 SCC 496, AIR 1958 SC 86, (1998) 8 SCC 1.

Harish Dixit, for the petitioners.
Praveen Newaskar, Dy. G.A. for the respondents No. 1 to 3.
D.P. Singh, for the respondent No.4.
Deepak Khot, for the respondent No.5.

ORDER

SUJOY PAUL, J.: This is second visit of the petitioners to this Court. Petitioner No.1 is a registered society under the provisions of Madhya Pradesh Society Registrikaran Adhiniyam, 1973 (in short the Adhiniyam). The registration certificate of petitioner No.1 is filed as Annexure P/2. It is tated that earlier election of the society took place on 31.7.2011 and the next elections are due on completion of three years from the said date as per the bye-laws. The petitioner No.1 was served with a show- cause notice by respondent No.2 dated 30.6.2012 (Annexure P/13). The petitioner No.1 submitted its reply to the same but the said authority issued communication Annexure P/25 and stated that petitioner No.1 did not file its reply. At this stage, petitioner No.1 filed W.P.No.6995/12 before this Court. This Court disposed of the said petition on 27.9.2012. On perusal of the material, it was found by this

Court that petitioner No.1's reply was very much received by the Assistant Registrar, and therefore, his finding that reply has not been received runs contrary to the record. On the basis of aforesaid, it was found that there is violation of principles of natural justice and the making process was not proper. Consequently the order, Annexure P/1 therein, was set aside and direction was issued to the parties to appear before the said authority on an appointed date and the Assistant Registrar was directed to proceed further in accordance with law.

2. Shri Harish Dixit, learned counsel for the petitioners, submits that after the order of this Court dated 27.9.2012 although certain dates of hearing were fixed by the Assistant Registrar, but he ultimately passed the order Annexure P/1 dated 24.1.2013 wherein there is no consideration of the reply submitted by petitioner No.1. This communication (Annexure P/1) is called in question on following counts:

(i) The petitioner No.1's reply has not been considered and dealt with and in absence thereof, the impugned order is vitiated.

(ii) in the enquiry report, certain allegations were found proved against the petitioner/society. In the impugned communication, Annexure P/1, Assistant Registrar has opined in addition to the said finding of the enquiry officer and travelled beyond the finding of the enquiry officer for which no opportunity of hearing was provided to petitioner No.1.

(iii) As per heading of Section 32 of the Adhiniyam, enquiry can be conducted only when the ingredients of Section 32(2) are satisfied i.e. the application is preferred by more than 1/3rd members or by majority of members of the governing body and such application is supported by an affidavit. It is stated that the heading of Section 32 of the Adhiniyam makes it clear that it deals with 'enquiry and settlement'.

(iv) The principles of natural justice and fair play in action are grossly violated in issuing Annexure P/1. There is no consideration of the defence of petitioner No.1 and direction so issued by Annexure P/1 causes prejudice to the petitioner/ society because there is a direction to conduct election much before completion of normal tenure of the society.

(v) As per the bye-laws (clause 3 (ii)), there is no requirement for homeopathy practitioner to get his name registered, and therefore, the Assistant Registrar has erred in law in relying on M.P. Gazette (extraordinary) dated 14th May, 2009 which deals with requirement of renewal of membership. In other words, Shri Dixit submits that bye-laws which were made in the year 1953 makes it crystal clear that any medical practitioner can become member and there is no need to get his name registered, and therefore, the said Gazette notification is wrongly applied by respondent No.2.

3. Shri Dixit, learned counsel for the petitioners, in support of his contentions, relied on 2003 (2) M.P.L.J. 377 *(Shramadham Uchchatar Madhyamik Vidyalaya Sanchalan Samiti and others Vs. State of M.P. and others)* and AIR 2004 SC 1280 *(Mangilal Vs. State of Madhya Pradesh).*

4. Shri Praveen Newaskar, learned Deputy Govt. Advocate for respondents No.1 to 3, supported the communication Annexure P/1 and submits that communication is appealable under Section 40 of the Adhiniyam. He submits that two appeals are available to the petitioners under Section 40 of the Adhiniyam, and therefore, this petition is not entertainable. He submits that merits and demerits of the matter cannot be gone into at this stage by this Court, more so when there exists an alternative, efficacious remedy to the petitioners.

5. Shri D.P.Singh and Shri Deepak Khot, learned counsel for the private respondents, submit that as per amended rule published in 2009 Gazette notification of the State Government, one has to be a registered practitioner. Relying on the parent Adhiniyam and Rules, it is stated that 'medical practitioner' means a practitioner who is duly registered under the statute and in absence thereof he cannot be treated as a medical practitioner under the bye-laws. They submit that authority to practice homeopathy as a practitioner is available only when one is duly registered under the provisions of M.P. Homeopathy Council Adhiniyam, 1976 (in short 1976 Adhiniyam). They submit that enquiry officer has given finding about the members on the basis of documents and record of the society. The finding of enquiry is not binding on respondent No.2 and it was open for respondent No.2 to apply the Gazette notification which makes it clear as to who can be the member and in which capacity.

Thus, it is stated that there is no deviation from the enquiry officer's report and in fact respondent No.2 has applied the legal provision and his communication is only an outcome of consideration and application of Gazette notification. It is further stated that petitioner/ society was given ample opportunities, the records were permitted to be produced by it and reasonable opportunity in accordance with Section 32 of the Adhiniyam was afforded to the petitioner/society. It is further stated that the powers exercised by respondent No.2 are *'suo motu'* powers which are flowing from Section 32(1) of the Adhiniyam. By placing reliance on Annexure P/8, it is stated that the said document makes it crystal clear that the said authority has exercised suo motu powers. It is the common stand of learned counsel for the respondents that the powers to take action *suo motu* can be based on an application preferred by any complainant. In other words, it is stated that if an application is preferred by any person, on the basis of said application, it is open for respondent No.2 to take action by exercising suo motu powers under Section 32(1) of the Adhiniyam. It is also the common stand of the respondents that petition is not entertainable because of a specific remedy available under Section 40 of the Adhiniyam.

6. Lastly it is stated that petitioners have not shown any prejudice which warrants interference either in the decision making process or on communication Annexure P/1. For that, reliance is placed on 2006 (4) M.P.L.J. 403 (para 35 and 36) *(Maharaja Jiwajirao Education Society and another Vs. State of M.P. and others)*. By placing reliance on (2001) 8 SCC 509 *(Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and another Vs. State of Maharashtra and others)*, it is argued that election process is on and when it is in full swing, there is no justification in making any interference at this stage. In addition, it is stated that certain members of petitioner No.1/society have already participated in the election.

7. In rejoinder submission, Shri Harish Dixit, learned counsel for the petitioners, submits that petitioner No.2 and 3's registration was renewed by Annexure P/27 dated 16.1.2012 and Annexure P/28 dated 9.10.2012 respectively. He submits that despite this renewal in accordance with 2009 Rules, their names do not find place/not counted by the impugned order which will deprive them from their right to vote and participate in the election. He submits that petitioners No.2 and 3 are also prejudiced by this action. In addition, he submits that the members of the society are from different states,

including M.P., U.P. Rajasthan, and 2009 Gazette notification of the State of M.P. has no application on State of Rajasthan and U.P. Since this new point was considered for the first time in Annexure P/1, no opportunity was available to the petitioners to put forth their case and for this reasons also, petitioners are prejudiced. He submits that there is no application of mind in the order of Assistant Registrar on this aspect i.e. applicability of Gazette notification of the State of M.P. on the members who are practising outside the territory of State of M.P.

8. No other point is pressed by the learned counsel for the parties before this Court.

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

10. The bone of contention of the petitioners is that pursuant to show cause notice, they submitted their reply and respondent No. 2 by impugned order opined that the election of governing body of the petitioners' society was invalid. This finding is adverse and entails civil consequences. The pivotal question is therefore, whether principles of natural justice and fair play in action have any application in the facts and circumstances of this case. The case of the petitioners is that by impugned order, an adverse decision has been taken and petitioners' elections were held to be illegal and new elections are directed. Thus, it was obligatory on the part of the respondent No. 2 to deal with the reply filed by the petitioners. In absence thereof, the principles of natural justice and fair play in action are grossly violated. I deem it proper to deal with this facet first. The stand of the other side is that Section 32 nowhere prescribes that the opportunity should be granted to the petitioner before passing of Annexure P-1. It is the common stand of the respondent that under Sub-Section (4) of Section 32, the Registrar is only obliged to provide result of the enquiry to the society and, therefore, principles of natural justice have no application in the present matter. It is apt to quote Section 32, which reads as under:-

> "32. Enquiry and settlement of disputes.-(1) The Registrar may, on his own motion or on an application made under sub-section (2) either by himself or by a person authorised by him, by order in writing, hold an enquiry into the constitution, working and financial conditions of a society.
>
> (2) An enquiry of the nature referred to in sub-section (1)

shall be held on the application together with an affidavit in support of its contents of-

(a) a majority of the members of the governing body of the society: or

(b) not less than one-third of the total number of members of the society.

(3) The Registrar or the person authorised by him under sub-section (1) shall for the purpose of an enquiry under this section have the following powers, namely:-

(a) he shall at all times have free access to the books, accounts, documents, securities, cash and other properties belonging to, or in the custody of, the society and may summon any person in possession, or responsible for the custody of any such books, accounts, documents, securities, cash or other properties to produce the same, if they relate to the head office of the society at any place at the headquarter thereof and if they relate to any branch of the society, at any place in the town wherein such branch thereof is located or in his own office:

(b) he may summon any person who he has reason to believe has knowledge of any of the affairs of the society to appear before him at any place at the headquarters of the society or any branch thereof or in his own office and may examine such person on oath: and

(c) (i) he may notwithstanding any regulation or bye-laws specifying the period of notice for a general meeting of the society, require the officers of the society to call a general meeting of the society at such time at the head office of the society or at any other place at the headquarter of the society and to determine such matters as may be directed by him and where the officers of the society refuse or fail to call such a meeting, he shall have power to call it himself;

(ii) any meeting called under sub-clause (i) shall have all the powers of a general meeting called under the regulations

or bye-laws of the society and its proceedings shall be regulated by such bye-laws.

(4) When an enquiry is made under this section the Registrar shall communicate the result of the enquiry to the society and may issue appropriate direction to the society, which shall be binding on all parties concerned."

(Emphasis Supplied)

11. The aforesaid provision deals with the power of the Registrar to conduct enquiry regarding the constitution, working and financial condition of a society. For the purpose of this enquiry, he is equipped with certain powers enumerated in Sub-Section (3). He has free access to the books, accounts, documents, properties and other relevant material of the society, he may summon any person in whose possession or custody, the aforesaid documents are there. He may summon any person who he has reason to believe as knowledge of the affairs of the society to appear before him. He can examine such person on oath. Thus, various powers for the purpose of enquiry are given to the Registrar under the aforesaid provision. Sub-Section (4) is amended on 04.09.1998. The first portion of Sub-Section (4) makes it obligatory on the part of the Registrar to communicate the result of the enquiry to the society. The word "shall" is employed in the first portion of Sub-Section (4), whereas the second portion envisages the power of the Registrar to issue appropriate directions to the society. For the purpose of exercising this power, the legislature has chosen to employ the word "may". A careful reading of Sub-Section (4) shows that it is obligatory on the part of the Registrar to communicate the result of the enquiry to the society. However, it is not always necessary or mandatory for the Registrar to pass any appropriate direction to the society. An element of discretion is there with the Registrar to pass appropriate directions to the society. For example, if result of the enquiry is in favour of the society and no action is required to be taken on it nor any appropriate directions are required, the Registrar may not issue any such directions. However if on the basis of enquiry report, any adverse order, directions to comply with the provisions of the Act, cure the defects etc. are to be done, the Registrar is equipped with the power to issue appropriate directions. For this purpose, the legislature has used the words "may issue appropriate directions to the society". Thus, first portion of Sub-Section (4) is mandatory, wherein Registrar is bound to communicate the result of the enquiry whereas the second portion is an enabling provision, wherein the Registrar, if required

and as the case may be, may issue appropriate directions to the society.

12. In the present case, the respondent No. 2 issued a show cause notice on 20.06.2012 and copy of the enquiry conducted by Shri M.L. Kudape was supplied to the petitioner. In last line of this notice (Annexure P-13), the petitioner was directed to submit his reply (स्पस्टीकरण). In turn, petitioner submitted his reply. The respondent No. 2 passed the order dated 14.09.2012 and gave a finding that petitioner did not submit his reply pursuant to said show cause notice and enquiry report. The petitioner filed W.P. No. 6995/2012 and stated that the said reply was very much filed and is in the records of the respondents. This Court noticed the other side, summoned the record and gathered that the reply was very much received by the Assistant Registrar. Thus, it was opined by this Court that decision making process is polluted and principles of natural justice are violated. Accordingly, the matter was remitted back to the respondent No. 2 to proceed after the stage petitioner had submitted the reply (Annexure P-19 with W.P. No. 6995/2012). In turn, the respondent No. 2 has passed the impugned order (Annexure P-1). A microscopic reading of Annexure P-1 shows that the respondent No. 2 although has referred about the filing of reply of the petitioner but did not deal with the said reply. In other words, the contention and the stand of the petitioner in the said reply was not discussed, analyzed, considered and dealt with. A mere finding is given that said reply is filed.

13. In the opinion of this Court, the respondent No. 2 has taken both the actions as provided in Section 32(4). Firstly he communicated the result of the enquiry to the society and then issued appropriate directions to the society.

14. The ultimate direction, which is given to the society, contains a finding that the election of existing governing body is found to be illegal/invalid. Findings are also given on various aspects including membership, audit report, income and expenditure etc. This is also not in dispute between the parties that before preparation of enquiry report the relevant documents/material were summoned from the petitioner No. 1. The main contention of respondents is that under Section 32(4), the communication made is not an order and since respondent No. 2 is only obliged to forward the enquiry report to the society, principles of natural justice has no application.

15. In the opinion of this Court, in the factual matrix of this matter, it is clear that firstly the respondent No. 2 communicated the result of the enquiry and then based on such result passed an adverse order against the petitioner's

society. The question is whether in this situation, the principles of natural justice and fair play in action have any role to play.

16. The nature of powers given to the Registrar under Section 32 shows that he can summon relevant documents, record evidence on oath and therefore this nature of power is not purely administrative in nature. More so when he is given further power to act on the enquiry report by issuing appropriate directions to the society. This kind of action, which can effect the rights of the society or a person adversely, is a quasi judicial power. The dictionary meaning of the word "quasi" is "not exactly". In "principles of administrative law (by M.P. Jain and S.N. Jain (revised by Justice G.P. Singh and Alok Aradhe Advocate - as his Lordship then was) (Page 37, 5th Addition), it is opined that a quasi judicial act is just in between a judicial and administrative function.

17. In *Ridge Vs. Baldwin* [1964 AC 40], it was held that the duty to act judicially may arise from the very nature of the function performed by the authority. The ratio of *Ridge* (supra) was approved by the Constitution Bench of the Supreme Court in the celebrated case of *Maneka Gandhi Vs. Union of India* [(1978) 1 SCC 248]. A Division Bench of this Court in *Sukhlal Sen Vs. Collector, District Satna* and others [1969 MPLJ 516], opined that the nature of duty to determine whether licensee has committed any breach of terms or conditions of his licence and whether for that reason the licence should be cancelled, imposes upon the authority the duty to act judicially and to comply with the principles of natural justice. In *Sukhlal* (supra) Justice G.P. Singh speaking for the Bench held as under :

> "5.....*Ridge V. Baldwin* in establishes that judicial character of a duty may be inferred from the nature of the duty itself and there need not be any express language used by the Legislature requiring the body on which the duty is impose to act judicially; duty to act judicially will be implicit in the duty to determine what the rights of an individual should be."
>
> "8..... Cancellation of a licence is a serious matter as it deprives, the licencee of his right to carry on business. In our opinion, the nature of the duty to determine whether the licensee has committed any breach of terms or conditions of his licence and whether for that reason the licence should be cancelled, imposes upon the authority the duty to act judicially. It necessarily follows that the authority must follow the

requirements of natural justice and must give an opportunity to the licensee to meet the allegations of breaches of terms and conditions of the licence reported against him before cancelling the licence . As in the instant case, this opportunity was not given to the petitioner, it has to be held that the cancellation of his licence was invalid or void."

18. It is also apt to mention that the dividing line between an administrative power and a quasi judicial power was held to be thin and was treated to be gradually obliterated by various judgments of the Supreme Court. In *A.K. Kraipak Vs. Union of India* [AIR 1970 SC 150], the Apex Court opined as under:

"13.. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power."

(Emphasis Supplied)

In the same judgment, the Court observed - "the horizon of natural

justice is constantly expanding" and "if the purpose of rules of natural justice is to prevent miscarriage of justice, one fail to see why those rules should be made inapplicable to administrative enquiries". In *Mohinder Singh Gill Vs. Chief Election Commissioner* [(1978) 1 5CC 405], the Apex Court opined as under in para 53 and 55:-

> ".....To-day, in our jurisprudence, the advances made by natural justice far exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fair play into its wheels.... Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity....."

In *Swadeshi Cotton Mills Vs. Union of India* [(1981) 1 SCC 664], the Apex Court opined as under:

> "44.....this rule of fair play "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands". The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications."

19. In the opinion of this Court, the impact of impugned order entails civil consequences on the petitioners. The Apex Court in *Mohinder Singh Gill* (supra), opined as under:

> "66.....'Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-primary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence....."

20. The Constitution Bench in *Maneka Gandhi* (supra) has emphasized that natural justice is a great "humanising principle" which intended to invest law with fairness and to secure justice. The soul of natural justice is "fair play in action". On the basis of this, it can be said that there is no distinction between a quasi judicial and an administrative function for the purpose of applicability of the principles of natural justice. The aim of both administrative enquiry and quasi judicial enquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure the justice, or, to put it negatively, to prevent

miscarriage on justice, it is difficult to see why it should be applicable to quasi judicial enquiry and not to administrative enquiry. It must logically apply to both. Bhagwati J. in *Maneka Gandhi* (supra) opined as under:-

> "12.....The law must, therefore, now be taken to be well settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable."

In *Mohinder Singh Gill* (supra), the Apex Court opined as under:-

> "44. The dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent."

In *S.L. Kapoor Vs. Jagmohan* [(1980) 4 SCC 379], the Apex Court opined as under:-

> "7. The old distinction between a judicial act and an administrative act has withered away and we have been liberated from the psittacine incantation of "administrative action....."

21. On the basis of the development of law and its interpretation aforesaid shows that the principles of natural justice are implicit in quasi judicial as well as administrative action. The same view was taken by the Supreme Court by following *Swadeshi Cotton Mills* (supra) in *Mangilal* (supra), the Apex Court opined as under in Para 10:-

> "10. Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of a provision in procedural laws, power inheres in every tribunal/court of a judicial or quasi-judicial character, to adopt modalities necessary to

achieve requirements of natural justice and fair play to ensure better and proper discharge of their duties. Procedure is mainly grounded on the principles of natural justice irrespective of the extent of its application by express provision in that regard in a given situation. It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment. *(See Swadeshi Cotton Mills v. Union of India.)* Its aim is to secure justice or to prevent miscarriage of justice. Principles of natural justice do not supplant the law, but supplement it. These rules operate only in areas not covered by any law validly made. They are a means to an end and not an end in themselves. The principles of natural justice have many facets. Two of them are: notice of the case to be met, and opportunity to explain."

(Emphasis Supplied)

22. The legal position stated above makes it clear that, whether impugned order is outcome of a quasi judicial act or an administrative act in both the situations, principles of natural justice and fair play in action were the requirement of law. In other words, the impugned order could have been passed only after following the principles of natural justice and fair play in action. Fairness is an integral part of good administration. In the present case, in the first round, the petitioners succeeded because despite filing reply by him, the respondent No. 2 opined that reply has not been filed. When it was found to be incorrect on perusal of record, this Court directed the respondent No. 2 proceed further from that stage. Now in the impugned order, the respondent No. 2 mentioned about factum of filing of reply but did not deal with the contentions and averments of the reply in his order/communication. He has given a finding, which is detriment to the petitioner and an elected body is ousted before completion of normal tenure. In my considered opinion, it has serious consequences on the petitioners and this order certainly falls within the ambit of "civil consequences". The requirement of principles of natural justice and fair play was to examine, deal with, consider and discuss the reply filed by the petitioner. In absence thereof, the impugned order runs contrary

to principles of natural justice and fair play in action.

23. This is settled in law that principles of natural justice does not supplant the law but supplements the law. Its application may be excluded either expressly or by necessary implication *(Dr. Umrao Singh Chaudhary Vs. State of M.P. and another)* [(1994) 4 SCC 328)]. In *Mohinder Singh Gill* (supra), it is held by the Supreme Court that it is not permissible to interpret any statutory instrument so as to exclude natural justice. Unless the language of the instrument leaves no option to the Court. It is further observed that natural justice is so integral to the good government that the onus is on him who urges exclusion to make out why.

24. In the light of this legal position, in my opinion, the principles of natural justice are implicit and are required to be read into Section 32(4) of the Adhiniyam. In cases, whether after supplying the result of the enquiry, the Registrar receives the response of the society and if he intends to pass any order which affects the right of the society in any manner or which may entail civil consequences, the Registrar is bound to follow the principles of natural justice and fair play in action. Accordingly, he is under an obligation to deal with the stand of the party going to be effected in his order. In absence of thereof, the order would be an order without assigning any reason on the defence of the petitioners. The necessity to assign reason is emphasized by the Supreme Court in *Kranti Associates Private Limited v. Masood Ahmed Khan,* (2010) 9 SCC 496, in following words:-

> *"(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b) A quasi-judicial authority must record reasons in support of its conclusions.*
>
> *(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
>
> *(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
>
> *(e) Reasons reassure that discretion has been exercised*

by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons faciliate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny.

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence.

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

25. In the light of aforesaid, in my opinion, the impugned order suffers from serious infirmity because the reply of the petitioners has not been considered. The principles of natural justice and fair play in action are grossly violated. No doubt, this Court can refuse to exercise its jurisdiction under Article 226 of the Constitution in certain cases of availability of alternative remedy. However, the said rule requiring the exhaustion of alternative remedy before the writ court is not a rule of law but is a rule of policy, convenience and discretion. In other words, it is not a compulsion but a discretion. The High Court can certainly issue an appropriate writ in case of denial of natural justice. This view is taken by the Supreme Court way back in AIR 1958 SC 86 *(State of UP Vs. Mohd. Nooh).* The same was followed by the Division Bench in *Sukhlal Sen* (supra). The Apex Court also took the same view in catena of judgments including in *Whirlpool Corporation Vs. Registar of Trace Marks* [(1998) 8 SCC 1].

26. In view of aforesaid, I am not inclined to relegate the petitioner to avail the alternative remedy. The objection regarding entertainability of this petition because election process is on, is also of no substance. Admittedly, petitioners society's normal tenure is not over and without considering the stand of the petitioners, its election was held to be invalid. It not only entails civil consequences, it is a drastic order qua petitioners. Elections, in the present case, have not taken place whereas in the judgment of *Shri Sant Sadguru Janardan Swami* (supra) of the Supreme Court cited by Shri D.P. Singh, the election had already taken place. In the peculiar facts and circumstances of this case, the said judgment has no application. At the cost of repetition, principles of natural justice and fair play in action coupled with the duty to act judicially is not observed by respondent No. 2. Consequently, the said order cannot be upheld.

27. In view of the analysis aforesaid, other points raised by the parties are not required to be dealt with. Consequently, petition is allowed. The impugned order dated 24.01.2013 (Annexure P-1) is set aside. However, liberty is reserved to the respondent No. 2 to pass order in accordance with law.

It be noted that this Court has not expressed any opinion on the merits of the case.

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

Petition allowed.

I.L.R. [2013] M.P., 854
APPELLATE CIVIL
Before Mr. Justice Shantanu Kemkar &
Mr. Justice Prakash Shrivastava
F.A. No. 676/2012 (Indore) decided on 21 September, 2012

VARTIKA (SMT.) ...Appellant
Vs.
ANKIT JAIN ...Respondent

Hindu Marriage Act (25 of 1955), Section 13B - Divorce by mutual consent **- Not living as husband and wife - Petition for divorce by mutual consent was filed with specific averment that the parties are not living as husband and wife since last one year - Petition was dismissed on the ground that the appellant is living separately in her parental house since 19.02.2011 and the petition was filed on 11.01.2012 - Held - Living Separately connotes not living like husband and wife - It has no reference to place of living - Further the requisite period of one year under Section 13B(1) of the Act was already elapsed when the judgment was delivered - Judgment of Family Court set aside - Decree of divorce is granted to the parties by mutual consent.**

(Paras 6 to 10)

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13बी – आपसी सहमति से विवाह विच्छेद – पति–पत्नी के रुप में नही रह रहे – आपसी सहमति से विवाह विच्छेद हेतु याचिका इस विनिर्दिष्ट प्राक्कथन के साथ प्रस्तुत की गयी कि पक्षकार पिछले एक वर्ष से पति–पत्नी के रुप में नहीं रह रहे हैं – याचिका को इस आधार पर खारिज किया गया कि अपीलार्थी अलग से अपने माता–पिता के घर में 19.02.2011 से निवासरत है और याचिका 11.01.2012 को प्रस्तुत की गई – अभिनिर्धारित – अलग रहना दर्शाता है कि पति–पत्नी के समान नहीं रह रहे हैं – इसमें निवास

के स्थान का कोई संदर्भ नहीं – इसके अतिरिक्त अधिनियम की धारा 13बी(1) के अंतर्गत एक वर्ष की अनिवार्य अवधि पहले ही व्यपगत हो चुकी थी जब निर्णय घोषित किया गया था – कुटुम्ब न्यायालय का निर्णय अपास्त – पक्षकारों को आपसी सहमति से विवाह विच्छेद की डिक्री प्रदान की गई।

Cases referred :

AIR 1992 SC 1904, 2003(2) JLJ 121, AIR 2005 M.P. 203.

Prateek Maheshwari, for the appellant.
V.K. Zelawat, for the respondent.

ORDER

The Order of the court was delivered by : **SHANTANU KEMKAR, J:-** This appeal under section 28 of the Hindu Marriage Act, 1955 (for short, 'the Act') is directed against the judgment dated 21.08.2012 passed by 2nd Additional Principal Judge, Family Court, Indore in Hindu Marriage Act Case No.50 of 2012.

2. Brief facts necessary for disposal of this appeal are that on 11.01.2012 the appellant (wife) and the respondent (husband) had filed a petition for dissolution of marriage by a decree of divorce by invoking the provision under section 13B of the Act. In the petition it was averred that the marriage was solemnised between them on 13.02.2009. The wife is living in her parental house since 19.02.2011. It was further averred that they are having no relationship as husband and wife since last one year and that it is not possible for them to live together. They further stated that they have mutually agreed for dissolution of their marriage. The petition was also supported by the affidavits of the parties.

3. The learned Judge after recording the evidence led by the parties vide impugned judgment dated 21.08.2012 dismissed the petition by observing that since the parties are residing separately only from 19.02.2011, they could not have filed the petition on 11.01.2012 i.e. prior to completion of 1 year from the date of their residing separately. The learned Judge accordingly, dismissed the petition by holding it to be not maintainable. Feeling aggrieved, the appellant (wife) has filed this appeal.

4. The respondent (husband) has appeared. He did not oppose the grounds raised and the prayer made in this appeal.

5. We have considered the submissions made by learned counsel for the

parties and perused the pleadings.

6. We find that in the petition filed under section 13B of the Act the appellant and the respondent, apart from stating the fact that the wife is residing separately in her parental house since 19.02.2011 have also stated that both the parties are not living as husband and wife since last one year' (emphasis supplied). This part of the pleading raised by the parties have been completely lost sight of by the learned court below and considering only the first part of the pleading that since 19.02.2011 the appellant is residing in her parental house, declined to grant decree by holding that from the date of her living separately in the parental house one year has not elapsed. However as is clear from the averment in the petition when it was very categorically pleaded that 'both the parties are not living as husband and wife since last one year' in. our considered view there was no legal impediment of not completing the requisite period as provided under section 13B(1) of the Act in allowing the petition for grant of decree of divorce by mutual consent.

7. Our view finds support by the ratio of judgment of the Supreme Court laid down in the case of *Smt. Sureshta Devi vs. Om Prakash* (1992 SC 1904). The Supreme Court while dealing with the expression "living separately" has observed thus

> "The expression 'living separately', connotes not living like husband and wife. It has no reference to the place of living. The parties may be living under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition."

8. This Court in the case of *Deepak (Dr.) vs. Smt. Tanuja* (2003 (2) JLJ 121] in paragraph 14 has observed thus :-

> "14.-From the aforesaid decisions, it is clear that the trial Court as well as the appellate Court at any stage of the proceedings can grant a decree by mutual consent if the conditions laid down in Section 13B and Section 23 of the Act of 1955 are fulfilled and can grant a decree for divorce in a case where the dispute is pending for more than a year and parties have been living

separately for a period of more than one year and they have not been able to live together and have mutually agree that the marriage should be dissolved and the consent has not been obtained by force, fraud or undue influence. Under Section 13B of the Act of 1955 application can be filed and accepted by the Court and after an enquiry Court can dissolve the marriage between the parties by mutual consent. There is nothing in Section 13B of the Act of 1955 to indicate that the parties seeking divorce by mutual. consent are required to prove anything in addition to that laid down under Section 13B of the Act of 1955. Therefore, this Court is fully competent to accept the application filed by the parties for divorce by mutual consent under Section 13B of the Act of 1955."

9. A Division Bench of this Court in the case of - *Smt. Rupali Singh and another vs. Aneel Kaur* (AIR 2005 MP 203) in similar set of facts where the Family Court had dismissed the application filed under section 13B of the Act on the bedrock that as per the statement of the appellants before the Family Judge to the effect that they were residing separately from December 2003 and the application preferred under section 13B of the Act was presented before the Court on 3.09.2004 and therefore, the requisite condition stipulated under section 13-B(1) of the Act was not complied with inasmuch as they were living separately for less than one year, set aside the order passed by the learned Family Court Judge and granted decree of divorce.

10. Keeping in view the aforesaid pronouncement of the Supreme Court and of this Court and the clear averments of the parties in the petition stating therein :-

उभयपक्षों के मध्य एक वर्ष से कोई दाम्पत्य संबंध स्थापित नहीं हुए हैं ।

and the fact that even otherwise more then the requisite period of one year provided under section 13B(1) of the Act was already elapsed when the judgment was delivered by the trial court, we are of the considered view the judgment of the court below is liable to be setaside.

11. Accordingly, we set aside the judgment passed by the trial court and grant the decree of divorce to the parties by mutual consent under section 13B of the Act.

12. The appeal stands allowed. Parties to bear their own costs.

Appeal allowed.

I.L.R. [2013] M.P., 858
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
S.A. No. 455/1995 (Jabalpur) decided on 5 February, 2013

RAM NARAYAN TIWARI & ors. ...Appellants
Vs.
UMA SHANKER PACHOLI & anr. ...Respondents

A. Succession Act (39 of 1925), Section 63 - Will - Proof - **It is necessary for the propounder of the Will to prove that the testator signed it, that he understood the nature and effect of the depositions of the Will, and that he had affixed his signatures on the Will knowing what it contains. (Para 12)**

क. उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत – सबूत – वसीयत के प्रस्तुतकर्ता के लिये यह साबित करना आवश्यक है कि वसीयतकर्ता ने उस पर हस्ताक्षर किये कि उसने वसीयत के कथनों के स्वरुप को उसके प्रभाव को समझ लिया है और यह कि उसने वसीयत की अंतर्वस्तु जानते हुए उस पर अपने हस्ताक्षर किये हैं।

B. Succession Act (39 of 1925), Section 63 - Registration of Will - **Registration of Will would not attach presumption as to the correctness or regularity of the attestation and a person claiming through the Will is required to specifically plead and prove through the attesting witness that the requirement of Section 63 of the Act, 1925 and 68 of Evidence Act, 1872 have been complied with. (Para 15)**

ख. उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत का पंजीकरण – वसीयत के पंजीयन से अनुप्रमाणन की सत्यता या नियमितता के बारे में उपधारणा नहीं निकलेगी तथा वसीयत के द्वारा दावा करने वाले व्यक्ति को अनुप्रमाणक साक्षी द्वारा विनिर्दिष्ट रुप से यह अभिवाक् कर साबित करना अपेक्षित है कि अधिनियम, 1925 की धारा 63 एवं साक्ष्य अधिनियम, 1872 की धारा 68 की अपेक्षाओं का अनुपालन किया गया है।

C. Succession Act (39 of 1925), Section 63 - Will - **Testator was blind and apparently could not see what was written - Nothing on record to show that the Will was prepared and written on the instructions of the testator, it was typed and read out to the testator to make sure that it was in accordance with the instructions issued by her and as per her wishes, and she understood the same before affixing her thumb**

impression on the Will - Further after the death of her husband, the testator was never looked after or kept by the propounder of the Will - Her stay in the house of the defendant was only for a very short period - Execution of will not proved. (Paras 19 to 23)

ग. उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत – वसीयतकर्ता अंधा था और प्रकटरुप से जो लिखा है उसे देख नहीं सकता था – अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि वसीयत को वसीयतकर्ता के निर्देशों पर तैयार किया गया और लेखबद्ध किया गया, उसे टंकित किया और वसीयतकर्ता को पढ़कर सुनाया गया, यह सुनिश्चित करने के लिए कि वह, उसके द्वारा जारी निर्देशों के अनुसरण में तथा उसकी इच्छानुसार था और उसने वसीयत पर अपनी अंगूठा निशानी लगाने से पहले उसे समझ लिया था – इसके अतिरिक्त उसके पति की मृत्यु के पश्चात, वसीयत के प्रस्तुतकर्ता द्वारा वसीयतकर्ता की देखभाल नहीं की गई और न ही साथ रखा गया – प्रतिवादी के मकान में उसका रुकना केवल अति अल्पावधि के लिये रहा – वसीयत का निष्पादन साबित नहीं।

Cases referred :

AIR 1959 SC 443, AIR 1962 SC 567, (2003) 12 SCC 35, C.A.No. 1153/1966.

Ravish Agrawal, V.S. Shroti with *Ashish Shroti & Amit Nagpal* for the appellants.

Arun Kumar Choubey & Jagtendra Prasad, for the respondent No.1.

Sudesh Verma, G.A. for the respondent No.2.

JUDGMENT

R.S. JHA, J. :- The appellants have filed this appeal being aggrieved by the judgment and decree dated 23.3.1995 passed by the Additional Judge to the Court of District Judge, Hoshangabad in Civil Appeal No. 14-A/90 affirming the judgment and decree dated 28.02.1990 passed by the Civil Judge Class-II, Seoni Malwa, in Civil Suit No. 34-A/1987.

2. Before adverting to the issue involved in the appeal it is necessary to take note of the genesis of the dispute.

3. The land in question initially belonged to one Anant Ram and thereafter to his son Kanhaiyalal. Kanhaiyalal had two sons, Sunderlal and Shyamlal. Sunderlal died in the year 1919 issue-less leaving behind his widow Smt. Rajkunwar Bai. Shyamlal had three sons. The appellants are the sons of Shyamlal whereas the original respondent, Uttra Bai, is the daughter of the

brother of Smt. Rajkunwar Bai, widow of Sunderlal. Rajkunwar Bai died on 7.9.1982 before which she is said to have executed a Will on 26.7.1982 in favour of Uttra Bai, her brother's daughter.

As Uttra Bai had filed an application for recording her name in the disputed property on the strength of the Will dated 26.7.1982, the appellants/ plaintiff filed a suit for declaration and injunction in respect of the disputed area of 3.009 Hectares of land out of the total area of 5.715 Hectares of Khasra No.376/1 and 376/3, Patwari Halka No.33, Seoni Malwa.

The suit was opposed by the respondent/defendant on the ground that the land in question had been bequeathed to Uttra Bal by Rajkunwar Bai by registered Will dated 26.7.1982, Exhibit D-1 and, therefore, the appellants had no right on the same.

4. Both the courts below have dismissed the claim of the appellants by recording a finding to the effect that the Will dated 26.7.1982 executed in favour of Uttra Bai was a registered document and, therefore, the appellants have no right or claim on the land in question.

5. This second appeal was admitted by this Court on the following substantial question of law:-

> "Whether the will executed dt. 26.7.82, by Smt. Rajkunwar Bai, has been proved in accordance with law, as per section 63 of Indian Succession Act ?"

6. Arguments before this Court have, therefore, been limited to the aforesaid substantial question of law.

7. It is submitted by the learned Senior Counsel for the appellants that the Will dated 26.7.1982 was a registered document and one of the attesting witness, husband of Uttra Bai, Ramashankar who has prosecuted the entire matter as Power of Attorney Holder of Uttra Bai, has deposed in support of the Will as DW-1. It is submitted that a bare reading of his statement makes it clear that the requirement of proving and establishing a Will as provided by Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Succession Act') and Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Evidence Act'), have not been fulfilled. It is submitted that the sole attesting witness Ramshankar, D.W-1, has nowhere stated that Rajkunwar Bai understood the nature and effect of the Will; that the contents of the same were read out to her; that she understood the contents thereof

which were explained to her; and that she had affixed her signature/thumb impression on the same knowing what it contained.

8. It is submitted that in the absence of any such statement on the part of the attesting witness, the Will could not have been relied upon by the courts below to dismiss the appellants claim as the requirement of Section 63 of the Succession Act and the requirement of Section 68 of the Evidence Act, were not fulfilled. It is submitted that in the absence of fulfilling the requirement of proving the Will as contained in the aforesaid provisions, mere registration of the Will would not confer any authenticity on it as far as the contents, nature and effect of the same is concerned.

9. The learned Senior Counsel for the appellants, in support of his submissions, has relied upon the decision of the Supreme Court rendered in the case of *H. Venkatachala Iyengar vs. B. N. Thimmajamma and others,* AIR 1959 SC 443, *Rani Purnima Debi and another vs. Kumar Khagendra Narayan Deb and another,* AIR 1962 SC 567, *Bhagat Ram and Another vs. Suresh and Others,* (2003) 12 5CC 35 and an unreported judgment of the Supreme Court rendered in Civil Appeal No.1153/1966 (*Smt. Maya Devi vs. Anant Ram (deceased) and others*) decided on 31.10.1969.

10. The learned counsel for the respondent no.1, per contra, submits that the Will was duly typed out and was read out to Rajkunwar Bai and thereafter she affixed her thumb impression on the same in front of the Registrar. It is further stated that as provided for and required by Section 63 of the Succession Act, one of the attesting witness namely Ramshankar, D.W-1, has given his statement in affirmation thereof and in such circumstances no fault can be found with. the findings recorded by the trial court and affirmed by the appellate court.

11. It is submitted that the courts below have rightly dismissed the claim of the appellants as there is a concurrent finding of fact in this regard which does not suffer from any perversity or material irregularity and, therefore, does not warrant interference and the substantial question of law as framed by this Court does not arise for adjudication in the present appeal.

12. I have heard the learned counsel for the parties at length. From a perusal of the decision of the Supreme Court rendered in the case of *H. Venkatachala Iyengar* (supra), it is clear that the Supreme Court, while analyzing the provisions of Sections 59 and 63 of the Succession Act and

Sections 67 and 68 of the Evidence Act, has held that it is necessary for the propounder of the Will to prove that the testator signed it; that he understood the nature and effect of the depositions of the Will; and that he had affixed his signature on the Will knowing what it contains, in the following terms:

> "18 ....Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression " a person of sound mind " in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? ....."

13. In the case of *Smt. Maya Devi* (supra) the Supreme Court while taking into consideration the judgment rendered in the case of *H. Venkatachala Iyengar* (supra), has further held that a claim based on a Will must fail in the absence of any evidence to show that the executor of the Will had informed anybody previously that he was going to make a Will or that the scribe of the Will had been given instructions by the executor for drawing up a Will moreso in the absence of examining the scribe of the Will, in the following terms:-

> "In our view, the District Judge and the High Court had come to the correct conclusion about the will not being a genuine document. No evidence was led to show that Shankar Dayal had even informed anybody previously that he was going to make a will. The scribe of the will who could have given evidence about the testator's giving instructions for the drawing up of the will was not examined ...."

14. In the case of *Rani Purnima Debi* (supra) the Supreme Court has again analyzed the law in this regard while specifically laying down that the

aforesaid requirements are not excluded nor can they be overlooked merely on the ground or on the fact that the Will has duly been registered in the following terms in paras 23 & 24:-

> "23. There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to the registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering. Law reports are full of cases in which registered wills have not been acted upon (see for example, *Vellasaway Sarvai v. L. Sivaraman Servai,* ILR 8 Rang 179; (AIR 1930 PC 24), *Surendra Nath Lahiri v. Jnanendra Nath Lahiri,* A.I.R. 1932 Cal. 574 and *Girji Datt Singh v. Gangotri Datt Singh*), A.I.R. 1955 S.C. 346. Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a will; though the fact that there has been registration would be an important circumstance in favour of the will being genuine if the evidence as to registration establishes that the testator admitted the execution of the will after knowing that it was a will the execution of which he was admitting.
>
> 24. The question therefore is whether in the circumstances

of the present case the evidence as to registration discloses that the testator knew that he was admitting the execution of a will when he is said to have put down his signature at the bottom of the will in the presence of Arabali. We have scrutinized that evidence carefully and we must say that the evidence falls short of satisfying us in the circumstances of this case that the testator knew that the document the execution of which he was admitting before Arabali and at the bottom of which he signed was his will. Therefore we are left with the bald fact of registration which in our opinion is insufficient in the circumstances of this case to dispel the suspicious circumstances which we have enumerated above. We are therefore not satisfied about the due execution and attestation of this will by the testator and hold that the propounder has been unable to dispel the suspicious circumstances which surround the execution and attestation of this will. In the circumstances, no letters of administration in favour of the respondent can be granted on the basis of it."

15. In the case of *Bhagat Ram* (supra) the Supreme Court while again analyzing the aforesaid aspect has held that on mere registration of a Will, a presumption as to the correctness or regularity of the attestation cannot be drawn and a person claiming through the Will is required to specifically plead and prove through the attesting witness that the requirement of Section 63 of the Succession Act and Section 68 of the Evidence Act, have been complied with inspite of due registration in the following terms in paras 21 & 22:-

"21. - Registration of a document does not dispense with the need of proving the execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. Under Section 58 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

(1) the date, hour and place of presentation of the document for registration;

(2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the

signature and addition of such representative, assign or agent;

(3) the signature and addition of every person examined in reference to such document under any of the provisions of this Act, and

(4) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

22. Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by Registrar alongwith his signature and date on document under Section 59 and then certified under Section 60. A presumption by reference to Section 114 (Illustration (e)) of the Evidence Act shall arise to the effect that the events containing in the endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, required to be made by the Registrar of Deeds under the Registration Act, contemplates the factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds. The endorsements made at the time of registration are relevant to the matters of the registration only (See: *Kunwar Surendra Bahadur Singh v. Thakur Behari Singh*, AIR 1939 PC 117. On account of registration of a document, including a will or codicil, a presumption as to correctness or regularity of attestation cannot be drawn. Where in the facts and circumstances of a given case the Registrar of Deeds satisfies the requirement of an attesting witness, he must be called in the witness box to depose to the attestation. His evidence would be liable to be appreciated and evaluated like the testimony of any other attesting witness."

16. In view of the law as aforesaid laid down by the Supreme Court, it is clear that the Court while looking into these aspects is required to record a finding to the effect that apart from due registration of theWill, the attestator knew that he/she was singing a Will, that he/she has infact signed it; that he/

she understood the nature and effect of the deposition in the Will, that it was read out to him/her and he/she understood its content and that he/she puts his/her signature on the Will knowing what it contained.

17. The substantial question of law, as framed by this Court, in the present appeal has to be decided on the basis of the aforesaid parameters prescribed by Section 63 of the Succession Act and Section 68 of the Evidence Act, as has been held by the Supreme Court in the cases referred to above.

18. In the instant case Exhibit D-1 is the registered Will dated 26.7.1982. A perusal of this document indicates that it contains the thumb impression of Rajkunwar Bai and that it has been written by one Manaklal Sharma who has not been examined. It also contains the signatures of two attesting witnesses Bhajan Singh and Rama Shankar (D.W-1) who is the husband of the beneficiary of the Will, Uttra Bai and is the Power of Attorney holder who has prosecuted the matter on her behalf before all the courts. The note on the back side of the Will further indicates that at the time of execution of the Will Rajkunwar Bai was blind as she could not see and that she chose to affix her thumb impression as her hand was not steady and was shaking and, therefore, could not affix her signature.

19. The only attesting witness in support of the Will is Rama Shanker, D.W-1. From a perusal of his statement it is clear that he has not stated anywhere in his examination-in-chief that the Will was written and prepared on the instructions of Rajkunwar Bai; that it was typed out and read out to her to make sure that it was in accordance with the instructions issued by her and as per her wishes or that the contents thereof were ever read out to her and that she understood the same before affixing her thumb impression on the Will.

20. In the instant case, the aforesaid aspect assumes tremendous importance in view of the fact that the Registrar, while registering the Will, has specifically endorsed that Rajkunwar Bai, at the time of execution of the Will, was blind and apparently could not see what was written and in such circumstances it was all the more important that the attesting witness should have clearly stated that the Will was drafted out as per her instructions; that it was written down in accordance with her instructions; that it was read out to her; and that she understood the contents thereof before affixing her thumb impression on the same. Surprisingly, the scribe of the Will Manaklal Sharma has also not been examined in this regard nor had the other attesting witness Bhajan Singh been examined. The statement of the Registrar has also not

been recorded and, therefore, there is no indication or evidence on record to indicate that the Will in question was written down in accordance with the wishes of Rajkunwar Bai; that it was ever read out to her or that she understood the contents of the same before she affixed her thumb impression on the Will.

21. Apart from the aforesaid aspects, it is also apparent from a perusal of the oral and documentary evidence that Rajkunwar Bai, after the death of her husband in the year 1919 was living in her maternal village and was regularly being given her share of the produce by the appellants as stated by Rama Shankar, D.W-1 himself in his statement; that she continued to stay in her maternal house till May 1982 when the respondent Uttra Bai and her husband Rama Shankar, D.W-1, brought her to their village; that the Will in question dated 26.7.1982 was executed within two months of her shifting to the house of the respondent/defendant whereafter she died in September 1982 as admitted by Rama Shankar, D.W-1 in his statement, that admittedly her stay in the house of the respondent/defendant was only for a very short period of four months and, therefore, apparently Rajkunwar Bai had neither been looked after or kept by the respondent/defendant for a very long time, that Rajkunwar Bai was blind at the time when the Will was executed and there is nothing on record to show that she had ever expressed any desire or issued any instructions to the respondent/defendant or any other person regarding bequeathing of her share of the property to the respondent/defendant and that the Will mentions the existence of a previous Will which has neither been produced and is non-existant and mentions Khasra No.376 as the land in question although much prior to the date of the execution of the Will, Khasra No.376 had been renumbered as Khasra No.376/1 and 376/3.

22. When the aforesaid attending circumstances are re-read alongwith the fact that there is total absence of any evidence to the effect that Rajkunwar Bai had ever issued any instructions for drawing up the Will in favour of the respondent Uttra Bai or that the testator at the relevant time was in a sound and disposing state of mind or that the Will was every read out to her and explained to her at the time of its execution or that she knew that she was executing a Will in favour of Uttra Bai and that the scribe of the Will, the Registrar and other witnesses, have not been examined and Bhagirath Prasad, P.W.1, who is alleged to have been present at the time of execution of the Will by Rama Shankar, D.W-I in his statement, has specifically denied any knowledge about the Will, then in my considered opinion,it has to be held that the Will has not been proved in accordance with the provisions of Section 63

of the Succession Act and Section 68 of the Evidence Act and the findings recorded by the courts below in ignorance of the aforesaid aspect, apparently suffers from perversity.

23. In view of the aforesaid evidence, oral and documentary, on record I am of the considered opinion that the findings recorded by both the courts below to the effect that the respondent/defendant had pleaded, proved and established the Will as required by Section 63 of the Succession Act and Section 68 of the Evidence Act is perverse and suffers from material irregularity.

24. I am also of the considered opinion that in view of the law as consistently laid down by the Supreme Court in the aforementioned judgments, the substantial question of law framed by this Court in the present appeal deserves to be and is hereby answered in favour of the appellants.

25. The appeal, filed by the appellants, is accordingly allowed. The impugned judgment and decree dated 23.3.1995 passed by the Additional Judge to the Court of District Judge, Hoshangabad in Civil Appeal No. 14-A/90 and the judgment and decree dated 28.02.1990 passed by the Civil Judge Class-II, Seoni Malwa, in Civil Suit No.34-A/1987 are hereby set aside and it is accordingly held that the appellants are entitled to a decree of declaration and injunction as prayed for in respect of the land bearing Khasra Nos.376/1 and 376/3, Patwari Halka No.33, Seoni Malwa.

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

Appeal allowed.

I.L.R. [2013] M.P., 868
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
F.A. No. 284/2005 (Gwalior) decided on 11 February, 2013

MADHYA PRADESH STATE ELECTRICITY BOARD ...Appellant
Vs.
GIRVAN DHAKAD & anr. ...Respondents

A. Tortuous Act - Strict liability - **A person or authority undertaking an activity involving hazardous or risky exposure to human life - Liable to compensate for injury suffered irrespective of any negligence or carelessness on the part of the manager of such undertaking. (Para 8)**

क. अपकृत्य – कठोर दायित्व – कोई व्यक्ति या प्राधिकारी जो ऐसे किसी कार्य में लिप्त हैं जिसमें मानव जीवन के लिए हानिकारक या जोखिम अंतर्ग्रस्त है – किसी प्रतिष्ठान के प्रबंधक की ओर से कोई उपेक्षा या लापरवाही न भी हो तब भी वह सहन की गई क्षति के लिए प्रतिकर का दायी है।

***B. Assessment of Quantum of Compensation* - If the specific provisions are not available in the concerning enactment, then the court may take into consideration the provisions of some other enactment like Motor Vehicle Act and its interpretations for the assessment of Compensation. (Para 9)**

ख. प्रतिकर की मात्रा का निर्धारण – यदि अधिनियमिती में विनिर्दिष्ट उपबंध उपलब्ध नहीं है, तब न्यायालय किसी अन्य अधिनियमिती के उपबंधों को विचार में ले सकता है जैसे कि मोटर यान अधिनियम और प्रतिकर के निर्धारण हेतु उनके निर्वचन।

Cases referred :

2002(1) JLJ 240, (2009) ACJ 1298.

K.N. Gupta with *Anmol Khedkar,* for the appellant.
Sunil Jain, for the respondents.

JUDGMENT

U.C. MAHESHWARI, J. :- The appellant /M. P. Electricity Board has filed this appeal under Section 96 of CPC being aggrieved by the judgment dated 31.3.2005 passed by 3rd Additional District Judge, Shivpuri in Civil Suit No.3-B/04 whereby suit of the respondents for compensation of damages in respect of electrocution death of their son Rajendra has been decreed for the sum of Rs.1,59,000/- along with the interest @ 6% p. a. from the date of filing the suit. In addition to it, cost of the suit has also been awarded.

2. The facts giving rise to this appeal in short are that on 21.7.2003 between 9-10 am son of the respondents namely Rajendra was going towards some agricultural filed for cultivation purpose, on the way he came into the contact with the open and live electricity wire laying on the way resultantly by sustaining the electricity current, died on the spot. The incident was reported to P. S. Kolaras by respondent No.1, on which an inquest intimation was registered. In its inquiry besides the other formalities autopsy of the dead body was carried out according to which, he had died due to electrocution.

As per further case of the respondents the appellant Electricity Board has committed grave negligence in maintaining such electricity line and the same was not repaired within time and that is why the alleged incident was happened. In further averments it was stated that the deceased being young person was the only earning member of the family and was earning of Rs.5,000/- p. m. and due to his untimely death the respondents have come in starvation. With these averments the impugned suit was filed for compensation of Rs.5,00,000/- along with the interest @ 12% p. a.

3. On behalf of the respondents by filing the written statement by denying the material averments of the suit it was stated that the deceased was neither earning member of the respondents' family nor they were dependent on him. It is also stated that such wire at that time was not laying on the way due to any mistake of the appellant Board. In any case, the place where the wire was laying the same was not the way to approach the field. Besides this, it is also stated that Electricity Board was never informed about such breaking the wire and laid on the road otherwise it could have been repaired within time. In such premises no negligence has been committed on behalf of the appellant. There is no evidence to show that appellant has violated any rules, regulations and failed in performing its duty. One more thing is stated that it appears from the postmortem report that the deceased voluntarily caught hold the aforesaid naked wire, and consequently died hence no liability of compensation could be imposed on the appellant Board. With these averments the prayer for dismissal of the suit was made.

4. After framing the issues the evidence was recorded, on appreciation of the same respondent's suit was decreed as stated above, on which the appellant has come to this Court with this appeal.

5. Shri K. N. Gupta, Senior Advocate after taking me through the record of the trial Court along with impugned judgment, said that in the available circumstances the respondents/ plaintiff have utterly failed to prove that on account of any gross negligence or violation of the duties by the officials of the appellant the incident was happened. So, firstly on that count the impugned decree is not sustainable. In continuation he said that unless specifically it is proved that some duty was violated by the officials of the appellant and due to that the deceased died, no liability could be imposed on the appellant Board and prayed for setting aside the impugned judgment and decree by dismissing the suit. In alternate he said that in case Court comes to conclusion that there

is no scope for rejection of the suit then considering the available evidence according to which, the deceased was not the earning member of the family the sum awarded by the trial Court being higher side be reduced reasonably and prayed to allow the appeal accordingly.

6. On the other hand Shri Sunil Jain, learned counsel for the respondent responding the aforesaid arguments by justifying the impugned judgment and decree said that same being based on proper appreciation of the evidence available on record, is in conformity with law, the same does not require any interference at the stage of appeal. In continuation, he said that the impugned decree being passed keeping in view of the principle of "strict liability" could not be interfered or set aside. In support of such argument by placing his reliance on a decision of the apex Court in the matter of *M. P. Electricity Board Vs. Shail Kumari and others* reported in 2002 (1) JLJ 240, he said that Electricity Board being an institution running the business of electricity supply and such department knows the risk and other things of such business. In such premises during the course of such business if some unhappy incident is happened then in view of principle of strict liability the Board could not escape from its liability to pay the compensation and by referring the pleadings and evidence available on record said that it is apparent from the postmortem report and the depositions of the witnesses that the deceased died on the way due to sustaining the injuries of electricity current from the open and live wire laying on the floor. As such the same was not repaired by the officials working with the appellant Board to look after and maintain the electricity lines and prayed for dismissal of this appeal.

7. Having heard keeping in view the arguments advanced after perusing the record of the trial Court along with the impugned judgment, I am of the considered view that the trial Court has not committed any error or perversity either in appreciation of the evidence or in decreeing the suit of the respondents.

8. As per available evidence including the postmortem report said Rajendra had died due to electrocution death. So in such premises, this Court has to answer only one question, whether in the lack of any information about breaking tile live wire laying on agricultural filed the liability to pay the compensation could be saddled on the appellant-Board. Before proceedings further to examine this question, I would like to reproduce the relevant para of the decision of the Apex Court in the matter of *"Shail Kumari and others"* (Supra), in which considering the identical question it was held as under.

"Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is foreseeable risk inherent in the every nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way i. e. the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he can not be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions."

In view of aforesaid dictum of the Apex Court, on examining the case at hand, I am of the view that in the available factual matrix, the principle of "strict liability" as laid down in the cited case is applicable. The appellant Board khow /knewit business hazardous, risk and liabilities. So, on happening the alleged incident, the appellant could not be escaped to pay the compensation. So, in such premises, I have not found any perversity, in the impugned judgment holding the liability to pay compensation on the appellant.

9. It is apparent on record that the impugned suit was filed by the respondents for compensation under the law of torts and damages, I agree with the submission of learned Senior counsel of the appellant that for assessment of the compensation regarding electrocution death, neither the specific rules have been enacted nor any specific direction in this regard has been given by the Legislature in any existing law. But to assess the reasonable quantum of compensation, if the specific provisions are not available in the concerning enactment then the Court may on consideration such question keeping in view the provisions of some other enactments and it's interpretations in which the question of compensation has been considered and adjudicated and in such premises, the approach of the trial Court could not be said to be arbitrary or contrary to law.

10. Undisputedly the respondents are the parents of the deceased and not the wife and children and in such premises on examining the reasonableness of the awarded sum of compensation then in view of aforesaid discussions, there is no option with the Court except to assess the compensation keeping in view of the provisions of Motor Vehicles Act and its interpretations.

11. As such in the light of the aforesaid, Court has to answer that if a person of 18 years is died in an accident then, how much his income could be assessed and out of which, how much amount could be awarded as compensation to the dependents of such deceased.

12. True it is that the Court has not to decide the dependency but to decide the just and reasonable compensation for the respondents. Therefore, keeping in view the provisions of Motor Vehicles Act relating to accidents claims and taking into consideration the principle laid down by the Apex Court in the matter of *Sarla Verma and others Vs. Delhi Transport Corporation and others* reported in (2009) ACJ 1298, on examining the case at hand in the available circumstances, I have not found any force or substance in the matter to reduce the sum decreed by the trial Court in in favour of the respondents. As such the trial Court has asses the income of the deceased Rs.2000/- pm which comes to Rs.24,000/- that the impugned suit has been filed by the parents of deceased, thus on deducting 50% sum, which would have been spent by the deceased on himself, had he been alive, the annual dependency of the respondents comes to Rs. 24000-12000=Rs.12000/- and on adopting the multiplier of 16, then the dependency comes about one lac ninety five thousand besides the traditional expenses. I am also of the view that in the year 2003 the income of young boy of 18 years Rs.5000/-P.M. as held by the trial Court could not be said to be higher side. So in such premises also, the quantum of sum decreed by the trial Court is not required any interference.

13. In the aforesaid premises, by affirming the impugned judgment and decree, this appeal is hereby dismissed. The appellant shall bear it's own cost of the appeal as well as the cost of the respondents.

14. Appeal is dismissed as indicated above.

Appeal dismissed.

I.L.R. [2013] M.P., 874
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A.No. 5680/2008 (Jabalpur) decided on 19 February, 2013

MANJU SAHU & ors. ...Appellants
Vs.
GYANI SINGH RAJPUT & ors. ...Respondents

A. Motor Vehicles Act (59 of 1988), Section 163 - Compensation - Income - **Claimants filed and proved the last pay certificate - Name of bank is also mentioned in certificate - Employee maintaining the record was also examined - Tribunal erred in holding that claimants have failed to prove that deceased was teacher and was getting salary of Rs. 4,284/- - Compensation enhanced.(Paras 6 & 7)**

क. मोटर यान अधिनियम (1988 का 59), धारा 163 – प्रतिकर – आय – दावाकर्ताओं ने अंतिम वेतन प्रमाण पत्र प्रस्तुत कर साबित किया है – बैंक का नाम भी प्रमाण पत्र में उल्लिखित – अभिलेख का रख–रखाव करने वाले कर्मचारी का भी परीक्षण किया गया – अधिकरण ने यह धारणा करने में भूल की कि दावाकर्ता साबित करने में असफल रहे कि मृतक एक शिक्षक था और रु. 4,284/– का वेतन प्राप्त कर रहा था – प्रतिकर बढ़ाया गया।

B. Motor Vehicles Act (59 of 1988), Sections 10 & 147 - Liability of Insurance Company -License - **Road roller is a different class of vehicle requiring separate license - Driver was possessing license of L.M.V. - As driver was not possessing valid driving license but since the deceased was a third party, Insurance Company shall pay with right of recovery from owner and driver - Appeal allowed.(Para 8)**

ख. मोटर यान अधिनियम (1988 का 59), धाराऐं 10 व 147 – बीमा कम्पनी का उत्तरदायित्व – अनुज्ञप्ति – रोड रोलर भिन्न श्रेणी का वाहन है जिसके लिए पृथक अनुज्ञप्ति अपेक्षित है – वाहन चालक के पास एल.एम.व्ही. की अनुज्ञप्ति थी – चूंकि वाहन चालक के पास वैध ड्रायविंग अनुज्ञप्ति नहीं थी, किन्तु चूंकि मृतक तृतीय पक्षकार था, बीमा कम्पनी भुगतान करेगी और उसे मालिक एवं चालक से वसूली का अधिकार होगा – अपील मंजूर।

Pramod Thakire, for the appellants.
Amrit Ruprah, for the respondents/Insurance Company.

ORDER

N.K. Mody, J.: This order shall also govern the disposal of MA No.16/2009, filed by the respondent No.3. As in both the appeals the award under challenge is dated 24/10/2008 passed by MACT, Narsinghur, in claim case No.77/07, whereby claim petition filed by the appellant was allowed and compensation of Rs .2,47,120/-, was awarded present appeal has been filed. In the appeal filed by the appellant, the prayer is for enhancement of the compensation, while in the appeal filed by the respondent No.3, the prayer is that respondent No.3 be exonerated.

2. Short facts of the case are that appellant filed a claim petition alleging that on 28/09/2007, Shivkumar was going on his motor bike along with his wife and children, at that time road roller, which was owned by respondent No.2 and insured with respondent No.3 and was being driven by respondent No.1, rashly and negligently, dashed the motor bike of the deceased, with the result deceased sustained head injuries and passed away. It was alleged that deceased was Teacher and was earning Rs.4,284/- per month. It was alleged that claim petition be allowed and adequate compensation be awarded.

3. The claim petition was contested by respondent No.3 on various grounds including on the ground that respondent No.1 was not possessing valid driving license. It was alleged that the offending vehicle was being driven by respondent No.1 in violation of terms of the policy, therefore, claim petition be dismissed. After framing of issues and recording of evidence, learned tribunal allowed the claim petition and awarded a sum of Rs.2,47,120/- as compensation, against which present appeal has been filed.

4. Learned counsel for the appellant submits that learned tribunal assessed the income Rs.2,000/- per month and after deducting 1/3 towards personal expenses applied the multiplier of 12. It is submitted that there was no justification on the part of learned tribunal to assess the income ~ Rs.2,000/- per month. It is submitted that the appeal filed by the appellant be allowed and the compensation be enhanced.

5. Learned counsel for the respondent No.3 supports the award, so far as amount of compensation is concerned, learned counsel submits that since the offending vehicle was road roller and the respondent No.1 was possessing driving license to drive Light Motor Vehicle, therefore, learned tribunal was not justified in holding the respondent No.3 liable for payment of compensation.

It is submitted that the appeal filed by the respondent No.3 be allowed and the findings whereby respondent No.3 has been held liable, be set aside.

6. From perusal of the record, it appears that Ex.P. 1, is the Last Pay Certificate, wherein salary paid to the deceased @ Rs.4,284/-. The name of the bank is also mentioned in the certificate. The employee who is maintaining the account , was also examined. In the circumstances, there was no justification in holding that appellant failed to prove that deceased was Teacher and was getting salary of Rs.4,284/-. Thus, the appellants are entitled for the following amount:

Rs	5,80,120/-	Towards loss of dependency
Rs.	5,000/-	Towards funeral expenses
Rs.	5,000/-	Towards consortium
Rs.	5,000/-	Towards loss of estate
Rs.	20,000/-	Towards love and affection
Rs.	**6,15,000/-**	**Total**

7. In other words, in view of this, the claimant is held entitled for a total sum of **Rs.6,15,000/-** by way of compensation for the injuries sustained by appellant in the accident. The enhanced amount of Rs.3,68,000/- shall carry interest @ 8% p.a. from the date of application. The amount awarded shall be deposited by the Insurance Company with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant in the nearest Nationalized Bank, in the area where the appellant is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant, which shall be opened by the appellant from where appellant can withdraw the amount as per his needs. However, on an application by the appellant this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant.

8. Undoubtedly the offending vehicle was road roller. Section 10 of the Motor Vehicles Act, deals with different types of license. Road roller is a

different class of vehicle, for which separate license is necessary. Undoubtedly respondent No.1 was possessing the license to drive Light Motor Vehicle, in the circumstances respondent No.1 was not possessing valid driving license. Since the deceased was a third party, therefore, instead of holding the respondent No.3 liable, right of recovery ought have been given to the respondent No.3. In view of this, the appeal filed by the appellant is allowed and the amount of compensation is enhanced.

9. So far as liability is concerned, keeping in view that the respondent No.1 was not possessing valid driving license, the respondent No.3 shall pay and shall have a right to recover the same from respondents No.1 and 2.

10. With the aforesaid modification both the appeals stand disposed of.

11. Copy of the order be placed in the connected case.

Appeal disposed of.

I.L.R. [2013] M.P., 877
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
M.A. No. 1107/2005 (Gwalior) decided on 27 February, 2013

OM PRAKASH GUPTA & ors. ...Appellants
Vs.
WAJEER AHMED ALI NAYAK WADI & anr. ...Respondents

Motor Vehicles Act (59 of 1988), Section 173 - Enhancement of Compensation **- Tribunal as well as appellate court are bound to take into consideration not only the present scenario or the present income of the deceased but also his education status and future prospects - Even the non earning person of the family if suffers the injury or dies in the vehicular accident, then on the basis of notional income the victim or dependent are entitled to get compensation - In such cases compensation may be awarded either on the basis of principle of notional income or as per the rate of minimum wages fixed by the State. (Paras 9 to 10)**

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर की रकम को बढ़ाना – अधिकरण तथा अपीली न्यायालय भी, न केवल वर्तमान स्थिति या मृतक की वर्तमान आय को विचार में लेने के लिए बाध्य है बल्कि उसका शिक्षण, प्रतिष्ठा एवं भावी संभावनायें भी – परिवार का कमाई न करने वाला कोई व्यक्ति भी यदि

वाहन दुर्घटना में चोट सहन करता है या उसकी मृत्यु होती है तब भी काल्पनिक आय के आधार पर पीड़ित या आश्रित प्रतिकर प्राप्त करने का हकदार होगा – ऐसे प्रकरण में प्रतिकर या तो काल्पनिक आय के सिद्धांत के आधार पर अवार्ड किया जा सकता है या राज्य द्वारा निर्धारित किये गये न्यूनतम वेतन की दर से किया जा सकता है।

Case referred :

(2009) 6 SCC 121.

Anvesh Jain, for the appellants.
None for the respondent No.1.
Mahesh Goyal, for the respondent No.2.

ORDER

U.C. MAHESHWARI, J.:- The appellants/claimants have filed this appeal under section 173 of the Motor Vehicle Act (in short `the Act') for enhancement of the sum awarded by the Vth MACT, Morena in claim case No.31/04 vide award dated 12/8/2005 whereby their claim with respect of vehicular death of Tarun aged 22 years the son of appellant No.1 and 2 while brother of appellant No.3 and 4, has been awarded against the respondents for the sum of Rs.2,43,500/- along with interest at the rate of 6% per annum from the date of filing the claim petition if the payment is made within two months and if the payment is made beyond this period then @ 9% per annum. The liability to pay such sum is saddled jointly and severally against both the respondents.

2. The facts giving rise to this appeal in short are that the appellants herein filed the claim petition in the aforesaid tribunal contending that on 19.8.03 at about 12 O' clock in the night, the aforesaid Tarun Agarwal, aged 22 years while riding his Yamaha motorcycle MH-14-T/1057 reached in front of the gate of court compound, Pune. At the same time from the side of Kamguar statute a PMT bus bearing registration No. MH-12-AR/7942 driven by respondent No.1 in a rash and negligent manner, came and dashed his motorcycle from the front side, resultantly, he fell down. The pillion rider Sandeep (AW-2) also fell down. In such incident, Tarun Agarwal sustained fatal injuries on his head and subsequently succumbed to such injuries. As per further averments such bus was registered with the RTO in the name of respondent No.2 while respondent No.1 was driving the same under the employment of respondent No.2. On receiving the report, a criminal case was registered at the concerning police station. After holding the investigation,

respondent No.1 was charge sheeted for the offence of section 304-A of the IPC. In addition it is stated that deceased Tarun, at the time of accident, was prosecuting his studies of Engineering in Computer Science and was the student of III year at Pune and very soon after completing such degree, he would have got the job in some higher package in lacs. In his education, huge amount was spent by his parents and due to his untimely death, they have not only suffered the mental agony but have also been deprived from the benefit of future income of the deceased so also the love and affection of the deceased. With these averments, under different heads, the impugned claim was filed by the appellants for the sum of Rs.76,25,000/- along with interest @ 18% per annum.

3. Respondent No.1 inspite service of the notice did not appear before the tribunal,hence the case was proceeded ex-parte against him.

4. In reply of respondent No.2, it is stated that the claim petition has been filed contrary to rule 220 and 221 of the M.P.Motor Vehicle Rules,1994. It is further stated that along with the claim petition no papers regarding qualification or the education of the deceased have been placed or sent to such respondents. It is also stated that the appellants No.3 and 4, being brother and sister of the deceased, were not dependent on him. Besides this, the deceased was not earning member of the family so the appellants have not been deprived from any right of dependency. In further averments it is stated that the aforesaid motorcycle was driven by the deceased in a rash and negligent manner and that was the only cause for the accident and, in such premises, the deceased himself was responsible for the alleged accident and there was no negligence on the part of the bus of the respondents or its driver. In alternate, it is pleaded that, in any case, it was the case of contributory negligence because both the vehicles have been collided from front side. The claim is filed by assessing the sum on excessive side for which the appellants are not entitled and prayed for dismissal of the claim petition.

5. In view of the aforesaid pleadings of the parties, issues were framed,on which, the evidence was recorded. On appreciation of the same, by holding that the alleged incident was the cause and consequence of rash and negligent driving of the aforesaid bus by respondent No.1, it was held that due to such negligent act of respondent No.1, deceased Tarun Agarwal had died in the alleged incident. The appellant No.3 and 4 were held to be the unnecessary party in the matter. The deceased was not found to be responsible to commit

any contributory negligence in the alleged accident and, in such premises, the claim of appellant No.1 and 2 was awarded by the tribunal for the sum of Rs.2,43,500/- as stated above. Being dissatisfied with the awarded sum, appellants have come to this court for further enhancement of the same.

6. Appellants counsel after taking me through the record of the tribunal as well as the impugned award by referring the depositions of the witnesses examined on behalf of the claimant said that looking to the nature of the education of the deceased and his future prospects, whatsoever amount has been assessed taking into consideration the imaginary income of the deceased @ Rs.3000/- per month, the sum awarded by the tribunal is not sufficient. The same is very meager and lesser side. In any case, deceased Tarun, who was prosecuting his studies in III year of computer engineering, should have been treated by the tribunal to be the educated person of technical side and, in such premises, in view of the available unrebutted evidence on record, his expected future income ought to have been assessed @ of Rs.15000/- per month. In continuation he also said that the claim of the respondent No.3 and 4 was wrongly dismissed by the tribunal holding them to be the unnecessary party in the matter. He further said that the Court ought to have taken the judicial notice that on obtaining the degree of engineering after two years the deceased would have got the job with the package of 2 to 2.5 lacs per year had he been alive and such expected imaginary income of the deceased has been proved by the witness Sandeep (A.W.1) and such version has not been challenged by the respondent No.2 in his cross examination. In view of such unrebutted evidence the income of the deceased ought to have been taken @ Rs. 2 to 2.5 lacs per annum. He also said that multiplier of 13 was wrongly adopted by the tribunal. Taking into consideration the age of the deceased, the multiplier of 15 should have been adopted or in any case, keeping in view the age of 41 years of his mother the appellant No.2 in the light of the principle laid down in the matter of *Sarla Verma (Smt) and others Vs. Delhi Transport Corporation and another*-(2009) 6 SCC 121 the multiplier of 14 should have been applied and prayed for enhancement of the sum awarded by the tribunal up to the extent prayed in the claim petition by allowing this appeal.

7. On the other hand, responding the aforesaid arguments, Shri Mahesh Goyal, counsel of respondent No.2 by justifying the findings of the impugned award said that the same being based on proper appreciation of the available evidence, is in conformity with law and in the available circumstances the sum awarded by the tribunal is just and proper. The same does not require further

enhancement at this stage. In continuation he said that according to admission of the claimant himself, the deceased was not the earning member of the family and in that premises, the amount which has been awarded by the tribunal is more than the amount of notional income. So, in such premises also it does not require further enhancement. He further said that unless the earning of the deceased person is proved on record, mere on the basis of assumption and presumption or on the basis of imagination, no order for enhancing the awarded sum could be passed against the respondents. He further said that keeping in view the age of appellant No.1, the father of the deceased, the multiplier of 13 was rightly adopted. The same does not require any interference at this stage and prayed for dismissal of this appeal.

8. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the record as well as the impugned award. It is undisputed fact on record that at the time of alleged accident, deceased Tarun Agarwal was prosecuting the course of III year in Engineering in Computer Science at Pune. His age 22 years, is also not in dispute. It is also undisputed fact on record that on the date of aforesaid vehicular accident deceased Tarun was not earning member of the family although on the expenses of the Family and parents, he was prosecuting his studies at Pune.

9. It is settled proposition of the law that whenever the claim of compensation under the Motor Vehicle Act is decided then the tribunal as well as the appellate court are bound to take into consideration not only the present scenario or the present income of the deceased on the date of the incident but his education status and future prospects should also be taken into consideration. In such premises Court may take notice in this regard that now a days for higher education parents sent their children to metro cities for higher education in which huge amount is also spent by them. It is necessary to mention here that now a days the fees of technical education like engineering per semester are in thousands of rupees. Besides this, to meet the expenses of hostel, mess, conveyance, stationary, clothes, cosmetics and other necessary things for human being in day to day life the huge sum is required. So, such amount is also spent by the parents or otherfamily members under the expectation that some day, after getting the degree of such technical education, their children will serve the parents and family from his income. In the case at hand, it could be said safely that after obtaining the degree of graduation in computer science, deceased could have got the job and earned the money in some lacs per year, had he been alive. But inspite spending huge amount by

the parents the appellant No.1 and 2 on their son Tarun in connection of his higher education due to his untimely death in the alleged vehicular accident their all dreams and expectations from their son in future have come to an end. Besides this they have also been deprived from the sum spent by them in making the career and and the future of said son. In such premises they have also been deprived from their future right of dependency on the income of the son.

10. So, while dealing with the claim case, the court is bound to take all these things into consideration to assess the just and proper compensation for the parents of the deceased. It is also settled proposition of the law that even the non-earning person of the family if suffers the injury or dies in the vehicular accident, then on the basis of notional income or the available interpretation of such provision of notional income the victim or the dependents as the case may be are entitled to get the compensation. Such compensation is awarded either taking into consideration the principle of notional income or on the basis of rate of minimum wages fixed by the State. Simultaneously court is also bound to assess the compensation keeping in view the educational status of the deceased along with his expected income after obtaining the degree of his education so also the future prospects of the professional course in which the deceased was studying.

11. So, keeping in view the aforesaid,on examining the case at hand then as per findings of the tribunal the deceased was studying in III year of computer science engineering. Their cannot be two opinions on the question that after passing the Engineering course or getting the degree of B.E in computer science, the deceased would have got the job in some institution or company where in normal course, the annual package between 4 to 5 lacs is initially given and thereafter within 9 to 10 years, such annual package comes upto Rs. 10 lacs or more. So, such future prospects could not be ignored while deciding the claim of the students of technical side.

12. It is not in dispute that the tribunal has also considered this aspect and held that the deceased was prosecuting the study of III year in engineering but keeping in view that he was not the earning member, his imaginary future income was assessed and taken only Rs.3000/- per month and on that basis, keeping in view the principle laid down by the Apex Court in the case of *Sarla Verma* (supra) the sum of compensation was assessed. According to which fifty percent sum was deducted on account of expenses of the deceased which

he would have spent on himself, had he been alive and assessed the dependency of the appellants No.1 and 2 on the deceased to be fifty percent and taking into consideration the age of father 46 years and not the age of mother 42 years, the multiplier of 13 was adopted and compensation was assessed and awarded accordingly.

13. But in view of the aforesaid discussion, I do not agree with the approach of the tribunal whereby the income of the deceased was taken only @ Rs.3000/- per month which is normally taken into consideration as income of the unskilled laborer and not for the person of the technical side. So, the impugned award requires the modification on the assessment of imaginary monthly income of the deceased so also in respect of adopting the multiplier. Because the tribunal has committed error in adopting the multiplier in view of the age of the father of the deceased while the same ought to have been adopted in view of the age of mother which is at lower side.

14. In view of the aforesaid discussion, keeping in view the future prospects and the scope of Engineering jobs in our country, according to which, the junior engineer at his initial stage of the career is getting the package of between Rs.3 to 5 lacs per annum and as per evidence of the colleague of the deceased, namely, Sandeep (A.W. 2), now a days, Engineers are getting the job with the package of 2 to 2.5 lacs per annum and it is apparent fact on record that such part of the deposition of in-chief has not been cross-examined on behalf of respondent No.2. So such part of the deposition being unrebutted on record in the available facts and circumstances of the case and in existing legal position could not be ignored and on that basis, the court has to decide the quantum of compensation.

15. I would like to mention here that after death of grown-up son of 22 years who was student of III year Engineering in computer science, his parents the appellant No.1 and 2 who were expecting support from the deceased in future have been deprived from such expectation and support so also from their future dependency on the deceased. The parents have also been deprived from the huge sum spend by them on the deceased for making the educational career in engineering course. The provisions of the claim under the Motor Vehicle Act, being the provision of social welfare, the appellants/claimants could not be deprived from the just and proper compensation regarding death of their son Tarun Agarwal.

16. In view of the aforesaid discussion, taking into consideration the future prospect of the engineers in our country and availability of jobs in such branch so also the expected imaginary salary of the Engineering branch, in the available scenario, especially in view of the deposition of Sandeep (A.W.2) who categorically stated about initial package of the job between Rs.2 to 2.5 lacs per annum, I take the expected imaginary income of the deceased Rs.15000/- per month which he could have earned just after two years on obtaining the degree, had he been alive, the same comes to Rs.15 X12=1,80,000/- per annum and in the available scenario, the claimants being his parents, father and mother then in view of the aforesaid decision of the Apex Court in the matter of *Sarla Verma* (supra), the court has to deduct first the fifty percent sum on account of expenses of the deceased which he would have spent on himself, had he been alive then the annual expected dependency of appellants No.1 and 2 comes to Rs.90,000/- per annum. Keeping in view the age of mother 42 years, which is less than the father, in view of the aforesaid case of *Sarla Verma* (supra), the multiplier of 14 is applicable. On applying the same, the total dependency comes to Rs.12,60,000/-. Besides this, appellants No.1 and 2 are also entitled to get Rs.15,000/- towards traditional heads like funeral expenses, loss of estate and love and affection.

17. I would like to mention here that any of the findings of the tribunal holding responsibility of the impugned claim against the respondents jointly and severally, has not been challenged by either of the respondents before this court by way of appeal or by filing any cross-objection in the present appeal. So, such approach and findings of the tribunal have attained finality between the parties, hence the same does not require any interference.

18. In view of the aforesaid discussion, by allowing this appeal in part, the impugned award is modified and the sum awarded by the tribunal is further enhanced from Rs.2,43,500/- to Rs.12,75,000/- as discussed above. The enhanced sum shall carry the interest @ 6% per annum from the date of filing the claim petition, if the same is paid within three months from today otherwise the same shall carry interest @ 9% per annum. Till this extent, the impugned award of the tribunal is modified while the other findings of the same are hereby affirmed.

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

Appeal partly allowed.

I.L.R. [2013] M.P., 885
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
F.A. No. 169/1996 (Jabalpur) decided on 28 February, 2013

KISHANLAL ...Appellant
Vs.
ASHOK KUMAR & anr. ...Respondents

A. ***Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract*** **- Defendant having 21 acres of land deriving profit out of it - No evidence that the defendant wanted to establish a business or was unable to manage the land or was not obtaining profit from the said land - Only 5 acres out of 21 acres of land was agreed to be sold - No evidence that defendant was in need of money - No explanation that why defendant agreed to sell the land to the plaintiff - Agreement of sale surrounded by heavy dark clouds. (Para 20)**

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – प्रतिवादी के पास 21 एकड़ भूमि थी और वह उससे लाभ प्राप्त कर रहा था – कोई साक्ष्य नहीं कि प्रतिवादी कोई कारोबार स्थापित करना चाहता था या भूमि का प्रबंधन करने में अक्षम था या उक्त भूमि से लाभ प्राप्त नहीं कर रहा था – 21 एकड़ में से केवल 5 एकड़ भूमि विक्रय का करार हुआ – कोई साक्ष्य नहीं कि प्रतिवादी को रुपयों की आवश्यकता थी – कोई स्पष्टीकरण नहीं कि प्रतिवादी ने वादी को भूमि का विक्रय करने का करार क्यों किया – विक्रय का करार भारी संदेह से घिरा है।

B. ***Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract*** **- Plaintiff is alleged to have agreed to purchase 5 acres of land for a consideration of Rs. 50,000/- - Rs. 45,000 were paid on the date of execution of agreement - When the 90% of the total consideration was already paid then why sale deed was not got executed by paying the entire amount - Explanation given by plaintiff that defendant was going to his village is not plausible because the agreement to sell was executed in Tehsil Kachehari - Why the sale deed was not executed in the office of sub-registrar which is situated in the same locality is an another circumstance which makes the agreement of sale highly suspicious. (Para 21)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – अभिकथित रुप से वादी ने 5 एकड़ भूमि रु. 50,000/– के

प्रतिफलार्थ क्रय करने का करार किया – करार के निष्पादन की तिथि को रु. 45,000/– अदा किये गये – जब संपूर्ण प्रतिफल का 90 प्रतिशत पहले ही अदा किया जा चुका था तब संपूर्ण रकम अदा करके विक्रय विलेख को निष्पादित क्यों नहीं किया गया – वादी का स्पष्टीकरण कि प्रतिवादी अपने गांव जा रहा था, विश्वसनीय नहीं क्योंकि विक्रय का करार तहसील कचहरी में निष्पादित किया गया था – विक्रय विलेख को उप–पंजीयक के कार्यालय में निष्पादित क्यों नहीं किया गया जो उसी इलाके में स्थित था, जो विक्रय के करार को अधिक संदेहास्पद बनाती है, की एक और परिस्थिति है।

***C. Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract* - Defendant alleged to have approached the plaintiff to sell 5 acres of land on 07.03.1990 and agreement to sell was executed on the same day - Normally intending purchaser will never purchase an immovable property without examining it - Suit property is also adjacent to river and growing good crops - Evidence available on record also shows that defendant was threatened by putting him into fear of his arrest by police and under coercion and undue influence he put his signatures upon the document of agreement of sale - Circumstances available on record clearly show that the agreement to sell was suspicious document - Suit dismissed - Appeal allowed.**

(Paras 25 to 37)

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – अभिकथित रुप से प्रतिवादी 07.03.1990 को 5 एकड़ भूमि का विक्रय करने हेतु वादी के पास गया था और उसी दिन विक्रय करार निष्पादित किया गया – सामान्यतः आशयित क्रेता किसी अचल संपत्ति का क्रय उसका निरीक्षण किये बिना कभी नहीं करेगा – वाद सम्पत्ति नदी किनारे भी है और अच्छी फसल उगा रही है – अभिलेख पर उपलब्ध साक्ष्य भी दर्शाती है कि प्रतिवादी को पुलिस द्वारा गिरफ्तारी का भय दिखाकर धमकाया गया और प्रपीड़न में एवं अनुचित प्रभाव में आकर उसने विक्रय करार के दस्तावेज पर हस्ताक्षर किये – अभिलेख पर उपलब्ध परिस्थितियां स्पष्ट रुप से दर्शाती हैं कि विक्रय का करार संदेहास्पद दस्तावेज था – वाद खारिज – अपील मंजूर।

Case referred :

AIR 1967 SC 878.

V.S. Shroti with *Vikram Johri,* for the appellant.
None for the respondent No.1/Plaintiff though served.
Akhilesh Singh, P.L. for the respondent No. 2/State.

JUDGMENT

A.K. SHRIVASTAVA, J. :- Feeling aggrieved by the judgment and decree dated 7th March, 1996 passed by learned Second Additional District Judge, Hoshangabad in Civil Suit No. 2-A/1991 whereby the suit of plaintiff-respondent for specific performance of contract has been decreed, this first appeal under Section 96 CPC has been filed by the defendant.

2. In this judgment, wherever the expression 'defendant' is used it would mean first defendant Kishanlal because second defendant, the State of M.P. has been impleaded as formal party in view of Order I Rule 3(B) State Amendment in the CPC.

3. In brief, the suit of plaintiff is that the suit land is 5 acres of agricultural land situated in *Mouza Banada, Tehsil Seoni Malwa, District Hoshangabad* is owned by appellant-defendant in his Bhumiswami right having possession over it. The defendant approached respondent-plaintiff on 7.3.1990 at Seoni Malwa and expressed his desire to sell 5 acres of his land at the market rate Rs.10,000/- per acre and the said proposal was accepted by the plaintiff and he asked the defendant to execute a document of agreement of sale and eventually on 7.3.1990 a document of agreement of sale was executed. It is the further case of plaintiff that the sale consideration was agreed between the parties to be Rs.50,000/- and out of this amount a sum of Rs.45,000/- was paid on the date of agreement of sale and this has also been embodied in the document of agreement of sale. According to the plaintiff it was agreed between the parties that the balance amount of consideration Rs.5,000/- shall be paid at the time of execution of the sale deed and it was agreed that the sale deed will be executed on or before 30.6.1990 at the pleasure of the plaintiff.

4. In the plaint it has also been pleaded that the plaintiff is carrying on the business at Banapura and the defendant is the resident of interior village Mouza Banada of Tehsil Seoni Malwa. Further pleading of the plaintiff is that the defendant was desirous to get the suit property sold because he wanted to establish his business at Banapura. According to the plaint averments the defendant was not able to manage his land properly and was not getting profits from the disputed land and therefore, out of his entire holdings of agricultural land he was desirous to sell 5 acres of land to the plaintiff. It has been further pleaded in the plaint para 2(b) that because in the vicinity of Seoni Malwa the plaintiff may not get any land @ Rs.10,000/- per acre as a result of which he accepted the offer of defendant to purchase his 5 acres of land for a

consideration of Rs.50,000/-. The plaintiff also expressed his willingness that immediately he is ready to pay entire sale consideration and is ready to get the sale deed executed, on this the defendant told that although he is ready to execute the sale deed but he has to go out of station and therefore, instead of executing the sale deed and getting it registered a document of agreement of sale may be executed, eventually the aforesaid agreement of sale was executed.

5. In para-3 of the plaint it has been pleaded by the plaintiff that despite the plaintiff orally requested defendant to get the sale deed executed but he tried to avoid it and when it created doubt in the mind of plaintiff that defendant may turn up from his part of contract, he sent a notice by registered A/d post through his counsel on 11.6.1990 asking the defendant to get the sale deed executed on 30.6.1990 and in case this date is not suitable to him, the date which is suitable to him may be intimated so that the sale deed may be executed on that date. This notice of plaintiff was received by defendant on 12.6.1990 but till the suit was filed on 10.12.1990 the sale deed was not executed by the defendant. Further it has been pleaded that instead of getting the sale deed executed a false reply was sent by defendant through his counsel Shri D.S. Mandloi in which a false story has been set up but the plaintiff has nothing to do with that story. On the basis of these pleadings the plaintiff had filed suit for specific performance of contract.

6. The defendant-appellant specifically denied the plaint averments. In para-2(a) of the written-statement there is specific pleading of defendant that he never intended to sell his land which is under his cultivation and the details are pleaded in the additional pleading. In this para this fact has also been denied by him that he cannot manage his agricultural land and further denied that he is not deriving any profit from the suit land. The factum of expressing to start a business in Seoni Malwa has also been denied.

7. In the special plea of the written-statement it has been specifically pleaded that he never intended to sell the suit land to plaintiff-respondent No.1. According to him, in the capacity of Commission Agent of one Vimal Seth who is one of the relative of plaintiff, his 100 bags of grain and also 24 quintals of plaintiffs *Alsi* (linseed) by loading them in a truck, he carried them to Nagpur at the instance of said Vimal Seth on 1.3.1990 and he delivered the goods as per the instructions of plaintiff and Vimal Seth, to the broker Pramod Kumar of Nagpur who after taking his commission paid a sum of Rs.45,000/- to the defendant but when he was coming to Seoni Malwa back along with

cash amount of Rs.45,000/- of said Vimal Seth and plaintiff, he was looted and robbed at Nagpur Railway Station by some miscreants. Further it has been pleaded that not only cash amount of Rs.45,000/- was looted but his wrist watch, chain and rings etc. were also snatched by brandishing knife by those miscreants. Eventually he also lodged a report to the G.R.P. Police Station on the same date on 2.3.1990. The broker Pramod Kumar also informed Vimal Seth when he (Vimal Seth) reached to Nagpur but upon a false complaint made by Vimal Seth who is also the near relative of plaintiff, the G.R.P. Police at Nagpur, came to defendant's village Banapura and took the defendant to Nagpur for investigation and pressurised him to pay an amount of Rs.45,000/- to Vimal Seth, he was also beaten in the police station and on giving undertaking and assurance of making payment Rs.45,000/-to Vimal Seth and plaintiff the police personnel released him. It has also been pleaded that Vimal Seth who was present at Nagpur gave Rs.6,000/- as a loan to defendant to pay illegal gratification to the police personnel at Nagpur and the said amount defendant paid to said Vimal Seth when he came back to his village Banapura, but, said Vimal Seth who is in near relation of plaintiff-respondent Ashok Kumar asked defendant to pay an amount of Rs.45,000/- which was given by the broker Pramod Kumar in cash to him and when he put his inability that at present he is not having that much amount of cash a document of agreement of sale stating therein the consideration of Rs.45,000/- was executed and threat was given to him that if he does not execute a sale deed they will call the police personnel of Nagpur to take penal action against him and upon this threat of the police and under coercion the document of agreement of sale was executed. According to the defendant in these facts and circumstances the agreement of sale dated 7.3.1990 has no sanctity in the eye of law since it has been obtained under coercion and undue influence and therefore, it has been prayed that the suit be dismissed.

8. Learned Trial Court framed necessary issues and after recording the evidence of the parties dismissed the suit. In this manner this appeal has been filed by the defendant under Section 96 CPC.

9. In this case the plaintiff-respondent was personally served and he also appointed counsel but none appeared for him on 3.1.2013 when this appeal was taken up for hearing, as a result of which this Court directed to issue SPC to the plaintiff-respondent since his counsel Shri R.K. Pandey had passed away. The SPC was issued to the respondent-plaintiff for a date of hearing 25.2.2013 but no one appeared on behalf of the respondent.

10. The contention of Shri V.S. Shroti, learned senior counsel is that the story put forth by defendant in additional plea that he was looted by the miscreants at Nagpur on 2nd March, 1990 in which Rs.45,000/- was looted was found to be proved and in this regard my attention has been drawn to para-22 of the impugned judgment. Hence, according to learned senior counsel the entire episode is to be visualised from this spectrum with the plea of defendant that he was robbed and a sum of Rs.45,000/- cash and other items like wrist watch, chain and rings etc. were looted at Nagpur is proved and therefore, the case of plaintiff become *ex facie* false.

11. Another contention of learned senior counsel is that before executing the document (Ex.P-1) the plaintiff never went to the village to examine the suit property which is highly unnatural for an intending purchaser because certainly before purchasing an immovable property one would go and examine the property at the spot. Learned counsel further propounded that the alleged contract of agreement of sale is not workable because the suit land which is 5 acres is only a piece of entire land owned by plaintiff which comprises of 8.515 hectare i.e. 21.04 acres, but, which specific portion of 5 acres was agreed to be sold to the plaintiff there is nothing in the document of agreement of sale. Further it has been contended by him that when 90% of the consideration (Rs.45,000/-) was paid to the defendant, why directly sale deed was not executed especially when the plaintiff is a businessman and after paying a meager amount of Rs.5,000/- a sale deed could be executed. Learned counsel submits that although in the plaint it has been pleaded that defendant stated that he is going to village, therefore, the sale deed cannot be executed on 7.3.1990 but the plaintiff has not so proved this fact in his evidence when he appeared as PW-1.

12. By hammering the authenticity and hallmark of document of agreement of sale (Ex.P-1) it has been put forth by learned senior counsel that there is nothing in the document that the defendant was in need of money or the disputed property was not in his use and it was lying idle.

13. It has been further contended by learned senior counsel that although putting signature upon the document of agreement of sale dated 7.3.1990 (Ex.P-1) is admitted by the defendant, but, he never intended to sell his suit property and looking to the pleadings made in the written-statement as well as the case of coercion and undue influence set up by him in additional plea of the written-statement, the suit of plaintiff for specific performance of contract

cannot be decreed. The contention of learned senior counsel is that there was no prior negotiation before executing the document of agreement of sale (Ex.P-1) and directly and straightway the document of agreement of sale was executed on 7.3.1990. Learned counsel by inviting my attention to the evidence of plaintiff (PW-1) who has deposed that 7 days earlier to the execution of the document of agreement of sale the plaintiff had gone to the defendant's village to negotiate with him. But, this evidence cannot be relied upon for two reasons. Firstly there is no pleading to that effect of plaintiff, and secondly during those days the defendant had gone to Nagpur where he was looted and FIR (Ex.D-1) of G.R.P. Police Station Nagpur is on record where the entire incident has been narrated including that a sum of Rs.45,000/- has been looted by miscreants from defendant and therefore, in these facts and circumstances if under coercion and under pressure of said Vimal Seth and plaintiff the document of agreement of sale has been executed it cannot be given effect to. Learned counsel submits that although said Vimal Seth is not the signatory of impugned document (Ex.P-1) and he also did not sign as an attesting witness but in the evidence of the defendant it is borne out that he was throughout present when the document of agreement of sale was being executed. In this regard my attention has also been drawn to the evidence of scribe of the document Radheyshyam Anjane (DW-2) who has categorically stated that Vimal Seth was also all the time present when the document of agreement was being prepared and typed by him. This witness has also signed Ex.P-1 in the capacity of the scribe. The contention of learned senior counsel is that if the story and defence of coercion and duress which is put forth by defendant is not true why throughout said Vimal Seth was present at the time of the preparation of Ex.P-1 till it was typed by the scribe.

14. It is further contended that name of Vimal Seth as well as of plaintiff is mentioned in the FIR (Ex.D-1) and therefore, it can be inferred that on account of giving threat, coercion, duress and undue influence the defendant put his signature on the impugned document (Ex.P-1). Learned senior counsel has placed heavy reliance upon the decision of this Court *Koze and another v. Makhan Singh,* 1973 JLJ 671 wherein the principle how the plea of undue influence can be proved, is laid down and this decision is squarely applicable in the present factual scenario. By further placing heavy reliance on para-12 of the decision of Delhi High Court *Kishan Lal Kalra v. N.D.M.C.* AIR 2001 Delhi 402 it has been contended that by playing fraud and coercion of MISA the document was executed and it was held that the contract cannot be

given effect to. Learned counsel has also placed reliance upon the single Bench decision of this Court *Mhow Hosiery Pvt. Ltd. vs. Jitendra Nirlan Singh,* 2005 (3)M.P.L.J.179 and the decision of Mysore High Court *T.G.M. Asadi and Sons v. The Coffee Board and another,* AIR 1969 Mysore 230 and latest pronouncement of the single Bench decision of this Court in *Kashiram vs. Mitthulal and another,* 2013(1) M.P.H.T.388.

15. Lastly it has been submitted by learned senior counsel that learned Trial Court has wrongly drawn adverse inference against the defendant for not examining Vimal Seth. According to learned senior counsel, looking to the defence which has been set up by defendant in his additional plea since Vimal Seth played a vital role adverse to the interest of defendant, no adverse inference could be drawn against him for his non-examination and further according to learned senior counsel how in these circumstances the defendant could examine him. On these submissions it has been prayed by learned senior counsel for the appellant defendant that by allowing this appeal the impugned judgment decreeing the suit of plaintiff for specific performance of contract be set aside and the suit be dismissed.

16. Despite the respondent No.1 plaintiff has been after having sent SPC to him, no one has put appearance for him. Having heard learned senior counsel for the appellant and after going through the record throughly I am of the view that this appeal deserves to be allowed.

17. On the basis of the arguments placed by learned senior counsel for the appellant the following question emerges :-

> "Whether the document of agreement of sale (Ex.P-1) dated 7 3.1990 was executed under coercion and undue influence by giving threat to defendant to arrest him by the police?

Regarding the question:

18. Since the plea of coercion and undue influence has been taken by defendant-appellant in the additional plea of the written-statement the burden of proof is upon him and therefore, this Court will examine the evidence of defendant as well as of plaintiff in order to ascertain whether this plea has been proved.

19. The pleading of defendant and the story which he has set up in his additional plea of the written-statement that he was looted and robbed at

Nagpur Railway Station has been very much found to be proved by learned Trial Court in para-22 of the impugned judgment. Hence, the entire episode and the case is to be visualised *inter alia* from this spectrum. Before I advert myself to the basic document of the case i.e. agreement of sale (Ex.P-1), it would be profitable to go through the contents of the important document FIR dated 2.3.1990 (Ex.D-1) lodged by the defendant at Nagpur. This document is a true copy given under the signature of Sub-Inspector Lohmay Police Station, Nagpur and the defendant by examining Head Constable No.857, Ram Rao (DW-4) of that Police Station the original FIR was summoned and it was brought by this constable and the same has also been proved by him. From this document it is proved that upon the report of defendant a case under Section 392 IPC was registered against unknown persons. This witness has deposed that Ex.D-1 is the copy of the original. In the FIR it has been specifically stated that on 1.3.1990 the defendant in a truck carried 100 bags of grain of Vimal Seth and 24 quintals of plaintiffs Alsi (linseed) and these goods were sold to broker Pramod Kumar for Rs.45,000/- and the said cash amount of Rs.45,000/- (the details of the currency notes are also mentioned in the FIR) was handed over to defendant. Thereafter, he arrived at the Railway Station and inquired about the position of the train Chhattisgarh Express which was reported to be late. The defendant felt to ease as a result of which nearby a corner of wall he went to ease. At that juncture, some miscreants came and looted the cash amount as well as wrist watch, chain and rings etc. of the defendant. The learned Trial Court has already found this plea of defendant to be proved in para-22 of the impugned judgment. In the FIR the names of Vimal Seth and plaintiff are mentioned with further averments that defendant sold the goods of these two persons to said Pramod Kumar.

20. Now coming back to the execution of agreement of sale (Ex.P-1), this Court finds that in this document specifically it has been mentioned that defendant is having huge agricultural land comprising of 21.04 acres and out of this huge land only a part of 5 acres he agreed to sell to the plaintiff. In this document it is not mentioned that defendant is in need of money or the land was lying idle and therefore, he is entering into agreement of sale with the plaintiff. There is nothing in this document that from the sale price he will establish his business at Banapura. It has also not been mentioned in this document that defendant is unable to manage the suit property and is not earning any profit from the agricultural land which is agreed to be sold. But,

to bring out a full proof case, averments are pleaded in para 2(a) of the plaint by plaintiff with uttermost object that his suit of specific performance may be decreed. But, all these pleadings have not at all been proved by the plaintiff when he appeared in witness box as PW-1. In his entire statement there is no whisper that defendant wanted to establish a business at Banapura or he is unable to manage the land in question and further he is not obtaining any profit from the suit land which is a part of huge agricultural land owned by defendant. Hence, the plea which has been raised by plaintiff in para-2(a) of the plaint has not at all been proved either in his testimony or from document of agreement of sale (Ex.P-1) itself. Thus, when it is not proved that defendant was in need of money or the suit land was lying idle and further he was earning profit from, it by obtaining crops why it has been agreed to be sold by defendant to plaintiff, there is no explanation of the plaintiff in this regard. At this juncture only I would like to mention here that defendant in his deposition when he appeared as DW-1 has categorically stated that he is deriving profit from his agricultural land which is 21.04 acre. There is nothing in the evidence of plaintiff that out of total area of agricultural land only the suit land which comprises of 5 acres only is not fetching any profit and therefore, for this reason also it creates heavy doubt in the mind of the Court that when defendant was drawing profit from the agricultural land and when he was not in need of money to establish some business in Banapura why he will sell the suit property which is less than ¼th portion of his entire holding. It is not the case of plaintiff that in order to establish business and to become a businessman the defendant who is an agriculturist was desirous to sell his entire agricultural land 21.04 acres. On the other hand, his case is that only a part of land was agreed to be sold to him. Hence, I am of the view that when the plaintiff's evidence is totally silent that the defendant was not deriving any profit from the suit land and defendant's evidence is that he is deriving full profit from it and also the document of agreement of sale is silent on this point it can be inferred that the document of agreement of sale is surrounded by heavy dark clouds.

21. On bare perusal of the pleadings of the plaintiff and by paying heed to para 2(b) of the plaint that straightway on 7.3.1990 the defendant came to the work place of plaintiff who is a businessman and is carrying on business in Banapura and interacted with plaintiff and offered him to purchase the land in question and immediately it was agreed by the plaintiff and document of agreement of sale was executed on the same day only i.e. 7.3.1990. Surprisingly if the total consideration of the suit land was Rs.50,000/- and an

amount of Rs.45,000/- which is 90% of the alleged consideration was paid on 7.3.1990 only, why directly sale deed was not executed. The explanation which has been given in para 2(b) of the plaint by the plaintiff is that because the defendant stated that he is going to village on that day, therefore, today i.e. 7.3.1990 he cannot execute the sale deed. But, this fact is totally missing from the evidence of plaintiff (PW-1) and therefore, this plea which he has pleaded in the plaint is also not proved. Apart from this, on bare perusal of para 2(c) of the plaint this Court finds that there is specific pleading of plaintiff that on 7.3.1990 when the document of agreement of sale was executed, plaintiff and defendant went to Tehsil Kachehari at Seoni Malwa and a document of agreement of sale was executed. It be noted that the document is on Rs.5/- stamp paper. If they had gone to Kachehari (a premises comprising different Courts including the office of Sub-Registrar) why the sale deed was not executed in the office of the Sub-Registrar which is also situated in the same locality. Thus, this is an another circumstance in order to hold that there is something black in the bottom and document of agreement of sale becomes highly suspicious.

22. At this juncture only it would be quite relevant to mention here that in the examination-in-chief para-2 the plaintiff himself has stated that he is not at all related to the incident pleaded by the defendant in written-statement which is in regard to the defendant being looted by the miscreants at Railway Station, Nagpur when he was coming back after selling plaintiffs linseed and 100 gunny bags of grain of Vimal Seth. Thus, the plaintiff has admitted that defendant went to sell his linseed and also the grain of Vimal Seth. In cross-examination para-3, plaintiff has admitted that defendant used to sit at the work place of Vimal Seth. In cross-examination para-4 again he has admitted that it is in his knowledge that while returning back from Nagpur he was looted. Although the suggestion put to him that Vimal Seth is related to plaintiff has been denied by him. But the scribe of document (Ex.P-1) Radheyshyam Anjani (DW-2) has specifically stated that along with plaintiff, Vimal Seth also came and except these two persons nobody came to him to write this document which would mean neither the defendant nor attesting witnesses were there. Specifically the scribe (DW-2) says that defendant was not there and he did not sign before him nor Rs.45,000/- was paid to him.

23. Another important circumstance in order to hold that defendant never intended to sell suit property (which is less than 114th of his entire agricultural land) is that normally intending purchaser will never purchase an immovable

property without examining it. According to the plaint averments directly the suit property was agreed to be sold on 7.3.1990 when the defendant approached the plaintiff. There is nothing in the pleadings that any prior negotiation took place between the plaintiff and defendant but when the plaintiff was cornered in the cross-examination and he faced a tight situation he has deposed in cross-examination para-5 that he has seen the suit land in the year 1988-89. Surprisingly when there was no prior negotiation as per the pleading of plaintiff why he did go to the village where defendant's agricultural land is situated and examined the suit property. According to me, unless and until there is prior meeting of mind to sell the suit property why a businessman will go to a remote village and examine the suit property and that too two years prior to the date of agreement of sale which according to the plaintiff straightway executed when defendant approached him on that date only.

24. Another strong circumstance which creates heavy doubt on the authenticity and hallmark of document of agreement of sale is that as per plaintiffs own case which he pleaded in para 2(a) and (b) of the plaint is that defendant is not deriving any profit from the suit land and further the land in question is of inferior quality because it is far away from Narmada river, but, when the plaintiff was cornered during the cross-examination in para-5 he has admitted that the suit property is adjacent to river Narmada and is also growing good crop. Thus, again the pleadings of the plaintiff is contrary to his evidence and is not proved.

25. Another circumstance which is carved out from the testimony of plaintiff in order to hold that the document of agreement of sale in the manner and fashion it is written is highly suspicious is that as per the document (Ex.P-1) and the evidence of plaintiff Ashok Kumar (PW-1) an amount of Rs.45,000/- was paid in cash as advance money to the defendant on the date of the execution of document (Ex.P-1). Normally, this figure of Rs. 45,000/- may not have any significance, but, in the present case this figure is very much material in order to test the plea of coercion and undue influence. It be noted that an amount of cash Rs.45,000/- was looted while the defendant was robbed at Nagpur and this figure finds place in the FIR (Ex.D-1) also by stating therein that this cash amount of Rs.45,000/- was paid to the defendant towards the price of the grain and linseed of Vimal Seth and plaintiff Ashok Kumar. The names of these two persons are also mentioned in the document of FIR (Ex.D-1). Hence, this is one more circumstance to hold that by giving threat to the defendant of arrest by the police the cash amount which was looted and robbed from the

appellant has been figured in Ex.P-1 towards advance money.

26. The plea of coercion and undue influence by putting the defendant-appellant in the fear of arrest and humiliation by the police while procuring the document of agreement of sale (Ex.P-1) by Vimal Seth and plaintiff is also proved from the evidence of defendant when he appeared as DW-1. There is specific evidence of defendant of giving threat of his arrest by the police by exercising undue influence and coercion by Vimal Seth. Further he has deposed that when he came to Banapura he found that Vimal Seth was informed by Pramod Kumar about the incident as a result of which said Vimal Seth firstly had gone to G.R.P. Nagpur and thereafter arrived at Banapura along with two constables of G.R.P. who carried defendant during the odd hours at night at 2:00 a.m. to Hoshangabad and from where he was brought to Nagpur. At Nagpur he was beaten by the G.R.P. police personnel and insisted him to return the cash amount to Vimal Seth and to pay Rs.6,000/- to the police personnel. He has further deposed that because he was not having any cash with him at that time he borrowed money of Rs.6,000/- from Vimal Seth and that amount was given to G.R.P. police personnel and he came back to Banapura along with Vimal Seth. In para-6 of his deposition he has also deposed that after coming back to Banapura, Vimal Seth carried him to plaintiffs place where plaintiff on a document of Rs.51- stamp paper which was ready and directed him to sign it. The scribe, Radheyshyam Anjane (DW-2) has also said that when he typed the document (Ex.P-1) at that time only plaintiff Ashok Kumar and Vimal Seth were there. The defendant has further deposed at that time he did not intervene because he was under fear and was mentally disturbed because he was ill-treated and beaten by the police personnel of Nagpur. He has also further deposed that an amount of Rs.45,000/- was never paid to him and G.R.P. Police Nagpur gave threat to him that in case he will not pay Rs.45,000/- he will be arrested and therefore, he put his signature on Ex.P-1. Indeed, this plea has been taken by the defendant in the additional plea of his written- statement and despite it has been proved from his examination-in-chief, but, no cross-examination on this very vital piece of evidence was made by the plaintiff. Hence, according to me, this part of important evidence which goes to the root of the matter to prove the plea of coercion and undue influence stands unrebutted. The evidence of defendant is corroborated by the evidence of scribe Radheyshyam Anjane (DW-2) and according to me, he is an independent witness because he is a petition writer and is carrying his job in the Tehsil office premises. This witness

is also the signatory of the impugned document (Ex.P-1) as he has signed the document in the capacity of scribe and he has also proved his signature upon it. This witness has also deposed that plaintiff and Vimal Seth came to him and got a document of agreement of sale prepared and typed because they do not know how and what is to be written in a document of agreement of sale. He has specifically deposed that except these two persons third person was not there. This witness after typing the document of agreement of sale handed over it to the plaintiff. In very specific words this witness has deposed that the two attesting witnesses Trilok Kothari (PW-2) and Rambabu (DW-3) were not present and defendant was also not present.

27. Looking to the aforesaid circumstances and pleadings of defendant which are proved from the evidence discussed hereinabove in detail, one can infer that the defendant was threatened by putting him into fear of his arrest by the police and under coercion and undue influence he put his signature upon the document of agreement of sale (Ex.P-1). There is a specific evidence of defendant that he was brutally beaten by G.R.P. police persons in the presence of Vimal Seth. Thereafter, when he came back to Banapura, Vimal Seth carried him to the house of plaintiff Ashok Kumar where the document of agreement of sale (Ex.P-1) which was already ready, was directed to be signed by defendant.

28. In the above circumstances, the role of Vimal Seth becomes very vital and how the defendant could have examined said Vimal Seth in his evidence. Even if the defendant would have examined him, certainly he would not have deposed in favour of defendant and therefore, according to me, the learned Trial Court erred in drawing adverse inference against defendant for not examining Vimal Seth in his evidence.

29. The presence of Vimal Seth while executing the document of agreement of sale has been denied by the plaintiff when the suggestion was given to him in his cross-examination para-5. But the independent witness, petition writer (scribe) DW-2 has specifically deposed that on the insistence of Vimal Seth and plaintiff he typed the document of agreement of sale (Ex.P-1). According to defendant, when the document (Ex.P-1) was executed, apart from him and defendant the attesting witnesses namely Trilok Kothari (PW-2) and Rambabu (DW-3) were present. A suggestion given to plaintiff in cross-examination para-6 that by joining his hands along with Vimal Seth by putting the defendant in fear of arrest the document (Ex.P-1) was procured but it has been denied.

However, looking to the evidence of the scribe, when the document (Ex.P-1) was being prepared Vimal Seth was present and to me the evidence of scribe (DW-2) is more reliable and thus it can be inferred that if Vimal Seth had nothing to do with the impugned transaction why he was throughout present at the time of the preparation of Ex.P-1 till it was typed and why he (Vimal Seth) came with the plaintiff. Thus, it is apparent that the evidence of plaintiff and the attesting witnesses who have denied the role of Vimal Seth becomes unreliable. According to me, when there is specific plea in the written-statement and which has been proved by the defendant in his evidence by dismantling the evidence of plaintiff and his witnesses and there is no cross-examination on behalf of plaintiff, it shows that the evidence of defendant on this vital point is unrebutted and if the evidence of plaintiff and defendant is marshalled in the aforesaid circumstances, the evidence of defendant is found to be more reliable. Had the coercion and undue influence would not have been exercised by the plaintiff and Vimal Seth certainly there would have been cross-examination upon the defendant on this important evidence. Learned Trial Court has failed to consider has important aspect of the matter particularly when it has been found that the defence of defendant of loot has been proved (see para-22 of the impugned judgment). At the cost of the repetition I may again reiterate here that in the FIR (Ex.D-1) the name of plaintiff Ashok Kumar and that of Vimal Seth is mentioned and it is specifically averred in the FIR that the defendant was carrying a cash Rs.45,000/- of these two persons.

30. The term coercion has been defined in Section 15 of the Indian Contract Act, 1872 and for ready reference I would like to quote the said provision which reads, thus:-

> 15. ***"Coercion" defined.-***"Coercion" is the committing, or threating to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
>
> *Explanation* - It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

If the facts and circumstances and the evidence of the parties and by paying heed to the plea of coercion and undue influence which is also found to be

proved on account of unrebutted testimony of defendant in this regard, according to me, the suit cannot be decreed. According to me, a threat of bringing a criminal charge does not amount to coercion as it is not per se forbidden by penal law but threat of bringing a false charge and when it was materialized by carrying the defendant to Nagpur where he was beaten by G.R.P. Police with an object to get the document of agreement of sale procured it would amount to coercion and in this regard decision of Delhi High Court placed reliance by learned counsel for the appellant is applicable in the present case. In this decision by giving threat to get arrested in MISA the contract was made and the Delhi High Court held that said contract cannot be acted upon.

31. Thus, in the aforesaid circumstances, it can be said that even if consent of the defendant was obtained and his signature was obtained upon the document of sale (Ex.P-1), because it was procured under coercion of threat of unlawful detention, this document (Ex.P-1) cannot be given effect to by decreeing the suit. I may further add that act of violence is coercion if it relates to a person intended to be harmed and there is an actionable wrong at his suit. In this regard, Halsbury's Laws of England, 4th Edition Volume 45, para-1524 at page 718 may be seen and for ready reference I would like to quote that relevant para as under:

> "1524. ***Inducement and intimidation, coercion etc.*** Although it is not an actionable wrong for an individual merely to induce a person not to serve or not to employ another when no breach of contract is caused, yet, if the inducement is accompanied by illegal means, such as violence, intimidation, coercion, obstruction, molestation, fraud or misrepresentation, and damage results to a person intended to be harmed, there is an actionable wrong at his suit."

32. To me, the covenants in a deed are ineffective where the consent of one of the parties to the deed has been obtained by fraud or coercion and where one of the parties has repudiated his or her obligations under the deed, and elected to treat it as a nullity, the other party is not bound by the covenants and in this regard I would like to quote the relevant portion of para 696-700 of Halsbury's Laws of England, 4th Edition Volume 13, at page 340, which reads thus:-

> "696-700. ***Covenants in a deed: when ineffective.***

> Covenants in a deed are ineffective where the consent of one of the parties to the deed has been obtained by fraud or coercion; and where one of the parties has repudiated his or her obligations under the deed, and elected to treat it as a nullity, the other party is not bound by the covenants."

Thus, according to me, a contract (in the present case Ex.P-1) obtained by means of coercion by one party over the other, it is a voidable contract, if not void. If the aforesaid analogy is applied in the present factual scenario and is kept in juxtaposition to the pleadings and particularly when there is unimpeachable and uncrossed testimony of defendant, a clear case of obtaining impugned document of agreement of sale by exercising coercion is made out.

33. The term coercion has also been explained in Law of Lexicon by P. Ramanatha Aiyar 4th Edition 2010 page 1223, which reads as under:-

> "To constitute coercion or duress, there must be some actual or threatened exercise of power, possessed or believed to be possessed, by the party coercing over the person and property of another. Actual violence is not necessary to constitute coercion; imaginary terrors may be sufficient for that purpose. (*Boyse v. Rossborough*, 6 HL Case 2, 48)."

In Black's Law Dictionary 9th Edition page 294, the expression 'coercion' has been explained as under:-

> ***"coercion.*** Compulsion by physical force or threat of physical force. An act that must be voluntary, such as signing a will, is not legally valid if done under coercion. And since a valid marriage requires voluntary consent, coercion or duress is grounds for invalidating a marriage."

34. Under Section 72 of the Indian Contract Act, 1872 also the expression 'coercion' has been mentioned. This section pertains to liability of person to whom the money is paid, or thing delivered by mistake or under coercion. According to this section, a person to whom money has been paid or anything delivered, by mistake or under coercion must repay or return it. By applying this section to the present case in hand, if the plaintiff would have obtained some money or anything by keeping the defendant under coercion, certainly he was liable to repay or return it. In the present case, the document of agreement of sale (Ex.P-1) has been obtained by keeping the defendant under

coercion and therefore, the plaintiff is not entitled to enforce any specific performance of contract of this document.

35. The case of defendant would also come under the expression "undue influence" as defined under Section 16 of the Indian Contract Act, 1872, which reads thus:-

> 16. ***'Undue influence' defined.***-(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generally of the foregoing principle, a person is deemed to be in a position to dominate the will of another-
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
>
> (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the will of the other.
>
> Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

The term "undue influence" has also been explained in ***Corpus Juris Secundum*** Vol.26 page 761, which reads as under:-

> "Undue influence invalidates a deed procured thereby and generally speaking consists in a wrongful influence so exerted over the grantor as to rob him of free agency and to substitute the will of another for that of the grantor. Influuence which is not undue, such as that arising from affection or from fair

argument, does not destroy the validity of a deed."

By testing the plea of 'undue influence' taken by defendant in the additional plea and looking to his unimpeachable and unrebutted testimony it is gathered that because plaintiff and Vimal Seth were in dominating position to procure impugned document of agreement of sale (Ex.P-1) by giving threat to arrest defendant by Police of Nagpur and therefore, according to me, the plea of 'undue influence' has also been duly proved from the unimpeachable and uncrossed testimony of the defendant.

36. The Supreme Court in *Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others,* AIR 1967 SC 878 has laid down the test how the undue influence is to be proved. According to the Apex Court, the Court trying the case of undue influence must consider two things; (1) relation with the parties to each other must be such that one is in a position to dominate the will of other and (2) once the position is substantiated the second stage would reach to the issue where the contract has been obtained by undue influence. Since there is overwhelming evidence that the plaintiff and Vimal Seth were in dominating position over the defendant by giving threat to be arrested by the police and not only this he was also carried to G.R.P. Police Station where the police personnel had beaten him, I am of the view that the plaintiff was in dominating position along with Vimal Seth and thereafter if document of agreement of sale (Ex.P-1) has been procured it was on account of undue influence. The decision of this Court in *Koze* (supra) placed reliance by learned senior counsel for the appellant is applicable in the facts and circumstances of the case. Another decision of this Court *Mhow Hosiery Pvt. Ltd.* (supra) is also applicable because in that case the Company was in financial crisis and to get rid off its workers exercised undue influence and coercion and thereby obtained resignation of 200-250 workers, in that situation it was found that the resignations were not voluntary.

37. According to me, when the impugned document of agreement of sale has been obtained by plaintiff on account of exercise of coercion and undue influence, therefore, in these circumstances because it gives plaintiff an unfair advantage over the defendant, the Court may refuse specific performance and further because it will be inequitable in such facts and circumstances to enforce specific performance. Indeed, for this only purpose Section 20(2) of the Specific Relief Act, 1973 has been enacted. Sub-section (1) of Section 20 of the Specific Relief Act empowers the Court to exercise discretion of

specific performance and further gives power that the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court should not be exercised arbitrarily and should be exercised on sound and reasonable manner guided by judicial principles and capable of correction by a court of appeal. Thus, according to me, the discretionary power to decree the suit has not been exercised by learned Trial Court on the grounds which are not guided by judicial principles and they are also not reasonable and therefore, the discretion exercised in decreeing the suit can be corrected by this Court in appeal. In these facts and circumstances, I am unable to uphold the decree of specific performance of contract.

38. The question which I framed for its determination is accordingly decided and answered in favour of defendant- appellant.

39. Resultantly, this appeal stands allowed, the impugned judgment and decree passed by learned Trial Court is hereby set aside and the suit of specific performance of contract is hereby dismissed. Since no one has put appearance on behalf of the respondent, the appellant shall bear his own cost. Counsel fee, according to Schedule, if pre-certified.

Appeal allowed.

I.L.R. [2013] M.P., 904
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A.No. 1485/2011 (Jabalpur) decided on 5 March, 2013

GAYATRI SINGH (SMT.) & ors. ...Appellants
Vs.
SANTOSH CHATURVEDI & ors. ...Respondents

A. Motor Vehicles Act (59 of 1988), Section 168 - Contributory Negligence - **Deceased was going on his motor bike when he met with an accident with truck when the deceased tried to overtake the truck - Driver of the Truck did not appear before Tribunal to explain under what circumstances accident took place - Contributory negligence on the part of the deceased assessed at 25% instead of 50% as assessed by Tribunal.** **(Para 6)**

क. मोटर यान अधिनियम (1988 का 59), धारा 168 – योगदायी उपेक्षा – मृतक अपने मोटर साईकिल से जा रहा था तब उसकी ट्रक के साथ दुर्घटना घटी

जब मृतक ने ट्रक को ओवरटेक करने का प्रयत्न किया – ट्रक का चालक यह स्पष्ट करने के लिए अधिकरण के समक्ष उपस्थित नहीं हुआ कि किन परिस्थितियों में दुर्घटना घटी – मृतक की ओर से योगदायी उपेक्षा का निर्धारण, अधिकरण द्वारा निर्धारित 50 प्रतिशत की बजाए 25 प्रतिशत निर्धारित किया गया।

***B. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Driving License* - Driver was not holding valid driving license on the date of accident - As deceased was third party therefore, right of recovery could be given to Insurance Company of Truck - As the liability of Insurance Company of Motor Bike is limited to Rs. 1,00,000/- therefore, Insurance Company is rightly held liable to that extent. (Para 8)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का उत्तरदायित्व – ड्रायविंग लाईसेंस – दुर्घटना की तिथि को चालक के पास वैध ड्रायविंग लाईसेंस नहीं था – चूंकि मृतक तृतीय पक्षकार था इसलिए वसूली का अधिकार ट्रक की बीमा कम्पनी को दिया जा सकता है – चूंकि मोटर साईकिल की बीमा कम्पनी का उत्तरदायित्व रु. 1,00,000/– तक सीमित है इसलिए बीमा कम्पनी को उक्त सीमा तक उचित रुप से दायी ठहराया गया।

Case referred :

2008 AIR SCW 6512.

Pramod Thakre, for the appellants.
Rajesh Sen, for the respondent No.1.
Shailendra Samaiya, for the respondent No.3.
Rakesh Jain, for the respondent No.4.

O R D E R

N.K. Mody, J.: Being aggrieved by the award dated 31.1.2011 passed by 2nd Addl. MACT, Shahdol in Claim Case No.64/2009, whereby claim petition filed by appellants on account of death in a motor accident was allowed and deceased was held equally liable for the accident, therefore, after deducting 50% on account of contributory negligence a sum of Rs.2,22,500/- was awarded for which respondents No.1, 2 and 4 were held liable to the extent of Rs. 1,22,500/- and respondent No.4 was held liable to the extent of Rs. 1,00,000/-, present appeal has been filed.

2. Short facts of the case are that appellants filed a claim petition before the learned Tribunal alleging that on 26.6.2009 Deepak Singh was going on

his motor bike towards Shahdol met with an accident with the truck bearing registration No.CG-04-G-2576, which was being driven by respondent No.1 rashly and negligently, owned by respondent No.2 and insured with respondent no.3. It was alleged that the motor bike was driven and owned by the deceased, which was insured with respondent No.4. It was prayed that claim petition be allowed and the compensation be awarded. Respondent No.1 remained exparte before the Tribunal. Respondent No.2 filed reply, wherein it was denied that any accident was occurred because of the negligence of respondent No.1. However, it was submitted that in case any award is passed then it is respondent No.3, who is liable to pay the amount of compensation. Respondent No.3 contested the claim petition on various grounds including on the ground that respondent No.1 did not possess valid driving license, therefore, respondent No.3 is not liable to pay the compensation. Respondent No.4 contested the claim petition on the ground that the motor bike was not insured with the respondent No.4, therefore, claim petition be dismissed. After framing of issues and recording of evidence learned Tribunal allowed the claim petition holding that accident occurred because of negligence-on the part of respondent No.1 and deceased Deepak Singh himself and assessed the income @ Rs.3,000/- per month and after deducting 1/4th towards personal expenses and applying multiplier of 15 assessed the compensation of Rs.2,22,500/- after deducting 50% on account of contributory negligence on the part of deceased himself and further held that appellants are entitled to recover Rs. 1,22,500/-from respondent Nos. 1 & 2 and Rs. 1,00,000/- from respondent No.4, against which present appeal has been filed.

3. Learned counsel for appellants submits that income assessed by the learned Tribunal is on lower side as the accident is of the year 2009. It is submitted that on other heads also amount awarded is on lower side. It is also submitted that learned Tribunal was not justified in deducting 50% on account of contributory negligence. Respondent No.1 remained exparte. Criminal case was registered against respondent No.1 for the offence punishable under Section 304-A IPC. In the circumstances learned Tribunal was not justified in holding that deceased was equally liable for accident. It is submitted that deduction of 50% on account of contributory negligence on the part of deceased is illegal. It is submitted that appeal be allowed, amount be enhanced and the findings regarding deduction of 50% on account of contributory negligence be set aside.

4. Learned Counsel for respondents No.3 and 4 submit that after due

appreciation of evidence learned Tribunal found that deceased was equally liable for the accident. It is submitted that findings recorded by the learned Tribunal are based on due appreciation of evidence, which requires no interference. It is submitted that respondent No.1 was not possessing valid driving license. It is submitted that since respondent No.1 was possessing driving license, which was valid from 30.5.2002 to 15.2.2009, therefore, learned Tribunal was justified in exonerating respondent No.3. It is submitted that compensation assessed by the learned Tribunal is just and proper, which requires no interference. It is submitted that appeal be dismissed.

5. Learned counsel for respondent No.4 supports the contention of respondent No.3 so far as the amount assessed by the learned Tribunal is concerned. Learned counsel submits that learned Tribunal was not justified in holding the respondent No.4 liable to the extent of Rs. 1,00,000/- on the ground that under the policy respondent No.4 is liable to pay compensation upto the extent of Rs. 1,00,000/-. It is submitted that since the claim petition was filed under Section 166 of the Motor Vehicles Act and it was found that deceased himself was also liable for the accident, therefore, no liability could be fastened over respondent No.4. It is submitted that appeal be dismissed.

6. From perusal of the record it is evident that two eye witnesses were examined by the appellants, who were also travelling at the relevant time alongwith the deceased on the road. Respondent No.1 did not appear before the learned Tribunal. No steps were taken by respondent No.1 to explain that in what circumstances accident occurred. Criminal case was registered under Section 304-A of IPC of which outcome is not known to any of the parties. It has also come on record that accident occurred when deceased tried to overtake the truck and the respondent No.1 turned the vehicle towards road side. It appear that in the facts and circumstances of the case contributory negligence on the part of the deceased could be assessed @ 25% instead of 50%. So far as exoneration of respondent No.3 is concerned, undoubtedly, respondent No.1 was not possessing valid license to drive the offending vehicle. Respondent No.1 was having license, which was expired prior to accident and was renewed after the accident. In the matter of *National Insurance Co.Ltd. Vs. Swaran Singh,* reported in 2004 ACJ 1, Hon'ble Apex Court observed that the breach of policy conditions, e.g., disqualification of driver or invalid driving license of the driver, as contained in sub-Section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving license

or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

7. In the matter of of *Ram Babu Tiwari Vs. United india Insurance Co.Ltd.*, reported in 2008 AIR SCW 6512, wherein driver of offending tractor was not having valid license from the time when accident took place and was not renewed within 30 days from the date of expiry, Hon'ble Apex Court held that renewal of license would not take effect from retrospective date but from the date of its renewal and breach of contract of insurance is thus established insurer is not liable to indemnify insured.

8. Insurance Company has examined Atul Jain who is Administrative Officer posted at Rewa. In his statement he has stated that respondent No.1 was the driver of the vehicle, who was having the license, which was issued on 15/09/09. He has further stated that respondent No.1 was possessing the old license on the basis of which new license was issued w.e.f. 15/09/09 to 14/09/2012. The old license which the respondent No.1 was possessing was from 31/05/02 to 30/05/07. Since the date of accident is 26/06/09 and new license was issued on 15/09/09, therefore, undisputedly respondent No.1 was not possessing the valid driving license to drive the offending vehicle on the date of accident. Since Deepak Singh was third party, therefore, even if respondent No.1 was not possessing valid driving license, then too, respondent No.3 could not have been exonerated on that account. At the most right of recovery could have been given to respondent No.3 as respondent No.1 was not possessing valid driving license on the date of accident. Since the liability of respondent No.4 was limited to the extent of Rs. 1,00,000/-, therefore, learned Tribunal has rightly held the respondent No.4 liable to that extent. Since deceased Deepak Singh was on motor bike when accident took place and respondent No.1 remained ex-parte and also criminal case was registered against respondent No.1 for an offence punishable under Section 304-A of IPC, of which outcome is not known to any of the party, this Court finds that the learned Tribunal was not justified in holding the deceased liable to the extent of 50%. However, at the same time it can safely be said that the accident could have been avoided, if the deceased would have fully concious. In the

facts and circumstances of the case negligence on the part of deceased which is assessed as 50% is reduced to 25%. Thus, appellants are entitled for a sum of Rs.3,23,750/- instead of Rs.2,22,500/-, out of which respondent No.4 shall be liable to pay to the extent of Rs.1,00,000/- and balance amount of Rs.2,33,000/- shall be payable by respondent Nos. 1 to 3. Respondent No.3 shall have right to recover the same from respondent Nos. 1 & 2. The amount shall carry interest at the same rate as awarded by the learned Tribunal.

9. The amount awarded shall be deposited by the respondent Nos. 3 & 4 with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant No.1 in the nearest Nationalized Bank, in the area where the appellant No.1 is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant No.1, which shall be opened by the appellant No.1 from where appellant No.1 can withdraw the amount as per her needs. However, on an application by the appellant No.1 this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant No.1. Since no amount has been enhanced by this Court and it is only percentage of contributory negligence of the deceased is reduced from 50% to 25%, therefore, no Court fee is payable on that account.

10. With the aforesaid observations, appeal stands disposed of.

Appeal disposed of.

I.L.R. [2013] M.P., 909
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A.No. 4057/2009 (Jabalpur) decided on 6 March, 2013

SHYAMA MALVIYA (SMT.) & ors. ...Appellants
Vs.
MUKESH KUMAR GOYAL & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 163 - Compensation - Thumb Rule **- Deceased aged about 52 years - Thumb Rule is to be applied to those cases where there is no concrete evidence on record of definite rise in income due to future prospects - It can be deviated from in exceptional circumstances where income of deceased was found to increase. (Para 6)**

मोटर यान अधिनियम (1988 का 59), धारा 163 – प्रतिकर – व्यावहारिक नियम – मृतक की उम्र करीब 52 वर्ष – व्यावहारिक नियम उन प्रकरणों में लागू किया जाना चाहिए जहां अभिलेख पर भविष्य की संभावनाओं के कारण आय में निश्चित बढ़ोत्तरी का कोई ठोस साक्ष्य नहीं – अपवादक परिस्थितियों में उससे हटकर विचार किया जा सकता है जहां मृतक की आय में बढ़ोत्तरी पायी जाती है।

Cases referred :

(2009) 6 SCC 121, (2011) 4 SCC 689.

Vishal Dhagat, for the appellants.
Dinesh Koushal, for the respondent No.3.

ORDER

N.K. Mody, J.: This is an appeal filed by the claimants under Section 173 of the Motor Vehicles Act against an award dated 16.7.2009 passed by 1st MACT, Hoshangabad in claim case No.82/2008. By impugned award, the Claims Tribunal has awarded a total sum of Rs. 11,74,552/- with interest to the claimants for the death of one Kailash, who died in vehicle accident. According to claimants, the compensation awarded is on lower side and hence, need to be enhanced. It is for the enhancement in the compensation awarded by the Tribunal, the claimants have filed this appeal. So the question that arises for consideration is whether any case for enhancement in compensation awarded by the Tribunal on facts / evidence adduced is made out in the compensation awarded and if so to what extent?

2. It is not necessary to narrate the entire facts in detail, such as how the accident occurred, who was negligent in driving the offending vehicle, who is liable for paying compensation etc. It is for the reason that firstly all these findings are recorded in favour of claimants by the Tribunal. Secondly, none of these findings though recorded in claimants' favour are under challenge at the instance of any of the respondents such as owner/driver or insurance company either by way of cross appeal or cross objection. In this view of the matter, there is no justification to burden the judgment by detailing facts on all these issues.

3. As observed supra, it is a death case. On 3.3.2008, Kailash aged 52 years, met with a motor accident and died, giving rise to filing of claim petition by legal representatives (appellants herein) out of which this appeal arises seeking compensation for his death. The case was contested by the respondents. Parties adduced evidence. The Claims Tribunal by impugned award partly allowed the claim petition filed by claimants and as stated supra,

awarded a sum of Rs.11,74,552/-.

4. Learned counsel for the appellants submits that the learned tribunal assessed the income of the deceased @ Rs. 12,586/- per month and after deducting 1/3rd towards personal expenses applied the multiplier of 11. It is submitted that the income of the deceased is assessed on lower side and on other heads also amount awarded is on lower side. It is submitted that learned Tribunal committed error in not taking further prospects into consideration. It is submitted that the appeal filed by the appellants be allowed and the amount of compensation be enhanced.

5. Learned counsel for Insurance Company submits that the amount awarded by the learned Tribunal is just and proper and no case for enhancement is made out. It is submitted that since deceased was above 50 years in the age group of 52-53 years, therefore, for future prospects the law laid down in the matter of *Sarla Verma Vs. Delhi Road Transport Corporation,* reported in (2009) 6 SCC 121, deals with future prospects in the cases, where age of the deceased is below 50 years. It is submitted that the appeal be dismissed.

6. In the matter of *K.R. Madhusudan Vs.Administrative Officer,* reported in (2011) 4 SCC 689, the Hon'ble Apex Court had an occasion to re-consider the judgment rendered in the matter of *Sarla Verma* and also in the matter of *Sarla Verma* the Hon'ble Apex Court has held that there should not be any addition where age of the deceased was more that 50 years. It was further held that rule of thumb is to be applied to those cases where there is no concrete evidence on record of definite rise in income due to future prospects. It was further held that it can be deviated from in exceptional circumstances where income of deceased was found to increase.

7. After going through the above position of law, this Court finds that it is not a case, which comes under the purview of exceptional circumstances, therefore, thumb rule has to be applied. However, a case for enhancement is made out and the same is enhanced by Rs.50,000/-.

8. Thus, the appellants are entitled for a total sum of Rs. 12,24,552/- instead of Rs.11,74,552/-.The enhanced amount of Rs.50,000/- shall carry interest @ 8% p.a. from the date of application. The cross objections filed by the respondent No.3 stands dismissed.

9. With the aforesaid modification the appeal stands disposed of.

Appeal disposed of.

I.L.R. [2013] M.P., 912
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
Cr. A. No. 2017/1997 (Jabalpur) decided on 29 November, 2012

VIRENDRA SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 306 - Abetment to commit suicide **- Evidence of Sister with regard to cruelty and harassment due to non-satisfaction of demand for watch and cycle did not find place in police statements - Parents of the deceased not examined - Independent witness stated that the deceased and her devrani had run away from the house after taking all their ornaments - Both were reprimanded by appellant and co-villagers and therefore, deceased committed suicide by feeling ashamed for the misconduct - Conviction of appellant under Section 306 not sustainable. (Paras 9 & 10)**

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या कारित करने का दुष्प्रेरण – घड़ी एवं साईकिल की मांग को पूरा न किये जाने के कारण क्रूरता एवं उत्पीड़न के संबंध में बहिन का साक्ष्य पुलिस अभिकथन में नहीं पाया गया – मृतिका के माता–पिता का परीक्षण नहीं – स्वतंत्र साक्षी का कथन कि मृतिका एवं उसकी देवरानी अपने सारे जेवर लेने के बाद घर से भागीं – अपीलार्थी एवं गांव वालों ने, दोनों की भर्त्सना की और इसलिए मृतिका ने अपने दुराचरण के लिये शर्मिंदगी महसूस करने के कारण आत्महत्या की – धारा 306 के अंतर्गत अपीलार्थी की दोषसिद्धि कायम रखने योग्य नहीं।

Cases referred :

1995 Supp.(3) SCC 731, AIR 2005 SC 3100.

A. Usmani, for the appellant.
Ajay Tamrakar, P.L. for the respondent.

J U D G M E N T

R.C. Mishra, J. :- This appeal has been preferred against the judgment-dated 11.9.1997 passed by Fourth Additional Sessions Judge, Chhatarpur in S.T. No.79/97, whereby the appellant has been convicted and sentenced as under -

Convicted under Sections	Sentenced to under-
498A of the IPC	undergo R.I. for 1 year and to pay a fine of Rs.500/- & in default, to suffer R.I. for 2 months.
306 of the IPC	undergo R.I. for 3 years and to pay a fine of Rs.1000/- & in default, to suffer R.I. for 6 months.

With the direction that the jail sentences shall run concurrently

2. The appeal, so far as it relates to other appellant Laxmi Bai, has abated consequent to her death during pendency thereof.

3. Prosecution story, in short, may be narrated as under -

> "Guddo Bai @ Durgesh Nandini (since deceased), a resident of Damoh, was the daughter of Munna Singh & Tulsa Bai and younger sister of Sulekha (PW5). Her marriage was solemnized with the appellant on 29.5.1994. Her matrimonial life was not happy and cheerful as she had been persistently subjected to cruelty and harassment by the appellant and his mother Laxmi Bai. She was made to starve and work hard. Ultimately, on 20.10.1996, in a seriously burnt condition, Guddo's dead body was found in Kotha (room) of appellant's house only. Cause of her death was ascertained as shock due to ante-mortem burns.

4. The appellant pleaded false implication at the instance of Sulekha (PW5) who, according to him, had demanded money for not speaking against him. In the examination, under Section 313 of the Code of Criminal Procedure, he further asserted that his marriage with Guddo had taken place nearly 8 years prior to the incident. To substantiate the defence, he preferred to examine only himself as a witness. His statement also contained an explanation that Guddo had accidentally sustained burn injuries while cooking.

5. Legality and propriety of the impugned convictions have been challenged on the ground of what has been termed as mis-appreciation of the evidence on record. According to learned counsel, none of the convictions is sustainable in law in view of the following facts -

(i) Parents of the deceased, whose case diary statements

were recorded by Investigating Officer Bhaskar Datt Tripathi (PW8) on 22.10.1996, were not even cited as witnesses in charge sheet.

(ii) Probable cause of the suicide, not attributable to the appellant, was given by none other than Kripal Singh (PW1), the Sarpanch of Gram Panchayat.

(iii) No external injury on the body of Guddo was noticed by Autopsy Surgeon Dr. R.C. Malarya (PW4) and availability of undigested and digested food in the intestine was sufficient to belie the allegation as to starvation.

In response, learned Panel Lawyer, while making reference to the incriminating pieces of evidence, has submitted that the convictions are well founded.

6. In order to appreciate the merits of the rival contentions in a proper perspective, it is necessary to first advert to the medical evidence as well as to the nature of death.

7. Dr. R.C. Malarya (PW4) testified that the autopsy was conducted by a panel comprising himself as well as Dr. Smt. Sushma Khare. He further reiterated these findings, as recorded in the post mortem report (Ex.P-4) -

(a) Guddo's dead body was having pugilistic appearance and burns to the extent of 90% were found thereon.

(b) No external injury was found on the body of Guddo.

(c) Mode of death was shock caused by ante-mortem burns.

Correctness of this opinion was not questioned by the defence. Further, no suggestion was made that death of Guddo was accidental in nature. As reflected in the inquest panchnama (Ex.P-1) and spot map (Ex.P-11) prepared respectively by B.P. Pavaiya (PW7), the SDO(P) and Bhaskar Datt (PW8), the investigating officer, Guddo's dead body was not found in the kitchen. In the face of these surrounding facts and circumstances of the case, learned trial Judge did not commit any error in holding that it was a case of suicide.

8. Adverting to the other incriminating evidence on record, it may be observed that Sulekha (PW5) was not cross-examined in respect of her

assertion that marriage of Guddo was solemnized with the appellant nearly 2 years prior to her untimely death. It could, therefore, easily be concluded that appellant's statement on oath suggesting that a period of more than 8 years had already elapsed after the marriage was apparently an afterthought.

9. According to Sulekha, during their meeting at Chitrakoot on the occasion of *Somwati Amavasya,* Guddo revealed as to how she had been persistently subjected to cruelty and harassment by the appellant and his mother Laxmi Bal due to non-satisfaction of demand for a watch and a cycle in dowry and even made to starve for days together. However, these allegations did not find place in her police statement (Ex.D-1) recorded on 5.2.97 i.e. nearly 2½ months after the untimely death of Guddo. Further, charge sheet submitted after due investigation did not relate to the offence under Section 304B of the IPC. Moreover, Kripal Singh (PW1) clearly stated that no custom of dowry was prevalent in the Society to which the appellant belong. As pointed out already, the parents of the deceased, who could be the best witnesses to describe the instances of cruelty meted out to her in the matrimonial home, were not examined. Amongst the neighbours, only Kripal Singh (PW1) was produced in evidence and he did not state any incriminating fact against the appellant. According to him, -

(a) On the preceding day only, Guddo and her Devrani known as Revnawali, after taking all their ornaments, had run away from matrimonial home.

(b) On being brought back from Chandla by Bhawanideen, deputed by him only for the purpose, both Guddo and Revnawali were reprimanded by him and the co-villagers.

(c) Feeling ashamed for the misconduct, Guddo had committed suicide by setting herself ablaze.

10. To sum up, the statutory presumption under Section 113-A of the Indian Evidence Act was applicable to the facts and circumstances of the case as the marriage was less than seven years old yet, there was no evidence as to any proximate direct or indirect cause attributable to the appellant that could drive Guddo to take the extreme step of self-immolation. In such a situation, the conviction of the appellant under Section 306 of the IPC merely on the allegation of harassment to the deceased was not sustainable *(Mahendra Singh v. State of M.P.* 1995 Supp (3) SCC 731 referred to).

11. However, acquittal of the appellant of the offence under Section 306 would not, by itself, be sufficient to record the finding of not guilty in respect of the offence under Section 498A of the IPC in view of the basic difference that under the former, the suicide is abetted and intended whereas under the latter, cruelty drags the women to commit suicide (See. *Sushil Kumar Sharma v. Union of India* AIR 2005 SC 3100).

12. Sulekha (PW5) clearly deposed that Guddo had vividly described the cruel treatment meted out to her at the hands of the appellant. Nothing could be elicited in her cross-examination so as to suggest that she was, in any way, interested in securing conviction of the appellant on absolutely false grounds. For want of corresponding suggestion in her cross-examination, the story that she had demanded money for keeping quiet was rightly rejected as concocted one. This apart, her act of leaving the matrimonial home also warranted irrestible inference that Guddo had been subjected to cruelty within the meaning of Section 498A of the IPC. The conviction under this penal provision deserves to be affirmed as well merited for the reasons mentioned above.

13. Coming to the question of sentence, it may be observed that a considerable period of more than 16 years has already elapsed after the incident in question and meanwhile, the appellant has already suffered imprisonment for nearly 9 months. As such, no useful purpose would be served by sending the appellant back to jail for undergoing remaining part of sentence.

14. Consequently, the appeal is allowed in part. In the result -

(i) The conviction of the appellant under Section 306 of the IPC and consequent sentences are hereby set aside. Instead, the appellant is acquitted of the offence.

(ii) His conviction under Section 498-A of the IPC is maintained but the term of custodial sentence is reduced to the period already undergone by him and the amount of fine is enhanced from Rs.500/- to Rs.1500/- with the stipulation that in default, he would suffer imprisonment for a period of 3 months.

Needless to say that the amount of fine already deposited shall be adjusted against the fine hereby enhanced.

Appeal partly allowed.

I.L.R. [2013] M.P., 917
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr. A. No. 181/2004 (Jabalpur) decided on 23 January, 2013

BHURIA & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 32 - Dying Declaration - **Deceased suffer 45 injuries including gun shot injuries thereby sustaining fatal injuries to the internal organs - Deceased died because of excessive haemorrhage from injuries - It would not be safe to place reliance on the oral dying declaration by holding that deceased was in fit state of mind and body to make a dying declaration. (Para 22)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृतक ने 45 क्षतियां सहन की जिसमें गोली के घाव समाविष्ट हैं जिससे उसने आंतरिक अंगों की घातक क्षतियां सहन की – मृतक की मृत्यु घावों से अत्याधिक रक्तस्त्राव के कारण हुई – यह धारणा करते हुए कि मृतक मृत्युकालिक कथन करने के लिए उचित मानसिक एवं शारीरिक स्थिति में था, मौखिक मृत्युकालिक कथन पर विश्वास करना सुरक्षित नहीं होगा।

B. Penal Code (45 of 1860), Sections 149 & 302 - Murder - Common Object - **P.W. 4 had admonished accused No. 9 when he went to site and asked his labourers to discontinue work - This provoked the accused persons to teach a lesson to P.W. 4 and therefore, the common object of the assembly was to commit murder of P.W. 4 - However, deceased was attacked when he was seen with P.W. 4 who escaped unhurt - It cannot be said that the common object of the assembly was to commit murder of deceased - Appellants No. 1, 3, 5, 7 & 8 were unarmed and did not cause any injury - It cannot be said that appellants No. 1, 3, 5, 7, & 8 had shared common object to kill the deceased - Appeals of Appellants No. 1, 3, 5, 7 & 8 are allowed and they are acquitted - Conviction and sentence of remaining appellants who had actually caused injuries to the deceased are maintained - Appeal partly allowed. (Paras 25 to 28)**

ख. दण्ड संहिता (1860 का 45), धाराऐं 149 व 302 – हत्या – सामान्य उद्धेश्य – अ.सा. 4 ने अभियुक्त क्र. 9 को डांटा जब वह मौके पर गया और उसके

मजदूरों से काम रोकने को कहा – इससे अभियुक्तगण, अ.सा. 4 को सबक सिखाने के लिए उत्तेजित हो गये और इसलिए जमाव का सामान्य उद्देश्य अ.सा. 4 की हत्या कारित करने का था – किन्तु मृतक पर हमला किया गया जब वह अ.सा. 4 के साथ देखा गया जो बिना चोट बच निकला – यह नहीं कहा जा सकता कि जमाव का सामान्य उद्देश्य मृतक की हत्या कारित करना था – अपीलार्थी क्र. 1,3,5,7 व 8 निशस्त्र थे और उन्होंने कोई चोट कारित नहीं की – यह नहीं कहा जा सकता कि अपीलार्थी क्र. 1,3,5,7 व 8 का सामान्य उद्देश्य मृतक को जान से मारना था – अपीलार्थी क्र. 1,3,5,7 व 8 की अपीलें मंजूर और उन्हें दोषमुक्त किया जाता है – शेष अपीलार्थीगण की दोषसिद्धि व दंडादेश, जिन्होंने वास्तविक रुप से मृतक को क्षतियां कारित की, कायम रखा जाता है – अपील, अंशतः मंजूर।

Cases referred :

AIR 1983 SC 554, AIR 1984 SC 1717, AIR 1989 SC 1456.

Sharad Verma, for the appellants No. 1 to 7 & 9.
Manoj Mishra, for the appellant No.8.
Umesh Pandey, G.A. for the respondent/State.
Gitesh Singh Thakur, for the complainant.

JUDGMENT

The Judgment of the Court was delivered by :

RAKESH SAKSENA, J. :- Appellants have filed this appeal against the judgment dated 19.12.2003, passed by First Additional Sessions Judge, Chhatarpur, in Sessions Trial No.127/1992 convicting them under Sections 302/149 and 148 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs.2000/- and rigorous imprisonment for three years with fine of Rs.500/-, on each count respectively.

2. In short, the prosecution case is that on 23.4.1992 when complainant Sudhir Singh (PW-4) was getting some rehabilitation work done at Banshiya-Bhura Purwa passage by labourers, accused Mahendra reached there and asked labourers to discontinue work there by next day and to work at his godown. Sudhir remonstrated Mahendra Singh saying that he should not come to his site. After a hot altercation, Mahenera went towards village threatening Sudhir to stay there, saying that he would come back with Rajaram. In the evening, at about 4.30 pm, uncle of Sudhir viz. Chunni, while returning from village Chandla, met Sudhir and both of them started proceeding towards village on a bicycle. Chunni was driving the bicycle and Sudhir Singh was sitting on its carrier. At about 5 O'clock, when they reached near the godown,

accused persons came there in a tractor from the front side. They were armed with guns, spears and Lathis. The tractor was being driven by accused Chhota. As soon as tractor reached near, accused persons started alighting from it. Rajaram exhorted accused Dhillu @ Ram Vishal to assault them. Sudhir jumped from the bicycle and ran away. While Chunni was turning his bicycle back, Dhillu @ Ram Vishal fired a shot from his rifle, which hit in the abdomen of Chunni. Other accused persons also rushed towards Chunni and assaulted him with Lathi, Ballam and feet. When Sudhir asked them not to beat Chunni, some of the accused persons ran after him, therefore, he moved away from there. Sudhir Singh (PW-5), who was at his threshing floor and Ram Bahadur Singh, who was coming from the side of village also shouted, but accused persons intimidated them, therefore, they did not interfere. Complainant Sudhir (PW-4) went running to his village and informed his father Himmat Singh (PW-12), who alongwith Sudhir (PW-4) and other persons reached the spot, where Chunni was lying in injured condition. On way, they saw accused persons going in their tractor towards village Harrai. When Himmat Singh and other persons reached at the spot, Chunni narrated the incident to them. While they were taking Chunni to Police Station, Chandla, on way he died. They carried dead body to police station where Sudhir (PW-4) lodged first information report (Ex.P/3) at 7.15 pm.

3. Investigating Officer Devesh Kumar Pathak (PW-13), after inquest, sent the body of Chunni for postmortem examination to PHC Chandla where Dr. M.K. Prajapathi (PW-9) conducted postmortem examination and found about 46 injuries on the body of deceased including gun shot and stab wounds vide his postmortem examination report Ex.P/7.

4. During investigation, spot map was prepared, statements of witnesses were recorded, accused persons were arrested and at their instance weapons of offence were recovered.

5. After investigation, charge sheet was filed against 11 accused persons. Two of the accused persons viz. Rajaram and Ram Kishore @ Raju however died during trial.

6. On charges being framed, accused persons abjured their guilt and pleaded false implication due to enmity.

7. Upon trial and after appreciating the evidence adduced by prosecution, learned trial judge held the accused persons guilty, convicted and sentenced

them as aforesaid. Being aggrieved by their conviction and sentence, appellants have filed this appeal.

8. Learned counsel for the appellants submitted that the evidence of alleged eyewitnesses viz. Sudhir (PW-4) and Sudhir Singh (PW-5) was not reliable. It was not possible for them to have witnessed the incident. Similarly, the evidence of Jaikaran Singh (PW-2) and Himmat Singh (PW-12) in regard to the oral dying declaration allegedly made by deceased to them was not reliable. It was not possible for deceased to have made such dying declaration in view of the serious nature of injuries suffered by him. Learned counsel further submitted that since accused Chhota, who is alleged to have been driving the tractor and accused Bhuria, Abbu, Natthu and Prakash who are not stated to have wielded any weapon in the first information report, could not have been held to have shared common object of the assembly for committing murder of deceased. Learned trial judge since misappreciated the evidence in this regard, their conviction deserved to be set aside. On the other hand, learned counsel for the State submitted that the evidence of eyewitnesses as well as of witnesses who deposed about the dying declaration was reliable. The impugned judgment of conviction was just and proper, as such did not call for any interference.

9. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

10. It has not been disputed by the learned counsel for the appellants that the deceased died of a homicidal death. It has been deposed by Sudhir Singh (PW-4), Sudhir Singh (PW-5), Jaikaran Singh (PW-2) and Himmat Singh (PW-12) that deceased suffered injuries and died while being taken to police station. First information report (Ex.P/3) was lodged by Sudhir Singh (PW-4). Inspector Devesh Kumar Pathak (PW-13), after conducting inquest, sent dead body of deceased for postmortem examination to PHC Chandla. Dr. M.K. Prajapati (PW-9) performed postmortem examination of the body and found 46 injuries on it. The injuries comprised of one entry and exit wound of firearm, 4 lacerated wounds, 3 stab wounds, 26 contusions and 11 abrasions. These injuries were caused by firearm, stabbing object and hard and blunt objects. On internal examination, PW-9 found fracture of frontal and parietal bones, fracture of radius and ulna bones of right hand, fracture of tibia bone of left leg and breaking of costal margin. By the entry wound of gun shot on right side of the chest, ribs of the right side were broken, lung was ruptured

and the omentum was coming out from the exit wound. A piece of bullet or pallet was recovered by him from the lacerated part of liver. In his opinion, the cause of death was shock due to excessive bleeding from the injuries caused by firearm and other weapons.

11. From the aforesaid evidence it has been undoubtedly established that deceased met with a homicidal death.

12. Now the question before us is whether the appellants have been rightly convicted for committing the murder of deceased.

13. The prosecution case rested on the evidence of two eyewitnesses viz. Sudhir (PW-4) and Sudhir Singh (PW-5) and the oral dying declaration made by deceased to Himmat Singh (PW-12) and Jaikaran Singh (PW-2).

14. Sudhir Singh (PW-4) stated that Chunni Singh, the deceased, was his uncle. In the month of April he had taken a contract for putting soil on the passage between Banshiya and Bhura Purwa. On the day of occurrence, labourers viz. Sadhu, Pancha, Ram Ratan, Babu and Chutua were throwing soil. At about 3.00 O'clock, accused Mahendra Agnihotri came there and asked labourers to not to work there and to work at his godown from the next day. When he admonished Mahendra that he should not come to his site and he should go, Mahendra went to his village threatening him that he would come back with Rajaram. At about 4.00 O'clock when his uncle came, he alongwith his uncle proceeded back to his village on his bicycle. He was sitting on the carrier and uncle was driving bicycle. As soon as they reached near the godown, they saw the tractor of accused Rajaram approaching towards them. Tractor stopped near them and accused Rajaram exhorted Dhillu @ Ram Vishal to kill him. He jumped from the bicycle and ran away. Ram Vishal fired gun shot from his rifle at deceased. From some distance he saw the incident. According to him, the tractor was being driven by accused Chhota Agnihotri. Ram Vishal and Ram Sharan were sitting on its mudguards having rifle and a Ballam. Other accused persons viz. Rajaram, Chhutta, Mahendra, Raju, Bhuria, Abbu, Prakash and Natthu were present in the trolley attached with the said tractor. Rajaram and Chhutta were armed with Ballams. Mahendra had 12 bore gun whereas others had Lathis. After the gun shot fired by Ram Vishal hit Chunni, all the accused persons rushed towards Chunni and assaulted him by their respective weapons. When he asked accused persons to refrain from assaulting Chunni, accused Mahendra, Bhuria and Chhota ran after him to beat, whereupon he ran away but stopped on the

other side of a culvert and saw accused persons assaulting Chunni. At the time of occurrence, Sudhir Singh (PW-5) was also present at his threshing floor and had seen the occurrence. After the incident he went to his house and informed the incident to his father Himmat Singh. He, his father,uncle Jaikaran and Kuber then proceeded for the spot in a tractor. On way they saw accused persons going on their tractor trolley towards village Harrai. When they reached near Chunni, he was alive. Chunni narrated the incident to Himmat Singh, Jaikaran Singh and Kuber Singh. They carried Chunni in the tractor to Police Station, Chandla, but, on way, he expired. At police station, he lodged first information report (Ex.P/3). He further stated that when they alongwith investigating officer came back to spot, the bicycle of deceased was not there. The same was later on recovered from the possession of accused Rajaram.

15. Learned counsel for the appellants submitted that the evidence of Sudhir Singh (PW-4) was not reliable because his presence with the deceased was doubtful. If the dispute of accused persons in respect to labourers was with Sudhir Singh (PW-4), there was no reason for them to have assaulted deceased. Learned counsel further submitted that if at all this witness was present at the spot, accused persons would not have left him alive. In fact deceased was killed by some unknown persons and when his dead body was found, false evidence was created by this witness (PW-4).

16. Sudhir Singh (PW-4) was subjected to a very lengthy cross-examination, but nothing could be elicited out to indicate that he was not present at the place of occurrence. He categorically stated that when he alongwith deceased was going on the bicycle, as soon as he saw tractor of accused persons approaching towards them, and Rajaram shouting, he jumped from the bicycle and ran away. He stated that shot of the rifle fired by the accused Dhillu @ Ram Vishal hit deceased from a distance of 20-22 cubit. It was quite reasonable that by the time other accused persons alighted from the tractor and reached near deceased, he could have run away to some distance to reach a safe place. Though there appeared no apparent evidence about the motive on the part of the accused persons to kill the deceased, but it was categorically stated that Dhillu @ Ram Vishal fired gun shot from a distance of 22 cubit, at deceased. Since many times motive lies hidden in the heart of an offender, it may not be proved by direct evidence, but in a case of direct evidence, the lack of evidence in respect of motive does not affect the prosecution case. It was quite natural for Sudhir Singh (PW-4) to have seen the incident from some distance, as his uncle was being assaulted. Merely by

the fact that this witness managed to escape and did not interfere or tried to save the deceased, his presence cannot be doubted. The evidence of this witness finds corroboration from the first information report (Ex.P/3) lodged by him soon after the occurrence and also by the medical evidence of Dr. M.K. Prajapati (PW-9) who found one gun shot, 3 stab and about 40 other injuries caused by hard and blunt objects on the body of deceased.

17. Another eyewitness Sudhir Singh (PW-5) stated that at the time of occurrence he was present in his Khalihan (threshing floor). He saw all the accused persons coming in a tractor trolley. The said tractor was being driven by Chhota Agnihotri. When Sudhir Singh and Chunni came on a bicycle, accused Rajram raised a '*Lalkar*' to Dhillu *"Maar sale ko bhaga ja raha hai'*. Dhillu @ Ram Vishal jumped from the tractor and fired at Chunni. Other accused persons also alighted from the tractor and went near Chunni. In the meantime, Sudhir, who was sitting on the carrier of bicycle, jumped and ran back. He stayed near a culvert and shouted not to kill his uncle. When some of the accused persons tried to run after him, he ran away. After some time, Himmat Singh, Jaikaran Singh, Sudhir Singh s/o Himmat Singh and Kuber Singh came on a tractor where injured Chunni Singh was lying. He also went at the spot. At that time Chunni Singh was alive and moaning. He stated that he saw the incident from a distance of about 60-70 paces, but he could not see as to at which part of the body of deceased Rajaram dealt the blow of Ballam.

18. Learned counsel for the appellants referring to the evidence of Shivdatt Patwari (PW-8) stated that it was not possible for Sudhir Singh (PW-5) to have seen the occurrence as there were shrubs between his Khalihan and the place of occurrence. We are unable to accept the submission made by the learned counsel for the appellants because this fact was not suggested to Sudhir Singh (PW-5) in cross examination and further because in the map (Ex.P/6) prepared by Patwari (PW-8) no shrubs were shown at or near about the place of occurrence. The presence of Sidhir Singh (PW-5) at his Khalihan, which was not far away from the place of occurrence, appeared natural. The evidence of this witness stood corroborated from the evidence of Sudhir Singh (PW-4) and also from the fact that his name was mentioned by Sudhir (PW-4) in the first information report (Ex.P/3).

19. Himmat Singh (PW-12), the brother of Chunni Singh, stated that at about 5.00 O'clock in the evening when he was at his house, his son Sudhir

Singh came running and informed him that accused persons were bent upon killing Chunni. He then alongwith his brother Jaikaran, sons Kuber and Sudhir went in a tractor trolley towards godown. As soon as they came out of village, they saw accused persons going in a tractor trolley towards village Harrai. When they reached near Chunni, who was lying on the way, they saw injuries on his body. He was alive. He told to them that accused persons came in a tractor trolley, Ram Vishal fired gun shot at him and others assaulted him with Ballam, Lathis and the butt of gun. When they were carrying him in the tractor for treatment, on way he died. All of them then went to Police Station Chandla where his son Sudhir lodged report. Similar statement was given by Jaikaran Singh (PW-2), another brother of deceased.

20. Learned counsel for the appellants placing reliance on the case of *Darshan Singh and others v. State of Pun*jab-AIR 1983 SC 554 submitted that since deceased had suffered serious gun shot and number of other serious and bleeding injuries, it was not possible for him to speak. In fact he was already dead. The evidence of dying declaration was fabricated by the brothers of deceased due to enmity. Learned counsel referring to the police statement of Himmat Singh (Ex.D/4) submitted that the name of accused Ram Sharan was not disclosed by him in the police statement whereas he improved before the Court in naming Ram Sharan also. Learned counsel also pointed out that Himmat Singh did not mention in Ex.D/4 that Jaikaran Singh (PW-2) accompanied him when he went to spot.

21. In case of *Darshan Singh* (supra) Apex Court held that the conviction can rest on a dying declaration if it inspires confidence. When from the medical evidence it is found that vital organs of the deceased like peritoneum, stomach and spleen were completely smashed, he cannot be said to be in a fit state of mind and body to make any kind of coherent or credible statement relating to the circumstances which resulted in his death. Therefore, his dying declaration could not be relied upon.

22. On perusal of the evidence of Dr. M.K. Prajapati (PW-9) it is apparent that about 45 injuries were found on the body of deceased. Because of gun shot injury on the right side of chest, his ribs were broken. Lung was ruptured. His diaphragm and intestines were ruptured. Small intestine and liver was also ruptured. The membranes were lacerated. Frontal and parietal bones of skull were broken and bones of hands and leg were also fractured. The deceased had died because of excessive haemorrhage from the injuries caused by firearm

as well as other injuries. Apart from gun shot injury, he had also suffered three stab injuries on the leg and numerous injuries on other parts of his body. In these circumstances, in our opinion, it would not be safe to place reliance on the evidence of the said oral dying declaration by holding that deceased was in fit state of mind and body to make a dying declaration or that he was alive. No doubt eyewitnesses viz. Sudhir Singh (PW-4) and Sudhir Singh (PW-5) stated that by the time Himmat Singh and Jaikaran Singh reached the place of occurrence, deceased was alive and had narrated the incident to them, but it seems sheer exaggeration by them.

23. Learned counsel for the appellants placing reliance on the ratio of Apex Court in the case of *Dajya Moshya Bhil and others v. State of Maharashtra*-AIR 1984 SC 1717 submitted that since appellants Chhota Bhuria, Abbu, Natthu and Prakash were empty handed and did not cause any injury to deceased, it could not held that they were aware of the intention of remaining accused persons to kill the deceased. In the circumstances of the occurrence, it was also not possible for them to know that others had an object to cause death of deceased. As such, their conviction under Section 302/149 IPC was not justified. Learned counsel for the State, per contra submitted that from the very fact that all the accused persons came together in a tractor, some of whom were armed with deadly weapons including guns, it could be inferred that the common object of assembly was to commit murder of deceased.

24. In case of *Dojya Moshya Bhil* (supra) the Apex Court while considering the liability of appellants 2 and 3 in the case observed that even though they came unarmed when they chased deceased with appellant 1, who was armed with a Dharya a weapon of cutting and pelted stones, an inference of common intention being formed on the spur of moment cannot be made. The fact that appellant 1 was armed with a Dharya and appellants 2 and 3 pelted stones causing injuries may permit all inference that appellants 2 and 3 could have shared the common intention with appellant 1 of causing grievous hurt to deceased. Therefore in the circumstances, the minimum common intention that can be attributed to appellants 2 and 3 is one of causing grievous hurt with a sharp-cutting weapon like a dharya. Thus appellants 2 and 3 are shown to have committed all offence under S. 326 read with S. 34 of the Penal Code and they should be convicted accordingly.

25. It is true that appellants in the case in hand have been convicted under

Section 302 read with Section 149 of the Indian Penal Code, but if the evidence of complainant Sudhir Singh (PW-4) is carefully scrutinized, it can be seen that in the first information report he attributed no weapons to aforesaid five accused persons. Accused Chhota was driver of the tractor whereas Bhuria, Abbu, Natthu and Prakash were unarmed. He, in the court, however, improved and stated that they were armed with Lathis. Other witness Sudhir (PW-5) also stated that these accused persons were armed with Lathis. But, since these accused persons were stated to be unarmed in first information report (Ex.P/3), in our opinion, it would be safer to hold that they had no weapons and they did not cause any injury to deceased. We, however, find it established that remaining other accused who were armed with guns, Ballam and sticks caused injuries to deceased as a result of which he died.

26. Now the question before this Court would be whether accused Chhota, Bhuria, Abbu, Natthu and Prakash would be liable for committing murder of deceased vicariously for the acts done by other accused persons. The Apex Court for such a situation, in case of Allauddin Mian and others, *Sharif Mian and another v. State of Bihar*-AIR 1989 SC 1456 observed:-

> "In order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other members or members of that assembly provided the same is/ are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in

carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of S. 149. It is not the intention of the legislature in enacting S.149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke S. 149 it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

* * *

Where the common object of the unlawful assembly was to kill the father of the deceased girls and on frustration of that object in consequence of the father who had gone inside the house to fetch a spear, having been prevented from coming out of the house, two of the accused killed the deceased, other accused could not be punished for the acts of killing for accomplishing the common object it was not necessary to kill the two girls who were not hindrance to accused in question from accomplishing their common object.

27. Keeping in view the ratio of the aforesaid Apex Court's decision, if we analyze the situation occurring in the instant case, it can be readily inferred that the cause of incident was that Sudhir Singh (PW-4) had admonished accused Mahendra when he went to his site and asked his labourers to

discontinue work there. This, in all probability, infuriated accused Mahendra who challenged him that he would come back with Rajaram. If this was the cause, which provoked accused persons to teach a lesson to Sudhir, the common object of the assembly formed by them must be to commit murder of Sudhir Singh (PW-4), but when accused persons found Chunni Singh with Sudhir, they instead attacked him and caused his death. Sudhir escaped unhurt. In these circumstances, in our opinion, it cannot be held that initially the common object of the assembly was to commit murder of Chunni, but suddenly when Sudhir escaped, some of them took up in their minds to kill Chunni Singh. In these circumstances, in our opinion, it cannot be held established that the persons who were empty handed, and who did not cause injury to deceased also shared the common intention or the common object of the assembly of those accused persons who actually caused injuries and committed murder of the deceased. Therefore, appellants viz. Bhuria, Abbu, Natthu, Prakash and Chhota, who were not armed and caused no injury to deceased, cannot be held liable for causing death of Chunni.

28. For the reasons stated hereinabove, conviction and sentence of appellant No.1 Bhuria, No.3 Abbu, No.5 Natthu, No.7 Prakash and No.8 Chhota on the charge under Sections 148 and 302/149 of the Indian Penal Code deserves to be and is hereby set aside. They are acquitted. The conviction and sentence of remaining appellants viz. appellant No.2 Chuttu, No.4 Ramsharan, No.6 Ram Vishal and No.9 Mahendra awarded to them by the trial court on the aforesaid counts is affirmed.

29. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2013] M.P., 928
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr. A. No. 274/2007 (Jabalpur) decided on 31 January, 2013

CHHABBI LAL GOUD ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 302, 304 Part II - Murder or Culpable Homicide not amounting to murder **- Appellant went to the house of P.W. 5 along with his wife where they had meals and consumed**

liquor - Wife of the appellant slept on a cot and refused to go home - Appellant slapped her twice and took her on his shoulder and threw his wife on the floor in front of his house and started giving fist blows - Deceased died because of severe bleeding - Held - Incident took place without any premeditation - There was no previous quarrel - Assault was made with an intention to cause bodily injury only - Injuries were not sufficient in the ordinary course of nature to cause death - Appellant is guilty under Section 304 Part II and not under Section 302 - Appeal partly allowed. (Paras 15 and 16)

दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अपीलार्थी अ.सा. 5 के घर अपनी पत्नी के साथ गया, जहां उन्होनें भोजन किया और मदिरा का सेवन किया – अपीलार्थी की पत्नी खाट पर सो गई और घर जाने से मना किया – अपीलार्थी ने उसे दो बार थप्पड़ मारे और अपने कंधे पर लेकर अपनी पत्नी को जमीन पर अपने घर के सामने पटक दिया और उसे घूंसे मारने लगा – अधिक रक्तस्त्राव के कारण पीड़िता की मृत्यु हुई – अभिनिर्धारित – घटना बिना किसी पूर्व चिंतन से कारित हुई – कोई पूर्वतर झगड़ा नहीं हुआ – हमला केवल शारीरिक क्षति कारित करने के उद्देश्य से किया गया था – प्रकृति के सामान्य क्रम में मृत्यु कारित करने के लिए क्षतियां पर्याप्त नहीं थी – अपीलार्थी धारा 304 भाग–II के अंतर्गत दोषी और न कि धारा 302 के अंतर्गत – अपील अंशतः मंजूर।

Durgesh Gupta, for the appellant.
Amit Pandey, P.L. For the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **VIMLA JAIN, J. :-** Appellant Chabbilal Goud preferred this appeal under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment dated 11.1.2007 passed by Additional Sessions Judge, Mandla in Sessions Trial No.129/2006, whereby he has been convicted and sentenced as under:-

Provision	Sentence
Under Section 302 of IPC	Imprisonment for life and fine of Rs.2000/-, in default of payment of fine, rigorous imprisonment for one year.

2. It is the allegation against appellant/accused Chhabbilal that on

22.7.2006 in the afternoon at Village Naijhar, he intentionally and knowingly caused MARPEET with his wife Sonabai and committed her murder.

3. Brief facts of the case are that on 22.7.2006, complainant Sukhniyabai invited her brother-in-law (DEVAR) appellant Chhabbilal at her house for meal. Accused Chhabbilal, his wife Sonabai (since deceased), Phuliabai and Deva Goud came to the house of Sukhniyabai and consumed liquor. Accused Chhabbilal and his wife Sonabai also had their meal. Thereafter, Sonabai slept in the house of Sukhniyabai on a cot (KHATIYA). Phuliabai, Deva Goud, Ratan Goud and Chhotelal had left the house of Sukhniyabai. After around ½ an hour, accused Chhabilal came there and asked Sonabai to go home but Sonabai refused to go home. On her refusal, the accused slapped her twice. Sukhniyabai requested him not to beat Sonabai. Chhabbilal replied that Sukhniyabai was his wife and he would take her to home. Thereafter, he took Sonabai on his shoulder and went towards his house. Chhabilal threw his wife Sonabai on the floor in front of the stairs of his house and started giving fists blows and dragged her legs. Subbal Goud, a neighbour of Chhabbilal, came there and scolded Chhabbilal. Thereafter, Chhabbilal forcibly kept his wife Sonabai on his shoulder and entered into his house. In the evening, a news spread in the village that Chhabbilal had killed his wife Sonabai. Sukhniyabai (Bhabhi of Chhabbilal), Sarpanch, Upsarpanch and other members of the village reached the house of accused Chhabbilal. Accused Chhabbilal had admitted in front of the villagers that he caused MARPEET with his wife and committed his murder. Dead body of Sonabai was lying in the room of accused Chhabbilal and the blood was oozing out from her mouth. There were number of injuries on the body of Sonabai. On the request made by the villagers, Sukhniyabai (PW.5) went to Police Station Gughri alongwith her husband Ratan and Kotwar Rameshdas. As the direct road towards Gughri Police Station from Naijhar was closed due to heavy rain, complainant Sukhniyabai went to Police Station Gughri via Bichhia and lodged the report on 22.7.2006 at about 11:10 pm. On the basis of her information, Marg Intimation (Ex.P/11) and First Information Report (Ex.P/3) were registered. On 23.6.2006 in the night, the police party reached the spot and prepared Panchnama of the dead body (Ex.P/2). The dead body of Sonabai was sent for postmortem. On the basis of the statement on memorandum, bloodstained shirt was recovered from the house of accused Chhabbilal and he was arrested.

4. After investigation, charge sheet was filed under Section 302 of IPC against the appellant before the Court of Judicial Magistrate First Class,

Mandla, who committed the case to the Court of Sessions and ultimately it was transferred to the learned Additional Sessions Judge, Mandla. On being charged with the offence under Section 302 of IPC, the appellant/accused pleaded not guilty and complete innocence and claimed to be tried with the prayer that he had been falsely implicated in the case.

5. In order to bring home the charges against the appellant, the prosecution examined eighteen witnesses and proved the documents (Ex.P/1 to P/22) on record. The appellant did not examine any witness in support of his defence.

6. The learned Court below, after scanning the evidence found the charges proved against the appellant, convicted and sentenced him as stated hereinabove.

7. This appeal has been filed by the appellant assailing the said judgment of conviction and order of sentence.

8. Learned counsel for the appellant submitted that the Court below has committed an error of law in holding the appellant/accused guilty for the offence under Section 302 of IPC. Learned counsel has prayed that appeal of appellant/accused deserves to be allowed by setting aside the finding of conviction and order of sentence.

9. On the other hand, learned Panel Lawyer for the State has supported the finding of the trial Court.

10. We have considered the arguments advanced by learned counsel for the parties and perused the record.

11. PW.15 Dr.Parasram Dhurve conducted the postmortem of deceased Sonabai vide Ex.P/7 and found following injuries on her person:-

INTERNAL INJURIES

1. Scratch mark on left side of chest.

2. Inflammation on right side of knee joint.

3. Echymosis on both back side of chest.

4. Injury on mouth with clotted blood.

Opinion :- The cause of death of Smt. Sonabai, Aged 28 years,

W/o Chhabbilal Goud, Police Station Gughri is shock due to severe bleeding from mouth and internal vital organ, duration within 26 hours from performing postmortem. Homicidal in nature.

12. There is no challenge from any side to the fact that death of deceased Sonabai was homicidal. PW.15 Dr.Parasram Dhurve found four injuries on the person the deceased and as per his opinion, Sonabai died as a result of shock due to severe bleeding from mouth and internal vital organ. Therefore, it is apparent that injuries caused on her person were fatal in nature and sufficient to cause her death in due course. Therefore, looking to the nature of injuries, death of Sonabai appears to be homicidal.

13. PW.5 Sukhniyabai, who is sister-in-law (JETHANI) of deceased Sonabai, has stated in her deposition that on the day of the incident, accused Chhabbilal had gone to the house of Phuliabai for doing some BEGAR work. She did not know as to what Chhabbilal consumed at the house of Phuliabai. Phuliabai had offered liquor to Sonabai. She did not know as to how many persons had consumed liquor. Deceased Sonabai consumed liquor at her house. She only invited Chhabbilal at her house for meal. Sonabai, Phuliabai and Deva had also come to her house for meal. Before having meal, they had consumed liquor at her house. Sonabai had slept at her house. Chhabbilal, Ratan, Deva and Phuliabai had left her house. After sometime, Chhabbilal had come to her house as Sonabai was sleeping there and slapped twice to Sonabai and when she requested not to beat Sonabai, Chhabbilal said that he is her husband and what he wants he will do with her. She also stated that Chhabbilal threw her on the floor and took Sonabai to his house. Thereafter, what happened, she had not seen. Before the sun-set, accused Chhabbilal had taken his wife Sonabai from her house and in the evening, she came to know that Chhabbilal had killed his wife Sonabai. She went to the house of Chhabbilal and found that the body of Sonabai was lying on his corridor. She did not know as to where Sonabai sustained injuries. All the villagers were present on the spot. She had seen the dead body of Sonabai. She had wound on her back. She went to Police Station Gughri alongwith her husband Ratan and Kotwar and lodged the report (Ex.P/3).

14. PW.7 Harish Chandra Sahu, who is a Upsarpanch of Village Naijhar, has stated in his deposition that on the day of the incident, he was at the Bazar Square. Accused Chhabbilal came there and said to him that some quarrel

had taken place between Sonabai and him. He had caused MARPEET with her and now she was not responding. At that time, Chamanlal, former Sarpanch Ratnu and Phagulal were also present there. Thereafter, he alongwith all persons went to the house of Chhabbilal and found that Sonabai was lying on the corridor of the house of accused Chhabbilal. She was dead and blood was oozing out from her mouth. Police party came to the spot in the night and next day they started their investigation. This witness also stated that the dead body of Sonabai was recovered from the house of accused Chhabbilal in his presence and at the instance of accused Chhabbilal, a bloodstained shirt was also recovered from his house.

15. There is no doubt that dead body of deceased was lying in the corridor of the house of appellant/accused. From the evidence of all the witnesses examined by the prosecution, it is apparent that the incident culminated in the MARPEET by appellant with deceased, erupted from consumption of liquor by deceased and refusal to go to her house with appellant. It appears from the record that there was no previous dispute or quarrel between the appellant and deceased. Appellant did not use any weapon for assaulting the deceased for causing bodily injuries to her as is likely to cause her death. In the instant case, all these facts are established from the record. The incident took place without any premeditation of the appellant. Evidence, examined in its entirety, shows that without any premeditation, the appellant committed the offence, which however was done with the intention to cause a bodily injury only, which resulted in the death of the deceased. The injuries were not sufficient in the ordinary course of nature to have caused her death.

16. In view of our foregoing discussion, we are of the considered opinion that the appellant is guilty of an offence punishable under Section 304 Part II IPC and not under Section 302 IPC. Hence, we set aside the impugned conviction and sentence of imprisonment for life rendered by the trial Court under Section 302 IPC. Instead, we convict the appellant under Section 304 Part II IPC and sentence him to rigorous imprisonment for the period already undergone, which comes to six years and six months and we direct that the appellant be set at liberty forthwith unless wanted in any other case.

17. In the result, the appeal is partly allowed to the extent indicated above.

Appeal partly allowed.

I.L.R. [2013] M.P., 934
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr. A. No. 1393/2002 (Jabalpur) decided on 19 February, 2013

LAKKHU @ LAKHANLAL GOND ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 9 - Test Identification Parade - **Person who conducted Test Identification Parade not examined - Property was also shown in the police station prior to holding of T.I.P. - Not creditworthy. (Paras 11 and 12)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 9 – पहचान परेड – उस व्यक्ति का परीक्षण नहीं किया गया जिसने पहचान परेड संचालित की थी – पहचान परेड कराने से पूर्व पुलिस थाने में संपत्ति को दिखाया भी गया था – विश्वसनीय नहीं।

B. Evidence Act (1 of 1872), Section 27 - Recovery of articles - **Blood Group - No report about blood group of deceased - In absence of comparison of blood group of deceased with blood group of stains found on articles no inference can be drawn against the appellant. (Para 13)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 27 – वस्तुओं की बरामदगी – रक्त समूह – मृतक के रक्त समूह के बारे में कोई रिपोर्ट नहीं – मृतक के रक्त समूह के साथ, वस्तुओं पर पाये गये दाग के रक्त समूह का मिलान नहीं किये जाने से, अपीलार्थी के विरुद्ध कोई निष्कर्ष नहीं निकाला जा सकता।

C. Penal Code (45 of 1860), Section 302 - Murder - Circumstantial Evidence - **Conviction based on memorandum of accused and recovery of articles - Held - Circumstances sought to be proved against the appellant were not established by cogent and convincing evidence - Suspicion however strong can not take the place of proof - Conviction set aside - Appeal allowed. (Para 14)**

ग. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अभियुक्त के ज्ञापन एवं वस्तुओं की बरामदगी पर आधारित दोषसिद्धि – अभिनिर्धारित – अपीलार्थी के विरुद्ध जिन परिस्थितियों को साबित करना चाहा गया था, वे युक्तिसंगत एवं विश्वासप्रद साक्ष्य द्वारा स्थापित नहीं की गई – संदेह कितना

भी प्रबल हो, किन्तु सबूत का स्थान नहीं ले सकता – दोषसिद्धि अपास्त – अपील मंजूर।

Durgesh Gupta, for the appellant.
Amit Pandey, P.L. For the respondent.

JUDGMENT

The Judgment of the Court was delivered by :

RAKESH SAKSENA, J. :- Appellant has filed this appeal against the judgment dated 26th June 2002, passed by First Additional Sessions Judge, Damoh, in Sessions Trial No.75/2000 convicting him under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.2000/-.

2. In short, the prosecution case is that in the night intervening between 24th and 25th February, 2000 Hallebhai, the deceased, slept in the back side room of his house. In the morning, at about 7.00 am, when his elder brother Deo Singh opened the door of the room, he found Hallebhai lying dead on the cot. There were injuries on his neck. Deo Singh went and informed to his father Girdhari, who was staying at his field. Girdhari and his wife reached at the room where the dead body of Hallebhai was lying. They found that a small portable black and white TV and Rs.2000/- which were kept in the room were stolen. Girdhari went to police station, Jabera and lodged first information report (ExP/1) at 11.00 am. Inspector S.K. Jain (PW-8), after recording the first information report, went at the place of occurrence, prepared spot map (Ex.P/17) and conducted inquest. After recording inquest memorandum (ExP/4), he sent the dead body for postmortem examination to Primary Health Centre, Jabera. Assistant Surgeon Dr. K.C. Koshta (PW-12) conducted postmortem examination and found injuries on the body of deceased caused by some sharp edged weapon.

3. On 7.3.2000, three accused persons viz. Lakkhu (appellant), Guddu @. Ganesh, and Harchat Gaud were arrested. On the information given by appellant, a wrist watch, axe and clothes were recovered. Broken pieces of a television were also recovered from a Talaiya on the information given by the accused persons. Wrist watch and the pieces of TV were identified by Girdhar (PW-1) and Deo Singh (PW-2). After completion of investigation, charge sheet was filed and the case was committed for trial.

4. On charges being framed, accused persons abjured their guilt and pleaded false implication in the case. Upon trial, after appreciating the evidence

on record learned Additional Sessions Judge held appellant Lakkhu guilty and convicted and sentenced him as mentioned above. However, finding the evidence insufficient against accused Harchat and Guddu © Ganesh learned trial judge acquitted them. Aggrieved by his conviction and sentence, appellant Lakkhu @ Lakhanlal has filed this appeal.

5. Learned counsel for the appellant submitted that the learned trial judge misappreciated the evidence and erred in holding the appellant guilty. The identification of recovered property was improper and illegal. It was not established that the property, allegedly recovered on the information of appellant, belonged to deceased. As such the conviction of the appellant was illegal and deserved to be set aside. On the other hand, learned counsel for the State supported the impugned judgment of conviction and submitted that the evidence adduced by the prosecution was correctly appreciated. Appellant was rightly convicted.

6. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

7. It has not been disputed by the learned counsel for the appellant that the deceased died of a homicidal death. The dead body of deceased was seen by Girdhari (PW-1) and Deo Singh (PW-2), respectively, the father and brother of deceased. Girdhari lodged the report (Ex.P/1) about the death of deceased. After conducting inquest, investigating officer S.K. Jain (PW-8) sent the body of deceased for postmortem examination. On examination of the body, Dr. K.C. Koshta (PW-12) found following injuries on it:

> "1. Incised wound 6" x 4" extending from the bone of chin to the cervical bone of neck, Mandible was crushed and the bone of vertebral column was cut. Respiratory tract, trachea and main blood vessels of the neck were cut.
>
> 2. Incised wound 2" x 1/8"xl/2" on right jaw.
>
> 3. Incised wound 3" x 1/2" x bone deep on lower neck..
>
> In the opinion of doctor, the cause of death of deceased was excessive haemorrhage due to injuries on the neck, respiratory tract, trachea and large blood vessels of the neck. The injuries were ante-mortem and homicidal in nature."

From the aforesaid evidence it stood established that deceased met with a

homicidal death.

8. Now the question before us is whether it was appellant who caused the homicidal death of deceased. There being no direct evidence, the case rests on the circumstantial evidence of recovery of the incriminating articles from the possession of the appellant. Learned counsel for the appellant submitted that it was not established by the prosecution evidence that the articles recovered from the possession of appellant belonged to, or were in possession of the deceased at the time of his death and that the identification of the articles was improper and unreliable.

9. Investigating officer S.K. Jain (PW-8) deposed that on 7.3.2000 in the presence of two witnesses appellant gave information about a TV, axe, a watch and the clothes which he had worn at the time of occurrence. He recorded the said information in the memorandum (Ex.P/ 6) and, on the same day, at the instance of appellant, he seized a Seiko wrist watch, an axe with blood stains, a jeans and a yellow T-shirt having blood stains vide seizure memo Ex. P/9. On the same day, on the information given by all the three accused persons, he recovered broken pieces of a black and white TV from a Talaiya vide seizure memo ExP/12. Clothes and axe seized from the possession of the appellant were sent to FSL, Sagar. As per FSL report (Ex.P/ 21) and serology report, the clothes and the axe were found to be stained with human blood.

10. Independent witnesses of memorandum and recovery of the aforesaid articles from the possession of appellant viz. Komal Singh (PW-5) and Harlal (PW-6) did not support the prosecution case. They were declared hostile. But, in our opinion, the evidence of investigating officer S.K. Jain (PW-8), who recovered the aforesaid articles, cannot be doubted in this regard in the absence of any grudge on his part against the appellant.

11. Recovered articles were identified by Girdhari (PW-1) and Deo Singh (PW-2) in the test identification conducted by Surat Singh, the Block President of village Jabera. Learned counsel for the appellant urged that the evidence of identification conducted during investigation cannot be accepted since Surat Singh, who conducted the test identification parade (Ex.P/2), was not examined in the court. In the absence of the evidence of Surat Singh, the evidence of identification was inadmissible. We find substance in the submission made by learned counsel for the appellant. Apart from it, in our opinion, the identification of property, allegedly recovered from the possession of appellant, suffers with

number of other infirmities also. The Seiko wrist watch, which is alleged to have been recovered from the possession of the appellant, was not mentioned by Girdhari(PW-1) to have been lost or missing in the first information report (Ex.P/1) lodged by him. Girdhari as well as Deo Singh (PW-2), who participated in the test identification admitted that such type of watch could be available in any body's house. Similar is the case with the broken pieces of TV which are said to have been recovered from Talaiya at the instance of all the accused persons. Since the information about the discovery of pieces of television was given first in time by the appellant, the recovery of it was attributed to appellant. From the evidence of Girdhari (PW-1) it is revealed that only one set of pieces of broken TV were put up for test identification whereas the mixed article was a working TV set. According to him, he identified the watch because no other watch was kept for identification. Apart from it, these articles were shown to him in the police station before the test identification parade was conducted.

12. Girdhari (PW-1) admitted that he had no knowledge about the articles which had been stolen. He could know about the articles only when the accused persons were arrested. Deo Singh (PW-2) stated that a TV, two tape recorders and a wrist watch, which the deceased had been wearing, were not found in the room. He also admitted that before the test identification proceedings he had gone to police station and thereafter he went to Block Office where the test identification was conducted. He stated that the TV which was missing from the room of deceased was of big size and he could not say of which company it was. He expressed his ignorance about the company of the wrist watch also. Deo Singh (PW-2) also stated that there was only one wrist watch and broken pieces of TV. It is true that both the aforesaid witnesses identified the aforesaid articles in the court, but, in our opinion, the evidence of identification of articles cannot be held credit worthy. It does not appear probable that a person, who comes from a rural background can identify the broken pieces of TV set especially when he did not know the name of company which manufactured the said TV and in the absence of any specific mark of identification. Similar is the position with respect to wrist watch. In these circumstances, we are of the opinion that learned trial judge misappreciated the evidence and committed error in accepting the evidence of identification of property allegedly recovered from the possession of the appellant.

13. Next comes the recovery of the axe and the clothes from the appellant which were found to have stains of human blood. The T-shirt was found to be

stained with 'B' group of blood. Admittedly no report about the blood group of deceased was made available. In the absence of the comparison of blood group of deceased with the blood group of stains found on the articles recovered from the possession of the appellant no incriminating inference could be drawn against the appellant. It could merely be a corroborating piece of evidence when there is other clinching evidence against the appellant connecting him with the crime. In absence of such evidence, the appellant cannot be held to be the perpetrator of crime solely on the basis of human blood being found on the articles recovered from him.

14. For the aforesaid reasons, we are of the considered opinion that the circumstances sought to be proved by the prosecution against the appellant were not established by cogent and convincing evidence. Suspicion howsoever strong cannot take place of proof. Accordingly, the conviction and sentence awarded to appellant under Section 302 of the Indian Penal Code is set aside. He is acquitted. He be released forthwith, if not required in any other case.

15. Appeal allowed.

Appeal allowed.

I.L.R. [2013] M.P., 939
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain

Cr. A. No. 1669/2001 (Jabalpur) decided on 25 March, 2013

GAJENDRA SINGH CHOUHAN ...Appellant

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Murder - Dying Declarations **- In written dying declarations, information given by one of the deceased to the Doctor and the Dehati Nalishi lodged by the deceased clearly speaks that the appellant poured kerosene oil and ignited the deceased persons - There is nothing on record to show that the dying declarations were result of imagination, tutoring or prompting - Dying Declarations were made voluntarily - Appellant guilty of committing murder - Appeal dismissed. (Paras 15 & 21)**

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा

32 – हत्या – मृत्युकालिक कथन–लिखित मृत्युकालिक कथन में, मृतको में से एक ने देहाती नालिसी अभिलिखित कर स्पष्ट यह कहा कि अपीलार्थी ने मिट्टी का तेल उडेला और मृतक व्यक्तियों को जला दिया – यहां अभिलेख पर कुछ नहीं जो यह दर्शाता हो कि मृत्युकालिक कथन काल्पनिक, पढ़ाया हुआ या अनुबोधन का परिणाम थे – मृत्युकालिक कथन स्वेच्छापूर्वक दिये गये थे–अपीलार्थी हत्या का दोषी–अपील खारिज।

Case referred :

(2005) 9 SCC 113.

V.K. Lakhera with *Neena Khera* for the appellant.
Umesh Pandey with *A.K. Chaurasiya*, G.A. For the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **RAKESH SAKSENA, J. :-** Appellant has preferred this appeal against the judgment dated 19th September, 2001 passed by Sessions Judge, Bhopal in Sessions Trial No. 73/2001, convicting the appellant under Section 302 of the Indian Penal Code on two counts and sentencing him to imprisonment for life with fine of Rs. 500/- on each count. In default of payment of fine, further imprisonment for three months. Both the sentences to run concurrently.

2. In short, the prosecution case is that the deceased persons viz. Guddu and his wife Basanti Bai lived in village Kajalikheda. On 20.11.2000, around 8-9 O' clock in the night, when they were at their house in which they used to run tea shop also, appellant Gajendra along with his two associates reached there and demanded money. On refusal by Guddu, he picked up a can of kerosene kept in the shop and poured kerosene on him and Basanti Bai, and set fire to them. When Guddu tried to extinguish the fire of his wife, he also got burnt. Papoo (PW2) and his mother Rajo (PW3) reached there and extinguished the fire. Appellant and his associates ran away. Papoo, in his truck carried Guddu and Basanti Bai to Hamidia Hospital, Bhopal for treatment. Guddu gave a report to Sub Inspector Purnendra Singh (PW13) which was recorded by him at Hamidia Hospital as Dehati Nalishi Ex. P/18. On the basis of said report, first information report Ex. P/18-A was registered at police station Kolar Road under Sections 307 and 34 of the Indian Penal Code. Due to burn injuries, both the injured persons died. Thereafter, the case was converted to one under Section 302 of the Indian Penal Code.

3. During treatment, dying declarations Ex. P/13 and Ex. P/14 of both

the deceased persons were recorded by Executive Magistrate Maqsood Ahmed (PW7). After the death, dead body of Guddu was sent to Medico Legal Institute, Bhopal, where Dr. Ashok Sharma (PW4) conducted autopsy of his body. The dead body of Basanti Bai was sent to Gandhi Medical College, Bhopal, where Dr. V.K. Athwal (PW11) conducted autopsy of her body. After arrest of the accused/appellant and further requisite investigation, charge sheet was filed and the case was then committed for trial.

4. During trial, appellant abjured his guilt and pleaded false implication. According to him, though he did not know to deceased persons, but false dying declarations were made by them against him.

5. Learned Sessions Judge, upon trial after appreciation of evidence held appellant guilty, convicted and sentenced him as mentioned above.

6. Learned counsel for the appellant submitted that the eye witnesses and other main witnesses of the prosecution did not support the prosecution case, yet learned Sessions Judge mis-appreciating the evidence of dying declarations held the appellant guilty. Learned Sessions Judge committed error of law and facts in holding the dying declarations reliable in the absence of any supporting evidence. On the other hand, learned counsel for the State submitted that the evidence of dying declaration of deceased Guddu recorded by Executive Magistrate was clear and reliable. It stood corroborated from the evidence of dying declaration of Basanti Bai, the statement of deceased Guddu recorded by Investigating Officer Purnendra Singh (PW13) and also by the evidence of Dr. Pankaj Tiwari, C.M.O.

7. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

8. It has not been disputed by appellant that both the deceased persons died of burn injuries. Mangilal (PW1) and Rajobai (PW3), respectively the father and mother of deceased Guddu, and Papoo Singh (PW2) deposed that on hearing cries they reached at the spot and saw Guddu and Basanti Bai in burnt condition. They extinguished the fire. Papoo carried deceased persons to hospital in his truck. Papoo also gave information Ex. P/6 about the burning of deceased persons at police station Kolar Road which was recorded by Head Constable Sultan Singh (PW9). Dr. Pankaj Tiwari (PW10) stated that on 20.11.2000, he examined the injuries of Guddu and Basanti Bai. According to him, there was smell of kerosene in their bodies. There were 90% burn injuries on the body of Guddu, whereas Basanti Bai had suffered 100 % burn

injuries. He recorded medical reports Ex. P/16 and Ex. P/17. Both the injured persons died in the hospital. Police conducted inquest proceedings and recorded memorandums Ex. P/1 and Ex. P/2 and referred the bodies of deceased persons for postmortem examination.

9. Dr. Ashok Sharma (PW4) of Medico Legal Institute, Bhopal conducted autopsy of the body of Guddu and found second and third degree burns on it. The burns were on face, chest, abdomen, both thighs, back and scalp. Except burn injuries, there was no other injury on the body. The death of deceased, in his opinion, occurred due to anti-mortem burn injuries. He recorded the postmortem examination report Ex. P/9 and signed it.

10. Dr. V.K.Athwal, Assistant Professor of Gandhi Medical College, Bhopal conducted autopsy of the body of Basanti Bai and found burn injuries of second and third degree on her face, neck and chest.Similar burn injuries were found on her both hands, shoulders, back, neck, both legs, knees, face and foot.These burn injuries were also anti-mortem in nature.

From the aforesaid evidence, it stood established that both the deceased persons died due to anti-mortem burn injuries.

11. Now, it's to be seen whether burn injuries to deceased persons which resulted into their death, were caused by appellant.

12. Executive Magistrate Maqsood Ahmed (PW7) deposed that on 20.11.2000, police requisitioned him for recording the dying declarations of Guddu and Basanti Bai, who were admitted in Hamidia Hospital, Bhopal. He went there and recorded their dying declarations. Before recording the said dying declarations, he sought opinion of the doctor on duty about their fitness. The doctor endorsed his opinion about the fitness of the patient on the dying declaration Ex. P/13. On questioning, Guddu stated that "while he and his wife were sitting in his shop, his mother was cooking, Gajendra Singh reached there and poured kerosene on him and ignited". According to Maqsood Ahmed (PW7), in the dying declaration Ex. P/14, Basanti Bai stated that "at about 8-9 O' clock, at her house while she was warming up milk on a stove in her shop, that ignoble person poured kerosene on her. Since, she was standing near a stove, she got burnt. He was *dairy wala*. She knew him by face, but did not know his name. Mother-in-law was cooking and her husband was warming up in the courtyard. When she caught fire her husband came to save her and stuck to her, therefore, he also got burnt. Kerosene was kept in a can in the shop. Assailant had come in a jeep. There were three persons". Both the deceased persons stated that the incident occurred because of some

money dispute. Maqsood Ahmed (PW7) in respect of Basanti Bai had also obtained opinion of the doctor about her fitness to make statement and had got it recorded on Ex. P/14.

13. Dr. Nitin Garg (PW8) who was posted as R.S.O. in Hamidia Hospital, Bhopal deposed that Guddu and Basanti Bai were admitted in Hamidia Hospital as a burn case. Executive Magistrate had come to record their dying declarations. After examining both the patients, he had certified that both the persons were mentally and physically fit to give dying declarations. He had recorded his endorsements on Ex. P/13 and Ex. P/14. Both the dying declarations were recorded in his presence. He had signed both the endorsements. He firmly denied that he recorded his endorsements under compulsion of police.

14. Despite roving cross examination of Executive Magistrate Maqsood Ahmed (PW7) and Dr. Nitin Garg (PW8), there appeared nothing to indicate that they had any grudge or animosity against the appellant. Even otherwise both of them were public servants and had recorded the dying declarations in discharge of their duties.

15. Apart from the above evidence of dying declarations, there is also evidence of Dr. Pankaj Tiwari (PW10), who examined both the deceased persons when they were brought in burnt condition to hospital. Dr. Pankaj Tiwari deposed that when Guddu and Basanti Bai were brought to hospital, they informed him that around 8 O' clock in the night, Gajendra Singh poured kerosene and ignited them. This fact was recorded by him in their injury reports Ex. P/16 and Ex. P/17. In our opinion, there appears no reason to disbelieve the evidence of Dr. Tiwari. From his evidence, it is manifestly clear that immediately after Guddu and Basanti Bai were brought to hospital they disclosed to Dr. Tiwari that appellant Gajendra Singh set fire to them after pouring kerosene. Evidence of Dr. Tiwari (PW10) supplied a strong corroboration to the evidence of Executive Magistrate Maqsood Ahmed (PW7). Yet another piece of evidence appeared in the form of Dehati Nalishi Ex. P/18 recorded by Inspector Purnendra Singh (PW13) on the information given by deceased Guddu. In this report, details about the occurrence were furnished by Guddu. For the sake of convenience, the contents of Ex. P/18 are reproduced as under:

> "मैं उपरोक्त पते पर रहता हूं तथा मेहनत मजदूरी का काम करता हूं कि मैं तिवारी जी की डेरी पर काम करता था जो वहां से दो महिना पहले गजेन्द्र मुंशी ने काम, पर से हटा दिया था गजेन्द्र तिवारी जी का मुंशी है। तिवारी जी की भैंसों की डेरी ग्राम कजलीखेड़ा के पास है कि तिवारी जी ने मुझे साढ़े सात

हजार रूपया ईंट बनाने के लिए लेवर लाने के लिए दिया था जो मैं पिछले मंगलवार को कछुआ बैंक के पास लेबर लाने गया था वहां पर गजेन्द्र के आदमियों ने मुझसे रूपया छीन लिया था मैंने कहीं पर रिपोर्ट नहीं किया हूं इस रूपया को चुकाने के लिए मेरे पिता ने तिवारी जी को एक ऐकड़ जमीन बरसीम बोने के लिए दे रहे थे।

आज मैं और मेरी पत्नी घर पर थे, उसी घर में चाय की दुकान चलाते हैं। मेरी मां बगलवाले कमरे में खाना बना रही थी कि गजेन्द्र अपने दो साथियों के साथ आया जो गजेन्द्र मुझसे रूपये मांगने लगा, मैंने मना किया तो गजेन्द्र मेरी दुकान में रखी मिटटी के तेल की कुप्पी उठाकर जान से मार डालने की नियत से मेरे और मेरी पत्नी के ऊपर डाल दिया और गजेन्द्र के साथी ने माचिस की तीली से आग लगा दी। मेरी पत्नी के कपड़ों ने आग पकड़ ली और जलने लगी। मैंने बचाने लगा तो मैं भी जल गया। मेरा तथा मेरी पत्नी का पूरा शरीर जल गया है, तभी पप्पू और मेरी मां ने आग बुझाई। गजेन्द्र व उसके साथी भाग गए, पप्पू अपने ट्रक में डालकर इलाज कराने हमीदिया अस्पताल लाया है।"

16. Learned counsel for the appellant argued that the aforesaid dying declarations were suspicious because father and mother of deceased viz. Mangilal (PW1) and Rajobai (PW3),and Papoo Singh (PW2) did not support the prosecution case and expressed their ignorance about the person, who caused burn injuries to deceased persons. Learned counsel submitted had the aforesaid witnesses seen appellant setting fire to deceased persons, they would have certainly spoken so before the Court. Before entering into appreciating the evidence of aforesaid witnesses, it is significant to note that Papoo Singh (PW2) and Rajobai (PW3) disowned their versions which they had given under Section 161 of the Code of Criminal Procedure, therefore, they were declared hostile.

17. As far as the evidence of Mangilal (PW1) is concerned, he stated that in the night Guddu and Basanti Bai got burnt; they were taken to hospital where they died, but he expressed his ignorance as to when and how the incident occurred and how Guddu and Basanti Bai got burnt. When he received information in the night at about 11 0' clock, he went at the shop and found two policemen present there. The evidence of this witness is of no use since neither he happened to be an eye witness nor he met deceased persons before their death.

18. Rajobai (PW3) stated that in the night while she was cooking food she heard some sound then she saw Guddu and Basanti Bai burning. According to her, she and Papoo extinguished the fire and then she became unconscious.

Papoo took Guddu and Basanti Bai to hospital in his truck where they died. She stated that neither she saw how Guddu and Basanti Bai got burnt nor Guddu told anything about it to her. This witness was declared hostile. She was confronted with her police statement Ex. P/8, wherein she stated that Gajendra Singh along with his two associates burnt Guddu and Basanti Bai, but she denied of having made any such statement. Similarly Papoo Singh (PW2), who carried deceased persons to hospital in his truck stated that he saw Guddu and Basanti only in burnt condition. He extinguished their fire, but none of them told to him how they caught fire. He lodged report Ex. P/6 at police station mentioning that injured persons caught fire from stove, but he explained that he did not see with his own eyes that they caught fire from stove. Since he saw stove kept at the place of occurrence, he presumed that they must have caught fire from stove and for this reason he mentioned the said fact in the report Ex. P/6.

19. On a close scanning of the evidence of aforesaid witnesses it can be gathered that there was something which persuaded them to disown themselves to be the eye witnesses of the occurrence, though they remained present at the time of occurrence. But on the basis of negative evidence of such witnesses, the dying declaration made by deceased Guddu which stood corroborated from Dehati Nalishi Ex. P/18 and the evidence of Dr. Pankaj Tiwari (PW10) cannot be discredited. There appears no reason for deceased persons to have falsely implicated the appellant. A person may make false dying declaration implicating some body, who is inimical to him, out of suspicion when the incident occurs in darkness or in such circumstances that the assailant could not have been seen or identified by him or some time when deceased person commits suicide feeling harassed, frustrated or traumatised by the conduct of that person. But we find no such situation in the present case which could have induced deceased persons to make false dying declarations implicating the appellant.

20. The Apex Court in case of *Muthu Kutty and another Vs. State*- (2005) 9 SCC 113 observed:

> "16. In the light of the above principles, the acceptability of the alleged dying declaration in the instant case has to be considered. The dying declaration is only a piece of untested evidence and must like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is

absolutely safe to act upon it. If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration. (See *Gangotri Singh v. State of U.P., Goverdhan Raoji Ghyare v. State of Maharashtra, Meesala Ramakrishan v. State of A.P. and State of Rajasthan v. Kishore.*)"

21. After a careful consideration of the dying declarations made by deceased Guddu in the light of the law laid down by the Apex Court, we find that the said dying declarations were not the result of imagination, tutoring or prompting. They appeared to have been made by the deceased voluntarily. In our opinion, the dying declarations made by Guddu are trustworthy and creditable and learned trial Judge committed no error in holding that it stood established beyond doubt that appellant Gajendra Singh set fire to deceased persons after pouring kerosene on them.

22. In the result, the conviction of appellant as recorded by the trial Court and the sentence imposed by it, warrant no interference. The appeal being without any merit is dismissed accordingly.

Appeal dismissed.

I.L.R. [2013] M.P., 946
CRIMINAL REVISION
Before Mr. Justice A.K. Shrivastava & Mr. Justice G.D. Saxena
Cr. Rev. No. 08/2013 (Gwalior) decided on 29 January, 2013

STATE OF M.P. ...Applicant
Vs.
NARAYAN SINGH ...Non-applicant

A. Penal Code (45 of 1860), Sections 409, 420, 467 & 471 - Cheating - **Respondent was alleged to have withdrawn the amount by forging the signatures of complainant - Evidence of Bank Manager and Handwriting Expert shows that the signature of complainant on the cheque do tally with her admitted signatures - Evidentiary value of testimony of Bank Manager is having high credential value since he must be tallying and comparing thousands of signatures on the withdrawal forms - Revision dismissed. (Para 4)**

क. दण्ड संहिता (1860 का 45), धाराऐं 409, 420, 467 व 471 – छल – अभिकथित रुप से प्रत्यर्थी ने शिकायतकर्ता के जाली हस्ताक्षर करके रकम निकाली – बैंक प्रबंधक एवं हस्ताक्षर विशेषज्ञ का साक्ष्य दर्शाता है कि शिकायतकर्ता के चेक पर हस्ताक्षर उसके द्वारा स्वीकृत हस्ताक्षरों से मिलते हैं – बैंक प्रबंधक के परिसाक्ष्य का साक्षियक मूल्य, उच्च कोटि की विश्वसनीयता का मूल्य रखता है, क्योंकि वह निकासी प्रपत्रों के हजारों हस्ताक्षरों का मिलान एवं तुलना करता होगा – पुनरीक्षण खारिज।

***B. Evidence Act (1 of 1872), Sections 45 & 47 - Expert Opinion* - As a matter of extreme caution and judicial sobriety, the Court should not normally take up itself the responsibility of comparing the disputed signatures with that of admitted signatures or handwriting - In the event of doubt, it should leave the matter to the wisdom of experts.** **(Para 5)**

ख. साक्ष्य अधिनियम (1872 का 1), धाराऐं 45 व 47 – विशेषज्ञ राय– आत्यांतिक सतर्कता एवं न्यायिक संजीदगी को ध्यान में रखते हुए न्यायालय को सामान्यतः अपने ऊपर विवादित हस्ताक्षर का मिलान स्वीकृत हस्ताक्षर या हस्तलेख से करने की जिम्मेदारी नहीं लेनी चाहिए – संदेह की स्थिति में, उसे, मामले को विशेषज्ञ के विवेक पर छोड़ देना चाहिए।

Case referred :

(1997) 7 SCC 110.

B.K. Sharma, for the applicant/State.
None for the non-applicant.

ORDER

The Order of the court was delivered by :
A.K. Shrivastava, J: The respondent/accused was tried for the offences punishable under sections 467,471,409 and 420 of IPC, but after recording the evidence, the charges were not found to be proved and he was acquitted. After obtaining leave to file appeal, an appeal was preferred before the learned First Additional Sessions Judge, Datia who has dismissed the appeal by the impugned judgment.

2. The contention of the learned Public Prosecutor appearing on behalf of the revisionist/State is that the complainant has categorically stated in her testimony that by putting her forged signatures on the withdrawal form, the respondent/accused has withdrawn an amount of Rs.19,000/- from Gram

Panchayat's account No.5837 of Punjab National Bank, therefore, her testimony should be given credence and not that of handwriting expert Rajendra Verma (PW 17) who has stated in his testimony that the admitted signatures of complainant Angoori Devi (PW 1) do tally with that of the disputed signatures on the withdrawal form etc. and, therefore, the accused /respondent be convicted holding the charges to be proved.

3. Considered the submissions.

4. On a bare perusal of the impugned judgment, this Court finds that at the relevant point of time, complainant Angoori Devi (PW 1) was serving on the post of Sarpanch while the accused/respondent was serving on the post of Panchayat Secretary. The allegation against the respondent is that he has withdrawn an amount of Rs.19,000/- of Gram Panchayat's account of which the complainant was the Sarpanch for his own use and has tampered the record, therefore, he has committed the offences under sections 467, 471, 409 and 420 IPC. On a bare perusal of the findings recorded by the two courts below, this Court finds that although there is a statement of complainant Angoori Devi (PW 1) accusing the respondent, but if her statement is kept in juxtaposition to the testimony of the Branch Manager of the Bank namely A.K.Saxena (PW 14) as well as the statement of handwriting expert Rajendra Verma (PW 17), we find that there is positive evidence of both these independent witnesses that the admitted signatures of the complainant Angoori Devi (PW 1) do tally with that of the signatures on the disputed documents. According to us, the evidentiary value of the testimony of the Branch Manager A.K.Saxena (PW 14) is having high credential value since he being a Branch Manager must be tallying and comparing thousands of signatures on the withdrawal forms of the customers including the signature of the complainant Angoori Bai (PW 1) with their admitted signatures kept in the Bank and if he has stated that the disputed documents bear the signatures of the complainant Angoori Devi (PW 1), we do not find any scintilla of doubt in our mind to hold that the charges for which the respondent was tried are not proved.

5. Apart from the evidence of Bank Manager, the handwriting expert Rajendra Verma (PW 17) is prosecution's own witness and not only this, he is also a handwriting expert of the State Government and, as such, his testimony carries high weightage. The Supreme Court in the case of *Ajit Savant Majagvai vs. State of Karnataka,* (1997)7 SCC 110 has categorically held that section 73 of the Evidence Act does not specify by whom comparison of

handwriting should 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. In para 38, the Supreme Court has further held that as a matter of extreme caution and judicial sobriety, the court should not normally take up itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of experts..

6. According to us, it appears that since the investigating agency was itself under certain doubt that the disputed signatures on the withdrawal form etc. were of respondent/accused or not or the signatures on the disputed documents are of the complainant and therefore, her admitted signatures were taken and they were sent to the handwriting expert. Accordingly, the Government handwriting expert tallied the signatures of the complainant Angoori Devi (PW 1) on the disputed documents with that of her admitted signatures and gave an opinion that they do tally with each other. According to the Government handwriting expert, the person who has signed the specimen (admitted) signatures is the same person who has signed the disputed documents, therefore, according to us, since the handwriting expert has been examined as a prosecution witness and he was not declared hostile, therefore, his evidence is also having high credential value.

7. At this juncture, we may further add that no specific mode is provided in the Evidence Act that how the handwriting on a document or signature can be proved. Under section 47 of the Evidence Act, when the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact and therefore, according to us, this can be proved from the statement of Branch Manager A.K.Saxena (PW 14) because he must have come across several times with the signatures of the complainant Angoori Devi (PW 1) since she was serving on the post of Sarpanch and used to sign cheques etc. on several occasions. The Bank Manager is totally an independent witness and we have already held herein above that his testimony is having great weightage in the case.

8. The Apex Court in the aforesaid decision of *Ajit Savant Majagvai*

(supra) has further held that the Court can also compare the disputed signature with the admitted signature as this power is clearly available under section 73 of the act, however, this should be done in exceptional cases and normally as a matter of extreme caution and judicial sobriety the responsibility should be assigned to the handwriting expert, although the Court may accept or not accept his opinion on the basis of facts and circumstances of each case.

9. Thus, according to us, if both the courts below by considering the evidence of A.K.Saxena (PW 14) and Rajendra Verma (PW 17) vis-a-vis the testimony of the complainant Angooti Devi (PW 1) have come to a definite conclusion that the charges are not proved, that finding is a pure finding of fact and we decline to interfere in it in our revisional jurisdiction.

10. Eventually, this revision application is dismissed summarily.

Revision dismissed.

I.L.R. [2013] M.P., 950
CRIMINAL REVISION
Before Mr. Justice U.C. Maheshwari
Cr. Rev. No. 1823/2012 (Jabalpur) decided on 8 February, 2013

BASANT KUMAR RAWAT ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 211, Penal Code (45 of 1860), Sections 467 & 468 - Framing of charge - **Applicant is alleged to have involved himself in conspiracy with main accused in fabricating and forging mark sheet and facilitated the main accused to appear in the counselling - Prima facie evidence that the applicant had signed the mark sheet as Principal of School - Revision dismissed. (Para 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 211, दण्ड संहिता (1860 का 45), धाराऐं 467 व 468 – आरोप विरचित करना – आवेदक पर आरोप कि जाली अंक सूची की कूट रचना के षडयंत्र में वह स्वयं मुख्य अभियुक्त के साथ शामिल था और मुख्य अभियुक्त को परामर्श में शामिल होने में सहायता की – प्रथम दृष्टया साक्ष्य कि आवेदक ने शाला के प्राचार्य की हैसियत से अंक सूची हस्ताक्षरित की – पुनरीक्षण खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 211

- ***Framing of Charges,*- Documents produced by accused - Documents placed on record by accused cannot be taken into consideration to examine the sustainability of charges - Charges should be framed only on the basis of documents filed along with charge sheet. (Para 6)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 211 – आरोप विरचित करना – अभियुक्त द्वारा प्रस्तुत दस्तावेज – आरोपों की पोषणीयता के परीक्षण में अभियुक्त द्वारा अभिलेख में प्रस्तुत दस्तावेज पर विचार नहीं किया जा सकता – मात्र आरोप पत्र के साथ प्रस्तुत दस्तावेजों के आधार पर आरोप विरचित किये जाने चाहिए।

***C. Criminal Procedure Code, 1973 (2 of 1974), Section 211 - Framing of Charges* - If the Court is satisfied that evidence produced only gives rise to suspicion as distinguished from grave suspicion he can discharge the accused - While framing charges, the broad test to be applied is that whether the materials on record, if unrebutted, makes a conviction reasonably possible, then charge should be framed. (Para 11)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 211 – आरोप विरचित करना – यदि न्यायालय की संतुष्टि होती है कि प्रस्तुत साक्ष्य घोर संदेह से भिन्न केवल संदेह उत्पन्न करता है, वह अभियुक्त को आरोप मुक्त कर सकता है – आरोप विरचित करते समय, मोटे तौर पर यह परीक्षण लागू करना चाहिए कि क्या अभिलेख की सामग्री, यदि अखंडित है, दोषसिद्धि को युक्तियुक्त रुप से संभव बनाती है, तब आरोप विरचित करना चाहिए।

Cases referred :

AIR 1987 SC 955, AIR 1992 SC 1815, Cr.A. 744/2008, (2007) 5 SCC 403, AIR 2005 SC 359.

Vishal Bhatnagar, for the applicant.
Punit Shroti, P.L. for the non-applicant.

O R D E R

U.C. Maheshwari, J.: The applicant accused has preferred this revision being aggrieved by the order dated 31.5.2012, (Ann. A-1) passed by the Vth Additional Sessions Judge in Sessions Trial No. 558/2011 whereby charges of Section 120-B, 467 and 468 of IPC were framed against him.

2. The facts giving rise to this revision in short are that on dated

24.11.2009 at Police Station, Gandhi Nagar, Bhopal an First Information Report as Crime No. 429/2009 for the offence of Sections 420, 467 and 468 of IPC was registered against one Ku. Akansha Bajpai, D/o Gayacharan Bajpai. As per averments of such FIR, the complainant M.S. Patel, A.S.I. Police posted at Gandhi Nagar Bhopal received a letter of Rajeev Gandhi Proudyogiki Vishwavidyalya from the office of SHO, Police Gandhi Nagar for holding the enquiry regarding the mark sheet of said Ku. Akansha Bajpai submitted by her in the Counselling of P.E.P.T. 2009. In the course of such enquiry by the said Police Officer, he interrogated Shri Pankaj Jam, Counselling Incharge, so also Shri B.K. Sethi, the Secretary of R.G.V.V. and found such mark sheet of Ku. Akansha was false and fabricated, on which aforesaid FIR was registered and the matter was investigated. In the course of aforesaid enquiry and investigation it was revealed that Ku. Akanksha was failed in Class 12th in three subjects while such mark sheet submitted in the University for the aforesaid counselling was showing her as passed out student. In further investigation of the case, it was also found that original mark sheet was signed by the present applicant of this revision as Principal of Maharishi Vidya Mandir, Rewa and in such premises, it has been prima facie established that the present applicant has involved himself in criminal conspiracy of the main accused Ku. Akansha in fabricating and forging such mark sheet and in such manner the applicant has facilitated to the aforesaid co-accused Akansha to apply and appear in the alleged competitive counselling of the aforesaid examination, while she being failed in three subjects in Class 12th was not qualified and entitled to appear in such counselling. In such premises, alongwith Ku. Akansha Bajpai, the applicant was also charge sheeted for the offence of Sections 420, 467 and 471 and 120-B of IPC. After committing the case to the Sessions Court, on evaluation of the charge sheet, the charges of the offence of Sections 467, 468 and 120-B of IPC against the applicant while of Sections 467, 468, 471, 420/511 and 120-B of IPC against co-accused Ku. Akansha were framed, on which they abjured the guilt and thereafter the applicant has come to this court with this revision.

3. The applicant's counsel after taking me through the papers of the charge sheet alongwith the averments of revision petition, the copies of the recorded depositions of the prosecution witnesses, (those are four in numbers), argued that the alleged mark sheet was neither found in possession of the present applicant nor was seized from his possession and there is no chain of evidence to show that the applicant was involved in any such conspiracy with the

impugned mark sheet was fabricated with forgery. In the lack of such material ingredients of Sections 467, 468 and 120-B of IPC in the charge sheet, the charges framed against the applicant is not sustainable. In continuation he said that mere on account of signature of the applicant over the mark sheet or the report of the hand writing expert in that connection was not sufficient to frame the impugned charges. He also argued that even on taking into consideration the papers of the charge sheet as accepted in its entirety, even then the ingredients of any of the aforesaid offences are not made out against the applicant and prayed for quashment of the aforesaid charge by admitting and allowing this revision. He also placed his reliance on decisions of the Apex Court in the matter of *Paramhansh Yadav & Sadanand Tripathi Vs. State of Bihar and others*, reported in 1987 AIR SC 955 and of *Punjab National Bank and others Vs. Surendra Prasad Sinha*, reported in 1992 AIR SC 1815, so also of *Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra* decided by the Apex Court on 24th April 2008 in Appeal (Cri.) 744/2008.

4. On the other hand with the assistance of the case diary, learned PL has justified the impugned charges framed against the applicant saying that same being in consonance with the charge sheet is not required any interference at this stage with further submission that sufficient prima facie ingredients of the alleged offence have been established against the applicant for framing such charges and in such premises the trial court has not committed any error either in passing the impugned order or in framing the charges and prayed for dismissal of this revision. In support of his submission he also placed his reliance on a decision of the Apex Court in the matter of *Soma Chakravarty Vs. State* through CBI reported in (2007) 5, SCC, 403.

5. Having heard the counsel at length, keeping in view the arguments advanced by them, I have carefully gone through the case diary as well as papers of the charge sheet available on record, so also the case laws cited by the parties.

6. I am of the considered view that at the stage of framing the charge against the applicant whatsoever papers or the documents placed on behalf of the applicant either before the trial court or before this Court with this revision which are not the part of charge sheet, in the light of decision of the Apex Court in the matter of *"State of Orissa Vs. Debendra Nath Padhi"* reported in AIR 2005 SC 359 could not be taken into consideration to examine

and quashing the sustainability of the impugned order or the charges framed against the applicant, as such the court is bound to consider the question of framing the charge strictly only on the basis of papers, evidence and documents submitted alongwith the Police report (the charge sheet) filed under Section 173 of Cr.P.C.

7. On evaluation of the papers of the charge sheet, if the ingredients of the alleged offences are prima facie established, then there is no option with the court except to frame the charges of such offence against the accused. The court has not to consider at the stage of framing the charge whether trial shall be culminated in conviction or not. My such approach is based on a decision of the Apex Court in the matter of *Soma Chakravarty Vs. State through CBI* reported in (2007) 5, SCC, 403.

8. It is apparent from the papers of the charge sheet that such Akansha had failed in three subjects in the alleged examination of 12th Class, inspite of that the disputed mark sheet to show that she had passed out in such examination was given to her with the signature of the applicant from the institution of the applicant. So prima facie, it could be assumed at this stage that at the time of signing of such mark sheet, it was known to the applicant that such mark sheet has been fabricated and forged with intention of some ulterior purpose to commit the fraud by submitting the same in some other institution for taking admission of participating in the competitive examination or counselling. In the case at hand, it is undisputed fact that such mark sheet was filed by Ku. Akansha in the above mentioned University to appear in the competitive counselling but on having doubt, the to the management of University, the impugned complaint was made by. the institution to some Police Station and subsequent to it, in accordance with the procedure, the enquiry was made and on establishing the offence, the crime was registered and in further investigation the involvement of the applicant in the alleged conspiracy in fabricating the aforesaid mark sheet, which could be deemed and termed to be a valuable security on account of his signature as Principal of the Institution from where the same was issued, was found, on which he was also implicated as accused in the matter. So in such premises, there are prima facie evidence against the applicant for framing the alleged charges. So in such premises, mere on account of non seizure of such mark sheet or the relevant documents from the possession of the applicant the impugned charged could neither be quashed nor the applicant could be discharged.

9. I have carefully gone through the above mentioned case laws cited on behalf of the applicant. The case of *Paramhansh Yadav & Sadanand Tripathi Vs.State of Bihar and others,* (supra) was decided on the background that a clear link in respect of the alleged conspiracy was not established between the accused and in the lack of the same, such case was decided but such situation is not in the case at hand. In the case at hand, it is prima facie apparent fact that the alleged fabricated mark sheet was signed by the applicant as Principal of the Institution and thereby he has involved himself in the alleged conspiracy with the student, Ku. Akansha. So this citation is not helping to the applicant.

10. So far the other case law in the matter of *Punjab National Bank and others Vs. Surendra Prasad Sinha,* (supra) is concerned, the same was decided taking into factual matrix of some private complaint, so also considering the situation that *prima facie* evidence for the alleged offence was not available in such case for framing the charges. But in the present case in investigation carried out by the Police, prima facie evidence with respect of the alleged offence has been collected against the applicant and placed with the charge sheet and on that basis the impugned charges have been framed. So this citation is also not helping to the applicant.

11. So far the case law of the Apex Court in the matter of *Yogesh @ Sachin Jagdish Joshi Vs.. State of Maharashtra* (supra) is concerned, the same was decided taking into consideration the legal position that where there is no sufficient ground for proceeding against the accused, then the charge could not be framed and trial could not be proceeded against him. In addition, it is also observed in such judgment that where on evaluation of the charge sheet, if two views are equally possible and the judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, then he will be fully within his right to discharge the accused. Simultaneously, it was also stated in such judgment that at the time of framing the charge, the Magistrate has not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, makes a conviction reasonably possible, then the charge should be framed. Keeping in view the observation of the Apex Court of this case, on examining the case at hand, it is apparent that in the present case there are prima facie ingredients in the evidence showing that inspite of knowing that the impugned mark sheet of Ku. Akansha is false and fabricated and prepared under some conspiracy, the same was signed by the applicant.

So in such premises, at this stage, it could not be inferred that there are two views and any of such views creates suspicion with respect of the alleged offence against the applicant whether the same was committed by him or not. Hence this citation is also not helping to the applicant in the present case.

12. In view of the aforesaid discussion, I have not found any perversity, infirmity, illegality or anything against the propriety of law in the order impugned framing the aforesaid charges against the applicant. Consequently this revision being devoid of any merits is hereby dismissed.

Revision dismissed.

I.L.R. [2013] M.P., 956
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 534/2011 (Jabalpur) decided on 8 February, 2013

TARACHAND VISHWAKARMA ...Applicant
Vs.
SMT. PUSHPA DEVI VISHWAKARMA ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - Legally wedded wife - **Respondent was already married and without obtaining divorce from first husband she claims to have married the applicant - Second marriage during the subsistence of first marriage is no marriage in the eye of law - Period of live-in-relation has no concern in the present case. (Paras 8 to 10)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – वैधानिक विवाहित पत्नी – प्रत्यर्थी पहले से विवाहित थी और पहले पति से तलाक लिये बिना उसने आवेदक से विवाह किया – पहला विवाह कायम रहते हुए दूसरा विवाह कानून की दृष्टि में विवाह नहीं है – वर्तमान प्रकरण में साथ रहने की अवधि का कोई प्रभाव नहीं।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - Compromise Deed - **If the wife wants to get the compromise deed complied with, she can proceed by any legal procedure to get the compliance of compromise deed - However, she is not entitled for maintenance amount under Section 125 of Cr.P.C. (Para 12)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – समझौता विलेख – यदि पत्नी समझौता विलेख का अनुपालन कराना चाहती है,

वह समझौता विलेख का पालन कराने के लिए किसी विधिक प्रक्रिया द्वारा कार्यवाही कर सकती है – किन्तु वह द.प्र.सं. की धारा 125 के अंतर्गत भरण पोषण के लिए हकदार नहीं।

Case referred :

(2010) 10 SCC 469.

Ashok Pandey, for the applicant.
Arun Kakoniya, for the non-applicant.

ORDER

N.K. Gupta, J.: The applicant has preferred the present revision against the order dated 21.2.2011 passed by the Principal Judge, Family Court, Jabalpur in MJC No.605/2009. whereby a maintenance of Rs.2,000/- p.m. was granted to the respondent alongwith a cost of Rs.1,000/-.

2. The facts of the case, in short, are that, the respondent moved an application under section 125 of the Cr.P.C. that she came into the contact of the applicant in the year 1988. In July, 1989, marriage of the respondent took place with the applicant in a temple. She resided as wife of the applicant upto December, 2005. Thereafter, the applicant started misbehaviour with the respondent and therefore, a compromise deed was executed on 6.1.2006 for alimony till the life-time of the respondent but, after giving the alimony for few months, the applicant stopped the payment and therefore, an application under section 125 of the Cr.P.C. was initiated.

3. The applicant in his reply denied the application. He pleaded that Mooratlal Vishwakarma, the first husband of the respondent is alive and no divorce took place between the respondent and her husband. No marriage ceremony took place between the parties. The applicant was an old aged person and the respondent was a house maid, who was a domestic assistant with the applicant. However, the applicant was kind enough to pay a sum of Rs.600/- p.m. to the respondent. It was paid through her brother Mukesh Vishwakarma but, after sometime the respondent refused to receive the sum, though the amount was sent by the money order. Compromise as submitted by the respondent is forged one. The respondent had a female child from her husband and she performed the marriage of her daughter at Bhopal on her own. She did not inform the applicant about that marriage, which shows that there was no relation of husband and wife between the parties. The applicant is burdened with expenditure of his younger son and his children. In meager

amount of his pension, he is unable to pay any maintenance to the respondent and therefore, he prayed that the application may be dismissed.

4. The learned Principal Judge, Family Court, Jabalpur, after considering the entire evidence of the parties, granted a maintenance of Rs.2,000/- p.m. to the respondent on the basis of their live-in relations for a very long period.

5. I have heard the learned counsel for the parties.

6. The learned counsel for the applicant has submitted that the respondent was already a married woman and no divorce took place between the respondent and her husband. Therefore, the respondent could not be said to be the valid wife of the applicant and maintenance under section 125 of the Cr.P.C. can be granted to the wife only. In this connection, the judgment passed by Hon'ble the Apex Court in case of *"D. Velusamy vs D.Patchaiammal"* [(2010) (10) SCC 469], is referred by the learned counsel for the applicant. It is also submitted that looking to the pension amount of the applicant, a huge amount of maintenance could not be granted to the respondent. If it is found that a compromise deed was executed between the parties then, the respondent was to prosecute a civil suit for execution of that compromise. She could not get anything under section 125 of the Cr.P.C.

7. On the other hand, the learned counsel for the respondent has submitted that the respondent was a married wife of the applicant. It is mentioned in the compromise deed and therefore, the applicant is estopped to say contrary to that fact. The younger son of the applicant is an earning member and he or his children are not the liability of the applicant. Looking to the pension amount of the applicant, he can easily give the amount of maintenance directed by the trial Court and therefore, it is prayed that the revision application filed by the applicant may be dismissed.

8. After considering the submissions made by the learned counsel for the parties, it is apparent from the evidence adduced by the parties that the marriage if at all took place between the applicant and the respondent is not material in the present case because the respondent Pushpa (P.W.1) has accepted in para 14 that her husband is alive. She did not say that any divorce took place with her husband from any Court or by any customary arrangement and therefore, if any marriage was performed between the parties then, it cannot be said to be a valid marriage in the eye of law because in Hindu Marriage Act, bigamy is not permitted and therefore, no married woman can marry with another man, without taking any divorce etc. from her previous husband.

Therefore, it is not under dispute that whether any marriage took place between the parties or not because if any marriage took place then, that was not a valid marriage in the eye of law and therefore, the respondent was not a wedded wife of the applicant.

9. The learned Principal Judge has twisted the law laid in various judgments and gave an order in favour of the respondent. The judgment passed by Hon'ble the Apex Court in case of *D. Velusamy* (supra) was referred before the trial Court. This was the judgment passed by Hon'ble the Apex Court in the year 2010. The latest precedents given by Hon'ble the Supreme Court shall be given preference over the previous precedents given by Hon'ble the Supreme Court itself and therefore, if any previous order or judgment is found of the similar Bench of Hon'ble the Apex Court on that point then, the latest view shall apply. Also, if any judgment passed by Hon'ble the Apex Court at any span of time then, the contrary judgments given by various High Courts shall turn per incuriam and such adverse judgments cannot be considered as a precedent at that time. Under such circumstances, the law laid by Hon'ble the Apex Court in case of *D. Velusamy* (supra) has superseded all the previous judgments, which were contrary to the view taken by Hon'ble the Apex Court. In case of *D. Velusamy* (supra), Hon'ble the Apex Court has distinguished between the provisions under section 125 of the Cr.P.C. and the provisions of Protection of Woman from Domestic Violence Act, 2005 (hereinafter it will be referred to as 'The Act'). It is mentioned that for the relief under section 125 of the Cr.P.C., a woman should be a wife or a divorced wife and therefore, a valid marriage is necessary for the woman, so that she can be considered as a wife, whereas 'Live-in' relations are accepted in the Act and therefore, marriage is not at all required for getting relief in that *Act*.

10. Case of such a woman is different when she was residing with a man for a longer period to the case when she claims that she was a married wife of that man. If wife is unable to prove her marriage by direct evidence then, such relationship should be proved by conduct of the man and time period should be such that they were living as husband and wife. In the present case, duration of live-in relation is not relevant because the respondent was already married with someone else and no divorce took place with her husband and therefore, if marriage took place between the parties then, it was not a valid marriage. Under such circumstances, the period of live-in relations has no concern in the present case. The learned Principal Judge could not distinguish between the provisions of section 125 of the Cr.P.C. and the provisions of the Act.

The present application was not filed under the provisions of the Act but, it was filed under section 125 of the Cr.P.C. No inherent powers under section 482 of the Cr.P.C. were granted to the Family Court, who was enjoying the Magisterial powers for consideration of application under section 125 of the Cr.P.C., so that the Principal Judge of Family Court could grant the relief under the Act, where the application was filed under section 125 of the Cr.P.C. Hence, the learned Principal Judge of the Family Court has committed an error of law in granting the maintenance to a woman under section 125 of the Cr.P.C., who was not the wife of the applicant in the eye of law.

11. So far as the amount of maintenance is concerned, the amount of pension received by the applicant is proved. He could not prove any liability upon him. His younger son is grown up. He had 2-3 children and therefore, they were not dependent upon the applicant and looking to the contention of the applicant, the maintenance amount computed by the trial Court, may not be said to be excessive.

12. On the basis of the aforesaid discussion, it is apparent that the respondent applied for maintenance under section 125 of the Cr.P.C., whereas, she was not the wife of the applicant at all and therefore, she could not get any maintenance amount from the respondent under the provisions of section 125 of the Cr.P.C. If the respondent wants to get the compromise deed to be complied with then, it may be a separate procedure and she can proceed by any legal procedure to get the compliance of the compromise deed. However, she is not entitled to get any maintenance under section 125 of the Cr.P.C. A legal mistake has been committed by the learned Principal Judge, Family Court, Jabalpur that he applied the provisions of Domestic Violence Act, 2005 in the application filed under section 125 of the Cr.P.C. and therefore, looking to that legal error, an interference is required from the side of this Court by way of a revision. Hence, the revision appears to be acceptable.

13. On the basis of the aforesaid discussion, the revision filed by the applicant is hereby allowed. The impugned order passed by the learned Principal Judge, Family Court, Jabalpur is hereby set aside. The application under section 125 of the Cr.P.C. filed by the applicant is hereby dismissed. However, the order relating to the cost passed by the trial Court shall be maintained.

14. A copy of the order be sent to the trial Court alongwith its record for information.

Revision allowed.

I.L.R. [2013] M.P., 961
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 1053/2012 (Jabalpur) decided on 14 February, 2013

SUBHAM ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Juvenile Justice (Care and Protection of Children) Act (56 of 2000), Section 7, Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 12 - Enquiry - **Date of birth of applicant is 01.10.1995 as per matriculation certificate whereas the incident took place on 18.04.2012 - Age of accused should be considered on the date of incident - When the matriculation or equivalent certificate is available, then it would be the basis of computation of date of birth - Applicant was below 18 years of age. (Para 7)**

क. किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 7, किशोर न्याय (बालकों की देख–रेख और संरक्षण) नियम 2007, नियम 12 – जांच – मेट्रीकुलेशन प्रमाण पत्र के अनुसार आवेदक की जन्म तिथि 01.10.1995 है, जबकि घटना दिनांक 18.04.2012 को घटित हुई – अभियुक्त की आयु का विचार, घटना दिनांक पर किया जाना चाहिए – जब मेट्रीकुलेशन या समकक्ष प्रमाण पत्र उपलब्ध है तब, वह जन्म तिथि की संगणना का आधार होगा – आवेदक 18 वर्ष से कम आयु का था।

B. Juvenile Justice (Care and Protection of Children) Act, (56 of 2000), Section 7 - Ossification Test - **As per the Ossification test, the age of the accused could be between 16 years and 4 months to 18 years and 4 months - Where there appears to be a doubt in computation, then the benefit is to be given to the accused. (Para 8)**

ख. किशोर न्याय (बालकों की देख–रेख और संरक्षण) अधिनियम (2000 का 56), धारा 7–अस्थि विकास परीक्षण–अस्थि विकास परीक्षण के अनुसार अभियुक्त का वय 16 वर्ष और 4 माह से 18 वर्ष और 4 माह के बीच का हो सकता है–जहां कहीं संगणना में संदेह उत्पन्न होता है, तब लाभ अभियुक्त को दिया जाना चाहिए।

Cases referred :

2011 AIR SCW 4632, (2009) 6 SCC 681.

K.S. Rajput, for the applicant.
P.C. Gupta, P.L. for the Non-applicant/State.

ORDER

N.K. GUPTA J.: The petitioner has challenged the order dated 23.5.2012 passed by the learned Sessions Judge, Burhanpur in criminal appeal No.61/2012, whereby the appeal filed by the petitioner was dismissed and order dated 7.5.2012 passed by the Chief Judicial Magistrate, Burhanpur in criminal case No.71/2012 was kept intact, by which it was found that the petitioner was not a juvenile in the eye of law.

2. The prosecution's case, in short, is that on 18.4.2012, at about 12 O'Clock, the petitioner and other children were playing cricket. The boy Sachin had a liability of Rs.50 to 60 thousands and therefore, they planned to kidnap a boy Kaushal, so that some ransom may be demanded from his father. Kaushal was also playing cricket with these persons. He did not agree and therefore, the petitioner and other accused persons held the deceased Kaushal and tried to take him away. His hands and feet were tied by a rope and during such a procedure, the deceased Kaushal expired, due to strangulation. Thereafter, the dead body of the deceased Kaushal was disposed off by throwing it in a dry well and ultimately, a sum of Rs.6 Lacs were demanded from his father. After enquiry, one accused Dipesh was found to be juvenile and therefore, his matter was directed to be considered by the Juvenile Justice Board.

3. The petitioner had also applied to assess his age and declare him juvenile and therefore, an enquiry was done by the learned Chief Judicial Magistrate, Burhanpur, as per the provisions of section 7 (a) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter it will be referred to as 'The Act') and rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter it will be referred to as 'The Rule') and after getting the enquiry done, it was directed that the applicant was not a juvenile and therefore, the application filed by the

applicant was dismissed. On preferring an appeal, the learned Sessions Judge has found that the appeal was not maintainable and therefore, no interference was done in the order passed by the learned Chief Judicial Magistrate, Burhanpur.

4. I have heard the learned counsel for the parties.

5. The learned counsel for the petitioner has submitted that the petitioner is a juvenile in the eye of law and the learned Chief Judicial Magistrate has committed an error in making the observations regarding the age of the petitioner. Age of the petitioner was to be computed according to the provisions of rule 12 of the Rules, which was no where computed. In support of his contention, reliance is placed upon various judgments and orders of Hon'ble the Apex Court in cases of *"Shah Nawaz Vs.State of U.P. & Anr."*, [2011 AIR SCW 4632], *"Ram Suresh Singh Vs. Prabhat Singh @ Chhotu Singh & Anr"*, [(2009) (6) SCC 681], *"Madhuri Patil Vs. Additional Commissioner, Tribal Development"*, [AIR 1995 SC 94], *"Dharambir Vs. State (NCT of Delhi) & Anr"*, [(2010) (5) SCC 344]. The learned counsel for the petitioner has also relied upon the orders passed by the single Bench of this Court in case of *"Devendra Singh Vs. State of M.P."*, [(1998) (1) MPLJ 529]. Also one order passed by the single Bench of Jharkhand High Court was referred in case of *"Poulush Pahan Vs. State of Jharkhand & Anr."*, [(2000) Cr.L.J. 785] and therefore, it is prayed that the petitioner may be declared to be a juvenile and his matter may be directed to be tried by the Juvenile Justice Board.

6. On the other hand, the learned Panel Lawyer has submitted that the learned Chief Judicial Magistrate, Burhanpur has discussed the entire case laws in his order and it was found that the report received from ossification test was accepted by the doctor. A certificate issued by the Sarpanch, Shiv Thakur (P.W.1) has no value and therefore, the ossification test done by Dr.Azad Jain (P.W.3) is to be relied and therefore, the petitioner was above 18 years of age at the time of the incident.

7. If age of anyone is to be computed then, evidence should be

considered in a particular order. If date of birth of a person is found registered as required by the registration of Births and Deaths Act, 1969, soon after his birth then, that entry amounts to be admissible under section 76 of the Indian Evidence Act and it is a conclusive proof to that fact but, if registration of birth was done after sometime then, the Court has to consider the reasons of such delay and genuineness of the entry. Secondly, when a person continues with his shown date of birth for a longer period then, he is estopped to say contrary to that fact and therefore, he could be believed for that entry because when the date of birth was informed to a particular authority and it continues for a longer period then, it cannot be said that a particular date of birth was mentioned due to a particular reason but, such a principle is not acceptable in case of the prosecutrix of any case. The reason behind the principle is that the computation of age should be done in a manner that if any doubt is created then, benefit of doubt should be given to the accused. Therefore, when a date of birth of the accused is to be counted then, his entry relating to date of birth given to the school, which continues till his high school examination then, that entry of date of birth shall be considered in favour of the accused, if no cognate evidence is submitted by him contrary to that entry, whereas in case of a prosecutrix, it is to be considered as to whether the entry given to the school authorities was given on the basis of any document and what was the source of that entry. Otherwise, that entry becomes doubtful and benefit of doubt is to be given to the accused. Similarly, in ossification test, if age of the accused is computed then, variation of two years may be considered on the lower side to assess as to whether he is a juvenile or not, whereas, age of the prosecutrix assessed by the ossification test, may be added by two years on upper side, so that the benefit of doubt may be given to the accused. However, age of any person, if it is computed by the ossification test then, two years may be added or deleted, according to the other symptoms of that person and factual position of the case and therefore, it cannot be said that it is a hard and fast rule, by which age may be computed.

8. The learned counsel for the petitioner has cited some of the

judgments passed by Hon'ble the Apex Court and the single Bench of this Court as well as the Jharkhand High Court. In case of *Dharambir* (supra), Hon'ble the Apex Court has mentioned the effect of amendment in the Act in the appeals pending before various Courts. It was mentioned in the judgment that the age of the accused be considered on the date on which the offence was committed. In case of *Devendra Singh* (supra), the single Bench of this Court has directed to consider the age of the accused on the basis of mark-sheet of the school because the Court did not take any consideration of the affidavits given by the parents of the accused and therefore, matter was remanded back. The judgment passed by Hon'ble the Apex Court in case of *Madhuri Patel* (supra) is not relevant for assessment of the age of the juvenile. In the present case, Dr.Azad Jain (P.W.3) found the age of the petitioner to be 18 to 19 years but, in his cross-examination he has accepted that his assessment of age, according to the x-ray report Ex.P/6 was 17.5.1995. He has further accepted that there may be a variation of six months in his assessment and therefore, assessment of the age of the petitioner by the ossification test could be 17 to 19 years. The assessment was done on 27.12.2012 and the incident took place on or about 18.4.2012 and therefore, according to the judgment passed by Hon'ble the Apex Court in case of Dharambir (supra), age of the accused should be considered on the date of the incident. Therefore, the age of the accused on the date of the incident, according to the ossification test would be 16 years, 4 months to 18 years 4 months. The range given by Dr.Azad Jain (P.W.3) is such that the petitioner could be below 18 years of age at time of the incident or he could be above 18 years of age at the time of the incident. However, as discussed above there appears to be a doubt in computation then, the benefit was to be given to the accused and therefore, when there was a possibility that he could be below 18 years of age, according to the ossification test then, he should be determined to be a juvenile being below 18 years of age at the time of the incident.

9. In the case of *Shah Nawaz* (supra), Hon'ble the Apex Court has referred the procedure of computation of age as mentioned in the rule 12

of the Rules, 2007. In that rule, exclusion of next procedure is given, if the document presented by the accused refers to the previous provision of sub rule 3 of the Rule 12. In sub rule 3, it is mentioned that if the matriculation or equivalent certificate is available then, it would be the basis of computation of the date of birth. In the present case, the matriculation certificate is shown to the Chief Judicial Magistrate, in which the Date of Birth of the petitioner was mentioned to be 1.10.1995 and therefore, the petitioner was below 18 years of age at the time of the incident. When the matriculation certificate was available then, according to the provisions of rule 12 (3) (b), no other evidence is required to be considered for computation of the age and therefore, the ossification test done by Dr.Azad Jain loses its value.

10. Hence, in the light of judgments passed by Hon'ble the Apex Court in cases of *Shahnawaz* (supra) and *Ramsuresh Singh* (supra) and also, the computation which took place on the basis of rule 12 (3) (a), the petitioner appears to be below 18 years of age at the time of the incident.

11. It appears that the learned Chief Judicial Magistrate decided the age of the petitioner being sentimental with the gravity of the crime alleged to have been committed by the petitioner. It is strange that in the order dated 7.5.2012, the learned Chief Judicial Magistrate did not discuss the Date of Birth of the petitioner, which was mentioned in the matriculation certificate, whereas on perusal of his order-sheet dated 26.4.2012, such matriculation certificate was produced before him by Shyam Singh, father of the petitioner. Under such circumstances, where the matriculation certificate is available and the Date of Birth given in that certificate clearly indicates that the petitioner was below 18 years of age at the time of the incident then, nothing more could be seen at the time of assessment of his age. The learned Chief Judicial Magistrate has committed an error of law in the assessment of age done by the petitioner. Hence, it is a good case, in which interference is required from the side of this Court by way of a revision.

12. On the basis of the aforesaid discussion, the revision filed by the petitioner is hereby allowed. The order dated 7.5.2012, passed by the

learned Chief Judicial Magistrate, Burhanpur and order dated 23.5.2012 passed by the learned Sessions Judge, Burhanpur are hereby set aside. It is declared that the petitioner Subham was a juvenile at the time of the incident. Therefore, his name may be removed from the trial which is pending before the Sessions Court. The SHO Police Station Lalbag, District Burhanpur is directed to produce the charge-sheet against the petitioner before the concerned Juvenile Justice Board. The trial Court shall fix a date of appearance of the petitioner before the Juvenile Justice Board.

13. A copy of the order be sent to the trial Court forthwith, so that the petitioner should not face the trial before the Sessions Court.

Revision allowed.

I.L.R. [2013] M.P., 967
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Brij Kishore Dube
M.Cr.C. No. 3416/2012 (Gwalior) decided on 6 March, 2013

BALWANT SINGH TOMAR @ BALWANTA ...Applicant
Vs.
TIGMANSHU DHULIA & ors. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) **- The Complaint must disclose the material ingredients of cognizable offence - If there is flavour of civil nature, the same cannot be agitated in the form of criminal proceeding - The magistrate cannot act merely as a post office and he is bound to apply his mind before ordering investigation u/s 156(3). (Paras 16 to 17)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – परिवाद में संज्ञेय अपराध के तात्विक घटक प्रकट होने चाहिए – यदि सिविल स्वरुप के गुण विशेष हैं, उसे दाण्डिक कार्यवाही के रुप में नहीं उठाया जा सकता – न्यायाधीश मात्र डाक घर के रुप में कार्य नहीं कर सकता और वह धारा 156(3) के अंतर्गत अन्वेषण आदेशित करने से पहले अपने मस्तिष्क का प्रयोग करने के लिए बाध्य है।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 **- If there is no infirmity or illegality in the order - No interference can be called for u/s 482 - Petition is liable to be dismissed. (Para 21)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – यदि आदेश में कोई कमी या अवैधता नहीं है – धारा 482 के अंतर्गत हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज किये जाने योग्य।

***C. Penal Code (45 of 1860), Section 420* - Complaint reveals that the allegations are of civil nature and do not prima facie disclose the commission of criminal offence of cheating-Hence mere use of expression "Cheating" in the complaint is of no consequence. (Para 19)**

ग. दण्ड संहिता (1860 का 45), धारा 420 – शिकायत प्रकट करती है कि अभिकथन सिविल स्वरुप के हैं और प्रथम दृष्टया छल का दाण्डिक अपराध कारित होना नहीं दर्शाते – अतः शिकायत में मात्र 'छल' शब्द के प्रयोग को कोई महत्व नहीं।

Cases referred :

2009(2) CCSC 798(SC), 2009(2) CCSC 962(SC), 2002 CR.L.R.(SC) 221, 2008(III) MPWN 25(SC), 2008(III) MPWN 73(SC), 2007 (2) CR.J. 104, 2007(5) CRJ 195 All., (2000) 2 SCC 636, (2011) 3 SCC 412, (2005) 10 SCC 228.

A.S. Bhadoriya, for the applicant.

Udita Singh, Priyankush Jain & Anand V. Bhardwaj, for the non-applicants No. 1 & 2.

Mukund Bhardwaj, P.P. For the non-applicant No.3./State.

ORDER

B.K. DUBE, J.: This petition under Section 482 of Cr.P.C. is preferred by the petitioner/complainant for quashing the order dated 17.04.2012 passed by J.M.F.C., Gwalior in Complaint Case No.__/2012 (*Balwant Singh Tomar v. Tigmanshu Dhulia Film & Ano.*) by which an application under Section 156 (3) of Cr.P.C. filed by the petitioner/ complainant has been dismissed.

2. Brief facts of the case are that the petitioner/complainant, Balwant Singh Tomar submitted a complaint in writing on 23.02.2012 to the Station House Officer, Police Station Madhoganj, District Gwalior and the Superintendent of Police, District Gwalior alleging therein that the respondents No.1 & 2 had approached while he was at his house in Guda

and sought his assistance for the purpose of making film 'Paan Singh Tomar' for which they offered to pay Rs.40.00 lacs but after seeking and procuring his assistance for making of the film they had not paid Rs.40.00 Lacs. Therefore, it was prayed that after registering the case against the respondents No.1 & 2 for commission of the offence of cheating, they may be punished. Thereafter, on 24.02.2012 petitioner preferred writ petition bearing No.1608/12, alleging inaction of the police authorities for not taking action against the respondents No.1 & 2 on the basis of the aforesaid complaint dated 23.02.2012 and prayed for issuance of writ of mandamus to the police authorities for registering the FIR against the respondents No.1 & 2 in respect of commission of the offence of cheating as alleged in the complaint dated 23.02.2012. The writ petition was disposed of by this Court vide order dated 01.03.2012 with an observation that if the petitioner prefers a representation, the authorities will deal with it in accordance with the law. Thereafter, on 06.03.2012, the petitioner preferred an application before the Superintendent of Police, Gwalior praying for registration of FIR against the respondents. On 09.04.2012, the petitioner filed an application under Section 156 (3) of Cr.P.C. before the Court of J.M.F.C., Gwalior seeking a direction to the Station House Officer, Kampoo, District Gwalior to register FIR in respect of commission of offence punishable under Sections 419 and 420 of IPC against the respondents No.1 & 2 and for investigation thereof. The application was rejected by the Court vide the impugned order dated 17.04.2012. The relevant portion of the impugned order reads as under:-

> "उक्त अभिकथनों से स्पष्टतः परिलक्षित होता है कि अभिकथनों में अनावेदकगण की ओर से कोई ऐसा आशय होना नहीं बताया गया है कि वे आवेदक से प्रारंभ से छल करने का कोई आशय रखते थे जिस प्रकार के अभिकथन है उनसे यह दर्शित होता है कि अनावेदकगण ने अपने वचन को पूरा नहीं किया है जबकि आवदेक ने अपने भाग के वचन को पूरा किया तथा उसका परिश्रमिक उसे नहीं दिया गया। यह अभिकथन स्पष्टतः संविदा के भंग की श्रेणी के है या पारिश्रमिक न मिलने के संबंध में है जिसके आधार पर छल के अपराध के लिए आपराधिक अभियोजन को अनुज्ञात किया जाना उचित नहीं है और तब प्रस्तुत आवेदन के आधार

पर प्रथम दृष्टया ही छल के अपराध के तत्व आकर्षित नहीं होना पाए जाते हैं और तब न्यायिक विवेक का उपयोग इस आवेदन पर से अनावेदकगण के विरूद्व अपराध पंजीबद्व करने का आदेश देने के लिए किया जाना कतई उचित नहीं है बल्कि यह न्यायिक प्रकिया का दुरूपयोग ही होगा क्योंकि उपक्षापूर्ण या यांत्रिक तरीके से आदेश पारित कर अपराध पंजीबद्व करने के लिए आदेश दिया जाना निर्दोष व्यक्ति की व्यक्तिगत स्वतंत्रता को भी गंभीर आघात पहुंचा सकता है और यह उसके संवैधानिक अधिकारों का हनन होगा और इस सिद्वांत को दृष्टिगत रखते हुए कि मजिस्ट्रेट में निहित किए गए विवेकाधिकार का उपयोग उसे न्यायहित में सावधानी पूर्वक और न्यायिक रूप से करना चाहिए आवेदक की ओर से प्रस्तुत आवदेन निरस्त किया जाता है।

पत्रावली विहित अवधि में अभिलेख प्रकोष्ठ में तजमा करायी जावे ।"

3. Being aggrieved by the aforesaid order, this petition has been preferred by the petitioner.

4. Shri A.S. Bhadoriya, learned counsel appearing on behalf of the petitioner submits that the petitioner had submitted a complaint in writing for commission of offence of cheating by the respondents No.1 & 2 to the Station House Officer and the Superintendent of Police, District Gwalior but the complaint has not been registered by the police. Thereafter, in compliance with the direction of this Court in W.P.No.1608/12, the petitioner submitted an application dated 06.03.2012 before the Superintendent of Police, Gwalior for registering the FIR against respondents No.1 & 2 but the FIR has not been registered, then, the petitioner filed an application under Section 156 (3) of Cr.P.C. but the application was dismissed by the impugned order observing that the alleged dispute i.e., the breach of contract is of civil nature. It is further submitted by the learned counsel that sub-section (1) of Section 156 of CrPC empowers the Police Officer incharge of the Police Station to investigate cognizable offences. The police has statutory duty to investigate the circumstances of an alleged cognizable offence but on failing to do so, the petitioner submitted an application before the Magistrate under Section 156 (3) of Cr.P.C.. Sub-section (3) of Section 156 of

Cr.P.C empowers any Magistrate to order for an investigation. The power under Section 156 (3) of Cr.P.C. has been conferred on the Magistrate to check the arbitrary action of the police in matters of registration of FIR of cognizable offence. It is mandatory under Section 156 (3) of Cr.P.C. that if the Magistrate found prima-facie the cognizable offence is made out from the contents of the application, he is bound to order to register the case and order to investigate the matter. As per facts mentioned in the application, it is clear that the offence of commission of cheating which is cognizable offence is made out against the respondents No.1 & 2. Learned counsel has further submitted that merely because alleged act has civil profile, not sufficient to denude it of its criminal outfit. He has placed reliance on the following decisions:-

(i) State of Punjab v. Pritam Chand and others, 2009(2) CCSC (Criminal cases of Supreme Court) 798 (SC);

(ii) Smt. Rumi Dhar v. State of West Bengal and another, 2009 (2) CCSC 962 (SC);

(iii) Suresh Chand Jain v. State of Madhya Pradesh & Anr., 2002 Cr.L.R. (SC) 221;

(iv) Lalita Kumari v. Government of U.P. and others, 2008 (III) MPWN 25 (SC);

(v) Sakiri Vasu v. State of U.P., 2008 (III) MPWN 73 (SC);

(vi) Rajwati v. State of U.P., 2007 (2) CRJ 104; and

(vii) Smt. Santosh Kumar v. State of U.P., 2007 (5) Criminal Reported Judgments, 195 All.

5. Miss. Uditya Singh, learned counsel appearing on behalf of the respondents No.1 & 2 argued in support of the impugned order and submitted that the impugned order is a speaking order and does not call for any interference by this Court in exercise of powers under Section

482 of Cr.P.C. The allegations by the petitioner are completely false and baseless, made with malafide intention of extorting money from the respondents No.1 & 2. At no point of time, the respondent No.2 visited the petitioner's house either before the commencement of the film, during its production nor at any time after it. Respondent No.1 was desirous of making a film based on the life of 'Paan Singh Tomar'. For the said purpose, he alongwith his associates came to Gwalior, where the petitioner who is the nephew of Paan Singh Tomar met and offer to provide the information regarding the life and activities of Paan Singh Tomar voluntarily to the respondent No.1. No talk took place regarding monetary consideration for the information and assistance being provided by the petitioner. It is further submitted that Sauram Singh Tomar who is the son of Late Paan Singh Tomar has consented to the making of the film, "Paan Singh Tomar" based on the biography and activities of his father. In this respect, a letter of agreement dated 19th June, 2008 was executed between the respondent No.2 and Sauram Singh. According to the terms and conditions of the said agreement, a sum of Rs.15 lacs was paid to him. It is further submitted that if the allegations contained in the complaint/application were taken to be true in their entirety, then also, the subject-matter is of civil in nature. The Supreme Court deprecated the practice of registering criminal cases in purely civil cases. She has cited the case of *G. Sagar Suri and another v. State of U.P. And others,* (2000) 2 SCC 636 in support of her contention.

6. In order to understand the rival contentions, it is useful to refer to the complaint/application dated 09.04.2012 under Section 156 (3) of Cr.P.C. which was made by the petitioner before the J.M.F.C., Gwalior in which the respondents No.1 & 2 herein have been shown as the accused. The said criminal complaint/application was made for the commission of offence punishable under Sections 419 and 420 of IPC. The following averments in the complaint/application are relevant for consideration, which reads as under:-

> "2. यह कि लगभग 2 वर्ष पहले फिल्म निर्देशक तिगमांशु धुलिया तथा फिल्म निर्माता रोनी स्कूवाला प्रार्थी के घर गुडा पर आये और उससे कहा कि वे प्रार्थी

के चाचा पानसिंह तोमर तथा उसके उपर फिल्म बनाना चाहते है, जिसके ऐवज में वे प्रार्थी को 40 लाख रूपये देंगे उन्होंने प्रार्थी से यही भी कहा कि फूलनदेवी को उसकी फिल्म बनाने पर उसे 25 लाख रूपये मिले थे लेकिन अब हम तुम्हें 40 लाख रूपये देंगे। प्रार्थी गांव का सीदा–सादा कम पढ़ा–लिखा किसान है इसलिये ऐग्रीमेंट के बारे में उसे कोई जानकारी नहीं थी उसने यही सोचा कि अभियुक्तगण बड़े लोग है और झूठ नही बोलगें तथा उसके साथ बेईमानी नहीं करेंगे, इसलिए प्रार्थी ने 40 लाख रूपये में हामी भर दी, उसके बाद अभियुक्तगण ने धोलपुर के राजघाट से करौली तक जंगलों में शूटिंग शुरू कर दी और अपनी टीम को महारानी प्लेस धोलपुर में ठहराया जहॉ से वे प्रत्येक सुबह प्रार्थी के लिए गाडी भेजते थे और उसे धौलपुर ले जाते थे उक्त लोगों ने 4 माह तक प्रार्थी से बेजोड़ मेहनत कराई और बाद में बिना कुछ दिये वापस मुम्बई चले गये तब से लगातार अभियुक्तगण पैसा देने के नाम पर प्रार्थी को टरकाते रहे है, अभियुक्तगण ने 40 लाख रूपये देने का प्रलोभन देकर प्रार्थी से 4 माह तक फिल्म बनाने में पूरा सहयोग लिया उसके परिवार के बारे में पूरी जानकारी ली, यदि अभियुक्तगण 40 लाख रूपये देने का वादा नहीं करते तो प्रार्थी फिल्म बनाने में उनकी कोई मदद नहीं करता इस प्रकार अभियुक्तगण ने प्रार्थी के साथ उसके घर पर आकर धोखा– धड़ी की ।

3. यह कि, प्रार्थी द्वारा सर्वप्रथम मामले की लिखित रिपोर्ट दिनांक 23.02.2012 को थाना– माधौगंज जिला – ग्वालियर तथा पुलिस अधीक्षक, ग्वालियर को की गई किन्तु पुलिस ने मामले में कोई विधिवत् कार्यवाही नहीं की, जिससे दुःखी होकर प्रार्थी द्वारा माननीय म.प्र. हाईकोर्ट खण्डपीठ ग्वालियर में एक रिट याचिका क्रमांक 1608/12 प्रस्तुत की गई जिसमें माननीय हाईकोर्ट ने प्रार्थी से इस आशय की अपेक्षा की कि उसने पुलिस में रिपोर्ट करने के तत्काल बाद हाईकोर्ट में रिट याचिका प्रस्तुत कर दी, प्रार्थी को थाने पर मामले की जॉच करना चाहिए और यदि पुलिस ऐसा नहीं करती तो उसे द.प्र.सं. के प्रावधानों के तहत् पुलिस अधीक्षक को प्रतिवेदन देना चाहिये और यदि प्रार्थी प्रतिवेदन प्रस्तुत करेगा तो माननीय हाईकोर्ट को कोई संदेह नहीं कि अधिकारी विधि के अनुसार कार्यवाही करेंगें।

4. यह कि, माननीय हाईकोर्ट के उक्त आदेश के पश्चात् प्रार्थी द्वारा पुलिस थाना–कम्पू जिला ग्वालियर में मामले की विधवत् जॉच एवं विधिक कार्यवाही हेतु निवेदन किया गया किन्तु विवेचना अधिकारी ने प्रार्थी से कहा कि बड़े लोगों के विरूद्व मामला बिना अधिकारियों की अनुमति के दर्ज नहीं होता, विवचेना अधिकारी द्वारा मामले में कोई विधिवत् कार्यवाही न किये जाने की शिकायत प्रार्थी द्वारा थाना प्रभारी को की गई, किन्तु जब थाना प्रभारी द्वारा

भी मामले में कोई रूचि प्रदर्शित नहीं की गई तब, उसने माननीय हाईकोर्ट के आदेश के पालन में पुलिस अधीक्षक, ग्वालियर को एक प्रतिवेदन दिनांक 06.03.2012 को प्रस्तुत किया किन्तु पुलिस अधीक्षक ने भी मामले में कोई वधानिक कार्यवाही नहीं की ।

5. यह कि, अभियुक्तगण द्वारा प्रार्थी को पुलिस थाना–कम्पू, जिला–ग्वालियर क्षेत्रान्तर्गत फिल्म बनाने में सहयोग करने तथा पैसा देने का प्रलोभन दिया गया था जो कि भा.द.वि. की धारा 419,420 के अन्तर्गत एक दण्डनीय अपराध है जिसके निराकरण का माननीय न्यायालय को क्षेत्राधिकार एवं श्रवणधिकार प्राप्त है ।

अतः विनम्र निवेदन है कि थाना प्रभारी थाना– कम्पू, जिला–ग्वालियर को आदेशित किया जावे कि वे द.प्र.स. की धारा 154 के तहत मामले की प्रथम सूचना रिपोर्ट पंजीबद्व कर, मामले की विधि अनुसार विवेचना करे ।"

7. The complaint is concerned with Sections 419 and 420 of IPC which reads thus:-

"419. Punishment for cheating by personation -

Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

420. Cheating and dishonestly inducing delivery of property -

Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

8. Now, this Court has to find out whether the ingredients of Sections 419 and 420 of IPC have been made out from the complaint and whether the J.M.F.C. was justified in rejecting the application? Simultaneously, this Court has to consider the decisions relied upon by the learned counsel.

9. In *Pritam Chand and others* (supra), the respondents were charged for alleged commission of offence punishable under Section 406 of IPC. They were partners of one Jagdamba Rice Mills to whom the paddy was entrusted for milling by the Punjab State Civil Supplies Corporation Ltd., during the year 1983-84. It was alleged that the accused failed to account for the paddy and thus misapproriated the same. Pursuant to arbitration clause between the parties, an arbitrator was appointed and an award of Rs.1,81,315.43 was rendered in favour of the Corporation. The trial court acquitted the accused on the ground that the matter arose out of breach of contract, the same was of civil nature and a criminal case against the accused was not made out. High Court endorsed the view and dismissed the appeal. The Apex Court held that the High Court should not have in a summary manner dismissed the appeal after having recorded that a criminal case may arise even when breach of contract is also there and there is no bar for prosecution under the criminal law. Having said so, the High Court came to an abrupt conclusion because two views are possible as to whether the allegation made was a civil dispute or of a criminal nature, no interference was called for. The approach is clearly erroneous. The Apex Court set aside the impugned judgment of the High Court and remitted the matter to it for fresh consideration in accordance with law.

10. In *Smt. Rumi Dhar* (supra), the appellant and her husband alongwith various other persons including the officers of the Oriental Bank of Commerce Khidirpur Branch, Calcutta were prosecuted for alleged commission of offences under Sections 120B/420/467/468 and 471 of IPC. The officers of the Bank had also been prosecuted under Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988. A charge-sheet was filed against the appellant and seven others. She (appellant) was inter alia charged for taking the benefit of overdrafts between the period 8th February, 1993 to 5th March, 1993 without furnishing any security. The Bank filed application for recovery before D.R.T. The appellant and Bank entered into settlement and Rs.25.51 lakhs paid by appellant to Bank. The question was whether the appellant

entitled to be discharged from criminal proceedings on account of said settlement and repayment. The Apex Court held that the appellant shall not absolved of criminal liability. A civil proceeding and a criminal proceeding can proceed simultaneously.

11. In *Suresh Chand Jain* (supra), the Apex Court while explaining the scope of Section 156 (3) of CrPC observed that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156 (3) of Code. Even if the Magistrate does not say in so many words while directing investigation under Section 156 (3) of the Code that an FIR should be registered, it is the duty of the officer-in-charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

12. While considering the grievance in regards that the police authorities do not register FIRs' unless some direction is given by the Court and investigations do not commence even after registration or FIRs'. The Apex Court in the case of *Lalita Kumari* (supra) has ruled as under:-

> "Let order dated 14th July, 2008, and this order be put on the website of the Supreme Court of India so that the people of India may know what directions have been given by this Court and they may take appropriate steps in case of any inaction on the part of the concerned officer of the police station in instituting a case and the Chief Judicial Magistrate/ Chief Metropolitan Magistrate, as the case may be, shall take action in a case of inaction upon filing of complaint petition and give direction to institute the case within the time directed in the said order failing which the Chief Judicial Magistrate/Chief Metropolitan Magistrate, as the case may be, shall not only initiate action against the delinquent police officer but punish them suitably by send them to jail, in case the cause shown is found to be unsatisfactory. Apart

from this, the Chief Judicial Magistrate/Chief Metropolitan Magistrate, as the case may be, shall report the matter to the disciplinary authority at once by fax as well upon receipt of which the disciplinary authority shall suspended the concerned police officer immediately in contemplation of departmental proceeding."

13. In *Sakiri Vasu* (supra), the Apex Court ruled that if a person has a grievance that his FIR has not been registered by the police station, his first remedy is to approach the Superintendent of Police under section 154 (3) CrPC or other police officer referred to in section 36 CrPC. If despite approaching the Superintendent of Police of the officer referred to in section 36 his grievance still persists, then he can approach a Magistrate under section 156 (3) CrPC instead of rushing to the High Court by way of a writ petition or a petition under section 482 CrPC. Moreover, he has a further remedy of filing a criminal complaint under section 200 CrPC.

14. In *Smt. Santosh Kumari* (supra), a Single Bench of Allahabad High Court held that once a cognizable offence is disclosed in the complaint the Magistrate is bound to direct the FIR to be registered and the matter be investigated. Similar view has been taken by the Single Bench of Allahabad High Court in the case of *Rajwati* (supra).

15. In the case cited by learned counsel for the respondents No.1 & 2, the Apex Court in *G. Sagar Suri* (supra), while explaining the scope of Section 482 of CrPC in case of civil nature has ruled that 'jurisdiction under Section 482 of the code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law.

16. The Apex Court in the case of *Thermax Limited and others v. K.M. Johny and others*, (2011) 3 SCC 412, held that for proceeding under Section 156 (3) of the Code, the complaint must disclose relevant

material ingredients of cognizable offence. If there is flavour of civil nature, the same cannot be agitated in the form of criminal proceeding.

17. It is pertinent to mention here that the power conferred under Section 156 (3), the Magistrate should not mechanically pass order directing the police to investigate the case. The need for investigation by police is necessary only in cases where the Magistrate is prima facie satisfied that the allegations contained in the complaint point to the commission of cognizable offence. For ordering investigation by police under Section 156 (3) of CrPC, the Magistrate cannot act merely as a post office and he is bound to apply his mind before doing so.

18. In this case, admittedly, no complaint was filed. The petitioner chose to file only a complaint under Section 156 (3) of Code before the Magistrate.

19. On a bare perusal of the complaint/application would only reveal that the allegations as contained in the application are of a civil nature and do not prima-facie disclose commission of allegation criminal offence under Section 420 of IPC. In *Anil Mahajan v. Bhor Industries Ltd. and another,* (2005) 10 SCC 228, a three Judges Bench of Apex Court analyzed the difference between a breach of contract and cheating and held as under:-

> "The substance of the complaint is to be seen. Mere use of the expression "cheating" in the complaint is of no consequence. Except mention of the words "deceive" and "cheat" in the complaint filed before the Magistrate and "cheating" in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay ....."

20. The essential ingredient for an offence under Section 420 of IPC is that there has to be dishonest intention to deceive another person. The relevant allegations made in the complaint and on perusal of the same,

reproduced hereinabove, it is evident that no such dishonest intention of the respondents No.1 & 2 can be seen or even inferred inasmuch as the entire dispute pertains to contractual obligation between the parties. Since, the very ingredients of Section 420 of IPC are not attracted, the J.M.F.C. has rightly disallowed the application. Even for the sake of arguments, this Court admit that allegations in the complaint do make out a dispute, still it ought to be considered that the same are merely a breach of contract and the same cannot give raise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning [Relied upon *Thermax Limited* (supra)].

21. Therefore, in the peculiar facts and circumstances of the present case and in the aforesaid legal dictum and for the reasons given hereinabove, I do not find any infirmity or illegality in the impugned order which may call for interference in exercise of powers under Section 482 of Cr.P.C. This petition is devoid of any merit and is, therefore, dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 979
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Brij Kishore Dube
M.Cr.C. No. 1367/2013 (Gwalior) decided on 7 March, 2013

BAZEER KHAN ALIAS LALLA KHAN ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 167(2) & 482 **- Filing of Charge sheet during pendency of application for statutory bail does not affect the right of the accused to Bail u/s 167(2) - The orders of both the courts below set aside - Petition allowed.**
(Paras 6 to 11)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 167(2) व 482 – कानूनी जमानत हेतु आवेदन लंबित रहने के दौरान आरोप पत्र पेश करने से अभियुक्त को धारा 167(2) के अंतर्गत जमानत का अधिकार प्रभावित नहीं होता – दोनों निचले न्यायालयों के आदेश अपास्त – याचिका मंजूर।

Cases referred :

2013 CR.L.R.(SC) 126, 2012 AIR SCW 6026, 2011 AIR SCW 5551, AIR 2001 SC 1910.

A.K. Nirankari, for the applicant.
Anil Kumar Shrivastava, P.L. for the non-applicant/State.

ORDER

B.K. DUBE, J.: This petition under Section 482 of Cr.P.C., is preferred by the petitioner herein/accused for quashing the order dated 02/01/13 passed by the Additional Sessions Judge (FTC), Sabalgarh, District Morena in Criminal Revision No.303/12 affirming the order dated 14/12/12 passed by the Additional Chief Judicial Magistrate, Sabalgarh in Criminal Case No.1096/12 whereby an application under Section 167(2) of Cr.P.C., filed by the petitioner/accused has been dismissed.

2. Learned counsel for the petitioner submitted that the petitioner/accused has been arrested on 13/10/12 in connection with Crime No.411/12 under Sections 306 & 498A read with 34 of IPC registered at Police Station, Kailaras, District Morena and produced before the Court on the same day. The learned Magistrate has granted judicial remand against the petitioner and lastly, it was granted till 17/12/12. The police authority has not filed challan within sixty days, therefore, the petitioner is entitled to be released on bail as per the statutory provisions of Section 167(2) Cr.P.C., accordingly, he has submitted an application on 13/12/12. The learned Magistrate fixed the case for 14/12/13 for hearing on the said application. Before that the police submitted the challan on 13/12/12, and, therefore, the application was rejected on the ground that the challan has been filed in the matter. Learned counsel further submitted that the police did not submit the challan within statutory period, i.e., sixty days but it was submitted on sixtyfirst day, i.e., after filing of the application under Section 167(2) of Cr.P.C., by the petitioner/accused. In such circumstances, the petitioner is entitled for grant of statutory bail and merely by filing challan subsequently by the police his right of bail remains unaffected and, therefore, the impugned orders deserves to be quashed.

He placed reliance on three Judge Bench decision of the Apex Court in *Sayed Mohd. Ahmed Kazmi Vs. State, GCTD and others*, [2013 Cr.L.R.(SC) 126] = 2012 AIR SCW 6026.

3. In response, learned Panel Lawyer argued in support of the impugned orders and submitted that since challan has been filed, therefore, the right of the petitioner/accused to be released on bail wiped out. He has cited in support of his contention two Judge Bench decision of the Apex Court in the case of *Sadhwi Pragyna Singh Thakur Vs. State of Maharashtra*, 2011 AIR SCW 5551 wherein it has been held as under:

> "23. From the discussion made above, it is quite clear that even if an application for bail is filed on the ground that chargesheet was not filed within 90 days, before the consideration of the same and before being released on bail if chargesheet is filed, the said right to be released on bail, can be only on merits. So far as merits are concerned the learned counsel for the appellant has not addressed this Court at all and in fact bail is not claimed on merits in the present appeal at all."

4. It is transpired from a perusal of the record that on 24/09/12, the Police, Kailaras registered the FIR at Crime No.411/12 under Sections 306 & 498A read with 34 of IPC against the petitioner and the mother of the petitioner. At 10.30 a.m., on 13/10/12, the police apprehended the petitioner, Bazeer Khan alias Lalla Khan and produced before the learned Magistrate on the same day, i.e., on 13/10/12 who remanded the petitioner/accused for 15 days in judicial custody, i.e., till 19/10/12. Subsequently, the period of remand was extended, by extending the period of investigation and the custody of the petitioner from time to time. On 12/12/12, the learned Magistrate further extended the period of investigation and the custody of the petitioner by another 15 days, i.e., till 17/12/12. On 13/12/12, an application had been made under Section 167(2) of Cr.P.C., seeking default bail on the ground that charge sheet was not filed within the prescribed statutory period of sixty days of the petitioner's custody. The learned Magistrate adjourned the hearing and

fixed 14/12/12 for consideration of the aforesaid application. Subsequently, on the same day, i.e., on 13/12/12, the police submitted the challan. The order dated 13/12/12 passed by the learned Magistrate reads as under:

> "थाना कैलारस की ओर से अपराध कमांक 411/12 धारा 306, 498 ए भा.द.सं. का अभियोग पत्र आरोपीगण बसीर खॉ एवं बन्नो के विरूद्ध पेश किया।
>
> धारा 190 (1) द.प्र.स. के तहत संज्ञान लिया गया।
>
> प्रपत्र मूल आपराधिक पंजी मे दर्ज हो।
>
> शासन द्वारा ए.डी.पी.ओ.
>
> आरोपी बसीर खॉ पूर्व से निरोध में है।
>
> आरोपी बन्नो पूर्व से जमानत पर है, परन्तु प्रकरण मे चालान प्रस्तुती दिनांक 17.12.12 नियत है।
>
> बंडल फाइल चालान के साथ नस्ती हो।
>
> चालान की नकल नियत दिनांक को अभियुक्त को दी जावे।
>
> अविलंब जेल अधिक्षक के माध्यम से उपलब्ध करायी जावे।
>
> प्रकरण पूर्व मे 17.12.12 को पेश हो एवं आरोपी बसीर खां के आवेदन पर विचार हेतु 14.12.12 को पेश हो।"

5. The learned Magistrate declined to allow the application filed by the petitioner on the ground that the charge sheet has been submitted by the police. The aforesaid order was affirmed by the Revisional Court.

6. It is apparent from the record that the police has not submitted the charge sheet within the statutory prescribed period of sixty days of the petitioner's custody. The charge sheet was submitted on 13/12/12, i.e., on sixtyfirst day of the custody of the petitioner. Admittedly, before submitting the charge sheet by the police, the petitioner had submitted an application under Section 167(2) of Cr.P.C.,

7. Now, the core question is whether the right of the petitioner/

accused to be released on bail under Section 167(2) of Cr.P.C., is defeated by filing of the charge sheet by the police?

8. A three Judge Bench of the Apex Court in *Uday Mohanlal Acharya Vs. State of Maharashtra,* AIR 2001 SC 1910 while considering the earlier judgments on the point of right of accused being released on bail observed as under:

> "Where after expiry of period of 60 days for filing challan the accused filed an application for being released on bail and was prepared to offer and furnish bail, however, the Magistrate rejects application on erroneous interpretation about non application of S.167(2) of Cr.P.C., to case pertaining to MPID Act of 1999 and accused approaches higher forum and in meanwhile chargesheet is filed, the indefeasible right of accused being released does not get extinguished by subsequent filing of chargesheet. The accused can be said to have availed of his right to be released on bail on date he filed application for being released on bail and offers to furnish bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a chargesheet being filed in accordance with S.209 of Cr.P.C., and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail."

9. A three Judge Bench of the Apex Court in *Sayed Mohd. Ahmed Kazmi* (supra) has ruled that filing of the chargesheet during pendency of application for statutory bail does not affect the right of the accused to bail under Section 167(2) of Cr.P.C.,

10. Considering the submissions of the learned counsel for the parties and facts of the case as well as the law laid down of the Apex Court referred to hereinabove, it is held that the petitioner/accused rightly availed

the benefit to be released on bail under Section 167(2) of Cr.P.C. and, therefore, this petition deserves to be and is hereby allowed.

11. Consequently, the impugned orders dated 02/01/13 passed by the Additional Sessions Judge (FTC), Sabalgarh, District Morena in Criminal Revision No.303/12 and the order dated 14/12/12 passed by the Additional Chief Judicial Magistrate, Sabalgarh in Criminal Case No.1096/12 rejecting the application of the petitioner/accused under Section 167(2) of Cr.P.C., stand set aside. The petitioner/accused is directed to be released on bail on his furnishing a personal bond in the sum of Rs.20,000/(Rupees twenty thousand only) with one solvent surety of the like amount to the satisfaction of the learned Magistrate on the condition that he shall remain present before the Court concerned during the trial .

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

Petition allowed.

I.L.R. [2013] M.P., 984

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Brij Kishore Dube

M.Cr.C. No. 1675/2013 (Gwalior) decided on 8 March, 2013

PRAMOD GUPTA ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 391 & 482 - Additional Evidence **- The whole scheme of this section suggests that like civil cases an application for taking additional evidence on record should be considered and disposed of after hearing the criminal appeal on merits - Such application should not be decided in isolation i.e. Without hearing the appeal on merits - If so, there may be cases of failure of justice. (Para 6)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 391 व 482 – अतिरिक्त साक्ष्य – धारा की संपूर्ण व्यवस्था प्रस्तावित करती है कि सिविल प्रकरणों जैसे अभिलेख पर अतिरिक्त साक्ष्य लाये जाने हेतु आवेदन पर विचार

एवं निराकरण, दाण्डिक अपील की गुणदोषों पर सुनवाई पश्चात किया जाना चाहिए – उक्त आवेदन का विनिश्चय, पृथक से अर्थात अपील को गुणदोषों पर सुने बिना नहीं किया जाना चाहिए – यदि ऐसा है तो, न्याय की हानि के प्रकरण हो सकते हैं।

Case referred :

2006(1) MPLJ 436.

Rajiv Sharma, for the applicant.

Prabal Solanki, P.P. for the non-applicant/State.

ORDER

B.K. DUBE, J.: This petition under Section 482 of Cr.P.C. is preferred for quashing the order dated 21.11.2012 passed by the Sessions Judge, Bhind in Criminal Appeal No.177/2012 whereby an application under Section 391 of Cr.P.C. filed by the petitioner herein/accused has not been decided.

2. Learned counsel for the petitioner submits that during the course of hearing of criminal appeal, the petitioner herein/accused submitted an application under Section 391 of Cr.P.C., for taking additional evidence, i.e., examining Head Constable, Shiv Dayal, who had been mechanically examined the vehicle but the Court below neither allowed the application nor rejected the same, but deferred for deciding it at the time of final hearing. It is further submitted that Section 391 of Cr.P.C. provides that the application has to be decided before hearing the final arguments of appeal. Learned counsel further submits that the impugned order passed by the Court below is against the law, therefore, the impugned order may be set-aside and a direction may be issued to decide the application before hearing the appeal finally to the Court below.

3. In response, learned Public Prosecutor has argued in support of the impugned order and prayed for rejection of the petition.

4. It is transpired from the record that vide judgment of conviction and order of sentence dated 08.05.2012 passed by J.M.F.C., Bhind in

Criminal Case No.152/09, the petitioner herein/ accused, Pramod Gupta has been convicted under Sections 304- A, 338 and 337 of IPC and sentenced to suffer two years rigorous imprisonment with fine of Rs.2,000/ -, six months rigorous imprisonment with fine of Rs.600/- and three months rigorous imprisonment with fine of Rs.400/- respectively. Feeling aggrieved thereof, the petitioner preferred an appeal on 04.06.2012, it was admitted on 05.06.2012 for final hearing and during the pendency of appeal on 19.10.2012, the petitioner filed an application under Section 391 of Cr.P.C. for taking additional evidence, i.e., for examining the Head Constable Shiv Dayal. The application was considered and vide order dated 21.11.2012, the learned Sessions Judge kept the application pending with an observation that the same shall be considered and decided at the time of final arguments and fixed the case for final arguments. The relevant part of the order reads as under:-

> "लोक अभियोजक श्री बघेल ने अपीलार्थी की ओर से प्रस्तुत आवेदन अंतर्गत धारा 391 द.प्र.सं. का कोई लिखित उत्तर न देना प्रकट करते हुये उसका मौखिक रूप से विरोध किया।
>
> आवेदन पर उभयपक्ष को सुने जाने के बाद न्यायालय का यह मत है कि उक्त आवेदन पर अंतिम तर्क सुने जाते समय ही विचार किया जाना उचित होगा इसलिए इसे लंबित रखते हुये इस पर अंतिम तर्क सुने जाते समय विचार किया जाएगा।
>
> अपील अंतिम तर्क हेतु दिनांक 23.1.13 को पेश हो "

5. It would be useful to quote the Section 391 of Cr.P.C which reads as under:-

> "391. Appellate Court may take further evidence or direct it to be taken:-
>
> (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of

Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

6. From a reading of the aforesaid provision, it is evident that the opening words of sub-section (1) of Section 391 clearly suggests that the application moved under Section 391 of Cr.P.C. should be considered by the Appellate Court while dealing with the criminal appeal and when it comes to the conclusion that this additional evidence is necessary, such application can only be dealt with after going through the entire record of the Trial Court and after hearing both the parties. Therefore, the provisions of Section 391 of Cr.P.C. suggests that the application moved under this section should not be considered in isolation but should be considered after hearing the parties on merits. If after hearing parties on merits, the Court if comes to the conclusion that the additional evidence is unnecessary then while deciding the appeal, application moved under Section 391 CrPC can be dismissed. If such additional evidence appears necessary for rendering decision of the matter and without which the appeal cannot be disposed of, then such additional evidence may be taken on record either by the Appellate Judge himself or by the Trial Court. The Appellate Court may also remand back the matter to the trial Court for the purpose of recording additional evidence as provided under sub-section (2) of the said section 391 of Cr.P.C., therefore, the whole scheme of Section 391 of Cr.P.C. suggests that like civil cases an application for taking additional evidence on record under Section 391 of Cr.P.C. should also be considered and disposed of after hearing the criminal appeal on

merits and such application should not be disposed of in isolation without hearing the appeal on merits because if such applications are disposed of without hearing the appeal on merits, then there may be cases of failure of justice. (*Dharmendra s/o Chandan Singh v. State of M.P.*, 2006 (1) MPLJ 436 referred to).

7. For the foregoing reasons and peculiar facts and circumstances of the case, this Court in exercise of powers under Section 482 of Cr.P.C. does not find any ground to interfere in the impugned order. This petition is devoid of any merit and is, therefore, dismissed.

Petition dismissed.